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BETTY O'NEIL, ADMINISTRATRIX OF THE ESTATE OF JAMES F. O'NEIL, DECEASED, APPELLANT, V. UNION NATIONAL LIFE INSURANCE COMPANY, A CORPORATION, APPELLEE.

27 N. W. 2d 837

Filed June 6, 1947. No. 32194.

Insurance. Unless the policy specifically provides otherwise, the term "due proof of death" as used in a policy of life insurance does not require any particular form of proof which the insurer might arbitrarily demand, but such a statement of facts which, if established in court, would require payment of the claim or some portion thereof.

APPEAL from the district court for Lancaster County: JEFFERSON H. BROADY, JUDGE. *Reversed and remanded.*

Baylor, Bloss & Evnen, and *Davis, Stubbs & Healey,* for appellant.

Frank A. Peterson, for appellee.

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

CARTER, J.

This is an action to recover on a policy of life insurance payable to the insured's estate. The trial court dismissed the action without prejudice to a new action after the filing of a proper proof of loss. The plaintiff appeals.

Plaintiff as the administratrix of the estate of James F. O'Neil, deceased, brought the action against the defendant insurance company to recover $2,500, the face amount of the policy held by the deceased with the defendant company.

The policy contained the following provision: "This Policy is payable at the Home Office of the Company in Lincoln, Nebraska. Before any amount shall be paid hereunder, due proofs of the death of the Insured must be furnished, * * *."

On December 22, 1943, the administratrix wrote the defendants in part as follows: "This letter will inform

you of the death of Capt. James F. O'Neil, while in military service in Italy, November 4th." The defendant contends, and the trial court held, that the letter was insufficient to constitute a proof of death under the terms of the policy. In so holding we think the trial court was in error.

The only requirement of the policy before us relative to proof of death is that "due proofs of the death of the Insured must be furnished." Under such a policy provision the proof of death need not be made on forms provided by the insurance company, nor does the company have the right to prescribe any particular manner of making proof. If the proof of death is sufficient in law, the insurance company is obliged to accept it.

The general rule is: "Unless the policy specifically provides otherwise, no particular form of proof of loss is required other than one adequate to enable an insurer to consider its rights and liabilities." 29 Am. Jur., § 1120, p. 840. An authoritative annotator states the rule as follows: "The term 'due proof,' as used in a policy providing for the payment of disability benefits, or waiver of premiums, upon receipt of 'due proof' of disability, does not require any particular form of proof which the insurer might arbitrarily demand, but such a statement of facts reasonably verified as, if established in court, would prima facie require payment of the claim." 109 A. L. R. 826. In support of the foregoing rule we find cited the cases of McAndrews v. Prudential Ins. Co., 132 Neb. 332, 271 N. W. 857; Schollman v. Prudential Ins. Co., 130 Neb. 662, 266 N. W. 75; and Wray v. Equitable Life Assurance Society, 129 Neb. 703, 262 N. W. 833. In the McAndrews case we said: "It is true that the term 'due proof of disability,' as used in the policy, does not require any particular form of proof which the insurer might arbitrarily demand, but only a statement of fact as, if established in court, would require payment of the claim."

The rule is no different in a suit on a life policy than

on a policy providing for disability benefits. The principle involved is the same. Under the cited rule the proof of death is sufficient. If the administratrix can establish in court the facts set forth in her letter to the company, a prima facie case would be made. Consequently, the facts recited in the letter constitute a sufficient proof of death within the provisions of the policy presently before us. This being true, the furnishing of proof of death as a condition precedent to the bringing of suit has been met.

The judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED.

CARTER, J., participating on briefs.

CHAPPELL, J., concurring.

I concur in the result of the majority, but on a somewhat different basis of reasoning.

The policy required only that due proof of death be furnished. As I view it, under the provisions of the policy and the facts and circumstances presented, plaintiff furnished sufficient proof of death because, by its conduct, defendant waived more formal proof. Defendant duly had in its possession all of the information which could be contained in more formal proof. Partial liability under the policy was thereafter admitted. Defendant refused only to pay the full amount of the claim and simply attempted by its action to arbitrarily impose upon plaintiff the duty not of making due *proof of death* but of making *proof of the cause of death.* It sought thereby to establish its limited liability under the war clause in the policy, a burden which plaintiff was not obliged to assume.

Proof of the cause of death need not be given although the insurer arbitrarily demands it, if the policy does not by its terms require specific information to be furnished as to the cause of death. Due proof of death, as distinguished from satisfactory proof of death, means only such reasonable evidence of the death of the insured

as will give assurance that the event has happened, but a failure to furnish a particular type of formal proof of death does not bar recovery when the policy does not require it, and the company has in its possession all the information which could be contained in such formal proof. 45 C. J. S., Insurance, § 1064, p. 1289; § 1067, p. 1302; 29 Am. Jur., Insurance, § 1120, p. 840; § 1123, p. 842.

Under the circumstances of this case, it is my belief that defendant waived more formal proof than that presented by admitting and recognizing partial liability for death of the insured, and proposing settlement therefor, upon its own terms. See 7 Couch, Cyc. of Ins. Law, § 1579, p. 5572; 45 C. J. S., Insurance, § 1073, p. 1314. The burden was on defendant, having admitted validity of and liability upon the policy for that purpose, to plead and prove that insured died while engaged in military service and that his death occurred at such time and in such manner that defendant's liability was thereby limited under the provisions of the war clause in the policy. That matter was purely defensive, and the burden was not on plaintiff in any manner to establish it for defendant. 46 C. J. S., Insurance, § 1319, p. 441.

Justice demands a determination of the case on its merits in the present action, and I concur in the conclusion of the majority that the cause should be reversed and remanded for further proceedings.

PAINE, J., dissenting.

With the concluding statement in the opinion of the majority, I cannot agree. This statement reads as follows: "Consequently, the facts recited in the letter constitute a sufficient proof of death within the provisions of the policy presently before us. This being true, the furnishing of proof of death as a condition precedent to the bringing of suit has been met."

Before discussing this point, I desire to make a more complete statement of the facts of the case.

This is a suit to recover on a life insurance policy

payable to the insured's estate. Action was brought by the widow as administratrix to recover from the insurance company the full face amount of the policy. A jury was waived. The trial court dismissed the action, without prejudice to a new action, on compliance with proof of loss requirements, and the administratrix appealed.

An amended petition was filed on April 10, 1945, in which plaintiff administratrix brought suit for a judgment for the full sum of $2,500 with interest at the rate of six percent from November 4, 1943. Attached to this amended petition is a copy of the policy sued upon, which is marked "Exhibit A." The policy is dated March 12, 1937; the name of the insured is James Francis O'Neil, who was 25 years of age at that time. The policy was issued by the Union National Life Insurance Company of Lincoln for $2,500.

Under the paragraph of this policy entitled "Incontestibility," the third provision reads as follows: "Conditions as to Military Service or Naval Service in time of war. Should the Insured die before attaining the age of thirty-five, from any cause while engaged in Military or Naval Service in time of war or within six months after the termination of such Service as a result thereof, the amount payable hereunder shall be limited to the premiums paid together with interest thereon at the rate of five per cent per annum, less any indebtedness thereon to the Company."

Under the "General Conditions" printed in this policy, it is provided that "This Policy is payable at the Home Office of the Company in Lincoln, Nebraska. Before any amount shall be paid hereunder, due proofs of the death of the Insured must be furnished, * * *."

The company in its answer admitted the issuance of the policy and that the policy was in full force and effect at the time of the commencement of this action. It further alleged that at no time has this defendant denied liability under the policy, but at all times it has recog-

nized it to be in full force and effect. The defendant company further alleged that said policy provides that its benefits are payable upon receipt of due proofs of death, and alleges that no such proofs of death have been furnished to the company prior to the commencement of this action.

For a reply the plaintiff administratrix admitted that the said policy provides that benefits are payable upon receipt of due proofs of death, and alleged that prior to the commencement of this action the defendant company by its written communication denied liability for the face amount of the policy and by such denial the defendant waived the furnishing of due proofs of death of the insured.

Upon cross-examination of the administratrix, counsel for defendant company offered in evidence exhibit No. 6, to which plaintiff objected, but it was received in evidence for the purpose of showing the fact of death. Said exhibit No. 6 was written by the administratrix at Sweetwater, Texas, December 22, 1943, addressed to the defendant company, the first sentence of said letter reading: "This letter will inform you of the death of Capt. James F. O'Neil, while in military service in Italy, November 4th." The second sentence of the letter described the policy. The last sentence was: "I would like to hear from you by return mail relative to this policy."

Exhibit No. 3, dated December 27, 1943, was the reply of the company to her, expressing regret to learn of his death, enclosing a settlement form for her to complete, and asking her to attach the official notification from the War Department of his death, saying they would photostat this and return it to her. The letter then continued:

"You will notice by the terms of the contract that the death claim under the conditions of your husband's death is the return of the life premiums paid with interest at 5%. In addition to this we will refund the Double Indemnity premiums from the date of enrollment in the

armed forces of your husband, on which date the benefits with the Double Indemnity clause are cancelled. * * *

"It appears that the total premiums paid, with interest and the refund of the Double Indemnity premiums will amount to approximately $245.00."

On January 13, 1944, the defendant company again wrote to the administratrix, saying they had received no answer and asking for the official notification of the War Department of the death of Capt. O'Neil, and saying: "When these proofs of death are received and approved, your claim will be paid, and we will return the notification of death to you."

On April 6, 1944, the defendant company wrote to her a third time, saying, in brief, that they had not heard from her and asking what they could do to help her complete the claim.

The principal assignments of error of plaintiff are: That the trial court erred in not finding that she had complied with all of the terms of the policy; that the court erred in finding that the defendant company did not waive the furnishing of due proofs of death; that the trial court erred in admitting in evidence and permitting cross-examination upon the letter, exhibit No. 6, of the plaintiff, notifying the company of the death of the insured; and erred in permitting cross-examination of the plaintiff as to why she did not answer the company's letters, and why she did not send the company a copy of the telegram from the War Department; that the decision of the trial court is not sustained by the evidence and is contrary to law.

The defendant company relies upon the Nebraska statutory requirement and sets out that the 12th provision of section 44-502, R. S. 1943, provides: "(12) A provision that when a policy shall become a claim by the death of the insured, settlement shall be made upon receipt of due proof of death, or not later than two months after receipt of such proof."

"Where, by the terms of a policy of insurance on

property, the payment of the loss is to occur only after the furnishing of notice and certain proofs thereof, the furnishing of such notice and proofs constitutes a condition precedent to any right of action thereon." 7 Cooley's Briefs on Insurance (2d ed.), p. 5737.

There is an obvious difference between the words "evidence" and "proof." The former, in legal acceptation, includes the means by which any alleged matter of fact is established or disproved. The latter is the effect or result of the evidence. See 1 Greenleaf, Evidence, § 1, p. 3.

Proof is that which convinces; evidence is that which tends to convince. Evidence is the medium of proof; proof is the effect of the evidence.

When a statute requires proof of death to be made, as our Nebraska statute does, it must be by legal evidence, not by a simple letter.

"Life policies frequently contain a provision requiring 'due notice and proof of death' before any right of action accrues upon the policy. Such a provision is of course a condition precedent to payment. And no liability attaches unless proof is furnished or unless the provision is waived." 5 Joyce on Insurance (2d ed.), § 3290, p. 5494. And this court has said: "And it seems to be the well settled doctrine in this country that the notice and statements, supported by oath, are conditions precedent, and must be performed before the assured is entitled to receive payment or sue for the loss, unless the company by some act on its part waives the performance of said conditions." McCann v. The Aetna Insurance Company, 3 Neb. 198.

"Proof of death is defined to be more or less formal evidence furnished insurer by claimant under policy of fact that death has occurred, the particulars thereof and the data necessary to enable the insurer to determine its liability, and no formality is essential in furnishing proof of death unless policy so requires." Schell v. Metropolitan Life Ins. Co., 3 S. W. 2d (Mo. App.) 269.

The question may properly be asked whether the sylla-

bus of the opinion adopted in the case at bar should not include the words "reasonably verified" following the words "a statement of facts," as found in the text of the opinion.

The plaintiff in the case at bar argues that the only real issues presented by the pleadings are whether the plaintiff performed all the conditions required of her by said policy, and whether the defendant company, as shown by its letters, waived the furnishing of due proofs of death.

But this court has said: "There is no forfeiture or denial of liability when the insurance company treats the policy sued upon as a valid or binding contract." Dodder v. Pacific Mutual Life Ins. Co., on rehearing, 104 Neb. 74, 176 N. W. 730.

However, from a careful examination of the letters in the case, I fail to see any possible statement in the three letters of the defendant company which can be construed as a denial of all liability and so constitute a waiver of the requirement that proofs of loss must be furnished.

It may be admitted that the defendant company did, in effect, very properly deny liability for the entire $2,500, but it offered to return the premiums, for which amount it would be liable in case of a war death, but it always insisted on the plaintiff first making due proofs of death.

It appears from plaintiff's actions that this kind of a settlement was not satisfactory to her, and after a delay of many months she brought suit for the entire face of the policy of $2,500 and never furnished the company with the required legal proofs of death, which were clearly required, first, by the terms of the policy itself, and, second, positively required by the law of Nebraska, which provision is a valuable protection to other policyholders by forbidding an insurance company to pay out its assets to a claimant who simply writes

in a letter saying the insured has met death, as the plaintiff did in the case at bar.

"A provision in an insurance policy reducing liability or exempting an insurer from liability in case the insured dies while engaged in naval or military service is valid, and not against public policy." 29 Am. Jur., Insurance, § 911, p. 695. See Olson v. Grand Lodge, A. O. U. W., 48 N. Dak. 285, 184 N. W. 7, 15 A. L. R. 1270.

The company in the instant case does not appear to me to be avoiding payment, but rather appears willing and able to settle this policy promptly and exactly according to the terms of the contract, when legal proof is made.

This dissent has adhered somewhat closely to the statements made by the trial court in its reasons for dismissing the plaintiff's action, as set out in the order of dismissal.

It is my considered opinion that this court should have affirmed the action of the trial court of a dismissal without prejudice to bringing a new action after compliance with the proof of death requirements.

YEAGER, J., dissenting.

I feel that I must dissent from the majority opinion in this case. I do not disagree with the principles of law set forth in the opinion as abstract principles of law but I earnestly insist that they have only remote application to the gist of the controversy which is presented here for determination.

From a reading of the majority opinion it is clear that the majority have mistakenly concluded that form of proof of death is the basic matter for consideration in this case. If that were true I would not hesitate to agree with the majority but it requires only superficial examination of the record to disclose that this is not true.

I agree with the majority that the term, due proof of death, as used in a policy of life insurance does not

require any particular form of proof, but that is not the question here. The question here is that of whether or not there was in fact, in substance, due proof of death.

I submit that under the decisions cited and the texts quoted from in the majority opinion the conclusions of the majority on the matter truly involved in this case do not find support. The exact opposite is true.

The following, the majority say directly, was sufficient in form as due proof of death and they say indirectly that it was sufficient in substance and in fact: "This letter will inform you of the death of Capt. James F. O'Neil, while in military service in Italy, November 4th."

They rest the sufficiency of this communication as due proof of death on a quotation from 29 Am. Jur., § 1120, p. 840, a quotation from a note from 109 A. L. R. 826, and three Nebraska cases. The authenticity of the quotations may not be questioned and neither may the fact that the Nebraska cases support the quoted statements be questioned but they do not sustain the sufficiency of the quoted communication as due proof of death.

The quotation from 29 Am. Jur., § 1120, p. 840, is but an excerpt from a paragraph which read as a whole makes clear that the communication is insufficient in substance as due proof of death. The quoted portion of the paragraph contains enough in itself to indicate insufficiency. The quotation points out that the proof must be adequate to enable the insurer to consider its rights and liabilities. I ask, how on the basis of the meagre information contained in the communication the insurer in this case can consider its rights and liabilities?

In the same paragraph and in the sentence following the one quoted appears the following: "* * * if it operates to bring the attention of the insurer to the loss, sets forth the essential facts upon which the liability of the insurer depends, and appears credible, it is sufficient; * * *." I submit that the communication calls

attention of the insurer to the loss, but it fails to set forth essential facts upon which the liability of the insurer depends.

In the next paragraph of the section from which the quotation in the majority opinion is taken, due and satisfactory proof is defined as follows: "For proofs to be due or satisfactory, they should be such as to make out a prima facie case against the insurer, but they need not be of a higher grade than would be sufficient to establish a claim on the policy in court, nor need the information furnished be that of an eyewitness; any form of information which is substantial and trustworthy enough to enable the insurer to form an intelligent estimate of its rights is sufficient."

Would anyone suggest that the communication which it is asserted in the majority opinion is due proof of death be such as would make out a prima facie case against the insurer herein? Coming from the lips of its author it would not even be admissible in a court of law or equity for any purpose or in any event.

With the quoted note from 109 A. L. R. 826 I find no fault, but I insist that it supports the contention of this dissent and not the position taken in the majority opinion. The note calls for a statement of facts reasonably verified which if instead of being presented as proof of death under an insurance policy it were presented in court it would prima facie require payment of a claim.

Coming now to the Nebraska cases referred to in the opinion it may be said that none of them support the majority opinion beyond the declaration thereof that it is not necessary that due proof of death shall partake of any particular form. On the other hand the case of Wray v. Equitable Life Assurance Society, 129 Neb. 703, 262 N. W. 833, fully supports the contention of this dissent. Reasonably interpreted the opinion announces that the proof must be sufficient in statement of fact so that if it were presented to a court instead

of as proof of loss under an insurance policy it would make a prima facie case.

The cases of Schollman v. Prudential Ins. Co., 130 Neb. 662, 266 N. W. 75, and McAndrews v. Prudential Ins. Co., 132 Neb. 332, 271 N. W. 857, reiterate the rule in this respect laid down in Wray v. Equitable Life Assurance Society, *supra*.

In my opinion the majority have confused "proof" with "notice," and "form" with "substance." This ought not to be so. The terms should be allowed to retain that separate significance and recognition which has been theirs traditionally in law, literature, and lexicology.

The design of this dissent is not to aid in defeating the plaintiff of a right of recovery under the insurance policy which is the basis of this action. The position taken herein would not have that effect. It would only require that she supply the insurer with the facts necessary to permit it to intelligently and expeditiously act upon her claim. This requirement, in my opinion, is legal, contractual, and reasonable.

RICHARD C. WEBBER, APPELLEE, V. HARRY A. SPENCER ET AL., APPELLEES, KATHERINE R. SHANKLAND ET AL., APPELLANTS.

27 N. W. 2d 824

Filed June 6, 1947. No. 32187.

1. **Guardian and Ward.** Section 38-601, R. S. 1943, sets forth the purposes for which a guardian may be authorized to sell real estate of his ward upon obtaining a license therefor and proceeding therein as provided in sections 38-601 to 38-643, R. S. 1943, and must be complied with to enable the guardian to sell his ward's real estate.
2. ———. Before a guardian may proceed to sell the real estate of his ward he must comply with section 38-607, R. S. 1943, which provides: "In order to obtain a license for such sale, the guardian shall present to the district court, or judge thereof in vacation, of the county in which he was appointed

guardian, a petition therefor, setting forth the condition of the estate of his ward, and the facts and circumstances on which the petition is founded, tending to show the necessity or expediency of a sale, which petition shall be verified by the oath of the petitioner."

3. ———. Failure on the part of a guardian to comply with the foregoing statutory provisions to sell the lands of his ward renders a contract for sale thereof void and against public policy.
4. ———. A contract by a guardian to sell his ward's land in advance of legal authority is contrary to public policy and void.
5. **Contracts.** A void contract is one without legal effect or force, and incapable of ratification.
6. **Vendor and Purchaser: Guardian and Ward.** The rule of caveat emptor applies to a purchaser under a contract of sale of an insane ward's lands as well as a guardian's sale of the real estate of a ward.
7. **Subrogation.** Whether the doctrine of subrogation is applicable to a particular case depends upon the peculiar circumstances of such case.
8. **Guardian and Ward: Trusts.** There are distinctions between the rights, powers, and duties of a guardian and those of a trustee, in that a trustee has title to the trust property with an equitable interest in the beneficiary, whereas a guardian has no title, but only certain powers and duties to handle therewith for the ward's benefit, the ward having the title.
9. **Subrogation: Guardian and Ward.** Where a surety on a guardian's bond is compelled to make good a loss to the property of the ward which is in excess of the value thereof, and by doing so makes the estate of the ward whole in such respect, under these circumstances the surety is subrogated to all rights and interests of the ward in such property.

APPEAL from the district court for Lancaster County: HARRY R. ANKENY, JUDGE. *Affirmed.*

Ginsburg & Ginsburg, for appellants.

William Niklaus, for appellees.

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

MESSMORE, J.

This is a suit to quiet title in the plaintiff as owner of Lot 8, Block 2, Second East Park Addition, Lincoln,

Nebraska, against Harry A. Spencer and the unknown heirs of W. R. Shankland, also known as William R. Shankland who will hereafter be referred to as W. R. Shankland, and Celia R. Shankland, husband and wife, deceased, defendants. The plaintiff claims title as purchaser at a mortgage foreclosure sale, and alleges in substance in his petition that on November 23, 1943, the defendant, Harry A. Spencer, caused to be filed in the office of the register of deeds of Lancaster County, a certain affidavit wherein said defendant set out a copy of a contract providing for the sale of the property heretofore described, dated July 1939, between W. R. Shankland and Clifford L. Rein; and further alleges that such affidavit casts a cloud on the plaintiff's title. The petition also alleges that the estates of W. R. Shankland and Celia R. Shankland have never been administered, and all right, title, and interest, if any, of the defendants and each of them, is junior and inferior to the plaintiff's title; and prays judgment quieting title in him.

Defendant, Harry A. Spencer, disclaims any interest in the property in controversy. The defendants, Katherine R. Shankland and Jeane Shankland, claim title to the property set forth in the contract between W. R. Shankland and Clifford L. Rein vested in them and the other heirs at law of W. R. Shankland and Celia R. Shankland, deceased, and pray judgment accordingly.

The record discloses that Fannie E. Griggs, a mental incompetent, was placed under guardianship August 10, 1920. On or about June 29, 1927, Clifford L. Rein was appointed guardian of her person and estate. On August 24, 1927, Katherine R. Shankland became the owner of the property in controversy. August 22, 1927, the guardian was authorized by the county court to loan Katherine R. Shankland $2,500, taking a first mortgage on the property as security. Subsequently, on May 1, 1928, the loan was increased, by the authorization of the county court, to $3,500, and a first mortgage

on the property was taken as security. On March 2, 1931, Katherine R. Shankland was unable to pay the mortgage and offered to convey the property to the estate of the ward. By order of the county court March 3, 1931, the guardian was authorized to accept the conveyance, and to allow Katherine R. Shankland to occupy the premises rent free for one year from September 1, 1930, the date of the deed tendered by Katherine R. Shankland. The record shows a quitclaim deed from Katherine R. Shankland to Fannie E. Griggs, dated September 1, 1930. The guardian made application to the county court April 27, 1931, to mortgage the property for $1,800, which application was approved by an order of the county court on April 27, 1931. The Conservative Mortgage Company, a corporation, Trustee, became the mortgagee. On July 9, 1934, this mortgage was released as paid, and a mortgage for $800 was placed on the property and filed June 22, 1934, running to the same mortgagee.

During July 1939, a contract was entered into by and between Clifford L. Rein and W. R. Shankland. This contract appears in the record as exhibit 5, and will hereafter be referred to in the opinion as the contract. The contract provides, in substance, that W. R. Shankland was to pay $100 down at the time of entering into the contract, and the balance of $300 in 90 days, and to enter into possession of the premises without payment of rent as provided therein; in addition, to assume and agree to pay an $800 first mortgage, a lien on the property, and have the privilege to designate the person who should take title. The contract was signed personally by Clifford L. Rein. The ward held the title to the property and Clifford L. Rein was, at the time of entering into the contract and up to about April 1, 1943, the duly appointed, authorized, and acting guardian of Fannie E. Griggs, incompetent.

On November 20, 1939, the guardian filed an application in the county court, which appears in the record

as exhibit 9, calling the court's attention to the fact that the property was encumbered by an $800 mortgage, as heretofore mentioned, which was past due as of May 1, 1939; that the mortgagee refused to renew the mortgage and the estate had insufficient funds to pay the same; further, that the property had not been worth to exceed $1,500 and was worth $1,200 at that time, and would require the expenditure of $150 per year for upkeep, and would not rent for an amount to exceed $12.50 per month; that W. R. Shankland would bid $1,200 at any foreclosure sale of the property and pay the same; that this amount would pay the mortgage and delinquent interest and leave $150 to $200 to the ward's estate; prayed the court to approve the action of the guardian in behalf of the defendants in the foreclosure action and the filing of an answer in the form of a general denial, and to direct the guardian not to proceed further in resisting the foreclosure. The county court, on November 21, 1939, by order, approved the application. The order recited that there was a bidder available who would pay $1,200 for the property.

The guardian testified the mortgagee was going to bid the property in at the foreclosure sale for the amount as stated in the contract, and W. R. Shankland was to make a new mortgage and pay off the existing mortgage of $800 and thereby acquire title to the property. Under the circumstances the Shanklands were not made parties to the foreclosure action. The attorney for the mortgagee testified that the guardian informed him that W. R. Shankland was to bid at the sale and pay $1,200. The attorney bid for Celia R. Shankland as a party to take over the title, as provided for in the contract and as the guardian requested. The guardian testified that he complained of the attorney for the mortgagee bidding in behalf of Celia R. Shankland, as that was not the deal.

Prior to taking possession pursuant to the contract,

the Shanklands paid rent for the premises in the amount of $12.50 per month.

W. R. Shankland, in his lifetime, paid the $400 as provided for by the contract and as shown by the endorsements thereon, the last one being September 5, 1939. He designated his wife, Celia R. Shankland, as the person to take title to the property. He died prior to February 1940, and his estate has not been administered. Celia R. Shankland died subsequent to June 4, 1941, but in the year of 1941. Her estate has not been administered. Six adult daughters were the sole and only heirs at law of both W. R. and Celia R. Shankland. Some of the heirs continued to live in the property until Jeane Shankland entered the military service in 1943.

The action to foreclose the $800 mortgage was filed October 13, 1939. Decree of foreclosure was entered December 19, 1939. The property was sold to Celia R. Shankland for $1,200 on February 27, 1940. Thereafter, on December 21, 1940, a motion was filed to set aside the sale, for failure to complete the purchase. On June 4, 1941, Celia R. Shankland filed a motion to confirm the sale in her, supported by an affidavit of her attorney, Harry A. Spencer, setting forth that the terms of the contract had been complied with, and it was agreed, in order to perfect a title to the premises, the guardian would foreclose the $800 mortgage; further, that Celia R. Shankland was ready and willing, and had been since September 5, 1939, which was the date the last payment was endorsed on the contract, to execute a mortgage in the amount of $800 on the premises when the same were conveyed to her free and clear of all encumbrances. The motion to confirm the sale in Celia R. Shankland was overruled, and the motion to set aside her bid was sustained.

It appears from the record that some six months to a year after the mortgage foreclosure was started, Spencer had a conference with a representative of the mortgagee, the attorney foreclosing the mortgage, and

the guardian, wherein he informed them of the willingness of his clients to complete the obligations of the contract and to pay the $800 in cash for the benefit of the bondholders, rather than secure another loan. This was agreeable to all the parties, but failed on account of the guardian's inability to obtain funds to pay the taxes.

On January 9, 1942, exceptions were filed against the guardian's final report by a next friend of the ward, requesting that the guardian be surcharged for improvident handling of the ward's estate. On the same day the county court entered a decree surcharging the guardian in the sum of $6,607.53. Of this amount $2,765.88 was the loss the estate suffered by the guardian's handling of the property in controversy. An appeal was taken and the judgment was settled for $6,500. The surety on the guardian's bond paid the judgment. Exhibit 14 appearing in the record is the order of the county court approving and directing settlement of the judgment. It provides in part that the Western Surety Company, the surety on the guardian's bond, agreed to assign or quitclaim any interest it might acquire by equitable subrogation or otherwise in and to the property here involved.

Referring again to the mortgage foreclosure proceedings, Jeane Shankland, through her attorney, filed a motion and affidavit on July 24, 1943, requesting the appointment of a receiver. The affidavit set forth the willingness of the Shankland heirs to comply with the contract and pay the $800 mortgage in cash. Apparently this motion was overruled.

On November 23, 1943, Spencer, as attorney for the Shankland heirs, filed in the register of deeds office an affidavit sworn to by him, wherein he set forth the contract entered into between W. R. Shankland and Clifford L. Rein.

The plaintiff became interested in the property in January 1943, and contacted relatives of the Shanklands

who referred him to Spencer who informed him the Shanklands had an interest in the property and that he might be able to obtain a quitclaim deed from them for $150. The plaintiff did not accept the offer.

When the Shankland girls left the property, they left some clothes, books, and a small amount of furniture. The plaintiff, with the assistance of Spencer who had the key to the house, looked the house over. Nobody was living in it at the time, and the front door was locked. Spencer referred the plaintiff to Clifford L. Rein. The plaintiff asked Rein the price of the property and was informed that it was $1,500. He offered $1,300, which was accepted and paid to the guardian ad litem of the estate of Fannie E. Griggs, incompetent. The plaintiff made a down payment of $300 in May or June of 1943, and paid the balance in September 1944, by procuring a loan. Out of this $1,300, eight hundred dollars was used to pay the bondholders under the mortgage—the remainder to obtain quitclaim deeds from Rein and the surety company. Clifford L. Rein, the former guardian of Fannie E. Griggs, incompetent, and his wife conveyed by quitclaim deed to the plaintiff April 7, 1943. The Western Surety Company conveyed by quitclaim deed to the plaintiff April 2, 1943.

Spencer testified he fully informed the plaintiff with respect to the interest of his clients, their possession of the premises, and the contract between Rein and Shankland.

Apparently, from the date of making the contract, no rent nor taxes was paid by the Shanklands for the property.

The plaintiff, as the highest bidder, purchased the property at the foreclosure sale on September 12, 1944, for $85.50. Sheriff's deed was made, executed, and delivered to the plaintiff October 2, 1944. The plaintiff went into possession of the property April 15, 1944.

The foregoing constitutes a resume of the evidence upon which the trial court quieted title in the plain-

tiff as prayed in his petition; found that the contract of sale was null and void and unenforceable; further found that by reason of the proceedings against Clifford L. Rein for losses sustained by the estate of the ward, Clifford L. Rein or his surety acquired interest in the property in controversy, and the plaintiff derived his title through deeds of conveyance from Clifford L. Rein or the surety, and also from the foreclosure of the mortgage. From this judgment, the defendants appeal.

For convenience, the defendants will hereinafter be referred to as the appellants, and the plaintiff as appellee.

Appellants contend the trial court erred in finding that the appellee's title in and to the real estate involved in this action should be quieted and confirmed against the claims of the appellants and all persons whomsoever, and in finding that the appellants are claiming under a void and unenforceable contract.

In considering this assignment of error, it appears to this court that any interests the appellants might have in the property in controversy must be derived from exhibit 5 appearing in the record and heretofore referred to as the Rein-Shankland contract.

It is true, as suggested by the appellants, the relation of a guardian to his incompetent ward is tantamount to a trust relationship. However, there are distinctions between the rights, powers, and duties of a guardian and those of a trustee, in that a trustee has title to the trust property with an equitable interest in the beneficiary, whereas a guardian has no title but only certain powers and duties to deal therewith for the ward's benefit, the ward having the title. See Guardianship of Paulsen, 229 Wis. 262, 282 N. W. 36.

The appellants rely on exhibit 9, a petition in the county court, as constituting a presentation of the contract, exhibit 5, to the court, and likewise rely on exhibit 10 which it is claimed by the appellants is an order of the county court approving the contract. An

examination of the two exhibits, the substance of which is heretofore set forth, discloses that the contract and the terms thereof were never called to the attention of the county court, and there is no authorization of that court permitting the guardian to enter into such contract.

Regardless of whether or not the contract was approved by the county court, in this state before a guardian of an incompetent ward can sell the real estate of his ward it is necessary to obtain a license to do so from the district court. Section 38-601, R. S. 1943, provides: "When the income of the estate of any persons under guardianship, whether a minor, insane person, idiot, spendthrift or other person, shall not be sufficient to maintain the ward and his family or to educate the ward, when a minor, or the children of such insane person or other person under guardianship, or when the personal property in the hands of the guardian or any person under guardianship shall be insufficient to pay all of the debts of his ward, with charges of managing his estate, the guardian of any such person may sell the real estate of his ward for any of the purposes enumerated above, upon obtaining a license therefor and proceeding therein as provided in section 38-601 to 38-643."

We deem it unnecessary to set forth all the statutory provisions governing this subject matter. However, section 38-607, R. S. 1943, provides: "In order to obtain a license for such sale, the guardian shall present to the district court, or judge thereof in vacation, of the county in which he was appointed guardian, a petition therefor, setting forth the condition of the estate of his ward, and the facts and circumstances on which the petition is founded, tending to show the necessity or expediency of a sale, which petition shall be verified by the oath of the petitioner."

The record in the instant case fails to disclose that the guardian either attempted to or in any manner complied with the foregoing statutory provisions.

Section 38-613, R. S. 1943, provides in part: "The license shall order the guardian to sell described land or interest in land at public sale; * * *" and contains a provision that the land may be sold at private sale where the interest of the ward in and to the land to be sold is of less value than the sum of five hundred dollars, which would not be the situation in the case at bar.

It is obvious that the statutes heretofore referred to expressly provide the manner and purposes for which a guardian may sell his ward's real estate.

"It is a general rule that a guardian has no authority to sell real estate of his ward without an order of court, in the absence of a statute expressly or by implication conferring the power or authority otherwise conferred upon him, as by will." Anno. 108 A. L. R., p. 944. See, also, 39 C. J. S., Guardian and Ward, § 82, p. 128; 28 C. J., Guardian and Ward, § 219, p. 1133.

In the instant case, W. R. Shankland cannot be said to be an innocent purchaser. He and his family had occupied the premises prior to the making of the contract of sale, and obviously knew the relation of the guardian and ward with reference to the property for which he contracted. Likewise, these appellant heirs knew the facts and circumstances with reference to the guardianship, and the property here involved. There was enough upon the face of this record to have deterred any prudent man from investing his money in this property.

"One who purchases real estate at a guardian's sale, or purchases from the vendee of that sale, must take notice at his peril of the authority of the guardian to make the sale. The doctrine of *caveat emptor* applies to purchasers at guardians' sales." Bachelor v. Korb, 58 Neb. 122, 78 N. W. 485. This case held that a guardian's sale of lands of his ward is void unless before such sale a guardian executes a bond as required by statute.

If, as held in Bachelor v. Korb, *supra,* the doctrine

of *caveat emptor* applies to purchasers at guardian's sales, most assuredly the doctrine would apply to a contract for the sale of the ward's property, as shown by the facts in the instant case.

"A guardian having no power to sell cannot make a valid contract to sell his ward's lands, and if without authority he assumes to make such a contract it cannot be specifically enforced, nor can damages be awarded for its breach." 39 C. J. S., Guardian and Ward, § 82, p. 129.

In 25 Am. Jur., Guardian and Ward, § 124, p. 78, it is said: "It is, therefore, a firmly established general rule that a guardian has no authority to sell real estate of his ward without an order of court, in the absence of a statute expressly or by implication conferring the power or authority otherwise conferred upon him, as by will. A contract by a guardian to sell his ward's land in advance of legal authority is contrary to public policy and void. * * * In most jurisdictions guardians' sales are provided for by statute, and it is generally settled that courts having jurisdiction over the estates of infant and incompetent wards have the power, either by virtue of their general jurisdiction or under express statutory provisions, to authorize the sale of realty belonging to a ward, if necessary or if the welfare of such person will thereby be promoted."

"And in Le Roy v. Jacobosky (1904) 136 N. C. 443, 48 S. E. 796, 67 L. R. A. 977, the court held that a contract by a guardian to sell his ward's land, in advance of legal authority, was contrary to public policy and void.

"Where a statute provided that guardians could sell the real estate of a ward only upon the order of a court of competent jurisdiction, it was held in Nichols v. Bryden (1912) 86 Kan. 941, 122 P. 1119, that a guardian's executory contract for the sale of land, not approved by the Probate Court, had no legal standing.

"And in Cox v. Burrus (1922) 198 Ky. 48, 248 S. W.

239, it was held that a guardian could not make a valid contract for the sale of his ward's real estate for a stipulated amount, upon the condition that he would obtain a decree of court for the sale of the property." 108 A. L. R. 950.

"In Morrison v. Kinstra (1877) 55 Miss. 71, the court said: 'It is ultra vires of the powers of the guardian to bind the title and interest of the ward by a contract to sell. Such an agreement contravenes the policy of the law. The title of the ward can only be divested by proper decree and sale at public vendue, whether the interest of the ward be legal or equitable.'" 108 A. L. R. p. 949.

Other cases bearing directly upon this proposition of law are: Downing v. Peabody, 56 Ga. 40; Gaylord v. Stebbins, 4 Kan. 42; Worth v. Curtis, 15 Me. 228; Morris v. Goodwin, 1 Ind. App. 481, 27 N. E. 985; Funk v. Rentchler, 134 Ind. 68, 33 N. E. 364; Joseph v. Belcher, (Mo. App.) 74 S. W. 2d 483; Zander v. Feely, 47 Ill. App. 659; Smith v. Moore, 178 N. C. 370, 100 S. E. 702; Thacker v. Henderson, 63 Barb. (N. Y.) 271; Smith v. Rockett, 79 Okla. 244, 192 P. 691.

"Void" means nonenforceable, and without legal effect incapable of ratification. A void contract is one without legal effect or force. See King v. King, 63 Ohio St. 363; City of Litchfield v. Litchfield Water Sup. Co., 95 Ill. App. 647; Bishop on Contracts (2d Ed.) § 611, p. 259.

"A thing is void which is done against law, at the very time of doing it, and where no person is bound by the act." Anderson v. Roberts, 18 John. (N. Y.) 515. See, also, Winfield, Adjudged Words and Phrases, p. 633.

If the contract was void for the reason assigned, the court would not enforce a breach of it, but leave the parties where they found them. See York v. Merritt, 77 N. C. 213; Le Roy v. Jacobosky, *supra.*

The method adopted and pursued by the guardian in attempting to vest title to the real estate of the ward in the vendee under the contract of sale by having the

mortgage of the Conservative Mortgage Company foreclosed, discloses he apparently believed the contract was void and of no legal force and effect. We conclude, from the facts and circumstances here presented, the contract designated as exhibit 5 is absolutely void, has no legal force or effect, and is incapable of ratification.

The following authorities are also applicable and decisive of this appeal: "The doctrine of subrogation is not administered by courts of equity as a legal right, but the principle is applied to subserve the ends of justice and to do equity in the particular case under consideration. It does not rest on contract, and no general rule can be laid down which will afford a test in all cases for its application." Fender v. Reed, 143 Neb. 911, 12 N. W. 2d 98.

Whether the doctrine of subrogation is applicable to a particular case depends upon the peculiar circumstances of such case. See Fender v. Reed, *supra*. See, also, Equitable Life Assurance Society v. Person, 135 Neb. 800, 284 N. W. 260.

A surety on guardian's bond was held subrogated to rights of ward. See Brovan v. Kyle, 166 Wis. 347, 165 N. W. 382.

"Sureties having satisfied the claims of obligees on a guardian's bond are subrogated to the rights of the latter, * * *." Woerner, American Law of Guardianship, § 46, p. 156. See, also, Sheldon on Subrogation, (2d Ed.) § 88, p. 138; 21 R. C. L., Principal and Surety, § 155, p. 1118.

"If the surety has been compelled to make good a defalcation of the guardian, he is subrogated to any right of the ward against one who assisted in the defalcation." 25 Am. Jur., Guardian and Ward, § 203, p. 127, and cases cited under note 15.

In the instant case, on June 9, 1942, the county court decreed that the guardian of Fannie E. Griggs, incompetent, or the Western Surety Company, the surety on the guardian's bond, pay into court $6,607.53, or to a suc-

cessor guardian to be appointed by the court. On appeal to the district court the case was not tried, but the judgment rendered in the county court was settled by the surety in the amount of $6,500. On April 2, 1943, the county court entered an order approving and directing settlement, which was perfected according to such order. The amount paid to the ward's estate by the surety for the loss accruing to the property in controversy caused by the guardian's defalcation, was an amount in excess of the value of the property, the property at the time, as shown by the record, not exceeding a value of $1,200 to $1,500, while the surety paid an amount a trifle in excess of $2,400 on this item, thus making the ward's estate whole in such respect.

We believe that under the circumstances equity and good conscience require that the surety be subrogated to any rights or interests the ward may have had in such property and, as provided for in the order approving the settlement, may quitclaim any right or interest it may have obtained by equitable subrogation. Thereafter, the surety, by quitclaim deed, deeded what interest it may have had in the property to the appellee, as did the former guardian. Further, the appellee received a sheriff's deed by virtue of the mortgage foreclosure sale. Under the circumstances, we conclude that the appellee is entitled to a decree quieting title in him to the property here involved.

In view of our holding, it becomes unnecessary to determine other legal questions presented in this appeal.

AFFIRMED.

WILLIAM HOWARD SPAULDING, APPELLEE, V. JOHN HOWARD, APPELLANT.

27 N. W. 2d 832

Filed June 6, 1947. No. 32208.

1. **Trial.** A motion for a directed verdict must for the purpose of decision thereon be treated as an admission of the truth of all material and relevant evidence submitted on behalf of the party against whom the motion is directed.
2. ———. 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.
3. **Automobiles: Negligence.** If a driver confronted with an emergency turns his car to the left in an attempt to avoid a collision, the question of negligence is for the determination of the jury.
4. **Negligence.** If the defendant pleads that the plaintiff was guilty of contributory negligence, or that the accident resulted solely from his negligence, the burden is upon the defendant to prove those defenses, and does not shift during the trial of the case, but he should receive the benefit of the plaintiff's evidence tending to prove those issues.
5. **Trial.** When instructions requested are substantially given in the charge prepared by the court on its own motion, it is not error to refuse to repeat them, though expressed in language different from that used by the court.
6. **Appeal and Error.** Error in instructions not prejudicial to the complaining party and not affecting the verdict, does not require reversal.
7. **Negligence.** Where reasonable men might draw different conclusions from the evidence, negligence is a question for the jury.

APPEAL from the district court for Richardson County: VIRGIL FALLOON, JUDGE. *Affirmed.*

Armstrong & McKnight, for appellant.

Jean B. Cain, Dan J. Riley, and *Wendell Miller,* for appellee.

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

MESSMORE, J.

This is an action at law brought by the plaintiff to recover damages to his automobile and to his person, alleged to have been caused by the negligence of the defendant when plaintiff's automobile and defendant's truck collided.

The plaintiff's petition sets forth several charges of negligence against the defendant which he claims constitute the direct and proximate cause of the accident and the resulting damages to his automobile and person. The defendant's answer denies the affirmative allegations of the plaintiff's petition, and alleges that any damage to the plaintiff's automobile or to his person, sustained by virtue of the accident, was the direct and proximate result of the plaintiff's negligence. The cross-petition charges the plaintiff with negligence in certain respects, alleging that the plaintiff's negligence, so charged, was the direct and proximate cause of the accident resulting in damage to the defendant's truck, and the doctor bill which he paid in behalf of his wife. The reply, in effect, is a general denial to the answer. The answer to the cross-petition denies the allegations of negligence charged against the plaintiff contained therein.

The record discloses the plaintiff, a discharged war veteran, 27 years of age, on February 6, 1946, purchased a 1935 LaSalle coach in St. Joseph, Missouri for $625, and after the accident here involved it was worth $100. After purchasing the car he proceeded from St. Joseph to Dawson, Nebraska, to visit his mother. At a point about six miles north of Falls City, Nebraska, he was driving on highway U S 73, an arterial highway extending north from Falls City having a cement surface 20 feet in width. At this point the highway makes a wide curve to the west, and approximately 200 feet north of the point where the curve commences, the highway joins with a gravel-surfaced road which proceeds to the east, referred to as the Barada road. There

is a continuous down grade of highway U S 73 toward the north for a distance of about half a mile south of the curve heretofore mentioned. The highway markings in this vicinity, as testified to by an engineer, are as follows: 573 feet south of the intersection of the Barada road on highway U S 73, is a standard United States highway sign; further south, a distance of 873 feet from the Barada intersection, is a highway mile sign; 1691 feet south from the Barada road intersection is a steel post by a flume at the edge of the highway. On each side of the Barada road where it intersects with highway U S 73 are stop signs, approximately 38½ feet distant from the east edge of the paved surface of highway U S 73.

The defendant, aged 52, engaged in farming for more than 30 years and living 16 miles north of Falls City, left his home about 1:15 p. m. the afternoon of February 6, 1946, which was a nice, sunshiny day. The surface of the road was dry. He was accompanied by his wife, and driving a 1940 International truck equipped with a stock rack, and loaded with livestock. The total weight was approximately 13,000 pounds, including the livestock. The defendant was familiar with the Barada road which he followed, having driven it for many years on an average of from two to six times a week. Arriving at the stop sign on the Barada road at about 2:00 or 2:30 in the afternoon, he stopped his truck adjacent to the stop sign on the south side of the road at the approximate distance of 38½ feet east of the east edge of the paved surface of highway U S 73. His version as to what occurred thereafter, and as testified to by him in substance, is as follows: After stopping he looked to the right, or to the northwest; there were no cars in sight. He then looked to the south and saw a car, which later developed to be the plaintiff's car, which was a little south of the steel post, a distance of 1691 feet from the intersection. He estimated the plaintiff's car was south on highway U S 73 about 1800 feet

distant from the intersection. He then proceeded into the intersection at a speed of two or three miles per hour, and when the front wheels of the truck were in the middle of the pavement, he saw the plaintiff's car which at that time was near the highway sign 873 feet south of the intersection. He drove in an arc, or circle, for the reason the Barada road is on a curve and the paving curves at this point, traveling a little less than 38½ feet to reach the pavement on the highway. He then proceeded a distance of 97½ feet south on the highway, with his entire truck on his own right hand side of the highway, or on the west side thereof. His speed in negotiating his truck in such manner averaged five miles per hour. The plaintiff was on his right hand side of the highway and driving at a high rate of speed, and when approximately within 15 to 20 feet of the defendant's truck, he angled a trifle, crossing to the left hand side of the highway and, as described by the defendant, with the speed of a "cannon ball" collided with the defendant's truck, striking the truck on the bumper, bending the frame and the cross bar across the front of the frame of the truck; the right wheel of the plaintiff's car striking the left corner of the bumper of the truck while the truck was in forward motion. The impact knocked the truck back across the road at least five feet, as indicated by the burned rubber mark on the road made by the left front wheel of the truck. When the plaintiff's car came to a stop it was up on the grass on the west side of the highway, possibly with one of its hind wheels on the pavement. It faced northwest. The right rear wheel of the truck was practically on the center of the cement highway, to the right. After the truck was hit, the front end of it was pushed toward the west; the rear of the truck was pushed to the east, and the right hind wheel was on the line which divided the 20 foot paved surface of the highway.

The defendant's wife testified that when the truck

stopped she looked to the south and saw the plaintiff's car south of the highway sign which is a distance of 873 feet. The plaintiff was proceeding at a high rate of speed, and when within 15 to 20 feet of the truck his front wheels turned directly and came across in front of the truck. The truck, at the time, was on the west side of the center line of the highway, or on its proper portion of the highway. The defendant was driving at a speed of seven or eight miles per hour.

The plaintiff's version of the collision, according to his testimony, is in substance as follows: When he was 200 feet distant from the intersection he saw defendant, and the front wheels of the truck were on the highway. He blew his horn, believing the defendant would stop, and swerved to the left endeavoring to miss him, and if the defendant had stopped, he would have missed him. However, the defendant proceeded on, and hit the plaintiff's car on the front fender with the bumper of the truck, pushing the plaintiff's car over the paved slab to the west. There was no forward movement of either the car or truck thereafter. The truck was going about five to ten miles per hour. Immediately after the accident the truck was headed almost exactly straight west into the bank, across the paved surface of the highway. The front end of the truck, the bumper and the grille were pushed against the right front fender of the plaintiff's car, and the right front wheel of plaintiff's car was lying almost flat under the truck. The endgate, or rear, of the truck was not over a foot off the pavement on the east side. In other words, the truck and plaintiff's car completely blocked the highway and no one could get by, either from the north or south, without pulling completely off the pavement on the east side of the highway.

After the accident the plaintiff examined skid marks made by the tires of his car at the time he saw the truck approaching the highway. They were about 20 feet long, proceeding north and a little to the west on the

pavement. The right front fender of plaintiff's car was completely demolished; the right front tire blown out by the impact; the radiator destroyed; the grille and hood bent; and the frame and cowl bent where the fender pushed against the truck. He testified the bumper of the truck collided with the front fender on the right side of his car; and that his bumper never touched the truck. The defendant testified that when the plaintiff left the paving, his car hit the bumper of the truck which smashed down his right front wheel; that when the plaintiff's car struck the ground it made a mark for 13 feet and 2 inches; and that there was a pile of gravel in front of his radiator caused by plowing up the side of the road. The plaintiff testified that the pile of gravel in front of his radiator was directly opposite the place where the Barada road enters the intersection of highway U S 73.

After the accident the defendant went over to the plaintiff's car, told him to shut off his radio, asked him if he was hurt, and then walked with him and endeavored to explain his version of the accident and show the plaintiff where it happened.

The evidence with reference to the injuries to the plaintiff, the damage sustained to his automobile, the damage sustained to the truck of the defendant, and the medical bill paid by the defendant in behalf of his wife is all in the record and need not be reviewed.

The case was submitted to the jury which returned a verdict in favor of the plaintiff. Upon overruling the motion for new trial judgment was entered on the verdict. Defendant appeals.

For convenience, the appellant will be referred to as the defendant, and the appellee as plaintiff.

The defendant contends that the verdict of the jury and the judgment entered thereon is contrary to the evidence and the law.

At the close of all the evidence the defendant moved for directed verdict, which was overruled.

The general rule in this jurisdiction when a motion for directed verdict is made, follows: "A motion for a directed verdict must for the purpose of decision thereon be treated as an admission of the truth of all material and relevant evidence submitted on behalf of the party against whom the motion is directed. Such party is entitled to have every controverted fact resolved in his favor, and to have the benefit of every inference that can reasonably be deduced from the evidence." Roberts v. Carlson, 142 Neb. 851, 8 N. W. 2d 175. See, also, Halliday v. Raymond, 147 Neb. 179, 22 N. W. 2d 614; Gutoski v. Herman, 147 Neb. 1001, 25 N. W. 2d 902. We consider the evidence in conformity to the foregoing rule.

There is a sharp conflict in the evidence as to where the collision occurred. The plaintiff contends the collision occurred where the Barada road intersects highway U S 73, at about the center of the intersection, while the defendant contends the collision occurred 97½ feet south of the intersection of the Barada road and highway U S 73, on the west side of the pavement.

"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." Stoffel v. Metcalfe Const. Co., 145 Neb. 450, 17 N. W. 2d 3; Gutoski v. Herman, *supra*.

The defendant cites the rule set forth in Bergendahl v. Rabeler, 133 Neb. 699, 276 N. W. 673, which follows Vandervert v. Robey, 118 Neb. 395, 225 N. W. 36, as follows: "The duty of the driver of a vehicle * * * to look for vehicles approaching on the highway implies the duty to see what was in plain sight." We gave approval to the rule with this qualification, "unless some reasonable excuse for not seeing is shown." Roberts v. Carlson, *supra*.

It is clear from the evidence that the defendant saw the plaintiff's car 1,800 feet south of the intersection when he stopped. He elected to proceed across the in-

tersection at a rate of speed averaging five miles an hour. The plaintiff did not see the defendant's truck when he was 1,800 feet distant from the stop sign on the Barada road, and saw it for the first time when he was within 200 feet of it. It is a question of fact as to the negligence of the parties as to what they did or did not see, or what they should or could have seen.

The following authority is also applicable under the facts in this case: "Where a driver of an automobile is suddenly confronted with an emergency requiring instant decision, he is not necessarily guilty of negligence in pursuing a course which mature reflection or deliberate judgment might prove to be wrong." Riekes v. Schantz, 144 Neb. 150, 12 N. W. 2d 766.

In the instant case the plaintiff testified that he believed the defendant would stop and permit him to pass to the left, and when the defendant did not stop, the plaintiff angled a little more to the left and the collision occurred. Under the plaintiff's evidence the plaintiff could not have passed to the east, or right, of the defendant's truck. He testified if he had done so he would have hit the cab of the defendant's truck directly.

The defendant contends that the plaintiff was driving his car at such speed that he was unable to stop or turn aside in time to avoid the truck which was discernible within the range of his vision, and therefore was negligent, relying on Ross v. Carroll, 138 Neb. 1, 291 N. W. 726, and Hardung v. Sheldon, 133 Neb. 427, 275 N. W. 586. In the cited cases the question of negligence in such respect was for the jury to determine, as it is in the case at bar.

The defendant contends that the trial court erred in giving instruction No. 6. This instruction placed the burden of proof upon the defendant to establish by a preponderance of the evidence that the plaintiff operated his automobile negligently in one or more of the particulars set up in the answer and cross-petition, and that such negligence, so established, was the proximate cause

of the injuries to defendant's wife and truck, and the amount of damages he has sustained by reason of plaintiff's negligence.

"If the defendant pleads that the plaintiff was guilty of contributory negligence, or that the accident resulted solely from his negligence, the burden is upon the defendant to prove those defenses, and does not shift during the trial of the case, but he should receive the benefit of the plaintiff's evidence tending to prove those issues." McGahey v. Citizens Ry. Co., 88 Neb. 218, 129 N. W. 293. See, also, McCulley v. Anderson, 119 Neb. 105, 227 N. W. 321; Roberts v. Carlson, *supra;* Schrage v. Miller, 123 Neb. 266, 242 N. W. 649.

The defendant contends that he is not claiming in his cross-petition any damages for injuries sustained by his wife. He does ask for $15.45 for her medical expenses. He testified that she had a hospital and doctor bill. Obviously there would be some occasion for the trial court to instruct with reference to this item.

"Where an instruction, though erroneous, is not prejudicially so and cannot by any course of logical reasoning be deemed to have resulted in disadvantage to the complaining party, it should not be allowed to work a reversal." Johnson v. Samuelson, 116 Neb. 297, 216 N. W. 810.

The defendant objects to other instructions which were requested, and some which were given by the trial court.

"When instructions requested are substantially given in the charge prepared by the court on its own motion, it is not error to refuse to repeat them, though expressed in language different from that used by the court." Curry v. State, 5 Neb. 412. See, also, McGahey v. Citizens Ry. Co., *supra.*

From an examination of the instructions given by the court on its own motion, and those tendered and refused, we conclude the trial court did not err in re-

fusing requested instructions and in giving instructions on its own motion.

"Where evidence is in conflict and such that reasonable minds may draw different conclusions therefrom, the questions of negligence and comparative and contributory negligence are for the determination of the jury." Parks v. Metz, 140 Neb. 235, 299 N. W. 643. See, also, Grantham v. Watson Bros. Transportation Co., 142 Neb. 362, 6 N. W. 2d 375; Hardung v. Sheldon, *supra;* Gutoski v. Herman, *supra.*

For the reasons given in this opinion, the verdict and judgment of the trial court is affirmed.

AFFIRMED.

ABRAHAM L. REED ET AL., APPELLANTS, V. COUNTY OF DOUGLAS, APPELLEE.

28 N. W. 2d 144

Filed June 13, 1947. No. 32210.

1. **Taxation.** The law requires the assessor each year to add to the real estate assessment all real estate that shall have become subject to taxation since his last previous listing of property in the county, with the value thereof.
2. ———. Such real estate shall be valued for taxation purposes at its actual market value, and any excessive valuation of such property may, upon complaint of the owner, be corrected, first, by the county board of equalization, and, on appeal, by the district court.
3. ———. Where a tax is levied upon a tract of real estate as a whole, and a part of it is exempt, the assessment, if inseparable, is unauthorized and the whole tax is void.
4. **Easements: Taxation.** When an easement for a drainage ditch which is exempt from taxation has not been taken into consideration in taxing the real property across which such ditch runs, and when the exempt and the nonexempt parts of said property can be separated, this should be done, and the correct amount of taxes legally due on the nonexempt portion of said real estate be apportioned to it.

APPEAL from the district court for Douglas County: JACKSON B. CHASE, JUDGE. *Reversed and remanded.*

Morsman & Maxwell, for appellants.

James J. Fitzgerald and *William C. Ramsey,* for appellee.

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

PAINE, J.

This is an equitable action, brought against Douglas County, for the purpose of determining that the taxes levied and assessed for several years against certain accretion lands are null and void, and to remove the cloud thereby cast upon the title to said land, and for other equitable relief. The trial court denied the relief prayed and dismissed the action, from which decree plaintiffs appealed.

The plaintiffs are the owners of the lands in question, which are accretions on the west side of the Missouri River in Douglas County, and described as Government Lots 1, 2, and 3, in Section 6, Township 15 North, Range 14, all of such accretion land lying east of the right-of-way of the East Omaha Drainage District.

The owners of this land in 1925 and 1926 platted that part of their land lying on the west side of the drainage ditch. The plat shows that a road, called Woodland Road, is just to the west of and parallel with the levee of the drainage district through all the additions. They then platted three additions, to wit, Woodland Acres, Woodland Acres Annex, and south of these additions an addition called Reedwood Acres, all on the west side of this road and levee. These additions having many blocks divided by many streets and avenues, and the stipulation of facts in the bill of exceptions shows that these three additions have now been entirely taken over by the City of Omaha by condemnation proceedings in connection with the municipal aviation field.

It is stipulated that if plaintiff Abraham L. Reed was called as a witness he would testify that back in the fall of 1921 the plaintiffs executed an instrument which granted an easement to the East Omaha Drainage District, which district is a governmental subdivision of the state of Nebraska, for which reason its property is exempt from taxation. The original agreement for this easement was never recorded, and appears to be lost, but it provided for an easement of a 75-foot strip over this accretion land.

However, an instrument for an easement in perpetuity was introduced in evidence as exhibit No. 5, which was dated June 27, 1946, between the same parties, and appears to have been recorded July 15, 1946, in the register of deeds' office. This exhibit stated that this 75-foot easement, from Thirty-third Street, East Omaha, to Pinkney Street, contains 13.605 acres.

It should be noted that this recent instrument contains, in Parcel II, in addition to the original easement, additional right-of-way, being therein conveyed for the first time.

Because these accretion lands were swampy and of no agricultural value, they were not entered on the tax rolls of Douglas County prior to the year 1937, in which year the county assessor placed such lands on the tax roll as Government Lots 1, 2, and 3, heretofore described, placing a substantial valuation on each of said lots. The county board levied taxes for that year on Lot 1 of $95.75, on Lot 2 of $134.05, and on Lot 3 of $95.75, which was done without notice to the plaintiffs. The lands were described as accretion lands to Government Lots 1, 2, and 3, lying east of the platted additions heretofore mentioned. As the easterly boundary of these additions was the road known as Woodland Road, the description entered by the assessor on each of these lots covered the land in the easement of the East Omaha Drainage District, which was approximately 75 feet in width.

Taxes were also levied and assessed on each of these accretion lots for the subsequent years.

It appears by a stipulation in the bill of exceptions that the Byron Reed Company, which had been the company which originally platted these additions, filed a complaint of the taxes for the year 1942 before the board of equalization of Douglas County, and asked to have the assessed valuation of the aforesaid accretions reduced, and the county board of equalization reduced the valuation thereon, from which no appeal was taken. It is claimed by the plaintiffs that they did not know of nor authorize this appeal to be taken by the Byron Reed Company, by whom a declaration of trust was executed, showing that the conveyance of lands to it by plaintiffs was to plat certain portions of said lands and sell and convey same by warranty deed, and to account therefor to plaintiffs.

The taxes were not paid for any of the years from 1937 to 1941, nor were the taxes paid in 1942 on the reduced valuation, and taxes were levied and assessed for the years 1943, 1944, and 1945, none of which have ever been paid.

It is alleged that, in conformity with section 77-1918, R. S. 1943, the county board, after examining the report of the county treasurer, issued an order directing the county treasurer to issue to Douglas County a certificate of tax sale for the accretion lands to Government Lot 1 for taxes for the years 1937 to 1942, inclusive.

It is alleged in the second cause of action that, under the same authority and in the same manner, a tax certificate was issued to Douglas County on the accretion to Government Lot 2. And in the third cause of action it is alleged that another tax certificate was issued to Douglas County on the accretion land to Government Lot 3. It is also alleged that taxes have also been levied and assessed separately against each of said three lots for the years 1943, 1944, and 1945, all of which are null and void and constitute a cloud on plaintiffs' title to said

lands, and plaintiffs are entitled to have the same vacated and set aside.

The prayer of the plaintiffs' petition is for a decree adjudging that the taxes purporting to have been levied and assessed against the plaintiffs' accretion land in Government Lots 1, 2, and 3 are null and void, and of no force and effect, and constitute the taking of plaintiffs' land without due process of law, and that the cloud cast upon the plaintiffs' title to the said lands be removed, and for such other relief as may be just and equitable.

The county of Douglas in its answer admits that the East Omaha Drainage District was organized as alleged, and further admits that any real estate owned by said drainage district is not subject to taxation. The defendant county admits that the lands of the plaintiffs and the lands which the plaintiffs allege to be the right-of-way of said drainage district were assessed together as one tract for the purpose of taxation, and taxes were levied thereon from the year 1937, as alleged. The defendant county admits that on April 10, 1944, three certificates of tax sale covering said land were issued to Douglas County for taxes for the years 1937 to 1942, and alleges that said certificates of tax sale are valid first liens upon the property described therein. The defendant county admits that the real estate in question was placed upon the tax rolls for the first time in the year 1937, without notice to the owners of the land.

The defendant also alleges that the land to which plaintiff claims ownership and the land which plaintiff alleged to be the right-of-way of the drainage district appeared upon the public records as all belonging to the same owner and as one entity, or tract of land, at the time each of said assessments for taxation purposes was made, and further alleged that at no time prior to bringing this action had the taxing officials of Douglas County been notified that the East Omaha Drainage District owned or claimed any title to any part of this land, and have never been notified that there has been

a division of ownership of said tract of land, nor have the plaintiffs ever requested Douglas County officials to set off or apportion to any part of said land the full and just portion of the assessed valuation and tax levied thereon.

The defendant further alleges that the plaintiffs have not at any time offered to pay to the county treasurer of Douglas County a just proportion of the taxes that have been assessed and levied upon that part of said tract of land of which the plaintiffs allege ownership, and the plaintiffs are estopped in this action from questioning the assessed valuation placed upon said land. Defendant Douglas County prays that the plaintiffs' amended and supplemental petition be dismissed and that the defendant go hence without day and recover its costs herein expended.

The plaintiffs' assignments of error alleged that the trial court erred in its findings and decree dismissing the plaintiffs' first cause of action, for they were not sustained by sufficient evidence and are contrary to the evidence and contrary to law. Plaintiffs made the same allegation in regard to their second and third causes of action separately.

It is further alleged that the trial court erred in dismissing the three causes of action, because essential allegations of plaintiffs' pleadings were admitted by defendant's answer, and by such admission the defendant is conclusively bound and thereby estopped from contending that the purported taxes levied constitute a valid lien against plaintiffs' lands; that the defendant admitted in the stipulation of facts material and essential allegations of plaintiffs' pleadings, and is thereby bound and estopped from contending that the purported taxes constitute any lien against the same.

In determining the questions involved in this case, we find that, when the assessor first placed said Government Lots 1, 2, and 3 on the assessment schedules and levied taxes thereon in 1937, there was an easement in

the westerly line of these three lots for a 75-foot drainage ditch of the East Omaha Drainage District, and which embraced an area of about 13.605 acres.

Of what did the three lots consist? In the amended and supplemental petition it is stated that Government Lot 1 embraces 99.36 acres, Lot 2 embraces 108.6 acres, and Lot 3 embraces 73.884 acres, or a total acreage of 281.844 acres. It is shown that of Lot 1, 49.36 acres are under water, leaving 50 acres above water; of Lot 2, 36.6 acres are under water, leaving 72 acres above water; and of Lot 3, 13.884 acres are under water, leaving 60 acres above water. Accepting these figures, they show that there are at least 182 acres of land above water, belonging to the plaintiffs, which were not assessed at all until 1937, and since then have been assessed each year, but the owners have never paid any taxes whatever, as shown by the record.

Section 77-1306, R. S. 1943, requires the assessor each year to add to the real estate assessment all real estate "that shall have become subject to taxation since the last previous listing of the property in the county, with the value thereof, * * *." Such real estate shall be valued for taxation purposes at its actual market value, and any excessive valuation of such property may upon complaint of the owner be corrected, first, by the county board of equalization (§ 77-1503, R. S. 1943), and, on appeal, by the district court (§ 77-1513, R. S. 1943). See Wilson & Co. v. Otoe County, 140 Neb. 518, 300 N. W. 415.

In the stipulation of the parties, it was agreed that plaintiffs were the fee title owners of said Government Lots 1, 2, and 3. Also, that engineer Roy N. Towl would testify, if called as a witness, that he was engineer for the East Omaha Drainage District, which constructed a levee across the accretions to Government Lots 1, 2, and 3, and for which a grant for a perpetual easement had been given; that said work has ever since been kept in

repair, and stands today across the land where it was originally constructed.

The exhibit of the transcript of the bond issue indicates that bonds were authorized in the principal amount of $254,500 for the construction of said drainage district.

The exhibit showing the plat and dedication of the lands in this addition was presented to the city council of Omaha and approved by James C. Dahlman, mayor, on May 12, 1925, and recites that the Byron Reed Company, by Abraham L. Reed, president, is the owner and proprietor of the above described property, as shown by Deed Record 521, page 36, of the records of Douglas County.

The stipulation of counsel, as found on page 58 of the bill of exceptions, reads in part as follows: "That the description of said accretions to said Government Lots 1, 2 and 3 on defendant's said tax records for the year 1937 and subsequent years up to and including 1945 embraced not only plaintiffs' accretion lands to said Government Lots 1, 2 and 3, lying east of said right-of-way of said East Omaha Drainage District, but also embraced such right-of-way of the Drainage District and the dike or levee constructed thereon; * * * ."

Therefore, this evidence discloses that the assessor placed assessments of taxes upon the entire 182 acres in Government Lots 1, 2, and 3, and thereby included 13.605 acres in the drainage district which were exempt from taxation, and against which the taxes levied were therefore void.

We will now examine some of our Nebraska opinions relating to similar situations. In Young Men's Christian Ass'n v. Lancaster County, 106 Neb. 105, 182 N. W. 593, the county assessor valued the five-story brick building in Lincoln at $100,000. Objections were filed with the county board of equalization on the ground that the property was used exclusively for religious, educational and charitable purposes, and was therefore exempt from taxation. But evidence disclosed that, in addition to the

offices and dormitories, there was also a cafeteria, in which necessary floor space was leased to outside parties, who paid 10 percent of the gross receipts as rental, which averaged about $700 a month, and small spaces were rented to a tailor shop for $15 a month and to a barber shop for $25 a month. The county board of equalization reduced the valuation to $80,000, but on appeal the district court held the entire building exempt from taxation. This court held that the judgment should be reversed and the cause remanded to the district court with instructions to ascertain the taxable value of that portion of the property which was taxable, having due reference to the taxable value of the entire property.

Another Nebraska case is that of Sioux City Bridge Co. v. Dakota County, 61 Neb. 75, 84 N. W. 607. The plaintiff began action in the district court to enjoin the collection of taxes upon its bridge and the approach thereto by the Village of South Sioux City, the plaintiff claiming that the whole of said taxes was void for the reason that the bridge itself and 90 feet of the approach to the bridge were outside of the corporate limits of the village. It was held by this court that "A tax levied on a whole property, part of which is within and part without the territorial limits of the body imposing the same, is invalid as to that part levied on the portion without the jurisdiction, which renders the whole assessment void, unless the tax assessed against the part within the jurisdiction of the taxing body can readily be separated from the portion without it."

We will now consider the case of McDonald v. Masonic Temple Craft, 135 Neb. 48, 280 N. W. 275, 118 A. L. R. 855, which plaintiffs rely upon to support their contention in the case at bar that the levy of a tax on the entire area of each of their three lots, upon which there was an easement for an exempt drainage ditch along the west side, made all of the taxes levied on these three lots for all these years absolutely void. It appears that the Masonic Temple Craft built a four-story building in

North Platte, and the two upper floors were used exclusively for purposes of the Masonic order, and therefore were held to be exempt from taxation. The two lower floors of the building, being rented for commercial purposes, were subject to taxation, but the property was assessed for taxation as a whole, and in the opinion it is stated on page 51, "There never has been an assessment levied upon the property not exempt as it has been commingled with the exempt part." It was held that "Where a tax is levied upon property as a whole, and a part is exempt * * *, the assessment, if inseparable, is unauthorized and the whole tax is void."

It appears from the holdings in the last two cases that, if a tax is levied on exempt and nonexempt property and it is impossible to separate it, then the tax is void, but if it can be separated it is not void.

In the annotation following the McDonald case, in 118 A. L. R. 861, it is said: "And the practical question, admitting the correctness of the above rule, would seem to be largely as to whether the tax is apportionable. In the majority of the cases in the annotation it seems that there has been such an apportionment and the tax on the nonexempt part therefore sustained."

We have reached the conclusion in the case at bar that, from the maps, stipulations, and evidence, there will be no difficulty in separating and determining the area of the exempt and nonexempt portions of said Government Lots 1, 2, and 3 and then apportioning to the nonexempt portions of said lots the correct amount of taxes for which each is legally liable.

The judgment of the lower court is hereby reversed and the cause is remanded, and the district court is directed to separate the exempt from the nonexempt portions of said lots and to determine and apportion the actual and correct amount of taxes due for each of the years in question on the nonexempt portion of each lot in question.

REVERSED AND REMANDED.

NEWTON W. ELLIS, APPELLEE, V. UNION PACIFIC RAILROAD COMPANY, A CORPORATION, APPELLANT.

27 N. W. 2d 921

Filed June 13, 1947. No. 31889.

1. **Evidence.** As a general rule, an issue as to the existence or occurrence of a particular fact, condition, or event may be proved by evidence as to the existence or occurrence of particular facts, conditions, or events under the same or substantially similar circumstances.
2. **Railroads: Negligence.** To recover under the Federal Employers' Liability Act, plaintiff must establish by a preponderance of the evidence that defendant was negligent in one or more of the particulars as alleged in his petition, and that such negligence was in whole or in part the proximate cause of his injuries.
3. **Trial.** In such cases, instructions to the jury should be considered together that they may be properly understood and when, as an entire charge it appears that they do not limit recoverable negligence to that charged in plaintiff's petition, but authorize recovery for negligence generally, they will ordinarily be adjudged to be prejudicially erroneous.
4. **Negligence.** Assumption of risk is ordinarily an affirmative defense and unless made an issue by the pleadings and evidence, no instruction should be given thereon.
5. **Railroads: Negligence.** In actions to recover damages under the Federal Employers' Liability Act, the defense of assumption of risk has been removed from the law only if the risk involved was in whole or in part caused by or resulted from defendant's negligence.
6. ———: ———. As the Federal Employers' Liability Act is construed, the carrier cannot be relieved from the consequences of its own negligence by claiming that the employee assumed the risk thereof, but the carrier cannot be charged with or liable for those injuries which result from the usual risks incident to employment, notwithstanding its exercise of reasonable care, or for those solely caused by or resulting from plaintiff's own negligence, although his contributory negligence as a defense will only proportionately diminish his recovery.
7. ———: ———. In actions to recover under the Federal Employers' Liability Act, it is prejudicial error to instruct the jury without appropriate qualification that plaintiff cannot be held to have assumed the risk of his employment.

APPEAL from the district court for Douglas County:

JAMES M. FITZGERALD, JUDGE. *Reversed and remanded.*

T. F. Hamer, R. B. Hamer and *G. C. Holdrege,* for appellant.

Rosewater, Mecham, Shackelford & Stoehr, and *Tautges, Rerat & Welch,* for appellee.

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

CHAPPELL, J.

This action was predicated upon the Federal Employers' Liability Act. Plaintiff recovered a verdict for $10,000, upon which judgment was entered. Defendant's motion for new trial was overruled, and it appealed to this court. Former opinions in the same case are reported 146 Neb. 397, 19 N. W. 2d 641, and 147 Neb. 18, 22 N. W. 2d 305, respectively. Upon the record before us, we therein ultimately reversed and dismissed plaintiff's case, primarily upon the premise that plaintiff's evidence failed to disclose any negligence by defendant in whole or in part proximately causing plaintiff's injuries, but rather affirmatively established as a matter of law that they were proximately caused solely by his own negligence. As a matter of course, in that situation we did not discuss defendant's other assignments of error, which, if they had merit, would have required reversal and remand for new trial. In view of the fact, however, that upon appeal, the Supreme Court of the United States, 329 U. S. 649, 67 S. Ct. 598, 91 L. Ed. 433, held that the evidence did raise questions of fact for the jury to determine, the case is again before this court to adjudge the merit of defendant's other assignments of error.

Those assignments were: (1) That the trial court erred in admitting certain evidence over defendant's objections, and (2) erred in giving instructions No. 1, 4, 10, 11, 12, and 13 respectively. We conclude that instructions No. 4, 10, and 13 were prejudicially erroneous.

The nature of the case and a detailed statement of its salient facts, together with quotations from the federal statutes involved, will be found in our former opinions and the opinion of the Supreme Court of the United States. Except where necessary for clarity, they will not be repeated.

However, it will be well at the outset to quote a part of the opinion of the Supreme Court of the United States. After reviewing a portion of the evidence, it was said: "From this evidence the jury might have concluded that petitioner had a safe place to work but elected to choose a dangerous one, that any duty of warning was fully discharged by the presence of the sign, and that the engineer had not been negligent in any way. In that view of the case the accident would be an unforseeable, freak event or one caused solely by petitioner's own negligence. On the other hand, it would not have been unreasonable for the triers of fact to have inferred that it was proper and usual procedure to work on the right side of the engine, that the hazard was not readily apparent and was almost in the nature of a trap, that while the sign was placed so as to be readily visible from a train, it was insufficient warning to a man on the ground, and that consequently petitioner was not furnished a safe place to work. And the jury might have thought that the engineer was negligent in failing to perceive the peril in time to avert the accident by a warning or by stopping the engine. Again, both parties might have been found negligent, in which event it would have been the duty of the jury, as the trial judge charged, to render a verdict based upon the damages caused by respondent's negligence diminished by the proportion of negligence attributable to petitioner. 45 U. S. C. § 53.

"The Act does not make the employer the insurer of the safety of his employees while they are on duty. The basis of his liability is his negligence, not the fact that injuries occur. And that negligence must be 'in whole

or in part' the cause of the injury. 45 U. S. C., § 51; Brady v. Southern Ry. Co., U. S. 476, 484. Whether those standards are satisfied is a federal question, the rights created being federal rights. Brady v. Southern Ry. Co., supra; Bailey v. Central Vermont R. Co., 319 U. S. 350."

With regard to the first assignment, it was argued that the trial court prejudicially erred in receiving, over defendant's objection, the testimony of a witness relating to the condition of the track and roadbed involved at some time other than the time when the accident occurred, when such evidence was not material and when no similarity in essential conditions was shown to exist. It was also argued that the same witness was erroneously permitted to testify that on some occasion other than the time of the accident, he saw cars rock back and forth and that they had a tendency to lean toward the adjacent building as they were being moved on the track, when such evidence was not material and when no substantial similarity in essential conditions affecting the result was shown to exist.

Without reciting or summarizing such evidence, we deem it sufficient to say that we have examined the same and conclude that its admission was not logically subject to the complaint made by defendant. Rather, the evidence was material and its character was such as to make it admissible. The evidence discloses that the necessary similarity of essential conditions existed at the time, making applicable the general rule that: "An issue as to the existence or occurrence of a particular fact, condition, or event, may be proved by evidence as to the existence or occurrence of similar facts, conditions, or events, under the same, or substantially similar, circumstances." 32 C. J. S., Evidence, § 584, p. 438. See, also, 20 Am. Jur., Evidence, § 306, p. 284. We conclude that the trial court did not abuse its discretion in admitting the evidence and that its admission was not prejudicially erroneous.

Defendant assigned that a part of instruction No. 1, which submitted the material allegations of plaintiff's petition, was erroneous. That portion of the instruction read as follows: "Plaintiff alleges that the defendant was guilty of negligence in moving the car which came in contact with plaintiff, in that the said car was too large to safely move on the said track. He further alleges that the defendant negligently and carelessly failed to maintain its said tracks, in a reasonably safe condition and permitted the same to become uneven, and permitted low joints to exist therein, which plaintiff alleges caused the car while in motion to list in the direction of the building, and alleges that that greatly reduced the clearance between the side of the car and the said building."

Defendant argued that the instruction erroneously invited the consideration of issues which were not supported by evidence. The evidence disclosed that the car involved, although of a type used by defendant and other railroads, was 50 feet 6 inches long, and approximately 10 feet 7 inches wide. It was of such unusual size, comparatively speaking, that it was the only type which could have caused the failure of clearance at the precise point where plaintiff was injured.

Admittedly, that part of the instruction relating to the condition of the track had some support in the evidence. It will be noted, also, that there was evidence in the record that by reason thereof and the size of the car, it was caused to list in the direction of the building, thus reducing the clearance. There was nothing said in the instruction about swaying, pitching, or lurching of the car, as argued by defendant. In Southern Railway Company v. Hobbs, 35 F. 2d 298, the court found that the use of a car of unusual size, under circumstances comparable with those at bar, was evidence of negligence properly submissible to a jury for its determination. We find nothing in instruction No. 1 which could be prejudicially erroneous.

Defendant assigned that instructions No. 4 and 13 were prejudicially erroneous because they told the jury in substance to return a verdict for plaintiff if it found that defendant was guilty of any negligence proximately causing the accident, without qualifying or limiting therein or in any other instruction that the recoverable negligence of defendant must be that pleaded by plaintiff. In other words, defendant argued that the jury was thus left at liberty to find that defendant had been guilty of any negligence and permit recovery upon any theory which suited its fancy, whether pleaded by plaintiff or otherwise. We agree with defendant's contentions.

This court has held that: "An instruction which would allow the jury to render a verdict on an issue not of the pleadings is erroneous." Norfolk Beet-Sugar Co. v. Hight, 56 Neb. 162, 76 N. W. 566. As stated in 38 Am. Jur., Negligence, § 370, p. 1090: "An instruction which does not limit negligence to that charged in the plaintiff's pleading, but authorizes recovery for negligence generally, is objectionable." In 53 Am. Jur., Trial, § 574, p. 452, a related rule is stated as follows: "It is a well-settled general principle that the instructions given by the trial court should be confined to the issues raised by the pleadings in the case at bar and the facts developed by the evidence in support of those issues or admitted at the bar." See, also, 64 C. J., Trial, § 651, p. 745; Citizens Nat. Bank v. Sporn, 115 Neb. 875, 215 N. W. 120.

In Grifenhan v. The Chicago Railways Co., 299 Ill. 590, 132 N. E. 790, it was found that an instruction similar to instructions 4 and 13 was prejudicially erroneous. In doing so, the court used the following language: "This instruction does not limit the negligence of defendant to that charged in the declaration. It tells the jury that defendant would be liable for the injury if it was guilty of any negligence, whether it was charged in the declaration or not. * * * It might assume any number of things which it might fancy or imagine was negligence on the part of defendant, and then, under

this instruction, find defendant guilty. It is elementary that recovery can only be had upon the negligence charged in the declaration."

Also, in Herring v. Chicago & A. R. R. Co., 299 Ill. 214, 132 N. E. 792, it was said in passing upon the merits of an instruction very similar to those at bar: "This instruction directs a verdict and authorizes a recovery for negligence generally, without limiting the negligence to that charge in the declaration. * * * An instruction of this character permits the jury to wander afield and return a verdict against a defendant for what they might fancy to be an act of negligence, though the act so considered by them to be negligent was one which the law would not recognize as actionable."

Likewise, in Indianapolis & Cincinnati Traction Co. v. Sherry, 65 Ind. App. 1, 116 N. E. 594, the court passed upon the merits of an instruction very similar to those at bar. In the opinion it was said: "Appellant's contention is that this instruction failed to limit the right of recovery to the acts of negligence alleged in the complaint, but opened wide the door and informed the jury that it might return a verdict for appellee if it found the injuries alleged in the complaint were the result of the negligence of appellant, whether alleged in the complaint or not. It is well settled that a plaintiff is only entitled to recover, in an action for damages predicated on negligence, by proof of one or more of the specific acts of negligence alleged in his complaint, and that a failure to make such proof will defeat his right of action, no matter what other acts of negligence are disclosed by the evidence. * * * The giving of this instruction violates this rule, as its reasonable interpretation would lead the jury to believe that it was its duty to return a verdict for appellee, on a finding that his injuries were caused by any negligence of appellant, regardless of the allegations of the complaint. The giving of it was therefore error."

We have examined all of the instructions given by the

trial court to observe whether they could be properly understood and find that as an entire charge they did not limit recoverable negligence to that alleged in plaintiff's petition. Rather, they authorized recovery for negligence generally, in addition to two elements of negligence referred to in instructions No. 11 and 12, without specifically limiting it to that pleaded. Thus instructions No. 4 and 13 were prejudicially erroneous.

Defendant assigned that instruction No. 10 was prejudicially erroneous. It read as follows: "You are instructed that the doctrine of assumption of risk has no place in this case, and that under the Federal Employers' Liability Act, the plaintiff cannot be held to have assumed the risk of his employment. This instruction, however, is not intended to conflict with the instructions on the subjuct (sic) of negligence."

It was argued by defendant that the trial court erred in giving any instruction upon the doctrine of assumption of risk and that in doing so, it also erroneously stated the rule in a manner prejudicial to defendant. We agree with those contentions.

Assumption of risk is an affirmative defense. In the case at bar it was not made an issue either by the pleadings or the evidence. Therefore, it had no relation to the issues in the case and should not have been given. On the other hand, in its form and substance as given, it could have no other effect except to have confused and misled the jury by inducing the erroneous inference that defendant was an insurer against all risks of plaintiff's employment, regardless of their character or genesis. In effect, it was the equivalent of a direction for plaintiff.

As applicable here, section 54, Title 45, Railroads, U. S. C. A., as amended in 1939, specifically provides: "That in any action brought against any common carrier under or by virtue of any of the provisions of this chapter to recover damages for injuries to, * * * any of its employees, such employee shall not be held to have

assumed the risks of his employment in any case where such injury * * * resulted in whole or in part from the negligence of any of the officers, agents, or employees of such carrier; * * *." The construction thereof was discussed at length in the opinions reported Tiller v. Atlantic Coast Line R. R. Co., 318 U. S. 54, 63 S. Ct. 444, 87 L. Ed. 610. See, also, Owens v. Union P. R. R. Co., 319 U. S. 715, 63 S. Ct. 1271, 87 L. Ed. 1683.

In cases similar to the one at bar, it is now the rule that assumption of risk as a defense has been removed from the law only if the risk involved was caused by or resulted in whole or in part from defendant's negligence. In other words, now the employee does not assume the risk of those dangers in his employment which are caused by or result in whole or in part from defendant's negligence, but the employee still assumes the risk of those ordinary dangers in his employment which are naturally inherent in the business and are not in whole or in part caused by or the result of defendant's negligence. Stated in another manner, the carrier cannot now be relieved from the consequences of its own negligence by claiming that the employee assumed the risk of its negligence. On the other hand, the carrier cannot be charged with or liable for those injuries which result from the usual risks incident to employment which cannot be eliminated by the carrier's exercise of reasonable care or for those caused by or resulting solely from plaintiff's own negligence, although his contributory negligence as a defense will only proportionately diminish his recovery.

To hold otherwise in effect would be to say that in any event defendant was liable to its plaintiff employee in toto for injuries received while in its employment, even in the absence of negligence by defendant in whole or in part proximately causing them, or in the presence of negligence by plaintiff proximately contributing thereto. To assume such a position would be in direct violation of sections 51 and 53, Title 45, U. S. C. A.

Instruction No. 10 not only had no relation to nor application in the action and should not have been given, but as given, its substance was also prejudicially erroneous for failure to correctly state the rule by reason of its omission of the aforesaid qualifications. It did not intelligently contain the qualification that the risks of his employment, which plaintiff could not be held to have assumed, were only those risks caused by or resulting in whole or in part from defendant's negligence. It did not intelligently explain to the jury that plaintiff assumed the usual risks of his employment which were naturally inherent in the business, notwithstanding the exercise of reasonable care by defendant, nor that plaintiff assumed the risks of his employment which were caused by or resulted solely from his own negligence. Rather, without question the instruction clearly inferred that plaintiff could not be found to be negligent, thereby in fact superseding and conflicting with the instructions theretofore given on negligence and contributory negligence.

The suggestion therein that the instruction was "not intended to conflict with the instructions on the subject (sic) of negligence" certainly could not cure its erroneous character. It would be expecting too much of ordinary lay jurors to assume that they could or would intelligently and correctly apply such an instruction when some courts seemingly still have differences of opinion concerning the proper application of the doctrine of assumption of risk in such cases.

Instruction No. 11, which defendant assigned as erroneous, told the jury in effect that it was defendant's duty to provide plaintiff with a safe place to work and that failure to do so would be negligence for which it would be liable. Defendant's objection to the instruction was that it was inapplicable because there was no competent evidence that defendant had failed to perform that duty. While we were originally of the opinion that defendant's objection had merit, the Supreme Court of

the United States on appeal held otherwise, which disposed of the question adversely to defendant.

Instruction No. 12, which defendant assigned as erroneous, read as follows: "If you find from a fair preponderance of all of the evidence that defendant's engineer who was operating the locomotive shoving the car in on the Casein spur track, knew or in the exercise of ordinary care should have known and discovered that plaintiff was in a position of peril, and that the engineer in the exercise of ordinary care could and should have avoided injuring plaintiff, and you find from a preponderance of the evidence that the engineer negligently failed to do so, then it would become your duty to find a verdict in favor of the plaintiff."

Defendant argued that the instruction erroneously submitted the question of the last clear chance, while plaintiff argued that the last clear chance was not an issue in the case and that the instruction merely defined what would constitute negligence on the part of defendant's engineer. We agree with plaintiff. It also appears that the Supreme Court of the United States on appeal in the case at bar took a similar view. Mooney v. Terminal R. Assn. of St. Louis (Mo.), 176 S. W. 2d 605, discussed at length the reasons why such an instruction correctly reflected the law under the Federal Employers' Liability Act, and, after doing so, approved an instruction very similar to the one at bar. The court's conclusions in that case were ably supported by many applicable, well-reasoned federal decisions, which need not be cited here. It is sufficient to say that we do not find the instruction to be prejudicially erroneous.

For the reasons heretofore stated, the cause should be and hereby is reversed and remanded for new trial.

REVERSED AND REMANDED.

ELECTRONIC DEVELOPMENT COMPANY, A CORPORATION, APPELLEE AND CROSS-APPELLANT, V. ANDREW M. ROBSON ET AL., APPELLANTS AND CROSS-APPELLEES, FAYE D. KNAPP ET AL., APPELLEES AND CROSS-APPELLANTS.

28 N. W. 2d 130

Filed June 13, 1947. No. 32127.

1. **Corporations.** A president of a corporation has no general inherent authority to contract for the corporation, nor to control its property, funds, or management.
2. **Specific Performance.** If one party to a contract cannot enforce substantial performance, a court of equity will not decree specific performance at the instance of the other party. The right to specific performance must be mutual and reciprocal.
3. **Corporations.** An officer or director of a corporation will not be permitted without authority to divert corporate property to the payment or securing of a debt of the corporation to himself.
4. ———. Officers of a corporation as such cannot enter into a contract on its behalf by which they dispose of its assets or grant the right to or use of its facilities to the extent of terminating its ability to operate. Authority for any such transaction must come from stockholders and directors. It is not the ordinary business of the corporation that officers may transact.
5. ———. An officer or director of a corporation occupies a fiduciary relation towards the corporation and its stockholders.
6. **Trusts.** A fiduciary by abandoning his trust and by assuming toward the beneficiary a hostile attitude cannot change the legal consequences of former relations and conduct.
7. ———. Outside of proper compensation and expenses, any advantage gained by a trustee, either in performing his duty or in betraying his trust, inures to the benefit of the beneficiary.

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

Morsman & Maxwell, Edgar M. Morsman III, for appellants and cross-appellees.

Leon, White & Lipp, and *Lloyd Dort,* for appellees and cross-appellants.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, CHAPPELL, and WENKE, JJ., and ANKENY, District Judge.

ANKENY, District Judge.

This is an action wherein the plaintiff Electronic Development Company, a corporation, seeks specific performance of an instrument purporting to be a contract between said corporation and the defendant Robson-Burgess Company, a copartnership, and for an accounting based upon the contract against said partnership and its partners, defendants Andrew M. Robson and Frank D. Burgess, Jr. Stockholders of the plaintiff corporation, Faye D. Knapp, Charles F. Betcke, and Betty Betcke, as interveners, seek to have the contract declared invalid on account of (a) default of corporate authority in the officer executing the contract on behalf of the plaintiff corporation, and (b) violation of corporate fiduciary duties of the said defendants Robson and Burgess, as officials and directors of plaintiff corporation, in executing the contract in behalf of the defendant partnership. Interveners also seek an accounting from the defendant partnership and its partners as fiduciaries of the said corporation.

Defendant Robson-Burgess Company and its partners, defendants Andrew M. Robson and Frank D. Burgess, Jr., appear here as appellants; plaintiff Electronic Development Company appears as appellee and cross-appellant; and interveners Faye D. Knapp, Charles F. Betcke, and Betty Betcke appear as appellees and cross-appellants.

As a convenience, Electronic Development Company will hereafter be referred to as plaintiff or the corporation, defendant Robson-Burgess Company as the partnership, defendant Andrew M. Robson as Robson, defendant Frank D. Burgess, Jr. as Burgess, and Faye D. Knapp, Charles F. Betcke, and Betty Betcke as interveners.

The case is here on a voluminous record and extensive

briefs. However, an understanding of the case does not require a detailed statement of the numerous claims made by the parties. Therefore we will set out merely the controlling facts but with sufficient adequacy to disclose the true picture and to show the applicability of the rules which are decisive.

Plaintiff was organized as a corporation in 1938 with offices and plant in Omaha, Nebraska. For a period of 15 years prior thereto the organization operated as a partnership under the name Electronic Company, of which George Risk was a partner. Prior to incorporation it engaged in the manufacture of various electronic devices, intercommunication equipment, public address systems, diathermy equipment, microphones, and some test equipment. After incorporation the company discontinued the manufacture of diathermy equipment and microphones but continued the manufacture of the other devices. From 1938 to 1942 it operated an extension and residence school for training workers in electronics and in connection therewith manufactured various equipment and parts necessary for the training of its students, particularly in the assembly and repair of such devices. In 1942, and subsequently, it received contracts from government agencies to train army, navy, and marine personnel in the operation and servicing of electronic and radar equipment, and it maintained schools in Omaha and Minneapolis for this purpose. In connection with the operation of these schools, the corporation built intricate and precise equipment not otherwise available, thereby obtaining favorable recognition from government agencies in awarding contracts for the manufacture of electronic equipment.

The managing officers of the corporation were George Risk, president, having the usual duties of the office; defendant Robson, vice president and assistant treasurer, in charge of operations with special duties to supervise, direct, and control the technical phases of the corporation's business; and defendant Burgess, general manager,

with special duties to coordinate the various activities of the corporation, supervise its bookkeeping, and assist in the negotiation of loans and government contracts, etc.

On March 31, 1944, plaintiff was awarded a government contract, known as "1049-DAY-44" for the manufacture of 20 modulators, a type of test equipment otherwise referred to as IE-modulator, by the Dayton Signal Corps Procurement District of Dayton, Ohio, at a price of approximately $10,000. The fulfillment of this contract was well under way in June 1944 when the plaintiff began to experience a financial crisis which became acute about the middle of June 1944 when its bank and the Reconstruction Finance Corporation withdrew loan credits, demanded payment of loan balances, and refused to extend the company further loans or credit. Because of such restricted credit the corporation was unable to finance its current obligations. Its lack of such credit jeopardized its ability to perform the contracts and other obligations it had assumed. Such condition also threatened to dissipate the favorable status which the corporation had achieved at the expense of much time, money, and effort for obtaining future business, especially government contracts.

In order to protect a partially performed government contract with the United States Marine Corps for the training of marine personnel, the managing officers about July 1, 1944, caused a corporation to be formed under the name Electronic Institute, Inc., and said contract, together with all leases, necessary equipment, and facilities, to be assigned to said corporation without consideration other than the obligation on its part to turn over to plaintiff, on completion of the contract, all net earnings resulting from its performance. By virtue of such transaction the marine contract was in due time completed, resulting in a profit turned back to plaintiff.

To protect the fulfillment of the "1049-DAY-44" modulator contract, Robson and Burgess, about the middle of July 1944, suggested to George Risk their willingness

to form a partnership to take over from plaintiff the test equipment necessary for the fulfillment of such contract, offering to pay plaintiff the invoice cost of materials and direct labor cost expended to that date and to finance all operations necessary for its completion. An important factor in connection with the negotiations which followed was the desire of the parties to keep the corporation, or the contemplated partnership, in a favorable position to obtain a certain government contract with the Dayton Signal Corps Procurement District which then was expected to be let soon for the manufacture of 700 modulators at a cost price in excess of $280,000. There is no dispute that these parties, prior to the execution of the contract here in question, agreed that the corporation, because of the position it had built for itself in manufacturing electronic devices was properly entitled to an interest in such contemplated contract if awarded to the proposed partnership. Under such conditions George Risk, without direct authority from the board of directors or the stockholders, assuming to act on behalf of plaintiff, and Robson and Burgess, acting in behalf of the then contemplated partnership, later organized as the Robson-Burgess Company, executed the following executory agreement, to wit:

"Omaha, Nebraska
July 22, 1944

AGREEMENT

It is hereby agreed by and between the Electronic Development Company, Omaha, Nebraska, and the Robson-Burgess Company, Omaha, Nebraska,

WHEREAS, since certain circumstances prevent the Electronic Development Company from completing contract #1049-DAY-44 on schedule, it has requested the Signal Corps to cancel said contract and reissue to the Robson-Burgess Company for completion.

IT IS AGREED THAT, the Robson-Burgess Company will reimburse the Electronic Development Company $1807.99 for parts, equipment, and labor which have

been fully paid for and are free from any incumbrance; and assume unpaid parts and labor of $524.13 provided the contract is awarded to them.

That, the payments will be made in the following manner:

$1444.63 in cash
561.88 offsetting credit for partial salaries due A. M. Robson and F. D. Burgess, Jr.
325.61 to be paid in cash, same to be applied directly to unpaid accounts for parts received by the Electronic Development Company on credit.

IT IS FURTHER AGREED THAT, the Robson-Burgess Company would utilize the facilities of the Electronic Development Company for a period of not less than one year and remunerate the Electronic Development Company for the use of such facilities at an actual cost to the Electronic Development Company. In consideration of this the Robson-Burgess Company agrees to, at any time within a year from above date, to allow the Electronic Development Company to absorb its assets, contracts, good will, and profits in excess of $1400.00 per month from date of this agreement, and it is understood that at such time that the Electronic Development Company will absorb the Robson-Burgess Company it will also absorb the services of A. M. Robson and F. D. Burgess, Jr. at their present prevailing salaries of the Electronic Development Company, and such employment to be assured for a period of one year.

In the event that the contract #1049-DAY-44 is not awarded to the Robson-Burgess Company, this agreement becomes null and void.

Signed and sealed this 22nd day of July, 1944.

Witness

Sidney N. Jacobs
Helen M. Helgren

ELECTRONIC DEVELOPMENT COMPANY,
By George Risk
President

Witness
Sidney N. Jacobs
Helen M. Helgren
Yeolande Beadle

ROBSON-BURGESS COMPANY,
By A. M. Robson
Partner

Witness
Helen M. Helgren
Yeolande Beadle.

By F. D. Burgess, Jr.,
Partner."

It should be observed here that the price the partnership agreed to pay for parts, equipment, and labor referred to in the contract was the invoice cost of the materials and the direct labor cost then expended, or for which the corporation was obligated, and does not include promotion or administration costs incurred by plaintiff. It also should be observed that the partnership acquired the right to the facilities of the corporation, at actual cost, for a period of not less than one year, which amounted to the termination of its operation for such period and, obviously, was beyond the ordinary business to be transacted by such corporate officers.

As part of the same transaction, and in keeping with the terms of the foregoing agreement, George Risk, in the presence of Robson and Burgess, dictated and addressed a letter to the Dayton Signal Corps Procurement District, under date of July 21, 1944, containing words as follows: "The Electronic Development Company is suffering from certain financial embarrassments and, at this time, are undergoing a financial reorganization. * * * Because of the financial drain that this department (the test equipment department in which the IE-45 modulator units referred to in contract 1049-DAY-44 were built) makes on the corporation, its operation must be temporarily discontinued. We, therefore, request that the contract (1049-DAY-44) be cancelled with the Electronic Development Company and be reissued directly to the Robson-Burgess Company, Omaha, Nebraska, which is operated by Mr. A. M. Robson and Mr. F. D. Burgess, Jr. They are in a position to take over

and complete said contract. * * * As soon as financial reorganization has been completed, we will again be in a position to consummate any future contracts upon which we may have the privilege of bidding. We hope this will not preclude us from such invitations in the future."

The letter, of which the foregoing is a part, then was taken in person by Robson to the offices in Dayton, Ohio, of the Dayton Signal Corps to which it was addressed. Accordingly, as requested in such letter, the Dayton Signal Corps caused contract 1049-DAY-44 to be canceled and, within a short time thereafter, to be reissued to the partnership.

Pursuant to the contract here in question, the president of the corporation executed in its name, for a recited consideration of $1,522.48, a bill of sale to the partnership, identified in the record as Exhibit 10, by which it assumed to sell and transfer to the partnership certain listed tools, materials, and supplies as set forth in an attached list of 110 items designated "Inventory of parts bought for construction of IE-45 modulator." Subsequently said president in the name of the plaintiff executed a bill of sale to said partnership, identified in the record as Exhibit 11, by which it assumed to sell and transfer to the partnership, for a recited consideration of $1,222.75, certain furniture and equipment.

It appears from the record that, subject to a subsequent agreed revision of figures, Robson and Burgess made all payments to plaintiff required of them by the terms of the written agreement.

The entire transaction between the parties, as evidenced by the above-mentioned documents, was consummated by Risk, Robson, and Burgess, the sole managing officers of the corporation, without regard to or authority from plaintiff's board of directors or its stockholders.

With the assistance of several of the plaintiff's skilled employees, who transferred their employment to the

partnership upon the making of the agreement in question, and others, the partnership was able to and did complete the 1049-DAY-44 contract within a period of two weeks from July 24, 1944, "except for transformers and choke," the delivery of which was delayed, and on completion of this modulator contract the partnership received the gross sum of $10,083.53. This amounted to 7.7 percent of the gross income of the partnership for the year succeeding its formation. Other business of the partnership during said period consisted of the manufacture of multitesters accounting for 26.5 percent, voltage dividers accounting for 65.6 percent, and miscellaneous items accounting for .1 percent of the partnership's gross income.

Plaintiff and interveners made due demand on the partnership for an accounting and return of all the assets and profits of the partnership. Defendants at no time attempted in any manner to rescind said contract. Nor did they indicate they would refuse compliance with its terms until July 23, 1945, after plaintiff had made due demand upon them, under the "reabsorption clause," at which time their attorneys, by letter, declined to comply with such demand.

In an interlocutory decree the trial court found and determined (1) that the agreement in question, and the transfers of property from the corporation to the partnership, were invalid and that a trust resulted, (2) that the plaintiff was the owner and entitled to the immediate possession of all gross profits made on government contracts by the partnership to August 31, 1945, including contract termination benefits thereon, and that an accounting thereof should be made, and (3) in the accounting of the profits on government contracts, the partnership should retain as compensation for the services rendered by Robson and Burgess a sum which would bear the same ratio to $18,200 (representing a salary basis of $1,400 per month for the thirteen-month accounting period) as the profits on

government contracts would bear to the aggregate profits of the partnership operations for the period of the accounting, and the partnership should keep all profits from the manufacture of mutitesters and could continue in the manufacturing business.

Upon accounting the court fixed the liability of the partnership and its partners, Robson and Burgess, at $29,129.12 and entered judgment therefor and costs.

On the facts established by the record, and the principles of law applicable, the decree of the trial court, as herein modified, was properly rendered.

The agreement in question was executed by the president of the corporation without authority from the stockholders or the board of directors. We cannot presume that he had power to sign the contract and bind the corporation. "It is true that a corporation can act only by its agents, and the presumption is that an act pertaining to its ordinary business, when performed by its president, secretary or general manager, is legally done and is binding upon the corporation, yet no such presumption prevails, when the act done by such officers does not fall within the scope of the powers conferred upon and usually exercised by them as part of the ordinary business of the corporation." Traphagen v. City of South Omaha, 69 Neb. 577, 96 N. W. 248. As a general rule the president of a corporation has little or no inherent power to bind the corporation outside of a comparatively narrow circle of the functions especially pertaining to his office. "While the extent of the inherent authority of the president is not clearly defined, it seems to be quite limited; he has no general inherent authority to act as its agent in making contracts, but like other agents, he must derive his authority from the board of directors or from the corporation; * * *." 7 R. C. L., § 436, p. 450. "As a general rule, the president of a corporation has no authority merely by virtue of his office to effect a sale or incumbrance of its real or personal property, * * *. He must, at least

to make a general conveyance of the assets, have the assent of the board of directors." 13 Am. Jur., § 904, p. 882. In 4 Cook on Corporations, (8th ed.) § 716, p. 2981, it is said: "The president of a corporation has no power * * * to buy, sell, or contract for the corporation, nor to control its property, funds, or management. * * * But the general rule is that the president cannot act or contract for the corporation any more than any other director."

Here the contract was executed by the president on his own responsibility. It must therefore be regarded solely as the president's undertaking. The fact that the contract is not legally enforceable against the plaintiff must be given due consideration in determining the right of the corporation to the remedy of specific performance. See 49 Am. Jur., § 36, p. 50. This court is committed to the doctrine announced in Moore v. Markel, 112 Neb. 743, 201 N. W. 147, and quoted with approval in Rudolph v. Murphy & Son, 121 Neb. 612, 237 N. W. 659: "If one party to a contract cannot enforce substantial performance, a court of equity will not decree specific performance at the instance of the other party. The right to specific performance must be mutual and reciprocal."

The foregoing principles of law, when applied to the undisputed facts in this case, do not warrant the exercise of the court's discretionary power to decree, in behalf of the corporation, specific performance of the contract in question.

In our opinion officers of a corporation as such cannot enter into a contract on its behalf by which they dispose of its assets or grant the right to or use of its facilities to the extent of terminating its ability to operate. Authority for such transaction must come from stockholders and directors. It is not the ordinary business that officers may transact.

In our opinion the principles of law which control the determination of this case are not limited to nor conditioned by consideration of the terms of the writ-

ten agreement. The entire transaction must be considered. It is undisputed that the transaction which forms the basis of this action was negotiated by and between the three sole managing officers of the plaintiff without express corporate authority. It resulted from the financial crisis which confronted the corporation at the time. The methods used by these officers in their attempt to solve its financial problems pose for our consideration. These financial difficulties placed a particular duty on its managing officers. They were the officers to whom management of the corporate business was entrusted. Their single purpose should have been to bring the company to a successful fruition. See 2 Thompson, Corporations, (3d ed.) § 1327, p. 797. In the furtherance of this purpose these officers were bound to manage the corporation in the interests of its owners, the stockholders, as a whole, and not in the interest of themselves or any particular stockholders. The managerial duty of a corporate officer is of such a degree of legal and practical importance that if he fails to conduct the affairs of his enterprise with the care of a reasonably prudent officer, he becomes liable to his company or its stockholders for negligent management. His obligation "is increased in the precise degree that his representative character has given him power and control derived from the confidence reposed in him by the stockholders who appointed him their agent." Twin-Lick Oil Co. v. Marbury, 91 U. S. 587, 23 L. Ed. 328.

When the corporation was confronted with the financial crisis and was unable to discharge its current obligations, the duty then rested as heavily on Robson and Burgess, as managing officers, as upon Risk, the president, to seek and solve in a proper manner the corporation's financial difficulties. It does not appear that these defendants assumed, much less discharged, such responsibility. Risk appears to have made repeated efforts for loans with which to refinance the operations. Defendants Robson and Burgess, on the other hand, do not

appear to have put forth a bona fide effort toward a legitimate solution of the corporation's financial problem. In the corporation's financial crisis they appear to have been motivated toward one solution only, and that was to divert the unfinished 1049-DAY-44 contract to themselves, together with the equipment and facilities necessary for carrying out the contract. They frankly admit that they were motivated in part by their own interests. Their manifest efforts to secure the executory agreement, to purchase the equipment necessary for completion of the government contract on a basis below cost to the corporation, and to use the facilities of the corporation, confirms the conclusion that these defendants bypassed, as it were, the duty which rested on them to finance the corporation's operations in a proper manner and in the interest of its stockholders.

"* * * when one accepts a position of trust in the management and conduct of the affairs of a corporation, he owes to said corporation the duty, not only to conduct, promote, and safeguard its interests, but also the further duty of refraining from doing anything whatever that would injuriously affect said corporation, or deprive it of any profits which skill and ability might properly bring to it, or enable it to make, in the fair and legitimate exercise of its powers." Jasper v. Appalachian Gas Co., 152 Ky. 68, 153 S. W. 50, Ann. Cas. 1915B 192.

Defendants Robson and Burgess contend that the executory agreement in question, so far as the right of absorption clause in the contract is concerned, is not binding upon them for the reason that it was agreed between said parties that it should be binding only on the condition that the partnership should obtain the contemplated contract for the manufacture of 700 modulators and that they never secured such contract. This contention is strenuously denied by the corporation and by the interveners herein. As we view the case, the determination of this issue is immaterial. We conclude that the entire transaction evidenced by the executory

agreement, as well as the later bills of sale, is voidable at the option of the corporation or its stockholders as in violation of the fiduciary duties of the managing officers of the corporation without regard to the claimed conditional character of the instrument.

Defendants also argue, and we recognize that there is some authority for the contention, that where a corporation is insolvent or legally disabled from carrying out a favorable contract which it has entered into, it is immaterial who takes over the opportunity. The rule thus contended for, so far as we have been able to find, applies only in case the corporation is actually insolvent to such a degree that it cannot carry on business or the corporation is legally disqualified from embracing the opportunity. Financial inability, unless it amounts to insolvency to the point where the corporation is practically or actually defunct, is insufficient to warrant application of the rule. We do not find, from our search, any authority for applying the rule to technical insolvency such as inability to pay current bills when due or where mere inability to secure credit prevails as appears in this case.

We find and conclude that the transaction which is the basis of this action involves (1) an agreement between the sole managing officers of a corporation whereby one of them, in effect, attempts to transfer to the other two personally, contingent or absolute ownership of a valuable manufacturing contract, (2) an attempted transfer by one managing officer to the other two managing officers of personal property, assets, and facilities of the corporation, without corporate authority and at a price below the reasonable cost to the corporation, and (3) an attempt to transfer corporate assets by one managing officer to the other two managing officers of a corporation, in payment of a debt due them by the corporation.

We apply in this case the following principles: (1) a transaction between officers of a corporation outside

the scope of the ordinary business entrusted to them is not binding on the corporation or its stockholders; (2) managing officers are not exempt from the rule of the humblest agent in the service of his principal that an agent cannot use the property of his principal for private gain; and (3) property of the corporation constitutes a trust fund in the hands of its officers and directors, and a transaction between them whereby the corporation's property is diverted from the corporation to their own use and benefit will not be upheld.

The principles applied in this case are sustained by the authorities as follows: "An officer or director of a corporation occupies a fiduciary relation towards the corporation and its stockholders." Fisher v. National Mtg. Loan Co., 132 Neb. 185, 271 N. W. 433; Rettinger v. Pierpont, 145 Neb. 161, 15 N. W. 2d 393. "A director of a corporation should refrain from all acts inconsistent with his corporate duties * * *." Howell v. Poff, 122 Neb. 793, 241 N. W. 548. "An officer or director of a corporation will not be permitted without authority to divert corporate property to the payment or securing of a debt of the corporation to himself." Fisher v. National Mtg. Loan Co., *supra*.

"No principle in the law of corporations, therefore, is founded on sounder reasons, or more surely settled, than the principle that the directors, trustees or other officers of a corporation, who are intrusted with its interests, and occupy a fiduciary relation towards it, will not be allowed to contract with the corporation, directly or indirectly, or to sell property to it, or purchase property from it, where they act both for the corporation and for themselves. In such a case, the transaction is, at least, voidable at the option of the corporation; and it may be avoided and set aside, or affirmed and any profits recovered, without proof of actual fraud, or of actual injury to the corporation. * * * Generally, this rule is applied in case of directors but it is equally applicable

to other officers." 3 Fletcher, Cyclopedia Corporations, (Perm. Ed.), § 924, p. 275.

"A fiduciary by abandoning his trust and by assuming toward the beneficiary a hostile attitude cannot change the legal consequences of former relations and conduct." Nebraska Power Co. v. Koenig, 93 Neb. 68, 139 N. W. 839.

The trial court determined the partnership liability from July 22, 1944, to August 31, 1945, on the following basis:

Liability of Partnership

Profits on government contracts	$42,486.38
½ of salary Miss Beadle	770.00
¼ of salaries Mrs. Robson and Mrs. Burgess	799.38
Profits on termination of U. S. contracts	4,243.45
Total due without deductions	$48,299.21

Deductions due Partnership

Sub-contractors on termination	$ 588.81	
Packing	103.20	
Light and power	30.00	
Insurance	49.00	
Robson and Burgess work on termination	1,100.00	
Depreciation on equipment	600.00	
89.75% of salary of $1,400 per month	16,699.08	
Total deductions	$19,170.09	19,170.09
Amount of judgment		$29,129.12

In this accounting the trial court charged the partnership with profits on government contracts amounting to $42,486.38, or 89.78 percent of the total profits for the accounting period; also with $4,243.45 as profits on termination of U. S. contracts; but did not charge it with the profits on non-government business amounting to $4,836.70, or 10.22 percent of the total profits.

All these profits resulted from the breach of duty of the fiduciaries and an accounting of such profits should therefore be required.

It is further contended by the corporation and by the interveners that (1) all business, assets, and good will of the partnership should be returned to the corporation, (2) that the deductions for salaries paid Mrs. Robson and Mrs. Burgess should be disallowed, (3) that Robson and Burgess should not be permitted any salary or "especially any allowances in excess of $11,600 per year from July 22, 1944" as a deduction in connection with their liability, and (4) the depreciation of 10 percent, or $600, on equipment be disallowed.

We have given due consideration to these contentions and, in doing so, reach the following conclusions:

That the corporation was at all times the owner and entitled to possession of the personalty set out and described in the two bills of sale, identified in the record as Exhibit 10 and Exhibit 11, and that said unlawfully diverted assets of the corporation, or the portion thereof existing and available as of August 31, 1945, should be returned by the defendant partnership and its partners to the corporation; or in the event of failure to return said property, or any part thereof, said defendants pay to the corporation the reasonable value thereof as of said date, less the sum paid by said defendants as consideration for said corporate assets.

That all business, assets, and good will of the partnership grew out of and resulted from the fiduciary relationship between Robson and Burgess and the plaintiff corporation and therefore all business, assets, and good will, and all profits from the partnership business, including non-government contracts as well as government contracts, should be returned to the corporation and that an accounting should be made of the period from August 31, 1945, to the day when such business is actually returned to the corporation as herein directed.

That the full salary paid Mrs. Robson, Mrs. Burgess, and Miss Beadle by the partnership was reasonable and proper credit, and should be allowed as proper expenses incurred in the prosecution of the partnership business.

That the fair and reasonable salary of Robson and Burgess for the accounting period should not be $18,200, but that their said services were fairly and reasonably worth $12,566.66, and adjustment should be made accordingly.

That the depreciation on equipment as determined by the trial court should be allowed.

We therefore conclude that the judgment rendered herein by the trial court should be modified, and such further proceedings had as will conform to the foregoing findings. In all other respects said judgment should be and is hereby affirmed.

AFFIRMED AS MODIFIED.

R. O. WATKINS, APPELLEE, V. FRED R. WAITS ET AL., APPELLANTS, VICTOR H. HALLIGAN, APPELLEE.

28 N. W. 2d 206

Filed June 20, 1947. No. 32220.

1. **Appeal and Error.** Upon appeal of an action in equity, when the testimony of witnesses orally examined before the court on the vital issues is conflicting, this court will, while trying the case de novo, consider the fact that the trial court observed the witnesses and their manner of testifying, and must have accepted one version of facts rather than the opposite.
2. **Agency.** An agent is one who acts for or in the place of another by authority from him; one who undertakes to transact some business or manage some affairs for another by authority and on account of the latter, and to render an account of it.
3. ———. Where one employed to act as the agent for another in the purchase of real estate becomes a purchaser himself, he will be considered in equity as holding the property in trust for his principal, although he purchased with his own money, subject to reimbursement for his proper expenditures in that behalf.

4. **Trusts.** If a party obtains the legal title to property by virtue of a confidential relation, under such circumstances that he ought not, according to the rules of equity and good conscience of the offending party and convert him into a benefits, out of such circumstances or relations, a court of equity will raise a trust by construction and fasten it upon the conscience of the offending party and convert him into a trustee of the legal title.
5. ———. A constructive trust is a relationship with respect to property subjecting the person by whom the title to the property is held to an equitable duty to convey it to another on the ground that his acquisition or retention of the property is wrongful and that he would be unjustly enriched if he were permitted to retain the property.
6. **Statute of Frauds: Trusts.** By express provisions of section 36-104, R. S. 1943, trusts arising by implication or by operation of law, are excepted from the operation of the statute of frauds.
7. ———: ———. Both resulting and constructive trusts fall within the exception of section 36-104, R. S. 1943.
8. **Trusts.** Evidence in the record examined and held sufficient to sustain the judgment of the trial court.

APPEAL from the district court for Frontier County: VICTOR WESTERMARK, JUDGE. *Affirmed.*

C. L. Baskins, for appellants.

Van Pelt, Marti & O'Gara and *V. H. Halligan,* for appellees.

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

MESSMORE, J.

This is an action in equity, brought in the district court for the purpose of having the court determine that a constructive trust exists in favor of the plaintiff, and to compel the defendants, Fred R. Waits and Mae Waits, to specifically perform the obligation of the trust by conveying the land described in the plaintiff's petition to the plaintiff, free and clear of encumbrance. The rights of the defendant Halligan have been established, and he is not involved in this appeal.

The plaintiff's petition alleges an oral agreement

made between the plaintiff and the defendant, Fred R. Waits, wherein the defendant Fred R. Waits was to purchase certain land, referred to as the Shambaugh land, described in the petition. The plaintiff was to receive the farm land and pay $3,000 for it, while the defendants were to receive the pasture land, paying therefor $3,000. The defendants took title to all the land and failed to convey to the plaintiff as provided for in the oral agreement made by the defendant. The petition also pleads an assignment made by the defendant, selling all his right, title, and interest in the Shambaugh farm land to the plaintiff.

The defendants, in their amended answer, claim the defendant, Fred R. Waits, made an oral agreement with the plaintiff that if the plaintiff would purchase certain land known as the Osterhout land, that he, Waits, would turn over the Shambaugh land to the plaintiff; that the assignment of the Shambaugh land to the plaintiff was with the understanding that it was conditioned upon the plaintiff procuring the Osterhout land; and denied any agreement whereby said defendant was to sell to the plaintiff any of the Shambaugh land.

The cross-petition requested the court to cancel the assignment of record, and to compel the plaintiff to account for the rents of the farm land for the year of 1945.

The reply denies there was a contract between the parties with reference to the Osterhout land; admits the defendant requested the plaintiff to purchase the Osterhout land, but that this transaction had nothing to do with the purchase or assignment of the contract involving the Shambaugh farm land; alleges further that the plaintiff went into possession of the farm land, rented it, received the rent, and in so doing relied on his ownership.

The land involved in this suit is the southwest quarter of Section 14, and the northwest quarter and the west half of the southwest quarter of Section 23, Township

7 north, Range 28 West, Sixth Principal Meridian, Frontier County, Nebraska, and at the time of this controversy was owned by Grace Metcalf, Bessie Cook, and Albert J. Shambaugh, known as the Shambaugh heirs, and the land is referred to as the Shambaugh land. There are approximately 125 acres of farm land on the southwest quarter of Section 14, the balance of the quarter being waste and pasture land. There are three small cultivated tracts on the northwest quarter and the west half of the southwest quarter of Section 23, one of 22 acres in the southwest corner; 14 acres near the northeast corner close to the improvements, and a seven or eight acre tract in the north part; all of which are operated with the farm land in the southwest quarter of Section 14. The balance of the Shambaugh land consists of pasture. The improvements consist of a house, barn, hog shed, drive-in granary, and other appurtenances, and are located on the northeast corner of the northwest quarter of Section 23, right at the turn in the highway between Stockville and Curtis. The southwest quarter of Section 14 is directly across the road from a quarter section known as the Woods place, and owned by the plaintiff.

The defendants Waits own land half a mile from the Shambaugh place, which is partly adjoined by the plaintiff's land. The house on the Waits' land is on the east part thereof, making their house approximately a mile distant from the Shambaugh land.

In 1941, the Waits had rented the Shambaugh land, and their son-in-law lived on said land and farmed it and other land with the Waits. He farmed the Shambaugh land in 1944.

Due to the nominal situation of the appellant, Mae Waits, wife of Fred R. Waits, we deem it unnecessary to mention her further, and for clarity and brevity will refer to the appellant Fred R. Waits as the defendant, and to the appellee Watkins as the plaintiff.

The record discloses that during the latter part of

September 1944, the plaintiff had learned through a tenant of his that the defendant was contemplating the purchase of the Shambaugh land. He and the tenant drove to the defendant's farm where the plaintiff and defendant, in the presence of the tenant, engaged in a conversation with reference to the purchase of said land. It developed that the defendant was only interested in the pasture land and the plaintiff in the farm land, for investment purposes. An understanding was reached whereby the defendant, who was acquainted with the Shambaugh heirs, was to contact them and ascertain whether or not the land was for sale, and if so, the amount for which it could be purchased. In November 1944, the plaintiff and his tenant again drove to the defendant's farm where the plaintiff and defendant engaged in a conversation with reference to the purchase of the Shambaugh land. The defendant informed the plaintiff that such land could be purchased for $6,000 for the 400 acres. The plaintiff told the defendant he was willing to pay $3,000 for the southwest quarter of Section 14, which constituted the plowland. The defendant was in agreement that he would take the pasture land for the balance, and indicated that it would be necessary to have some legal papers drawn, and recommended an attorney, who was agreeable to the plaintiff, to do the legal work. At this time the defendant raised one objection to the transaction, to the effect that the pasture land he was receiving was not properly located to the place where he lived, and to keep stock on it would necessitate trips back and forth between his home place and the pasture land during the winter, to feed the stock. The defendant then spoke about a quarter section of land belonging to Bill Osterhout which adjoined his corrals to the east of his improvements. This part of the conversation will be set forth in connection with the defendant's testimony regarding the Osterhout land.

The plaintiff further testified that he had a conver-

sation with the defendant who came to his office on December 21, 1944, wherein the defendant informed him that the contract was all signed up, and he wanted the plaintiff to give him $200 more, and the plaintiff informed him that he would like to have a contract showing the part of the land that he, the plaintiff, was to get. The defendant told him he would give him such a contract. A little later the same day the defendant returned to the plaintiff's office and informed him that he had made an assignment to the plaintiff of the southwest quarter of Section 14, and he had turned it over to the attorney and the same was on its way to be recorded; that he was glad the transaction was completed because he did not want to lose out on the land for his cattle. The same evening the plaintiff drove down to the defendant's farm where they engaged in another conversation wherein the defendant related that he had an agreement with a Mrs. Gardner to subrent the 400 acres. He was desirous of taking some of the buildings off of the Shambaugh land and moving them down to his place. The plaintiff's former tenant was moving off of the Woods place, and the plaintiff told the defendant that he would have no objection to Mrs. Gardner having the Woods place. The plaintiff testified that he rented the Woods place and his part of the Shambaugh land to Mrs. Gardner.

The attorney found the title to the Shambaugh land defective. This required an action in the district court to clear the title, which was completed November 19, 1945.

In April 1945, the plaintiff testified, he agreed with the defendant whereby the defendant was to use the pasture land on the southwest quarter of Section 14, and the plaintiff's tenants were to use the farm land adjoining on the southwest quarter of Section 23.

Certain other conversations were had in 1945 between the plaintiff and the defendant, wherein the defendant desired to be released from the deal, or change

it in some manner whereby the defendant could take over the entire Shambaugh land, and in the fore part of January, conversations of similar import were had between the parties, the plaintiff adhering to the terms of his oral agreement.

In some of the conversations testified to by witnesses appearing in behalf of the plaintiff, the defendant informed them that he and the plaintiff had purchased the Shambaugh land for $6,000, and the manner in which they were to divide the land. In one conversation the defendant told Mrs. Gardner, in substance, that he wished he had had his head working and he would get the corn her son was raising for the plaintiff, which would make a payment on the place. This conversation was corroborated by Mrs. Gardner's son.

To set out the testimony of the several witnesses testifying for the plaintiff in such respect would unduly lengthen this opinion. Suffice it is to say such testimony corroborates the plaintiff's testimony with respect to the oral agreement claimed by him.

An officer of a bank testified that in December 1944, certain papers came to the bank which related to the Shambaugh land: A letter written by A. J. Shambaugh dated December 15, 1944, and an agreement for the sale of the Shambaugh land between the heirs and the defendant, dated December 2, 1944; a check from the plaintiff dated December 17, 1945, in the amount of $3,200; and a warranty deed with the Shambaugh heirs as grantors, the defendant and his wife as grantees, signed in December 1944, consideration $6,000.

The attorney testified that he prepared the agreement for the sale of the real estate between the Shambaugh heirs and the defendant. On December 21, 1944, the attorney typed the assignment appearing on the back of the agreement for the sale of the Shambaugh land, which was signed by the defendant, assigning to the plaintiff all of the defendant's right, title, and interest in and to the southwest quarter of Section 14, as

heretofore described. This contract and assignment was delivered to the proper authority to be recorded. The attorney also had possession of the plaintiff's check for $3,000, dated December 18, 1944, and an additional check made payable to the attorney by the plaintiff, for $200, not dated, received after the assignment was prepared.

In December 1945, the attorney advised the plaintiff to deliver a check for $3,200 to the Curtis State Bank. This check is previously mentioned.

The defendant testified that before he received the letter dated November 2, 1944, from one of the Shambaugh heirs as to whether or not their land could be purchased, he had a conversation with the plaintiff whereby it was arranged that the plaintiff was to try and buy the Osterhout land, and if he accomplished the purchase thereof, the plaintiff would then take the Shambaugh land for the price at which the defendant could purchase it. The plaintiff reported to the defendant the same evening that matters looked favorable for the purchase of the Osterhout land. Thereafter the defendant, in another conversation with the plaintiff, told him he would rather have the Osterhout land than the Shambaugh land. The defendant further testified that between the time he had the contract drawn and the time it came back, the plaintiff told him that the Osterhouts were not interested in selling; that he had not given up; and after the title to the Shambaugh land had been quieted, the plaintiff told him the Osterhout deal was off, and he was going to take the part of the Shambaugh land for which he had orally contracted. The defendant then endeavored to settle the matter with the plaintiff according to his conception of the oral agreement.

The Osterhout land was mentioned in the conversation had in November 1944, between the plaintiff and defendant, the substance of which is heretofore related. According to the plaintiff's testimony there was doubt

in the defendant's mind if the Osterhout land could be purchased, as he had had some difficulty with the Osterhout family. The plaintiff did contact members of the Osterhout family, without success, and notified the defendant that such land could not be purchased.

The trial court found generally in favor of the plaintiff and against defendants on their cross-petition; ordered the plaintiff to deposit $3,200 with the clerk of the district court; directed the defendants Waits to execute a deed to the land claimed by plaintiff by virtue of an oral agreement, and upon failure of the said defendants to do so within a given time, title to the land be quieted in the plaintiff. Defendants appeal.

The first question presented on this appeal is whether or not the evidence is sufficient to warrant the trial court in holding a constructive trust was created. In considering the foregoing question it is necessary to determine whether or not the defendant acted in the capacity of an agent of the plaintiff in purchasing that part of the Shambaugh land claimed by the plaintiff by virtue of an oral agreement.

"An agent is a person having an express or implied authority to represent or act on behalf of another person, who is called his principal." Bowstead on Agency (4th ed.) p. 1.

"An agent is one who acts for or in the place of another by authority from him; one who undertakes to transact some business or manage some affairs for another by authority and on account of the latter, and to render an account of it. He is a substitute, a deputy, appointed by the principal, with power to do the things which the principal may or can do." 2 C. J. S., Agency, § 1, p. 1025. See, also, 1 Mechem on Agency (2d ed.), § 36, p. 21; 21 R. C. L., Principal and Agent, § 5, p. 819.

The foregoing definitions were approved in Stephenson v. Golden, 279 Mich. 710, 734, 276 N. W. 849, 857, and in Lamb v. Sandall, 135 Neb. 300, 281 N. W. 37.

As stated in Lamb v. Sandall, *supra,* following Harrop

v. Cole, 85 N. J. Eq. 32, 95 A. 378, affirmed in 86 N. J. Eq. 250, 98 A. 1085: "'When one man assumes to act as agent for another, as the representative of another, he necessarily establishes a fiduciary relation between himself and the other person who stands as his principal. This is in the very nature of the transaction because the agent undertakes to act not for his own benefit but for the benefit of his principal, and his principal stays out of his own business and confides in the agent to attend to this business for him. It is the assumption by the agent of his representative status and the confidence necessarily reposed in him by the principal which create the agent's peculiar liabilities and cast special limitations and obligations upon him. The agency may be established by a written contract or a verbal contract, or no contract whatever, * * *.'"

"The test is whether or not the relation is in fact shown to exist. The origin of the confidence is immaterial and the relation may be legal, moral, social, domestic or personal." Quinn v. Phipps, 93 Fla. 805, 113 So. 419.

A fiduciary relation may be established in a large number of ways. It is a mere incident that in this particular case, and in a large number of others, the fiduciary relations grow out of a verbal promise. As the authorities abundantly show, equity will not tolerate the betrayal of confidence, and it makes no difference how this confidence has been obtained.

We conclude from the record, the evidence is sufficient to establish the relationship of principal and agent, between the plaintiff and defendant, in view of the foregoing cited authorities.

In Lamb v. Sandall, *supra,* a case similar in facts to the case at bar, this court followed Harrop v. Cole, *supra.* With reference to the cited case we said: "In this jurisdiction we stand with the states which are in harmony with the New Jersey courts, and we have announced the following as controlling in this state, viz.: 'Where

one employed to act as the agent for another in the purchase of real estate becomes the purchaser himself, he will be considered in equity as holding the property in trust for his principal, although he purchased with his own money, subject to reimbursement for his proper expenditures in that behalf.' Johnson v. Hayward, 74 Neb. 157, 103 N. W. 1058.

"See, also, Dickson v. Stewart, 71 Neb. 424, 98 N. W. 1085; Rice v. Dougherty, 148 Ill. App. 368; Pope v. Dapray, 176 Ill. 478, 52 N. E. 58; Carr v. Craig, 138 Ia. 526, 116 N. W. 720; Matney v. Yates, 121 Va. 506, 93 S. E. 694; Schmidt v. Beiseker, 14 N. Dak. 587, 105 N. W. 1102; Brookings Land & Trust Co. v. Bertness, 17 S. Dak. 293, 96 N. W. 97; Morris v. Reigel, 19 S. Dak. 26, 101 N. W. 1086; Rose v. Hayden, 35 Kan. 106, 10 Pac. 554; Sanford v. Hamner, 115 Ala. 406, 22 So. 117; Quinn v. Phipps, 93 Fla. 805, 113 So. 419, 54 A. L. R. 1173; Stephenson v. Golden, 279 Mich. 710, 276 N. W. 849." See, also, Faust v. Murray, 245 Wis. 643, 15 N. W. 2d 793; Krzysko v. Gaudynski, 207 Wis. 608, 242 N. W. 186; Boswell v. Cunningham, 32 Fla. 277, 13 So. 354, 21 L. R. A. 54; 54 Am. Jur., Trusts, § 237, p. 180.

A constructive trust has been defined as follows: "A constructive trust is a relationship with respect to property subjecting the person by whom the title to the property is held to an equitable duty to convey it to another on the ground that his acquisition or retention of the property is wrongful and that he would be unjustly enriched if he were permitted to retain the property." Restatement of the Law, Trusts, ch. 1, § 1, p. 5. See, also, Federal Trust Co. v. Ireland, 124 Neb. 369, 246 N. W. 707; Wilcox v. Wilcox, 138 Neb. 510, 293 N. W. 378; Fisher v. Keeler, 142 Neb. 728, 7 N. W. 2d 659; Kozina v. Watkins Lbr. Co., 146 Neb. 594, 20 N. W. 2d 606; 1 Scott on Trusts, § 44.1, p. 251.

In Pollard v. McKenney, 69 Neb. 742, 96 N. W. 679, on rehearing 69 Neb. 753, 101 N. W. 9, this court said:

" * * * if a party obtains the legal title to property by virtue of a confidential relation, under such circumstances that he ought not, according to the rules of equity and good conscience as administered in chancery, hold and enjoy the benefits; out of such circumstances or relations, a court of equity will raise a trust by construction and fasten it upon the conscience of the offending party and convert him into a trustee of the legal title." See, also, Restatement of the Law, Trusts, ch. 12, p. 1249.

In the light of the foregoing authorities and the facts in the case at bar, we hold that a constructive trust was created and established in favor of the plaintiff.

This brings us to the question to be determined, whether or not the statute of frauds bars the plaintiff from recovery from the defendant on an oral agreement relating to the sale of real estate.

Sections 36-103, and 36-104, R. S. 1943, commonly known as the statute of frauds, provide: "No estate or interest in land, other than leases for a term of one year from the making thereof, nor any trust or power over or concerning lands, or in any manner relating thereto, shall hereafter be created, granted, assigned, surrendered, or declared, unless by operation of law, or by deed of conveyance in writing, subscribed by the party creating, granting, assigning, surrendering or declaring the same."

"Section 36-103 shall not be construed to affect in any manner the power of a testator in the disposition of his real estate by a last will and testament, nor to prevent any trust from arising or being extinguished by implication or operation of law."

These sections, in substantially the present form, were before this court in Pollard v. McKenney, *supra*. This court there said: "But, by the express provisions of the fourth section, trusts arising by implication, or by operation of law, are excepted from the operation of the statute. Both resulting and constructive trusts ob-

viously fall within the exception." See, also, O'Shea v. O'Shea, 143 Neb. 843, 11 N. W. 2d 540; Windle v. Kelly, 135 Neb. 143, 280 N. W. 445; Reetz v. Olson, 146 Neb. 621, 20 N. W. 2d 687; Raasch v. Lund Land Co., 103 Neb. 157, 170 N. W. 836; Doll v. Doll, 96 Neb. 185, 147 N. W. 471.

Under the foregoing authorities, the defense of the statute of frauds cannot prevail in the instant case.

"Upon appeal of an action in equity, when the testimony of witnesses orally examined before the court on the vital issues is conflicting, this court will, while trying the case *de novo,* consider the fact that the trial court observed the witnesses and their manner of testifying, and must have accepted one version of the facts rather than the opposite." Rogers v. Casady, 134 Neb. 227, 278 N. W. 267; Lamb v. Sandall, *supra.*

In view of the controlling principles and authorities herein discussed, the defendants, Fred R. Waits and his wife, under the facts disclosed by the evidence, are to be properly considered in equity as holding the southwest quarter of Section 14, Township 7 north, Range 28 West, Sixth Principal Meridian, Frontier County, Nebraska, in trust for the plaintiff as determined by the decree of the trial court. It follows that the judgment of the trial court is correct, and it is affirmed.

AFFIRMED.

IN RE APPLICATION OF JOSEPH J. CUPITA, JOSEPH J. CUPITA, APPELLANT, V. A. H. FECHNER, SUPERINTENDENT OF THE STATE HOSPITAL FOR THE INSANE AT LINCOLN, NEBRASKA, APPELLEE.

28 N. W. 2d 149

Filed June 20, 1947. No. 32260.

1. **Intoxicating Liquors: Insane Persons.** Under section 83-324, R. S. 1943, applications for admission of dipsomaniacs as provided for in section 83-306, R. S. 1943, to a state hospital for the insane shall be in writing in the nature of an information,

verified by affidavit. The information shall allege that the person, in whose behalf the application is made, is believed by the informant to be a dipsomaniac and a fit subject for treatment in the hospital. There must be a hearing upon the information and a finding of the board of commissioners of insanity that the information is true. A commitment of a dipsomaniac as an insane person is not in accordance with the statutory provisions relating to dipsomaniacs, and such commitment is void and of no legal force and effect.

2. ———: ———. Where it appears as provided for in section 83-343, R. S. 1943, the proceedings of the commissioners of insanity were so irregular as not to justify the detention of the patient, the patient then, by order of court, shall be returned to the sheriff of the county from which he came, and new proceedings shall be had before the commissioners of insanity of the county; held, the facts in the instant case disclose such an irregularity as requires the invoking of the foregoing part of section 83-343, R. S. 1943.

APPEAL from the district court for Lancaster County: JEFFERSON H. BROADY, JUDGE. *Reversed and remanded with directions.*

Winters & Winters, for appellant.

Walter R. Johnson, Attorney General, and *Homer L. Kyle,* for appellee.

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

MESSMORE, J.

This is an action on the application of Joseph J. Cupita, relator, for a writ of habeas corpus brought against the superintendent of the state hospital for the insane at Lincoln, Nebraska.

The application alleges the relator had been confined in the state hospital for the insane as an insane person since July 27, 1942; that on July 18, 1942, the father of the relator filed an information with the board of commissioners of insanity in Sarpy County, Nebraska, on which a warrant was issued for the

arrest of the relator on July 20, 1942; that hearing was had and the relator was adjudged insane, notwithstanding that the information and the warrant for arrest issued upon its filing stated that the relator was charged with dipsomania; that no application was made at any time in the nature of an information alleging that the relator was believed by the informant to be insane and a fit subject for custody and treatment in the state hospital for the insane, as required by section 83-323, R. S. 1943, therefore, the board of commissioners of insanity did not have jurisdiction to declare relator insane and have him committed as an insane person; and that all proceedings had in connection with the relator in such respect were null and void.

On December 13, 1946, the district court entered an order that the application for writ of habeas corpus be denied. Upon the overruling of motion for new trial, the relator appeals.

The appeal is presented on a case stated, which discloses that the relator was delivered to the state hospital for the insane at Lincoln, Nebraska, by the sheriff of Sarpy County, and is at this time a patient in the hospital, as an insane person. Upon hearing, the charge of dipsomania was ordered by the board of commissioners of insanity to be changed to insanity, and the relator was thereupon found by the board to be insane and a fit subject for treatment in the hospital. No information was filed at any stage of the proceedings charging the relator with insanity.

The relator contends that the proceedings of the commitment are void, for the reason that no information was filed charging relator with insanity, and therefore the board of commissioners of insanity had no jurisdiction to find the relator insane.

Section 83-323, R. S. 1943, provides in part: "Application for admission to a state hospital for the insane shall be made in writing in the nature of an information, verified by affidavit. The information shall allege

that the person in whose behalf the application is made is believed by the informant to be insane and a fit subject for custody and treatment in the hospital; * * *."

Section 83-324, R. S. 1943, provides in part: "Applications for admission of the persons mentioned in section 83-306 to a state hospital for the insane shall be made in writing in the nature of an information, verified by affidavit."

Section 83-306, R. S. 1943, provides: "Dipsomaniacs, inebriates and persons addicted to the excessive use of morphine, cocaine or other narcotic drugs, shall be admitted, detained, cared for and treated in the state hospitals for the insane."

Referring again to a part of section 83-324, R. S. 1943: "The information shall allege that the person, in whose behalf the application is made, is believed by the informant to be a dipsomaniac, * * * and a fit subject for treatment in the hospital; * * *."

Section 83-331, R. S. 1943, provides: "If the commissioners of insanity find the allegations of the information to be true, they shall impose a sentence of detention in a state hospital for the insane upon the proposed patient until he is cured, not exceeding three years."

Section 83-343, R. S. 1943, provides in part: "The writ of habeas corpus shall be available to any person confined in a state hospital for the insane. * * * Upon the hearing of the writ, if it shall appear that the commissioners of insanity had jurisdiction of the patient, the patient shall not be released from custody unless the patient has been restored to reason or has been cured. If the proceedings of the commissioners were so irregular as not to justify the detention of the patient, then the patient shall, by order of the court, be returned to the sheriff of the county from which he came, and new proceedings shall be had before the commissioners of insanity of the county."

It will be noted, section 83-323, R. S. 1943, refers specifically to an information which "shall allege that the person in whose behalf the application is made is believed by the informant to be insane, * * *." Section 83-324, R. S. 1943, refers to the class of persons specifically mentioned in section 83-306, dipsomaniacs, inebriates and persons addicted to the excessive use of morphine, cocaine or other narcotic drugs, and provides: "The information shall allege that the person, in whose behalf the application is made, is believed by the informant to be a dipsomaniac, * * *."

Section 83-307, R. S. 1943, provides: "The patients mentioned in section 83-306, shall be placed in separate wards at the state hospital for the insane and shall be given such treatment as is deemed best to eliminate the effects of alcohol or narcotic drugs, to build up their systems physically and mentally, and which will tend to strengthen their moral character and enable them to resist the temptation to use alcoholic drinks or narcotic drugs."

Section 83-320, R. S. 1943, confers jurisdiction on the commissioners of insanity by granting cognizance for admissions to the state hospitals for the insane for treatment or for the safekeeping of insane persons within their respective counties.

Section 83-322, R. S. 1943, vests jurisdiction in the commissioners of insanity in each county by granting cognizance of all applications for admission to the state hospitals for the insane of the persons mentioned in section 83-306, R. S. 1943, and provides that they shall have the same powers and exercise the same jurisdiction as in the case of an insane person.

The foregoing statutory provisions disclose a distinction between dipsomania and insanity, in the method of treatment and the period of custody, and it is apparent that a person charged with dipsomania is not considered in the class of insane persons.

In the instant case the board of commissioners of in-

sanity, upon their own motion, committed the relator as an insane person, as distinguished from the information in which he was charged with being a dipsomaniac. This was in violation of the mandatory provisions of the statute under which the relator was charged, and deprived the board of commissioners of insanity of jurisdiction under the circumstances.

In the case of In re Simmons, 76 Neb. 639, 107 N. W. 863, this court held: "The statute providing for the commitment of inebriates to the state hospital for the insane requires that an application 'in the nature of an information' be filed with the commissioners of insanity, alleging that the person in whose behalf the application is made is a dipsomaniac or inebriate and a fit subject for treatment in the hospital. There must be a hearing upon the information, and a finding by the commissioners that the information is true. A commitment without such information and finding is void."

In the body of the opinion the court said, after reviewing certain provisions of the statutes: "From these provisions of the statute it appears that, when a citizen is charged with being a dipsomaniac or an inebriate, there must be a trial and findings of fact, and there must be, of course, a record of this trial and of these findings, and this record must be kept with sufficient formality to show the jurisdiction of the commissioners in the premises, and also to show the action that was taken by the commissioners upon the complaint."

It is apparent that if an information charging dipsomania is necessary to confer jurisdiction on the board of commissioners of insanity to find a person a dipsomaniac, it follows there must be an information charging a person with insanity before the board of commissioners of insanity has jurisdiction to commit him as an insane person.

As stated in Ex parte Trant, (Mo. App.) 175 S. W. 2d 161: "An inquiry into one's sanity is a proceeding in invitum, and of the gravest character; and the law regu-

lates with no little precision the jurisidictional steps to be taken therein."

We conclude that the action of the board of commissioners of insanity of Sarpy County in committing the relator to the state hospital for the insane as an insane person, under the circumstances, was void and of no effect.

We have previously set out section 83-343, R. S. 1943. The part of such statute pertinent to the instant case is as follows: "If the proceedings of the commissioners were so irregular as not to justify the detention of the patient, then the patient shall, by order of the court, be returned to the sheriff of the county from which he came, and new proceedings shall be had before the commissioners of insanity of the county."

We conclude the foregoing part of section 83-343, R. S. 1943, is applicable to a determination of this appeal, and hold it should be followed in the instant case for the purpose of determining the rights of the relator as provided for by law. It is therefore ordered that the judgment of the district court be reversed and the cause remanded with directions to enter judgment in accordance with this opinion.

JUDGMENT ACCORDINGLY.

AUGUSTA MEIER ET AL., APPELLANTS, V. GEORGE GELDIS, APPELLEE.

28 N. W. 2d 140

Filed June 20, 1947. No. 32250.

Trusts. An antecedent debt is not such consideration as to have the effect of cutting off the trust against funds applied to the satisfaction thereof even though the creditor acts in good faith and without notice where he has not changed his position in relation to the person from whom the fund was received.

APPEAL from the district court for Douglas County:

JACKSON B. CHASE, JUDGE. *Reversed and remanded with directions.*

Cranny & Moore, for appellants.

William N. Jamieson, for appellee.

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

WENKE, J.

Plaintiffs, Augusta Meier and Beulah Meier, brought this action in the district court for Douglas County asking that the defendant, George Geldis, be adjudged to be trustee for the benefit of the plaintiffs of certain funds that he had received from John H. Owens and that he be required to account therefor. The petition sets forth two causes of action. Decree was entered in favor of the defendant. Their motion for new trial having been overruled, plaintiffs appeal.

The parties will be referred to as they appeared in the district court.

As to the first cause of action the record discloses the following: John H. Owens induced the plaintiffs to make a $3,000 loan. Plaintiffs understood this loan was being made for the benefit of Helen E. Geldis and George P. Geldis, wife and husband, and was to be secured by their mortgage on 40 acres of land in Douglas County, Nebraska. Helen E. Geldis owned this land. On March 28, 1945, the plaintiffs delivered to John H. Owens the sum of $3,000 for the Geldis loan. In consideration thereof Owens delivered to the plaintiffs what purported to be a mortgage note of Helen E. Geldis and George P. Geldis in the sum of $3,000 together with interest coupons thereto attached and a real estate mortgage on 40.5 acres of land in Douglas County securing the same. This mortgage had been recorded and Owens delivered to plaintiffs an abstract showing the mortgage to be a first lien on the premises.

However, the signatures on all of these instruments

were not the signatures of Helen E. Geldis and George P. Geldis nor were they made with their authorization or approval. In fact, they are forgeries. The Geldis' had never authorized Owens to secure the loan for them nor did they receive any part of the proceeds thereof, except as hereinafter set forth. The husband, George P. Geldis, is the same party as the defendant herein.

On March 28, 1945, Owens deposited the $3,000 he had received from the plaintiffs to his account in the Omaha National Bank. Immediately before this deposit was made his account showed a balance of only $23.72. On March 30, 1945, Owens drew a check on this account in the sum of $1,500 payable to George Geldis who, on the same day, deposited it to his account in The United States National Bank at Omaha. On March 31, 1945, the check was paid by the Omaha National Bank and charged to Owens' account, there being sufficient balance of the deposit remaining to cover it.

Prior to October 26, 1944, the defendant had talked to Owens about buying a farm and for that purpose did, on the above date, advance to Owens the sum of $1,500. No contract was obtained and defendant asked Owens to return the money. He received from Owens the aforesaid check in payment thereof. Owens died on August 9, 1945, and thereafter, in October 1945, the plaintiffs, for the first time, discovered that the signatures of the Geldis' were not genuine but were forgeries.

The loan has never been paid.

As to the second cause of action the record discloses the following: John H. Owens induced the plaintiffs to make a $12,000 loan. Plaintiffs understood this loan was being made for the benefit of James T. Maxwell and was to be secured by his mortgage on 160 acres of land which he owned in Dodge County, Nebraska. On July 18, 1945, the plaintiffs delivered to John H. Owens the sum of $12,000 consisting of $11,888.37 in cash items and an interest coupon in the sum of $111.63 due on a Carl A. Swanson loan. In consideration thereof Owens

delivered to the plaintiffs what purported to be a mortgage note of James T. Maxwell in the sum of $12,000 together with interest coupons thereto attached and a real estate mortgage on a quarter section of land in Dodge County securing the same. This mortgage had been recorded and Owens delivered to the plaintiffs an abstract showing the mortgage to be a first lien on the premises.

However, the signatures on all of these instruments were not the signatures of James T. Maxwell nor were they made with his authorization or approval. In fact they are forgeries. Maxwell had never authorized Owens to secure the loan for him nor did he receive any part of the proceeds thereof.

On July 18, 1945, Owens deposited to his account in the Omaha National Bank the $11,888.37 in cash items which he had received from the plaintiffs on the loan. Immediately before this deposit was made his account showed a balance of only $275.84. On July 20, 1945, Owens drew a check on this account in the sum of $3,200 payable to Geo. Geldis who, on the same day, deposited it to his account in The United States National Bank of Omaha. On July 21, 1945, the check was paid by the Omaha National Bank and charged to Owens' account, there being a sufficient balance of the deposit remaining to cover it.

Prior to June 11, 1945, the defendant had talked to Owens about buying a farm and for that purpose did, on the above date, advance to Owens the sum of $3,200. No contract was obtained and defendant asked Owens to return the money. He received from Owens the aforesaid check in payment thereof. Owens died on August 9, 1945, and thereafter, in October 1945, the plaintiffs for the first time discovered that the signatures of Maxwell were not genuine but were forgeries.

The loan has never been paid. The record shows that the plaintiffs have recovered $742.51 thereof from the

legal representatives of the estate of John H. Owens, deceased.

It is the money defendant received by virtue of these checks that plaintiffs are seeking to recover.

Where property, as here, has been acquired by fraud, equity, at the suit of the injured parties, will impress a constructive trust upon such property in their favor and, in the event of a prior transfer by the wrongdoer, will trace the property, if possible, through whatever mutations and impress a trust thereon in the hands of a third person, unless he be a bona fide purchaser for value and without notice. Cady v. South Omaha Nat. Bank, 46 Neb. 756, 65 N. W. 906; Allen Dudley & Co. v. First Nat. Bank, 122 Neb. 443, 240 N. W. 522.

By his conduct in obtaining these funds Owens became a trustee thereof ex maleficio and the question arises whether the antecedent indebtedness of the defendant is such a consideration as to make him a bona fide purchaser for value. The record shows he had no notice either as to the source or nature of the funds with which he was paid.

As stated in 54 Am. Jur., Trusts, § 273, p. 216: "Whether an antecedent indebtedness is such consideration as to make one a bona fide purchaser for value with the consequence that a trust cannot be enforced against the property or funds in prejudice of his rights is a matter concerning which there are differences of opinion. Many courts follow the rule that the antecedent debt is not such consideration as to have the consequence of cutting off the trust against the property or funds applied or pledged to the satisfaction of the debt, where the creditor acts in good faith and without notice and where he has parted with nothing and has not changed his position, even though it is admitted that ordinarily an antecedent debt is good consideration."

Also, in 65 C. J., Trusts, § 923, p. 994: "As a general rule, where trust property has been transferred to pay or secure an antecedent debt, the debt does not consti-

tute such a valuable consideration as entitles the creditor to hold the property free from the trust if he has no notice thereof; * * *."

"The general rule is that an antecedent debt does not form a valuable consideration in a case of this kind, so as to make the creditor, who is paid from wrong funds, a purchaser without notice. 2 Pom. Eq., 622, and authorities cited." Swift v. Williams, 68 Md. 236, 11 A. 835.

"* * * where the money or property is found in the possession of one who has parted with nothing, and who has not changed his position to his injury because of the apparent ownership of the one in possession of the money, it will be returned to the true owner. A pre-existing debt is not such a consideration as will constitute a party a bona fide holder for value, and one who receives money in payment of a pre-existing debt must therefore take it subject to prior equities. Hewitt et al. v. Powers (1882), 84 Ind. 295; Busenbarke, Executor, v. Ramey et al. (1876), 53 Ind. 499; Louthain et al. v. Miller (1882), 84 Ind. 295; Busenbarke, Executor v. Ramey, 89 Ind. 17; New Albany National Bank et al. v. Brown et al. (1916), 63 Ind. App. 391, 114 N. E. 486." Peoples State Bank v. Caterpillar Tractor Co., 213 Ind. 235, 12 N. E. 2d 123. See, also, Porter v. Roseman, 165 Ind. 255, 74 N. E. 1105.

This court has followed the principle that an antecedent debt is not such consideration as to have the consequence of cutting off the trust against the funds applied to the satisfaction of the debt, although the creditor acts in good faith and without notice but has not changed his position. See, Cady v. South Omaha Nat. Bank, *supra;* Union Stock Yards Nat. Bank v. Campbell, 2 Neb. (Unof.) 72, 96 N. W. 608; and Allen Dudley & Co. v. First Nat. Bank, *supra.*

As stated in Allen Dudley & Co. v. First Nat. Bank, *supra,* in quoting from Shotwell v. Sioux Falls Savings Bank, 34 S. D. 109, 147 N. W. 288: "We deny that

there is any recognized principle of law, or even any reason founded upon that necessity which is said to know no law, that will sustain either the justice or necessity of holding that, when a fund, even though it consists of money, can be fully and clearly traced into the hands of one who has neither paid a valuable consideration therefor nor changed his relation to the person from whom the fund was received so as to give rise to any equitable defense against the claims of the true owner of such fund—when one man has money which in equity and good conscience belongs to another —such fund should not be recovered by the equitable owner thereof."

The record does not show that the defendant in any way changed his relation to Owens so as to give rise to any equitable defense against the claims of the plaintiffs. If such change of position actually occurred it should have been pleaded and proved. Cady v. South Omaha Nat. Bank, *supra.*

The defendant contends for the rule, "Where one of two innocent parties must suffer a loss, he whose negligence caused the injury should bear the loss." In view of the foregoing principles of law as herein set forth and the facts of this case, we do not think that the rule is applicable here.

For the reasons stated we find the holding of the trial court should be reversed with directions to enter judgment for the plaintiffs on both causes of action.

REVERSED WITH DIRECTIONS.

GERHARD D. L. FRESE ET AL., APPELLEES, V. JOE MICHALEC, APPELLANT.

28 N. W. 2d 197

Filed June 27, 1947. No. 32218.

1. **Waters.** A stream which is accustomed to spill waters beyond its banks in times of high water and to flow over adjacent lands in its flood plane, and which flood waters return to the stream

at points farther down stream, remains a live stream, and the spilled waters so flowing out are flood waters and not diffused surface waters.

2. ———. A riparian owner may not dam or dike against such flood waters to the injury of adjacent owners of lands or crops growing thereon.
3. **Injunction.** Injunction affords a proper remedy to relieve from the continuing damage of recurring floods which are the proximate result of such a dam or dike construction.
4. **Continuances.** Where due diligence by the moving party has not been shown, the ruling of the trial court overruling a motion for a continuance for the purpose of securing additional evidence will not be disturbed.

APPEAL from the district court for Thurston County: SIDNEY T. FRUM, JUDGE. *Affirmed.*

Mark J. Ryan and *Alfred D. Raun,* for appellant.

Robert G. Fuhrman, for appellees.

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

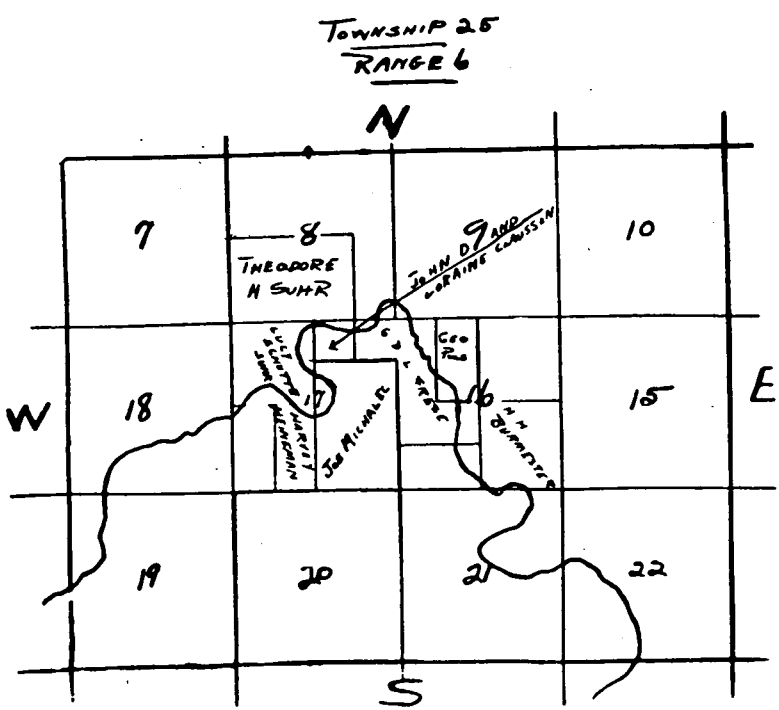
CARTER, J.

This is an action for a mandatory injunction to require the defendant to remove a dike which he constructed on his land to prevent the waters of Rattlesnake Creek from flooding over onto it, and for a permanent injunction enjoining the defendant from constructing or maintaining an embankment interfering with the natural flow of flood waters from Rattlesnake Creek across his land. The trial court found for the plaintiffs and the defendant has appealed.

The defendant is the owner of the southeast quarter and the south half of the northeast quarter of Section 17, Township 25, North, Range 6, East of the 6th P. M. in Thurston County. Plaintiffs are owners and tenants of owners of lands in Sections 17, 8 and 16, and allege that their lands and crops have been damaged by the waters of Rattlesnake Creek as the result of the construction of the dike hereinafter described.

Rattlesnake Creek is a small winding stream which

flows from the southwest across Section 18 into Section 17 and onto the land of the defendant. It enters defendant's land a little south of the northeast corner of the southwest quarter of Section 17. It then makes a loop resembling a horseshoe with the open end to the west and leaves defendant's land in a northwesterly direction at a point approximately 700 feet south of the northwest corner of his land. The stream proceeds north a little more than a quarter of a mile and turns in an easterly direction until it reaches a point near the northeast corner of Section 17 where it turns in a southeasterly direction. Thereafter it follows a southeasterly course approximately a quarter of a mile east of defendant's land. The following map of the area more adequately pictures the relation of the stream to the lands owned or leased by the parties to this litigation.



The plaintiffs offered the evidence of many witnesses long acquainted with Rattlesnake Creek, who testify that during all the years they have known defendant's land, Rattlesnake Creek has spilled over its banks on the eastern side of the horseshoe bend. These waters flowed across defendant's land in a northeasterly direction to the northeast corner thereof, where they ordinarily passed under the highway bridge located at that point, thence east to Rattlesnake Creek, where it pursues a southwesterly course in Section 16. In cases of exceptionally heavy rain the water traveled across defendant's land in such quantities that the bridge was unable to carry the full flow and it would spread out and flow across the highway on the east line of Section 17 near the bridge. These waters also found their way to Rattlesnake Creek over the Frese land in Section 16.

The waters thus spilled out of the creek at the eastern side of the horseshoe bend followed a fixed course to the northeast and did not remain long on defendant's land. While the evidence is somewhat in conflict, the preponderance of the evidence is that, except for small depressions here and there, these flood waters were not trapped on defendant's land, nor did they become diffused surface waters.

Plaintiffs' engineer testifies that as Rattlesnake Creek approaches the horseshoe bend on defendant's land it has considerable fall. A short distance west of the half section line, between the east and west halves of Section 17, it begins to level off, with the result that after heavy rains it tended to pile up in the horseshoe bend and flood over the eastern bank thereof at the point where defendant constructed the dike constituting the subject of this suit. The northeast corner of defendant's land is five feet lower in elevation than at the east base of the dike constructed by the defendant. The engineer further testifies that there are evidences of a more or less defined drainageway, or swale, from the east bank of the dike to the northeast corner of

defendant's land, although no definite channel exists.

The evidence shows that in 1945 defendant employed a contractor to construct a new ditch across the open end of the horseshoe bend just inside his west line fence, connecting the channel of Rattlesnake Creek immediately after it enters defendant's land from the southwest with the channel at a point a short distance before it leaves defendant's lands in a northwesterly direction. On the east bank of this channel a dike estimated from six to eight feet in height was constructed, which prevented the waters from spilling over and passing across defendant's land as they did in former times. In 1945 and 1946 this resulted in a flooding and damaging of the lands of plaintiffs in Sections 17, 8 and 16, shown on the map as belonging to Lucy Schutte Suhr, Theodore H. Suhr, John D. and Loraine Claussen, G. D. L. Frese, H. H. Burmester, and others. The testimony shows that these lands had never before been flooded from this source and that the flooding complained of resulted from the ditch and dike construction hereinbefore described.

The defendant offered evidence to the effect that there was no overflow channel or drainage course from the horseshoe bend to the northeast corner of his land. The evidence offered by him tends to establish that these flood waters spilled over the bank of Rattlesnake Creek and were trapped on his land, spreading out and percolating away only after several days time. The preponderance of the evidence, however, does not sustain this theory.

Defendant produced evidence, also, that the flooding complained of was caused primarily from a filling of Rattlesnake Creek in the southwest quarter of Section 16 to permit it to be "farmed across" at that point. There is evidence that on one occasion a road grader was used to smooth down the banks so that farm machinery could be driven across the creek. This work is alleged to have consumed an hour and one-half in

time. There is no other evidence of damming or interfering with the flow of the waters of Rattlesnake Creek in this area.

The evidence does show that Rattlesnake Creek progressively decreased in size as it proceeds through and beyond the southwest quarter of Section 16. The evidence shows, however, that this condition was brought about by a change in course of Rattlesnake Creek. It is shown that on or about July 5, 1945, the creek broke through to a large drainage ditch a short distance to the east of it. This break-through occurred near the point where Rattlesnake Creek crosses the north line of the southwest quarter of Section 16, and followed the east and west center line of Section 16 to the east until it reached the drain.

It is clear from the evidence that any interference with the flow of Rattlesnake Creek in and below the southwest quarter of Section 16, shown by the record before us, was not a contributing factor in causing the flood damage of which complaint is made. The lack of a well-defined channel and a live stream is primarily due to the break-through to the large drain to the east.

We conclude from a consideration of all the evidence that the straightened channel with the dike on the east bank thereof, which was constructed by defendant on his land as hereinbefore described, covers the area at which Rattlesnake Creek was wont to flow before the construction of the dike, and prevents the overflow flood waters of Rattlesnake Creek to spill out and pass over defendant's land as it had done for many years prior to the construction of the dike; that instead, the dike causes the flood waters of Rattlesnake Creek, in excess of the capacity of its channel, to back up and flow onto the lands of these plaintiffs and damage them by depositing mud and debris thereon.

It is clear that such damage to plaintiffs' lands and crops will occur periodically in the future if the dike is permitted to remain in its present condition.

It is the established rule in this state that a stream which is accustomed to spill flood waters beyond its banks in times of high water and to flow over adjacent lands in its flood plane, and which flood waters return to the channel of the stream at points farther down stream, remains a live stream, and the spilled waters so flowing out are flood waters and not diffused surface waters. Mohatt v. Olson, 146 Neb. 764, 21 N. W. 2d 516; Cooper v. Sanitary District No. 1, 146 Neb. 412, 19 N. W. 2d 619. Such flood plane must be considered as a portion of the channel of the stream, and structures or obstructions tending to dam the water back upon property of adjacent owners cannot properly be constructed or maintained. Cooper v. Sanitary District No. 1, *supra;* Snyder v. Platte Valley Public Power and Irrigation District, 144 Neb. 308, 13 N. W. 2d 160. Where a person constructs a dam or dike that diverts flood water from its natural flood plane where it was wont to flow in its natural state for many years before the construction of the obstruction, injunction affords the proper remedy to relieve from the continuing damage from recurring floods which are certain to occur in the future and which are the proximate result of the dam or dike construction. The trial court was clearly right in granting the injunctive relief prayed for.

The defendant claims error in the refusal of the trial court to grant a continuance of the trial in order to permit him to secure additional evidence concerning elevations and other expert evidence bearing upon the case. It is evident that defendant should have anticipated the need of such evidence before the trial. No surprise is shown and due diligence appears to have been lacking. Under such circumstances the discretion exercised by the trial court in denying the continuance will not be disturbed.

AFFIRMED.

ROY HAMPTON, PLAINTIFF IN ERROR, V. THE STATE OF NEBRASKA, DEFENDANT IN ERROR.

28 N. W. 2d 322

Filed June 27, 1947. No. 32230.

1. **Criminal Law: Evidence.** The state, having offered evidence that the defendant and the complaining witness were outdoors in a yard when a shot was fired from a gun in the hands of defendant, and having offered evidence as to what was said by defendant and complaining witness immediately prior to and after the shot was fired, the evidence having been admitted, and no one else being shown to have been present, evidence of parties nearby, who at the time and place heard the words and the shot and related the words heard, but did not identify the parties nor the voices as those of the complaining witness and defendant, is admissible as circumstantial evidence.
2. ———: ———. Where a photograph illustrates or makes clear some controverted issue in the case, a proper foundation having otherwise been laid for its reception in evidence, it may properly be received, even though it may present a gruesome spectacle.
3. **Appeal and Error.** Error must affirmatively appear in the record.
4. ———. Whenever the facts stated in the record are consistent with the duty of the court, and nothing is shown to establish a contrary theory, it will be assumed that the court acted properly and all things were rightly done.
5. **Trial.** After the defendant has produced evidence and rested, the state generally is confined to rebutting evidence, but the court for good reason in furtherance of justice may thereafter permit the state to offer evidence in chief. It is within the sound discretion of the court to permit in rebuttal the introduction of evidence not strictly rebutting.
6. **Criminal Law: Evidence.** The rule that generally threats made against a third person by a defendant prior to the commission of a crime are not admissible as evidence against a defendant held not applicable under the circumstances related in the opinion.
7. **Appeal and Error: Trial.** An instruction will not be held to be prejudicially erroneous merely because of a harmless imperfection which cannot reasonably be said to have confused or misled the jury to the prejudice of the party complaining.
8. ———: ———. Error cannot be predicated on a failure to give an instruction on the question of intoxication of the

defendant as affecting criminal intent unless a request was made for such a charge and the request denied.

ERROR to the district court for Dawes County: EARL L. MEYER, JUDGE. *Affirmed.*

Charles A. Fisher, for plaintiff in error.

Walter R. Johnson, Attorney General, and *Erwin A. Jones,* for defendant in error.

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

SIMMONS, C. J.

The defendant, plaintiff in error, was informed against, tried and found guilty of maliciously shooting one Loretta Hampton with intent to kill, wound and maim her. He brings the cause here assigning error in several particulars. We affirm the judgment of the trial court.

Defendant and Loretta Hampton were formerly husband and wife, they having been separated by divorce. The shooting occurred outdoors in the yard of the home of Mrs. Hampton about 12:15 or 12:30 a. m., May 30, 1946. That Mrs. Hampton was shot by a repeating shotgun in the hands of defendant is not disputed. The defense was that the shooting was accidental and not intentional.

It appears that some days prior to the shooting, the defendant took the shotgun, some shells, and shirts to Mrs. Hampton's home, and with her consent placed them in the basement. On the night of May 29, the defendant went to the home about midnight and entered it. Mrs. Hampton was not there. She came in shortly. Mrs. Hampton testified that defendant asked her who brought her home; she told him. He went to the basement; she followed. She testified that he got the gun and told her it had to end. Mrs. Hampton turned, ran upstairs and outdoors, and tried to hide in a hedge. He followed her with the gun in his hand.

She testified he said she had it coming and was going to get it; she screamed, begged him not to shoot, and the shot followed, resulting in her serious wounds. He testified the gun went off accidentally.

Parties in the house next door were permitted, over objection, to testify that they heard the voices, the screaming, the shot, and were also permitted to testify as to what was said by a man's voice and a woman's voice. Their testimony corroborated Mrs. Hampton. They did not identify the voices as those of Mrs. Hampton and of defendant. Defendant assigns as prejudicial error the admission of the testimony as to what they heard said that night. This evidence was not offered until the state had produced Mrs. Hampton's evidence placing the defendant and Mrs. Hampton in the yard at the time involved, and also her testimony of conversations directly connecting defendant with them. There is no one else shown to have been present. We think this evidence falls within the classification of circumstantial evidence, the admission of which was within the sound discretion of the trial court. Under these circumstances its admission was not error.

The evidence showed that the main charge of the shot struck Mrs. Hampton in her right arm between the elbow and wrist. The trial court admitted in evidence an X-ray picture taken some time after the injury, showing the arm with a part of one bone gone and the presence of several shot and particles of shot in the flesh of the arm. In MacAvoy v. State, 144 Neb. 827, 15 N. W. 2d 45, we held: "Where a photograph illustrates or makes clear some controverted issue in the case, a proper foundation having otherwise been laid for its reception in evidence, it may properly be received, even though it may present a gruesome spectacle." The evidence was admissible and the assignment is without merit.

Just before the close of the state's case-in-chief, the state requested that the jury be given an opportunity

to examine the outside of the premises where the shooting occurred. The defendant stated he had no objection. The court instructed the jury to proceed in a body to the premises and that they might inspect the outside, but not to discuss the case nor form an opinion, and that after they made the inspection they could be excused until 9 a. m. the next morning. The sheriff was called to escort the jury and instructed not to permit anyone to discuss the case with them. Defendant assigns as error that the court permitted the jury to view the scene of the crime without the presence of the defendant. The record is silent as to whether or not the defendant accompanied the jury to view the premises. In fact, the bill of exceptions does not show that the jury actually did view the premises. Be that as it may, in Fillion v. State, 5 Neb. 351, we held that to obtain a review, error must affirmatively appear in the record; and that whenever the facts stated in the record are consistent with the duty of the court, and nothing is shown to establish a contrary theory, it will be assumed that the court acted properly and all things were rightly done. In that case the facts were remarkably similar to the facts in the instant case. Under the above rule we held that error was not shown. We reach the same conclusion here.

There was evidence offered by the state and the defense as to the gun, its operation and condition, and as to whether or not it was left in a loaded condition prior to the shooting. Mrs. Hampton on cross-examination testified, without objection or motion to strike, that a few days before the shooting their son had found the gun loaded and had told her he had unloaded it. The defendant testified that he never left shells in the barrel, but did in the magazine. On rebuttal the state offered the testimony of the son who stated, over objection, that on May 27 preceding the shooting here involved, he found the gun loaded and unloaded it.

As a part of the state's case-in-chief there were admitted in evidence a photograph of a lawn chair in which shot were found, and also an empty cartridge and evidence as to where it was found. On rebuttal the state offered, and there was received in evidence, a picture showing the place where the shell was found, the chair, and a tree in which shot markings were found. Defendant assigns the admission of this evidence in rebuttal as prejudicial error. Defendant offered no evidence to contradict the evidence received and does not claim to have any.

Section 29-2016, R. S. 1943, provides that after defendant has produced his evidence, the state will be confined to rebutting evidence, unless the court for good reason in furtherance of justice shall permit it to offer evidence in chief. Such would be the rule in the absence of statute. While it would have been better practice for the state to have introduced this evidence in its case-in-chief, it is within the discretion of the court to permit in rebuttal the introduction of evidence not strictly rebutting. Neither abuse of discretion nor prejudice is shown.

The record shows that the defendant, on cross-examination of Mrs. Hampton, went into quarrels about other men between Mrs. Hampton and the defendant over a period of time preceding the shooting here involved, and developed that at least one of the quarrels resulted in personal violence between the defendant and another man. On cross-examination of the defendant, the state also went into some of these quarrels. Mrs. Hampton's birthday was on May 23. Defendant was present at a birthday party that evening at a club. Defendant's birthday was on May 25. Defendant testified on direct examination that he and Mrs. Hampton exchanged birthday gifts. The state, on cross-examination of defendant, brought out that on May 25 (defendant's birthday) a party including defendant and Mrs. Hampton and a Mr. and Mrs. Dun-

can went to a number of places and finally to the Duncan home. Some of the parties had been drinking and according to the defendant, "We was all in pretty good shape." An argument occurred involving Mrs. Duncan. Defendant testified that he left the Duncan home, went to Mrs. Hampton's home, saw his son, and told him of his mother's actions. He said he went there to talk to his son, and that he was pretty drunk that night. He was asked if he did not pick up the gun and say he was going out and use it. Defendant didn't "recall." He was asked if he and the son didn't quarrel about the gun and again he didn't recall that. He denied that Mrs. Hampton had asked him to get the gun out of the house as she didn't want him to have it around to threaten people. On rebuttal the state asked the son as to the events of that evening. The son testified that he was abed in the basement of his mother's home in the room where the gun then was; that defendant came home, picked up the gun, and said he was going to take it with him; that defendant had had an argument with Duncan that night, and that Duncan could not treat him that way. Defendant objected to this rebuttal evidence, and here contends that it constitutes evidence of threats against a third person, and its admission was prejudicial error. Defendant relies upon the rule stated in Carr v. State, 23 Neb. 749, 37 N. W. 630, that "As a general rule, threats made by the defendant prior to the murder, to kill or injure some other person than the deceased, are not admissible as evidence against him." If this rebuttal evidence stood alone there would be a serious question as to its admissibility. But it does not stand alone. The defendant first on cross-examination of Mrs. Hampton injected into the evidence facts of quarrels with Mrs. Hampton and third parties, arising because of the attention paid to her by other men. The defendant testified to the exchange of birthday gifts, indicating harmonious relations at that time. The state on cross-

examination of defendant developed the incidents occurring on the night of defendant's birthday and of the trouble that arose. The rebuttal evidence, to which defendant objects, was offered to supply that which defendant did not recall. Under these circumstances we are of the opinion that its admission was not prejudicial error.

The transcript shows "Instructions Given by the Court." Defendant complains of Instruction No. 7, which is entitled, "Information No. 7"; the other subheads are all entitled "Instruction No." ——. The instruction is as follows: "The defendant says that he did not know, and did not have any reason to believe that the gun in question was loaded, and that said gun was discharged accidentally and unintentionally, and that when it was discharged, he did not intend to shoot, kill, maim or wound the said Loretta Hampton, and if you so find, or if there is a reasonable doubt in your mind as to how said gun was discharged, or that the defendant purposely shot the defendant, or that said shooting was maliciously done, or as to the defendant's intent, or that said intent was to feloniously kill or wound or maim said Loretta Hampton, then you cannot find the defendant guilty as charged, and it matters not how careless or negligent the defendant may have been, or how great the injury may have been to Loretta Hampton." Complaint is made to the use of the word "Information" and to the underscored language in the instruction. Obviously, the use of the word "Information" was an error; obviously, the use of the word "defendant" where underscored was an error and just as obviously we think the jury could not have been confused by the instruction. They obviously knew that the "Information" was an instruction and quite clearly they knew that the defendant was not accused of shooting himself. An instruction will not be held to be prejudicially erroneous merely

because of a harmless imperfection which cannot reasonably be said to have confused or misled the jury to the prejudice of the party complaining. Kaufmann v. State, 112 Neb. 718, 200 N. W. 998; Hans v. State, 147 Neb. 67, 22 N. W. 2d 385.

Defendant, pointing out that there was evidence of his intoxication on the night of the shooting, complains that the trial court did not, on its own motion, charge the jury of the effect of intoxication and whether defendant was capable of forming the necessary intent. Without determining whether or not such an instruction should have been given if requested, we point out that in Curtis v. State, 97 Neb. 397, 150 N. W. 264, we were presented with the same contention, and held that error cannot be predicated on a failure to give an instruction on the question of the intoxication of the defendant as affecting criminal intent unless a request was made for such a charge and the request denied. The ruling applies here.

The defendant was sentenced to serve a period of 15 years. He contends that in any event the sentence is excessive. The record amply sustains the jury's verdict of guilt. The defendant was well acquainted with the gun he used; he knew its dangers and power of destruction. That his act did not result in the death of Mrs. Hampton was not of his design. The act did result in the serious wounding of Mrs. Hampton, her confinement in a hospital for a long period, and the loss of the use of her lower right arm and hand. The sentence is not excessive and is warranted by the evidence.

The judgment of the district court is affirmed.

AFFIRMED.

FRANK PROKOP, PLAINTIFF IN ERROR, V. THE STATE OF NEBRASKA, DEFENDANT IN ERROR.

28 N. W. 2d 200

Filed June 27, 1947. No. 32228.

1. **Trial.** While practical necessity can require the intervention of an interpreter between counsel, witness, and the jury, the need for such an appointment is left to the sound discretion of the trial court.
2. ———. An interpreter should be absolutely impersonal and translate the questions and answers between the counsel and witness so the jury will have the exact answers made by the witness on the stand.
3. **Rape.** In a charge of forcible rape, where the testimony discloses that the woman, as a result of such attack, had a bruise above her eye, discolorations on her neck and back, a bruised and bleeding heel, and was hysterical when she made complaint of being raped to her doctor, such evidence is corroborative of her denial of consent to the act, and will support a verdict of guilty.

ERROR to the district court for Fillmore County: STANLEY BARTOS, JUDGE. *Affirmed as modified.*

Miles W. Johnston, for plaintiff in error.

Walter R. Johnson, Attorney General, and *Erwin A. Jones,* for defendant in error.

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

PAINE, J.

The defendant was convicted of the crime of rape in the district court for Fillmore County and was sentenced to imprisonment in the penitentiary for ten years at hard labor. Defendant brings error proceedings to this court.

The assignments of error are as follows:

"(a) Because the prosecutrix was not corroborated by evidence other than her own statements, acts, and doings, and same was insufficient in law.

"(b) Because the evidence showed that the pros-

ecutrix did not offer the resistance legally necessary in order to make the admitted act of sexual intercourse rape.

"(c) Because the proof relating to the non-consent of the prosecutrix to the admitted act of sexual intercourse was not established by the proper quantum or degree of proof.

"(d) Because the interpretation of the prosecutrix's testimony was not verbatim as spoken by the witness, but was colored and unfairly and improperly interpreted by the interpreter, thus depriving the defendant of a clear and impartial presentation of the evidence."

We will take up the last alleged error first. The bill of exceptions discloses that, when the county attorney called the prosecutrix as his first witness to the stand, he stated that she did not speak the English language well, but spoke Bohemian, and asked for an interpreter. The court thereupon appointed one, and he was duly sworn to act in that capacity.

As the taking of her evidence progressed, the trial judge, understanding the Bohemian language, warned the interpreter a number of times as to his duties, such as, that he must not ask any questions except those which were asked by the attorney, and must directly interpret her answers as given; again, that he must stop her and have her restate any part of the answer which he did not recall. He warned him that he must interpret what she said; that "If the answer doesn't mean anything to you the attorney can ask another question then."

Again, the question was in regard to the screen door on the porch, which the defendant broke open. "Q And what kind of a latch is there on this door? A It was a new one and a good one. * * * THE COURT: That isn't all of the answer that she made. She says, 'I just had it put on new.' * * * Q Now, after you heard the knocking and after you heard what sounded like the screen was being broken, then what did you hear?

A She was scared and she just laid there. THE COURT: Mr. Wozab, she didn't say 'she'. She says 'I'. You must interpret exactly as she says it. It is a difficult proposition, I know, but you must interpret it exactly as she states it."

Later the court said: "Mr. Wozab, that is not a fair interpretation. She stated first that she saw a man standing by the door in the hallway and then she struck a match. * * * It is a difficult proposition, but you let her run away with you." During the cross-examination the court said: "Let's try this witness without interpreting for a while and see how we get along."

It is rather difficult to be compelled to examine an important witness through an interpreter. The interpreter should be absolutely impersonal, the counsel asking a question the same as if the witness could understand it and the interpreter repeating the question with no added remarks of his own, and giving back the witness' answer in her own words. There should be no extraneous conversations between counsel and the interpreter; all should be left to the sound discretion of the court. See section 33-142, R. S. 1943.

Counsel and witness were fortunate in the case at bar, in that the trial court understood the language of the witness and apparently corrected the shortcomings of the interpreter. See Gregory v. Chicago, R. I. & P. R. Co., 147 Iowa 715, 124 N. W. 797.

"But the danger of mistakes in legal proceedings is such that nothing but practical necessity can justify the intervention of an interpreter between counsel and witness or witness and jury, although it is well settled that on a proper occasion it is allowable, and the occasion must usually be judged of by the trial court." Rajnowski v. Detroit, D. C. & A. R. R. Co., 74 Mich. 15, 41 N. W. 849. See Annotation, 53 A. L. R., p. 373; 31 C. J. S., Evidence, § 280, p. 1031.

In accordance with this rule, we note that after the prosecuting witness became somewhat accustomed to the

court procedure, and could employ her limited knowledge of the English language to advantage, the court very properly instructed them to proceed without the interpreter.

It appears to this court that the evidence given through the interpreter and corrected by the trial judge gave to the jury a fair and unbiased version of the answers made by the witness in Bohemian, and therefore the defendant was not in any way prejudiced in the taking of such evidence, and the fourth assignment of error is without merit.

The first three assignments of error charge that there was insufficient corroboration of the evidence of the prosecutrix, that she did not offer the resistance legally necessary to make the intercourse rape, and the crime was not established by the proper quantum of proof. To examine these alleged errors requires an examination of the evidence.

We will now set out the facts very briefly. The defendant was a young man 23 years of age, about 6 feet tall, weighing 196 pounds, and is charged with having committed the crime of rape on June 27, 1946, upon the complaining witness, both of the parties being residents of the village of Milligan. The defendant admitted the intercourse, but testified that it was with her consent, which she denied.

The complaining witness was 5 feet 6 inches in height, weighing 125 pounds, 60 years of age, and was the mother of seven children. She was a spry, healthy woman, doing her own marketing and housework. The defendant got into her home by breaking the screen on the back door and unlatching the door. She was awakened by this, and when he struck a match, she saw that a man was in the house. She got up and turned a flashlight on his face and recognized him and asked what he wanted. He grabbed her hands and squeezed her throat, threw her on the bed, covered her head with a pillow, so she could hardly breathe. She said that whenever

she got her mouth free she screamed. The act charged in the complaint was committed twice, during which time there was some conversation between them. She tried to elude him, but he was too strong for her. After he left she turned on the electric light and saw that it was 1:00 a. m. She found that her right heel was scratched or bruised from his boot, it was bleeding and she bandaged it; she had a bruised eye, a bruised leg, and there were imprints of his hands on her throat.

She went to bed and in the morning she met several people but said she was too ashamed to make complaint, but went to see the doctor during the morning and told him she had been raped earlier that morning.

The doctor testified that he knew both parties very well, having known the prosecutrix for over 30 years. He said she came to his office about 11:00 a. m. and told him she had been raped. He examined her body and found some discoloration of the skin on her arms and back. He told her it was a serious matter, and to tell her relatives about it, which she did. At the time she came to the doctor, she was very nervous and on the verge of hysteria, her voice jerked and her face twitched. Toward evening she returned to his office and he then examined her vagina, and it was red and irritated, and was not normal.

The deputy sheriff, who examined her several hours later, testified to seeing a bruise over her right eye on the forehead, and he noticed that her heel had been bandaged. Her nephew testified that he saw pink bruises on her throat.

The defendant testified that he knocked on her door and she came to the door and said, "Come on in." She recognized him and said, "why didn't I go home and go to bed," but he refused to go, speaking "in a drunken way," and went in, and testified in the greatest detail as to the acts, which evidence need not be set out herein. He said that he then went out the front door and went home.

The evidence of the prosecutrix and the admission of the charge by the defendant, with the claim that she consented to the acts, were submitted to the jury, and in instruction No. 9 the jury was told: "You must find on the part of the woman not merely a passive policy or equivocal submission to the defendant; such resistance will not do. Voluntary submission by the woman, while she has power to resist, no matter how reluctantly yielded, removes from the act an essential element of the crime of rape. If the carnal knowledge was with the voluntary consent of the woman, no matter how tardily given, or how much force had theretofore been employed, it is not rape." This was as favorable an instruction as the defendant was entitled to under the facts proven in the case, and the jury found the defendant guilty.

"The degree of force required is relative, depending upon the particular circumstances, but in any such case it must be sufficient to subject and put the dissenting woman within the power of the man, and thus enable him to have carnal knowledge of her, notwithstanding good-faith resistance on her part. In that connection, whether carnal knowledge was forcible and against her will or with her consent, is ordinarily indicated by resistance or lack of it by the woman. While the degree of resistance required is also relative, depending upon the particular circumstances, the general rule is that a mentally competent woman must in good faith resist to the utmost with the most vehement exercise of every physical means or faculty naturally within her power to prevent carnal knowledge, and she must persist in such resistance as long as she has the power to do so until the offense is consummated." Cascio v. State, 147 Neb. 1075, 25 N. W. 2d 897.

We have reached the conclusion that the jury were justified in finding that this elderly woman resisted, to the extent required by law, the attack of this 23-year-old man weighing 196 pounds, who had been drinking, and

who broke into her home in the dead of night to accomplish his purpose of raping her.

"In a prosecution for rape, it is not essential to a conviction that the prosecutrix should be corroborated by the testimony of other witnesses as to the particular act constituting the offense. It is sufficient if she be corroborated as to material facts and circumstances which tend to support her testimony, and from which, together with her testimony as to the principal fact, the inference of guilt may be drawn." Fager v. State, 22 Neb. 332, 35 N. W. 195. See Mathews v. State, 19 Neb. 330, 27 N. W. 234; Robbins v. State, 106 Neb. 423, 184 N. W. 53; Wiedeman v. State, 141 Neb. 579, 4 N. W. 2d 566; 44 Am. Jur., Rape, § 108, p. 971.

We are as definitely of the opinion that the evidence of her bleeding heel, bruised back, eye, and wrists, discoloration on her neck, and other evidences of the attack were corroborative evidence within the meaning of the law, sufficient to sustain the verdict of the jury. However, after a consideration of the entire evidence, and in view of the youth of the defendant and his record up to this offense, we will reduce the sentence to five years, and as thus modified the sentence is affirmed.

AFFIRMED AS MODIFIED.

CARTER, J., participating on briefs.

SIMMONS, C. J., dissenting.

I am of the opinion that the evidence is not sufficient to sustain the conviction of the defendant, when tested by established rules defining the proof required to establish the crime of rape.

In Cascio v. State, 147 Neb. 1075, 25 N. W. 2d 897, we held: "In a prosecution for rape, competent evidence must show beyond a reasonable doubt not only that defendant committed the act charged, but that he did so under such circumstances that every element of the alleged offense existed, and where the

evidence fails to meet that test, it is insufficient to support a conviction."

We further held: "In the absence of sufficient proof of threats and fear, proof beyond a reasonable doubt of want of consent, that is, of actual force by the man with actual good-faith resistance thereto by the woman, is always essential to support a conviction." There is no evidence here that the complaining witness yielded "because of fear caused by threats of immediate great bodily injury or death." There were no threats.

We further held: "The degree of force required is relative, depending upon the particular circumstances, but in any such case it must be sufficient to subject and put the dissenting woman within the power of the man, and thus enable him to have carnal knowledge of her, notwithstanding good-faith resistance on her part. In that connection, whether carnal knowledge was forcibly and against her will or with her consent, is ordinarily indicated by resistance or lack of it by the woman." There is evidence of the use of force here, but the last use of force occurred when the complaining witness was placed face down on her bed. She testified to no act of force thereafter.

We further held: "While the degree of resistance required is also relative, depending upon the particular circumstances, the general rule is that a mentally competent woman must in good faith resist to the utmost with the most vehement exercise of every physical means or faculty naturally within her power to prevent carnal knowledge, and she must persist in such resistance as long as she has the power to do so until the offense is consummated." In Selvage v. State, *ante* p. 409, 27 N. W. 2d 636, we held: "To constitute the crime of forcible rape upon a woman of the age of 18 years or upwards, possessed of her natural physical and mental powers and not terrified by threats or force, she must resist to the extent of her ability and persist in such actual resistance, by every means at

her command, until the act is consummated." There is no evidence here of any acts of resistance on the part of the complaining witness from the beginning to the end of the event. As was said in Brown v. State, 127 Wis. 193, 106 N. W. 536 (cited with approval in the Cascio case): "Resistance is opposing force to force (Bouvier), not retreating from force." In Vaughn v. State, 78 Neb. 317, 110 N. W. 992, we stated that under peculiar circumstances a less degree of resistance may be sufficient. See Hammond v. State, 39 Neb. 252, 58 N. W. 92, and Thompson v. State, 44 Neb. 366, 62 N. W. 1060, for illustrations of peculiar circumstances calling for an application of the exception. It is not claimed that there are any peculiar circumstances here to make the general rule inapplicable.

We further held in the Cascio case: "In determining the sufficiency of the evidence in the case at bar, we are required to observe the rule that mere general conclusions of the prosecutrix, without relating the very threats and acts justifying submission because of fear or constituting the required actual force and resistance, are of themselves insufficient to sustain a conviction of the accused." Here the complaining witness testified to the conclusions that the act was against her will; that she could not help it; that she did not have strength; that she resisted to the full extent of her strength; and that it would have done no good to resist. These assertions are both of resistance and of lack of resistance. Clearly under the rule just cited, they are insufficient to sustain the conviction. Mathews v. State, 19 Neb. 330, 27 N. W. 234.

In Oleson v. State, 11 Neb. 276, 9 N. W. 38, we quoted with approval this rule: "The prosecutrix, if she was the weaker party, was bound to resist to the utmost. Nature had given her hands and feet with which she could kick and strike, teeth to bite, and a voice to cry out; all these should have been put in requisition in defense of her chastity." (In Brown v. State, *supra*,

the court added "pelvic muscles" to the list.) We applied this test in Vaughn v. State, *supra.* The complaining witness here testified that she did not use her legs, arms, or any other ordinary means of reprisal. The witness does testify that she screamed. Yet, her evidence is replete with admissions of opportunity to scream before any act of intercourse, and she testified that she did not because it would do no good.

The complaining witness testified that when the defendant entered her home she recognized him, called him by name, and asked him what he wanted. During the actual acts of intercourse, the witness and defendant visited about her age (and she refused to tell him, requiring him to guess), and about his mother's name. He asked for cigarettes; she asked him not to smoke on her bed. She was thirsty and got up partly from the bed, took a glass of water from a window sill, drank it, and lay down again beside defendant. Between the two acts the defendant lay still on the bed and she remained beside him. After the defendant left the witness' home, she got up, turned on the light, noted the time, locked the doors, bandaged the scratch on her heel, went back to bed and apparently to sleep until morning. The next morning she saw two of her lady neighbors, one of them was in her home. She made no complaint to them and there is no evidence of anything unusual in her appearance or conduct at the time. Just before noon she went to the doctor and complained to him, but on cross-examination testified that she called on him because she feared a venereal disease. Thereafter followed repeated discussions of the event with relatives and officers. The prosecution followed.

Take an admission or proof of the sexual act, add to it the natural revulsion against the crime of rape, together with relative and community hysteria, and you have the ingredients by which juries are persuaded to return verdicts of guilty, as witness the verdicts in

this, the Cascio, and Selvage cases. It is the duty of trial courts to require proof meeting the tests of law before submitting these cases to the emotions of juries. It is the duty of appellate courts to set aside convictions where the evidence does not meet these tests. Heretofore we have done so in many cases down to and including the Cascio case and more recently the Selvage case.

This defendant may or may not have been guilty of some offense against the laws of this state. However that may be, the evidence falls far short of meeting the tests or establishing the elements of the crime of rape. I see no distinguishing difference in the factual situation in the Cascio and Selvage cases and the instant case.

CARTER, J., joins in this dissent.

IN RE ESTATE OF DAVID J. LEWIS, DECEASED, HASTINGS COLLEGE ET AL., APPELLANTS, V. DILYS MORWENA REES ET AL., APPELLEES.

28 N. W. 2d 427

Filed July 3, 1947. No. 32276.

1. **Wills.** It is the court's duty in the construction of a will to give effect to the true intent of the testator so far as it can be collected from the whole instrument, if such intent is consistent with the rules of law.
2. ———. The intention of the testator is to be ascertained from a liberal interpretation and comprehensive view of all of the provisions of the will.
3. ———. The general rules with reference to the interpretation of wills are fully applicable in determining whether a legacy, in any particular instance, is to be treated as demonstrative, general, or specific.
4. ———. A specific legacy is a bequest of a specific thing or fund that can be separated out of all the rest of the testator's estate of the same kind so as to individualize it, and enable it to be delivered to the legatee as the particular thing or fund bequeathed.

5. ———. A general legacy is one which is payable out of the general assets of a testator's estate, such as a gift of money or other thing in quantity, and not in any way separated or distinguished from other things of like kind.
6. ———. A demonstrative legacy partakes of the nature of both a general and specific legacy; it is a gift of money or other property charged on a particular fund in such a way as not to amount to a gift of the corpus of the fund, or to evince an intent to relieve the general estate from liability in case the fund fails.
7. **Common Law.** The courts have the power to modify the common law, adopting such of its principles as are applicable and rejecting such others as are inapplicable.
8. ———. The adoption of the common law of England, as provided for in section 49-101, R. S. 1943, does not admit of an unqualified application of all of its rules without regard to local circumstances and the then present and enlightened conception of reason and justice, for the common law is applicable only insofar as it is suited to the genius, spirit, and objects of its intentments affecting the society of the state.
9. **Wills.** The will in the instant case, construed and interpreted under the rules of this state governing the construction and interpretation of wills, held to contain demonstrative legacies as well as general and specific legacies.

APPEAL from the district court for Adams County: FRANK J. MUNDAY, JUDGE. *Reversed and remanded with directions.*

Harry F. Russell, for appellants.

Stiner, Boslaugh & Stiner, for appellees.

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

MESSMORE, J.

This appeal involves the construction of a will. On March 11, 1943, David J. Lewis, a resident of Hastings, Nebraska, departed this life testate. His last will and testament, dated July 13, 1937, was admitted to probate in the county court of Adams County March 29, 1943. On November 15, 1944, Hastings College filed a motion in the probate proceedings, requesting

the county court to issue an order directing the personal representative of the estate of David J. Lewis, deceased, to pay from the residue of the estate in his possession, the bequest in favor of Hastings College, contained in paragraph six of the will. Like motions were filed on the same day by the Y.M.C.A. and Y.W.C.A. of Hastings, Nebraska. On May 25, 1945, the county court sustained the motions and directed the executor of the estate to pay Hastings College the sum of $5,000, and in the event there were not sufficient funds to pay said amount in full from the residue of the estate, that under and in accordance with the 32d paragraph of the will, the executor then was directed to pay all cash bequests pro rata so that each beneficiary should receive a proportionate amount of the bequest in accordance with all other cash bequests under the will provided that the payment of the bequests should be made from the residue of the estate and not from any property specifically devised. This order likewise related to the bequests to the Y.M.C.A. and Y.W.C.A., as set forth in the sixth paragraph of the will.

From this order, the sole and only heirs at law of David J. Lewis, deceased, appealed to the district court. The matter was heard in the district court upon the transcript of proceedings from the county court, without the filing of new or additional pleadings in the district court. Upon hearing the matter, the district court decreed and adjudged that the legacies set forth in paragraph six of the will to Hastings College, the Y.M.C.A., and Y.W.C.A., of Hastings, Nebraska, constituted specific bequests to each of such legatees, and were not to be paid out of any other property except the property mentioned in paragraph six of the will and in accordance with the terms thereof, and that the order of the county court ordering such bequests to be paid out of the general assets of the estate be set aside and the case remanded to the county court to enter the proper judgment. Upon the overruling of the motion

for new trial, this appeal was perfected.

The record discloses that, during his lifetime, David J. Lewis owned an undivided one-seventh interest in the Hastings Daily Tribune property. Contract was made on July 1, 1937, by the owners of the property to sell the same. There was some cash consideration and the balance in notes. The cash payment was made and the notes were delivered on July 12, 1937. The one-seventh interest of David J. Lewis in the notes constituting part of the purchase price amounted to $17,854.14. At the time of the execution of his will, these notes were not paid, and were in excess of the three legacies set forth in paragraph six of the will. All of such notes constituting his interest in the sale of the Hastings Daily Tribune were paid during his lifetime.

There are 32 paragraphs of the will, most of which make specific bequests of different items of personal property. Paragraph six, of importance in this appeal, is as follows: "I give, devise and bequeath to the endowment fund of the Hastings College of Hastings, Nebraska, Five Thousand Dollars ($5000.00); to The Hastings Y.M.C.A. of Hastings, Nebraska, Five Hundred Dollars ($500.00); to Hastings Y.W.C.A. of Hastings, Nebraska, Five Hundred Dollars ($500.00); such bequests to be paid out of notes given for purchase of my interests in The Hastings Daily Tribune, and if after the payment of the above three bequests there is a balance in the fund received from the sale of the Hastings Daily Tribune, then and in that event such remaining funds be divided between * * * (five legatees which are named) an equal amount thereof share and share alike."

Paragraph 32 of the will provides: "I hereby direct my executor that if there is not sufficient personal estate to pay the cash bequests to the various beneficiaries then and in that event each beneficiary shall receive his proportionate amount of the same."

Hastings College, as appellant, contends the district court erred in its construction of the will of David J.

Lewis, deceased, in finding that the legacies in favor of the Hastings College, Hastings Y.M.C.A., and Hastings Y.W.C.A., are required to be paid only from the proceeds of certain notes mentioned in paragraph six of the will.

It is the court's duty in the construction of a will 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. See Lacy v. Murdock, 147 Neb. 242, 22 N. W. 2d 713; In re Estate of Zents, *ante* p. 104, 26 N. W. 2d 793.

The intention of the testator is to be ascertained from a liberal interpretation and comprehensive view of all of the provisions of the will. No particular words, nor conventional forms of expression, are necessary to make a valid will. See Lacy v. Murdock, *supra;* In re Estate of Zents, *supra.*

The general rules with reference to the interpretation of wills are fully applicable in determining the nature and kind of legacies appearing therein. Especially operative is the rule that effect will be given to the intent of the testator as evinced by the words of the will. See In re Estate of Wilson, 260 Pa. 407, 103 A. 880, 6 A. L. R. 1349, and annotation at p. 1359.

"In construing whether a legacy is general, specific, or demonstrative, it must be remembered that the will of the testator is the law of the court, and that the testator's intention, so far as it is lawful, is his will. It is therefore the intention which must be ascertained." Shaw v. Shaw, 32 Ohio App. 168, 167 N. E. 611. Cases conforming to the foregoing rules which constitute the law in most of the jurisdictions are too numerous to cite; to do so would unnecessarily lengthen this opinion. In this connection, see 6 A. L. R. 1353, annotated cases cited therein, and annotation 73 A. L. R. 1244, supplementing 6 A. L. R. 1353.

Appellants urge in view of the foregoing authorities the legacies appearing in paragraph six of the will are not specific legacies, but are demonstrative legacies,

and when paragraph six of the will is read in conjunction with paragraph 32 thereof, and where there are remaining assets of the estate in the hands of the personal representative of the deceased, the appellants are then entitled to their pro rata share of said assets, as provided for by paragraph 32 of the will, in relation to the amounts of the legacies as provided for in paragraph six of the will.

"For general purposes legacies are commonly considered as falling into one of three classes designated as specific, general, and demonstrative, * * *." Maxim v. Maxim, 129 Me. 349, 152 A. 268, 73 A. L. R. 1244. See, also, 73 A. L. R. Anno. 1251, supplementing 6 A. L. R. 1353 to 1358; Taylor v. Hull, 121 Kan. 102, 245 P. 1026; Leighton v. Leighton, 193 Iowa 1299, 188 N. W. 922; In re Mandelle's Estate, 252 Mich. 375, 233 N. W. 230; Hobbs v. Brenneman, 94 W. Va. 320, 118 S. E. 546.

A demonstrative legacy has been defined in Nusly v. Curtis, 36 Colo. 464, 85 P. 846, 7 L. R. A., N. S. 592, 118 Am. St. Rep. 113, 10 Ann. Cas. 1134, 6 A. L. R. 1353, as follows: "A demonstrative legacy partakes of the nature of both a general and specific legacy; it is a gift of money or other property charged on a particular fund in such a way as not to amount to a gift of the corpus of the fund, or to evince an intent to relieve the general estate from liability in case the fund fails." This definition is sustained in numerous decisions by the federal courts and the courts of last resort in Alabama, California, Connecticut, District of Columbia, Georgia, Illinois, Indiana, Iowa, Kentucky, Maine, Maryland, Massachusetts, Minnesota, New Hampshire, New Jersey, New York, North Carolina, North Dakota, Ohio, Pennsylvania, Rhode Island, Tennessee, Texas, Vermont, Virginia, Wisconsin, and also by the English and Canadian courts. See, also, annotation to 73 A. L. R. 1251, citing cases from Kansas, Louisiana, Michigan, and West Virginia.

"A specific legacy is a bequest of a specific thing or fund that can be separated out of all the rest of the

testator's estate of the same kind, so as to individualize it, and enable it to be delivered to the legatee as the particular thing or fund bequeathed." Palmer v. Palmer, 106 Me. 25, 75 A. 130, 19 Ann. Cas. 1184; Maxim v. Maxim, *supra.*

A legacy is specific, when it is the intention of the testator that the legatee should have the very thing bequeathed, and not merely a corresponding amount in value. See Wallace v. Wallace, 23 N. H. 149. To like effect, Douglass v. Douglass, 13 App. D. C. 21; 6 A. L. R. 1357.

The distinction between a specific legacy and a demonstrative legacy seems to be this: "If a legacy be given with reference to a particular fund, only as pointing out a convenient mode of payment, it is considered *demonstrative,* and the legatee will not be disappointed, though the fund totally fail. But where the gift is of the fund itself, in whole or in part, or so charged upon the object made subject to it, as to show an intent to burden that object alone with the payment, it is esteemed *specific,* and consequently liable to be adeemed by the alienation or destruction of the object." Walls v. Stewart, 16 Pa. 275. See, also, Annotation to 73 A. L. R. 1251; In re Strasenburgh's Will, 136 Misc. 91, 242 N. Y. Supp. 453.

"A general legacy is one which is payable out of the general assets of a testator's estate, such as a gift of money or other thing in quantity, and not in any way separated or distinguished from other things of like kind." Nusly v. Curtis, *supra.*

A demonstrative legacy differs from a general legacy in that it does not, in the first instance, abate upon insufficiency of assets. See Thompson v. Stephens, 138 Ga. 205, 75 S. E. 136; Hart v. Brown, 145 Ga. 140, 88 S. E. 670; 6 A. L. R. 1358.

As a general rule the courts are not inclined to favor specific legacies, but entertain what has been called a judicial bias against them. See In re Calnane's Estate (Mo. App.) 28 S. W. 2d 420; Willis v. Barrow, 218 Ala.

549, 119 So. 678; Patanska v. Kuznia, 102 N. J. Eq. 408, 141 A. 88, 104 N. J. Eq. 203, 145 A. 921; Smith v. Smith, 192 N. C. 687, 135 S. E. 855; Shepard v. Bryan, 195 N. C. 822, 143 S. E. 835; Nash v. Hamilton, 8 Ohio App. 66, 28 Ohio C. A. 206, 39 Ohio C. C. 462.

The primary reason given by the cited authorities as being inclined against construing legacies as specific, is, as explained in Georgia Infirmary v. Jones, 37 F. 750, 6 A. L. R. 1360: "Because of the hardship of the doctrine that a specific legacy is lost if the subject of it is disposed of by the testator, or is extinguished in his lifetime, notwithstanding the will may denote unmistakably that the testator intended to treat the legatee as an object of his bounty, the courts incline to consider legacies as demonstrative, rather than specific, where the language of the will is reasonably capable of that construction." See, also, Kenaday v. Sinnott, 179 U. S. 606, 45 L. Ed. 339, 21 S. Ct. 233; Nusly v. Curtis, *supra;* Douglass v. Douglass, *supra;* Hart v. Brown, *supra;* and opinions by the courts of last resort in Maine, Maryland, New Hampshire, New Jersey, Ohio, Pennsylvania, South Carolina, and Virginia.

The foregoing authorities express the majority rules with reference to the different kinds and types of legacies here being considered.

The appellees cite and rely on the case of the Appeal of Stilphen, 100 Me. 146, 60 A. 888. The court, having defined the difference between specific and demonstrative legacies, says: "Thus it is important to observe that two elements are necessary to constitute a demonstrative legacy. It must appear in the first place that the testator intended to make an unconditional gift in the nature of a general legacy, and secondly the bequest must indicate the fund out of which it is payable. * * * In the case at bar the testatrix bequeathed to Mary D. White $600 of the $1100 in the hands of her brothers; and a careful examination of all the other provisions of the will in connection with this bequest fails to disclose any

intention on the part of the testatrix to make an unconditional gift of $600 which should be payable out of her general estate in case of the failure of the fund specially mentioned. Only one of the elements which constitute a demonstrative legacy is found to exist in this case. A particular fund is pointed out from which the sum of $600 is to be paid. That fund was not in existence at the decease of the testatrix. The legacy must be considered a specific one which was adeemed by the failure of the fund."

The appellees also cite Baker v. Baker, 319 Ill. 320, 150 N. E. 284, 42 A. L. R. 1514, as being a case somewhat analogous in fact to the case at bar.

After a careful consideration of the cited cases, and with full consideration of the Appeal of Stilphen, *supra,* and the language used by the court therein as to the two elements necessary to constitute a demonstrative legacy, and considering the case before us, we fail to find anything in the record persuading us to the conclusion that the testator in the instant case intended to make a specific legacy but, to the contrary, we find the elements necessary to constitute a demonstrative legacy as so determined by the great weight of authority heretofore cited. From a study of paragraph six of the will, we find the testator suggesting a fund out of which payment might be made and then, thereafter, if there is a balance in that fund, he proceeds to name, in the same paragraph, certain legatees who are to participate in the balance of the fund. Paragraph 32 of the will reveals that if there is not sufficient personal estate to pay the cash bequests to the various beneficiaries then, and in that event, each beneficiary shall receive his proportionate amount of the same. It seems clear that the testator assumed there would be a residue of his estate, and it is admitted there is a residue in the hands of the executor.

We conclude, from an examination of the entire will, that the testator had no intention of treating the three

legatees heretofore designated in this appeal in any other manner than other legatees receiving cash legacies. We believe the testator fully intended to make the three legacies appearing in paragraph six of the will demonstrative legacies.

The appellees cite certain cases from this jurisdiction wherein this court has held certain bequests to be specific bequests, and compares such cases with cases from other courts that hold similar bequests to be demonstrative. In the cited cases there are no provisions in the wills appearing therein analogous to paragraphs six and 32 of the will in the instant case, which paragraphs must be read together with the entire instrument to determine the intent of the testator.

There is some contention made by the appellees that the doctrine of demonstrative legacies has no place in the Nebraska law, for the reason that the Legislature has adopted and declared the common law of England to be in force under certain circumstances, as provided for in section 49-101, R. S. 1943, as follows: "So much of the common law of England as is applicable and not inconsistent with the Constitution of the United States, with the organic law of this state, or with any law passed or to be passed by the Legislature of this state, is adopted and declared to be law within the State of Nebraska."

In support of their contention appellees cite Walton v. Walton, 7 Johns. Ch. N. Y. 258, 11 Am. Dec. 456, and In the Matter of Smallman's Will, 247 N. Y. S. 593, 138 Misc. 889, and other cases, to the effect that a demonstrative legacy is derived from the civil law, and was not known to the common law. The latter case indicates that a demonstrative legacy was a new variety of legacy created about the middle of the nineteenth century, and is critical of such a legacy. Regardless of its origin, we are not in accord that section 49-101, R. S. 1943, sustains the appellees' contention that a demonstrative legacy has no place in the Nebraska law. The following

authorities are applicable under the circumstances.

In Kerner v. McDonald, 60 Neb. 663, 84 N. W. 92, 83 Am. St. Rep. 550, this court said: "Many principles of law have changed with the passing of time, through the gradual change of thought on the part of society and the flux and change of social organization; many others have ceased because the reason which called them into existence has ceased, * * *." See, also, City of Lincoln v. Ricketts, 84 F. 2d 795; Funk v. United States, 290 U. S. 371, 78 L. Ed. 369, 54 S. Ct. 212, 93 A. L. R. 1136.

The courts have the power to modify the common law, adopting such of its principles as are applicable and rejecting such others as are inapplicable. See 11 Am. Jur., Common Law, § 7, p. 162, note 18.

In furtherance of a reason for the soundness of such authorities: "The common law by its own principles adapted itself to varying conditions and modified its own rules so as to serve the ends of justice as prompted by a course of reasoning which was guided by these generally accepted truths. One of its oldest maxims was that where the reason of a rule ceased, the rule also ceased, and it logically followed that when it occurred to the courts that a particular rule had never been founded upon reason, and that no reason existed in support thereof, that rule likewise ceased, and perhaps another sprang up in its place which was based upon reason and justice as then conceived. No rule of the common law could survive the reason on which it was founded. It needed no statute to change it but abrogated itself. People v. Randolph (1855), 2 Park. Crim. Cas. (N. Y.) 174; Metropolitan Life Ins. Co. v. Clark (1911), 145 Wis. 181, 129 N. W. 1065, 37 L. R. A. (N. S.) 717; Beardsley v. City of Hartford (1883), 50 Conn. 542, 47 Am. Rep. 677." Ketelsen v. Stilz, 184 Ind. 702, 111 N. E. 423, L. R. A. 1918D 303, Ann. Cas. 1918A 965.

The adoption of the common law in the most general terms by any state would not admit of an unqualified

application of all its rules without regard to local circumstances and the then present enlightened conception of reason and justice, for the common law is applicable only insofar as it is suited to the genius, spirit, and objects of its intentments affecting the society of the state. See State v. Tautges, Rerat & Welch, 146 Neb. 439, 20 N. W. 2d 232.

We believe the appellees' contention in such respect is without merit. There is no obligation on the part of this court to adhere strictly to the common law, as the foregoing authorities clearly indicate. The statutory law of this state designates the rule in construing or interpreting wills. See section 76-205, R. S. 1943, heretofore referred to, and cases cited on this point.

This court is not in accord with the authorities holding that there is a judicial bias against specific legacies. Where a will discloses that the testator intended to bequeath a specific thing or fund that could be separated out from all the rest of his estate of the same kind so as to individualize it and enable it to be delivered to the legatee as a particular thing or fund, then, in that event, we will determine that the will contains a specific legacy. However, where a will, like the will in the instant case, contains language that shows the intention of the testator to be that the legatees named therein shall receive bequests made to them, either in whole or in part, and that such legacies shall not be lost to them, we will then invoke the doctrine of demonstrative legacies as heretofore determined by the authorities governing the same. This is the first instance of invoking a demonstrative legacy that has come to the direct attention of this court, and there is no sound or logical reason why such a legacy should not prevail when the interpretation of the will and the legacies under our rules of construction warrant the same.

The appellants predicate error upon the court's failure to admit certain offered evidence. In view of our hold-

ing, it becomes unnecessary to discuss this assignment of error.

For the reasons given in this opinion, we reverse the judgment of the district court and remand the case to the district court with directions to enter judgment therein in conformity with this opinion, the district court to certify the final decision and judgment in conformity with this opinion to the county court where such proceedings as may be necessary may be had thereon to carry the final decision and judgment into execution.

REVERSED WITH DIRECTIONS.

MILDRED H. REID, APPELLEE, V. BANKERS LIFE COMPANY OF DES MOINES, IOWA, A CORPORATION, APPELLANT.
28 N. W. 2d 542

Filed July 3, 1947. No. 32240.

1. **Insurance.** In transactions relating to insurance contracts, a party is generally required to exercise the same ordinary care and prudence as in any other business transaction.
2. ———. If an insured makes application for and accepts a life insurance policy which is issued and delivered in accordance therewith, the beneficiary in a suit at law upon the instrument cannot ordinarily have it enforced otherwise than according to its terms.
3. ———. Where such a contract of life insurance was antedated by agreement of the parties, as shown by the application and policy, it is binding upon them as of that date, and the controlling premium payment dates are those recited therein.
4. ———. Although an application for a life insurance policy issued and delivered in accordance therewith may state that the policy shall not take effect until the application is approved by the insurer or until the first premium is paid or until the policy is issued or delivered, the effective date of the policy and the premium payment dates provided for in the policy control in the absence of inconsistency, ambiguity, mistake, fraud, or statutory prohibition, regardless of the date such dependent event occurred.

5. **Case Overruled.** Cilek v. New York Life Ins. Co., 97 Neb. 56, 149 N. W. 49, is distinguished and overruled.

APPEAL from the district court for Gage County: CLOYD B. ELLIS, JUDGE. *Reversed and dismissed.*

Jack, Vette & Elliott, for appellant.

Hubka & Hubka, for appellee.

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

CHAPPELL, J.

This action was instituted by the beneficiary to recover double indemnity under the provisions of a life insurance policy. The defense in substance was that the policy was not in force and effect at the time of death of the insured by reason of failure to pay the last current premium due and payable as provided therein. Plaintiff was awarded a verdict and judgment. Defendant's motion for new trial was overruled, and it appealed to this court. Substantially, insofar as important here, defendant's assignments of error were that the verdict and judgment were contrary to law and not sustained by the evidence. We sustain those assignments.

The insured, born October 9, 1925, was the son of plaintiff and James G. Reid. Concededly, on April 8, 1943, the son's age changed for life insurance purposes. In other words, until that date he could be insured at a lower premium rate, applicable to age 17, but thereafter a higher premium rate, applicable to age 18 was required. On April 7 defendant's agent talked with the son at the home of a neighbor about insurance, and obtained the date of his birth.

Thereafter, on April 15, 1943, the agent called at the farm home of insured, where he lived with his parents. The agent discussed with insured and his father and mother the advisability of obtaining an insurance policy upon the life of the son. Premium rates were discussed. At that time they furnished the agent the information re-

quired and requested as the basis for obtaining such a policy. In their presence, the agent filled out an application for a policy in the amount of $1,000, with double indemnity for accidental death, and endowment at age 60. The application recited that insured was "Age 17 Nearest birthday" and provided for payment of a semi-annual premium of $11.68, concededly applicable to that age.

The application also contained the following provision: "(2) the Company shall incur no liability unless and until, during the lifetime and continued insurability of the proposed insured, a policy issued hereon is manually delivered to the applicant and the entire first premium is paid, *in which event such policy shall be deemed effective as of the date of issue shown on page one thereof*, * * *." (Italics ours) It also stated: "I have given * * * Note due 6/15/43 for $11.68 to cover first premium above specified on the Policy hereby applied for." It also stated: "27. If, in the opinion of the Company, a medical examination by a duly appointed medical examiner is necessary as further evidence of insurability, do you agree to take such examination? Yes."

The father read the application, which admittedly, together with the policy later issued, delivered, and accepted, constituted the entire contract. Thereafter, father and son both signed the application and executed the promissory note above referred to. The following statement appeared in the note: "This note is given in connection with my application for a policy of life insurance issued by the Bankers Life Company, applied for by me on or about the 15th day of Apl. 1943. If such policy is issued, then in the event of my death before the payment of this note, any part thereof unpaid with interest thereon shall be deducted by the said Company from any settlement under the policy and be paid to the payee herein."

On May 24, 1943, the insured took a physical examination required by defendant, and on June 1 the agent in-

formed insured that the policy had been issued. On June 17 the agent called at the home and in the presence of the father and mother delivered the policy to insured, at which time he signed and delivered the following receipt: "Received of BANKERS LIFE COMPANY, of Des Moines, Iowa, my Policy No. B 1329688 which is accepted. (Sign here) Harold Wayne Reid." At the same time the father paid in full the promissory note theretofore given, which was returned to him. Thereafter, the father paid the second semiannual premium on November 6, 1943, a few days prior to expiration of the grace date after October 8, as provided in the policy.

No other premiums were ever paid thereafter, although an attempt was made by the father to do so after the insured's death. Without doubt numerous appropriate premium notices were sent to insured by defendant prior to their due date. Also, defendant sent timely warning notices prior to expiration of the policy grace periods and thereafter sent lapsed letters of direction with forms for reinstatement. In evidence adduced for plaintiff, any knowledge thereof was denied; however, it was admitted that they could have been sent and received, but that if they were, nothing was done about it.

The policy was admittedly delivered in a manila envelope, upon the outside of which appeared, in typed capital letters, the following:

"HAROLD WAYNE REID
BANKERS LIFE COMPANY OF DES MOINES IOWA
#B-1329688 $1000 ENDOWMENT AT AGE 60
(PARTICIPATING) (red type)
ISSUED APRIL 8TH 1943 AGE 17
DOUBLE INDEMNITY FOR ACCIDENTAL DEATH
(red type)

PREMIUM DEPOSITS

ANNUAL	$22.89	
SEMI-ANNUAL	11.68	(red type)
QUARTERLY	5.96	"

The insuring clause of the policy, appearing on the first page thereof, provided in unmistakably bold type:

"Policy No. B 1329688 Amount of Insurance $1,000 Age 17

BANKERS LIFE
COMPANY
DES MOINES, IOWA
Agrees to pay

---------- ONE THOUSAND ---------- Dollars to the Insured ------ HAROLD W. REID ----------, on the 8TH day of APRIL, 1986, upon surrender of this Policy, while in full force, at the Home Office of the Company, if the Insured be then living; or upon receipt by the Company at its Home Office of due proof of the death of the Insured before such date while this Policy is in full force, AGREES TO PAY said amount of insurance to the Beneficiary, MILDRED H. REID, MOTHER, IF LIVING, OTHERWISE TO MARILYN L. REID, SISTER of the Insured, if living; otherwise as hereinafter designated with the power to change Beneficiary being reserved to the Insured.

A MONTHLY INCOME FOR THE INSURED MAY BE PROVIDED UNDER THIS POLICY upon its surrender prior to the Insured's death. (See page 3 hereof.)

Other 'Special Settlement Options' for the Beneficiary and for the Insured are provided on page 3 hereof.

This Policy will participate in the divisible surplus of the Company. (See page 3 for full details.)

This Policy is issued in consideration of the application, a copy of which is attached hereto, and of the payment in advance of $11.68 (which shall maintain the Policy in force from the date of issue set out below to the 8TH day of OCTOBER, 1943), and of the further payment in advance of $11.68, on or before the 8TH day of each OCTOBER AND APRIL hereafter until 43 full years' premiums shall have been paid, except that this Policy may become paid-up at an earlier date by dividends as hereinafter provided, and except as modified

in the agreements, if any, for disability or double indemnity benefits attached hereto, and except that no premium shall be payable for any policy year after that in which death of the Insured occurs.

The provisions set forth by the Company on the following pages are a part of this Contract as fully as if recited over the signatures hereto affixed.

CERTAIN WAR AND AERONAUTIC RISKS ARE NOT ASSUMED UNDER THIS POLICY (red type)

In Witness Whereof, the BANKERS LIFE COMPANY has by its President and Secretary signed, and by its Registrar countersigned, this Policy at its Home Office in the City of Des Moines, Iowa, *this 8TH day of APRIL, 1943, which is the date of issue of this Policy.*" (Italics ours)

Under GENERAL PROVISIONS on page 2, in a paragraph dealing with "Premium Payments" the policy provided: "No payment shall continue the Policy in force beyond the date when the next payment is due, except as herein provided."

On the same page, in a paragraph entitled "Grace" it provided: "Thirty-one days of grace without interest will be allowed in payment of any premium or installment thereof after the first; this Policy to remain in full force during such period."

Also on the same page in a paragraph entitled "Anniversary Date and Policy Year" it provided: "Unless changed by indorsement, anniversary dates and policy years referred to herein shall be computed from the date of issue set forth on page one hereof."

It will be noted that the contract provided not only for payment upon death of the insured but also for endowment at age 60, monthly income, cash values, paid-up cash surrender values, paid-up participating life policy benefits, extended insurance, loans, and dividends, as well as other features, all based upon the number of effective policy years, to be computed from

date of issue thereof, April 8, 1943, as clearly shown in the policy.

While the application provided that defendant should incur no liability unless and until, during the lifetime and continued insurability of the proposed insured, the policy should be manually delivered to the applicant and the entire first premium paid, it also provided that in that event, which happened without dispute, the policy should be effective for all purposes as of the date of issue shown on page 1 thereof, and it must be remembered that in order to have the benefit of "Age 17 Nearest birthday" as recited in the application, thereby giving the insured a lower rate as well as the added contractual benefits heretofore recited, the policy had to be issued as of April 8, 1943.

Plaintiff in the case at bar did not rely upon fraud or mistake. She attached a copy of the contract to her petition and sought recovery thereon as written, simply upon the theory that she had no knowledge that it was issued as of April 8, 1943 or that it provided for payment of premiums on October 8 and April 8 semiannually thereafter. Her theory was that since the policy was not delivered until June 17, 1943, on which date the premium note theretofore given was paid in cash, the policy became effective on that date only, regardless of other provisions in the application and policy. Plaintiff took the position that thereafter the semiannual premium dates were the 17th day of December and the 17th day of June respectively, rather than the 8th day of October and the 8th day of April, as specifically provided in the contract. A fortiori, it was argued that the premium paid November 6, 1943, paid the insurance premiums in full, keeping the contract in full force and effect until June 17, 1944 and 31 days of grace thereafter, permitting recovery thereon for death of insured, which admittedly occurred June 23, 1944, as the result of an accident under circumstances within the double indemnity provisions of the contract if it

were then in force and effect.

On the other hand, defendant argued that the provisions of the application and policy which formed the entire contract were plain, consistent, unambiguous, and binding upon the parties; therefore the semiannual premium dates of 8th day of October and April respectively, as specifically provided in the contract, were controlling, and that failure to pay the premium due and payable on the 8th day of April, 1944, or within 31 days thereafter, lapsed the policy, avoiding any liability thereon. We agree with defendant's contentions.

In Weidenaar v. New York Life Ins. Co., 36 Mont. 592, 94 P. 1, a case of different character but involving an insurance contract, the court said: "In the consideration of this case, many adjudications of the courts, in cases where life insurance companies were parties, have been examined, including all cases cited by the respondent. It seems to me that some courts, of the very highest respectability and learning, have taken judicial notice of matters which they were not by law authorized to judicially know, and have gone so far in holding insurance companies liable as to result in the application of different rules of contract law to them than would have been applied to individuals under the same circumstances. I cannot agree that this may rightfully be done."

In Gillan v. Equitable Life Assurance Society, 143 Neb. 647, 10 N. W. 2d 693, 148 A. L. R. 496, this court said: "The supreme court of the United States in Northern Assurance Co. v. Grand View Bldg. Ass'n, 183 U. S. 308, 22 S. Ct. 133, a case originating in Nebraska, declared that the rule with regard to impeachment of the contents of ordinary contracts was equally applicable to insurance contracts. In relation to this subject in its application to ordinary as well as insurance contracts the court in the opinion quoted with approval from Starkie (9th Am. ed.) 587: 'It is likewise a general and most inflexible rule, that wherever written instruments are appointed, either by the requirement of

law, or by the compact of the parties, to be the repositories and memorials of truth, any other evidence is excluded from being used, either as a substitute for such instruments or to contradict or alter them. This is a matter both of principle and policy; of principle, because such instruments are in their nature and origin entitled to a much higher degree of credit than parol evidence; of policy, because it would be attended with great mischief if those instruments upon which men's rights depended were liable to be impeached by loose collateral evidence.' "

In the same opinion we quoted with approval from Sun Fire Office v. Wich, 6 Colo. App. 103, 39 P. 587 as follows: "There is no reason, in contracts of insurance, that a party should be, by law, relieved from the duty of exercising the same ordinary care and prudence that is required in every other business transaction. It is the duty of every man to read what he signs. His failure to do so will or should not relieve him, or allow him to avoid the contract."

Likewise therein we quoted with approval from Lumber Underwriters v. Rife, 237 U. S. 605, 35 S. Ct. 717, as follows: "Of course if the insured can prove that he made a different contract from that expressed in the writing he may have it reformed in equity. What he cannot do is to take a policy without reading it and then when he comes to sue at law upon the instrument ask to have it enforced otherwise than according to its terms. The court is not at liberty to introduce a short cut to reformation by letting a jury strike out a clause."

The above statements have application to the case at bar. In other words, plaintiff in an action at law sought recovery on the contract of insurance precisely as applied for and accepted, by having it enforced in a manner otherwise than according to its plain terms, which the law will not permit.

On the other hand, the great majority of courts now hold in effect that even though an application may state

that the policy shall not take effect until the application is approved by the insurer, or until the first premium is paid, or until the policy is issued or delivered to the insured, that the effective date of the policy and the premium payment dates as shown and set out in the policy control, in the absence of inconsistency, ambiguity, mistake, fraud, or statutory prohibition, none of which were involved herein, regardless of the date on which such dependent event occurred. Without doubt, such agreements are ordinarily valid and enforceable only as written. The cases so holding are far too numerous to cite or discuss at length herein, but they will be found in the annotations to 6 A. L. R. 774, 32 A. L. R. 1253, 80 A. L. R. 957, and 111 A. L. R. 1420.

Concededly, a few states have adopted a minority rule, holding otherwise under varying conditions and application or policy provisions, which we need not here discuss. However, it will be observed that most of such cases are of ancient origin and the conclusions therein were generally based on contracts of different quality or character, which did not provide the many specific benefits, the values of which were dependent upon policy years commencing at definite times, which modern insurance policies, including the one at bar, now contain. Such provisions now form a large part of the policy values received by the insured as consideration for payment of the premiums as provided in the contract. It will be noted also that in some cases courts formerly adopting the minority rule have abandoned it by reversing and overruling their former decisions, thereby joining the majority.

Varying reasons are given by courts adopting the majority rule, chief of which is that effective dates of policies and premium due dates should be definitely fixed by binding written contracts rather than determinable after loss at the caprice of parol testimony of doubtful veracity, thereby permitting the avoidance or destruction of plain contractual provisions and undermin-

ing their actuarial foundations, the fundamental basis of all insurance. When so fixed in writing the result is a definite contract, easily understood and entirely just to the parties. It seems almost trite to say that a contract for insurance, antedated by agreement of the parties, as shown by the application and policy in the case at bar, is binding upon them and the premium payment dates should be those inserted in the contract. Whc can truthfully say that injustice could result from the construction of such a valid written contract in accordance with its terms?

Among other authorities, plaintiff relied upon Cilek v. New York Life Ins. Co., 97 Neb. 56, 149 N. W. 49, decided in 1914. While that case did not pass upon the precise question involved in the case at bar, it appears to have followed the minority rule. In that case, the application was signed on June 13, 1899. It provided in substance that the company would incur no liability under the application until it had been received and approved by the company at the home office and the premium had actually been paid to and accepted by the company or its authorized agent, during the lifetime and good health of the applicant. It was received and approved by the company on June 23 and delivered June 26.

The opinion does not disclose whether or not a specific date for payment of recurring premiums other than the first was provided for in the policy. Apparently for that reason the case is summarized in 6 A. L. R. 780 as one where: "No date was specified for the payment of the premiums." However, a reading of the record therein discloses that the contract was a 20-year endowment policy with participation in profits at expiration of that period. It contained extended insurance and cash loan provisions, all dependent on policy years beginning June 13, 1899, the date of the policy. The policy provided: "THIS AGREEMENT is made in consideration of the sum of Two hundred and ninety Dollars and seventy Cents, the receipt of which is hereby acknowledged, and

of the payment of a like sum on the thirteenth day of June in every year thereafter during the continuance of this Policy until Twenty full years' premiums shall have been paid."

It will be noted in that case the insured paid premiums as provided therein up to and including June 1905. He died July 23, 1906, without paying the premium due in June 1906. Nevertheless, this court paid no heed to the plain provisions of the contract and the fact that the policy had been in full force and effect as written for a period of more than seven years, thereby accumulating cash and loan values as and from June 13, 1899, which insured himself had already exhausted, but followed the minority rule and held that the premium date was June 23, the date of approval of the application, and permitted a recovery upon that premise. Of course, the case is distinguishable from the one at bar in view of the difference between the provisions in the application and policy, but in any event we have been unable to find any precedent logically supporting the conclusions reached therein.

In that opinion the court relied chiefly upon Stramback v. Fidelity Mut. Life Ins. Co., 94 Minn. 281, 102 N. W. 731, decided in 1905, wherein the application was made August 25, 1902, but the policy was issued September 8 and delivered September 24. The application was similar to that in the Cilek case. However, the policy provided for the payment of subsequent premiums semi-annually on the 8th day of September and March each year, the policy to remain in force only for the period actually paid. As stated in the opinion: "It is a curious fact that the application and the policy are silent as to the date from which the policy shall commence to run." It differs in that respect from the case at bar. The second premium payment was made, but the one due the next September 8 was not. The insured died September 11, 1903. The trial court held that the policy forfeited on September 8, 1903, for failure to pay the premium when due, but the opinion, after citing and

quoting from McMaster v. New York Life Ins. Co., 183 U. S. 25, 46 L. Ed. 64, 22 S. Ct. 10, also relied upon by this court in the Cilek case, reversed the case and ordered judgment for plaintiff. It appears, however, that there was a dissent primarily upon the ground that the intention of the parties as expressed by the written contract, should have prevailed.

In that connection it is interesting to note that in Juster v. John Hancock Mut. Life Ins. Co., 194 Minn. 382, 260 N. W. 493, decided in 1935 under comparable circumstances, the court approved the reasoning of the dissent in the Stramback case, and not only followed the majority rule heretofore set forth, but expressly held for naught and overruled Stramback v. Fidelity Mut. Life Ins. Co., *supra.*

McMaster v. New York Life Ins. Co., *supra,* cited and relied upon by the court in the Cilek case, was clearly distinguishable therefrom, as it is from the case at bar. A reading of the opinion will disclose that the court's conclusions therein were based primarily upon the alleged representations of defendant's agent to the insured, which were binding upon it.

We therefore conclude that the opinion in Cilek v. New York Life Ins. Co., *supra,* no longer reflects the law in this jurisdiction and insofar as it is in conflict with this opinion, it is overruled.

For the reasons heretofore stated, the verdict and judgment in the case at bar were contrary to law and not sustained by competent evidence. Therefore, defendant having appropriately moved for a directed verdict, which was overruled, the judgment should be and hereby is reversed and the cause dismissed.

REVERSED AND DISMISSED.

EDWIN G. SEVERIN, PLAINTIFF IN ERROR, V. STATE OF NEBRASKA, DEFENDANT IN ERROR.
28 N. W. 2d 326

Filed July 3, 1947. No. 32217.

New Trial. Whether a new trial should be granted under the provisions of section 29-2103, R. S. 1943, upon the ground of newly discovered evidence depends upon the facts and circumstances of each case.

ERROR to the district court for Pierce County: FAY H. POLLOCK, JUDGE. *Affirmed.*

Hugh J. Boyle, for plaintiff in error.

Walter R. Johnson, Attorney General, *C. S. Beck,* and *Carl H. Peterson,* for defendant in error.

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

WENKE, J.

Plaintiff in error, Edwin G. Severin, who will hereinafter be referred to as the defendant, was convicted of the crime of embezzlement. He appealed therefrom. His conviction was affirmed. See Severin v. State, 146 Neb. 506, 20 N. W. 2d 377.

Thereafter defendant filed a motion for a new trial on the ground of newly discovered evidence. The trial court, after a hearing, overruled the motion and defendant, by petition in error, has brought the matter here for review.

The question presented is, did the trial court err in overruling defendant's motion for a new trial on the ground of newly discovered evidence?

Section 29-2103, R. S. 1943, provides in part: "In any criminal case where it shall be made to appear upon the motion of the defendant for a new trial, supported by affidavits, depositions, or oral testimony, that the defendant has discovered new evidence material to his defense which he could not with reasonable diligence have discovered and produced during the time within

which the verdict upon which he was sentenced was rendered, the district court may set aside such sentence and grant a new trial; * * * ."

Whether a new trial should be granted under the provisions of section 29-2103, R. S. 1943, upon the ground of newly discovered evidence depends upon the facts and circumstances of each case.

In the opinion affirming the defendant's conviction we said: "Defendant never paid the money back to Brokaw. The theory of the defense is that the only relationship existing between the defendant and Brokaw was that of seller and purchaser and that defendant was at no time the agent of Brokaw."

The record discloses that at the trial the defendant testified as follows: "Q Then when was the next time you saw Mr. Brokaw and talked to him about the Rutan ranch deal? A February 9. (1943) Q And where was this? A At his farm. Q And what was the substance of the transaction or conversation that took place then? A I wanted to tell him about the suit I had started at Bassett, I stopped to see him on the 2nd, when I came back after filing the suit but he wasn't at home so I drove back on the 9th. Q And you talked to him about that? A Yes, sir. Q At that time did you tell Mr. Brokaw that the deal could not go through? A No, I didn't. I told him I had filed an action for specific performance and was bound to deliver that ranch. Q And you did not at that time also state that as soon as you could sell some property you would give him the $1000 back? A No, sir. I told him if I didn't win that suit and could not get the ranch, I said I would make a settlement with him after we had completed that suit. * * * Q Have you ever had any other conversations with Mr. Brokaw concerning this deal? A I think not. Q That is the last time you saw him about this deal to talk things over with him? A Yes, sir."

In his motion for new trial defendant sets forth that about March 11, 1946, which was after his trial, con-

viction, and our affirmance thereof, he came into possession of the following receipt: "2/9/'43 Rec'd of E. G. Severin $1000.00 earnest money that was paid on Rutan ranch Clarence Brokaw." He further alleges therein that he saw Clarence Brokaw, the complaining witness, sign the receipt at the time he paid him the $1,000 in currency.

At the hearing on his motion for a new trial the defendant testified that on February 9, 1943, at Foster, Nebraska, he paid Brokaw the sum of $1,000 in currency and obtained his signature to the receipt but had misplaced it and was not able to find it until around February 1, 1946. He explained the circumstances under which it was then discovered. He also produced a handwriting expert who testified that in his opinion the signature on the receipt was that of Clarence Brokaw and gave the reasons for his opinion.

At this hearing Clarence Brokaw testified that defendant had not paid him the $1,000 and that the signature on the receipt was not his signature. The defendant in error also produced a handwriting expert who was of the opinion that the signature on the receipt was not that of Clarence Brokaw and gave the reasons for his opinion.

Naturally whether or not defendant had paid to Clarence Brokaw the sum of $1,000 which he had received from him was peculiarly within his knowledge and certainly was known to him at the time of the trial. However, he did testify he did not know the whereabouts of the receipt at that time. He gave as his reason why he did not testify thereto at the time of the trial as follows: "Q Now was that discussed about testifying about that matter when we tried the case in this court? A Yes. Q Why wasn't that brought into the trial? A For this reason: When we first started discussing it was shortly after the arrest. If you remember, I told you at that time there was no doubt but what I could find it, but I felt that the time to produce that was when

we found it. I think the last discussion was at the jury trial when we were in the hotel at Norfolk and you told me that you had your own opinion and asked me what I thought of it. I said 'it looks to me going as far as we have we should try to win cn the merits of the case because if I should say now, without having the evidence here, that I had paid it and had a receipt and had lost it it seemed to me a jury would assume that I was just lying about it and grasping at straws and would possibly call me a liar for everything else I had said.' Q That was discussed? A Yes sir. And you agreed with me. So we decided not to mention it."

The defense now offered by the defendant was not discovered since the trial. It was known to him, on his own showing, from the beginning. He chose to withhold it for reasons of his own. We do not attempt to determine how much of his present story is true for even if entirely true the court could not help him as it is not new evidence within the meaning of the statute.

A defendant charged with a crime may not, for reasons of his own, experiment with one defense and when that fails him, invoke the aid of the law to experiment with another which was fully known to him at the time. Such is clearly not the purpose of the statute.

For the reasons stated the order of the trial court overruling the motion and denying the defendant his new trial is affirmed.

AFFIRMED.

CLARENCE A. SIMON ET AL., APPELLANTS, V. KATHRYN SIMON ET AL., APPELLEES.
28 N. W. 2d 393

Filed July 3, 1947. No. 32221.

1. **Divorce: Process.** Section 42-305, R. S. 1943, is a special statute relating to process in divorce actions and is controlling therein.

2. ———: ———. Service by leaving a copy of the summons at the usual place of residence of a defendant is sufficient, within the meaning and intent of section 42-305, R. S. 1943, to give the court jurisdiction of the party served.

APPEAL from the district court for Richardson County: VIRGIL FALLOON, JUDGE. *Affirmed.*

Lee Kelligar and *J. L. Gagnon,* for appellants.

Gerald M. Mullen, Jean M. Johnson, and *John C. Mullen,* for appellees.

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

WENKE, J.

Plaintiffs appeal from an order of the district court for Richardson County sustaining a demurrer to their second amended petition and dismissing their action. The parties will be herein referred to as they appeared in the lower court.

Clarence A. Simon, administrator of the estate of Leonard E. Simon, deceased, who died intestate on May 16, 1944, and Lucille Alexander and Mary Adele Ruch, daughters of said deceased and heirs at law, brought this action against Kathryn Simon, who was formerly Kathryn De Lair, and Charles De Lair. The purpose of the original action, which was filed on June 16, 1944, was to have the court cancel, set aside, and hold for naught the decree of divorce entered by the district court for Richardson County in the case of Kathryn De Lair v. Charles De Lair and to bar Kathryn Simon from claiming any interest in the estate of Leonard E. Simon, deceased.

The basis for the action is the claim that the defendant Kathryn Simon did not have legal capacity to enter into the contract of marriage with Leonard E. Simon, now deceased, on April 6, 1944, for the reason that she was then the wife of the defendant Charles De Lair, whom she had married on September 4, 1931. This latter

claim is based on the theory that the court did not have jurisdiction of the person of Charles De Lair in the divorce action brought in the district court for Richardson County on July 25, 1934, by Kathryn De Lair, in which the decree of divorce was entered on September 12, 1934, because the service made on Charles De Lair was not according to the requirements of section 42-305, R. S. 1943. The original return on the summons shows that it was served on Charles De Lair "by * * * leaving at his usual place of residence, a true and certified copy" thereof.

After our opinion and mandate in the case of De Lair v. De Lair, 146 Neb. 771, 21 N. W. 2d 498, and the trial court's order, entered pursuant thereto, amending the return to show that service was had on Charles De Lair in person, the plaintiffs filed their second amended petition on August 7, 1946. Therein they alleged and prayed the same as hereinbefore set forth and in addition thereto as follows: That the defendants, without notice to the plaintiffs and by means of fraud and perjury, induced this and the trial court to order the return to be amended to show that service was had on the defendant Charles De Lair by delivering a copy of the summons to him in person and praying, because of such fraud and perjury being used to obtain it, that the trial court's order of May 29, 1946, ordering the return to be so amended, be canceled, set aside, and held for naught insofar as it affects these plaintiffs.

Section 42-305, R. S. 1943, is a special statute relating to process in divorce actions and is controlling therein. It is in part as follows: "No person shall be entitled to a divorce unless the defendant shall have been personally served with process if within this state, or with personal notice duly approved and appearing of record, if out of this state, or unless the defendant shall have entered an appearance in the case; but if it shall appear to the satisfaction of the court by the affidavit of the petitioner or of his or her attorney that the petitioner

does not know the address or residence of the defendant, and has not been able to ascertain either, after reasonable and due inquiry and search continued for three months after the filing of the petition, the court or judge in vacation shall authorize notice by publication of the pendency of the suit for divorce, to be given in a manner as provided in other cases under the code of civil procedure; * * * provided, further, personal service out of the state as herein provided for shall not be had without the plaintiff or his or her attorney filing an affidavit showing that the defendant is a nonresident of this state, and that personal service cannot be had on the defendant in this state."

It is, of course, necessary in order for a court to render a valid decree against a defendant in a divorce action, that it have jurisdiction of his person in a manner provided by this statute and, in the absence thereof, such decree is void and subject to attack.

Therefore, at the very threshold of this case, we are met with the question of whether service by leaving a copy of the summons at the usual place of residence of the defendant is sufficient?

Most courts hold that where, in judicial procedure or official act, a notice or summons is required to be served "in person" or "personally" that such notice or summons must be handed or delivered to the party individually. In Gillian v. McDowall, 66 Neb. 814, 92 N. W. 991, under section 148, Code of Civil Procedure, R. S. 1866, which provides, " * * * and a copy thereof must be served personally upon the defendant," we held: "Unless a defendant sued by the initial letters of his name under section 148, Code of Civil Procedure, is served personally or makes an appearance in the case, the judgment or decree rendered therein is not binding upon him."

Likewise courts hold that where, in judicial procedure or official act, a notice or summons is required to be personally served, as the statute here requires, that such notice or summons must be handed or delivered

to the party individually. As stated in Brooks v. Orchard Land Co., 21 Idaho 212, 121 P. 101: "We do not think that defendant is 'personally served' within the meaning of said section of the statute where the process is served by leaving a copy thereof at the usual place of abode of the defendant."

However, other courts have come to a contrary view as stated in Dunkle v. Elston, 71 Ind. 585: " * * * the phrase 'personally served,' as used in this act, has reference to personal service as distinguished from publication, and in this sense service by copy left at the last and usual place of residence is personal service, * * * ."

The courts that extend this language to include what is referred to as "substituted service" often do so for the purpose of making the act sufficiently comprehensive to avoid situations whereby a defendant, in an action covered by the act, could avoid service.

In Atchison County v. Challiss, 65 Kan. 179, 69 P. 173, it was held: "By the language, 'thereupon a summons shall be issued as in other cases, and served upon the defendants personally, if residents of the state,' employed in section 1, chapter 392, Laws of 1901 (Gen. Stat. 1901, § 7718), reference is had to personal service upon resident defendants as contradistinguished from constructive service by publication against nonresident defendants. Service by leaving a copy of the summons at the usual place of residence of a defendant is personal service, within the meaning and intent of the act, and valid." Therein the court went on to say: "It clearly was not the intention of the legislature by the language employed to preclude from the operation of the act defendant citizens and residents of the state, temporarily absent therefrom. Yet such would be its effect if it should be held that the personal service required is service upon the defendant in person, for such personal service, in the nature of things, could not be made outside the state, nor could service by publication be obtained, because such constructive service is only pro-

vided in case of nonresidents of the state."

As stated in Westfall v. Farwell, 13 Wis. 563, which involved personal service of a notice to an endorser:

"It must also be conceded that the phrase 'personal service' is one frequently occurring in the law, and that in its strictest sense, it implies an actual delivery of the notice to be served to the person for whom it is intended. But conceding all this, we still think it was not used in that sense in the statute.

"In the first place, it would be a very remarkable provision if it was so used. It would be impossible to notify any indorser who was away from home at the time service was required. Any indorser desiring to discharge himself would only have to leave at about the time the notes fell due. It cannot be that the legislature intended to produce this result."

We most naturally assume that the Legislature intended to enact a law that would completely cover every situation and will give it that construction, unless the language used prevents us from so doing.

It will be noted that in order to obtain the right to have personal service out of the state the plaintiff or his attorney must file an affidavit showing the defendant is a nonresident of the state and that personal service cannot be had on him in the state. Likewise, if service by publication is desired, an affidavit must be filed and the court satisfied that the petitioner does not know the address or residence of the defendant and has not been able to ascertain either.

Thus, if a construction such as plaintiffs here contend for, that is, that the defendant must be served in person, is to be given to the act then a resident defendant, if he does not choose to enter his appearance, can avoid process by either absenting himself from the state or secreting himself within, and there would be no method available to bring him into court.

However, it will be observed that service, other than that the defendant be personally served, if within this

state, or enters his appearance in the case, depends upon his address or residence and not his whereabouts, thus clearly indicating that if his residence were known that service could be made there which would be adequate. We think such a construction gives the act the purpose for which it was enacted, that is, to provide for process in all divorce actions, and will carry out the intention of the Legislature.

The case of Mudge v. Mudge, 111 Neb. 403, 196 N. W. 706, was an action to obtain separate maintenance for the wife and minor daughter. Therein service was made by leaving a copy of the summons at the usual place of residence of the defendant and the question of the sufficiency of the service was discussed and it was held: "Considering the entire record, we are of the view that at the time of the service of the summons the usual place of residence of the defendant was the apartment occupied by him in the St. Regis apartment house, and that the manner of the service of the summons conferred jurisdiction on the court." However, the question here raised was not presented by the parties in their briefs nor discussed in the opinion and the case is therefore not authority on the question.

In view of our holding herein the other questions raised are not material and will not be discussed.

For reasons already stated we find the judgment of the lower court to be correct and that it should be affirmed.

AFFIRMED.

WILLIAM L. ALLEN, APPELLANT, V. FRANCIS O. CLARK ET AL., APPELLEES.

28 N. W. 2d 439

Filed July 11, 1947. No. 32192.

1. **Automobiles: Negligence.** It is the duty of an automobile driver, in driving his car, to keep such a lookout ahead that he will see an obstruction or a vehicle as soon as it is illuminated by his lights, and it is his duty to have his car under such control, under the driving conditions then existing, that he can stop it in time to avoid a collision with an object in the area lighted by his lights.
2. **Trial.** It is reversible error for the court to include, in its instructions to the jury, allegations of fact found in the pleadings but which have not been supported by any evidence.
3. **Negligence.** Where contributory negligence is pleaded as a defense, but there is no evidence to support such defense, it is prejudicial error to submit such issue to the jury.

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

Seymour L. Smith, E. D. O'Sullivan, Fitzgerald & Smith, for appellant.

Kennedy, Holland, DeLacy & Svoboda, for appellees.

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

PAINE, J.

The plaintiff brought suit for personal injuries against Francis O. Clark and the Blue Star Produce Company, a corporation. At the close of the plaintiff's evidence, counsel for the Blue Star Produce Company moved for a directed verdict. This motion was sustained, and the trial proceeded against Francis O. Clark as sole defendant. The jury returned a verdict for the defendant, and the plaintiff appealed from the judgment entered thereon.

The petition charged that the plaintiff, riding in the back seat of a car, was the innocent victim of an automobile collision, and that the resultant injuries were

painful, serious, and permanent; that the defendant, Clark, negligently and carelessly operated his car at the rate of 50 miles an hour, in violation of an Omaha ordinance, and regardless of the icy condition of the road; and that the defendant failed to have his car under control, failed to keep a proper lookout for other cars, and was unable to stop his car before striking automobiles in his pathway. The petition set out the injuries suffered in the greatest detail, with hospital and medical charges.

The defendant, Clark, in his answer charged that the driver of the car in which the plaintiff, Allen, was riding followed too closely another car ahead of it; that upon the stalling of a truck ahead carelessly and negligently drove his car across the center of Thirteenth Street and stopped it there; and that the plaintiff and his driver, whose negligence is attributable to him, were guilty of negligence in so operating the car and losing control. "That after plaintiff's car became stalled, plaintiff carelessly and negligently remained therein, although he had ample time to get out of said car." The defendant denied that he was guilty of any negligence whatever.

Thereafter the plaintiff was given leave to amend his petition by setting out certain ordinances of the City of Omaha. The reply was a general denial.

A very brief statement of the facts will assist in understanding the legal questions involved. Both plaintiff and defendant were working at the bomber plant of the Glenn L. Martin Company, and each was on his way there to begin work at eight o'clock, and the accident occurred at about 7:30 a. m. A large number of cars were going south on Thirteenth Street, Omaha, where the accident occurred.

Also on Thirteenth Street at this same time, going south slowly, there was a very large truck of the Blue Star Produce Company, reaching several feet over into the passing lane. This street at the place of the accident is 54 feet wide between curbs, with a seven-foot

parking place on each side, and the remainder of the street divided into four ten-foot lanes, the outside lane on each side being the driving lane, the inside or center lane on each side being the passing lane. As the truck went up the long hill at this place, it changed gears and went slower and slower, holding up the traffic, and at the time of the accident it was barely moving; other witnesses even testified that it had stopped entirely.

Millard V. Robbins, Meteorologist in charge of the local office of the United States Weather Bureau, testified as to the weather on this morning of January 8, 1945. At 7:30 the temperature was 33 degrees and dropping fast, for at 9:30 it was only 16. A light snowfall began at 6:38 and continued until 11:20 a. m. The sky was cloudy. There was a moderate fog at 8 o'clock. From 7:00 to 8:00 there was a high wind of 47 miles an hour.

It is shown that at the time of the accident, which was at about 7:30 a. m., it was still dark, being early in January, and all the cars were running with their lights on, the only exception being that some of the witnesses testified that they saw no light on the rear of the truck which was blocking the traffic. While it may have been snowing some at the time of the accident, the storm increased rapidly in intensity as shown by the falling temperature and the heavy snowstorm. The existing conditions are portrayed by exhibit No. 13, being a photograph taken while the Koessel car was being removed by a wrecker.

The hill at this point was about 1,400 feet long, and the accident happened a little more than half way to the top of the hill, at about the place where R Street would cross Thirteenth Street if it extended clear through.

The plaintiff, William L. Allen, was riding on the left-hand side of the rear seat of the car of W. A. Koessel, with two others in the rear seat and two in the front seat. These five men in this car were all employed at

the bomber plant. For about a year they had daily made the trip under an agreement by which each of the men drove his own car for one week, paying all of the expenses for that week, and carried the other four. No money changed hands. This happened to be Mr. Koessel's week. Under these facts, there was no such joint enterprise between them by which any negligence of Koessel could be imputed to the plaintiff. See Hofrichter v. Kiewit-Condon-Cunningham, 147 Neb. 224, 22 N. W. 2d 703.

Immediately before the accident the Koessel car was perhaps the second car behind the truck. The car ahead of the Koessel car turned to the left to go into the passing lane to go around the truck, and found the street icy toward the center, and it wobbled, for the heavy traffic had worn down the ice in the southbound driving lane so it was not slippery. To avoid hitting this car ahead of him, Koessel drove his car toward the southeast across the center of the road and into the driving lane for northbound traffic, of which there was little at the time of the accident, nearly all the traffic going south. This left only seven or eight feet between the front of his car and the curb on the east side of the road, and there Koessel stopped his car. One or two cars northbound went in front of him, one going over the curb to do it.

The testimony of plaintiff Allen was that he looked north, after the Koessel car had gone out of the lane of traffic on its side of the road and stopped, and saw defendant's car approaching when it was a block and a half away. He said that at that time it was out about twelve feet from the east curb, and it struck the Koessel car in the middle of the left side, jamming in the doors and leaving it facing south.

The plaintiff, Allen, was knocked unconscious, and recalled nothing until some time the next day in the Doctors Hospital, where he remained for 25 days, with both pelvic bones broken and many other injuries; so

that when he finally went back to work March 19, 1945, he had to quit work again August 1, 1945, because of ill health. He still suffered, at the time of the trial, from dizzy spells and severe headaches, pain in his back, and could not lift his left arm very far.

The testimony of Waldamar A. Koessel is that he is 44 years old, and was working as a disposal supervisor at the bomber plant. He was the owner and driver of the Nash car in which the plaintiff was riding at the time of the accident. When he left home that morning it was raining, but got colder right along. He was in the driving lane, and five or six cars ahead swung out into the passing lane to go ahead of the truck, which was about three feet over in the passing lane. When the car immediately ahead of him started to swing out, Koessel swung out farther to the east to give that car clearance, and his car finally stopped about eight or ten feet from the east curb, at an angle of 45 degrees, headed southeast. While standing there, the Clark car hit him a terrific crash and shoved his car forward about 18 to 20 feet and straightened it so that it was facing due south when it came to rest. Koessel was thrown into the windshield, and bounced back and could not open the doors, as the door was pushed in five or six inches on that side, but he helped get Allen out of his car.

Koessel testified that he first observed the Clark car coming when it was about two blocks away, and it looked as if he was making for the hole in front of him, but it hit his car, then hit the truck at about the left rear wheel.

On cross-examination he testified that on the side where there was no travel it was icy and on the other side it was slushy, the west side was pretty well "chewed up" all the way across from traffic. The moment witness turned to the left he found himself on ice, and instead of trying to brake too much to throw his car into a

spin he went across to the left side and stopped the car. The truck moved on slowly five or six feet.

Joseph W. Bachman, one of the passengers in the Koessel car, testified that after the car stopped three or four cars northbound were slowed down by the Koessel car, but a fourth one jumped the curb and got around them. He testified that the plaintiff, Allen, first called his attention to the defendant's car coming up on the wrong side of the road, astraddle the driving and passing lanes for northbound traffic, when it was 600 or 700 feet away. He watched it until it struck them about five seconds later. He estimated its speed at 50 miles an hour.

Another passenger in the Koessel car was Henry A. Franz. He also had his attention called to the Clark car when it was just starting up the hill about two blocks away. He estimated its speed at 45 miles an hour, and said it did not slacken its speed until it crashed into the Koessel car.

The defendant, Francis O. Clark, testified that he was 28 years old and driving his own car, with a man in the front seat and three women in the back seat, all of whom regularly made the trip with him. He said that it was misting and snowing a bit; and that he was driving in the southbound passing lane when he first saw the Koessel car standing sideways, and also the truck, when he was within 70 to 75 feet of them. He at once tried to stop, put on the brakes, but it was icy and "made a sled" out of the car, so he pumped his brakes up and down, trying to make the wheels hold, and ran into the Koessel car. Almost at that instant another car hit him in the rear and pushed him under the rear end of the truck, which had stopped, mashing the hood and radiator of his car.

The defendant, Clark, appears to have given a deposition after the accident in which he testified it was storming. He also made answer in the deposition that he first saw the truck just as he started up the hill, and that

he saw the Koessel car at the same time, but at the trial he insisted that he had gone up the hill a ways and first saw the Koessel car when it was only about 70 to 75 feet ahead of him. It appears from the evidence that there was ice, sufficient to skid the cars, only in the center of this highway, where it had not been worn off by heavy traffic.

On cross-examination defendant Clark testified that when he first saw the truck and the Koessel car he was going between 30 and 35 miles an hour. He had hydraulic brakes on his car. He put his pedal down about half way to the floorboards. "At first I shoved them down and left it there, but when it just made a sled out of my car, so then I started to pumping it so as to jar the car and make it break through the ice."

Witness Hightower was in the front seat with defendant Clark. He said he first saw the Koessel car and the truck when they were about 50 or 60 feet away. The truck was aligned north and south; the Koessel car was facing straight east. Clark applied the brakes but they did not seem to take effect, just made a sled out of the car, and it started sliding and slid right into the Koessel car, shoving it to the southeast, then it slid sideways. "It happened so quick, but I know we finally got to the truck." A part of the rear of the truck was through the windshield.

With this very brief summary of the nearly 700 pages of evidence as found in the bill of exceptions, we will examine the plaintiff's sixteen assignments of error, fourteen of which relate to the giving of, or refusing to give, certain instructions to the jury.

In his first assignment the plaintiff contends that it was prejudicial error for the court to give instruction No. 8, reading as follows: "You are instructed that it is the duty of an automobile driver in driving his car to keep such a look out ahead that he will see an obstruction or a vehicle as soon as it is illuminated by his lights, and it is his duty to have his car under such

control that he can stop it in time to avoid a collision with an object in the area lighted by his lights, under normal driving conditions.

This court said in Roth v. Blomquist, 117 Neb. 444, 220 N. W. 572, 58 A. L. R. 1473: "As a general rule it is negligence as a matter of law for a motorist to drive an automobile so fast on a highway at night that he cannot stop in time to avoid a collision with an object within the area lighted by his lamps." See, also, Redwelski v. Omaha & C. B. Street Ry. Co., 137 Neb. 681, 290 N. W. 904; Fischer v. Megan, 138 Neb. 420, 293 N. W. 287; Nichols v. Havlat, 140 Neb. 723, 1 N. W. 2d 829; Anderson v. Robbins Incubator Co., 143 Neb. 40, 8 N. W. 2d 446. And in Most v. Cedar County, 126 Neb. 54, 252 N. W. 465, we added: "* * * and the rule applies to driving in the daytime where vision is shortened by storms or other physical conditions."

Now, in the case at bar, there was ice in the highway, where defendant was driving too fast to avoid the collision, but the existence of this ice might well have been anticipated by an ordinarily careful driver, for in a case in which smoke made it impossible to see another car, this court said: "In such case, the smoke is a condition which the jury should consider in connection with the other evidence in determining the question of negligence." Anderson v. Byrd, 133 Neb. 483, 275 N. W. 825.

In our opinion, the addition of the last four words, "under normal driving conditions," in instruction No. 8 as given by the court, could not but confuse the jury. The evidence disclosed rain, then snow, rapidly falling temperature, strong wind, and an icy pavement. The jury would realize that these conditions on the morning in question made for anything but "normal driving conditions," and could draw the conclusion that these words were carefully placed there for some purpose by the court, and that in a measure it excused the de-

fendant for his inability to avoid a collision because of his negligence.

The correct applicable rule is that it is the duty of an automobile driver, in driving his car, to keep such a lookout ahead that he will see an obstruction or a vehicle as soon as it is illuminated by his lights, and it is his duty to have his car under such control, under the driving conditions then existing, that he can stop it in time to avoid a collision with an object in the area lighted by his lights. See Anderson v. Byrd, *supra;* Fischer v. Megan, *supra;* Fairman v. Cook, 142 Neb. 893, 8 N. W. 2d 315.

The plaintiff assigns error in including in instruction No. 2, giving a synopsis of the pleadings, the following sentence: "3. That after plaintiff's car became stalled, plaintiff carelessly and negligently remained therein, although he had ample time to get out of said car."

This court has held that it is error, in setting out the summary of the pleadings in an abridged form, to set out from the answer any statement that is not supported by the evidence. In this case there was no evidence adduced showing any negligence on the part of the plaintiff, and therefore there was no such issue in the evidence, and it was error to make this statement to the jury.

This court has very recently said: "The proper method of presenting a case to the jury is a clear and concise statement by the court of those issues which find support in the evidence and not by substantially copying the pleadings of the parties and if, by doing the latter, it results in prejudice to the complaining party it is a sufficient ground for reversal." Franks v. Jirdon, 146 Neb. 585, 20 N. W. 2d 597.

"This court stated in Hutchinson v. Western Bridge & Construction Co., 97 Neb. 439, 150 N. W. 193, that it was reversible error to include in the instructions of the court allegations of fact found in the petition but

which had not been supported by any evidence." Merritt v. Ash Grove Lime & Portland Cement Co., 136 Neb. 52, 285 N. W. 97.

It is next charged that the court erred in giving instruction No. 11 to the jury, setting out the comparative negligence rule. This court finds that there was no evidence showing any negligence on the part of the plaintiff.

This court has repeatedly said that, where contributory negligence is pleaded as a defense, but there is no evidence to support such defense, it is prejudicial error to submit such issue to the jury. See Koehn v. City of Hastings, 114 Neb. 106, 206 N. W. 19; Andersen v. Omaha & C. B. Street Ry. Co., 116 Neb. 487, 218 N. W. 135.

Other assignments of error might be discussed at length, but we have reached the conclusion that the several prejudicial errors in the instructions heretofore discussed require a reversal of the judgment.

REVERSED AND REMANDED.

CHAPPELL, J., concurs in the result.

HARRY GILLILAND ET AL., APPELLEES, V. THE COUNTY OF FRONTIER ET AL., APPELLEES, ELMO L. NEIMAN ET AL., APPELLANTS.

28 N. W. 2d 448

Filed July 11, 1947. No. 32229.

Highways. To establish a highway by prescription there must be a user by the general public under a claim of right, and which is adverse to the occupancy of the owner of the land, of some particular or defined way or track, uninterruptedly, without substantial change, for a period of time necessary to bar an action to recover the land.

APPEAL from the district court for Frontier County: VICTOR WESTERMARK, JUDGE. *Affirmed.*

Morrison & Hanson, for appellants.

Colfer, Russell & Colfer and *F. J. Schroeder,* for appellees.

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

SIMMONS, C. J.

Plaintiff Harry Gilliland is the owner and plaintiffs are the occupiers of 240 acres in Frontier County. There are two groups of defendants: The county and the county commissioners, and defendants Neiman. Defendant Elmo L. Neiman is the owner and defendants Neiman are the occupiers of 640 acres of land lying to the south and east of plaintiffs' land. The suit involves the question of a roadway across plaintiffs' land. Plaintiffs sought a decree enjoining the defendants Neiman from trespassing upon their lands and enjoining the defendant county from going upon the lands for the purpose of locating or constructing a public road thereon, and from interfering with plaintiffs' possession of the land.

Defendants Neiman answered alleging that the road involved was a public highway, setting out establishment by adverse user and by proceedings of the county commissioners had in 1908. They further alleged that the road had not been vacated and that plaintiffs attempted to close it in September 1945. Defendants sought a denial of plaintiffs' petition and equitable relief.

Defendant county answered making certain admissions and denying generally.

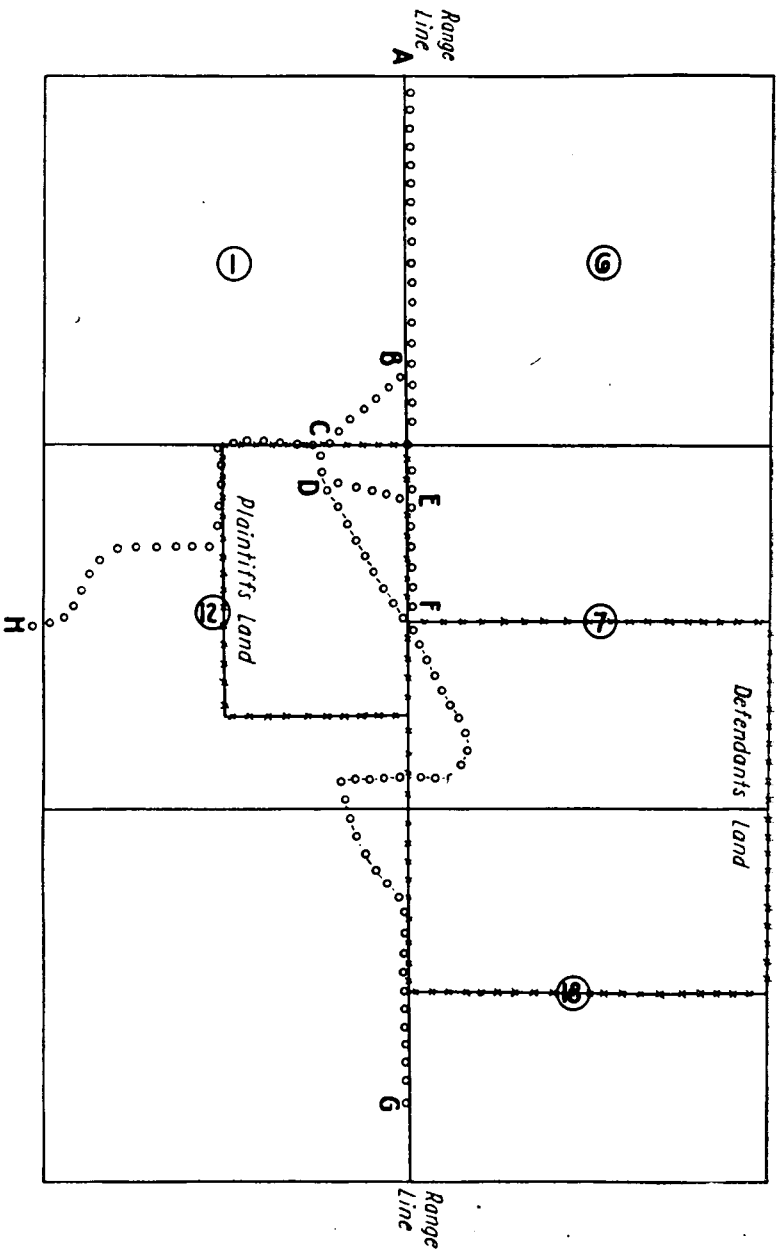
During the progress of the trial the court and attorneys viewed the premises. The court found generally for the plaintiffs and enjoined the defendants and each of them from trespassing upon the plaintiffs' lands. The Neimans appeal. The county makes no appearance here.

The error assigned is that the pleadings and evidence do not support the findings and judgment of the trial court. We affirm the judgment of the trial court.

The land in the northeast corner of plaintiffs' quarter is bisected by ravines running east and west and across the section line. It appears that for many years last past defendants Neiman and others have used a roadway across plaintiffs' land which went around the ravines. The road was meandering and unimproved, and went through gates which were in the fences on the east and north of plaintiffs' land. It appears that defendants Neiman desired a better outlet to the north and sought advice about opening a road. They were informed that there was a road which had been opened in 1908. The county surveyor on instructions from the commissioners, undertook to locate the 1908 road and surveyed a road lying to the south and west of the existing road. There is evidence that some work was undertaken on this road following the survey. Plaintiffs wired shut the gates. Defendants opened them and controversy arose, resulting in this litigation.

The first matters to be determined are questions of fact. Several exhibits were used. Throughout the trial witnesses were asked questions and gave answers with reference to unidentified exhibits and as to what they saw or knew existed here and there and of roads that went this way and that way. This evidence is unintelligible to us. It may have been clear to the trial court. Just as we give weight to his viewing of the premises, so this evidence gives weight to his conclusions.

We undertake to summarize the evidence that can be pinned down with reasonable certainty. For purposes of clarity we have prepared a chart showing the approximate location of the land and the various roads about which testimony was given. The chart is not an exact reproduction of any exhibit. It is used solely to enable a clearer understanding of the fact statements and the conclusions which we make.


Range Line
A
B
C
D
E
F
G
H
1
6
7
12
18
Plaintiffs Land
Defendants Land
Range Line

Plaintiffs' land consists of 240 acres as indicated in section 12. Title was acquired in 1916 and 1917. Defendants Neiman's land is 640 acres in sections 7 and 18. Title was acquired in the last two or three years.

The road which the county surveyor surveyed in 1946 is shown as F to C.

Before the county undertook to locate and establish public roads in this area by statutory proceedings in 1908, there were traveled roads in existence. They were usable roads, bearing in mind the conditions, development, and requirements that existed in western Nebraska half a century ago. There is substantial evidence that one of these roads came from the south, following natural levels of the land, running north from F to E and into section 6, and thence north still along natural levels east of the range line and at least as far as the north line of section 6. So far as dates are concerned this appears to have been the earlier of the roads. There also is shown to have been a series of trails from E to D to C, which meandered around the ends of the ravines, and which were in use in the early 1900's. One disinterested witness testified that when they wanted to go north from section 7, they used the road F to E and north across section 6, and that when they wanted to go west they used the road E to D to C.

On January 15, 1908, a petition was filed with the county commissioners asking for the establishment of a public road beginning at the southeast corner of section 19, thence one mile west, thence north four miles on the range line to intersection public road No. 389. The notice of opening this road shows its location more in detail and through pockets and canyons and around bluffs. It went across section and range lines and finally followed around a bluff "as road is now traveled back to the range line at a point near the southwest corner of the northwest quarter of section 7, * * * thence north as near as practicable on range line and as road is now worked and traveled to or near the northeast corner

of section 1, * * * and terminating at this point entersecting (sic) road No. 389 * * *." The same description was used in the appointment of appraisers and in the report of commissioner appointed to view and examine into the expediency of establishing the road. The commissioner attached a plat of the road and made it a part of his report. It shows the road going north along the line G to F to E to A, and east of the range line from the southwest corner of the northwest quarter of section 7.

On August 21, 1908, the county commissioners ordered the road opened and worked following the above recited description in their order. This road is locally known as the Wheeler road and as road No. 520.

Also on June 17, 1908, the county commissioners ordered opened and worked as a public road the road (known as the Mads Larsen road, or road No. 505) H to C to B to A, describing B to A as "in a northerly direction as road is now traveled to the northeast corner of section 1 * * * and terminating at this point on public road #389." This shows that at that time there was a traveled road from B to A which was entered by the new road C to B.

Of interest is a statement found in the report of the appraisers of damages on the establishment of the Wheeler road. To the owner of the northwest quarter of section 6, they recommended damages with this proviso: "But should the road petition known as the Mads Larson by (sic) granted then this party should have no damage, as this is on the same route on this piece of land." The county commissioners rejected this claim "owing to prior establishment of Larson Road over same route."

There also is in evidence a township road plat showing road 505 running from H to C to B to A with the road B to A having a slight curve and running east of the range line in section 6. It shows road 520 following the line F to E to B and terminating at B. The

road E to D to C is not shown on this plat. The date of the preparation of this plat is not shown.

There also is in evidence a plat of section 1 made by the county surveyor in March 1911, apparently to locate the corners of section 1. Among other things this shows road 505 along the line west of C, road 520 entering from the south at C, and 505 and 520 running from C to B to A. Road 520 is not shown south of point C, except for a short distance. This is the first time road CD appears on any of the maps.

We conclude that the Wheeler road or road 520 as established by the county commissioners in 1908 did not follow the course either along FDC to B or EDC to B, and that the defendants have no rights to a roadway across section 12 by virtue of those proceedings. We mention some of our reasons. Deviations from the range line of a less degree were noted and platted in other sections of the road. There was an existing traveled road generally along the range line from F to A and some evidence that it had been worked. There is no evidence that road EDC was ever a "worked" road. It was merely a meandering trail or series of trails across the open prairie at that time. The land in section 12 (here involved) is not mentioned in the description of the road; no service of notice of opening is shown to have been made upon the then owner of the land. He is not shown to have waived damages or claimed damages. The Larsen road opened about the same time, makes no reference to a road from C to D to E, or C to D to F. The two petitions when taken together show that the road B to A was the common route of both roads. The showing of a common route B to A tends strongly to negative a common route of C to B.

We think it reasonable to conclude, as did the county surveyor, that after the Larsen road was opened to travel, the traffic on the Wheeler road found it easier to take the trails E to D to C, and thereafter did so.

We should here mention the road F to D which the

surveyor marked out in 1946. He testified as to finding some evidences of a road for a short distance northwest of F.. He said it was a meandering road. He did not follow it to D but laid out a road in a straight line from F to D. Clearly the defendants have established no preexisting road along that line.

There remains to be determined what rights, if any, the defendants have to a road along the route E to D to C. As we have pointed out, there was a trail or series of trails along this route as early as 1903 or 1904. There never was a worked road, but the trail or trails meandered around the head of the ravines across the prairie. The land was open and unfenced until 1918. Some of it to the west was plowed land and the evidence indicates that the road had no fixed course.

The plaintiff owner acquired the land in 1916 and 1917. He fenced it in 1918 and there were gates at C and at E. Thereafter these gates were kept closed, in particular during the several months of each year when stock was kept there. The relatively few people who found occasion to use the road did so, opening and closing the gates. It was a community, neighborly arrangement such as existed in many sections of Nebraska. From 1918 to 1945, no one protested or questioned plaintiffs' right to enclose the road and to maintain the gates.

Defendants contend that the public has acquired a roadway across plaintiffs' land by prescription. In Engle v. Hunt, 50 Neb. 358, 69 N. W. 970, we held: "To establish a highway by prescription there must be a user by the general public under a claim of right, and which is adverse to the occupancy of the owner of the land, of some particular or defined way or track, uninterruptedly, without substantial change, for a period of time necessary to bar an action to recover the land."

In Smith v. Nofsinger, 86 Neb. 834, 126 N. W. 659, we said: "Mere willingness to accommodate school children, a neighbor, or the public ought not to be made

the basis for a decree wresting from the individual his property rights."

In Burke v. Diers, 102 Neb. 721, 169 N. W. 263, we said: "Another important, sometimes made a controlling, fact in determining either adverse user by the public under claim of right, or intent to dedicate, is whether the public authorities have ever assumed control of the road or repaired it. If so, it is evidence either of adverse user or of intent to dedicate, or both. Here the public authorities never attempted to establish, control, or repair the road. * * * Oftentimes farmers or owners of city lots, out of mere generosity and neighborly feeling, permit a way over their land to be used, when the entire community knows that the use is permissive only, without thought of dedication or adverse user. This use ought not to deprive the owner of his property, however long continued. Such rule would be a prohibition of all neighborhood accommodations in the way of travel. * * * Where the public has exercised no control or dominion over the road, nor used it to such an extent as to inform the owner, exercising reasonable care for his rights, that the public is using it under claim of right, then neither implied dedication nor adverse user is shown."

In Stalder v. Miles, 108 Neb. 386, 187 N. W. 854, we said: "Mere acquiescence or permission to use the road does not operate to deprive the owner of his property."

The evidence here is insufficient to sustain a prescriptive right to the use of a way across plaintiffs' land.

The judgment of the district court is affirmed.

AFFIRMED.

LEVI GAMRON, APPELLEE, v. JAMES M. JONES, WARDEN OF THE NEBRASKA STATE PENITENTIARY, APPELLANT.

28 N. W. 2d 403

Filed July 11, 1947. No. 32282.

1. **Criminal Law.** The Habitual Criminal Act does not create a new and separate criminal offense for which a person may be separately sentenced.
2. ———. Where a person convicted of a felony is sentenced for a period less than the minimum provided by law, such sentence is erroneous in failing to impose the minimum penalty, but is valid to the extent pronounced.
3. **Habeas Corpus.** Habeas corpus will not lie to secure the release of the person until the sentence so imposed is served.

APPEAL from the district court for Lancaster County: JEFFERSON H. BROADY, JUDGE. *Reversed and remanded with directions.*

Walter R. Johnson, Attorney General, *Erwin A. Jones,* and *Robert A. Nelson,* for appellant.

Cook & Cook, for appellee.

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

SIMMONS, C. J.

On January 8, 1946, an information was filed in the district court for Washington County, charging the plaintiff with the offense of chicken stealing. As a part of the same charge it was alleged that the plaintiff was an habitual criminal under section 29-2221, R. S. 1943, in that he was convicted on May 19, 1939, of the crime of burglary and sentenced to serve 18 months in the penitentiary, and on May 15, 1943, he was convicted of stealing an automobile and sentenced to imprisonment for one year. On the same day plaintiff pleaded guilty to the charge. The court ordered "that said defendant be and he hereby is sentenced to serve a term of two years for chicken stealing, and It is further ordered that defendant Levi Gamron, be and he is hereby sen-

tenced to 10 years as a habitual criminal * * *, sentence to run concurrently." Plaintiff was committed to the penitentiary that day and has since been confined under the judgment.

By petition of habeas corpus, filed February 18, 1947, plaintiff sought his release. He charged that the judgment was null and void in that under section 28-519, R. S. 1943 (the chicken-stealing statute), the maximum sentence which could be imposed on him was one year; that he had served more than one year; and that the district court for Washington County was without power to sentence him as an habitual criminal, citing Kuwitzky v. O'Grady, 135 Neb. 466, 282 N. W. 396. The defendant answered pleading the judgment and commitment.

The trial court held that the plaintiff had been given two separate sentences by the district court for Washington County—one for chicken stealing, and one as an habitual criminal; that the maximum sentence for chicken stealing (first offense) was one year, and that the term beyond one year was void; that the court had no authority to impose a separate sentence as an habitual criminal, and that the habitual criminal sentence was void. The plaintiff was ordered released from custody. Defendant appeals.

The positions of both parties here go to a construction of the sentence of the district court for Washington County. Defendant contends that there is but one sentence, and that in any event the sentence for two years is valid. Plaintiff contends, as he did in his petition, that there were two sentences; that the habitual criminal sentence is null and void; that the two-year sentence for chicken stealing is excessive to the extent of one year; and that having served more than one year, he is entitled to his release.

We see no reasonable basis for construing the judgment of the court to be other than one imposing two sentences—one for chicken stealing, and one as an habitual criminal. The Habitual Criminal Act does not create

a new and separate criminal offense for which a person may be separately sentenced. Kuwitzky v. O'Grady, *supra;* Davis v. O'Grady, 137 Neb. 708, 291 N. W. 82; Rains v. State, 142 Neb. 284, 5 N. W. 2d 887; Jones v. State, 147 Neb. 219, 22 N. W. 2d 710. The district court for Washington County was without authority to render a distinct separate judgment and sentence as was done for ten years as an habitual criminal. That portion of the sentence is void.

Under section 28-519, R. S. 1943, the maximum sentence for first-offense chicken stealing is one year imprisonment. However, the Habitual Criminal Act (§ 29-2221, R. S. 1943) provides for a sentence of not less than 10, nor more than 20, years. The district court for Washington County had the power under that act to sentence the plaintiff to serve the period there prescribed. See Rains v. State, *supra,* wherein we held: "The habitual criminal law of this state does not purport to create a new and separate criminal offense, but provides merely that the repetition of criminal conduct aggravates the guilt and justifies greater punishment." See, also, Jones v. State, *supra.*

The question comes, is the two-year sentence void under the facts here? In Hickman v. Fenton, 120 Neb. 66, 231 N. W. 510, we held that where a person convicted of a felony is sentenced for a period less than the minimum provided by law, such sentence is erroneous in failing to impose the minimum penalty, but is valid to the extent pronounced, and that habeas corpus will not lie to secure the release of the person until the sentence so imposed is served. It follows that the judgment of the trial court in holding that the sentence for chicken stealing in excess of one year was void and in ordering the release of the plaintiff from custody was erroneous.

The judgment of the trial court is reversed and the cause remanded with instructions to deny the writ.

REVERSED AND REMANDED.

CHICAGO & NORTH WESTERN RAILWAY COMPANY, APPELLANT, V. COUNTY BOARD OF DODGE COUNTY, NEBRASKA, APPELLEE.

28 N. W. 2d 396

Filed July 11, 1947. No. 32259.

1. **Railroads.** The Nebraska State Railway Commission is a constitutionally created body and, under section 20, article IV, of the Constitution, is endowed with powers and duties which include "the regulation of rates, service and general control of common carriers as the Legislature may provide by law. But, in the absence of specific legislation, the commission shall exercise the powers and perform the duties enumerated in this provision."
2. **Constitutional Law.** Section 20, article IV, Constitution of Nebraska, is self-executing in the absence of specific legislative action but the Legislature has the right to prescribe by law how the commission shall proceed and what authority it may exercise in the regulation and general control of common carriers.
3. **Statutes.** When specific legislation is enacted upon a subject in relation to the powers and duties of the State Railway Commission, such legislation preempts the field so occupied and thereby prescribes and controls the powers and duties of the commission.
4. ———. A legislative act complete in itself may supersede or repeal all preexisting acts or parts of acts in conflict therewith upon the same subject without numerically designating the particular sections so superseded or repealed.
5. ———. A preexisting statute will be considered as modified, superseded, or repealed by implication insofar as it is in conflict or inconsistent with a subsequently enacted statute, which is complete in itself, and inclusive of the same subject.
6. ———. When the Legislature subsequently enacts legislation making related preexisting laws applicable thereto, it will be presumed that it did so with full knowledge of such preexisting legislation and the judicial decisions of this court construing and applying it.
7. ———. When subsequently enacted legislation by reference incorporates related preexisting laws "insofar as same is applicable" that expression controls in determining the force or application of such adopted laws in a particular situation.
8. **Railroads.** Chapter 163, Laws of Nebraska, 1925, page 425, is an act complete in itself, which effectively provides comprehensive authority and procedure whereby, in order to promote public convenience or safety, whenever a railroad crosses or

shall hereafter cross a public highway at grade outside of incorporated villages and cities, such crossing may be changed, altered, or constructed, or any highway may be relocated so as to eliminate such crossings entirely, or so as to carry them over or under such railroad, by agreement between the county board and the railroad company, or upon failure thereof, by application to the State Railway Commission, which it is required to hear and determine upon the merits.

APPEAL from Nebraska State Railway Commission. *Reversed and remanded with directions.*

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

Charles H. Yost, for appellee.

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

CHAPPELL, J.

This is an appeal from an order of the Nebraska State Railway Commission holding that under sections 75-430, 75-431, and 75-432, R. S. 1943, it had no power or authority to hear and determine upon the merits an application to close a surface railroad crossing just outside the city limits, thereby routing its traffic over a viaduct constructed nearby but within the city limits. The Chicago & North Western Railway Company was applicant and the county board of Dodge County was respondent. They will hereinafter be designated respectively as plaintiff and defendant. Plaintiff's motion for rehearing was overruled, and it appealed to this court, assigning that the commission erred in so construing the statutes. We sustain plaintiff's contentions.

The factual situation was not in dispute. We will summarize it for clarity, and as a basis for discussion of the legal propositions involved. Congress had appropriated emergency relief funds for public works, a part of which was made available for the purpose of eliminating existing hazards to life at railroad grade crossings. At a special session of the Nebraska Legis-

lature, it enacted Laws of Nebraska, 1935, Sp. Sess., chapter 34, page 196, now chapter 18, article 6, R. S. 1943, authorizing and permitting certain cities, of which Fremont was one, to avail themselves of such funds by making contracts with the Department of Roads and Irrigation to construct viaducts over or subways under railroad tracks and "accomplish the elimination of grade crossings."

Thereunder, the city of Fremont, by ordinance, provided for the proposed construction of a viaduct over Bell Street and adjoining property at the east margin of the city limits. The city, the Department of Roads and Irrigation, and plaintiff, thereafter authoritatively entered into a contract for such construction, which was subsequently completed. State Highway No. 8 and U. S. Highway No. 30-South as relocated, crossed the right-of-way and tracks of plaintiff at grade on Bell Street, and the contract recited in substance that it was the purpose of the parties to separate the grades of street, highway, and tracks at that place, by constructing a viaduct in the interests of public safety and convenience.

At the time the viaduct was constructed, such highway was a diagonal paved road, the northerly end of which terminated at the junction with the north end of the viaduct and the south end of the highway passed over the surface crossing in dispute, approximately 2,000 feet east of the south end of the viaduct. The highway was rerouted over the viaduct as State Highway No. 275, connecting with the south end thereof. At the present time, a new highway has been constructed which connects with the south end of the viaduct.

There is a graveled highway north and south across plaintiff's tracks one-half mile east of old Highway No. 8, which anyone can use if he needs or desires to use a surface crossing rather than the viaduct. Over that crossing public travel comes into Fremont on First Street. The surface crossing over Bell Street was closed

by the city on October 26, 1937, after the viaduct was constructed, upon the ground that: "* * * the public safety and convenience requires that public travel be now diverted over said viaduct and be discontinued on said surface street across said railroad tracks."

In the meantime, however, the surface crossing involved remained open until March 18, 1942, when, upon application of plaintiff and hearing thereon, but without the filing of a petition by electors living within five miles of the road or the consent of a majority of the voters living within two miles of the road but not in the city, the county board by resolution agreeably ordered the crossing closed and barricaded, and the erection of signs directing public travel over the viaduct. In conformity therewith, its order was executed.

The resolution of the county board, after reflecting some of the salient facts heretofore set forth, recited that the object and purpose of constructing the viaduct "was to eliminate the grade crossings where they cross the tracks of the Chicago and North Western Railway Company just east of Bell Street and just outside of the city limits of Fremont, as well as the crossing at Bell Street itself * * *." The resolution also called attention to the fact that since the state highway department had "constructed a hard-surfaced highway from the intersection of old Highway #275 at the southeast corner of Fremont to connect with the south end of said viaduct," there was no longer any practical reason why travelers should use the old surface crossing over plaintiff's tracks and be subjected to its dangers. The concluding sentence ordered discontinuance of the crossing involved "for the duration of the war and until changed by duly constituted authority."

Regarding the dangers incident to continued use of the crossing in dispute, the evidence discloses that it passes over plaintiff's tracks which serve not only its main line but also its switching facilities and roundhouse lead. During the month of September 1946, some

1084 registered locomotives and train movements, an average of more than 36 per day, passed over the crossing. During that same period many nonregistered switching and other train movements also necessarily passed over it. After construction of the viaduct and before the crossing was closed in 1942, six accidents occurred thereat, in which one person was killed, five persons received personal injuries, and the automobiles involved were damaged. It is apparent that permanently closing the crossing will simply divert public travel safely over the viaduct to the same destinations.

Nevertheless, after consideration of petitions filed by certain electors residing within or near the city and others residing outside thereof, but within five miles of the crossing, alleging in substance that its original closing was unlawful, the county board by resolution August 22, 1946, ordered the crossing reopened for public use, effective within 30 days. Thereafter, on August 26, 1946, in conformity with section 75-431, R. S. 1943, plaintiff filed its application with the commission. Apparently, however, the crossing remained closed and the matter rests in status quo pending final decision thereon.

Without doubt, the construction of the viaduct was a public as distinguished from a local improvement. Hinman v. Temple, 133 Neb. 268, 274 N. W. 605, 111 A. L. R. 1217. It was constructed for the purpose of eliminating existing hazards to life at the railroad grade crossings involved, thereby promoting public convenience and safety. Therefore, the case at bar is an ideal one in which to invoke the commission's power and duties, if the Constitution and existent legislation will permit.

The State Railway Commission was created and its powers and duties were defined by section 20, article IV, Constitution of Nebraska. With reference to its powers and duties, that section provides: "The powers and duties of such commission shall include the regulation of rates, service and general control of common

carriers as the Legislature may provide by law. But, in the absence of specific legislation, the commission shall exercise the powers and perform the duties enumerated in this provision."

As will be observed, that constitutional provision is self-executing in the absence of specific legislative action, but the Legislature has the right by law to prescribe how the commission shall proceed and what authority it may exercise in the regulation and general control of common carriers. Therefore, when specific legislation is enacted upon a subject in relation thereto, such legislation preempts the field so occupied and thereby prescribes and controls the powers and duties of the commission. State v. Chicago & N. W. Ry. Co., 147 Neb. 970, 25 N. W. 2d 824; In re Application of Hergott, 145 Neb. 100, 15 N. W. 2d 418.

Pursuant to such authority, the Legislature enacted chapter 261, Laws of Nebraska, 1921, page 877, the title of which read: "AN ACT relating to the construction, repair and maintenance of all crossings of all railways and highways, both private and public; to place the supervision of the construction, repair and maintenance of such crossings outside of incorporated villages, towns and cities under the jurisdiction of the State Railway Commission; to require railways to construct and maintain crossings, gates, signs, signboards and warnings at crossings in such manner as the State Railway Commission shall require; to amend Section 3016 and to repeal said original section; to repeal Sections 3017, 3018, 6042, 6049, 6050 and 6051 of the Revised Statutes of Nebraska for 1913, and to repeal all other acts and parts of acts in conflict herewith."

The eighth section of the original act, after specifically repealing the above enumerated sections, also provided that: "* * * all other acts and parts of acts in conflict with the provisions of this Act, are hereby repealed." The 1921 act, therefore, must be the first to be considered. Its provisions now appear as sections 75-219, 75-

220, 75-221, 75-426, 75-427, 75-428, and 75-429, R. S. 1943.

A consideration of section 75-428, R. S. 1943, is of primary importance. It reads as follows: "The provisions of sections 75-219, 75-220, 75-221, 75-426, 75-427 and 75-429 shall not be construed as a limitation on the powers of the State Railway Commission which have heretofore been granted, but as supplemental and additional thereto. The powers herein granted shall not be construed as extending to the projection of a new public highway crossing or to the abandonment of an existing public crossing."

The last sentence of limitation in the above-quoted section is the one upon which the commission particularly relied in concluding that it had no power or authority to act in the case at bar. In that connection, if it were not for subsequent legislation enacted in 1925, the conclusion of the commission would doubtless have merit. However, in that year, the Legislature enacted chapter 163, Laws of Nebraska, 1925, page 425, which without doubt is controlling in appropriate situations such as that presented by plaintiff's application.

The title of the 1925 act read: "AN ACT relating to railroads; providing for the relocation of highways crossing railroad rights-of-way without corporate limits of cities and villages in order that railroad crossings thereover may be eliminated; providing for the separation of grade work so as to carry such highways over or under said rights-of-way; prescribing the duties of the State Railway Commission, if county boards or other public authorities in interest shall fail to agree upon the expense of such changes, relocations, or constructions; and to repeal all acts and parts of acts in conflict therewith."

Section 4 of the 1925 enactment provided: "All acts and parts of acts in conflict with the three preceding sections are hereby repealed." The three sections re-

ferred to now appear as sections 75-430, 75-431, and 75-432, R. S. 1943.

Section 75-430, R. S. 1943, provides: "Whenever a railroad crosses or shall hereafter cross a public highway at grade, outside of incorporated cities and villages, the railroad company and the county board of the county in which such crossing is located may agree upon such changes, alterations or constructions of any such crossing as will promote the public convenience or safety, and they may also agree upon the relocation of any highway so as to eliminate such crossings entirely, or so as to carry them over or under such railroad, and upon the apportionment of the expenses incident to any such changes, alterations, relocations or construction between the railroad company and the county or other public authority in interest."

Section 75-431, R. S. 1943, provides: "If the railroad company and the county board or other public authority in interest fail to agree upon any of the matters or things mentioned in section 75-430, either the railroad company, the county board, or other public authority in interest, in the name of the county, or other public authority in interest, may file an application with the State Railway Commission, setting forth such fact, together with a statement of the changes, alterations, relocations or constructions desired, the estimated cost thereof, and such other facts as may be relevant, and asking the commission to make an order directing that the desired changes, relocations or constructions be made. The commission shall proceed to hear such applications in the manner provided by law, and if it finds that the application should be granted, it shall make an order accordingly, designating therein what portion of the expense of complying with the order shall be paid by the railroad company and what portion shall be paid by the county or other public authority in interest, if any."

Section 75-432, R. S. 1943, provides: "The county

board, or other public authority in interest, shall have authority and power to carry out any such agreement or order of the State Railway Commission and may establish, vacate or relocate any public road so as to comply with any such agreement or order of the commission. The procedure shall be that provided by sections 39-101 to 39-160 insofar as the same is applicable, but no petition shall be necessary or required."

It is readily apparent that section 75-428, R. S. 1943, enacted in 1921, contained a limitation upon the powers and duties of the commission in connection with "the projection of a new public highway crossing or to the abandonment of an existing public crossing." However, on the other hand, the 1925 act, phrased in clear and specific as distinguished from general language, provided otherwise in proper cases such as the one at bar, and repealed all acts and parts of acts in conflict therewith.

Without doubt, the 1925 act was complete in itself and effectively provided a comprehensive authority and procedure whereby, in order to promote public convenience or safety, whenever a railroad crosses or shall hereafter cross a public highway at grade outside of incorporated villages and cities, such crossing may be changed, altered, or constructed, or any highway may be relocated so as to eliminate such crossings entirely, or so as to carry them over or under such railroad by agreement between the county board and the railroad company, or upon failure thereof, by application to the State Railway Commission, which it shall be required to hear and determine upon the merits.

We are unable to find any reason why the act would not be effectual to give the commission the power and authority to hear and determine plaintiff's application and enter an appropriate order upon the merits. Clearly, the 1925 act superseded and repealed the last sentence of section 75-428, R. S. 1943, which limited the commission's power and authority. That must be true because

a legislative act, complete in itself, may supersede or repeal all preexisting acts or parts of acts in conflict therewith upon the same subject without numerically designating the particular sections so superseded or repealed. It is also the rule that a preexisting statute will be considered as modified, superseded, or repealed by implication insofar as it is in conflict or inconsistent with a subsequently enacted statute, which is complete in itself and inclusive of the same subject. State ex rel. Kaspar v. Lehmkuhl, 127 Neb. 812, 257 N. W. 229; Drew v. Mumford, 114 Neb. 100, 206 N. W. 159; Uttley v. Sievers, 100 Neb. 59, 158 N. W. 373; Hinman v. Temple, *supra.*

Section 75-432, R. S. 1943, specifically gives the county board authority and power to carry out an agreement made between the railroad company and the county board or an order of the State Railway Commission theretofore authorized by sections 75-430 and 75-431, R. S. 1943. It then gives the county board authority and power to establish, vacate, or relocate any public road, in compliance with any such agreement or order of the commission, and provides that: "The procedure shall be that provided by sections 39-101 to 39-160 insofar as the same is applicable, but no petition shall be necessary or required."

As a matter of course, the last sentence of that very section itself answers adversely to it defendant's contention that the first resolution of the county board, closing the crossing upon application by the railroad company, was unlawful because a petition therefor, signed by at least ten electors residing within five miles of the road, was not filed, as provided by section 39-105, R. S. 1943.

Section 39-102, R. S. 1943, provides: "No public road or any part thereof shall be vacated or changed without the consent of the majority of the voters living within two miles of the road and not living in a village or city." Defendant contended that the 1925 act did not in any

manner effect the application of that requirement, but stated in section 75-432, R. S. 1943, that it should be followed as a part of the required procedure.

Upon that premise defendant argued that since section 39-102, R. S. 1943, had admittedly not been complied with, the county board had no authority to close the crossing, and the commission had no authority to entertain plaintiff's application. We cannot agree with that contention.

We must bear in mind that section 75-432, R. S. 1943, is a special statutory provision with regard to a particular subject, and as such is part of an act complete in itself, which supersedes and governs the general provisions of section 39-102, R. S. 1943, previously enacted. In re Application of Moritz, 147 Neb. 400, 23 N. W. 2d 545.

This court has only recently applied the rule that when the Legislature subsequently enacts legislation making related preexisting laws applicable thereto it will be presumed that it did so with full knowledge of such preexisting legislation and the judicial decisions of this court construing and applying it. When subsequently enacted legislation by reference incorporates preexisting laws "insofar as same is applicable," such an expression is always the controlling language which cannot be overlooked in determining the force or application of the adopted statute in a particular situation like the one at bar. Halligan v. Elander, 147 Neb. 709, 25 N. W. 2d 13.

In that connection it will be observed that the procedural portion of section 75-432, R. S. 1943, relates only to procedure to be followed by the county board in order to authoritatively carry out "any such agreement or order of the State Railway Commission" theretofore authorized, and "establish, vacate or relocate any public road" so as to comply therewith. In doing so, the procedure should be that provided by sections 39-101 to 39-160, R. S. 1943, but only "insofar as same is applicable." An examination of the applicable sections discloses that they

adequately protect the rights of all persons lawfully interested in the exercise of such authority by the county board.

It is apparent at once that section 39-102, R. S. 1943, has no relation or application to methods of procedure. It simply imposes a limitation upon the county board's power and authority to vacate or change a road under circumstances having no similarity with those in this proceeding. The 1925 act specifically superseded and removed that limitation in proper cases, such as the one at bar. Section 39-102, R. S. 1943, has no application in such a situation. To hold otherwise would give the 1925 act no force or effect. As a matter of fact, to so hold would, regardless of public convenience or safety, subject authoritative agreements of the county board with the railroad company, and official orders of the State Railway Commission, to a referendum of the voters living within two miles of the road, and not living in a village or city, which the Legislature clearly never intended.

We call attention to the fact that cases relied upon by defendant are all either distinguishable upon the facts and statutes involved, or decided prior to 1925, at a time when the authority of the county board in the premises was paramount, but its exercise was limited, and at a time when the authority of the State Railway Commission did not extend "to the projection of a new highway crossing or to the abandonment of an existing public crossing," as it now does in appropriate cases "whenever a railroad crosses or shall hereafter cross a public highway at grade outside of incorporated cities and villages."

We conclude that the statutes involved clearly conferred power and authority upon the State Railway Commission to hear and determine plaintiff's application on the merits, and the cause should be and hereby is reversed and remanded with directions that it do so.

REVERSED AND REMANDED
WITH DIRECTIONS.

ROGER WURMSER, INC., APPELLANT, V. INTERSTATE HOTEL COMPANY OF NEBRASKA, APPELLEE.

28 N. W. 2d 405

Filed July 11, 1947. No. 32247.

1. **Innkeepers.** Where a hotel company claims the benefit of a statute altering its common-law liability, the burden is on it to show compliance with the provisions of such statute on its part.
2. ———. A statute regulating or limiting the liability of an innkeeper applies only to his common-law liability as an insurer and has no application where the cause of action of the guest is based solely on the negligence of the innkeeper in caring for property entrusted to him.
3. ———. Where, as here, it is admitted that the plaintiff's salesman failed to inform the defendant's employees, with whom he left and entrusted his sample case, that it contained precious stones of the value of $187,755.04, such failure to inform the defendant's employees as to its contents is more than slight negligence as a matter of law and bars the plaintiff's right to recover because of its own contributory negligence.

APPEAL from the district court for Douglas County: WILLIAM A. DAY, JUDGE. *Affirmed.*

Fraser, Connolly, Crofoot & Wenstrand, William H. Wright and *J. V. Benesch,* for appellant.

Leon, White & Lipp, for appellee.

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

WENKE, J.

Roger Wurmser, Inc., a New York corporation engaged in the wholesale jewelry business with its principal place of business located in New York City, brought this action in the district court for Douglas County against the Interstate Hotel Company of Nebraska, a Nebraska corporation engaged in operating the Fontenelle Hotel in Omaha.

The nature of this action is one at law to recover damages for the loss of plaintiff's sample case and its

contents of precious stones of an alleged value of $187,755.04 due to the negligence of the defendant and its employees in caring therefor.

From an order sustaining defendant's demurrer and dismissing its action the plaintiff appeals.

For convenience the parties will be referred to as they appeared in the lower court.

The allegations of plaintiff's third amended petition, to which the trial court sustained the demurrer, insofar as they are necessary to a complete understanding of the questions herein involved are as follows:

"3. That at about 9:45 A. M., on October 16, 1942, one Samuel Kutner, a salesman and employee of the plaintiff herein, registered as a guest at the aforesaid Fontenelle Hotel and was assigned to room No. 806. That his personal baggage, consisting of handbags and a dark brown saddle-leather sample case about 24 inches long, 16 inches high, and 8 inches wide, marked with the initials 'R. W.', containing valuable jewelry and precious stones, which were the property of the plaintiff herein, were at said time brought to the room so assigned to him. That the said Samuel Kutner was ushered to his room by a bell-boy employed by the defendant, who carried the baggage and sample case of such guest at said time. * * *

"That soon thereafter, on the same day, October 16, 1942, the said Samuel Kutner left said hotel carrying such sample case with its valuable contents and called upon several customers and prospective customers. That he then returned to such hotel at about 2:00 P. M., and at his request the defendant placed such sample case with its contents in the hotel vault, which vault was located a short distance north and to the rear of the main registration desk of such hotel.

"That at about 2:35 P. M. the said Samuel Kutner asked defendant's clerk at the main registration desk for his sample case; that such clerk thereupon asked him to describe such case, which he did by telling

such clerk its approximate size, color and general appearance; that such clerk then directed the aforesaid Samuel Kutner to go to the left and to the rear and finally to the door of defendant's aforesaid vault, and at such place defendant's clerk handed out to him the said sample case.

"That plaintiff's salesman then, on the same day, October 16, 1942, called upon other customers and prospective customers and later returned to the Fontenelle Hotel and shortly after 5:00 P. M. again placed such sample case with its contents into defendant's possession for safekeeping in its aforesaid vault. That at said time he delivered such sample case to the clerk in charge of defendant's main registration desk, who thereupon took same to the rear and placed it in the aforesaid vault.

"That the defendant issued no claim or identification check for such sample case to plaintiff's salesman on either occasion.

"4. That on the next morning, October 17, 1942, at about 8:40 A. M., the said Samuel Kutner, while still a guest at said hotel, secured his sample case from the defendant. That at said time, at the direction of defendant's clerk in charge of its main registration desk, he again went to the rear and to the entrance of the aforesaid vault, and he there pointed out his sample case to defendant's aforesaid clerk and received it from him. That plaintiff's employee again called upon customers and prospective customers until close to the noon hour, when he returned to defendant's hotel. That at said time, being at about 11:30 A. M., he again placed such sample case into defendant's possession for safe-keeping in the aforesaid vault. That at said time he was directed by defendant's clerk in charge of its main registration desk to again go to the rear and to place his sample case in defendant's aforesaid vault. That he did as directed and placed his sample case in the aforesaid vault to his left as he faced forward on passing through such vault doorway, and between the left wall of said vault and another bag, which bag appeared similar to a metal tool-

carrying case. That he placed said sample case there at the direction of and in the presence of the defendant's aforesaid clerk. That no claim or identification check was issued or given him on such occasion by the defendant hotel company.

"That later on the same day, about 3:30 P. M., the said Samuel Kutner requested defendant's clerk in charge of its main registration desk, * * *, to return his sample case to him. That such sample case was then missing and the defendant has been unable to return same or its valuable contents to the aforesaid Samuel Kutner or to his employer, the plaintiff herein. * * *

"6. Plaintiff further alleges that the defendant was negligent and careless in the following particulars: (a) That it failed to provide a proper and safe place for the keeping of the property entrusted to it by its guests, in that the door of its aforesaid vault was left open; no checking system was used for incoming bags; bags deposited therein were easily accessible to persons in the hotel desiring to secure same; and bags were released from such vault by defendant's employees to persons claiming same, without requiring any identifying check or other proof of ownership. (b) That it failed to fully protect property placed in its vault from loss, in that it permitted same to remain in said vault, although the entrance to same was easily accessible to persons in the hotel. (c) That it failed to guard property in its vault from being stolen by thieves. (d) That it permitted guests and other persons to enter its vault to take property on their identification of same, in that on the several occasions when the said Samuel Kutner desired possession of his sample case, the defendant requested and required him to go to the rear and to the door of the aforesaid vault to identify and take possession of the aforesaid sample case. That the negligence and carelessness of the defendant, as aforesaid, was the proximate

cause of the disappearance and loss of the aforesaid sample case with its valuable contents.

"7. That the aforesaid sample case contained valuable precious stones, including emeralds, rubies, sapphires, star sapphires, star rubies and diamonds; that plaintiff's actual and true damage in the loss of such property amounted to $187,755.04, the reasonable wholesale market value of such merchandise, * * *. That by reason of its negligence, the defendant has become liable to the plaintiff for the aforesaid amount."

Plaintiff, in his brief, states the issues to be decided as follows: "(1) Did the defendant hotel comply with the provisions of 41-122, Rev. Stat. 1943, so as to have the benefit of the statutory limitation on its common law duty as an innkeeper? (2) Was the defendant hotel guilty of negligence in the handling of the sample case? (3) Was the plaintiff, through its agent, Mr. Kutner, guilty of contributory negligence of a degree sufficient to defeat a recovery under the Comparative Negligence statute? (25-1151, Rev. Stat., 1943.)"

With reference to the first question we have said: "Where hotel company claims the benefit of a statute altering its common-law liability, the burden is on it to show compliance with the provisions of such statute on its part." Leon v. Kitchen Bros. Hotel Co., 134 Neb. 137, 277 N. W. 823. See, also, Shiman Bros. & Co. v. Nebraska Nat. Hotel Co., 143 Neb. 404, 9 N. W. 2d 807.

There is nothing in plaintiff's petition that shows defendant complied with the statute and in the absence thereof we cannot assume such compliance. While compliance may have been made, that can only be determined when it has been pleaded and proved.

However, there is another reason why this question is not controlling. Here the action is based on negligence. As stated in Shiman Bros. & Co. v. Nebraska Nat. Hotel Co., *supra*: "A statute regulating or limiting the liability of an innkeeper applies only to his common-law liability as an insurer and has no application where

the cause of action of the guest is based solely on the negligence of the innkeeper in caring for property entrusted to him."

Assuming, but not deciding, that the second question should be answered in the affirmative we will next look to the third question here presented.

From the pleadings it is evident that plaintiff's salesman and employee, Samuel Kutner, at no time, while dealing with the employees of the defendant, informed them of the nature of the contents of his dark brown saddle-leather sample case, being a case about 24 inches long, 16 inches high, and 8 inches wide, marked with the initials "R.W.," nor of the value thereof, same allegedly consisting of precious stones of the reasonable wholesale market value of $187,755.04. It is admitted by plaintiff in both its original and reply brief that he did not do so.

A case comparable in fact is that of Shiman Bros. & Co. v. Nebraska Nat. Hotel Co., 146 Neb. 47, 18 N. W. 2d 551, except therein the salesman contended he informed the porter of the hotel of the nature of the contents of the wardrobe trunk. Therein we said:

"The evidence, in the instant case, of contributory negligence on the part of the plaintiff's salesman which is controverted, was his failure to inform or notify the defendant, its employees or agents, that the ordinary wardrobe trunk which he used in his business contained a valuable collection of jewelry of the extraordinary value of $45,000.

"Whether or not a bailor has exercised ordinary care is usually a question for the jury. However, in the instant case contributory negligence constitutes the only affirmative defense, and the only evidence of contributory negligence is the failure of plaintiff's agent to disclose the extraordinary value of the property bailed. This question was submitted to the jury which found, if it was decided on the question of contributory negligence, that such information was not disclosed. The

jury having so found, the plaintiff is barred from recovery as a matter of law, because of its own contributory negligence which obviously is more than slight negligence."

Following our previous holding we can come to no other conclusion than that the plaintiff is barred from recovery as a matter of law because of its own contributory negligence in the failure of Kutner to inform the defendant's employees that his sample case contained precious stones of the value of $187,755.04 which failure is obviously more than slight negligence.

For the reasons stated we find the judgment of the lower court to be correct and the same is therefore affirmed.

AFFIRMED.

RAY E. PROBERT ET AL., APPELLANTS, V. SYDNEY GRINT ET AL., APPELLEES.

28 N. W. 2d 548

Filed July 18, 1947. No. 32186.

1. **Appeal and Error.** When an action in equity is appealed, it is the duty of this court to try the issues de novo and to reach an independent conclusion without reference to the findings of the district court. But in a case wherein the court has made a personal examination of the physical facts, and where, in the same case, the oral evidence in respect of material issues is so conflicting that it cannot be reconciled, this court will consider the fact that such examination was made and that such court observed the witnesses and their manner of testifying, and must have accepted one version of the facts rather than the opposite.
2. **Waters.** Record examined and evidence held sufficient to sustain judgment of the district court.

APPEAL from the district court for Custer County: E. G. REED, JUDGE. *Affirmed.*

George I. Craven, for appellants.

Schaper & Schaper, for appellees.

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

MESSMORE, J.

The plaintiffs, as owners of the southwest quarter of Section 9, Township 19 North, Range 17 West of the Sixth Principal Meridian in Custer County, Nebraska, instituted this action in equity in the district court against the present owners of the northeast and southeast quarters of Section 9, and against Comstock Township which maintains an east and west township road between the north and south halves of Section 9. The purpose of the action was to enjoin the defendants from maintaining a dam and ditch in the township road, from maintaining a dam and ditch on the northeast quarter of Section 9, to require defendants to remove the dams and ditches constructed by them; and for such other and further relief as equity affords.

For convenience we will not hereafter detail the description of the lands involved in this appeal, but will make reference thereto as to the location in Section 9.

The plaintiffs' petition is in accordance with the purpose of the action as hereinbefore described. The defendants' answers deny the construction of dams and ditches affecting natural drainways that in any manner divert surface waters over to and upon the plaintiffs' land.

The district court found generally in favor of the defendants and against the plaintiffs, and entered a judgment denying the injunctive relief to the plaintiffs as prayed for in their petition. Upon the overruling of their motion for new trial, the plaintiffs appeal.

For convenience the parties will be referred to in their original status as the action was tried in the district court.

The plaintiffs' assignment of error is that the judgment of the district court is contrary to the evidence

and the law. This requires a review of the evidence, as the case is tried de novo in this court. We therefore give the following resume of the relevant and material evidence adduced from the record.

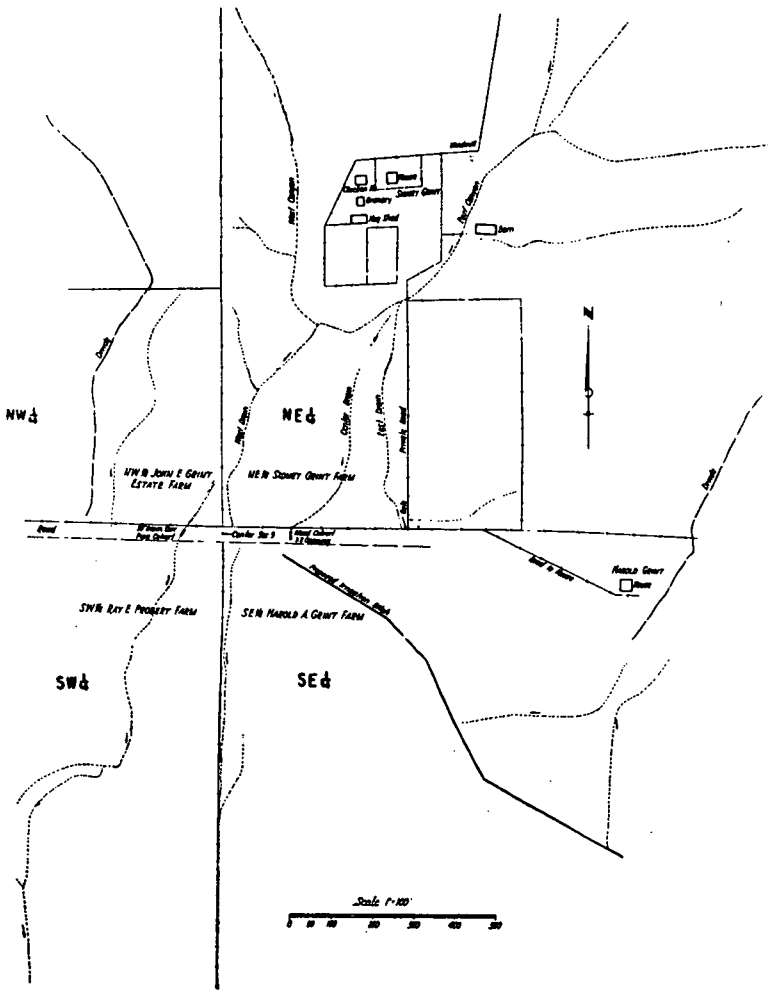
The record shows that George M. Probert, the father of plaintiff Ray E. Probert, held fee simple title to the southwest quarter of Section 9 from November 16, 1891, to April 1, 1935, or for a period of approximately 44 years, when he conveyed this land to the plaintiffs. The title of the other quarters in Section 9 appear in the record and disclose that George M. Probert and his wife also at one time owned the northeast quarter and the southeast quarter of Section 9. It appears that some of the Proberts lived on the northeast and southeast quarters from about 1908 to 1937. The defendants Sydney and Josephine Grint acquired title to the northeast quarter by deed September 5, 1942, and went into possession March 1, 1943. Harold E. Grint became the owner of the southeast quarter, by deed, May 10, 1940.

The defendant Sydney Grint was born on June 10, 1895, on a farm located in the first section west of Section 9, where he lived until 1923, at which time he moved to his present residence on the northwest quarter of Section 9. Harold Grint was born in October 1891, on the section west of Section 9; lived there until September 1917; farmed the northwest quarter of Section 9 in 1920; and lived on the northeast quarter of Section 9 from 1920 until 1944, when he moved to the southeast quarter of Section 9.

The plaintiff Ray E. Probert was born in Iowa; moved to Nebraska in 1889, and first moved to the northwest quarter of Section 9 where he lived one year; then moved to the southwest quarter of Section 9 where he has lived for more than 55 years.

The following sketch will permit a better visualization of the conditions existing at the scene of the controversy.

Section 9, Township 19, Range 17 West,
6th P.M., Custer County, Nebraska



Contours and elevations are eliminated from the above sketch. There appears in the evidence, however, defendants' exhibit 23, containing elevations and

contours, which is a map of the drainage area in controversy; also, exhibit 11, a plat made by the plaintiffs' engineer witness; and field notes, profiles, and levels made by engineers for both plaintiffs and defendants.

The east and west road between the north and south halves of Section 9 has been traveled since 1908. On May 6, 1924, a petition for a 33-foot road was filed by G. M. Probert, his wife Margaretta Probert, and others. The petition was granted July 31, 1926. Later, G. M. Probert, Margaretta Probert, and R. E. Probert, one of the plaintiffs, signed a petition agreeing to give an additional seven feet on the south side of this road, in order to make a 40-foot road. This petition was granted June 30, 1930. The road extends from the west boundary line of Section 9 east for a distance of 195 rods. The road was taken off of the north side of the south half of Section 9, with the north side of the road being the south boundary of the north half of the section. It extends east from the southwest corner of the northeast quarter, and the northeast corner of the southwest quarter about 35 rods in the direction of Harold Grint's house, and then southeast thereto.

There are 19.1 acres that contribute water to the mouth of the west canyon, and 33.3 acres of the drainage area that contribute water to the mouth of the east canyon. There are 15.5 acres representing the area that contributes water that will lead to the township road. The total of 67.9 acres represents the drainage area on the northeast and northwest quarters as disclosed by defendants' exhibit 23, or, in other words, that contributes water to the draws in the northeast quarter of Section 9 leading to the center of the section.

Before the road was considered as a township road, George M. Probert placed a 10-inch culvert about 100 feet west of the northeast corner of the southwest quarter of Section 9. In August 1932, a larger culvert, which is 30 inches in diameter and of corrugated pipe, was placed in the highway under the supervision of

George M. Probert at the same point, and is still there. The reason for replacing the 10-inch culvert with the 30-inch culvert was because the smaller one filled up, and would not carry the volume of water that flowed through it from the west drain. No culverts were placed east of this pipe until 1944.

The surface waters from the east and west canyons drain onto a rolling piece of ground approximately 500 feet square in the southwest corner of the northeast quarter, which has always been under cultivation. This point is designated as being important for the reason that it receives the surface waters as heretofore indicated.

The plaintiff Ray E. Probert testified in substance as to his acquaintance with the northeast quarter, the 500-foot square piece of ground above described, and with the flow of the surface waters from the east and west canyons; that 52 years ago the west watercourse ran across the southeast corner of the northwest quarter onto the southwest quarter. About 25 years ago the west watercourse changed by nature and went on south and across the township road onto the southeast quarter, the change occurring in 1920. The other watercourse on the southwest corner of the northeast quarter came from the northeast on the northeast quarter from the mouth of the east canyon, where it proceeded on to level ground, and in 1925, it cut a smaller course right down along the road. The course of this drain was practically straight south from the place it started to where it crossed the township road at the gateway. The largest one of the three drainage courses came out of the canyon and ran south and west. It was probably two-thirds of the distance from the east drainway over to the west drainway, and it went over onto the southeast quarter of Section 9. The east watercourse was not in existence 52 years ago. The center watercourse and the west watercourse were in existence at that time, the center watercourse being the larger, and drained the largest basin. The east water-

course came into existence about 1925. This watercourse developed to the size it is at this time in approximately three years.

The watercourses having been designated as the east, center, and west drains, the plaintiff further testified, in substance, as to the manner in which these watercourses crossed the south boundary line of the northeast quarter in 1942: When the water left the east canyon into the east watercourse, it flowed generally south and crossed the south boundary of the northeast quarter at the gateway, which is approximately 500 feet from the west line of the northeast quarter. The center watercourse ran south into the northeast quarter, then west and crossed the south boundary line of the northeast quarter approximately two-thirds of the distance from the east watercourse to the west watercourse, approximately 150 feet from the southwest corner of the northeast quarter. The west watercourse started approximately a quarter of a mile north of the south boundary line of the northeast quarter and ran southeast for approximately half of that distance, then flowed to the southwest until it was close to the line fence between the northeast and northwest quarters, and then ran practically straight south over onto the southeast quarter at approximately 17 or 18 feet from the west line of the northeast quarter.

The drainway on the east proceeded south across the road and meandered in a southerly direction almost straight south into an old irrigation ditch until that ditch was filled up, then ran down to the west line of the southeast quarter. The center watercourse has always run southwest after it crossed the road, close to the west line of the southeast quarter, and then south. The west watercourse, since it changed by nature in 1925, went south along the west side of the southeast quarter approximately a rod and a half from the boundary line fence between the southeast and southwest quarters until it got almost a quarter of a mile south,

and then turned slightly to the east, and in a southerly direction and ran off of that quarter.

The middle watercourse and west watercourse converge 50 feet south of the township road, and from the point where they converge there was a well-defined watercourse. In 1942, this watercourse was at least eight feet deep, a quarter of a mile long before it started to turn to the east, and at the north end, approximately 50 feet wide.

This witness described other features and flow of the drainways as hereinbefore indicated. However, the foregoing testimony is sufficient to show his contention with reference to the flow of surface waters from the northeast and northwest quarters of Section 9.

Other witnesses testifying for the plaintiffs substantially corroborated the plaintiffs' version of the drainways heretofore set forth.

The defendant Sydney Grint testified in substance, that his acquaintance with the drain of the surface water on the northeast quarter was for a period of 20 to 25 years. He detailed the number of times that he had been on the northeast quarter and the circumstances under which he became acquainted with the drainage thereon, which we deem unnecessary to set out. There was no east nor center drain in existence for that period of time, and such drains did not come into being until the latter part of May 1942, after an unusually hard rain which occurred on the 12th of that month, consisting of four or five inches within a space of 30 or 40 minutes, and another hard rain occurring about May 27, 1945, which washed the center and east drains wider and deeper.

The testimony of the defendants and their witnesses with reference to the drainage of the surface waters from the east and west canyons is, in substance, as follows: The waters from the east and west canyons join together on the northeast quarter at a point approximately 225 feet east of the west line of that

quarter and approximately 500 feet north of the south boundary line of the northeast quarter. From this junction point the surface waters from the east and west canyons flow southwest, then south into a drain which has been designated as the west drain, then across the south boundary line of the northeast quarter approximately 17 feet east of the center of the section designated as the quarter-section corner, and empty into the north ditch of the township road. From this point the surface waters from the west drain flow west in the north ditch of the township road for a distance of approximately 117 feet to a pipe culvert in the township road which is situated about 100 feet west of the quarter-section corner, and flow through the culvert in a well-defined drain onto the southwest quarter. From time immemorial, until about 1920, this west drain carried water across the southwest corner of the northeast quarter at a distance of approximately 125 feet north of the quarter-section corner where the water flowed diagonally in a southwesterly direction across the corner, came out on the south line of the northwest quarter approximately 100 feet west of the quarter-section corner and crossed the township road at the same place where the pipe culvert is now located, then continued on southwest onto the southwest quarter.

The defendants' engineer estimated that the drain extending from the east canyon west over to the drain from the west canyon would handle rains falling at the rate of one inch per hour, before overflowing, and a rainfall exceeding this rate would have to fall before the surface water from the east canyon would overflow from that drain to the center and east drains. He gave as his opinion, based on his survey and experience as an engineer, that the drain extending west from the east canyon over to the west drain, is the original and main drain because it takes the water first, and there was no evidence of the existence of the cen-

ter and east drains to indicate such drains had been in existence for a very long time.

Further testimony of the defendants' witnesses was to the effect that the surface water from the east canyon does not flow in what has been designated as the center and east drains except during or after an unusually hard rainfall, when sometimes waters which overflow from the connecting drain between the east canyon and the drain from the west canyon will run down the center and east drains. The overflow waters in the center and the east drains reach the township road at the point as testified to by the defendants' witnesses; the overflow water from the east drain being approximately 500 feet east of the quarter-section corner. On reaching the north ditch of the township road, it flows west to the wooden culvert, and the overflow water from the east drain reaches the township road approximately 150 feet east of the quarter-section corner and flows into the wooden culvert onto the southeast quarter. The overflow surface waters flowing onto the southeast quarter from the center and east drains work southwest in a diffused state to the fence line between the southeast and southwest quarters, and flow along the line to a place about midway therein where the surface waters spread out, some flowing southeast, some south, and some along with the other waters flowing in a southwesterly direction in a diffused state on the southeast quarter where such waters converge and flow southwest onto the southwest quarter. The water continuing south usually works across the southwest quarter about 300 feet north of the south line, and at another place about 350 feet north of the south line.

The flow of surface waters from the canyons and the drains as aforesaid, after they flow onto the southwest quarter, as contended for by the defendants, is controverted by the testimony of the plaintiffs' witnesses. The reason is that the plaintiffs contend that there is a natural ridge from the quarter-section corner between

the northwest and northeast quarters a distance of 600 feet north, and also between the southwest and southeast quarters, that constitutes a barrier so that any surface waters coming from the canyons cannot run over the ridge onto the southwest quarter. The elevations of the ridge are given according to the plaintiffs' conception of the same. There is a hog wire fence between the quarters of land heretofore described. The defendants' testimony is to the effect that the ridge is the result of wind erosion, and by the hog wire fence becoming covered with dirt and debris, which causes the water from the west drain to flow in the manner as hereinbefore described, 17 feet east of the quarter-section corner, thence west in the north ditch of the township road 117 feet, through the pipe culvert and onto the southwest quarter. The result of the dirt and debris that has washed and blown into the hog wire fence deflected the water in the west drain from the manner in which it originally flowed to the place where it has flowed since approximately 1920.

It is the plaintiffs' contention that Sydney Grint, in April or May of 1943, dug a ditch on his farm at a point near the beginning of the center drainway and near the outlet of the east canyon, west, connecting the center drainway and the west drainway, and made a dam below this ditch by piling the dirt which he took out of the ditch across the center drainway and the east drainway. The dam and ditch so constructed by Sydney Grint diverted the water that naturally flowed from the east canyon through the center and east drainways to the west drainway. This work resulted in a dam about 50 feet long and more than two feet across the east and center drainways where they came out of the canyon and turned south, and a ditch had been cut above the dam from the center drainway and the west drainway through the high ground. One witness for the plaintiff testified that the ditch was an excavation because it went through a natural ridge; and the

dam was man-made because the fill-in was above the natural course of the lay of the land. An engineer, who made no measurements or survey of the northeast quarter, testified from observation that the dam and ditch were man-made. This testimony was controverted by the defendant Sydney Grint, who admitted that in April or May of 1943, he and his boys did some work in the drain which runs west from the mouth of the east canyon over to the drainway from the west canyon at the point where that drain joins with the west drain; that there is a small field about 125 feet by 250 feet to the north across that drain; he desired to farm this tract along with that part south of the drain. He denied that he constructed a dam, as contended for by the plaintiffs; testified the drain connecting the east and west canyons was about six or eight feet wide and about four feet deep, and the banks were sharp and could not be crossed with horses and farm machinery, so he plowed the banks to make them more sloping, to enable him to cross the little field across the drain.

The defendants' engineer testified that he could not positively determine whether or not a dam had been built across the center and east drains, or whether the bank was the result of an act of nature. He did not see any indication that work had been done there by anyone to make a dam; what he saw looked like the regular bank of the draw. He did see evidence of debris in the bank, which had been washed there.

The plaintiffs contend that Harold Grint, with the assistance of one of Sydney Grint's boys, on May 10, 1944, did some work on the township road by constructing a ditch starting 17 feet east of the quarter-section corner and running through the ridge which divides the northwest and southwest quarters and the northeast and southeast quarters of Section 9. This was accomplished by taking the dirt out of the ditch on the north side of the township road and dumping it into the channel of the west drainway where the channel

crossed the roadway and piling the dirt several inches higher than the rest of the roadway so as to make the grade of the roadway across the west drainway higher than the roadway east and west, and by so doing, changed the course of the west drainway from running south onto the southeast quarter, and forcing the water in the west drainway to run through the ridge 117 feet west then south through the pipe culvert onto the southwest quarter.

The defendants' testimony is that in the latter part of May, or the first part of June 1943, the plaintiff Ray E. Probert, with the assistance of his son, constructed a dam across the township road at the quarter-section corner, which commenced in the southeast corner of the northwest quarter and extended across the north ditch of the road, across the road, and across the south ditch of the road to the northeast corner of the southwest quarter; the part of the dam in the north ditch being about three feet high and four or five feet wide, and the portion extending across the road about 15 to 18 inches high and about two feet wide. The portion extending across the south ditch was about four feet wide and high enough to make the top of the dam level clear across the road and both ditches. This dam remained in place until May of 1944, and during that period of time water from the west drain which was forced to flow across the township road because of this dam, made a wash-out in the road, and after a hard rain in May 1944, the wash-out across the road was approximately six to eight feet wide and about three feet deep.

The plaintiff denied that he ever put any dirt in the roadway, or a dam across the road, and said that what he did was to put two or three scrapers full of dirt on the south side of the roadway south of the traveled portion thereof, near his northeast corner, to stop the water from coming over onto his land. However, due to the increased volume of water flowing through the west drain, caused by the ditch and dam constructed by

Sydney Grint, and the ditch constructed by Harold Grint, the plaintiffs' efforts in such respect to stop the flow of the water onto the southwest quarter were unsuccessful.

The effect of the dam constructed by the plaintiff Ray E. Probert, as contended for by the defendants, was to force the water coming out of the west drain to run across the township road onto the southeast quarter, and prevent it from running west in the north ditch of the township road to the culvert 100 feet west of the quarter-section corner, onto the southwest quarter.

The defendant Harold Grint's testimony is that on or about May 10, 1944, he removed the part of the dam in the north ditch and the part which extended across the grade, and filled in the wash-out in the road which was caused by the dam. The dirt of the dam across the grade was placed in the wash-out in the road, as was the dirt of the dam in the north ditch. He cleaned out a portion of the north ditch, and denied that he had constructed a ditch from the quarter-section corner west of the steel culvert, or in any manner did anything to raise the grade of the road.

The township clerk testified that in May of 1944, he inspected the township road at a point near the quarter-section corner and observed that there was a dam which extended across the road and deflected the water coming out of the west drain onto the southeast quarter which caused a wash-out in the road, making the road almost impassable by car. The township officers authorized Harold Grint to remove the dam and fill in the wash-out in the road; to take the dirt from the dam and place it in the wash-out if necessary; to clean out the dirt which had washed into the north ditch; and use the dirt to fill the wash-out in the road.

The defendant Sydney Grint further testified that in May of 1944, the plaintiff Ray E. Probert constructed another dam all the way across the road at the same place. In the ditch on the north side of the road this

dam was five feet high, and across the roadway high enough so that the new model cars could not pass over it. In the south ditch the dam was four or five feet wide at the bottom, and two or three feet wide at the top. The dam was built directly across the road from the quarter-section corner to the south fence of the road. The plaintiff denies that he built a dam in any such manner; that the dam did not extend across the roadway, but only across the north ditch to keep the water from running west through the ditch and going onto his land.

The testimony is in conflict also as to the work done on the township road. The plaintiffs' testimony is to the effect that the township road east from the quarter-section corner was first graded by the township in the fall of 1944; it was worked before that, but not graded. The testimony of Harold Grint with reference to the township road is that it was worked in 1926; that from the quarter-section corner west for a distance of about 60 rods, which would be past the steel culvert 100 feet west of the quarter-section corner, dirt was taken from the fence line between the north side of the road and the south boundary of the northwest quarter and piled in the road; the ditch on the north side of the road was cleaned out and the dirt from it piled on the road, which raised the grade of the road; that the road again was worked about 1930, when a caterpillar tractor and road grader were used and ditches were made on both the north and south sides of the road; the dirt taken from the ditches was put in the road in order to create a grade. The road overseer of the township from 1919 to 1940, testified he worked the road in the fall of 1939, when he graded east from the steel culvert 100 feet west of the quarter-section corner to the road running north through the northeast quarter of Section 9. In addition to grading the road, a dip therein was repaired, which was about half way between the quarter sections and the section line, and a wooden culvert was put in the road

about half way from the quarter-section corner east to the end of the road, at the suggestion of the county engineer that such a culvert be placed any place that was low, the work being done under the supervision of the township road overseer. The wooden culvert was obviously placed in such position to receive the surface waters from the northeast quarter, as heretofore explained, and under the defendants' version of the flow of such water, would receive the overflow waters which flow down the center drain and run into the north road ditch which then run through the wooden culvert onto the southeast quarter rather than west in the north ditch to the steel culvert. The overflow waters running down the east drain would flow into the north ditch on the road and then west in the ditch to the wooden culvert.

The testimony is that the township road was properly constructed, as such roads are constructed in Custer County.

The conversations alleged to have been had by the plaintiff Ray E. Probert and Sydney and Harold Grint, and their denial of such conversations, we deem unnecessary to review.

The plaintiffs make certain contentions with reference to the survey of the defendants' engineer and the elevations taken by him at the point where the west drain enters into the north ditch of the township road. The opinion of the plaintiffs' engineer is that the waters from the west drainway flowed across the road approximately 17 feet east of the quarter-section corner for a long time in the past, and before the grade was put in the road; also, that the road grade is extra high at this particular point where the waters from the west drainway flow into the road right-of-way, and the grade serves as a dam. Several readings of elevations appear in the evidence to disclose that seven feet south of the quarter-section corner the land is two-tenths of a foot lower than the bottom of the west drainway as it

comes onto the township road from the northeast quarter, indicating the waters would have a fall of two-tenths of a foot over a distance of about 27 feet. Such fall would, by necessity, cause the water to run west to the pipe culvert in the ditch dug by the Grints and the township for that purpose, since it was stopped from running south by the grade in the roadway. Also, the bottom of the ditch on the south side of the township road is nine-tenths of a foot lower than the bottom of the ditch on the north side of the road. It is therefore apparent that the defendants, by making the grade in the road at the place where the west drainway crossed the township road, constructed a dam three feet high directly in the channel of the west drain. It is a physical fact that the ground immediately south is lower than the ground north at the point as heretofore designated. However, from time immemorial, as testified to by a number of witnesses, the natural drainage course of the west drain has been across the southwest corner of the northeast quarter, across the southeast corner of the northwest quarter to a place about 100 feet west of the quarter-section corner, then, as now, at the position of the pipe culvert as heretofore set out.

Defendants' exhibit 23 also shows that the general course of the drainage of water from the southwest corner of the northeast quarter is southwest and across the northeast corner of the southwest quarter. The land at the quarter-section corner slopes to the west and southwest, as shown by the elevations on exhibit 23.

The depression in the northwest corner of the southeast quarter is the result of a wash-out, and not of the normal flow of water from the west drain; and the depression to the east of the fence between the southeast and southwest quarters is due to wash-out, because the hog wire fence between the two quarters became drifted full of dirt as the result of wind erosion.

The plaintiffs contend that during recent years the defendants Grint have changed their mode of planting

crops so that ridges are formed on their lands in such a manner as to divert the surface waters coming onto such lands over to and upon the plaintiffs' land. The testimony is to the effect that changing the mode of planting, and diversifying such planting to cause ridges on such lands to be different succeeding years, is not unusual or out of the ordinary.

While request was made by the plaintiff Ray E. Probert to the township authorities that the pipe culvert should be moved to a position 17 feet east of the quarter-section corner to receive the flow of the surface waters in the west drain which plaintiffs contend naturally flow across the township road onto the southeast quarter, it is apparent that this request was not made until recently, and that through a number of years the plaintiffs were apparently content to leave the pipe culvert in the position that it is now in.

We are not in accord with the plaintiffs' contention that the evidence is insufficient to support the judgment of the trial court.

From the foregoing evidence, and after a view of the premises and the physical facts with reference to the surface waters involved in this litigation, it is apparent that the trial court, by finding generally in favor of the defendants and against the plaintiffs, determined the following important points involved: The original and natural drain of the surface water originating in the east canyon flows in a westerly direction over to the west drain. The surface water flowing from the west drain onto the northeast quarter has, from time immemorial, flowed onto the southwest quarter rather than onto the southeast quarter. That is, originally the drainage water in the west drainway flowed across the southwest corner of the northeast quarter and the southeast corner of the northwest quarter 100 feet west of the quarter-section corner, where the pipe culvert is now situated. Further, the effect of the district court's finding is that what the plaintiffs contend constitutes

a natural ridge between the northwest and northeast quarters, and the southwest and southeast quarters, is the result of deposits of dirt and debris in the hog wire fence accumulated by the collection of substances and by being windblown, that would have a tendency to deflect water. Further, that the township road is properly constructed; meaning it had a proper grade and ditches on the north and south sides. Further, that the work alleged to have been done by Sydney Grint on the northeast quarter, and the work done by Harold Grint on the township road, were not of a nature that such work was sufficient and neither was the work of the township on the township road sufficient with respect to the grade and ditches thereon, to cause the surface waters from the east and west canyons on the northeast quarter to be diverted onto the plaintiffs' land.

As aforesaid, the trial court also went upon and viewed the premises and the physical facts with reference to the drainage of the surface waters involved in this litigation. In this connection, the following authorities are applicable to a determination of this appeal which presents purely a factual situation: "When an action in equity is appealed, it is the duty of this court to try the issues de novo and to reach an independent conclusion without reference to the findings of the district court. Comp. St. 1929, § 20-1925 (this section being now 25-1925, R. S. 1943). But in a case wherein the trial court has made a personal examination of the physical facts, and where, in the same case, the oral evidence in respect of material issues is so conflicting that it cannot be reconciled, this court will consider the fact that such examination was made and that such court observed the witnesses and their manner of testifying, and must have accepted one version of the facts rather than the opposite." City of Wilber v. Bednar, 123 Neb. 324, 242 N. W. 644. See, also, State v. Delaware-Hickman Ditch Co., 114 Neb. 806, 210 N. W. 279; Greusel v. Payne, 107 Neb. 84, 185 N. W. 336.

"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." Columbian Steel Tank Co. v. Vosika, 145 Neb. 541, 17 N. W. 2d 488.

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. * * * 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."

From an independent investigation of the record, and in view of the foregoing authorities, we conclude that the judgment of the district court should be, and is hereby, affirmed.

AFFIRMED.

ANTON VANOUS, APPELLEE, V. THE CITY OF OMAHA, A MUNICIPAL CORPORATION, APPELLANT.
28 N. W. 2d 560

Filed July 18, 1947. No. 32246.

1. **Municipal Corporations: Pensions.** Under the provisions of section 14-614, R. S. 1943, service as a member of the police department for 20 years or more in the aggregate and age of

50 years or over must concur while the member is in active service to entitle him to the benefits of the act.

2. **Statutes.** Resort to contemporaneous construction of a statute by administrative bodies is neither necessary nor proper where the language used is clear, or its meaning can be ascertained by the use of intrinsic aids alone.

APPEAL from the district court for Douglas County: WILLIS G. SEARS, JUDGE. *Reversed and dismissed.*

E. F. Fogarty, Edward Sklenicka, Einar Viren, James M. Paxson and *Herbert M. Fitle,* for appellant.

E. Melvin Kennedy and *Emmet L. Murphy,* for appellee.

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

SIMMONS, C. J.

Plaintiff in this action sought a judgment for a pension under the provisions of section 14-614, R. S. 1943. Issues were made, trial to a jury waived, and trial had resulting in a judgment for the plaintiff. Defendant appeals. We reverse the judgment of the trial court and dismiss the cause.

The plaintiff was born October 8, 1889. He became a member of the regular police department January 10, 1913. He served continuously thereafter until August 1933. On August 11, 1933, he was suspended and relieved from duty. On August 12, 1933, he tendered his resignation as a member of the department to become effective from August 11, 1933. This was accepted August 15, 1933, by the city council. At that time he had served 20½ years. He became 50 years of age on October 8, 1939.

In 1940, plaintiff's son discussed the matter of a pension for his father with the city attorney, since deceased, and testified that he was advised its allowance would be automatic if plaintiff made application. Plain-

tiff made application in January 1942. On February 27, 1942, the same city attorney advised the council in writing that plaintiff was not entitled to a pension. It was denied on March 3, 1942. On May 29, 1943, this action was commenced. The action was tried in December 1946. Plaintiff pleaded a contemporary construction of the statute by the city in the granting of pensions in similar cases. He offered the record of one officer who was born August 24, 1884, became a patrolman July 1, 1910, was suspended March 2, 1932, returned to duty May 9, 1933, worked and was paid for the one day of May 10, 1933, resigned May 11, 1933, and was retired on a pension beginning August 22, 1934, by order of the city council adopted October 23, 1934.

Section 14-614, R. S. 1943, insofar as applicable here, is as follows: "Whenever any person shall have been duly appointed or selected and sworn and has served for twenty years, or more, in the aggregate, as a member, in any capacity or any rank whatever, of the regularly constituted police department of any such city, being of the age of fifty years, or over, such person shall have the absolute right and be entitled, on his application made in writing to the city council to retire from active service on such police force, and shall be allowed a pension equal to half his salary at the time of retirement; * * *."

It is plaintiff's contention that after he has served 20 years he then has earned his pension; that he can then retire or resign, but that he cannot be paid the pension until after he has become 50 years of age, at which time he is entitled to the pension provided in the act. It is the defendant's contention that plaintiff is required to meet the provisions of the act as to length of service and age while an active member of the department.

Leaving out language not necessary to be considered here, the statute provides: "Whenever any person shall have * * * served for *twenty years, or more,* in the ag-

gregate, as a member, * * * *being* of the age of *fifty years, or over,* such person shall have the absolute right and be entitled, * * * to retire *from active service* * * * and shall be allowed a pension equal to half his salary at the time of retirement; * * *." (Emphasis supplied.) The word "being" as used here imports the present time and has the same meaning as though the word "is" were used. Clearly under the language of the act service as a member of the department for 20 years or more in the aggregate and age of 50 years or over must concur while the member is in active service to entitle him to the benefits of the act. Such is the clear import of our opinions in State ex rel. Rishling v. Allen, 128 Neb. 675, 260 N. W. 191; and Lickert v. City of Omaha, 144 Neb. 75, 12 N. W. 2d 644. It is obvious that as of August 1933, when plaintiff resigned and his resignation was accepted, he had not then met the requirement of the act as to age. Nothing is shown to have happened since to bring him within the requirements of the act to entitle him to a pension.

Plaintiff offers one isolated pension allowance to sustain his contention of a contemporary construction. Defendant urges that the doctrine arises only from a course of conduct and is never applied to a single case. See 59 C. J., Statutes, § 608, p. 1024. That we need not determine. The rule is: "Resort to contemporaneous construction of a statute by administrative bodies is neither necessary nor proper where the language used is clear, or its meaning can be ascertained by the use of intrinsic aids alone." City of Lincoln v. First Nat. Bank, 146 Neb. 221, 19 N. W. 2d 156. See 59 C. J., Statutes, § 607, p. 1022; 50 Am. Jur., Statutes, § 319, p. 312. There is no occasion to resort here to contemporaneous construction.

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

REVERSED AND DISMISSED.

ORPHA L. JENSEN, APPELLEE, V. ANTON JENSEN, APPELLANT.
28 N. W. 2d 444

Filed July 18, 1947. No. 32242.

Divorce. The court, in making a division of the property and fixing the amount of alimony, if any, will take into consideration the fact that the parties were married in middle age and have no children as the result thereof, that all children by their former marriages have grown to maturity, the duration of their marriage, the estate of each party at the time of their marriage, their respective contributions since, including their earnings and their labors, the wife's loss of her interest in the husband's earnings, the loss of social standing, comforts, and luxuries of life which she would probably have enjoyed except for the enforced separation, the conduct of the parties leading up to the divorce, to which party the divorce is granted, their age, condition of health, and all other facts and circumstances relating thereto, and make such an award as appears to be fair and equitable.

APPEAL from the district court for Douglas County: JAMES M. FITZGERALD, JUDGE. *Affirmed in part and in part reversed and remanded with directions.*

Herbert T. White and *William H. Thomas,* for appellant.

George W. Pratt, for appellee.

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

PAINE, J.

This was a contested divorce action, in which the trial court granted an absolute divorce to the plaintiff and gave her title to property they owned as joint tenants, but required her to pay off all the mortgage on this property and to pay the defendant husband $50 a month until she had paid him $1,000. From this decree the defendant appealed.

The defendant charged, first, that the decree of absolute divorce was granted upon the uncorroborated testi-

mony of the plaintiff, and assigned as his second error that in dividing the property an excessive amount was given to the plaintiff.

The evidence relating to the two assignments of error is so interwoven that it would be difficult to present the facts relating to the grounds for divorce and the division of the property separately.

The plaintiff and defendant were married May 4, 1944, after an acquaintance of about eleven years. The defendant had been previously married and had a grown son and a daughter by that marriage. The plaintiff had been married and divorced twice, and she had four children by her first marriage, the youngest of whom was a son, Joe, who was 20 years of age at the time of the trial.

At the time of the marriage the plaintiff had been working at the bomber plant for about a year, earning $135 a month after all deductions were made, and she continued working at this job for three months after she was married.

On the day of their marriage they purchased the property at 616 North Nineteenth Street from Walter Ehlers for $7,800. The deed, exhibit No. 1, being dated May 4, 1944, passed the title to them as joint tenants with right of survivorship, and each one, in a way, paid $1,000 in cash and gave a first mortgage to the Omaha Loan & Building Association for $3,500 and a second mortgage to Ehlers for $2,300.

The testimony of the plaintiff and defendant conflicts on every important point in this case, and this conflict shows up first in the fact that she testified that the defendant had but $268 cash towards his $1,000 payment (his bank statement shows $263.30) and borrowed $700 on his Packard car and $106 at the bank and $150 from the State Finance Company, which loans he afterwards paid off out of the proceeds of the rent from the property, while the defendant, on the other hand, testified that the plaintiff had only $698.88 to put in,

and that he paid, in addition to his share $26 for insurance, $37.50 for fixing up the papers, and $7.50 for examination of the abstract.

The property purchased was a brick duplex, with all furniture therein, having 14 rooms, there being seven rooms on each side; nine were single sleeping rooms, one two-room apartment and one three-room apartment, one of the apartments being occupied by the parties hereto, and there were three rooms in the basement. The rents received from the rooms, which were at all times rented, were about $216 a month.

The plaintiff testified that defendant treated her cruelly on several occasions, beating and slapping her. In March 1946 he asked her to divorce him and she refused. She said he repeated such acts of cruelty. Their quarrels seem to have come to a head early Sunday morning, August 18, 1946, when she testified that he kicked her out of bed and ordered her to get his breakfast at five o'clock, although he did not have to go to work that day. She did not have anything in the house but oatmeal and coffee. He threw the oatmeal on the floor, told her to pick it up, and told her to go out and buy groceries. She claimed that they had a bitter quarrel and that he knocked her down and she was afraid he was going to kill her. She telephoned for her son Joe, who had returned in January from three years' service with the Marines, and the defendant telephoned for the police. She testified that her arm was still blue from his beating of two weeks before. Her son, Joseph H. Aken, testified that he "got there a minute after the cops got there," and he saw bruises on her. He testified that this beating which she had taken from Jensen was discussed there by the police and Jensen and his mother.

Dr. Oliver M. Krogh, a chiropractor, testified that his records showed that Mrs. Jensen came to his office about August 18, 19, or 20, while he was out of town, but Dr. Allen was there. She came back again August

29 after Dr. Krogh had returned from his vacation. She was in a very nervous condition. She had numerous bruises on her body. Two-thirds of her forearm was black and blue, and on the right thigh there was a large black and blue area where she had been bruised. He treated her with heat treatments and waves to relieve her pain.

One of the renters living in their duplex testified that he heard a lot of talking in angry voices but did not pay much attention to it, and did not visit back and forth with them at all.

As to this occurrence on Sunday morning, August 18, the defendant testified generally that she accused him of stealing her money and he pushed her out of his way and she was going to kick him and he backed away and she fell down on the porch.

The evidence fully supports the trial judge in granting an absolute divorce to the plaintiff on the grounds of extreme cruelty, as provided in section 42-302, R. S. 1943.

We will now consider the assignment of error that the alimony granted to the plaintiff was excessive.

The record proves that they made a very profitable investment on their wedding day in this roominghouse, which yielded enough rent to pay off the second mortgage and reduce the first mortgage very materially. The plaintiff gave her entire time to running these apartments and sleeping rooms, doing a maid's work, getting meals for her husband, and doing everything in her power to make a success of this venture, the defendant continuing his regular employment as driver of a bus for the Street Railway Company, working his regular hours and in rush times putting in overtime at additional pay.

The evidence of the defendant is to the effect that he worked at his job as a bus driver from 5 a. m. to 2 p. m., and at the last only to 1 p. m., and that he put in his afternoons working around the duplex; that he helped paper all of the rooms, painted the whole place,

and that he built a garage in which to keep the automobile he owned and used as a family car. He testified that he never refused plaintiff a dollar at any time to spend on herself; that she could go to a beauty parlor at any time; and one time when she asked for $15 for a dress he gave her $20 and she went down and bought one costing $17 or $18.

To show how thrifty these people were, we find that the plaintiff claims that during the first 26 months of their married life the defendant collected all of the rents and paid all of the bills, as follows:

26 months' rents at $216 a month	$5,616.00
26 months on radio rentals	141.20
26 months rental of washing machine	450.35
He collected plaintiff's wages at bomber plant	405.00
thus making total receipts	$6,612.55

The plaintiff admits that out of this income the defendant paid out the following items:

Payments on the first mortgage	$2,200.00
He paid off second mortgage in full	2,365.90
He paid gas bills	149.00
electricity	252.00
telephone	96.60
water rent	56.00
coal for heating seasons at $140 each	280.00
Total expenditures	$5,399.50

They differ slightly on the amount of coal consumed, and the defendant testified that the grocery bills were upwards of $50 a month, while plaintiff said $30 a month would cover that item.

There is no dispute at all as to the defendant's wages, for he shows that he earned in the last eight months in 1944, after their marriage $1,687.60
that in 1945 he earned, according to Government slip 2,965.95
and that for the first eight months in 1946 he earned 1,640.00

and that he received $75 a year for being president of the Relief Association, which for 28 months is 175.00

making the total amount he earned from their marriage, May 4, 1944, until he left on August 30, 1946 ..... $6,468.55

and since that date he has worked steadily, earning $185 a month.

Now, the defendant claims that he spent all of his earnings during the marriage on their family expenses, including such items as paying for papering and painting the entire roominghouse, building a garage, keeping up his automobile as a family purpose car, including painting it for $80. He mentions one item of repairs of $50, but as to necessary gas and oil and general items, nothing appears.

The trial court found that this duplex was purchased and owned by them as joint tenants, each advancing $1,000 to buy the property for $7,800, and then adds: "The balance of said purchase price has been paid from the income of said property, and there remains but $1410.00 to be paid upon said property to clear the same; that one-half of said property belongs to the plaintiff herein and the other half of the said property hereinbefore described should be given and awarded to the plaintiff as permanent alimony in this cause, so that all of said property, save and except the unpaid balance due upon the purchase price of the same, should be the sole property of the plaintiff herein, after plaintiff has paid to defendant the sum of $1,000.00 at the rate of $50.00 per month."

In the recent case of Munsell v. Munsell, 147 Neb. 590, 24 N. W. 2d 566, the defendant was also a bus driver for the same company, but in that case he turned over every check he earned to his wife, who handled all the cash during their seven years of married life. However, there we were also faced with a lack of satis-

factory records and the impossibility of clarifying their financial transactions. When such a marriage partnership ends in a divorce, the burden is thrown upon the courts to fix the proper amount of alimony. It is then necessary to attempt to untangle all their financial affairs, but the result can never be satisfactory to the litigants, the counsel, or the courts where there is such a lack of competent evidence as to their financial affairs.

In the case of Swolec v. Swolec, 122 Neb. 837, 241 N. W. 771, many Nebraska cases were cited in which the amount of alimony granted varied from one-fifth to one-half of the property involved, and certain rules were given for fixing the amount of the alimony.

In the case of Pierce v. Pierce, 96 Neb. 511, 148 N. W. 151, we have a case very similar to the one at bar, where the wife worked very industriously to help make money; there the parties started in on a rented farm and the wife milked the cows, made butter, fed and cared for the poultry, did the housework, as well as assisting in the farm work. They were both hard-working industrious people, each doing their full share of the work. The court found that, after the expenses of the trial, the defendant would have unencumbered property of $17,000, and raised the alimony granted by the district court from $6,000 to $8,500, giving her one-half of the net assets.

In the case of DeVore v. DeVore, 104 Neb. 702, 178 N. W. 621, where the parties had accumulated $29,717 by their joint efforts and the defendant had inherited from his father's estate $16,549, the court granted the plaintiff $17,200, and said there was no reason why the wife should be excluded from sharing in the property which the defendant had inherited.

In our opinion, the case at bar falls clearly within the third class of cases discussed in Phillips v. Phillips, 135 Neb. 313, 281 N. W. 22, in which mature parties, who are experienced in domestic relations by reason of

former marriages, and who have no children by the present marriage, seek a divorce.

The parties do not, and doubtless never will, agree on a division of their property. However, we believe their conduct for the first 26 months of their married life was that of good partners. Neither accuses the other of spending a cent foolishly, or of having any bad habits; early and late each worked for the joint success of their well-planned real estate investment. There is no evidence of either having any bonds, stocks, or savings accounts, and all the property that is shown is this roominghouse. The plaintiff's testimony that defendant never spent a cent of his earnings on her is not borne out. She made a number of trips to Missouri to visit relatives, and she overlooks the use and expenses of an automobile and its garage, and several other items already mentioned.

We have reached the conclusion that plaintiff should not be required to pay defendant $1,000, as ordered by the trial court, but that, on the other hand, the defendant is entitled to his one-half share in the equity in this roominghouse property.

The decree of the trial court is affirmed as to the part granting plaintiff an absolute divorce, and reversed as to the part ordering plaintiff to pay defendant $1,000, and the cause is remanded with directions that a decree be entered by that court to the effect that, as of the date of the entry of the judgment on the mandate, the plaintiff and defendant shall own this roominghouse property, and the furniture therein, equally as tenants in common, subject to the balance due on the first mortgage to the Omaha Loan and Building Association. Costs are taxed to the defendant.

AFFIRMED IN PART; REVERSED IN PART; AND REMANDED WITH DIRECTIONS.

WILLIAM A. EHLERS, APPELLANT, V. WILLIAM E. NEAL, SHERIFF OF MCPHERSON COUNTY, NEBRASKA, ET AL., APPELLEES.

28 N. W. 2d 558

Filed July 18, 1947. No. 32232.

1. **Appeal and Error.** The Supreme Court is without jurisdiction to entertain an appeal from the district court unless notice of appeal is filed in the office of the clerk of the district court within three months after the rendition of judgment or decree or within three months from the overruling of a motion for a new trial in the cause.
2. **New Trial.** An application for a new trial must be made at the term the verdict, report, or decision is rendered, and, except for the cause of newly discovered evidence, material for the party applying, which he could not, with reasonable diligence, have discovered and produced at the trial, shall be within three days after the verdict or decision was rendered, unless unavoidably prevented.
3. ———. A motion for a new trial that is not filed within the time specified by statute is a nullity and of no force and effect.

APPEAL from the district court for McPherson County: I. J. NISLEY, JUDGE. *Appeal dismissed.*

E. B. Zabriskie and *W. A. Ehlers,* pro se, for appellant.

Hoagland, Carr & Hoagland, Beeler, Crosby & Baskins, for appellees.

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

YEAGER, J.

This is an action in equity by William A. Ehlers, plaintiff and appellant, against William E. Neal, Sheriff of McPherson County, Nebraska, and National Surety Corporation of New York, a corporation, the surety on the official bond of said sheriff, defendants and appellees, the purpose of which is to require amercement in damages against the sheriff and his surety on account of alleged failure of the sheriff to make a proper levy of execution on the property of a judgment debtor and

on account of alleged illegal charges made and collected. A trial was had to the court which resulted in a finding in favor of the defendants and decree dismissing the plaintiff's action. From the decree plaintiff has appealed.

With appellees' brief which was filed in this court was also filed a motion to dismiss the appeal. This motion requires first consideration herein.

The ground of the motion for dismissal of appeal is that the appeal was not perfected within the time required by law, therefore this court is without jurisdiction to entertain it.

As grounds for dismissal the appellees say (1) no notice of appeal was filed within the time provided by law, (2) that no bond for costs was filed within the time provided by law, and (3) that no transcript was filed with the clerk of this court within the time provided by law.

The decree in this case was entered August 6, 1946. It is the contention of appellees that in this case this is the date from which the time for filing notice of appeal, for filing cost bond, and for filing transcript with the clerk of the Supreme Court must be calculated. This is the date of the order which they contend was the final order from which plaintiff sought to take his appeal.

If it be true that this is the date from which calculation of time is to be made for the filing of notice of appeal then the contention of appellees that this court is without jurisdiction to entertain the appeal is valid and must be sustained. By the terms of section 25-1912, R. S. 1943, notice of appeal must be filed in the office of the clerk of the district court within three months after the rendition of judgment or decree or within three months from the overruling of a motion for a new trial in the cause. This provision is declared in the same section to be jurisdictional which declaration has been approved by this court. See Federal Farm Mtg. Corporation v. Ganser, 145 Neb. 589, 17 N. W. 2d 613; Barney v. Platte Valley Public Power & Irri-

gation District, 144 Neb. 230, 13 N. W. 2d 120; Lee v. Lincoln Cleaning & Dye Works, 144 Neb. 659, 14 N. W. 2d 227.

The notice of appeal was not filed until December 19, 1946, which was more than four months from the date of the decree.

Appellant contends that the provision of section 25-1912, R. S. 1943, relating to the ruling on a motion for new trial is applicable and that he had three months from the ruling on a motion for new trial which he had filed in the case to file his notice of appeal and that his notice was filed within this period of three months. The notice was filed within three months of the ruling on this motion.

As against this the appellees assert that the motion for new trial could not be considered as such, and the ruling thereon availed appellant nothing in the matter of time since it was not filed within the time provided by statute for the filing of motions for new trial. It was filed August 20, 1946, and overruled on November 8, 1946.

Section 25-1143, R. S. 1943, provides: "The application for a new trial must be made at the term the verdict, report or decision is rendered, and, except for the cause of newly discovered evidence, material for the party applying, which he could not, with reasonable diligence, have discovered and produced at the trial, shall be within three days after the verdict or decision was rendered, unless unavoidably prevented."

In the case of Heeter v. Nisi, 134 Neb. 209, 278 N. W. 271, it was said: "A motion for a new trial that is not filed within the time specified by statute is a nullity and of no force and effect."

We are concerned here only with the three day limitation of the statute since examination discloses that the motion is in nowise based on newly discovered evidence.

It is clear that the motion for new trial was not filed

within three days of the rendition of the decree and was and is a nullity unless, as appellant contends, he may be excused from filing it in time.

In his motion for new trial appellant moved, in addition, to have the decree set aside agreeable to the terms of section 25-2001, R. S. 1943, on the ground of unavoidable casualty, that it was entered prematurely, and was unjust and inequitable. The motion was supported by the affidavit of appellant. Apparently a hearing was had and evidence introduced on the motion at the conclusion of which the court specifically found that there was no ground for setting aside the decree and overruled the motion.

The evidence adduced upon this motion has not been preserved in the bill of exceptions so therefore this court is unable to examine into the correctness of the ruling.

It therefore follows that the motion for new trial must be considered a nullity and that appellant's time for appeal began to run from August 6, 1946, and that appellant not having filed his notice of appeal within three months from that date, this court is without jurisdiction to entertain it.

The appeal is dismissed.

DISMISSED.

DONALD S. WIGHTMAN, APPELLEE, V. THE CITY OF WAYNE, NEBRASKA, A MUNICIPAL CORPORATION, ET AL., APPELLANTS.

28 N. W. 2d 575

Filed July 25, 1947. No. 32231.

1. **Judgments.** A party may not be vexed more than once for the same cause of action, and the doctrine of res judicata includes not only the things which were determined in the former suit, but also any other matter properly involved which might have been raised and determined therein.

2. ———. An adjudication upon a claim for general equitable relief bars, under the principles of res judicata, a renewal of such claim in a subsequent action involving the same subject matter.
3. **Improvements.** Section 76-301, R. S. 1943, commonly known as the Occupying Claimants Act, does not protect from the enforcement of a lien against real estate upon which improvements have been placed without compensation for such improvements.

APPEAL from the district court for Wayne County: SIDNEY T. FRUM, JUDGE. *Reversed and remanded with directions to dismiss.*

Fred S. Berry, H. D. Addison, and *Mark J. Ryan,* for appellants.

Harry E. Siman, for appellee.

E. B. Perry, amicus curiae.

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

YEAGER, J.

This is an action by Donald S. Wightman, plaintiff and appellee, against the city of Wayne, Nebraska, defendant and one of the appellants, brought under the Declaratory Judgments Act of the State of Nebraska for an adjudication of the rights and interests of the said parties in and to Lots 1, 2, and 3, in Block 6, Crawford & Brown's Addition to the city of Wayne, county of Wayne, Nebraska, and the improvements thereon and for various forms of relief based on unjust enrichment, estoppel, the principles of the Occupying Claimants Act, and other equitable principles.

In the action C. H. Hendrickson, as a citizen and taxpayer, intervened. He died and revivor was had in the name of Bertha Hendrickson, administratrix of his estate.

A trial was had to the court and certain relief was granted to plaintiff. From the relief granted the defendant and intervener have appealed.

No bill of exceptions was preserved and presented to this court hence the decision here must depend upon the transcript which contains the pleadings of the parties, the decree, motions for new trial, and the rulings thereon.

In order to have an understanding of matters presented it becomes necessary to detail the history of this litigation. This history is contained in the petition filed by plaintiff and the opinions in two former cases decided by this court which opinions were made a part of the petition by reference. The two cases were Taxpayers' League v. Wightman, 139 Neb. 212, 296 N. W. 886, and Wightman v. City of Wayne, 144 Neb. 871, 15 N. W. 2d 78.

The city of Wayne, prior to December 8, 1921, created two paving districts within the city. They were numbered 3 and 4. The lots in question were within the two districts. On December 8, 1921, a special assessment was levied against the lots in district No. 3 for $1,064.40 divided into 20 annual installments of $53.22 each and in district No. 4 for $1,077 divided into 20 installments of $53.85 each. Prior to June 25, 1931, none of the installments had been paid.

On October 13, 1930, Alice V. Lewis purchased the lots at private tax sale for the general taxes for the years 1928 and 1929 amounting to $130.93 and to her was issued a tax sale certificate.

On June 25, 1931, the city of Wayne purchased the lots at private tax sale for the first 10 installments of the special taxes. The amount due thereon at the time including interest and penalties was $2,495.71. A certificate therefor was duly issued by the county treasurer.

Thereafter on October 31, 1931, the city of Wayne filed a petition for the foreclosure of its certificate and made Alfred H. Lewis, the holder of the record title, and his wife, and Alice V. Lewis, the holder of the certificate for general taxes, parties defendant. On March 18, 1932, a decree of foreclosure was entered

whereby Alice V. Lewis, the holder of the certificate for general taxes, was decreed to have a first lien for $235.72 with 12 percent interest from date, and the city of Wayne a second lien for $2,713.76 with 12 percent interest from date.

No further proceedings were had in the case until September 9, 1936, when an order of sale was issued. On October 19, 1936, a sale was had of the lots to one Walter S. Bressler who was city clerk. He purchased the lots for the city on a bid of $4,600. No part of the bid was ever paid. Bressler took a sheriff's deed in his own name.

During the months of June and July 1938 plaintiff negotiated with the mayor and members of the city council for the purchase of the lots. A price of $1,500 was agreed upon. There is no official city record of these incidents or of any later incidents relating to this property.

By way of completion of the purchase plaintiff paid the city $1,134.75, to the holder of the lien for general taxes he paid $319.21 and took from her a quitclaim deed, and to the holder of the outstanding record title he paid $40 and from him also took a quitclaim deed. On October 5, 1938, Bressler and his wife gave plaintiff a quitclaim deed the purpose of which was to convey the interest of the city of Wayne. All of the money received by the city except a very small amount was allocated to the payment of installments 11, 12, 13, and 14 of the special assessments and general taxes for the years 1933, 1934, 1935, 1936, and 1937. Thus the city received nothing in liquidation of the amount represented by the certificate for special taxes which was foreclosed.

This court, in the opinion in Taxpayers' League v. Wightman, *supra,* which opinion, as hereinbefore stated, was made a part of the petition herein by reference, wherein the validity of that transaction was put in issue, held that the sheriff's sale to Bressler was void and that plaintiff took nothing by his deed from Bressler. It

was there held that if the action complained of were upheld it would have the effect of canceling the lien of the city for paving taxes in the tax foreclosure case in the sum of $2,713.76 and interest. It was further held that the entire transaction beyond the decree of foreclosure was a constructive fraud upon the owner of the equity as well as upon the holders and those interested in the tax liens being foreclosed. In that opinion it is stated: "If the title to the property could be successfully passed and tax liens, in this case amounting to $2,949.48 and interest when decree was rendered, barred by such proceedings, it would certainly be at least a constructive fraud both upon the owners of the equity as well as upon the holders and those interested in the tax liens being foreclosed."

It was the conclusion of this court in that opinion that plaintiff herein was the owner of the lots in question, not by reason of the deed from Bressler, but by reason of the deeds from the record titleholder and the holder of the first lien for general taxes, subject however to the lien of the city of Wayne under the decree of foreclosure entered March 18, 1932, for the sum of $2,713.76 and interest. That opinion stands unreversed and without modification.

After this determination by this court plaintiff filed an action against the defendant wherein, on the facts herein stated and notwithstanding the determination, he sought to have the lien of the foreclosure decree entered March 18, 1932, perpetually enjoined and for a decree requiring the city of Wayne to specifically perform its alleged contract to satisfy such lien. C. H. Hendrickson was intervener in that action. A trial was had which resulted in a finding against plaintiff and dismissal of his case. Appeal was taken to this court and is the case of Wightman v. City of Wayne, *supra.*

In the opinion in that case, which opinion was made a part of the petition herein by reference, this court found that there was no valid and binding agreement

between plaintiff and defendant and in consequence that there was no agreement that could be enforced by the equitable remedy of specific performance and that there was no basis for the entry of injunction restraining the enforcement of the lien. The following appears in the opinion:

"The record discloses that the agreement made was entered into by plaintiff and the officers of the city without any record thereof appearing in the minutes of the city council. It is the contention of the intervener that a city of the second class cannot in this manner enter into a valid contract for the sale of real estate. In this we concur. The power of the city of Wayne to contract with reference to its real estate is limited by section 17-401, Comp. St. Supp. 1941, and section 17-522, Comp. St. 1929. These provisions have been held to be mandatory. * * * And where, as here, no record of the proceedings of the city council exists with reference to the matter under consideration, the presumption is that none took place. * * * We necessarily conclude that there was no binding agreement made between the plaintiff and the city and, consequently, there is no agreement that can be enforced by the equitable remedy of specific performance.

"Plaintiff prays in this suit for a perpetual injunction against the enforcement of the city's lien for taxes. In this respect we point out that in Taxpayers' League v. Wightman, *supra,* this court held that a finding that Donald S. Wightman was the owner of the property was correct, but that the finding that the city had no right, interest or claim upon said property and that the title thereto should be quieted in Wightman as against the city was erroneous. The effect of that holding was to confirm the title to the property in Wightman by virtue of the deed obtained from Alfred H. Lewis, the former title owner, subject to the lien of the city which is under discussion in the present litigation. We can find no basis for the entry of an injunction restraining the

enforcement of the lien. There is no valid contract that can afford the basis for such a decree. The lien of the city is valid and no reason has been pointed out that would entitle plaintiff to relief by injunction."

In that action, as pointed out in the opinion, plaintiff contended that he was entitled to general equitable relief against the lien of the city since he purchased the lots for $1,500 which he paid, that he satisfied the first lien and procured a deed from the former titleholder, and thereafter built a home thereon of the value of approximately $8,500. The improvements were started before the commencement of the action of Taxpayers' League v. Wightman, *supra,* bringing into question the legality of the pretended sale to Wightman by the city through Bressler, however very little could have been done since but nine days elapsed between the two dates.

The intervener in response to that contention contended that the decision in Taxpayers' League v. Wightman, *supra,* was res judicata. The contention of the intervener in this respect was sustained. In its determination of that question this court said: "In Taxpayers' League v. Wightman, *supra,* the defendant Wightman filed an answer in which he asked for a dismissal of plaintiff's amended petition and for general equitable relief. Any available remedy could have been asserted in that case. The issues in that case in effect determined every issue raised by the present case. But whether they were specifically determined or not, every issue in the present case could have been raised in the former suit."

It may be well to interpolate here that the impression should not be indulged that the city profited by the $1,500 except in the payment of the first lien and in the payment of taxes which became due or delinquent after those which were represented by the certificates which were foreclosed. All except a few cents of the amount was used to purchase the outstanding first lien, to acquire the outstanding title, and to pay later install-

ments of the special assessments, and later annual general taxes. Thus a burden upon plaintiff as the successor in title was liquidated rather than an enrichment of the city at the expense of plaintiff.

This history reflects fairly, we think, the allegations of the petition of plaintiff filed herein and the relief prayed is based on the allegations thus reflected.

The relief prayed is in the alternative and is in substance the following:

(a) That the city of Wayne be required to comply with the bid of Walter S. Bressler and pay to the clerk of the district court $4,600 with interest and penalties thereon from the date of the tax foreclosure sale, or

(b) That the city of Wayne before exercising any right under its judgment lien be required to pay to plaintiff the value of the improvements placed on the three lots, or

(c) That plaintiff be subrogated to the city's judgment lien, or

(d) That in the event of the sale under the decree of foreclosure the city be required as a condition to reimburse plaintiff for the purchase price of $1,500 with interest from October 5, 1938; that plaintiff be decreed to have a first lien against the proceeds of sale for all general taxes paid by him subsequent to October 5, 1938, with interest, together with such part of the balance of the proceeds as the value of the improvements bears to the value of the property as enhanced by said improvements, and

(e) That the court render a declaratory judgment decreeing and adjudicating the rights and status of the parties and general equitable relief.

To the petition the defendant filed a general demurrer wherein it was alleged that the petition failed to state a cause of action or any ground upon which to grant any of the relief prayed. The demurrer was overruled. Thereafter the defendant filed an answer and therein the demurrer was reasserted. The intervener also filed an answer. Issues were joined by the filing of a reply.

Following the trial of the case the court after making lengthy findings of fact and conclusions of law decreed as follows:

"IT IS THEREFORE CONSIDERED, ADJUDGED, ORDERED AND DECREED that the defendant The City of Wayne have a valid first and paramount lien on and against the real estate herein, to-wit: Lots 1, 2, and 3, Block 6, Crawford & Brown's Addition to the City of Wayne, in Wayne County, Nebraska, for the sum of $907.09, with interest thereon at the rate of 6% per annum from the date of this decree.

"IT IS FURTHER ORDERED AND DECREED that said real estate be sold as upon execution under the tax foreclosure decree entered on the 18th day of March, 1932, for the satisfaction of said lien. It is further ordered that the proceeds of said sale shall be brought into court and applied, first, to the payment of the costs in this case, one-half of which is taxed to the plaintiff and the other one-half of which is taxed to the defendant, the City of Wayne; second, to the payment of the sum of $907.09 with interest at 6 per cent from the date of this decree to the City of Wayne, and, third, the balance of such proceeds to be paid to Donald S. Wightman, the plaintiff herein.

"IT IS FURTHER ORDERED BY THE COURT that the defendant herein pay all costs of record in the tax foreclosure suit No. 4291 up to and including the confirmation of the sale to Walter S. Bressler and also the attorney's fees allowed in said decree and that all further costs in said action be paid by the plaintiff herein."

It is from these provisions of the decree that the defendant and the intervener have appealed. Six assignments of error are set out by the city of Wayne but we may consider only five since one could receive consideration only through a bill of exceptions. As already pointed out no bill of exceptions was presented with the appeal. There are nine assignments of error set out by the intervener but they do not require separate

statement or consideration. The assignments of error proper for consideration are (1) that the court erred in overruling the demurrer of the defendant to the petition, (2) that the decree is contrary to law, (3) that plaintiff's cause of action and the matters and things alleged by him have been adjudicated and are res judicata, (4) that the court erred in holding that defendant could enforce its decree of foreclosure for the sum of only $907.09 and certain interest and costs provided in its decree, and (5) that the court erred in overruling defendant's motion for a new trial.

As pointed out the history, as set forth herein, contains the substantial allegations of the petition. The petition contains no substantial allegation not reflected in the opinions of this court in Taxpayers' League v. Wightman, *supra,* and Wightman v. City of Wayne, *supra.* The object and purpose of this action as is disclosed by the petition is to obtain on the same facts remedial relief prayed for and denied in the two previous cases and on the same facts remedial relief not prayed for in those actions.

As to those matters which were adjudicated in the earlier actions there is no question whatever but that here it becomes the duty of the court to say that those adjudications are final and conclusive and that they cannot be overturned by any judgment of the court herein. It is also true that the same rule applies to any remedy which could have been asserted in the former cases. The applicable rule was announced in Shepard v. City of Friend, 141 Neb. 866, 5 N. W. 2d 108, and quoted with approval in Wightman v. City of Wayne, *supra,* as follows: "The rule is that a party should not be vexed more than once for the same cause of action, and the doctrine of res adjudicata includes not only the things which were determined in the former suit, but also any other matter properly involved which might have been raised and determined therein."

It follows therefore that the district court was, and

this court is, without power to order the city of Wayne to comply with the bid of Walter S. Bressler since this court has adjudicated that the foreclosure sale was void.

It also follows that there was and is a lack of power to require the city, before exercising any right under its judgment lien, to pay plaintiff the value of the improvements placed on the lots. The opinion of this court adjudicated an unimpaired lien against this real estate for the sum of $2,713.76 with interest from March 18, 1932.

It cannot be properly said on any theory that the plaintiff is entitled to be subrogated to the city's lien since it is clear from the facts on which the previous adjudications were made that he gave nothing in satisfaction of or which it was agreed would be used in satisfaction of that lien. The money paid by him was used in satisfaction of a first lien for general taxes and in payment of taxes and special assessments of later dates than those which ripened into the judgment lien of the city.

The general equitable relief prayed cannot be granted. The question of plaintiff's right to general equitable relief was disposed of in Taxpayers' League v. Wightman, *supra,* which disposition was declared in the opinion in Wightman v. City of Wayne, *supra,* in the following words: "The intervener contends that any claims of plaintiff for general equitable relief are barred under the principles of res adjudicata. In Taxpayers' League v. Wightman, *supra,* the defendant Wightman filed an answer in which he asked for a dismissal of plaintiff's amended petition and for general equitable relief. Any available remedy could have been asserted in that case. The issues in that case in effect determined every issue raised by the present case. But whether they were specifically determined or not, every issue in the present case could have been raised in the former suit." This statement was then followed by quotation and approval

of the rule relating to res judicata hereinbefore quoted from Shepard v. City of Friend, *supra.*

It becomes clear on the record therefore that the decree of the district court in its entirety is incorrect and should be reversed since the effect is to overturn that which has been previously adjudicated by this court together with the imposition of burdens incident to the overturning of those things previously adjudicated.

Appellee contends substantially that a new element has been placed in issue by the record which has not been previously adjudicated by this court and which was not directly adjudicated by the district court which should be adjudicated in his favor. He insists that if the city is permitted to enforce its lien enforcement should be against the lots only and not against the improvements which were placed thereon by him. For support in this connection he relies on section 76-301, R. S. 1943, commonly known as the Occupying Claimants Act, and a claimed general equitable principle that under the facts pleaded his improvements should not be sold for the satisfaction of the lien. With this contention we do not agree.

An examination of the statute in question discloses that it has no application in a case such as this one. The act protects an occupying claimant in his improvements only against setting aside or canceling his claim or title by a person who sets up and proves an adverse and better title or claim to such real estate. It in nowise seeks to prevent the enforcement by foreclosure of a valid lien. No one is seeking to question the title of plaintiff but only to enforce a tax lien against it.

We are clearly of the opinion that if plaintiff had any right to have this question considered as a matter of general equity it has been disposed of by the adjudication in Taxpayers' League v. Wightman, *supra,* and Wightman v. City of Wayne, *supra.* We refer for support of this conclusion to the opinion in Wightman v. City of Wayne, *supra.*

In the two former actions the effort of the plaintiff herein was essentially to relieve the entire property, lands, and improvements, from the lien in question. The adjudications were as to the entire property. He may not be permitted now by severance of the improvements from the lands in a new action to again litigate the question of whether or not the improvements were subject to the lien.

We conclude therefore that the decree of the district court was erroneous and that the plaintiff is entitled to none of the relief prayed in a hearing de novo before this court.

The decree of the district court is reversed with directions to dismiss the action.

REVERSED WITH DIRECTIONS.

EARL KARLS, APPELLANT, V. JOHN M. NICHOLS ET AL., APPELLEES.

28 N. W. 2d 595

Filed July 25, 1947. No. 32241.

Homesteads. A homestead, as defined by statute, once established, is presumed to continue as such, and the burden of proving a waiver, loss, or abandonment thereof, is upon the party asserting such waiver, loss, or abandonment.

APPEAL from the district court for Douglas County: JACKSON B. CHASE, JUDGE. *Affirmed.*

Frost, Peasinger & Meyers and *Fremont Meyers,* for appellant.

John C. Barrett, for appellees.

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

TEWELL, District Judge.

This action was begun by Earl Karls, as plaintiff, in the district court for Douglas County to secure the specific performance of an alleged contract to convey real estate. Upon trial of the issues joined by the pleadings the trial court denied specific performance, dismissed the plaintiff's petition, and provided for the return to the plaintiff of the amount of payment that the plaintiff had made upon the purchase price. The plaintiff appeals to this court, after an order overruling his motion for a new trial. We affirm the decree of the trial court.

The only plaintiff is Earl Karls, and the only defendants are John M. Nichols and Edith Nichols, who, at all times involved in this action, have been and are husband and wife. The defendants filed separate answers to the plaintiff's petition. The answer of the defendant John M. Nichols alleges, in legal effect, that he accepted the sum of $200 as a part payment of the purchase price of the real estate described in the plaintiff's petition, but that the terms of said contract provided that its going into effect was conditioned upon his said wife approving of its terms, and that his said wife never signed the contract and never consented to its terms. Both answers allege that the real estate described in the plaintiff's petition is the homestead of the two defendants, and that defendant Edith Nichols never at any time consented to its sale.

The evidence shows that the defendant John M. Nichols became the owner of the three lots involved in 1931 or 1932. This property is described in the plaintiff's petition as follows: "Lots Five (5) Six (6) and Seven (7), Block Fourteen (14), Carter Lake View, an Addition to Douglas County, Nebraska; further known as 814 Camden Avenue, Omaha, Nebraska." Soon after acquiring this property the defendants erected a house upon the lots. They moved into the house and began making it their home about the year

1934. The family consists of the two defendants and their four children. The defendants lived in this house as their home continuously from the time they moved into it until sometime in the year 1941. Then the father of the defendant John M. Nichols was ill of cancer. The defendants with their children then moved across the street and lived in a house with Anna Taylor, who is the mother of the defendant Edith Nichols. The father and mother of defendant John M. Nichols lived in the house on the premises involved. The defendants testify that this was done to avoid their children's disturbance of their grandfather in his illness. This grandfather died, and after such death the mother, brother, and nephew of defendant John M. Nichols continued to live on the premises. In April 1943, while the defendants and their children were living in the home of said Anna Taylor, and the mother, brother, and nephew of defendant John M. Nichols were living in the house on the premises involved, the Missouri River overflowed its banks, and inundated the premises involved, and all lands lying within several blocks thereof, with water to a depth of around eight feet. The house on the premises involved was not occupied by anyone from the date of such flood to the date of the trial of this cause. Within a short time after this flood the defendants with their children moved into a rented house at 4751½ North 14th Street in Omaha, where they lived as tenants continuously thereafter to the date of trial.

On September 5, 1946, the plaintiff went to the place of residence of the defendants and there talked with the defendant Edith Nichols. He told her that he had been informed that the property involved was for sale. She directed him to where he could find her husband at his work. The plaintiff on that same day talked with the defendant John M. Nichols. Later the same day at the residence of defendants the plaintiff was furnished a key to the house in order that he might examine the

premises. The plaintiff left with the key, and in a short time he returned and told the defendant John M. Nichols that he would purchase the premises for $2,000. A verbal agreement was made whereby the defendant John M. Nichols agreed to convey the premises to the plaintiff for the sum of $2,000. Nothing was said about the agreement being subject to the approval of the defendant Edith Nichols. The sum of $200 was paid to John M. Nichols by the plaintiff. The plaintiff then drew, and John M. Nichols signed, a written memorandum, worded, after such signature, as follows:

"Omaha Nebraska Sept. 5, 1946.
Received of Earl Karls Two Hundred & 00/100 Dollars, For deposit on house at 814 Camden including three Lots #5-6 & 7 block 14. East Omaha. Balance of 1800.00 to be paid cash on delivery of deed & abstract.
$200.00 J. M. Nichols"

On the following Saturday the defendant John M. Nichols notified the plaintiff that the sale could not be made for the reason that his wife would not consent to it. Edith Nichols is shown not to have been present during any of the negotiations leading up to the agreement of sale, other than when she directed the plaintiff to where he could find her husband, and is shown not to have known of the agreement until after it had been made. This action was begun on September 16, 1946, 11 days after the date of the agreement.

We are not concerned with the question of whether or not the written memorandum, or other act, was sufficient to remove the agreement from within the requirements of the statute of frauds. No such question is raised by the parties. The defense, if such it be, raised by the answer of John M. Nichols to the effect that the agreement was not to become complete or effective until approved by his wife is not supported by any evidence. Section 40-104, R. S. 1943, provides in part as follows: "The homestead of a married person cannot be conveyed or encumbered unless the instrument

by which it is conveyed or encumbered is executed and acknowledged by both husband and wife, except as otherwise hereinafter provided." The exceptions mentioned have no application to this case. This court has consistently held to the effect that an agreement, such as the one above outlined, is void whenever a homestead is sought to be affected thereby. No further holding to that effect, or citation of authorities, is required. That the premises involved consist of three lots, rather than of a quantity of contiguous land not exceeding two lots, as embraced within the statutory definition of a homestead, need not concern us, as the plaintiff does not seek a conveyance of other than the entire three lots. We confine ourselves solely to the question of whether or not the homestead of the defendants, concededly once established, is shown to have been abandoned prior to the date of the agreement involved herein. This is purely a question of fact.

A homestead, as defined by statute, once established, is presumed to continue as such, and the burden of proving a waiver, or loss, or abandonment thereof, is upon the party asserting such waiver, loss or abandonment. 29 C. J., Homesteads, § 403, p. 961; Doman v. Fenton, 96 Neb. 94, 147 N. W. 209; Whitford v. Kinzel, 92 Neb. 373, 138 N. W. 597. In this case the evidence concededly shows the premises involved to have been the homestead of defendants continuously from sometime in the year 1934 to sometime in 1941. The removal in 1941 of defendants with their children to a home occupied by Anna Taylor across the street, to allow their homestead to be occupied by the father and mother of defendant John M. Nichols, is as much consistent with the existence of an intent to return to their homestead, under the circumstances shown in this case, as it is with the nonexistence of such intent. The flood in 1943 made the premises, and also their place of abode in the home of said Anna Taylor, unfit for occupancy until major repairs were made. Aside from the prem-

ises involved, approximately all, if not all, of the houses in the vicinity from which persons were driven by the flood above mentioned, are shown to have been repaired and reoccupied. On the other hand, the evidence shows that soon after the flood waters receded the defendants began to repair the premises that had been their home. The basement was nearly filled with mud. This the defendants removed. They relaid the floors of the lower story, and replastered much of the house. At the time of trial the house was still unfit for occupancy. The defendant John M. Nichols is shown to have done repair work on the house during the summer of 1946, only a short time before making the sale agreement now involved. He did all of the repair work himself on Sundays and after his hours of employment on other days. From lack of funds and materials the repairs had not been completed. Neither of the defendants is shown to have ever owned any real estate other than the premises they now claim as their homestead. Other than to relate the facts and circumstances above stated, it suffices to say that the evidence does not show any facts or circumstances that are inconsistent with the continued existence of an intent on the part of the defendants to return to the premises involved and make them their home. It is therefore not sufficient to prove an abandonment of a homestead that all parties concede was once established.

For reasons above stated the decree of the trial court is affirmed.

AFFIRMED.

GEORGE B. DENT, JR., APPELLEE, V. CITY OF NORTH PLATTE, NEBRASKA, A MUNICIPAL CORPORATION, APPELLANT, IMPLEADED WITH EARL BROWNFIELD, COUNTY TREASURER OF LINCOLN COUNTY, NEBRASKA, APPELLEE.

28 N. W. 2d 562

Filed August 1, 1947. No. 32257.

1. **Taxation: Attorney and Client.** An attorney who represents a county in a tax foreclosure action is eligible to become a purchaser of land obtained by the county at a tax foreclosure sale when the transaction between the county and the attorney has no relation to the foreclosure proceeding.
2. **Parties.** A trial court is required to order new parties to an action when a determination of the controversy cannot be had without the presence of such parties.
3. ———. It is not error for the trial court to refuse to order new parties to an action unless it is made to appear that the controversy cannot be determined without the presence of such parties.
4. **Taxation.** A deed issued in pursuance of a decree foreclosing the lien of general taxes has the effect of conveying title to the purchaser free and clear of liens of taxes or special assessments junior or inferior to the lien of general taxes and this is true even though the junior or inferior liens are not included in the foreclosure and the holder is not made a party.
5. ———. The remedy for failure to include junior or inferior liens in a foreclosure of the lien of general taxes or failure to make the holder thereof a party to the foreclosure action is an appropriate proceeding for redemption.
6. ———. Licking v. Hays Lumber Co., 146 Neb. 240, 19 N. W. 2d 148, distinguished.

APPEAL from the district court for Lincoln County: I. J. NISLEY, JUDGE. *Affirmed as modified.*

E. H. Evans, for appellant.

Bert L. Overcash and *James G. McIntosh,* for appellees.

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

YEAGER, J.

This is an action in equity by George B. Dent, Jr.,

plaintiff, appellee here, against the city of North Platte, Nebraska, and Earl Brownfield, County Treasurer of Lincoln County, Nebraska, defendants, to quiet title to Lot 1, Block 77, Landgraf's Subdivision of Lots 73, 74, 75, 76, and 77 of Platteview Addition to North Platte, Lincoln County, Nebraska. The city of North Platte is the appellant here.

The basic facts of this case are that the general taxes on the lot in question for the years 1932 to 1935 inclusive became delinquent and thereafter on April 6, 1937, a tax sale certificate was issued to the county of Lincoln. The county of Lincoln will be hereinafter referred to as the county. In 1928 the city of North Platte, which will be hereinafter referred to as the city, levied a special assessment against this lot for paving. The assessment was in ten annual installments. Nine of the installments were delinquent on July 9, 1938. One was not. The special assessment was not included in the tax sale certificate. On July 9, 1938, the county instituted action for foreclosure of its tax lien. The city was not made a party defendant. C. S. Beck and S. S. Diedrichs were at that time the attorneys representing the county in the foreclosure action. In January 1939 plaintiff herein took over the representation of the county in the foreclosure action and was its representative throughout from then on until sale and confirmation. In due course there was a foreclosure, sale, and confirmation. The lot was sold and deed issued to the county. The sheriff's deed, which is dated May 11, 1944, recited the price as $61.85. Thereafter on December 31, 1945, the county board of Lincoln County conveyed the lot to plaintiff by quitclaim deed for the consideration of $66.10. It was agreed that plaintiff was to assume and to pay the taxes which had become due and delinquent subsequent to those represented by the certificate which was foreclosed. A certificate had been issued for subsequent taxes which included the above mentioned special assessment for paving. Plaintiff tendered payment to

the county treasurer in accordance with the understanding with the county board of the purchase price of $66.10 plus $431.49 which was the subsequent tax assumed. Instead of accepting the tender the county treasurer demanded in addition payment of the installment of the special assessment for paving and accrued interest thereon. This demand the plaintiff refused, on the ground that the foreclosure of the lien for taxes represented by the certificate which was issued to the county on April 6, 1937, barred and canceled the lien of the special assessment for paving and that the county as purchaser at the foreclosure sale took the lot free from the burden of the special assessment.

The action here is to quiet title against the lien claimed by the city for the special assessment for paving. From a decree quieting title as prayed the city has appealed.

In defense of the action the defendants contended that the sale by the county to the plaintiff herein was void because of the fact that plaintiff had represented the county in the foreclosure action and was therefore ineligible to become a purchaser of the lot, and further that the foreclosure of the tax certificate did not destroy the lien of the special taxes since the city was not a party to the foreclosure proceeding. As grounds for reversal the city makes the same contentions and the additional contention that the trial court erred in its refusal, on motion of the city, to permit the county to be made a party to this action.

The contention that the plaintiff was not eligible to become a purchaser under the circumstances outlined in the evidence is without merit. The circumstances under which he acquired the title to the lot were entirely removed from any connection he had with the county in the foreclosure of the certificate or the sale and confirmation under foreclosure. At the time he purchased the lot he was not employed by the county. Long prior thereto the county had acquired the title by purchase. There is nothing whatever in the record to

indicate that the transaction was or could have been controlled or influenced by anything growing out of the previously existing relationship of attorney and client. The mere fact is that plaintiff was attorney for the county in this foreclosure proceeding and that long after the property had passed by judicial sale to the county the plaintiff purchased it from the county. This furnishes no ground for criticism. Jordan v. Evans, 99 Neb. 666, 157 N. W. 620.

The action of the trial court in refusing to permit the county to be made a party to this action must be sustained. On October 18, 1946, an oral motion was made by the attorney for the city for leave to file a cross-petition bringing into the litigation the county as a new party defendant. The motion was preserved in the bill of exceptions.

There is nothing in the record to indicate that the county was either a necessary or proper party to this action. By statute the court is only required to order new parties to an action when a determination of the controversy cannot be had without the presence of the other parties. Section 25-323, R. S. 1943. See Cunningham v. Brewer, on rehearing, 144 Neb. 218, 16 N. W. 2d 533. It is not shown that the controversy in this case cannot be determined without the presence of the county.

We come now to the question of whether or not plaintiff is entitled to have his title quieted against the city's lien, or what had been a lien, for the unpaid special assessment for paving.

The parties do not question that prior to the foreclosure the city had a lien for this assessment, and neither do they question that this lien was junior and inferior to the lien of general taxes. The substantial contention of the city is that the installment of this special assessment were not included in the certificate which was foreclosed or in the foreclosure and the city was not a party to the foreclosure proceeding and that therefore the special assessment is a valid, subsisting,

and enforceable lien against the lot in question.

It is clear from the record in this case that neither this special assessment nor any of its installments were included in the foreclosure action. The special assessment was levied in 1928 and at the time of foreclosure was a lien in its entirety. Section 16-646, R. S. 1943. It could have been included and foreclosed but was not. It is clear also that the city was not made a party to the foreclosure action.

Did the foreclosure without inclusion of the special assessment and without inclusion of the city as a party to the action have the effect of retaining the special assessment as a valid, subsisting, and enforceable lien against the real estate? We think the answer must be in the negative. We think that the deed issued in pursuance of the decree of foreclosure had the effect of conveying title to the purchaser, the county, free and clear of liens of taxes or special assessments junior or inferior to the lien of general taxes of the county which was foreclosed. This is not, however, to say that the city was without any kind or character of remedy in the premises nor that the plaintiff is entitled to have his title quieted.

The opinion in the recent case of Polenz v. City of Ravenna, 145 Neb. 845, 18 N. W. 2d 510, reviews exhaustively the statutes and earlier decisions of the court dealing with the effect of foreclosure of the lien of general taxes on the lien of special assessments and also the title acquired by the purchaser through and by his deed, and the following conclusion was therein reached: "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."

The following conclusion was reached therein as to

the title taken by the purchaser: "This court has held that 'The title conveyed under a tax (foreclosure) 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.' "

However, in Polenz v. City of Ravenna, *supra,* the city was made a party and served with process in the original tax foreclosure action and therein we cited the following applicable statutory provision: " '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."

The validity of the deed of the county, the purchaser at the foreclosure sale, is not brought into question, therefore it must follow, on the authority of the opinion in the Polenz case and the cases and statutes cited therein, that plaintiff as purchaser from the county takes title unencumbered by a lien of the special assessment in question, unless, as the city contends, because of failure to make the city a party to the foreclosure proceeding, the lien of the special assessment has not been extinguished.

This contention of the city cannot be sustained under the decisions of this court. For this failure the city has rights but those rights were not to have the special assessment continue as a subsisting lien against the real estate. The right that remained was that of redemption from the foreclosure.

It will be noted from the opinion of Polenz v. City of Ravenna, *supra,* that special assessments are classed with encumbrances inferior to the lien of general taxes.

This court, in Merriam v. Goodlett, 36 Neb. 384, 54 N. W. 686, in addressing itself to a failure to make a mortgagee a party to an action to foreclose general taxes, said: "A lien for taxes takes precedence of all other liens where the tax is assessed upon the land itself and not upon any particular interest therein * * *. The

foreclosure, therefore, extinguished the mortgage lien, even if it is not barred by the statute of limitations. As the mortgagee was not a party, if the mortgage lien is not barred, no doubt he could proceed in an action to redeem by setting up the necessary facts to entitle him to such relief."

However, therein the court goes on to say: "The plaintiff, however, by seeking to have the cloud removed from his title and to have it confirmed in him subjects himself to the equity rule that he that seeks equity must do equity. The rule, however, is imposed as a condition of granting relief. If relief is denied, the rule will not be applied."

In Gillian v. McDowall, 66 Neb. 814, 92 N. W. 991, a mortgagee, who had not been made a party in a tax foreclosure, sought to foreclose his mortgage. Therein we said: "In other words, in this case, as is said in Merriam v. Goodlett, the sale extinguished the mortgage lien, subject to the right of the mortgagee to reinstate it by exercising his outstanding right of redemption. * * * The necessity of redeeming in a case such as this may be rested upon the fact that otherwise the land is held by an independent title not subject to the mortgage lien. * * * Plaintiff, in his petition, makes no offer to redeem from the tax-foreclosure, but seeks a decree for sale of the land as though no such foreclosure had been had. Such is not his remedy. He should redeem from the foreclosure sale, and, upon redemption, sell the land for satisfaction of his lien."

In Coffin v. Old Line Life Ins. Co., 138 Neb. 857, 295 N. W. 884, it was said: "A situation comparable to that here presented was considered by this court in the case of Merriam v. Goodlett, 36 Neb. 384, 54 N. W. 686. In the Merriam case we announced the principle: 'If parties affected (by a tax foreclosure and sale) are not before the court their remedy is an action to redeem. If the court had jurisdiction the decree cannot be treated as void.'" It is therein further stated: "The fact that

he failed to make the owner of the Cowles decree a party to his proceeding, while operating to limit the conclusiveness of the decree involved so far as cutting off right of redemption of a subsequent encumbrancer, in no manner changed the essential character of the title received by him. So far as these proceedings were valid, the rights conferred were exclusively derived from a single source, viz., from the sovereign power."

The appellant contends that the position taken in Polenz v. City of Ravenna, *supra,* Merriam v. Goodlett, *supra,* and Coffin v. Old Line Life Ins. Co., *supra,* conflicts with the decision of the later case of Licking v. Hays Lumber Co., 146 Neb. 240, 19 N. W. 2d 148. With this contention we do not agree. The case of Licking v. Hays Lumber Co., *supra,* deals with specific statutory provisions which are therein applicable and controlling but which are in no way applicable or controlling here.

It is therefore the holding of this court that the deed, which the county of Lincoln took as a result of the foreclosure in question, conveyed to it the lot free and clear of the lien of the special assessment of the city of North Platte but subject to the right of the city to redeem and in consequence the plaintiff, as purchaser from the county of Lincoln, took the same title subject to the same right of the city. The plaintiff would therefore not be entitled, under the circumstances here, to have his title quieted free therefrom.

However, we have come to the conclusion, under the circumstances here, that the city should be allowed to redeem and to be given a reasonable time for that purpose. We therefore direct that the city of North Platte be allowed 60 days from the date of the mandate issued herein within which to redeem. If it fails to redeem within that time, the title should then be quieted in the plaintiff.

As thus modified the decree of the district court is affirmed.

AFFIRMED AS MODIFIED.

SYDNEY R. LANG ET AL., APPELLANTS, V. JOSEPH C. TODD, APPELLEE.

28 N. W. 2d 434

Filed August 1, 1947. No. 32255.

1. **Contracts.** A mere statement by a party to an executory contract, made prior to breach by him, to the effect that he cannot and will not perform, on the date for performance or thereafter, not acted upon by the vendor, does not constitute an abandonment of his rights acquired by the contract.
2. ———. Where one party to an executory contract, before time for performance by him has arrived, unequivocally states that he will not perform, the other party may either treat such renunciation as an abandonment or breach of contract, by affirmative election then made so to do, or may treat such renunciation as inoperative, await the time of performance, and then hold the one party responsible for all consequences of nonperformance, including specific performance in a proper case, but in case he elects to keep the contract alive, it lives for the benefit of both parties, and he remains subject to all his obligations under it, and enables the one party to complete the contract, notwithstanding his previous renunciation, with the same effect as if such renunciation had never been made.
3. **Cases Overruled.** The cases of Carstens v. McDonald, 38 Neb. 858, 57 N. W. 757, and King v. Waterman, 55 Neb. 324, 75 N. W. 830, are overruled insofar as they are in conflict herewith.
4. **Contracts.** A clause in a contract making time of the essence thereof may be waived by the subsequent acts of the parties.
5. ———. Where acts to be performed by parties to a contract are mutual and dependent, and are to be performed concurrently, one party must at least be able and willing to perform at time of performance, in order to enable him to declare a default on account of nonperformance by the other.

APPEAL from the district court for Lancaster County: RALPH P. WILSON, JUDGE. *Affirmed.*

William L. Walker and *Earl Ludlam,* for appellants.

Beynon, Greenamyre & Hecht, for appellee.

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

TEWELL, District Judge.

This action was begun by Sydney R. Lang and Ilo F. Lang, husband and wife, as plaintiffs, in the district court for Lancaster County, to establish an alleged prior rescission of a written contract to convey real estate, and to clear the record title to such real estate of the record of such contract. By answer and counterclaim, Joseph C. Todd, the only defendant, admitted the execution of such contract, denied rescission thereof, and sought specific performance of such contract. Upon the trial of the issues the trial court dismissed the plaintiffs' petition, granted the defendant specific performance, and provided for the payment to the plaintiffs of the unpaid portion of the sale price. The plaintiffs appeal. We affirm the decree of the trial court.

By the written contract involved, the plaintiffs agreed to sell to the defendant, and the defendant agreed to buy from plaintiffs, Lots 9 and 10 in Block 44, original town of Lincoln, Nebraska. The sale price set forth in the contract was $45,000. The terms of the contract provide that $2,000 of the sale price would be paid upon its execution, and the balance of $43,000 "to be paid on or before June 1st, 1946 upon delivery of deed and merchantable abstract with landlords possession to be given on date of settlement." The terms of the contract made time of the essence thereof, and provided for liquidated damages in the sum of $2,000 to be paid by any party failing to perform. On the lots described in the contract was a two-story brick and steel garage building, located at 109 North 9th Street in Lincoln. It was known as the "Annex Garage." The contract was executed and dated on April 13, 1946, in a trailer house at El Dorado, Arkansas, where the plaintiffs were then operating a carnival. The sum of $2,000 was then paid by the defendant upon the purchase price. After the contract was signed, appellant Sydney R. Lang asked as to whether it would be necessary for him to go to Lincoln to close the transaction. The appellee replied

that he did not see why that would be necessary, as appellants could send their deed to W. L. Walker, their attorney who was then present, or to a Mr. Freeman at First National Bank in Lincoln. No definite arrangements for closing the transaction were made. Appellants instructed Mr. Walker upon his return to Lincoln to obtain the abstract of title from the Security Mutual Life Insurance Company, which held a mortgage upon the property, and deliver it to appellee. This Mr. Walker did about April 24, 1946.

About May 6, 1946, Mr. Walker told appellee that appellants needed an additional $5,000 at once. Thereupon the appellee had the mortgagee above mentioned prepare a note and mortgage upon the premises to be signed by appellants for an additional $5,000 loan. These papers appellee took to Hot Springs, Arkansas, where appellants were then operating their carnival. Appellee arrived at Hot Springs, Arkansas, about May 16, 1946. He was then told by appellants that the sum of $5,000 would not enable them to buy another carnival from one Mr. Vernon who was then at Durant, Oklahoma, as Mr. Vernon by then had decided that he wanted the entire purchase price of $40,000 at the time of sale. Appellant Sydney R. Lang and appellee the next day drove to Durant, Oklahoma, to see Mr. Vernon. They found that they could not arrange to buy the carnival from Mr. Vernon for reasons immaterial here. In relation to their conversation at Hot Springs, Arkansas, about May 16, and at Durant, Oklahoma, about May 17, the testimony of appellants and of appellee directly conflicts. It is the claim of appellants that appellee told them that he had purchased the property for resale to the Salvation Army at a profit, that such prospect of resale had collapsed, and that he would not and could not complete his purchase from them. Appellants testify that appellee showed them an appraisal he had had made of the property he had agreed to purchase, which showed such property to have a value of about $37,000, and told

them he would forfeit his $2,000 down payment rather than to complete his purchase. All this the appellee unequivocally denies. It will be noted at this point that appellants do not testify that they in any manner gave notice of any kind of any acceptance by them of such anticipatory breach by appellee. Appellee returned to Lincoln. The day fixed for closing the contract came and passed with no offer to perform by either party to the contract. On June 6, 1946, appellee was advised that appellants were in Harvey, Illinois, and he sent them a telegram in which he asked that they call him by telephone. This appellants did. Appellant Sydney R. Lang testifies that in this telephone conversation appellee tried to get the purchase price reduced to $37,500. This the appellee denies, and testifies that he asked Mr. Lang to send his deed so the sale could be closed, and that Lang told him he would be in Lincoln in a few days. Appellants came to Lincoln about June 19, 1946, and at least two conversations were held between appellee and Sydney R. Lang. No offer to perform was made by either party. These conversations were mostly about finding an investment for Mr. Lang. Within a few days Lang left for Pennsylvania. A week or two later appellee asked Mr. Walker to prepare and send appellants a deed for their signature. This Walker did. Appellants received the deed, but did not execute or return it. Not receiving the deed, Walker advised appellee to call Mr. Lang. This appellee did, and asked Mr. Lang to sign and return the deed. Mr. Lang said he would be in Lincoln in a few days and would see appellee. He testifies that in this conversation, for the first time after the execution of the contract, appellee stated that he would pay the full balance of the purchase price. No notice of any acceptance by appellants or of any repudiation by appellee had been given appellee as yet. Just after this conversation appellee placed his contract of record on July 8, 1946. Lang returned to Lincoln and on or about July 19, 1946, went to lunch with appellee. They

had been close friends for many years. In the latter part of the conversation after lunch the two talked about closing their real estate transaction. Lang told appellee: "I am not going to deliver this building to you." Appellee said to Lang: "Syd, we have been friends for years and you wouldn't be a welsher, would you?" Lang replied: "Well, you are the welsher. You didn't carry out your contract on June 1st." This is the first time the record shows appellants to have notified appellee of any intention on their part to elect to rescind the contract on account of any statement or act on the part of appellee. The two parted unfriendly for the first time. This action was filed four days later.

It is the claim of the appellants that appellee purchased the property at a time when he thought he would be able to sell the property to the Salvation Army at a profit; that when prospects of such sale were soon thereafter lost, the appellee took the unprincipled and unbusinesslike attitude of attempting to "chisel" the appellants into accepting a lesser amount than the contract price, and in so doing went to the extent of unqualifiedly saying that he could not and would not complete the purchase and would forfeit the $2,000 he had paid upon the contract; that later and about July 1, 1946, the appellee found that he could make a lease of the premises advantageous to himself even upon his paying the full amount he had contracted to pay, and then decided to insist upon a performance of the contract. The appellee, on the other hand, denies that he ever said he would not complete the contract, and claims that about or soon after July 1, 1946, the appellants were advised that Gold & Company was going to terminate the lease on a building that Mr. Lang was renting, in which he was conducting a garage at 10th and N Streets in Lincoln, and that Mr. Lang then decided he needed the property he had contracted to sell to appellee, and therefore attempted to refuse performance of the contract involved. The evidence strongly indicates that the claims, as above

stated, of both appellants and of appellee, so far only as the claims of one relate to the statements and attitude of the other, are both true. For the purpose of this opinion we accept such claims of both parties, so far only as the claim of one relates to the statements and attitude of the other, as being true.

It is difficult to ascertain from the appellants' petition and briefs just how they claim the interest acquired by the appellee in the real estate by his contract was extinguished or detached from him, whether by abandonment, or on account of rescission, or on account of forfeiture. In addition to the facts above stated, it may be well to state that as late as July 15, 1946, Mr. Walker had certain entries of the abstract recertified by a bonded abstracter in compliance with a requirement of appellee's attorneys, although appellants deny knowledge of this, and also that in both their petition and during trial appellants offered to return to appellee the initial payment of $2,000 and at the same time ask in their petition, and contend for in their brief, a recovery of the $2,000 liquidated damages provided for by the contract. At the time of trial the mortgage above mentioned was still a lien on the land, but the maker had the right, by its terms, to pay it in full on the first day of any calendar month. Performance by the appellants admittedly was never tendered. On June 1, 1946, the date fixed for performance, appellants, then unbeknown to appellee, were in Russellville, Arkansas. The title to the property is still encumbered by a party-wall agreement, subject to which the appellee is willing to accept the title, without diminution in purchase price.

A mere statement by a vendee in a contract for conveyance of real estate made prior to breach by him to the effect that he cannot and will not perform on the date of performance or thereafter, or his attempt to secure a reduction in the purchase price, not acted upon by the vendor, does not constitute an abandonment of his rights in such real estate. 66 C. J., Vendor and

Purchaser, § 295, p. 731. The facts in Kesterson v. Marsh, 107 Neb. 202, 185 N. W. 346, in which an abandonment was declared, are much different than in this case. We need not be concerned here with what would have been the situation had appellants, with notice to appellee, affirmatively accepted such renunciation at any time before appellee offered and demanded performance.

Appellants contend that the prior repudiation by vendee placed him in default. We think not, in the absence of an affirmative acceptance thereof by appellants. Where one party to an executory contract to sell and convey real estate, prior to breach by him and before time for performance by either party has arrived, unequivocally states that he cannot and will not perform, when the time of performance arrives, the other party may either treat such renunciation as an abandonment or breach of contract by affirmative election so to do, or he may treat such renunciation as inoperative, and await the time of performance and then hold the one party responsible for all consequences of nonperformance, including specific performance in a proper case, but in case he keeps the contract alive, it lives for the benefit of both parties, and he remains subject to all of his obligations under it, and enables the one party to complete the contract, notwithstanding his previous renunciation, with the same force and effect as if such prior renunciation had never been made. Frost v. Knight, L. R. 7 Exch. 111; Roehm v. Horst, 178 U. S. 1, 20 S. Ct. 780, 44 L. Ed. 953; 13 C. J., Contracts, § 729, p. 655.

The holdings above announced are to some extent in conflict with our holdings in Carstens v. McDonald, 38 Neb. 858, 57 N. W. 757, and in King v. Waterman, 55 Neb. 324, 75 N. W. 830. In each of those cases there is a syllabus to the effect that an action for the breach of an executory contract cannot be maintained before date of performance upon the unequivocal declaration by one party, before performance is due, that he does not intend to perform the contract on his part. Such holding is

contrary to the rule followed in about all, if not all, of the jurisdictions in the United States other than Nebraska, is also illogical, and contrary to the welfare of business transactions. The bringing of an action before date for performance to rescind the contract, or to recover damages for breach, upon such anticipatory breach, constitutes an unequivocal acceptance of such a renunciation, and many times may work to the advantage of all concerned. It is true that this action was not begun until after time for performance had elapsed, as was the case in Carstens v. McDonald, *supra*. Nevertheless, the holding in those cases has a bearing upon the question in this case as to whether appellants and appellee, or either of them, were in default upon failure to tender performance on June 1, 1946, and as to whether appellants must notify appellee of his acceptance of such renunciation, if he desires to treat it as a breach. To the extent that the holdings in Carstens v. McDonald, *supra*, and in King v. Waterman, *supra*, hold that an action cannot be begun before date of performance and maintained for the breach of an executory contract by an unequivocal renunciation by one party before time for performance, and to the extent that the holdings in those cases may be in conflict with the holdings herein, they and each of them, and any other like holding of this court, are hereby overruled.

It has several times been held by this court that an unqualified renunciation of an executory contract, containing mutual and dependent provisions, before time for performance by one party, excuses tender of performance by the other party at time of performance. Chermak v. Smolik, 112 Neb. 54, 198 N. W. 562, and cases therein cited. Such rule could do no more than to prevent appellants from becoming in default on June 1, 1946, by having failed to tender performance. Appellants insist that time was of the essence of the contract. No advantage of such clause was taken by appellants. After time for performance had passed, the parties per-

formed acts looking to the fulfillment of the contract. They talked of an investment for appellants' money, they had certain entries of the abstract recertified at the request of appellee's attorney through Mr. Walker, and through Mr. Walker had deeds prepared. They were long-time friends, and by their conduct toward each other paid no attention to the clause making time of the essence of the contract. Such a clause in a contract has a legal effect, but the parties by their conduct may waive the effect of such clause. Cadwell v. Smith, 83 Neb. 567, 120 N. W. 130; 66 C. J., Vendor and Purchaser, § 251, p. 695. We hold that the effect of such clause was waived in this case.

It is urged that the appellee should not be awarded specific performance, when he himself was in default of performance. We cannot find that appellee was ever in default. His renunciation prior to June 1, 1946, was not treated as a breach. He did not unequivocally renounce the contract on June 1, 1946, or subsequently, and soon after June 19, 1946, was affirmatively seeking performance, and has sought performance ever since. Where acts to be performed by parties to a contract are mutual and dependent, and are to be performed concurrently, one party must at least be able and willing to perform, in order to enable him to declare a default by the other. Johnson v. Higgins, 77 Neb. 35, 108 N. W. 168; Olson v. Woodhouse, 112 Neb. 527, 199 N. W. 815; Klapka v. Shrauger, 135 Neb. 354, 281 N. W. 612.

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

AFFIRMED.

CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

SEPTEMBER TERM, 1947

HARRY F. MINGUS ET AL., APPELLEES, V. IDA BELL ET AL., APPELLANTS.

29 N. W. 2d 332

Filed October 17, 1947. No. 32234.

Vendor and Purchaser. A purchaser, having notice of a previous outstanding title in land, who purchases from one without notice, will be protected in his title by the want of notice in his vendor.

APPEAL from the district court for Dawson County: I. J. NISLEY, JUDGE. *Affirmed.*

W. A. Stewart, Jr., for appellants.

John M. Neff, for appellees.

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

SIMMONS, C. J.

This is an action to quiet title to accretion land. Both parties seek a decree. The trial court entered a decree quieting title in the plaintiffs. Defendants appeal. We affirm the judgment of the trial court.

The land involved is four acres of timber and pasture land, accretion to Lot 1, Section 29, Township 9 North,

Range 21, West of the 6th P. M., Dawson County, situated on the Platte River, a non-navigable stream. Both parties claim by mesne conveyances from a common grantor, one Mary H. Stratton. Four deeds are involved.

July 11, 1941, the Strattons (wife and husband) conveyed the accretion land involved by quitclaim to the Kirkpatricks (husband and wife). April 13, 1942, the Kirkpatricks deeded the accretion land by quitclaim to the defendant Ida Bell. These two deeds were filed for record May 22, 1944.

November 13, 1941, the Strattons conveyed Lot 1 by warranty deed to Ray L. Scott. This deed was filed for record January 14, 1942. November 20, 1943, Scott and his wife deeded Lot 1 to the plaintiffs Harry F. and Mildred F. Mingus. This deed was filed for record November 23, 1943.

Plaintiffs' claim, therefore, is by virtue of a deed subsequent in time but recorded prior to the deed through which defendants claim.

Both parties accept the rule that "An owner of land on the shore of an unnavigable river, in the absence of restrictions in his grant, owns to the thread of the stream, and his riparian rights extend to existing and subsequently formed islands." Haney v. Hewitt, 105 Neb. 746, 181 N. W. 861. In re Central Nebraska Public Power and Irrigation District, 138 Neb. 742, 295 N. W. 386; Hardt v. Orr, 142 Neb. 460, 6 N. W. 2d 589; State v. Ecklund, 147 Neb. 508, 23 N. W. 2d 782.

Section 76-238, R. S. 1943, provides: "All deeds, mortgages and other instruments of writing which are required to be or which under the laws of this state may be recorded, shall take effect and be in force from and after the time of delivering the same to the register of deeds for recording, and not before, as to all creditors and subsequent purchasers in good faith without notice; and all such deeds, mortgages and other instruments shall be adjudged void as to all such creditors and subsequent purchasers without notice whose deeds, mort-

gages or other instruments shall be first recorded; *Provided,* that such deeds, mortgages and other instruments shall be valid between the parties."

The question then is this: Are the plaintiffs entitled to the protection of the statute?

Defendants claim that they fenced the property in 1942 and placed and kept cattle thereon, and that plaintiffs had notice of their claim by virtue of that possession at the time of plaintiffs' purchase.

Subject to an exception not here involved, the rule is that a purchaser, having notice of a previous outstanding title in land, who purchases from one without notice, will be protected in his title by the want of notice in his vendor. Garland v. Wells, 15 Neb. 298, 18 N. W. 132; Snowden v. Tyler, 21 Neb. 199, 31 N. W. 661; Ford v. Axelson, 74 Neb. 92, 103 N. W. 1039; Clements v. Doak, 140 Neb. 265, 299 N. W. 505; Annotation, 63 A. L. R. 1362; 66 C. J., Vendor and Purchaser, § 1045, p. 1188; 55 Am. Jur., Vendor and Purchaser, § 760, p. 1119.

The first inquiry then is: Was Scott a purchaser without notice?

Scott, a witness for the plaintiffs, testified that he was acquainted with this land before he purchased; that there was some fence upon it; that he was not advised of any prior deed to the accretion land when he purchased; that he had no knowledge that Kirkpatrick or anyone else owned the land; that he never saw Mr. Kirkpatrick there; and that he received a deed and an abstract and he supposed the accretion land went with the other land.

Mrs. Stratton, Scott's grantor, testified as a witness for the defendants. She testified as to the execution and delivery of the deed by herself and her husband to Scott on November 13, 1941, and then was asked if there had been any talk with Scott about the accretion land. She answered, "* * * I dont (sic) know whether it was that day or not, but I told him about it * * *." She was asked what she told him and replied, "He came

down there and he asked me what I did to this place, and I told him that I had sold it; I had never used it." She also stated she told him she had sold to the Kirkpatricks.

Defendants rely upon the above testimony as proof of notice to Scott. The testimony obviously is indefinite as to when this conversation occurred. It is not nailed down to the date of the execution and delivery of the deed. It was when Scott "came down" and asked about it. Clearly it was at a time after Scott had notice from someone else—a notice which the record shows he subsequently received from the defendants.

The conclusion that the conversation about which Mrs. Stratton testified did not occur at the time of the execution and delivery of the deed to Scott is sustained by other testimony of hers, which is as follows: Q. "And when you were selling him Lot One, you hadnt (sic) sold him any accretion land?" A. "I didnt (sic) say that." Q. "What did you say?" A. "We just deeded it over, *we didnt* (sic) *say.*" (Emphasis supplied.) Q. "That you had previously deeded the accretion land?" A. "Previously deed that way before I deeded that to him." She further testified that she did not tell the party who made the deed anything in regard to the accretion land, and "when I made that deed I left."

We conclude then that Scott was a purchaser without notice and that the want of notice to Scott protects the plaintiffs in their title.

This conclusion makes it unnecessary to determine whether or not the plaintiffs had notice of defendants' deed and claim. Likewise it is unnecessary to determine whether or not defendants lost their rights by a claimed surrender of possession to plaintiffs.

The judgment of the district court is affirmed.

AFFIRMED.

BARNEY FREDERICKSEN, APPELLANT, V. FRED DICKSON, ACTING WARDEN OF THE NEBRASKA STATE PENITENTIARY AT LANCASTER, LANCASTER COUNTY, NEBRASKA, APPELLEE.

29 N. W. 2d 334

Filed October 17, 1947. No. 32254.

Criminal Law: Indictments and Informations. To charge a statutory offense, the information or complaint must contain a distinct allegation of each essential element of the crime as defined by the law creating it, either in the language of the statute or its equivalent.

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

Barney Fredericksen, pro se, for appellant.

Walter R. Johnson, Attorney General, *Robert A. Nelson*, and *C. S. Beck*, for appellee.

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

SIMMONS, C. J.

Petitioner here sought release from the penitentiary on a writ of habeas corpus. Hearing was had. The petition was denied and dismissed, and petitioner remanded to the custody of the respondent. Petitioner appeals. We affirm the judgment of the trial court.

Petitioner alleged that he was charged by information with the offense of breaking and entering with intent to commit a felony; that he pleaded guilty to that charge; that he was found guilty and sentenced for the separate and distinct offense of burglary; that the information to which he pleaded guilty did not charge an offense in that it alleged no overt act; that he was denied the right to be informed of the nature and cause of the accusation on which his conviction, judgment, and sentence of seven years rests; that he pleaded guilty, on the advice of counsel that the penalty for the offense charged was not to exceed 30 days in jail or a fine of

$300, or both; that the trial court entrapped him into entering a plea of guilty to one offense and convicted him of a more serious offense and did not give him a fair trial; and that his trial was a sham and a pretense. He set out the record of his trial in full.

The respondent answered setting out the proceedings of the trial court which resulted in the commitment of petitioner, denied generally allegations not admitted, and expressly denied the charge made against counsel and the charge of entrapment by the court.

Petitioner was brought into court in response to the writ. Respondent asked that the matter be set for hearing at a day certain in order that necessary witnesses could be present. Petitioner agreed. Petitioner was advised as to the witnesses respondent expected to have present and asked if there were any others petitioner desired to have. Petitioner named two men. The record shows that they were present and testified.

At the trial petitioner as his own witness stated that he was charged with and pleaded guilty to breaking and entering with intent, which he contended was not a felony but a misdemeanor, as it did not aver an overt act, and that he was sentenced for burglary. He rested his case upon his petition and the record of his case.

We will deal here first with the charges which petitioner made against his counsel, the trial court, and its officers. By his own admission they are false. He testified that he had counsel at his preliminary hearing and before his plea of guilty; that he understood the nature of the offense charged; that he was guilty of breaking and entering with intent to steal; and that he pleaded guilty knowing he could be sentenced to serve a period with a maximum of ten years. It further was conclusively shown that no promises, threats, or inducements were made to him to secure a plea of guilty. Before accepting his plea the trial court examined him at length as to his understanding of the charges, gave him an opportunity to ask questions, inquired if his

counsel had advised him of his rights and received an affirmative reply, explained to him that he had a right to plead not guilty and stand trial, asked him if he was ready for arraignment and received an affirmative reply, and asked him if he understood the information, which was read to him in open court, and received an affirmative reply. After all this, and more, he was asked to plead to the information and pleaded guilty. Two days elapsed before he was sentenced. It appears that he received a longer sentence than he anticipated. He became incensed about it. It appears further that after he reached the penitentiary he consulted one Hawk, an inmate, and that Hawk planted the seeds in his mind that have germinated and produced the charges here made.

Petitioner here presents his contentions: (1) That the information fails to state an offense; and (2) that he was informed against for breaking and entering with intent to steal and convicted of burglary, and that his conviction, sentence, and commitment are void.

The information clearly charges an offense under the provisions of section 28-532, R. S. 1943. In its charging parts it is substantially in the language of the statute.

It long has been the rule that:

"In this state all public offenses are statutory."

"To charge a statutory offense, the information or complaint must contain a distinct allegation of each essential element of the crime as defined by the law creating it, either in the language of the statute or its equivalent."

"Where a statute states the elements of a crime, it is generally sufficient, in an information or indictment, to describe such crime in the language of the statute."

"An indictment or information meets all constitutional requirements (1) if it shows that the acts which defendant is charged with committing amounted to a crime which the court had power to punish, and that it was committed within the territorial jurisdiction of

the court, (2) if it informs the defendant of the nature of the charge against him, and (3) if it constitutes a record from which it can be determined whether a subsequent proceeding is barred by the former adjudication." Sedlacek v. State, 147 Neb. 834, 25 N. W. 2d 533.

The information here meets these tests.

Petitioner in his trial below and here relies upon Smith v. State, 68 Neb. 204, 94 N. W. 106, and contends that he must be charged with an overt act. The information charged that he did unlawfully, willfully, maliciously, feloniously, and forcibly break and enter with intent to steal property of value. In the Smith case there was a failure to charge one of the essential elements that the statute there involved prescribed. No such omission is pointed out in the information here. It may be pointed out that the statute construed in the Smith case is now with amendments section 28-533, R. S. 1943. Clearly the information here was not intended to charge a violation of that section. See McElhaney v. Fenton, 115 Neb. 299, 212 N. W. 612, wherein we held: "The former section (now section 28-532, R. S. 1943) applies solely to the unlawful entering of a building with intent to commit some distinct act therein specifically designated; the latter section (now section 28-533, R. S. 1943) to the unlawful entering of the building and the committing or attempting to commit one of the acts in the section enumerated, after so being therein."

We next come to petitioner's contention that he was informed against and pleaded guilty to one charge and was convicted and sentenced for another.

As we have pointed out the information charges a violation of section 28-532, R. S. 1943. Defendant admits that this information was read to him in open court and that he pleaded guilty thereto. The trial court's journal entry shows that "upon due arraignment and reading of the information, the defendant entered his plea of guilty to the offense therein charged, to-wit: burglary." The

journal entry at the time of sentence shows the sentence to have been imposed upon the "defendant's plea of 'guilty' to the information." Petitioner vouches for the correctness of this record and relies upon it.

We have searched for the basis of petitioner's charge. We find no basis for it, unless it should be the use of the words "to-wit: burglary" by the trial court in the journal entry. The words are surplusage; they refer to the catch words " 'Burglary,' defined; penalty" used preceding section 28-532, R. S. 1943, and point to that provision of the act as the one upon which the information is based. As we said in Hardin v. State, 92 Neb. 298, 138 N. W. 146, in response to a similar claim: "The attempted distinction between the terms 'burglary' and 'breaking and entering' is, in our judgment, entirely too technical. As applied to our present criminal code, it is an attempted distinction without a difference."

Petitioner's contentions are entirely without merit.

The judgment of the district court is affirmed.

AFFIRMED.

OTIS V. LUSTER, PLAINTIFF IN ERROR, V. STATE OF NEBRASKA, DEFENDANT IN ERROR.

29 N. W. 2d 364

Filed October 17, 1947. No. 32307.

1. **Criminal Law.** The defendant in a criminal action may not secure a reversal because an instruction was more favorable to him than the law applicable to the charge made requires.
2. **Trial.** The court's entire charge to the jury should be considered in determining whether a slight inaccuracy in the language of a particular instruction is prejudicial. If the instructions to the jury, taken as a whole, correctly state the law, that is sufficient.

ERROR to the district court for Douglas County: FRANK M. DINEEN, JUDGE. *Affirmed.*

William N. Jamieson, for plaintiff in error.

Walter R. Johnson, Attorney General, *C. S. Beck,* and *Robert A. Nelson,* for defendant in error.

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

PAINE, J.

The information in this case charged the plaintiff in error, hereinafter called defendant, with murder in the first degree, to which he entered a plea of not guilty. Upon trial, the jury returned a verdict of manslaughter, and defendant was given a sentence of four years.

Defendant's petition in error sets out 32 errors of the trial court, but in his brief there is only one assignment of error, therefore all other alleged errors will be considered as waived. Mason v. State, 132 Neb. 7, 270 N. W. 661.

The error assigned is limited to the giving of three instructions to the jury, to wit, Nos. 9, 14, and 15. These three instructions will be considered solely with reference to the transcript, as no bill of exceptions has been brought to this court.

Instruction No. 9 is an instruction of four paragraphs on intent, ending with the paragraph: "A knife is a deadly weapon, and, if you find that the defendant intentionally cut the deceased with a knife, then the presumption would be that the defendant intended the natural and probable consequences of the cutting."

Defendant contends that this instruction, or any instruction on intent, is not applicable to the crime of murder in the first degree, but is only proper in felonious assault cases where intent is an essential requisite of the crime, as assault with intent to commit murder, rape, sodomy, or robbery.

Section 28-401, R. S. 1943, provides in part as follows: "Whoever shall purposely and of deliberate and premeditated malice * * * kill another; * * * every person

so offending shall be deemed guilty of murder in the first degree, * * *."

It may be admitted that the word "intent" does not occur in this statute, or in the approved short-form information for murder, as set out in Nichols v. State, 109 Neb. 335, 191 N. W. 333, yet in the section of the statute just set out the word "purposely" appears twice, and this court has held that "purposely" means "intentionally." See Pembrook v. State, 117 Neb. 759, 222 N. W. 956. Therefore, the defendant is in error in contending that intent is not an essential element of the crime of murder in the first degree.

However, in the case at bar, the defendant was convicted only of manslaughter, which, as will be observed, eliminated any question of the alleged error in instruction No. 9. If the instruction required a greater burden of proof to find defendant guilty of murder in the first degree, as defendant wrongly contends, it would be more favorable to him than required by law, and operate to his benefit.

"A defendant in a criminal action may not predicate error on an instruction that is more favorable to him than is required by the law applicable to the charge made." Crawford v. State, 116 Neb. 629, 218 N. W. 421. See, also, Stump v. State, 132 Neb. 49, 271 N. W. 163.

The defendant next alleges error in instruction No. 14, the first paragraph of which reads: "The essential elements of the crime of manslaughter as implied in this information, are that the defendant on or about the 20th day of October, 1946, in the County of Douglas, and State of Nebraska, then and there, without deliberation, premeditation or malice, did then and there unlawfully and feloniously kill one Theodore Dalton, on a sudden quarrel or while in the commission of an unlawful act, actuated by passion or anger."

Section 28-403, R. S. 1943, reads as follows: "Whoever shall unlawfully kill another without malice, either upon a sudden quarrel, or unintentionally, while the

slayer is in the commission of some unlawful act, shall be deemed guilty of manslaughter; and upon conviction thereof shall be imprisoned in the penitentiary not more than ten years nor less than one year."

The alleged error which defendant claims is prejudicial is in the omission of the two words, "or unintentionally," which in the statute follow the words, "upon a sudden quarrel," as well as in adding the words, "actuated by passion or anger."

We find that in instruction No. 13 the court properly set out the statute on manslaughter.

In the case of Chadek v. State, 138 Neb. 626, 294 N. W. 384, instruction No. 8 also omitted the word "unintentional," and we said there that the defendant had tendered no instruction and that instructions Nos. 7 and 8 adequately covered the offense of manslaughter, and the same is true in the case at bar, where the jury would clearly understand that instructions Nos. 13 and 14, taken together, covered manslaughter.

Lastly, we will examine the alleged error in instruction No. 15. There are five paragraphs in this instruction covering the law on self-defense, the last two paragraphs reading as follows:

"If, however, you find that the defendant's cutting with a knife, which cutting resulted in the wounding and death of Theodore Dalton, was not in self-defense but in an effort to kill or wound Theodore Dalton, then you shall find the defendant guilty of whatever charge you may find the defendant's intent indicates he had in mind.

"It is incumbent upon the State to satisfy you by the evidence beyond a reasonable doubt that the cutting with a knife was not done in self-defense, and if you are not so satisfied, you should render a verdict of not guilty for the defendant."

Defendant charges that the word "cutting" is superfluous and tended to confuse the jury, and that the word "intent" is not essential to the crime of manslaughter.

We are then cited to the case of Thompson v. State, 61 Neb. 210, 85 N. W. 62, in which a verdict and sentence for murder in the second degree was rendered, and this court said: "It has been frequently decided by this court, and the rule is a just one and founded in good sense, that the jury should not be required to choose between conflicting instructions."

The defendant insists that slight inaccuracies in minor respects in a single instruction constitute reversible error. This court has in the past refused to accept that argument, and has repeatedly held that whether an instruction is reversibly erroneous is not to be determined from its language alone, but from an examination and consideration of the whole charge, and that a verdict will not be reversed in the appellate court merely because a single instruction, when considered separately, is slightly inaccurate. In other words, if the charge to the jury in its entirety correctly states the law, that is sufficient. See Sedlacek v. State, 147 Neb. 834, 25 N. W. 2d 533; Frades v. State, 131 Neb. 811, 270 N. W. 314; Norton v. State, 119 Neb. 588, 230 N. W. 438; McVey v. State, 57 Neb. 471, 77 N. W. 1111; Bode v. State, 80 Neb. 74, 113 N. W. 996.

As the instructions, as a whole and construed together, present no prejudicially erroneous statement of law, and properly submitted the legal issues involved to the jury, the sentence is hereby affirmed.

AFFIRMED.

HARRY MOORE, PLAINTIFF IN ERROR, V. STATE OF NEBRASKA, DEFENDANT IN ERROR.

29 N. W. 2d 366

Filed October 17, 1947. No. 32268.

1. **Appeal and Error.** Errors assigned but not argued will be considered as waived.
2. **Homicide.** Sections 28-401 and 28-402, construed with section

29-2027, R. S. 1943, define the degrees of the crime of criminal homicide, a single offense, and prescribe the duty of the court and jury in ascertaining the degree and imposing sentence.

3. ———. The unlawful killing constitutes the principal fact but the condition of the mind or attendant circumstances determine the degree or grade of the offense, and the greater of the degrees includes the lesser degrees, they being necessarily involved as a constituent part of the higher crime.

4. ———. Consequently, if the information charges murder in the first degree, a conviction of murder in the second degree, or manslaughter, may lawfully be sustained, although the evidence was sufficient to have sustained a verdict of murder in the first degree.

5. ———. Where an information charges the crime of murder in the first degree, murder in the second degree and manslaughter are included in the charge, the degree ordinarily being for the jury, and where the evidence and circumstances of the killing are such that different inferences may properly be drawn therefrom as to the degrees, it becomes the duty of the court to submit the different degrees to the jury for them to draw the inferences.

6. **Criminal Law.** Under our code of criminal procedure the law does not distinguish between principals in the first and second degrees, and whoever aids, abets, or procures another to commit any offense may be prosecuted and punished as if he were the principal offender.

7. ———. The same rule as to the information, conduct of the case, and punishment, applicable to a principal in fact now governs his aider, abettor, or procurer, and no additional facts need to be alleged in an information against the latter than are required against his principal.

ERROR to the district court for Dundy County: VICTOR WESTERMARK, JUDGE. *Affirmed.*

Ross D. Druliner, Jr., for plaintiff in error.

Walter R. Johnson, Attorney General, and *Leslie Boslaugh,* for defendant in error.

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

CHAPPELL, J.

Plaintiff in error, hereinafter called defendant, was

charged with murder in the first degree for the death of George Wallace by shooting. Chris Courtright and Al Mathes were jointly charged with the same offense in the same information. Defendant pleaded not guilty, and upon a separate jury trial was found guilty of murder in the second degree. His motion for new trial was overruled and he prosecuted error to this court.

Defendant's petition in error contains 34 alleged errors, and his brief formally contains 15 assignments of error. However, only two of such assignments were argued to the court or in his brief, which makes applicable the rule that errors assigned but not argued will be considered as waived. Maher v. State, 144 Neb. 463, 13 N. W. 2d 641; Mason v. State, 132 Neb. 7, 270 N. W. 661; Madsen v. State, 44 Neb. 631, 62 N. W. 1081.

In conformity therewith, we will confine our discussion to the two assignments so argued, which are substantially: (1) That the evidence adduced was insufficient to sustain the charge of murder in the first degree, therefore the submission of that issue to the jury by the trial court over defendant's timely objections was prejudicial error, and (2) that the evidence adduced was insufficient to sustain the verdict of murder in the second degree. We conclude that the assignments cannot be sustained.

Section 28-401, R. S. 1943, as applicable to this case, provides: "Whoever shall purposely and of deliberate and premeditated malice * * * kill another; * * * shall be deemed guilty of murder in the first degree, * * *."

Section 28-402, R. S. 1943, provides: "Whoever shall purposely and maliciously, but without deliberation and premeditation, kill another, every such person shall be deemed guilty of murder in the second degree; * * *."

The above-quoted sections are construed with section 29-2027, R. S. 1943, which provides that: "In all trials for murder the jury before whom such trial is had, if they find the prisoner guilty thereof, shall ascertain in

their verdict whether it be murder in the first or second degree, or manslaughter; * * *."

In State v. Hutter, 145 Neb. 798, 18 N. W. 2d 203, this court recently said that the above-quoted sections: "* * * 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 degrees 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."

That opinion also calls attention to the fact that the trial court was duty bound to submit to the jury such degrees of the crime charged as found sufficient support in the evidence adduced. See, also, Jackson v. Olson, 146 Neb. 885, 22 N. W. 2d 124. It follows that if, as we affirmatively conclude, the evidence adduced was sufficient to have sustained a verdict of murder in the first degree, it was of necessity sufficient to sustain a verdict of murder in the second degree, and defendant's second assignment of error falls of its own weight without further discussion of it.

We must bear in mind that no complaint is made by defendant of the form and substance of the trial court's inclusive instructions which submitted the respective degrees of the crime charged to the jury. We are, therefore, not required to elaborate upon a technical discussion of the respective necessary elements submitted, which the state was required to prove beyond a reasonable doubt, or the comprehensive definitions contained in such instructions. It is sufficient to say that we are concerned only with the sufficiency of the evidence adduced to justify submission of murder in the first degree to the jury.

As recently as Jackson v. Olson, *supra,* this court reaffirmed the rule that: "Where an information charges the crime of murder in the first degree, murder in the second degree and manslaughter are included in the charge, the degree ordinarily being for the jury; and where the evidence and circumstances of the killing are such that different inferences may properly be drawn therefrom as to the degree, the court should submit the different degrees to the jury for them to draw the inference." See, also, Denison v. State, 117 Neb. 601, 221 N. W. 683; and Jackson v. State, 133 Neb. 786, 277 N. W. 92.

Bearing the foregoing rules in mind, we have examined the record. Without dispute, the death of Wallace occurred sometime during the night of September 26, 1946, as the result of internal hemorrhages caused by a .22-caliber bullet wound through the chest. The bullet coursed from the right front, between his ribs, and through his right lung toward the rear of his body, where it lodged in approximately the ninth thoracic vertebrae of his spine. He also had a frontally affected, tearing, groove-type shotgun wound in his left leg, about six inches above the knee, which wound of itself was not sufficient to have caused his death.

On the morning of September 27, 1946, Courtright called the sheriff, telling him: "There's a dead man lying down on my doorstep." Shortly thereafter, Wallace's body was found by the sheriff and others, lying on its right side on the ground, head to the south, feet toward the door to the north, adjacent to an old door used as the step of a small two-room brick house where defendant and Courtright lived, in Benkelman, Nebraska. Blood from the leg wound had coursed down into Wallace's boot, and there were a few drops on the step.

A .410 shotgun, loaded with a shell, but closed with the hammer down, and belonging to Wallace, lay across his body. Photographs appearing in the state's evidence, taken at the time the body was found, portray the gun's

unnatural position, as if planted in afterthought, and there was competent direct evidence that after the shooting defendant himself picked up the gun and laid it up close to Wallace's shoulder or breast in the position where it was found.

A .410 shotgun and a .22 rifle, belonging to Courtright, were also found in his house. A nickel-plated .22-caliber pistol, belonging to Courtright or Mathes, was later found in the basement of the house where Mathes lived. Careful handling and professional tests revealed smudges but no distinguishable identifying fingerprints on any of the four guns. However, the .22 rifle was not in good repair, and there is competent evidence that the fatal bullet was fired from the .22 pistol.

We turn then to the evidence relating to the sequence of events at the Courtright home on the night of September 26, 1946. The afternoon and evening were spent there by defendant, Courtright, and Mathes, eating watermelon and drinking liquor. Sometime between 10 p. m. and midnight, Wallace, a stranger to defendant, but a friend of Courtright and Mathes, drove his pick-up truck to the Courtright home and parked it nearby. After he was admitted to the house, they all drank together and talked, until Wallace and defendant engaged in an argument and a scuffle ensued, wherein defendant twisted Wallace's neck with force, until Wallace, angry, said: "I've got the difference between I and you," and left the house. Whether he drove his truck away or otherwise is not clear.

Thereafter, defendant, Courtright, and Mathes talked over Wallace's probable return. In the meantime, believing that he would do so, they located Courtright's .410 shotgun and the .22-caliber pistol, provided themselves with ammunition, loaded the guns, and, thus prepared, awaited Wallace's return, which occurred within ten or fifteen minutes. The house was lighted by electricity, and as Wallace approached the open door,

defendant and Courtright, or defendant and Mathes, started shooting at him.

Courtright, a witness for the state, testified in substance that he was outside the house as Wallace approached and a shotgun blast came through the door, then as Wallace turned to the east, two pistol shots came from the east, and Wallace fell upon his right side, whereupon defendant came running from the east, hand down to his side. If that were true, then Mathes fired Courtright's .410 shotgun at Wallace from inside the house, and defendant fired the pistol at him from the outside. There are also circumstances in the evidence lending support to that theory.

Defendant testified in substance that as Wallace approached the door, with his gun, defendant went to the door and fired Courtright's .410 shotgun at him low, whereupon Courtright jumped out of the door and fired the pistol at Wallace.

The evidence demonstrates clearly that Wallace never fired his gun or attempted to do so. After he fell, mortally wounded, defendant placed Wallace's gun on his body, as heretofore recited, and defendant, Courtright, and Mathes then proceeded some distance to the Mathes home, where they went to bed, without indicating the slightest interest in the fate of Wallace or reporting the matter to proper officials.

Before sunup the next morning defendant asked a near neighbor of Mathes to go with him to Courtright's house, telling him that the night before: "* * * they had a shooting match over there. * * * 'We was shooting and shooting to kill.' * * * 'I shot one load and shot low' * * *." Defendant and the neighbor walked over to the Courtright home, saw the body, and returned. Defendant then called to Courtright: "Hey, Chris, do you know there's a dead man up in front of your door?" Thereupon Courtright got up, dressed, and notified the sheriff.

Defendant did not voluntarily surrender himself, but

about noon of September 27, 1946, the sheriff found him lying in the weeds in the vicinity of the supply tanks, near the railroad tracks. At the time of his arrest he denied any knowledge of the shooting, but the next morning he made a statement, appearing in the record, admitting his participation therein, but asserting, among other things, that Courtright fired the pistol after defendant had fired the shotgun.

We are of the opinion that there was competent evidence in the record, both direct and circumstantial, sufficient to support a finding that defendant purposely and of deliberate and premeditated malice fired the bullet from the pistol which caused Wallace's death, thereby justifying the submission of murder in the first degree to the jury.

Be that as it may, however, defendant admits that he fired the first shot, but argues that he fired the .410 shotgun at Wallace low, and only in a manner and for the purpose of stopping him, in self-defense. The answer to that proposition is that the jury, under appropriate instructions, decided the issue of self-defense against defendant.

He argues that in any event the shotgun wound did not kill Wallace, but that his death was caused by the .22-caliber bullet fired by Courtright, not by defendant, therefore he could not be found guilty of murder either in the first or second degree.

That contention is wholly without merit. The record here would be sufficient to sustain a verdict of murder in the first degree or murder in the second degree, whether or not defendant actually fired the shot which caused the death, or whether Courtright fired it. It is conclusive that defendant was present at, participated, aided, and abetted in the commission of the crime.

Under our code of criminal procedure, the law does not distinguish between principals in the first and second degree. Jahnke v. State, 68 Neb. 154, 94 N. W.

158, reported on rehearing at page 181, 104 N. W. 154, and reversed, but upon other grounds.

Section 28-201, R. S. 1943, specifically provides that: "Whoever aids, abets or procures another to commit any offense may be prosecuted and punished as if he were the principal offender."

In the light of that statute: "* * * the general rule is that one who participates or aids and abets in the commission of a homicide is himself guilty of the homicide as a principal, to be indicted, tried, and punished as such, regardless whether or not he fired the fatal shot or struck the fatal blow." 40 C. J. S., Homicide, § 9, p. 836.

In Jahnke v. State, *supra,* it was held that: "Where a person accused of the commission of a felonious homicide is present at the time aiding, abetting, and assisting or counseling and procuring its commission, and a felony is committed, then he is guilty in the same degree and to the same extent as though he had performed the act causing death."

In Puckett v. State, 144 Neb. 876, 15 N. W. 2d 63, this court said: "* * * any person who is present at the place of the crime, aiding and assisting in the commission thereof is in fact a principal and may be prosecuted as such." In that opinion it was also held that: "The same rule as to the information, conduct of the case, and punishment, applicable to a principal in fact now governs his aider, abettor or procurer, and no additional facts need to be alleged in an information against the latter than are required against his principal."

The foregoing authorities have direct application to and control decision of the case at bar.

For the reasons heretofore stated, the judgment is affirmed.

AFFIRMED.

ALBERT E. DEWAAL, APPELLEE, V. LOIE M. DEWAAL, APPELLANT.

29 N. W. 2d 371

Filed October 24, 1947. No. 32251.

1. **Divorce.** Although no personal violence is threatened, yet constant nagging by a husband or wife, about conduct which is above reproach, may be so unreasonable as to utterly destroy the peace of mind, ruin all legitimate objects of matrimony, and constitute a ground for divorce as extreme cruelty "by other means," as defined in section 42-302, R. S. 1943.
2. ———. Alimony is not only support for a divorced wife, but it may be considered an equitable division of their property. Great latitude is allowed the trial court under section 42-318, R. S. 1943, not alone in fixing its amount, but also in determining the manner of its payment. The court may provide that, in case of the death of the wife, the husband's estate shall only be liable for a definite, certain amount.

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

Henry Pedersen and *John A. McKenzie,* for appellant.

Brown, Crossman, West, Barton & Quinlan, for appellee.

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

PAINE, J.

An absolute decree of divorce was granted the husband on the ground of extreme cruelty. The cross-petition of the wife for separate maintenance was dismissed, from all of which she appealed.

The plaintiff in his amended petition alleged that the parties were married May 12, 1917, in Omaha, and have been residents of Omaha continuously since that date. He charged that the defendant, without cause or provocation, has been guilty of extreme cruelty, which has destroyed the legitimate objects of matrimony; that she has been quarrelsome, has scolded and harrassed the

plaintiff in the family home, and without cause has charged him with wrongful association with other women. He charged that she has assumed and exercised authority over his earnings and of the family finances, and has attempted to limit him to such actual necessities as she arbitrarily determined.

The plaintiff alleged that two sons are the issue of said marriage, Roland A., aged 27, who is married and living in San Francisco, and Wallace E., aged 21, who is self-supporting and resides in the home of the parties; that their home is subject to a mortgage of approximately $1,300; that the defendant is the owner of a 1939 Chevrolet two-door sedan, acquired from the proceeds of an inheritance she received; and the plaintiff asked for an absolute divorce.

For her answer and cross-petition, defendant denied that she has been guilty of any of the acts of extreme cruelty charged in the amended petition, and alleged that she has administered to plaintiff in sickness, molded her life to his wishes, and at all times has done the things in her family life which met with his approval and desires; denied that she has ever assumed any authority over the family earnings, and alleged that she has never questioned his right to handle the money and pay the bills out of his earnings, except such bills as he had requested her to pay from money he had voluntarily turned over to her.

The defendant for her cross-petition alleged that during their 29 years of married life she has always conducted herself as a faithful, loving, and obedient wife, and that although the plaintiff is a strong-minded, domineering individual, she has always had the greatest love and respect for him.

The defendant alleged that she has had three major operations, the last one on June 5, 1945; that since said operation plaintiff has repeatedly told the defendant that she is no good any more, and that he wished to be rid of her; that he has ridiculed her; that he changed

his personal habits, and has become addicted to the use of cigarettes; that he is no longer interested in their home, has begun going to motion picture theaters, and reads sensational magazines; that he shows an interest in young women whom he has met in the course of his business or elsewhere, and carried on an animated conversation over the telephone with a young woman; and that he has become morose, sullen, and quarrelsome, refused to eat the food she prepared for him, and flies into rages without any cause. She further charged that she is in poor health, has no means to support herself, has no professional skill, and needs constant medical attention.

The defendant alleged that the plaintiff has been employed by Swift & Company for 30 years, earns at least $80 a week, and is entitled to certain pension rights which will accrue to him when he is 65; that he has $12,000 worth of life insurance, a bank account, war savings bonds; that during the summer of 1945 she first learned that the plaintiff was afflicted with diabetes, and she cooked special food for him and was sympathetic in his ailment; and that upon his return from ten days in the hospital, where he was treated for diabetes, he moved out of the home and has never returned. Wherefore, defendant prayed that she may be given a decree of separate maintenance and remain in the home, and be given such other relief as may be just and equitable.

The plaintiff, for a reply and answer thereto, denied many allegations therein; admitted that he smokes cigarettes and has moved from the family home and refuses to return; admitted that he holds said life insurance, and has approximately $1,000 maturity value of war savings bonds, and prayed that the defendant's cross-petition be dismissed and that the prayer of his petition be granted.

The trial of the case began on July 1, 1946, and was continued from time to time, as witnesses were

available, until December 11, and the evidence, as found in the bill of exceptions of nearly 600 pages, discloses the proof submitted by each of the parties in support of the allegations of their pleadings.

The trial court found the value of the property to be as follows: A 1939 Chevrolet sedan, owned by defendant, of the value of $750. The approximate value of all the household goods and personal property was fixed at $1,000, and the plaintiff was given out of this certain tools and movie equipment, a radio, etc., desired by him, of the value of $308. The present redemption value of war savings bonds held by the parties was $766.75. The face value of plaintiff's life insurance was $13,800, all payable to defendant as beneficiary, but its cash surrender value was but $991.87, subject to policy loans of $222.02, its net value being $769.85. A cemetery lot was of the fair value of $300. The value of the home, held in joint tenancy, was $8,500, subject to a mortgage of $1,246.08, less taxes due of $37.54, leaving its net value, $7,216.38, which property, except automobile and certain household goods, was given plaintiff.

The defendant was given the Chevrolet and household goods of the value of $692, and alimony of $6,500, payable at the rate of $60 a month, beginning December 1, 1946, such monthly payments to cease on the prior death of defendant, and if plaintiff should die before all payments have been made the maximum amount that his estate should be liable for should be $5,039.74, with a credit thereon of all payments theretofore made. The right was reserved to plaintiff at his option to pay off the balance of remaining payments at any time.

The defendant was given the right to occupy the home property for six months from December 1, 1946, and while she is occupying the home the plaintiff should be given a credit of $45 a month against the payment of $60 required of him, but he was required, in addition, to keep up payments of taxes and insurance on

said property. The decree provided that neither party should have any further right, title, claim, present or future, to earnings or property of the other. The court further found that plaintiff had paid all temporary allowances made to the defendant.

To summarize, it will thus be seen that the defendant was given a Chevrolet car, valued at $750, household goods to the value of $692, and alimony payments of $6,500, or a total of $7,942, together with an additional attorney's fee in the amount of $100.

The plaintiff was given household goods of $308, war savings bonds, $766.75, cash value of life insurance, $769.85, cemetery lot, $300, and the home, of the net value of $7,216.38, all amounting to $9,360.98. All costs in the district court were charged to plaintiff and appellee.

The defendant and appellant assigned as error the holding of the court that the evidence showed that defendant had been guilty of extreme cruelty towards plaintiff in charging that plaintiff had wrongfully associated with other women; further, it erred in holding that she was guilty of extreme cruelty in that she had exercised too much authority over the earnings of the parties; that the court erred in the division of the property between the parties, and in allowing the plaintiff to share in the bequest that the mother of defendant made to her, and in failing to provide for her support and maintenance until such time as she will be able to rehabilitate herself; and lastly, that the court erred in not granting a decree of separate maintenance to defendant.

In considering these assignments of error, the first is in the court finding it to be extreme cruelty for the wife to continually nag him about his conduct toward women in general. He testified that she objected to his associating with or talking with any women in the plant or office of Swift & Company, where he worked; that she objected to riding through parks on Sundays where

he would see girls riding bicycles in shorts; objected to his listening to women singers on the radio, such as "The Hour of Charm;" objected to his having kissed their new daughter-in-law at the wedding ceremony in California; objected to his going to the first aid station in the plant to have a cut finger attended to, charging that he went there just to see the nurses. She objected to his passing the time of day with the neighbor next door when she came out in slacks while he was working in their yard. He said he belonged to the Ak-Sar-Ben when it was a stag affair, but as soon as women joined he quit on his wife's request, and for years, they did not attend moving picture shows, on her objection.

The trial judge heard the testimony of these parties at great length, and, in addition, the court asked each of them questions. The decree shows that he accepted the testimony of the plaintiff rather than that of the defendant, which fact cannot be overlooked by this court.

It would serve no useful purpose to set out in further detail the conflicting evidence given by the parties to this suit as to their many bitter controversies over simple events of home life, with which the bill of exceptions is replete.

"In suit for divorce, husband's conduct in continuing to live with wife while she persisted in acts of nagging was not a 'condonation' thereof." Alford v. Alford, 7 S. E. 2d 278, (189 Ga. 630).

From the recent case of Morris v. Morris, 43 S. E. 2d (Ga.) 639, we take the following quotation as pertinent to the facts in the case at bar: " 'From the days of Socrates and Xantippe, men and women have known what is meant by nagging, although philology can not define it or legal chemistry resolve it into its elements. Humor can not soften or wit divert it. Prayers avail nothing, and threats are idle. Soft words but increase its velocity, and harsh ones its violence.' " And, again: " 'One or two petty fault findings may be to a degree

annoying, but it is the persistency of the fretting that causes the real vexation. It is the accumulation of the instances, the never-ending borings, the sum total of the repeated irritations; no one smarting, but the continued scraping of the surface already made raw and sore and inflamed by the previous annoying and provoking conduct. One briar prick, while not a pleasant sensation, may cause no serious pain, but a thousand of them may be harrassing.' " The opinion continues: "One or even several drops of water falling on the surface of a block of granite will make no perceptible change, but a constant dripping over a period of many years will mark its effect."

Although no violence is threatened, yet harping and nagging, continued for years by either a husband or wife, concerning conduct above reproach, may be so unreasonable as to utterly destroy the peace of mind, seriously impair health, and ruin all legitimate ends and objects of matrimony, and constitute extreme cruelty "by other means," as defined in section 42-302, R. S. 1943. See Brown v. Brown, 130 Neb. 487, 265 N. W. 556; Faris v. Faris, 107 Neb. 214, 185 N. W. 347; Oertle v. Oertle, 146 Neb. 746, 21 N. W. 2d 447; Hartshorn v. Hartshorn, 104 Neb. 561, 178 N. W. 186.

One of the assignments of error is that the trial court should have granted a decree of separate maintenance to the wife. In Yost v. Yost, 143 Neb. 80, 8 N. W. 2d 686, the wife was given such a decree, but in the case at bar the evidence not only fails to show her entitled to such a decree, but warranted the court in granting an absolute decree of divorce to plaintiff. See Phillips v. Phillips, 135 Neb. 313, 281 N. W. 22; Brown v. Brown, 146 Neb. 908, 22 N. W. 2d 148.

"The trial court is vested with sound discretion in determining whether a divorce from bed and board, or an absolute divorce, shall be granted, and in a majority of the cases an absolute divorce is to be preferred." Wetenkamp v. Wetenkamp, 140 Neb. 392, 299 N. W. 491.

The only other assignment of error we will discuss is the one which charges that the court erred in the division of the property. It is rather unusual to find a case in which the parties agree generally as to the net value of nearly all of the property holdings. The wife is granted alimony of $6,500, payable at the rate of $60 a month, thus requiring a little over nine years to complete the payments, but in case of the prior death of the wife, payment of installments not due shall terminate, and in case of the prior death of the husband then his estate shall be liable for a maximum sum of $5,039.74 as alimony.

In the defendant's brief, objections are made to the allowance of alimony, and we are asked to give her an undivided half interest in the home and the right to occupy it as long as she lives, together with $75 a month for five years, and a cash sum of $3,300 which she received from an estate, and additional amounts.

Considering the expense of keeping up taxes, insurance, interest and payments on the mortgage on the home, we believe the award of the home to the plaintiff was proper. This court finds that the grant of alimony to defendant of $6,500, payable in monthly payments over the years, is fair and equitable to the defendant, and warranted by the evidence.

Formerly alimony was considered an allowance for the support of the wife, and payments thereof terminated at her death. But the better view is that, when a definite sum is awarded, it is considered as a division of the property. See Annotation, L. R. A. 1916B, p. 854.

This court has taken the position that the trial court should be free to fix the amount of the alimony and how it should be paid. The decree may provide that upon the death of the wife, payment of installments not yet due may be terminated and that upon death of the husband his estate may be held liable for a less amount, as in the case at bar; it being understood that any monthly payments of alimony which might be in de-

fault on the date of the death of the wife must be paid in full. See Metschke v. Metschke, 146 Neb. 461, 20 N. W. 2d 238; Martin v. Martin, 145 Neb. 655, 17 N. W. 2d 625; Dunlap v. Dunlap, 145 Neb. 735, 18 N. W. 2d 51; Haussener v. Haussener, 147 Neb. 489, 23 N. W. 2d 700; Munsell v. Munsell, 147 Neb. 590, 24 N. W. 2d 566; Green v. Green, *ante* p. 19, 26 N. W. 2d 299.

The plaintiff insists that the appeal in this case was frivolous, that no additional attorney's fees should be allowed in this court, and that all costs of appeal already paid by plaintiff should be credited against the monthly payments of alimony. The record shows that this court allowed $30 for the cost of defendant's briefs, and only the actual cost of the bill of exceptions.

The decree of the trial court is affirmed, with an attorney's fee of $100 allowed to defendant for services in this court.

AFFIRMED.

DENNIS ALBERTS, AN INFANT, BY CARL F. ALBERTS, HIS NEXT FRIEND, APPELLEE, V. J. PICKARD, FIRST AND REAL NAME UNKNOWN, APPELLANT.

29 N. W. 2d 382

Filed October 24, 1947. No. 32277.

Pleading. When an answer to a petition consists of a general denial, the defendant may introduce such testimony as will tend to disprove the testimony of the plaintiff in support of his petition. For such purposes no other allegations in the answer are necessary.

APPEAL from the district court for Dodge County: RUSSELL A. ROBINSON, JUDGE. *Reversed and remanded.*

Spear & Lamme, for appellant.

Mapes & Johnson, for appellee.

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

MESSMORE, J.

This is an action brought under a federal law wherein the plaintiff, by his next friend, seeks to recover treble damages by virtue of the sale of an automobile to a minor, over and above the ceiling price as provided for in such statute.

The record discloses from the plaintiff's evidence, that the minor, in company with his father and mother, went into the business place of the defendant and, after negotiations, purchased an automobile for the amount of $1,250, which was $344.25 above the ceiling price as established in the automobile trade. The defendant, by his answer, denied that the minor was the purchaser. At the conclusion of the evidence the trial court directed a verdict for the plaintiff. Upon the overruling of the motion for new trial, defendant appeals.

The question before this court is whether or not, under the general denial, the defendant would be privileged to introduce evidence to the effect that the minor was not the purchaser of the automobile.

In the case of Broadwater v. Jacoby, 19 Neb. 77, 26 N. W. 629, this court held: "When an answer to a petition consists of a general denial, the defendant may introduce such testimony as will tend to disprove the testimony given by the plaintiff in support of his petition. For such purpose no other allegations in the answer are necessary." Followed in Wiedeman v. Hedges, 63 Neb. 103, 88 N. W. 170. See, also, Hughes Co. v. Farmers Union Produce Co., 110 Neb. 736, 194 N. W. 872.

From an examination of the record in the instant case, the foregoing authorities are applicable, and the judgment of the district court is reversed and remanded for further proceedings.

REVERSED AND REMANDED.

THOMAS BAKER ET AL., APPELLANTS, V. ASBURY HEAVRIN, APPELLEE.

29 N. W. 2d 375

Filed October 24, 1947. No. 32215.

1. **Statute of Frauds.** "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." § 36-105, R. S. 1943.
2. ———. "Nothing contained in sections 36-101 to 36-106 shall be construed to abridge the powers of a court of equity to compel the specific performance of agreements in cases of part performance." § 36-106, R. S. 1943.
3. ———. In order that an oral contract for the sale of real estate may be controlled by section 36-106, R. S. 1943, the evidence must disclose a contract clear, satisfactory, and unequivocal in terms; that there was part performance; that the thing done constituting part performance was referable to the contract and not such as might be referable to some other or different contract; and that the thing done in part performance was some act recognizable as a basis in equity for granting relief.
4. ———. Part payment of the consideration of an oral contract for the sale of real estate unaccompanied by other acts of part performance is insufficient as a basis for a decree of specific performance of the contract.

APPEAL from the district court for Douglas County: JACKSON B. CHASE, JUDGE. *Affirmed.*

Fischer, Fischer & Fischer, for appellants.

Gross & Welch and *Harold W. Kauffman,* for appellee.

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

YEAGER, J.

This is an action in equity by plaintiffs and appellants against defendant and appellee for specific performance of an oral contract for the purchase of certain real estate situate in Valley, Douglas County, Nebraska, and an oil or filling station and cabin camp located thereon.

There was a trial to the court which resulted in a decree denying specific performance and an order for the return to plaintiff of $100 which was given to defendant as earnest money and an order for the return to defendant of the abstract of title to the real estate involved.

From the decree denying specific performance of the contract plaintiffs have appealed. There is no cross-appeal.

The substantial contention of plaintiffs in their petition is that on April 17, 1946, they entered into an oral contract with defendant for the property in question for the agreed price of $8,000 and that they paid thereon $100; that relying on the agreement, and in part performance, they procured a loan of $5,300 with which to pay a part of the purchase price and that the plaintiff Baker relying on the agreement has turned down several opportunities for profitable employment and further that the plaintiffs purchased tools of the value of $50 to be used in the operation of the business on the property. They have not alleged a date for the completion of performance of the agreement. They alleged that defendant informed them that he had removed the property from the market and refused to complete the contract. They did not tender performance nor allege ability to perform.

In his answer the defendant renewed a general demurrer and denied that a sale of the property was ever made and pleaded that if any agreement was made it was oral, within the prohibition of the statute of frauds, and therefore illegal and void. Further answering, the defendant alleged that an oral agreement for the sale of the property for $8,000 was entered into on April 8, 1946; that on that date he received from plaintiffs $100 to be applied on the purchase price; that as a part of the agreement plaintiffs were to pay the balance, or $7,900, on or before April 20, 1946, and that the deal would expire on that date; and that since plain-

tiffs did not perform by that date he notified them of his refusal to complete performance.

The plaintiffs filed no reply but the parties appear to have treated the affirmative allegations of the answer as having been traversed.

As a basis for the decree denying specific performance the court found generally against the plaintiffs on their petition and in favor of the defendant on his answer and specifically found that plaintiffs had not sustained their petition.

As grounds for reversal plaintiffs assert (1) that the court erred in finding generally for the defendant and appellee, and (2) that the court erred in finding that the plaintiffs failed to sustain their petition.

In the light of the issues the rights of the parties hereto must be determined through an application of the following statutory provisions:

"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." § 36-105, R. S. 1943.

"Nothing contained in sections 36-101 to 36-106 shall be construed to abridge the powers of a court of equity to compel the specific performance of agreements in cases of part performance." § 36-106, R. S. 1943.

Before it may be said that plaintiffs have sustained their petition, they must present a record which will remove their contract from the operation of section 36-105, R. S. 1943, and bring it within the control of section 36-106, R. S. 1943. In order that this may be accomplished the evidence must disclose an oral contract clear, satisfactory, and unequivocal in its terms; that there was part performance by the party seeking specific performance of the oral contract; that the thing done constituting part performance was referable to the contract sought to be enforced and not such as might be referable to some other or different contract;

and that the thing done in part performance was some act recognizable as a basis in equity for granting relief. Overlander v. Ware, 102 Neb. 216, 166 N. W. 611; Taylor v. Clark, on rehearing, 143 Neb. 563, 13 N. W. 2d 621.

It appears clearly, satisfactorily, and unequivocally that there was an oral agreement unequivocal in terms, except in a single particular, for the sale of the property in question not only from the evidence but also by admission of defendant in his answer. Plaintiffs' evidence indicated that the terms included no specific time for completion of performance whereas the evidence of defendant indicated April 20, 1946, as the final date for completion of performance.

Since the defendant did not insist upon performance on April 20 and by his evidence declared a willingness to perform up to and including April 30, 1946, we feel that we must resolve this disputed question in favor of plaintiffs, the effect of which is to say that an oral contract unequivocal in terms was clearly, satisfactorily, and unequivocally proved.

That there was part performance and that the part performance was referable to the proved contract and did not contain the possibility of reference to any other or different contract there can be no question. The part performance was the payment of $100 of the purchase price. There was no evidence of any other act or acts which within the meaning of the law could be considered part performance.

It is true that plaintiffs proved that they had obtained a commitment for a loan on the property in question conditioned on clarity of the title in defendant and transfer thereof to plaintiffs by defendant. The defendant however had no knowledge of the commitment until after he had notified plaintiffs of his unwillingness to complete the contract, and at no time was defendant a party to the negotiations or transactions involved in obtaining the commitment. The evidence disclosed that the plaintiff Baker discontinued employment and pur-

chased tools and equipment suitable for use in the business to be conducted on the property but these things were not done in part performance of the agreement but in reliance upon his own belief that the contract would be consummated. There is evidence that after defendant had communicated his unwillingness to complete the contract plaintiffs obtained an opinion on the abstract of title confirming the availability of the loan for $5,300 and also had made available to them an additional loan sufficient to pay the balance of the purchase price agreed upon, but it is clear that these matters had no contemplation within the proved terms of the agreement between the parties hereto. The most that can be said is that these enumerated acts were referable to the contract but it cannot well be said that they were in part performance of it.

Returning then to the part performance which was proved, it becomes necessary to say that this furnishes no ground for a decree of specific performance of the agreement. This part performance was solely and alone the payment of a part of the consideration. Even payment of the entire consideration of an oral contract for the purchase of real estate is not alone sufficient part performance to take a case out of the statute of frauds. Bloomfield State Bank v. Miller, 55 Neb. 243, 75 N. W. 569; Riddell v. Riddell, 70 Neb. 472, 97 N. W. 609; Barkhurst v. Nevins, 106 Neb. 33, 182 N. W. 563; Herring v. Whitford, 119 Neb. 725, 230 N. W. 665; Taylor v. Clark, *supra*.

In Herbstreith v. Walls, 147 Neb. 805, 25 N. W. 2d 409, this rule of law is referred to with approval and in that opinion in the following words the necessity for proof of other acts of part performance in order to enforce an oral contract for the sale of real estate is pointed out: "But the general rule is that the payment of the purchase money, in connection with other acts of part performance, may authorize the specific enforcement of an oral contract."

Thus we conclude that the plaintiffs have failed to prove acts of part performance which remove the agreement sued upon from the operation of section 36-105, R. S. 1943.

For the reasons herein stated the decree of the district court is affirmed.

AFFIRMED.

ELMA SIMS, APPELLEE AND CROSS-APPELLANT, V. ERNEST SIMS, APPELLANT AND CROSS-APPELLEE.
29 N. W. 2d 378

Filed October 24, 1947. No. 32253.

1. **Divorce.** In a divorce suit where the court has jurisdiction of the parties, it has power to adjust all their respective property interests.
2. ———. Upon the granting of an absolute divorce, the trial court has the legal right to assign the property, both real and personal, acquired during the marriage by the joint efforts of the parties, between the parties as the equities require.
3. ———. The fixing of alimony in a divorce case is always determined by the facts and circumstances of each case and in doing so the court will take into consideration the estate of each party at the time of the marriage, the respective contributions thereafter, the duration of the marriage, the wife's loss of her interest in the husband's property by virtue of the divorce, the social standing, comforts, and luxuries of life which the wife would probably have enjoyed except for the enforced separation, the conduct of the parties leading to the divorce, the party to whom the divorce is granted, the age and condition of health of the parties, and all other facts and circumstances, and make an award which appears to be fair and equitable.
4. **Parent and Child.** A father usually continues to be liable for the support of his minor children to the same extent after the divorce as before, and provisions in a divorce decree for their suitable maintenance and support are entirely distinct from the allowances of specific alimony to the wife.
5. **Divorce.** Provisions in a divorce decree for the custody and support of minor children are at all times subject to future modification by the trial court upon appropriate application by

either party, and a proper showing of subsequently occurring changed circumstances and conditions justifying it.

APPEAL from the district court for Lincoln County: I. J. NISLEY, JUDGE. *Affirmed as modified.*

V. H. Halligan, for appellant and cross-appellee.

Carr & Hoagland, for appellee and cross-appellant.

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

CHAPPELL, J.

After a hearing upon the merits, plaintiff was awarded an absolute divorce and related equitable relief. Motions for new trial and rehearing were respectively overruled, whereupon defendant appealed and plaintiff cross-appealed.

Concededly, plaintiff was entitled to an absolute divorce, and the sole question presented for decision is the legality and justice of the trial court's decree insofar as it relates to allowances for child support and disposition of the property admittedly acquired by the parties during the marriage. In that connection, defendant contends that plaintiff was awarded too much, while plaintiff contends the opposite. We conclude that the trial court's decree should be affirmed except as herein modified for purposes of clarity and efficient enforcement.

It is well established that: "In a divorce suit, where the court has jurisdiction of the parties, it has power to adjust all their respective property interests." Colick v. Colick, *ante* p. 201, 26 N. W. 2d 820.

This court recently reaffirmed the rule that: "Upon the granting of an absolute divorce the trial court has the legal right to assign the property, both real and personal, acquired during the marriage, by the joint efforts of the parties, between the parties as the equities

require." Schrader v. Schrader, *ante* p. 162, 26 N. W. 2d 617.

The fixing of alimony in a divorce case is always determined by the facts and circumstances of each case, and in doing so: "* * * the court will take into consideration the estate of each party at the time of the marriage, the respective contributions thereafter, the duration of the marriage, the wife's loss of her interest in the husband's property by virtue of the divorce, the social standing, comforts, and luxuries of life which the wife would probably have enjoyed except for the enforced separation, the conduct of the parties leading to the divorce, the party to whom the divorce is granted, the age and condition of health of the parties, and all other facts and circumstances, and make an award which appears to be fair and equitable." Specht v. Specht, *ante* p. 325, 27 N. W. 2d 390.

Child support is in a somewhat different category of the law. A father usually continues to be liable for the support of his minor children to the same extent after the divorce as before, and provisions in a divorce decree for their suitable maintenance and support are entirely distinct from the allowances of specific alimony to the wife. In that regard, provisions for the custody and support of minor children are at all times subject to further modification by the trial court upon appropriate application by either party, and a proper showing of subsequently occurring changed circumstances and conditions justifying it. Gibson v. Gibson, 147 Neb. 991, 26 N. W. 2d 6; Schrader v. Schrader, *supra*.

Bearing in mind the foregoing applicable rules of law, we have examined the record. The relevant evidence discloses that the parties were married approximately nine years. Defendant at the time of trial was an able-bodied young man, with an income of approximately $300 per month as a plumber. Plaintiff was then without any separate income. She was physically

unable to work and was in need of medical care and a surgical operation.

The parties were without any separate estate at the time of the marriage. However, by their joint efforts during the marriage, they had at the time of the trial acquired an automobile worth approximately $305, furniture worth from $500 to $900, and a parcel of improved, partially modern real property, worth approximately $4,000, which they occupied as a home. It was located on the outskirts of North Platte. Some building repair material, already paid for by defendant, and worth approximately $40 to $50, was piled in the yard on that property. The house thereon contained four rooms, three of which were still unplastered, and the floors were badly in need of repair. The real property was encumbered by a mortgage, upon which $1,625.68 was still due and payable at the rate of $20 per month. In addition, defendant claimed that he owed $324 for repairs on the house, which indebtedness, however, was not a lien on the property.

In that situation, the trial court awarded the custody of their minor daughter to plaintiff, giving to defendant the right to visit the child at reasonable times and places. In that connection, however, the decree also provided: "If he desires to take the child with him he must advise the plaintiff about the same and give her reasonable time to prepare the child for said leave." That provision implied that the defendant had the right, whenever he so desired, to take the child from the mother's custody for an indefinite period of time. It clearly invited parental bickering, judicial intervention, and resulting juvenile frustration. Under the circumstances appearing in the record, which we need not recite, we find that plaintiff should have been given the exclusive care, custody, and control of the minor daughter without qualification, except that defendant should be permitted to visit the child at reasonable times and places.

Defendant was ordered to pay plaintiff for the support of said child the sum of $50 per month until the child was 21 years of age or married before that time. We conclude that the order was a proper one, except that it should also have provided that such payments should cease if the death of the child occurred before she became 21.

The decree gave plaintiff the furniture and defendant the automobile, which we find was a proper disposition of those items.

The decree also provided that the real property should remain in the name of both parties, but that plaintiff should have the use and possession of it until the child reached 21 years of age or married before that time. Such order, in lieu of alimony, should have provided that the property tentatively remain in the names of the parties as joint tenants, but that plaintiff should have the right to occupy and possess the same as a home during such time as she lived and had the custody of said child, until the child reached 21 years of age, or until the child's marriage or death occurred before that time, in which event, or in the event that plaintiff, still living and having the custody of said child, should no longer exercise her right to occupy the property as a home during such period, then plaintiff and defendant should own the property as tenants in common.

On the other hand, we find that defendant was properly ordered to pay the mortgage on the property by making the monthly payments to the mortgagee as they accrued until the mortgage was paid in full, and to pay the taxes on the property as they accrued. He was also appropriately ordered to complete essential repairs on the house, after which he was given the balance of the building material thereafter remaining in the yard, but was required to remove such material from and "fix up" the yard.

For the reasons heretofore stated, the judgment of the trial court is affirmed except as modified herein.

All costs, including $150 attorneys' fees allowed for services rendered in this court by plaintiff's attorneys, are taxed to defendant.

AFFIRMED AS MODIFIED.

IN RE ESTATE OF ADOLPH RENTER, DECEASED. FRANK RENTER ET AL., APPELLEES, V. RUDOLPH RENTER, APPELLANT.
29 N. W. 2d 466

Filed November 7, 1947. No. 32279.

1. **Wills.** Probate is proving the instrument purporting to be a will to have been signed by the testator in the presence of at least two witnesses, who at his request signed the same as witnesses; and that the testator, at the time of the execution thereof, was of sound mind.
2. ———. 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.
3. ———. Where contestants object to the probate of an instrument as the last will of an alleged testator on the ground that the instrument is not executed in manner and form as required by law, such objection includes the issue of whether the signature on the instrument was that of the alleged testator.
4. **Appeal and Error.** When the evidence is conflicting the verdict of the jury will not be set aside, unless it is shown to be clearly wrong.
5. **Wills.** Testimony of handwriting experts that the signature on an instrument offered for probate as a will is not the signature of the alleged testator, if based on sound reasons and circumstances supporting that theory, may be sufficient to overturn the testimony of subscribing witnesses that they saw the will signed.
6. ———. When an issue as to whether the signature on an instrument offered for probate as a will is that of the alleged testator is raised by pleadings and contested by evidence there is no presumption either in favor of witnesses or in favor of circumstances.

APPEAL from the district court for Dodge County: RUSSELL A. ROBINSON, JUDGE. *Affirmed.*

Cook & Cook and *Perry & Perry,* for appellant.

Spear & Lamme, for appellees.

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

SIMMONS, C. J.

This is an appeal from a judgment denying probate of a purported will. Proponent complains that there was a change of issues in the district court from those in the county court, and that the evidence is insufficient to sustain the verdict of the jury. We affirm the judgment of the trial court.

Proponent in his petition alleged that Adolph Renter died leaving a last will and testament which he offered for probate.

Contestants objected to the probate on these grounds:

"1. Said instrument is not executed in manner and form as required by law for the execution of a will.

"2. Said Adolph Renter at the time of the execution of said purported will was not of sound mind or possessed of testamentary capacity of reason of old age, senility, and mental weakness.

"3. Said alleged instrument was executed by Adolph Renter by reason of improper and undue influence exerted upon him by Rudolph Renter, who is the sole beneficiary thereunder, and those conspiring with him.

"4. That said alleged instrument was not executed on the date nor in the manner and form alleged in proponent's petition."

To these objections, proponent filed a general denial. Hearing was had resulting in a finding by the county court for the proponent and admitting the will to probate.

A transcript of the proceedings was filed in the district court. Thereafter the parties filed a written stipulation that the case be there tried upon the pleadings and issues that were filed and submitted in the county court. The contestants later filed a motion to amend

their objections by adding the following allegation: "5. That the signature on the alleged instrument is not the signature of Adolph Renter, deceased." The contestants stated in the motion that, although objections 1 and 4 were sufficient to permit proof of the issue, they made the motion to clarify the issues and to apprise proponent.

Proponent objected asserting a complete departure from the issues and the stipulation. The trial court overruled the objections and granted the motion. Proponent filed a motion to require the contestants to elect whether they would rely on the objection numbered 5, or rely on the grounds of contest set out and numbered 1 to 4, inclusive. The trial court, reasoning that objection numbered 3 admitted that Adolph Renter actually signed the instrument, required contestants to elect. Contestants excepted to the ruling and elected to rely on objection numbered 5. Proponent then denied this allegation. The cause was tried on the issue as to whether or not the signature to the instrument was that of Adolph Renter.

Proponent contends here that the trial court permitted a change of issues when it permitted the amendment. We see no merit in this contention.

Subject to exceptions not involved here, section 30-204, R. S. 1943, requires that a will be "* * * signed by the testator * * * and attested and subscribed in the presence of the testator by two or more competent witnesses; * * *." We have held that "* * * probate is proving the instrument purporting to be a will to have been signed by the testator in the presence of at least two witnesses, who at his request signed the same as witnesses; and that the testator, at the time of the execution thereof, was of sound mind." Pettit v. Black, 13 Neb. 142, 12 N. W. 841; Walker v. Ehresman, 79 Neb. 775, 113 N. W. 218; Shevalier v. State, 85 Neb. 366, 123 N. W. 424. Accordingly, when the proponent offered the instrument for probate he that instant had the bur-

den placed upon him of proving the signature to be that of the alleged testator.

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. In re Estate of Inda, 146 Neb. 179, 19 N. W. 2d 37. By their first objection to the probate contestants asserted that the instrument offered was not executed in manner and form as required by law.

We have approved this definition of "execute": " 'To complete, as a legal instrument; to perform what is required to give validity to, as by signing and perhaps sealing and delivering; as, to execute a deed, lease, mortgage, will,' " and " 'The act of signing, sealing, and delivering a legal instrument, or giving it the forms required to render it valid; * * *.' " Brown v. Westerfield, 47 Neb. 399, 66 N. W. 439. See, also, Hazelet v. Holt County, 51 Neb. 716, 71 N. W. 717. The term "execute" signifies those acts required of the testator. Lewis v. Lewis, 13 Barb. 17. See, also, Linton's Appeal, 104 Pa. 228; In re Burton's Will, 25 N. Y. S. 824; Heinbach v. Heinbach, 274 Mo. 301, 202 S. W. 1123; Fuller v. Sylvia, 240 Mass. 49, 133 N. E. 384.

Clearly, the act of signing is one of the elements constituting the execution of a will. When contestants presented the objection that the will was not executed in manner and form as required by law, they presented an objection which included the question of whether the signature on the instrument was that of the alleged testator. When they amended their objections and stated that the signature was not the signature of Adolph Renter, they were stating a ground of contest already presented. It necessarily follows that there was no change of issues and that proponent's contention is without merit.

Proponent next contends that the evidence is insufficient to sustain the jury's verdict, specifically con-

tending that the testimony of expert and nonexpert witnesses that the signature is not that of the testator is not sufficient to overcome the positive testimony of the attesting witnesses that the signature is genuine.

We summarize the evidence that went to the jury.

The testator was about 74 years of age when the writing was executed which is offered as his will. He had lived for many years on a farm near Dodge in Dodge County. He had a family of ten children, eight of whom are living. His wife died in 1923. During the latter years the proponent lived with him.

The writing was prepared by a lawyer at West Point in Cuming County. The attesting witnesses were the lawyer and his son who officed with him. West Point is about 18 miles from Dodge.

The lawyer testified that he had seen Renter on the street and had been told who he was. He had had no personal or business dealings with him prior to those here involved. There is evidence that the alleged testator did not drive a car, and that proponent ordinarily drove for him. The lawyer testified that Renter came into his office alone a week or so before the writing was prepared and discussed the making of a will. The lawyer told him he wanted to get the names of all his children. Renter said he would be back. On the day the writing was prepared, Renter came again to the lawyer's office alone. He had the names of the children written out. The lawyer did not know in whose handwriting these names were. There is evidence that Renter could only write his name. The lawyer and his son testified that Adolph Renter signed the instrument in their presence and that they signed as witnesses in his presence and in the presence of each other. The lawyer testified that he had an extensive probate business in Cuming County but did not draw many wills for people living in Dodge County.

The lawyer further testified that there was something wrong with Mr. Renter's eye, and that apparently he

could not see with one eye. The son testified that he noticed there was something wrong with one eye, and that Renter would "* * * kind of look to one side a little bit is all I noticed." There is other evidence that Renter lost the entire right eyeball when a child, and that in his later years he did not care for it properly and it was filled with offensive matter.

The lawyer testified that he had an idea he charged Renter five dollars for his services but that he could not find a book account of the item because he ran his miscellaneous small items together.

He further testified that the writing was placed in an envelope, sealed and left with the lawyer, where it remained until delivered in the sealed envelope to the county judge for probate.

The proponent was married in February 1943, and thereafter he and his wife lived in the home of Adolph Renter. The proponent testified that he knew nothing about his father having made a will until about two years before his father's death, which occurred October 9, 1945. This evidence leaves the instrument in the hands of an almost total stranger in a county where the alleged testator did not reside and without any showing of anyone but the testator knowing it was there for the first three years after the date of its purported execution.

After the death of Mr. Renter the children gathered in his home. All of the living children except one were there. The proponent's wife was there. Questions were asked about whether or not there was a will. There is evidence that the proponent was asked if there was a will on several occasions, and he said there was and then that there was not, and that finally his (proponent's) wife said, "* * * 'We know what is in our will but we don't know what is in yours.'" The proponent denied hearing his wife make this statement. We do not find any denial on her part. He testified that he told the others the day after the funeral that

there was a will in the lawyer's office at West Point, and asked them to go to the office with him. He testified that when he went there he saw a copy of the instrument but not the instrument itself, and that was his first knowledge of its contents.

Three nonexpert witnesses for the contestants testified that they had known Adolph Renter for many years, detailed their business dealings with him and the extent of their acquaintance with his signature. They testified that in their opinion the signature on the instrument was not the genuine signature of Adolph Renter. Two of the contestants testified likewise. The proponent testified that in his opinion it was his father's signature.

The contestants and the proponent each offered one expert witness. They compared the signature on the writing with established signatures of Adolph Renter. Each witness used enlarged photographs. Each witness detailed the reasons for his conclusion. For the contestants the one witness testified that in his opinion the disputed signature was not written by the same person who wrote the admitted signatures. For the proponent the one witness testified that in his opinion the disputed signature was written by same hand that wrote the admitted signatures.

The proponent offered a number of business men and officials of Cuming County who testified that the reputation of the lawyer and his son for honesty and fair dealing was good.

In the case of In re Estate of O'Connor, 105 Neb. 88, 179 N. W. 401, we held:

"Testimony of handwriting experts that a will offered for probate is a forgery, if based on sound reasons and circumstances supporting that theory, may be sufficient to overturn the testimony of subscribing witnesses that they saw the will executed."

"On the issue that a will offered for probate is a forgery, the testimony of subscribing witnesses that it was duly executed may be overthrown by any probative

proof, either direct or circumstantial, if admissible under the ordinary rules of evidence."

"After substantial evidence has been adduced in support of the plea that a will offered for probate is a forgery, there is no presumption that the persons purporting to be subscribing witnesses told the truth in testifying that they saw the will executed, though not directly impeached or directly contradicted."

"After contestants adduce credible proof that the will offered for probate is a forgery, it is error for the triers of fact to entertain the presumption that subscribing witnesses, in testifying that it was duly executed, told the truth merely because they were not directly impeached, but the issue must be determined from all evidential facts considered in their proper light in connection with the plea that the will is genuine and with the charge of forgery."

In the body of the opinion we said: "When an issue of forgery in a civil case is raised by pleadings and contested by evidence on both sides, there is no presumption either in favor of witnesses or in favor of circumstances. All of the evidential facts which throw light on the issue must be considered in connection with the allegation of proponents that the will is genuine and with the charge of contestants that the document offered for probate is a forgery. If the truth is found in oral testimony, it must determine the issue, but it is equally potent if found in circumstances." See, also, Bank of Commerce v. McCarty, 119 Neb. 795, 231 N. W. 34; Wert v. Equitable Life Assurance Society, 135 Neb. 654, 283 N. W. 506.

Tested by these rules we have no hesitancy in reaching the conclusion that the evidence is sufficient to sustain the verdict and that the proponent's assignment is without merit.

Proponent relies here largely upon three decisions, which we will mention briefly.

He relies upon the language used by the trial court in

Estate of Johnson, 170 Wis. 436, 175 N. W. 917, and which was adopted by the Supreme Court. The decision is not persuasive. In this state the rule is: "'* * * when the evidence is conflicting the verdict of the jury will not be set aside, unless it is shown to be clearly wrong.'" Arman v. Structiform Engineering Co., 147 Neb. 658, 24 N. W. 2d 723. This rule was applied in the case of In re Estate of O'Connor, *supra.* The rule in Wisconsin appears to be that the court reviews the evidence and determines whether the trial court's findings are contrary to the clear preponderance of the credible evidence. Will of Miller, 201 Wis. 148, 229 N. W. 656. Clearly, in the case of Estate of Johnson, *supra,* the court weighed the testimony of the attesting witnesses as against that of the expert and came to the conclusion that it believed one and not the other. Otherwise, there is no occasion for the statement. Again in the case of Will of Miller, *supra,* the court did the same thing. Again in Estate of Hatten, 233 Wis. 199, 288 N. W. 278, the court weighed the testimony of an interested eyewitness against the testimony of an expert and said that the testimony of an expert was entitled to careful consideration but was not conclusive.

Proponent relies also upon Buttman v. Christy, 197 Iowa 661, 198 N. W. 314. In this case the only issue submitted to the jury was the question of the genuineness of a signature to a will. The subscribing witnesses testified to the genuineness of the signature. An expert testified that in his opinion it was not genuine. The court held that there was not a single extraneous fact or circumstance that in any degree tended to corroborate the expert witness in saying that the signature was not genuine. The court held that the testimony of the expert was admissible, and reversed and remanded the case, saying that "* * * unless upon a retrial additional evidence should be produced, it would be the duty of the court to direct a verdict for proponents." The inference proponent here draws from

the opinion is that the opinion evidence of the expert was not sufficient to take the case to the jury as against the evidence of those who testified they saw the signature placed on the instrument. The inference appears to be that which the successful party there had. The case was retried upon the issue of the genuineness of the signature. Additional testimony was introduced consisting of one expert and three nonexpert witnesses. The verdict again was in favor of the contestants. On appeal it was insisted that the previous holding was decisive and required a directed verdict for the proponents, and that the verdict was contrary to the evidence. The court held that the evidence was sufficient to require submission of the issue to the jury and that it could not assume to exercise the functions of a jury. The judgment was affirmed. Buttman v. Christy (Iowa), 208 N. W. 218. We call attention to the decision of the Supreme Court of Iowa in Keeney v. De La Gardee, 212 Iowa 45, 235 N. W. 745, for a discussion of an instruction such as is referred to in Buttman v. Christy, first above cited, also to Brien v. Davidson, 225 Iowa 595, 281 N. W. 150, 282 N. W. 480; and State v. Wickett, 230 Iowa 1182, 300 N. W. 268.

Proponent likewise cites Johnston v. Linder, 168 Iowa 441, 143 N. W. 410, and sets out a quotation found therein taken from Murphy v. Murphy, 146 Iowa 255, 125 N. W. 191, with reference to the value of expert and nonexpert evidence in this class of cases. The quote appears to have been made correctly. However, proponent overlooks the fact that the quotation is not complete. The sentence next following it in Murphy v. Murphy, *supra,* is this: "But its weight is for the jury."

The judgment of the trial court is affirmed.

AFFIRMED.

ERNEST A. SMITH, APPELLEE, V. HARRY KINSEY ET AL., APPELLEES, LEO E. SELL, INTERVENER, APPELLANT.
28 N. W. 2d 588

Filed November 7, 1947. No. 32238.

1. **Statute of Frauds.** "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." § 36-105, R. S. 1943.
2. **Trusts.** A constructive trust is a relationship with respect to property subjecting the person by whom the title to the property is held to an equitable duty to convey it to another on the ground that his acquisition or retention of the property is wrongful and that he would be unjustly enriched if he were permitted to retain the property.
3. **Specific Performance: Statute of Frauds.** Specific performance of an oral contract to convey real estate may not be decreed on the basis of part performance unless the acts of part performance by the promisee, in relation to the subject-matter, in and of themselves unequivocally indicated the existence of a contract alleged and cannot be accounted for on any other reasonable hypothesis.
4. ———: ———. In an action for specific performance of an oral contract where one is claiming the estate of a deceased person the evidence of such contract and its terms must be clear, satisfactory and unequivocal.

APPEAL from the district court for Valley County: WILLIAM F. SPIKES, JUDGE. *Affirmed.*

Dryden & Jensen, Paul I. Manhart, and *M. J. Buckley,* for appellant.

Davis & Vogeltanz, for appellees.

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

MESSMORE, J.

This action in equity was brought by the plaintiff to require the defendants to make an accounting; to have the court decree that certain of the defendants who hold

title to the real estate in question hold the same as trustee for the plaintiff and the intervener in this action; and further, to require the defendants so holding title to convey the same to the plaintiff or intervener in accordance with the terms of a previous oral agreement. Prior to the date of trial the plaintiff died, and the case proceeded to trial on the petition in intervention, the issues raised therein and the relief sought being substantially the same as contained in the plaintiff's petition. The petition in intervention prayed that title be quieted in the intervener and the deed to the defendant Lueck be set aside and held for naught. The defendants' answer to the amended petition in intervention, so far as need be considered here, denies the affirmative allegations of the amended petition and the amended petition in intervention, and prays for a dismissal of the intervener's amended petition in intervention. The defendants, by counterclaim, seek to collect rent from the intervener as lessee of the real estate here involved.

The pleadings are voluminous, containing allegations of fact which the respective parties contend support their positions, and need not be set out. The material and relevant facts contained therein, as reflected by the record, will appear in a resume of the evidence.

The record discloses that Horace H. Bristol resided with a brother of the plaintiff. The plaintiff was desirous of buying what is known as the Lutz place, adjacent to Arcadia, Nebraska. In the latter part of 1926, Horace H. Bristol informed his landlord he was going to move and live with the plaintiff, for the reason that he had a business deal with the plaintiff, and he had loaned him some money for the purpose of purchasing the Lutz place. The plaintiff did purchase the Lutz place on October 4, 1926. Horace H. Bristol moved in and boarded and roomed with the plaintiff until he suffered a stroke and died on March 22, 1927. On November 18, 1926, the plaintiff executed and delivered to Horace H. Bristol his promissory

notes aggregating $5,000, secured by a first mortgage on such land. This mortgage was filed of record December 2, 1926.

A son of the plaintiff testified that Horace H. Bristol resided with his uncle for a number of years, and later lived with his father's family until his death. He related the substance of a conversation occurring prior to November 18, 1926, between his father and Horace H. Bristol, wherein his father was interested in buying the Lutz place. Bristol said he would help finance the deal if the plaintiff would permit him to live in his home the rest of his life. He would loan the plaintiff $5,000 at a reasonable rate of interest, and would pay five dollars per week board and room for the period of time he lived there; the plaintiff to pay the interest on the mortgage in cash each year. Then, in the event that he, Bristol, should die, the mortgage was to be canceled, provided his half brother Andrew Bristol should predecease him. If not, the interest was to be paid to Andrew Bristol until his death, and then the notes and mortgage were to be canceled. He further testified, after Horace H. Bristol died Andrew Bristol came to their home and in the presence of this witness his father fully informed Andrew about the agreement between Horace H. Bristol and himself, and as the same related to Andrew. Andrew acquiesced that the transaction was proper and should be carried out in accordance with the terms thereof. Defendants' evidence denies that Andrew Bristol ever came to the plaintiff's home after the death of Horace H. Bristol. The record shows that Andrew Bristol was 88 years of age at the time and a resident of Connecticut. There also appears a power of attorney issued by him to transact business with reference to Horace Bristol's estate.

The plaintiff continued to pay the interest until Andrew Bristol died, the date of his death being in December 1929. The witness also related, in substance, a

conversation between his father and Horace H. Bristol, wherein the latter informed his father he had notified Mr. Kinsey, an officer of the Arcadia bank, of the arrangements between himself and the plaintiff. This witness remembered a deed received by his mother, who was estranged from his father, while she was in California, conveying this real estate to the intervener. His mother informed him she had signed the deed and sent it back.

Lutz testified that he was negotiating a sale of his place to the plaintiff and finally sold it to him when Horace H. Bristol informed him of the oral agreement between himself and the plaintiff and his reason for making such a deal. He also had correspondence from the plaintiff with reference to the oral agreement which was to the same effect. Lutz testified that Kinsey was handling the matter. Lutz corresponded with Kinsey, informing him of the transaction from his standpoint.

Kinsey testified he knew Horace H. Bristol during his lifetime, that he was a customer of the bank. Kinsey had drawn the notes and mortgage in question. Upon examination of the same after the death of Horace H. Bristol, he found one of the notes had outlawed. He thereafter corresponded with H. Wilber Bristol, a nephew of Horace H. Bristol, with reference to the matter. H. Wilber Bristol, in reply to such correspondence, requested Kinsey to employ counsel to administer the estate of Horace H. Bristol. Proceedings were started and H. Wilber Bristol was appointed administrator.

The plaintiff filed a claim against the estate for board and room and other items, from February 14 to March 22, 1927, in the amount of $40.95. The claim was paid and the plaintiff receipted in full.

By virtue of the estate proceedings, the mortgage became the property of Andrew Bristol. The estate of Andrew Bristol was administered and his sons, H. Wilber Bristol and Gideon C. Bristol, became the owners of the mortgage.

H. Wilber Bristol testified to negotiations had with the plaintiff about the mortgage and the payment thereof after the death of Horace H. Bristol. The plaintiff paid the interest in the amount of $300 per annum to H. Wilber Bristol for the years of 1927, 1928, and 1929, and no interest payments were made by the plaintiff thereafter.

In correspondence appearing in the record between H. Wilber Bristol and the plaintiff, it is apparent the plaintiff recognized the mortgage as his indebtedness. He informed H. Wilber Bristol he was endeavoring to obtain a loan, and was requesting a reduction of the mortgage indebtedness so that he could accomplish such purpose. This is evidenced by two letters written by the plaintiff to H. Wilber Bristol dated September 11 and September 17, 1936. This witness further testified the plaintiff never made any claim in writing or otherwise that the mortgage was satisfied by virtue of his oral agreement, but orally admitted to him on occasions of owing the mortgage debt.

There appears in evidence a letter dated July 6, 1937, written by this witness to Kinsey, wherein he expressed the hope that the plaintiff would be able to make arrangements to keep the place so that foreclosure proceedings could be avoided. Six months thereafter proceedings to foreclose the mortgage in question were instituted.

The intervener related the circumstances under which he obtained a deed when he purchased the land on February 8, 1937. The deed was lost, and there appears in the record a deed dated February 8, 1937, filed of record in June 1940, subject to a $5,000 mortgage signed by the plaintiff, but not signed by the plaintiff's wife. The intervener went into possession of the land March 1, 1937, and proceeded to farm it. In the latter part of August 1937, the intervener contacted the defendant, Kinsey, at the Arcadia bank, with reference to the deed which he took with him, and with reference to

the notes and mortgage. He testified that he was cognizant of the agreement between Horace H. Bristol and the plaintiff prior to the time he purchased the land, having obtained the information from the plaintiff. There are conversations in the record between the intervener and Kinsey, held at different times, wherein the intervener explained to Kinsey the conditions of the purchase of the land. Kinsey felt that the conveyance, lacking the signature of the plaintiff's wife, was ineffective. The intervener testified that Kinsey suggested to him that the mortgage should be foreclosed, the interest on the notes figured, and he would bid the property in for such amount and by doing so, cure the imperfection in the deed, and the mortgage then would be canceled in conformity with the oral agreement existing between Horace H. Bristol and the plaintiff; that the intervener would not be served with summons or other papers, but would be kept out of the foreclosure proceedings, and when the property was bid in, the title would eventually rest in the intervener and the matter would be settled with the only expense to the intervener being the costs, payment of back taxes, and attorney fees. These foreclosure proceedings were instituted on January 8, 1938. However, the intervener and his wife were served with summons. The parties designated in the foreclosure proceedings were John Doe and Mary Doe, his wife. The intervener being in possession, the record of the foreclosure proceedings was made to conform with the fact that the intervener and his wife were tenants in possession. The plaintiff filed a motion for security of costs; the motion was not pressed and plaintiff was granted an 11-months stay. The intervener made no defense in the foreclosure action. After receiving the summons the intervener again contacted Kinsey and called his attention to the fact that he and his wife had been served with summons, contrary to the agreement between himself and Kinsey. He testified Kinsey assured him that the matter would be

taken care of according to his agreement with him, and that there must be some mistake. The intervener also informed Kinsey that he had expended considerable money in improvements on the land and had made total payments in the amount of $1,338.56. The amount of the improvements placed on the land by the intervener is questioned as to the value thereof in the defendants' evidence.

Kinsey denied that he ever had a conversation with the intervener wherein he ever made an agreement with him that the land would be foreclosed and the intervener could buy it under the terms and conditions as testified to by the intervener. He admitted the intervener brought the deed to the bank, and he did tell him the deed was no good because the plaintiff's wife had not signed it.

The mortgage went to decree February 24, 1938. The property was bid in by H. Wilber and Gideon C. Bristol. Sheriff's deed was recorded on September 7, 1939. The land was rented to the intervener for the year 1939.

Certain correspondence is in evidence whereby H. Wilber Bristol and Gideon C. Bristol arranged to sell the land to the intervener for $2,500, subject to taxes, if he could raise the money. Other correspondence discloses the intervener failed to obtain the loan and thereafter, on December 5, 1939, the Bristols sold the land to the defendant Lueck for $2,000, subject to taxes from 1931 to 1937, and Lueck filed his deed December 23, 1939.

A writ of assistance was issued against the intervener on February 7, 1940, and returned March 4, 1940.

The defendant Otto R. Lueck testified that in conversations and visits between the intervener and Lueck, the intervener informed Lueck that he was endeavoring to procure a loan and buy the land, and Lueck understood that the intervener was endeavoring to do so and, in view of this understanding, told the intervener if he could procure the loan by March 1, that he, Lueck, would turn over all of his interests to the intervener, provided he could receive the return of his money.

He further testified that he never heard of an agreement whereby the plaintiff or intervener was to obtain the title to the land by paying up the taxes and costs of foreclosure without any additional payment, until this action was started.

The witness Hanson testified that as an attorney he was consulted by the intervener with reference to the land in controversy. His understanding was to the effect that the intervener had purchased the land for the amount of $1,338 from the plaintiff. In a conversation with Kinsey, this witness told him the intervener had paid the purchase price, except the taxes and foreclosure costs which he was to pay when he got title from the Bristols. He further testified that Kinsey told him he knew the agreement was that the land was to be conveyed to the intervener by the intervener paying the taxes and foreclosure costs, however, the Bristol heirs were demanding $2,000, and he could not turn a hand; it would have to be paid before he could do anything.

The foregoing substantially constitutes the facts upon which the court entered a decree finding generally against the intervener and for the defendants. On the counterclaim of the defendants, the court entered judgment in favor of H. Wilber Bristol and Gideon C. Bristol in the amount of $300. The court further quieted title to the land in Otto R. Lueck, and taxed the costs of this action to the intervener. Upon the overruling of the motion for new trial, the intervener appeals.

The intervener, appellant, asserts that there are two transactions involved in this appeal, the first being the oral agreement between Horace H. Bristol and the plaintiff which is set forth in the resume of the evidence and in the interest of brevity will not be repeated, and the second, that there was an oral agreement between Kinsey, as the agent of H. Wilber Bristol and Gideon C. Bristol, and the intervener, in substance as follows: That in order to clear the title to this land and dispose of the

interest of the estranged wife of the plaintiff, the mortgage was to be allowed to be foreclosed and the intervener was to pay the expense of the foreclosure and the taxes, and was thus to receive a deed of reconveyance. For the purpose of the instant case these two alleged oral agreements are interrelated.

The appellant predicates error on the part of the district court in that the decree of the court is not sustained by sufficient evidence and is contrary to law. The appellant further contends the court erred in permitting the defendants to recover on their counterclaim.

It is the contention of the appellant that the facts as disclosed by the record create and constitute a constructive trust. A constructive trust has been defined as follows: "A constructive trust is a relationship with respect to property subjecting the person by whom the title to the property is held to an equitable duty to convey it to another on the ground that his acquisition or retention of the property is wrongful and that he would be unjustly enriched if he were permitted to retain the property." Restatement of the Law, Trusts, § 1, p. 5. See, also, Wilcox v. Wilcox, 138 Neb. 510, 293 N. W. 378; Fisher v. Keeler, 142 Neb. 728, 7 N. W. 659; O'Shea v. O'Shea, 143 Neb. 843, 11 N. W. 2d 540.

Appellant cites Restatement of the Law, Restitution, § 181, p. 727, as follows: "Where the owner of an interest in land which is about to be sold to satisfy a claim refrains from preventing the sale or otherwise protecting his interest, because of an oral promise of another to buy in the interest and reconvey it to the owner, and the agreement is unenforceable because of the Statute of Frauds, and the other buys in the interest and refuses to perform his promise, he holds it upon a constructive trust for the owner." Also, section 180, p. 727: "The rule stated in this Section is applicable whether or not the purchaser is in a fiduciary or confidential relation to the transferor." And subsection (e), p. 729: "The rule stated in this Section is applicable

where the owner was induced by the oral promise of the purchaser to refrain from preventing the sale. It is applicable not only where the owner had cash available for redeeming the land and preventing the sale and was induced not to redeem by the oral promise of the purchaser, but also where the owner could have borrowed the money from others and thus have prevented the sale."

In view of the cited authorities, it becomes necessary to review certain sections of the statute of frauds.

Section 36-103, R. S. 1943, provides: "No estate or interest in land, other than leases for a term of one year from the making thereof, nor any trust or power over or concerning lands, or in any manner relating thereto, shall hereafter be created, granted, assigned, surrendered, or declared, unless by operation of law, or by deed of conveyance in writing, subscribed by the party creating, granting, assigning, surrendering or declaring the same."

Section 36-105, R. S. 1943, 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."

Section 36-104, R. S. 1943, provides: "Section 36-103 shall not be construed * * * to prevent any trust from arising or being extinguished by implication or operation of law."

Section 36-106, R. S. 1943, provides: "Nothing contained in sections 36-101 to 36-106 shall be construed to abridge the powers of a court of equity to compel the specific performance of agreements in cases of part performance."

"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 unequivo-

cal. 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." Overlander v. Ware, 102 Neb. 216, 166 N. W. 611; Taylor v. Clark, 143 Neb. 552, 10 N. W. 2d 495; Baker v. Heavrin, *ante* p. 766, 29 N. W. 2d 375; Crnkovich v. Crnkovich, 144 Neb. 904, 15 N. W. 2d 66.

A mere oral promise to bid in property at a foreclosure tax sale or redemption sale, and convey it to the owner upon being reimbursed, is a contract for the sale of land which cannot be enforced by reason of the statute of frauds. See 42 A. L. R. 78, and cases cited in annotation.

With the foregoing authorities in mind, the question is whether or not the evidence is sufficient to meet the authorities under appellant's contention.

With reference to the oral agreement between Horace H. Bristol and the plaintiff, it seems clear from the evidence that the plaintiff did not rely upon the fact that such oral agreement was made. He filed a claim against Horace H. Bristol's estate for board and room that was owing to him, and this was the only claim that he filed against the estate. He was paid, and receipted in full. Further, he negotiated with the defendant, H. Wilber Bristol, with reference to retaining the property, attempting to get the amount of the loan reduced so that he might be able to obtain a loan and keep the property. He appeared in the foreclosure action and filed a motion for security for costs and was granted an 11-months stay. At no time in any proceeding affecting the notes

or mortgage wherein he was mortgagor did he ever contend that the notes and mortgage had been canceled by the oral agreement, except when he filed the instant case January 23, 1941.

With reference to the second oral agreement raised by the intervener as between himself and Kinsey as the agent of the defendants H. Wilber Bristol and Gideon C. Bristol, this intervener was a party to the mortgage foreclosure action. He did not defend against it or claim any interest in the mortgaged property at that time. He did endeavor to obtain a loan and buy the land from the Bristols for $2,500. He failed to obtain such loan and finally, by virtue of a writ of assistance, left the land. There would be nothing for Kinsey or the Bristols to gain by any such agreement. Kinsey had no authority to make any such an agreement, and held no interest in the mortgaged property. The only element of agency that involves him in this litigation is the commission he charged for the sale of the property to Lueck. Lueck was willing to give this intervener the chance to purchase the property and repay him for what he had in it. It seems quite clear that Lueck had no knowledge of the oral agreements as contended for by the intervener in this action.

From an analysis of the evidence, the intervener has failed to prove a constructive trust by clear, satisfactory, and convincing evidence. The authorities cited by the appellee, and heretofore set forth, show that there was no such performance upon the part of the intervener that would take this case out of the statute of frauds. Under the authority of Taylor v. Clark, *supra,* Crnkovich v. Crnkovich, *supra,* and other authorities heretofore cited, and in view of the sections of the statutes of frauds heretofore cited, we conclude the judgment of the district court is right, and is therefore affirmed.

AFFIRMED.

A. W. HAMEYER, REAL NAME UNKNOWN, PLAINTIFF IN ERROR, V. STATE OF NEBRASKA, DEFENDANT IN ERROR.
29 N. W. 2d 458

Filed November 7, 1947. No. 32256.

1. **Criminal Law: False Pretenses.** The pretense or pretenses relied on to constitute the crime of obtaining money by false pretenses must relate to a past event or an existing fact.
2. ———: ———. Any representation, assurance, or promise in relation to a future transaction, however false and fraudulent it may be, may not be the basis of a prosecution for obtaining money by false pretenses.
3. **Evidence.** Section 25-1267, R. S. 1943, as follows: "Either party or his attorney may demand of the adverse party an inspection and copy, or permission to take a copy, of a book, paper or document in his possession or under his control, containing evidence relating to the merits of the action or defense therein," is a part of the Civil Code and has no application to proceedings in criminal cases.
4. ———. The application of section 25-1267, R. S. 1943, to criminal proceeding in Marshall v. State, 116 Neb. 45, 215 N. W. 564, was an improper application of this section.
5. **Criminal Law.** By rule of procedure in criminal cases the court in the exercise of a sound discretion should, where the prosecution is based upon the correctness or incorrectness of certain records or documents, on application of the defendant, allow an inspection of such documents or records.
6. **Appeal and Error.** Errors assigned but not argued will be considered as waived.
7. ———. The ruling on an objection, wherein the ruling resides in the sound discretion of the court, is not available as ground for reversal unless discretion was abused to the prejudice of the party interposing the objection.
8. **Criminal Law.** Where guilt of a defendant depends upon the intent, purpose, or design with which the act was done, or upon guilty knowledge thereof, collateral facts in which he bore a part occurring before and leading up to the transaction complained of may be examined for the purpose of establishing such guilty intent, design, purpose, or knowledge, even though such facts show the commission of another crime.
9. **Evidence.** An objection to evidence made for the first time after it has been received and the witness from whom it was elicited excused comes too late and it may not be considered as ground for reversal.

10. ———. Photographs which illustrate a fact in issue are admissible in evidence.
11. ———. Enlargements of photographs which may make proportions plainer and serve to illustrate testimony of witnesses on facts in issue are admissible in evidence.
12. ———. Where documentary evidence is offered or a question is asked an objection is properly overruled unless it is good as to the entire document or question.
13. **Appeal and Error.** Errors which do not prejudice the substantial rights of the defendant will be disregarded.
14. **Banks and Banking.** The possession of a canceled bank check by the drawer, who testifies that on the day of its date he made and delivered it to the drawee, is sufficient proof prima facie of the payment of the amount named in the check.
15. **Indictments and Informations: False Pretenses.** In a charge of obtaining money by false pretenses proof that the defendant received a check, draft, or a certificate of deposit which was paid is not a variance from the charge.

ERROR to the district court for Seward County: EDMUND P. NUSS, JUDGE. *Affirmed.*

McKillip, Barth & Blevens and *David Tant,* for plaintiff in error.

Walter R. Johnson, Attorney General, *Leslie Boslaugh,* and *C. S. Beck,* for defendant in error.

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

YEAGER, J.

This is a criminal action prosecuted on information in the district court for Seward County, Nebraska, by the county attorney of said county in the name of the State of Nebraska against A. W. Hameyer, real name unknown, defendant. In the action in the district court the State of Nebraska was denominated plaintiff and A. W. Hameyer defendant.

The information contained four counts each of which contained a separate charge that A. W. Hameyer was guilty of obtaining money by false pretenses from Wil-

liam Woebbecke. At the conclusion of the evidence the defendant moved separately on each count for a directed verdict in his favor. This motion was sustained as to counts I and II of the information. Thereupon the other two counts were submitted to a jury. A verdict was returned finding the defendant guilty on the two counts. Following the rendition of verdict a motion for new trial was filed which was overruled and the defendant sentenced to serve a term of four years in the state penitentiary. The defendant has brought the record here for review by petition in error. In the proceeding here the defendant below is plaintiff in error and the State of Nebraska is defendant in error. However, for convenience he will be referred to as defendant and the defendant in error as the State.

The assignments of error in the brief upon which defendant relies for reversal are numerous but those which require consideration fall into seven general classifications and will be thus considered herein. These classifications do not follow the order of assignment in the brief and do not contain all of the assignments noted but they do embrace comprehensively the subjects that require consideration and determination. They are (1) that the information failed to state a cause of action; (2) that the court erred in denying a continuance; (3) that the court erred in refusing inspection of the lease on which the prosecution was based; (4) that the court erred in its rulings on the admissibility of evidence; (5) that the court erred in refusing to allow the defendant to withdraw his plea of guilty and file a motion to quash the information; (6) that the court erred in submitting the case to a jury on counts III and IV, the theory being that the evidence was insufficient to sustain a conviction; and (7) that the sentence is excessive.

The particular question raised by the objection that the information did not state a cause of action is that the representations pleaded have reference to events to happen in the future and not to past events or exist-

ing facts. The question was first raised by motion for leave to withdraw a plea of not guilty and to file a motion to quash the information.

The rule of law upon which defendant relies in this connection and which is controlling is the following:

"It is a well settled rule of the criminal law that the pretense or pretenses relied on to constitute the crime must relate to a past event or an existing fact; that any representation, or assurance, or promise, in relation to a future transaction, however false and fraudulent it may be, is not within the meaning of the statute." Cook v. State, 71 Neb. 243, 98 N. W. 810. There is no contention in this case that this is not the controlling rule.

It therefore becomes necessary to examine the alleged representations and to ascertain whether or not they or one or more of them may be interpreted as referring to past events or existing facts. The allegations as to representation are three in number and are identical in the two counts which we are required to examine. They are in substance (1) that the defendant could procure for William Woebbecke an oil and gas lease upon a 320 acre tract of land situated in Caddo County, Oklahoma, for $1,600 which lease could be sold for $32,000 within three months, (2) that the defendant had a buyer who would purchase the lease for $32,000, and (3) that there were active and producing oil and gas wells immediately adjacent to and surrounding the land. There are other detailed representations but we have interpreted them to be incidents of or elaborations upon these three.

These alleged representations analyzed and interpreted in the light of what a person of average intelligence and lay understanding would construe them to mean, we conclude, amounted to representations of existing fact. We think that this should be the approach and that courts in such circumstances should not indulge in strained or technical refinements the effect of which might be to defeat the purposes of law and the ends of justice.

Interpreted in this light the obvious purport of the first representation was that defendant had a present and existing ability to procure a lease on lands referred to for $1,600. This is not a strained but is a reasonable interpretation. It is therefore in this sense a representation as to an existing fact and not to a future event.

The second representation interpreted in the same view amounted to a representation that the defendant had a commitment for the purchase of the lease for $32,000, which was, like the first, a representation as to an existing fact and not to a future event.

No discussion is required as to the third beyond the statement that without interpretation it is on its face the representation of an existing fact.

In the light of these observations it becomes clear that the court did not err in overruling the motion for leave to withdraw the plea of not guilty and in denying leave to file a motion to quash the information. Counts III and IV stated causes of action against the defendant. This conclusion disposes of the first and fifth classifications.

Before the commencement of the trial the defendant requested leave to inspect and to make a copy of the lease. Leave was denied. Also before the trial a motion for continuance was made. This was also denied. Of these rulings the defendant complains.

For statutory right to have the lease produced for inspection the defendant relies on section 25-1267, R. S. 1943, the pertinent portion of which is the following: "Either party or his attorney may demand of the adverse party an inspection and copy, or permission to take a copy, of a book, paper or document in his possession or under his control, containing evidence relating to the merits of the action or defense therein." This section of the statute was applied in Marshall v. State, 116 Neb. 45, 215 N. W. 564, to procedure in criminal actions but an examination of its history discloses that it has no proper application in such actions, but applies

only in civil actions. The section was adopted as and remains a provision of the Code of Civil Procedure.

This is not to say however that a like rule of procedure is not applicable to criminal proceedings. In Cramer v. State, 145 Neb. 88, 15 N. W. 2d 323, this court, independent of statute, said: "If a prosecution is based upon the correctness or incorrectness of certain records, such as is ofttimes the case in a prosecution for embezzlement, the examination of such records by the defendant should be granted." This rule is reasonable but discretionary and should be enforced when the ends of justice require it.

The question then before this court is that of whether or not the trial court abused its discretion in refusing to order an inspection of the lease. On the record it cannot well be said that the court abused its discretion in this respect.

At the time of hearing on the motion all that the court had before it was the information and the motion. The motion was not supported by affidavit and from the record it cannot be said that the motion was supported by any other kind of evidence. There is nothing in the transcript or the bill of exceptions to show that the defendant was prejudiced by the failure of the court to order an inspection of the lease. The motion for continuance must receive the same treatment as the application for inspection of the lease since there is no showing of prejudice or abuse of discretion.

Another ground for continuance was presented by the defendant in his assignments but since it is not considered by defendant in his brief it will be disregarded agreeable to the rule that errors assigned but not argued will be considered as waived. Madsen v. State, 44 Neb. 631, 62 N. W. 1081; Mason v. State, 132 Neb. 7, 270 N. W. 661; Maher v. State, 144 Neb. 463, 13 N. W. 2d 641.

During the course of the trial the State, after proper identification thereof, offered in evidence a purported oil and gas lease on 320 acres of land in Caddo County,

Oklahoma, which had been delivered by the defendant to William Woebbecke which, as it became clear on the trial, was the lease and land contemplated by defendant in the representations which were made the basis of the present action. Over objection and motion for continuance the lease was received in evidence.

There were two objections and motions both of which were overruled.

The first one was: "That is objected to as being incompetent, irrelevant and immaterial and not such a lease as was described or referred to in the information, and for the further reason that the defendant at this time is taken by surprise by the offer of this lease, Exhibit '8', as much as we have heretofor (sic) filed a motion to be furnished with a copy of the lease on which the State was relying for a prosecution in this case, and our application for inspection of the lease having been heretofor (sic) refused and we now ask at this time, in as much as we are taken by surprise by this lease, which is not such a one as is described in the information, as we view it, that the case at our request be declared a mistrial and the case continued over the term."

The second was: "The defendant at this time, in as much as Exhibit '8' purports to describe real-estate situated in Caddo County, Oklahoma, and this being the first occasion on which the exhibit is available to the defendant's counsel, the defendant moves that the case be continued to enable defendant's counsel to make a trip to Caddo County in Oklahoma for the purpose of investigating the land described in said lease."

The decision here in part must depend on the question of whether or not the trial court abused its discretion to the prejudice of the defendant in its rulings on the motions. See Maher v. State, *supra;* Dolen v. State, *ante* p. 317, 27 N. W. 2d 264. The question of whether or not discretion was abused is in this instance ascertainable from the content of the objections and motion.

It will be observed from the objections and the motions themselves that the grounds of objection were that the defendant was taken by surprise and that the exhibit was not the one contemplated by the information. There is no contention or suggestion that if a continuance had been granted evidence was or could have been made available to in any wise weaken or destroy the effect of the exhibit. It was not contended or suggested that evidence was or could be made available to defeat proof that this lease was delivered by defendant to William Woebbecke as a part of the transaction involved herein. The only purpose which it was suggested could be accomplished by a continuance was a trip to Oklahoma by defendant's counsel for investigation purposes.

It follows that since nothing appears to disclose that the defendant was prejudiced by the rulings on the motions made during the trial for a mistrial and a continuance it cannot be said that the trial court abused its discretion in the premises.

The instrument, as pointed out, was properly identified and it had proper evidentiary bearing on the charges made in the information, therefore the objection that it was incompetent, irrelevant, and immaterial was properly overruled.

The defendant contends that the court erred in the admission of the testimony of a handwriting expert who gave it as his opinion that the signatures on the lease exhibit were in the handwriting of the defendant. The objection does not go to the qualification of the witness as an expert. The objections are that the evidence was not competent in proof of the charges in the information and that it came in such manner and at such time as to take defendant by surprise and prevent him from making his defense in regard thereto.

The exhibit has appended to it as lessors the names Aubrey Schmidt and Anna Schmidt. The evident purpose of the prosecution insofar as this case was con-

cerned in seeking to prove that the signatures were forgeries was to disclose the fraudulent intent of the defendant in making the representations charged against him in the information. On this question it had a direct bearing and was therefore admissible. The rule under the circumstances is that in cases where guilt of the defendant depends upon the intent, purpose, or design with which the act was done, or upon his guilty knowledge thereof, collateral facts in which he bore a part occurring before and leading up to the transaction complained of may be examined for the purpose of establishing such guilty intent, design, purpose, or knowledge, even though such facts show the commission of another crime. Clark v. State, 79 Neb. 473, 113 N. W. 211, rehearing denied, 79 Neb. 482, 113 N. W. 804.

The objection that the defendant was taken by surprise by this evidence was not taken before or at the time it was introduced but after it had been introduced. The objection was taken by motion after the witness had been excused. Whether or not the ruling would have been error if the objection and motion had been timely made we are not required to determine. They came too late to receive consideration.

The next assignment to be considered is that of whether or not the court erred in admitting in evidence enlargements of names appearing on Exhibit 8 as lessors and of proved handwriting of the defendant for purposes of comparison by the expert witness and the jury. This assignment is without merit. That photographs which illustrate a fact in issue are admissible there can be no doubt. MacAvoy v. State, 144 Neb. 827, 15 N. W. 2d 45; Hampton v. State, *ante* p. 574, 28 N. W. 2d 322.

Photographic reproductions being admissible, no good reason has been advanced and none suggests itself why enlargements are not likewise admissible. It is well known and it is made to appear in the bill of exceptions in this case that enlargements of photographs may make proportions plainer and serve to illustrate testimony

of witnesses the same as would a magnifying glass or microscope. Rules of evidence should not deprive courts or juries of the certainties which may flow from such demonstrations. This is the attitude of the courts of other jurisdictions. United States v. Ortiz, 176 U. S. 422, 44 L. Ed. 529, 20 S. Ct. 466; Johnson v. Commonwealth, 102 Va. 927, 46 S. E. 789; Adams v. Ristine, 138 Va. 273, 122 S. E. 126, 31 A. L. R. 1413; Harlan v. Blume, 190 S. W. 2d (Mo.) 273.

The defendant asserts that the court erred in ruling that Exhibits 15, 16, 18, and 19 were admissible in evidence. The description of exhibits in the brief does not correspond to this description but it is evident that these are the exhibits which this assignment comprehends. Exhibit 16 is the authenticated copy of a deed whereby 160 acres of land described in Exhibit 8 was conveyed to S. L. Davis. The date of the conveyance was February 27, 1907, and the date of recording was April 26, 1907. S. L. Davis appeared and testified as a witness on behalf of the State. Exhibit 15 is the authenticated copy of an oil and gas lease executed by S. L. Davis et ux. upon a portion of the land described in the deed. The effect of the testimony of this witness was to say that he was the owner of this land and to negative any right of the defendant to in any wise have control over the land or any oil and gas lease relating thereto. Exhibit 19 is the authenticated copy of a deed whereby the remaining 160 acres of the land described in Exhibit 8 was conveyed to Joseph A. Jaques. The date of the conveyance was July 17, 1925, and the date of recording was July 24, 1925. Joseph A. Jaques also appeared and testified as a witness on behalf of the State. Exhibit 18 is the authenticated copy of an oil and gas lease executed by Joseph A. Jaques and wife upon the land described in the deed. The effect of the testimony of this witness was to say that he was the owner of this land and to negative any right of the de-

fendant to in any wise have control over the land or any oil and gas lease relating thereto.

It is not the contention of the defendant here that the copies of the deeds and leases themselves were not admissible. It is the contention that the court erred in admitting them because the certificates contained inadmissible information or evidence, that is, that they contained evidence relating to the title to these two tracts of land which could be adduced properly only by witnesses in confrontation of the defendant in court.

Factually the objection is supported, and the legal principle contended for is sound, but the objection is not available to defendant on the record in this case.

The objection made to Exhibit 15 was the following, and the objections to the other three were substantially the same: "That is (the exhibit in its entirety) objected to as incompetent, irrelevant and immaterial, does not tend to prove or disprove any of the allegations contained in the information in this case, seeking by certificates of various parties to place unsworn testimony before the jury, denying the defendant here his constitutional right of being confronted personally by the witness."

It will be observed that the defendant did not separately object to the certificates but to the entire exhibits, a part of which was admissible and a part of which was not.

This court has adopted and followed the principle that where documentary evidence is offered or a question is asked an objection is properly overruled unless it is good as to the entire document or question. Skow v. Locke, 3 Neb. (Unoff.) 176, 91 N. W. 204; McMartin v. State, 95 Neb. 292, 145 N. W. 695; Sheppard v. State, 104 Neb. 709, 178 N. W. 616; Powerine Co. v. Grimm Stamp & Badge Co., 127 Neb. 165, 254 N. W. 722.

There is another reason why the admission of this evidence may not be considered as grounds for reversal even if it be assumed that it was erroneously admitted.

It clearly falls within the rule that errors which do not prejudice the substantial rights of the defendant will be disregarded. Sweedland v. State, 109 Neb. 453, 190 N. W. 668; Vickers v. State, 111 Neb. 380, 196 N. W. 629; Jurgensen v. State, 135 Neb. 537, 283 N. W. 228.

This evidence was inferentially corroborative of facts testified to positively by the respective owners of the land, it is true, but we fail to see how it could have been prejudicial in the light of the fact that no evidence was offered or adduced or proposed for introduction the effect of which would have been to refute the testimony of the two witnesses.

The contention of the defendant that the evidence was insufficient upon which to base a finding of guilty must on the record be resolved against him.

The testimony of William Woebbecke is that the defendant made all three of the representations charged against him in the information. This evidence stands undisputed except as denied by the plea of not guilty. This witness testified that he relied on the representations and that he parted with his money because of them. This evidence stands without direct or indirect contradiction. There was evidence which the jury had the right to believe disclosing either directly or by reasonable inference or both that the representations were false and known to the defendant to be false and that they were made with the intent to cheat and defraud William Woebbecke and that he was defrauded.

The defendant urges that the evidence fails to disclose that William Woebbecke parted with any money hence there was a failure of proof that he was defrauded. The record fails to sustain the interpretation placed upon it by the defendant in this respect.

As to count III of the information four certificates of deposit representing a total of $2,180 which had been issued by banks in Seward County, Nebraska, to William Woebbecke were endorsed and delivered to defendant. The certificates are in evidence and they show

endorsement by the defendant. The stamps on the certificates indicating payment were not received in evidence but William Woebbecke said that they were paid.

As to count IV William Woebbecke gave to defendant a bank check in the amount of $1,200 on a bank in Seward County, Nebraska. The check was endorsed by defendant and William Woebbecke testified that it was paid by the bank and charged against his account.

In the early case of Peavy v. Hovey, 16 Neb. 416, 20 N. W. 272, it was said: "The possession of a canceled bank check by the drawer, who testifies that on the day of its date he made and delivered it to the drawee in payment of a debt, is sufficient proof prima facie of the payment of the amount named in the check."

There having been no evidence to counteract the prima facie showing made by the State this rule disposes of the contention in this respect with regard to count IV of the information.

In State v. Detloff, 201 Iowa 159, 205 N. W. 534; People v. Hoffmann, 142 Mich. 531, 105 N. W. 838; State v. Brantingham, 66 Mont. 1, 212 P. 499; Schaumloeffel v. State, 102 Md. 470, 62 A. 803; State v. Joseph, 115 Ohio St. 127, 152 N. E. 186, the rule is announced that, in the case of a charge of obtaining money by false pretenses proof that the defendant received a check or draft which was paid, there is no variance in the charge and the proof. The rule as announced in these cases was referred to with approval in Pettijohn v. State, *ante* p. 336, 27 N. W. 2d 380. No reason suggests itself why the same rule should not apply to certificates of deposit.

It follows therefore that the evidence was sufficient upon which to base a finding that William Woebbecke was defrauded as charged in the information.

The defendant was sentenced to serve a term of four years in the state penitentiary. He urges that this penalty is excessive. The minimum provided by statute is one year and the maximum five years. The evi-

dence upon which the jury based its verdict of guilty discloses no fact or circumstance in extenuation of defendant's offense. It shows a deliberate purpose and design conceived and pursued over a long period of time to beguile, entrap, deceive, and defraud an apparently all too trusting and gullible person. In his design and purpose he has been successful to his profit and to the detriment of William Woebbecke, so far as the two counts of the information are concerned, in the amount of $3,380, and as to counts I and II in the amount of $3,319.91 all of which, if the inferences which are deducible from the record are correct, represent a permanent loss to William Woebbecke. The sentence under the circumstances as disclosed by the record cannot in good conscience be said to be excessive.

Finding no prejudicial error in the record the verdict of the jury and the judgment and sentence of the district court are affirmed.

AFFIRMED.

EDDIE VERN FULLERTON, PLAINTIFF IN ERROR, V. STATE OF NEBRASKA, DEFENDANT IN ERROR.

29 N. W. 2d 618

Filed November 7, 1947. No. 32295.

1. **Criminal Law.** Crimes are established by statute and in prosecuting a violation thereof it is necessary for the information to allege and the State must prove those elements which are essential to constitute the crime. The fact that the information includes nonessential matters does not make the proof thereof necessary and they need not be submitted to the jury. However, if they are submitted no error arises by reason thereof for the defendant cannot complain if a greater burden is placed upon the State than the statute requires.
2. **Indictments and Informations.** A variance between the allegations in the information and the evidence offered in proof thereof is not fatal unless it is material to the merits of the case or such as is prejudicial to the defendant.

3. **Trial.** It is error to give an instruction which assumes a controverted material fact upon which there is a conflict of testimony.
4. ———. All instructions given should be considered in determining whether a particular instruction is prejudicial.
5. ———. Where instructions, considered as a whole, state the law fully and correctly, error will not be predicated thereon merely because a separate instruction, considered by itself, might be subject to criticism.

ERROR to the district court for Red Willow County: VICTOR WESTERMARK, JUDGE. *Affirmed.*

Morrison & Hanson, for plaintiff in error.

Walter R. Johnson, Attorney General, and *Leslie Boslaugh,* for defendant in error.

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

WENKE, J.

Defendant was convicted on an information charging that he did forcibly break and enter a motor vehicle with the intent to steal therefrom property of value contained within the motor vehicle. He brings proceedings in error to reverse his conviction.

Section 28-531.02, R. S. 1943, provides in part: "Every person who shall break and enter, or enter without breaking, at any time, any motor vehicle, with intent to commit the crime of larceny, shall be deemed guilty of a felony, * * *."

The first question raised is whether or not the evidence is sufficient to sustain the verdict.

There is evidence in the record which shows that about 9 a. m. on October 4, 1946, Gene Price, a resident of Wichita, Kansas, parked his Ford coach in a vacant lot back of the Stramel liquor store in McCook, Nebraska; that he had in the car a suitcase containing his personal effects. After parking he went into the liquor store where he stayed for about twenty minutes.

He then returned to his car and noticed the suitcase and its contents were missing. Apparently he immediately notified the police.

Two police officers arrived immediately. Upon inquiry they were informed by J. E. Anderson, the manager of the Coca-Cola Bottling Works which is located just west of the vacant lot, that shortly after 9 a. m. he had observed two men, whom he described, fooling around the car parked in the vacant lot back of Stramel's liquor store and that they seemed to be looking into the car. Price's car was the only one parked in the vacant lot at that time.

Within the hour the police officers picked up the defendant and another man by the name of Ingram in the east part of the railroad yards located in McCook. The railroad passes along just south of A Street which is the street immediately south of the vacant lot. At the time he was apprehended the defendant was just finishing putting on his shoes and was wearing a pair of trousers and a pair of socks taken from Price's suitcase. Other of Price's personal effects were found in the possession of defendant and Ingram.

Both defendant and Ingram were then taken to the place where Anderson worked and he identified them as the men he saw walking around and looking into the Price car. Defendant told the authorities that Ingram had given him the clothing which was found in his possession.

Defendant offered evidence to show that at the preliminary hearing Ingram admitted to the authorities he had taken the suitcase and given defendant a part of its contents. However, he also stated at that time that Fullerton was present when he took the suitcase. We find the circumstantial evidence clearly sufficient to sustain the verdict of the jury. See Williams v. State, 91 Neb. 605, 136 N. W. 1011; Browne v. State, 115 Neb. 225, 212 N. W. 426; Ayres v. State, 138 Neb. 604, 294 N. W. 392.

Defendant further contends that there is a fatal variance between the information and the proof as to the identification of the car. The information describes the car as a "1939 Ford Tudor Sedan Model, Motor No. A-204276." Price described the car he parked back of the Stramel liquor store as a "1939 V-8 Ford coach."

Under the provisions of section 28-531.02, R. S. 1943, hereinbefore set forth, the detailed and specific description of the motor vehicle involved is not an essential element of the offense. The statute relates to "any motor vehicle." The gist of the offense, as defined in the statute, is the breaking and entering, or entering without breaking, of a motor vehicle with intent to commit the crime of larceny. The number on the engine of the motor vehicle is not an essential element of the crime. Neither is it descriptive of the offense nor is it material to the jurisdiction. Such allegations are immaterial save for the purpose of identifying the car. Sedlacek v. State, 147 Neb. 834, 25 N. W. 2d 533.

Defendant cites authorities from other jurisdictions to the effect that when averments of this character are made in the information, although unnecessary, it then becomes necessary for the State to prove them.

We do not think that is the correct rule nor the rule in this state. Crimes are established by statute and in prosecuting a violation thereof it is necessary for the information to allege and the State must prove those elements which are essential to constitute the crime. The fact that the information includes nonessential matters does not make the proof thereof necessary and they need not be submitted to the jury. However, if they are submitted no error arises by reason thereof for the defendant cannot complain if a greater burden is placed upon the State than the statute requires.

As stated in Foreman v. State, 201 Ind. 224, 167 N. E. 125: "The statement in the affidavit giving the number of the engine of the Ford sedan was not descriptive of the offense and not material to the jurisdiction, and may

be treated as surplusage." The court went on to say: "The general rule is that it is sufficient if the substance of the issue is proved. The issue in this case is the unlawful transportation of intoxicating liquor in a vehicle. In applying this rule there is a distinction between allegations of matters of substance and allegations of matters of essential description of the offense. Any allegation which is descriptive of the identity of that which is legally essential to the offense charged in the indictment must be proved as made. But where a particular fact is made part of an allegation, which is not essentially descriptive of the offense or material to the jurisdiction, a discrepancy between the allegation and proof as to this fact is not a material variance. 1 Greenleaf, Evidence (Lewis's ed.) §§ 56, 65; United States v. Howard (1837), 3 Sumner 12; Commonwealth v. Brailey (1883), 134 Mass. 527."

Under comparable situations we have said that a variance between the allegations in the information and the evidence offered in proof thereof is not fatal unless it is material to the merits of the case or such as is prejudicial to the defendant. See Burlingim v. State, 61 Neb. 276, 85 N. W. 76; Goldsberry v. State, 66 Neb. 312, 92 N. W. 906; Carson v. State, 80 Neb. 619, 114 N. W. 938; and Balis v. State, 137 Neb. 835, 291 N. W. 477. While the evidence does not establish the motor number of Price's car we think it sufficiently and without conflict establishes that the car from which the suitcase was taken was owned by Price and that the defendant had no right to enter it.

The defendant further contends there was error in giving instruction No. 8 as it relates to the following paragraph thereof, to wit: "That the said motor vehicle described in the first count of the information, which has been referred to in the testimony, was owned by one Gene Price; * * *."

As stated in Metz v. State, 46 Neb. 547, 65 N. W. 190: "It is error to give an instruction which assumes a con-

troverted material fact upon which there is a conflict of testimony." The record shows no conflict with reference to Price being the owner of the motor vehicle which he parked behind Stramel's liquor store on the morning of October 4, 1946.

As we have often said: "All instructions given should be considered in determining whether a particular instruction is prejudicial." Foreman v. State, 126 Neb. 619, 253 N. W. 898. Several other instructions given placed upon the State the burden of proving that the car entered belonged to Gene Price.

While it would have been better to have left out of the above quoted part of instruction No. 8 the language "which has been referred to in the testimony," we do not think, under the circumstances here, that it constitutes prejudicial error. We have often used the following language which is applicable here: "Where instructions, considered as a whole, state the law fully and correctly, error will not be predicated therein merely because a separate instruction, considered by itself, might be subject to criticism." Nanfito v. State, 136 Neb. 658, 287 N. W. 58.

None of defendant's contentions being tenable, we therefore affirm the conviction.

AFFIRMED.

LAURA HERLAN, APPELLEE, V. FRANK J. BLECK ET AL., APPELLANTS.

29 N. W. 2d 636

Filed November 14, 1947. No. 32262.

1. **Fraud.** Direct evidence is not essential to establish fraud. It may be inferred from circumstances; but such inference must not be guesswork or conjecture, but the rational and logical deduction from the circumstances proved.
2. ———. Fraud is never presumed and the party alleging and relying thereon must prove it. However, what constitutes fraud

is a matter of fact in each case. Deception finds expression in such a variety of ways that courts have studiously avoided reducing its elements to positive definitions. Courts content themselves with determining from the facts in each case whether fraud does or does not exist, for whatever satisfies the mind and conscience that fraud has or has not been practiced is sufficient.

APPEAL from the district court for Buffalo County: E. G. REED, JUDGE. *Affirmed.*

Blackledge & Sidner, for appellants.

Dryden & Jensen, for appellee.

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

SIMMONS, C. J.

In this action plaintiff alleged that the defendants wrongfully, illegally, and with intention to defraud caused the conveyance of a residence property purchased by the plaintiff to be made to defendants. She sought a decree that the property be conveyed to her. Defendants answered alleging that plaintiff purchased the property, but that on the date of the final payment plaintiff informed the defendants that she was buying the property for them and desired only to occupy the premises so long as she might live, and directed that the conveyance be made to these defendants as joint tenants, which was done. Defendants claimed a gift. Trial was had resulting in a finding for the plaintiff as the owner of the property and a decree ordering the premises conveyed to her. Defendants appeal. We affirm the judgment of the trial court.

The defendants are the son-in-law and daughter of plaintiff.

For many years prior to the events here involved plaintiff and her husband lived on a farm in Kearney County. The defendants lived on a farm near Riverdale in Buffalo County. Plaintiff had another daughter

who was married and lived in Grand Island. The evidence indicates a not-too-cordial relationship between the two girls. In any event, defendants were more often at plaintiff's home than was the other daughter, and did the many things that a daughter and son-in-law would be doing for the daughter's parents.

Plaintiff's husband died February 8, 1944. Plaintiff was at that time 69 years of age. Defendant Frank J. Bleck was administrator of the estate. Plaintiff received some insurance money which she had on deposit in a bank. She was alone on the farm. In conferences between plaintiff and defendants it was agreed that plaintiff should buy a home for herself and move to Kearney. Defendant Frank J. Bleck made the preliminary investigations, located the property in question, and recommended its purchase. Plaintiff viewed the property and decided to purchase it.

A contract for the purchase of the premises was prepared by the real-estate agent. Defendant Frank J. Bleck and the agent went to the farm home where plaintiff signed the contract, wherein she agreed to purchase the property for $4,200, and the owners agreed to furnish her with a warranty deed. Plaintiff then made a payment by check in the amount of $1,000, leaving the balance of $3,200 to be paid when an abstract was approved. This contract is dated August 4, 1944, and the evidence is that it was signed on that date.

On either August 9 or 10, 1944, the deed involved in this action was prepared. It was mailed to Wyoming for a grantor's signature on August 11th. The deed names the defendants as grantees as joint tenants with right of survivorship. Defendants' attorney, who drew the deed, testified that according to his recollection the grantees were so named at the instruction of defendant Frank J. Bleck. Defendant Frank J. Bleck testified that his mind was a complete blank as to how that happened.

The deed was completely executed and the transaction

ready for closing on August 22, 1944. Defendant Frank J. Bleck or defendants drove to plaintiff's farm home, as they testified, to bring her to town to close the deal. She did not come to town but instead gave one or the other a check for the balance of the purchase price. Defendants testified, both by deposition and at the trial, that plaintiff then, and for the first time, told them that she wanted the title to the property placed in their names, and that nothing was said about reserving a life estate, but that it was so understood. That statement is categorically denied by plaintiff.

There is no question but that plaintiff paid for the property with two checks. The blanks in the body of the first check for $1,000 were filled in by the agent in writing, and plaintiff signed it. There is no question but that the balance to be paid was $3,200. The check for that amount is in evidence. The blank spaces are filled in in typewriting. The signature is that of the plaintiff. Plaintiff testified that the body of the check must have been filled in before she signed it, as she would not have signed a blank check. Defendants' evidence is that plaintiff signed in blank and that the payee and amount were filled in by a lawyer when the deal was closed.

The transaction was closed August 22, 1944, and the deed filed for record and recorded on August 23, 1944.

Repairs and improvements were made on the house on the premises at plaintiff's expense, and plaintiff moved into the same in September 1944, and has since occupied the premises as her home.

Plaintiff testified that in December 1944 she was told by defendant Frank J. Bleck that he had the deed and she requested it to be put in her safety box at the bank, and that a short time thereafter he said he had had the deed made out to himself and his wife. Plaintiff testified that she was dumbfounded, felt bad, did not know what to do, and said nothing at that time. She testified that repeatedly thereafter she asked the de-

fendants to convey the property to her and they refused.

Defendants testified that on the Sunday following the closing of the transaction they went to plaintiff's farm home and told her that the property had been conveyed to them, and that she was satisfied. Defendant Frank J. Bleck also testified that on two subsequent occasions she asked them about it and that they again told her it had been done. They deny that plaintiff ever asked for a conveyance until December 1945. The evidence indicates that the parties continued their cordial relationship during this period.

Defendants also testified that there was a vacant lot adjoining this property which they purchased in March 1945; that plaintiff suggested their buying it because a merchant was thinking of buying it for a refreshment stand. Defendant Frank J. Bleck testified plaintiff said: "* * * 'You kids don't want that stand right under your nose here' * * *." Defendant Cecelia Bleck testified that if defendants bought the lot "* * * it would make a nice layout * * *" for them.

Sometime in November 1945, a serious dispute arose between plaintiff and defendants about a doctor for plaintiff. It resulted in physical abuse of plaintiff.

Early in 1946, plaintiff consulted the attorney who now represents defendants about this matter looking toward securing title to the property. No representation followed and thereafter other counsel was secured and this action was started April 19, 1946.

It is to be remembered that defendants by answer alleged that at the time the contract of purchase was signed and the down payment made, they "* * * assumed, and had no reason to believe otherwise, that the plaintiff intended to purchase the same in her own name"; and that "* * * on the date that the final payment was made * * * the plaintiff informed these defendants that she was buying this property for these defendants; that she wanted the title placed in the name of these defendants * * * and that the plaintiff only wanted to occupy the

same as her home so long as she might live, and that in accordance with this expressed direction and instruction, and with full knowledge of the plaintiff, the deed of conveyance was prepared to these defendants as joint tenants, * * *."

Now, what are the facts? Plaintiff denied that she ever made any such statement or gave any such instruction. There can be no question about these two facts: The statement, if made by plaintiff, was made on August 22, 1944. Defendants themselves so testify. The deed conveying the property to defendants was by defendant's direction prepared at least 12 days before the intention and direction to have title conveyed to defendants were allegedly expressed, and at a time when defendants by their own answer "* * * assumed, and had no reason to believe otherwise, that the plaintiff intended to purchase the same in her own name." Having the grantees so named far in advance of August 22, 1944, is unexplained on any basis. In this connection there is one rather significant answer to a question given by defendant Cecelia Bleck. She had testified that the first conversation with the plaintiff about their having title to the property was on August 22, 1944. She then was asked, "And Frank had never discussed it before that date, with you." She answered, "I wouldn't say." This evidence is its own commentary.

It is apparent that beginning with the time defendant Frank J. Bleck gave instructions as to the grantees of the deed he had complete control of the transaction until it was closed and title vested in defendants.

We think the testimony as to the $3,200 check is significant. Plaintiff testified that the payee and the amount of the check were filled in when she signed it. Defendants testify that it was signed in blank. The alignment of the typing on the check is not too good. The letters indicate that the type was dirty, resulting in solid impressions of the letters "o", "n", "a", "e", and "s". It is not the work of a well-kept machine.

More than that, however, is this fact—while the plaintiff might not have known the name of the payee to insert in the check, there was no question about the amount that she was to pay, and no reason is apparent for not filling in the amount of the check. While plaintiff testifies as to her poor health, her testimony does not indicate any lack of mental acumen. We think it a proper conclusion that the check was made out and taken in the condition it now is for plaintiff's signature. From that we think it a proper inference that defendants took the check to plaintiff at her farm home intending to get her signature and not intending to take her to town to participate in the closing of the deal, where she might well have discovered to whom the property was being conveyed.

There is evidence of both parties heretofore set out of repeated discussions of this matter, discussions which might naturally follow if plaintiff's position is the true one, but which naturally would not have followed if plaintiff intended at all times that defendants were to own the property. Defendants argue that the long delay between knowledge of the grantees in the deed which plaintiff had in December 1944, and the bringing of this action in April 1946, shortly after the rather violent quarrel of November 1945, indicates that this is now a spite action to revoke a gift. It is to be remembered, however, that plaintiff was an elderly woman, alone save for these defendants, who had been her advisers and constant companions and helpers. Under those circumstances a natural hesitancy to bring the action may be understood.

There is the matter of the purchase by defendants of the adjoining lot, and we are asked to infer that plaintiff suggested it to defendants as a matter of protecting their interests in the property and thereby recognizing the gift. We think it just as natural an inference that defendants purchased to protect the interest which they thought they had secured.

There also is evidence given by defendants' attorney with reference to two wills that he had prepared for plaintiff. This evidence was admitted over objection. The propriety of the attorney so testifying and the admissibility of the evidence are not assigned here as errors. The testimony is that on April 25, 1944, in his office, plaintiff executed a will wherein she bequeathed $4,000 to the defendants jointly, and that thereafter on July 12, 1945, plaintiff executed a new will in which the special bequest was eliminated and which contained a statement that any gifts theretofore made to either of her children were not to be considered as assets of her estate. Before this evidence was offered in behalf of defendants, plaintiff testified on cross-examination that in the month of April 1944, she did not have an intention to make a substantial gift to defendants; she admitted the execution of a will in April 1944, stated she was not presently familiar with its contents, and did not remember the specific bequest; she was offered what was purported to be a copy of the will, and having read it said again that she did not remember having such a bequest in the will she executed; and she stated that she did not remember anything about executing a will in 1945. We attach no significance to this testimony. Neither the entire wills nor copies of them are here. Certainly an inference of an intent to make the gift and a recognition of one made cannot be established from the two isolated paragraphs of the two wills.

In an equity action this court tries issues of fact de novo upon the evidence in the record and reaches an independent conclusion without reference to the findings of the trial court, yet when the testimony of witnesses upon material issues is in irreconcilable conflict, we consider the fact that the trial court observed the witnesses and their manner of testifying, and must have accepted one version of the facts rather than the other. Miller v. Knight, 146 Neb. 207, 19 N. W. 2d 153. In this case from the cold record we are able to con-

trast the almost uniformly direct and positive answers of the plaintiff with the many indirect, evasive, and sometimes argumentative answers of the defendants.

The rule is: "Direct evidence is not essential to establish fraud. It may be inferred from circumstances; but such inference must not be guesswork or conjecture, but the rational and logical deduction from the circumstances proved." Alter v. Bank of Stockham, 53 Neb. 223, 73 N. W. 667. See Rettinger v. Pierpont, 145 Neb. 161, 15 N. W. 2d 393.

"Fraud is never presumed and the party alleging and relying thereon must prove it. However, what constitutes fraud is a matter of fact in each case. Deception finds expression in such a variety of ways that courts have studiously avoided reducing its elements to positive definitions. Courts content themselves with determining from the facts in each case whether fraud does or does not exist, for whatever satisfies the mind and conscience that fraud has or has not been practiced is sufficient." Rettinger v. Pierpont, *supra.*

We are satisfied, as was the trial court, that this transaction was conceived and completed with the purpose of defrauding this plaintiff of the title to this property, and that the fraud had its inception at least as early as the giving of the instructions for the preparation of the deed.

The judgment of the district court is affirmed.

AFFIRMED.

BIRDWOOD IRRIGATION DISTRICT, APPELLEE, V. HARRY BRODBECK ET AL., APPELLANTS.
29 N. W. 2d 621

Filed November 14, 1947. No. 32258.

1. **Waters.** If land is nonirrigable because of natural causes, it cannot lawfully be held in an irrigation district and taxed to support an irrigation system.

2. ———. Whether or not a particular tract of land, from some natural cause, cannot be irrigated, is a question which may be raised at any time in a proper case.
3. Trial. A trial judge has the same power to view the premises, on a trial without a jury, as exists in him to permit inspection in a jury trial, and such view or inspection is entitled to the same effect in both cases.

APPEAL from the district court for Lincoln County: I. J. NISLEY, JUDGE. *Affirmed.*

C. L. Baskins, for appellants.

Carr & Hoagland, for appellee.

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

PAINE, J.

This is an action to foreclose a tax sale certificate, owned by plaintiff irrigation district, and issued for delinquent irrigation taxes. Defendants denied that the land could be irrigated, because of natural causes, and therefore was not subject to irrigation taxes within the district. The decree found generally for the plaintiff, and defendants appealed.

The plaintiff filed a petition alleging that it is a public corporation, organized under the provisions of chapter 46, R. S. 1943, as the Birdwood Canal, for the operation of an irrigation canal to furnish irrigation water for the land in said district; that a canal was constructed through various lands in Section 8, Township 14, Range 32, now owned by the defendants; that the plaintiff district has maintained said canal, and all of said lands have been benefited from the waters of said canal; and that bonds were duly issued by the plaintiff district for the construction required, and taxes levied for the purpose of general maintenance of the plaintiff district.

An itemized statement of the taxes duly assessed for the years 1927 to 1938 inclusive, against Lots 1, 2, 3, and 4 in said Section 8, is set forth. It is alleged that no

part of said taxes has been paid, although legally advertised for sale by the county treasurer; that the plaintiff irrigation district purchased said taxes and secured tax sale certificate from the county treasurer of Lincoln County for such delinquent irrigation taxes; and that the amount due on said tax certificate was $1,622.46, with interest at 7 percent from September 25, 1940.

The plaintiff prayed for a decree finding the amount due upon said tax certificate, and that the same is a first lien upon the equity of the defendants in said Lots 1, 2, 3, and 4 of said Section 8, consisting of 170.1 acres more or less.

To this petition the defendants filed an answer and cross-petition, admitting that the plaintiff is a public corporation, formed as alleged; admitting that the land described therein was included within the Birdwood Irrigation District at the time of its formation; and admitting that the defendants are the owners of a contract for said land from the State of Nebraska.

Defendants further alleged that said land is not subject to be irrigated and cannot be irrigated because of natural causes; that said land is crossed with depressions and knolls; that underlying the top soil is gravel, making said lands worthless; that said lands were originally within the bed of the North Platte River and there are channels and islands and towheads therein; and that said lands are covered with a very thin coating of soil and cannot be irrigated.

The defendants for cross-petition alleged that they are also owners of Lots 1 and 2 of Section 9, lying immediately east of the other land, which Lots 1 and 2 were included within the said irrigation district; that $381.60 of taxes have been levied against said Lots 1 and 2 for the various years from 1927 to the present time, which taxes the defendants have paid, but under protest; that said lands in Lots 1 and 2 in Section 9 are of the same general character of the lands in Section 8; that they cannot be irrigated because of natural causes; and

defendants prayed that the taxes thereon, paid under protest, should be refunded with 6 percent interest.

For a reply and an answer to the cross-petition, plaintiff denied that the depressions and knolls on lots in Section 8 make the land nonirrigable, and alleged that said lands in Section 8 were included in the district at the time of its formation; that a claim for water of the State of Nebraska was made and filed on July 12, 1895, and at a hearing it was found that said lands could be irrigated and benefited; that said lands have been benefited by water furnished by the plaintiff district; that the lands have produced much more hay than they did prior to irrigation; that the water seeps over and onto said lands from the irrigation district, and that defendants have had the beneficial use of said waters; and that the cross-petition should be dismissed.

Trial was had. The taking of evidence was begun on September 18, 1946. On September 20, both sides having rested in the production of evidence, the cause was continued until the lands could be examined by the court, as requested by counsel on both sides, and thereafter briefs were submitted to the court.

The decree of the court, entered November 8, 1946, recited that the court had made a personal inspection of the land and found: That part of the land is covered with good alfalfa, and another part with good prairie grass, making good hay for livestock; that the lands will be benefited by irrigation; that all of the lands can be irrigated profitably; that the ridges were not as bad as testified to by some of the witnesses; and that similar land to that in Section 8 has been profitably irrigated.

The court further found that there was due to the plaintiff district from the defendant, on the tax certificate and the subsequent taxes paid thereon, the sum of $2,150.56, with interest at 7 percent; that the same was a first lien upon said lands; that unless the defendants paid said taxes within 30 days the lands would be

sold for the satisfaction thereof; and that the cross-petition of the defendants should be dismissed.

The defendants, for their assignments of error, charged that the finding of the court that the land can be profitably irrigated is contrary to the evidence; that the finding that similar lands to those in Section 8 are irrigated is contrary to the evidence; that the judgment dismissing the cross-petition is contrary to law; and that the judgment awarding plaintiff a foreclosure of its tax lien is contrary to law.

It was stipulated between the parties that in the claim for water, filed in July 1895, Lots 1, 2, 3, and 4 in Section 8, Township 14 North, Range 31 West of the 6th P. M., in Lincoln County, Nebraska, were included within the lands listed.

The defendants and appellants in their brief stated that they were raising only one question by the appeal in this case. That question was whether or not the lands are irrigable from the works of the plaintiff irrigation district on account of natural causes, and they alleged that they were not raising any question as to the legality of the taxes levied on Section 8.

The evidence discloses that the four lots in Section 8 are over 170 acres in area, and lie between the north bank of the North Platte River and a county highway running north thereof; that Lots 1 and 2 at the east are wild hay land, and that the 50 acres of alfalfa are to the west in Lots 3 and 4; that the irrigation ditch runs along the north side of the road just north of these four lots, and continues on east about two miles.

Exhibits were introduced of minutes of meetings of the board of directors of the Birdwood Irrigation District sitting as a board of equalization. Exhibit No. 8½ is the minutes of the meeting of the board of directors of plaintiff district of May 1, 1928, showing defendant Harry Brodbeck as a member of the board and making the motion to levy a tax of 100 mills on the dollar on the land in the district. He was also present as a board

member at the meeting held May 7, 1929, and he again made the motion fixing the levy for that year. At the meeting on May 7, 1930, he seconded the motion to make a levy of .75 mills on the dollar. He again seconded the motion for the levy on this land under plaintiff's irrigation district on June 2, 1931. Similar minutes were also introduced showing the levy in each of the years in which the delinquent taxes were sold in the tax certificate in suit.

Section 46-176, R. S. 1943, covers the law on the exclusion of land from an irrigation district, the hearing, and the assent of the parties when implied. During the four years while defendant was a member of the board of the plaintiff irrigation district, nor in any other year in which the minutes are set out in the record, do they show any objection of defendants, or any attempt to exclude the land from the district. However, the last provision in said section reads as follows: "*Provided,* in no case shall any land be held by any district or taxed for irrigation purposes which cannot from any natural cause be irrigated thereby."

It appears from this statutory provision just set out that the question, whether or not lands taxed in an irrigation district are incapable of irrigation because of natural causes, can be raised at any time by the owners of the land, and therefore can be raised even in these proceedings on the foreclosure of this tax certificate.

In the case of Sowerwine v. Central Irrigation District, 85 Neb. 687, 124 N. W. 118, it was expressly held that land which from some natural cause is nonirrigable may be detached from the irrigation district, following the rule laid down in the second opinion in Andrews v. Lillian Irrigation District, 66 Neb. 461, 97 N. W. 336, which held that land which cannot from any natural cause be irrigated could not lawfully be held in the district and taxed to support the system.

In the case of Morrow v. Farmers Irrigation District, 117 Neb. 424, 220 N. W. 680, it was said that "If for any

reason growing out of natural causes a particular tract of land does not require additional water to be artificially provided, or is in such a location that water cannot be conducted to it by artificial means, then it cannot be said to be benefited by irrigation."

In State v. Several Parcels of Land, 80 Neb. 424, 114 N. W. 283, this court quotes, in discussing the rule in Andrews v. Lillian Irrigation District, *supra*: " 'Whether a particular tract of land from some natural cause cannot be irrigated is a question which goes to the jurisdiction of the county board over such tract and may be raised at any time in a proper case, because section * * * expressly denies the jurisdiction of the county board to include such land in an irrigation district, or to tax it for irrigation purposes.' "

We therefore reach the conclusion that, under a long line of Nebraska decisions, the question whether or not a certain tract of land by reason of natural causes cannot be irrigated, may be raised in the case at bar in an action to foreclose a tax certificate.

In the instant case, the counsel for both parties joined in a request that the court go out and examine the property involved, and the trial was adjourned for a couple of days so that the court might have ample time to make such an investigation. The court in its decree sets out its findings both from its personal inspection and from the evidence.

The question arises, what weight should be given to the court's finding in this regard? Section 25-1108, R. S. 1943, says that whenever in the opinion of the court it is proper for the jury to have a view of the property which is the subject of the litigation, it may order them to visit the place, under a proper officer.

In Carter v. Parsons, 136 Neb. 515, 286 N. W. 696, this court reviewed many authorities and held: "A trial judge has the same power to view the premises, on a trial without a jury, as exists in him to permit inspection on a jury trial, and such view or inspection is en-

titled to the same effect in both cases." It was further stated that such inspection by the court constitutes evidence, because the relevant and competent facts revealed by such inspection necessarily affect the mind of the trial judge and tend to produce belief or disbelief on any issue.

This question was discussed by this court in Independent Stock Farm v. Stevens, 128 Neb. 619, 259 N. W. 647, in which it was said that the view by the trial court placed it at a vantage point which this court does not have.

In Higgins v. Adelson, 131 Neb. 820, 270 N. W. 502, Taxpayers' League v. Wightman, 139 Neb. 212, 296 N. W. 886, DeVore v. Board of Equalization, 144 Neb. 351, 13 N. W. 2d 451, and Lippincott v. Lippincott, 144 Neb. 486, 13 N. W. 2d 721, the effect of an inspection by the trial judge is discussed from various viewpoints, and from a study of all of these cases it is our conclusion that a court, in making its observation at the locus in quo, takes into account the facts there disclosed, together with the evidence taken on the trial of the case, and the two together form the basis of his determination of the issues involved.

In the case at bar, the evidence as found in the bill of exceptions preponderates in favor of the plaintiff, and considering the findings of the trial court, as heretofore set out herein, based in part on its inspection of the land, no doubt remains that the lands can be irrigated.

In regard to defendants' cross-petition asking for the refund of the irrigation taxes defendants had paid on their land in the adjoining Section 9, for the reason that the land could not be irrigated by reason of natural causes, the situation is governed by section 46-141, R. S. 1943, which provides that the person complaining shall file in the office of the secretary of such irrigation district a copy of his tax receipt, showing that it was paid under protest, together with a sworn affidavit showing

why the tax so paid under protest should be refunded. The evidence does not disclose that the required affidavit was filed by defendants; therefore, not having complied with the law, the court rightly dismissed the cross-petition.

In conclusion, we find that the claim of the defendants that the lands in Section 8 cannot be irrigated because of natural causes was not supported by the evidence, and the findings and decree of the trial court are right and are hereby affirmed.

AFFIRMED.

RICHARD F. SHINN, APPELLEE, V. OPAL SHINN, APPELLANT.
29 N. W. 2d 629

Filed November 14, 1947. No. 32226.

1. **Divorce.** Society has an interest in the marital status, its continuance and its dissolution. Thus divorce is not favored or encouraged but is discouraged.
2. ———. One of the important purposes of the law requiring six months to lapse between the entry of a decree of divorce, which in this state is in the nature of an interlocutory order, and before the same becomes final is to give the spouses a chance to effect a reconciliation, which the law favors.
3. ———. Reconciliation is a state of mind to be determined from all the evidence, including rational inferences, the real question before the court being whether the circumstances as a whole showed a mutual intention to effect a reconciliation and unite in mending the break in the matrimonial yoke.
4. ———. The interest of the state in the preservation of the marital relation makes it an interested party in divorce proceedings. Any action of the principals which conceals the true facts and circumvents this is against public policy, and is a fraud upon the court.
5. ———. If prior to the date a decree of divorce becomes absolute the parties resume marital relations and reconcile their differences, and the successful party in the divorce action permits the decree to become final without notice or knowledge of the other spouse, such action constitutes extrinsic fraud, not only as to the other spouse, but also as to the court, since it is effected through concealment from the court of such facts as the party

who permitted the decree to become final in his favor is bound to disclose, and which if disclosed, would render impossible the finality of the decree.

6. **Judgments: Equity.** Statute enumerating grounds under which a judgment may be vacated after expiration of term at which judgment was rendered does not provide exclusive remedy, but such grounds are concurrent with independent equity jurisdiction.

7. ———: ———. Where the circumstances call for equitable relief, a decree may, upon petition in equity, be set aside by a court of equity having jurisdiction of the parties and of the subject-matter of the suit, after expiration of the term at which it was rendered.

APPEAL from the district court for Blaine County: WILLIAM F. SPIKES, JUDGE. *Reversed and remanded with directions.*

Evans & Lee and *Frank L. Burbridge,* for appellant.

Schaper & Schaper and *Carl G. Humphrey,* for appellee.

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

MESSMORE, J.

This is a suit in equity in which the defendant in a divorce action, after decree of divorce was rendered against her and in favor of the plaintiff, filed a petition to set aside such decree after the term at which the same was entered.

The defendant's second amended petition alleged, in substance, that the plaintiff practiced fraud against her and upon the court in procuring a decree of divorce; further alleged that the parties mutually forgave and condoned all wrongs or complaints they had against each other and became fully reconciled, living together in the relationship of husband and wife prior to the date upon which the decree of divorce became absolute; further alleged that the plaintiff promised the defendant that if the parties would live together again as

husband and wife he would forthwith have the decree of divorce vacated and set aside, the defendant believed and relied upon the plaintiff to fulfill his promise to set aside the decree of divorce, and the plaintiff led the defendant to believe that he had done so, thereby perpetrating a fraud upon her and upon the court.

The plaintiff's answer admits that he filed a petition for divorce, a property settlement was made and a decree was procured from which no appeal was taken; further pleads that the decree of divorce has never been vacated nor set aside and is in full force and effect; and denies any fraud on his part against the defendant or upon the court.

After hearing the case the trial court entered a judgment finding in favor of the plaintiff and against the defendant and dismissed her second amended petition. Upon the overruling of motion for new trial, the defendant appeals.

For convenience, the parties will be referred to as they appear in the divorce action and not as appellant and appellee.

This case is before this court on a trial de novo.

It appears from the record that the plaintiff, prior to his marriage on January 1, 1939, to the defendant, was a widower with two minor children. The defendant was his housekeeper. They resided on his turkey ranch. In October 1940, the defendant separated from the plaintiff, giving as her reason for so doing that she was overworked in doing the cooking and washing for the hired men and caring for the children; that the plaintiff refused to take her places and made light of her education, all of which resulted in her becoming nervous and in ill health. Thereafter a property settlement was made between the parties. The defendant filed a voluntary appearance in which she requested the restoration of her maiden name. The plaintiff procured a decree of divorce on April 14, 1941, on the grounds of extreme cruelty. The defendant, after she

left the plaintiff, entered a cosmetology school in Grand Island.

On or about September 12, 1941, prior to the date the decree of divorce would become absolute which would be October 14, 1941, the plaintiff and defendant, after some consultation, decided to again live in the relationship of husband and wife. On September 13, 1941, they returned to the turkey ranch where the defendant assumed her previous duties as a mother and housekeeper. The evidence is in abundance that this relationship continued until May 31, 1945, when the defendant again separated from the plaintiff.

The defendant's testimony is to the effect that the reconciliation was brought about by the promise of the plaintiff to have the decree of divorce set aside; that he would permit the defendant to assist in business transactions, issue and sign checks; would take her on vacations; and build a separate house for the hired help, also employ additional help for her. The defendant further testified that on several occasions in conversations with the plaintiff he agreed to set aside the decree of divorce and, in fact, had attended to setting aside such decree; that she relied upon the representation so made by the plaintiff for the reason that he had always attended to all the family business and she had no reason to disbelieve him.

In conversations had with several parties, it was apparent that the defendant believed that when parties to a divorce action went back together and lived as husband and wife prior to the time the decree of divorce became absolute, such action automatically canceled the decree of divorce.

The plaintiff's testimony is to the effect that he offered to remarry the defendant but she rebelled, and that they agreed to live together without remarriage.

It further appears from the evidence, by the testimony of a witness who at that time was keeping house for the plaintiff, that on September 13, 1941, while she was

in the kitchen waiting breakfast, the bedroom door opened and the defendant and plaintiff came out. The plaintiff introduced the defendant to the witness as his wife. On September 15, 1941, this witness had a conversation with the plaintiff regarding the marriage relationship of the plaintiff and defendant, wherein the witness asked the plaintiff where the marriage had taken place, and he said there was no marriage, that the marriage happened quite a while ago, and the witness replied: "I understand you had a divorce from your wife—from Opal Shinn. He said, 'I did * * * I am going to drop that divorce, I just have about a month to do it in.'" This witness left the plaintiff's employment December 10, 1941. While she was there the plaintiff and defendant treated each other as husband and wife, got along well, and occupied the same sleeping quarters.

The plaintiff offered evidence with reference to other conversations had between certain witnesses and the defendant. One with the wife of the brother of plaintiff's first wife, that in May of 1942, while visiting in the plaintiff's home, she had a conversation with the defendant concerning the divorce decree, wherein she asked the defendant where she and Dick were remarried the last time, to which the defendant replied: "'We weren't,' * * * 'We didn't have to be,' * * * 'A lot of people don't know that we aren't remarried, but we don't have to be, because we went back together before the six months were final,' * * *." And this witness said: "Are you sure?" and the defendant replied: "Yes, if you go back before the six months was final you don't have to be remarried."

In another conversation with a witness who was in the poultry business with the plaintiff, to the effect that the defendant told her she did not know whether she was married, the witness replied that she thought she was married. This conversation occurred in August 1944.

One of the attorneys for the plaintiff, the attorney who represented him in the divorce action, testified that on June 7, 1945, he had a conversation with the defendant at her sister's home. He asked the defendant if she and the plaintiff had remarried. The defendant replied "No." He asked her if the divorce decree had ever been set aside and she said "No." He asked her why, and she replied that she had always thought that if divorced couples resumed marital relations before six months the decree was automatically canceled. He further testified that during this conversation the defendant made no claim that the plaintiff had agreed to have the decree set aside.

The defendant's version of this conversation is practically the same as related by the attorney, and in addition, that the attorney told her the decree had not been set aside and she did not believe him. She knew nothing further about it until she had consulted counsel in the instant case.

According to the plaintiff's evidence, he believed that it was necessary to remarry in order to resume the relationship of husband and wife. His evidence indicates that he was fully informed by the court at the time he obtained the decree of divorce that he was not privileged to marry until the divorce became absolute.

In considering this appeal, we deem it advisable to restate the public policy of this state with reference to divorce.

In State, ex rel. Hunter v. Crocker, 132 Neb. 214, 271 N. W. 444, this court said: "The public policy of this state, as declared by legislative enactment, is to discourage divorce cases. The state is an interested party. The dissolution of the marriage relation involves a matter of public interest." Similar language is found in Dudgeon v. Dudgeon, 142 Neb. 82, 5 N. W. 2d 133: " 'Thus divorce is not favored or encouraged, but is discouraged; the husband and wife are not the only parties to a suit for divorce, but the state, or the public, is considered

to be impliedly a party, whose interests should be considered and must be protected by the court.' 27 C. J. S. 527, sec. 8." See, also, Faris v. Hope, 298 F. 727. Other cases that denote the underlying philosophy of public policy as reflected in State, ex rel. Hunter v. Crocker, *supra,* are Lippincott v. Lippincott, 141 Neb. 186, 3 N. W. 2d 207; Winder v. Winder, 86 Neb. 495, 125 N. W. 1095; Blakely v. Blakely, 102 Neb. 164, 166 N. W. 259; Carmony v. Carmony, 112 Neb. 651, 200 N. W. 830.

The foregoing cited cases disclose a markedly liberal attitude toward application for vacation or modification of divorce decrees which is peculiar to this class of judgments and obviously a departure from the rules applicable to judgments in general. See Dudgeon v. Dudgeon, *supra.*

With the foregoing authorities in mind, we make reference to section 42-340, R. S. 1943, which provides as follows: "A decree of divorce shall not become final or operative until six months after trial and decision, except for the purpose of review by appeal, and for such purpose only the decree shall be treated as a final order as soon as rendered; Provided, if appeal shall have been instituted within three months, such decree shall not become final until such proceedings are finally determined. If no such proceedings have been instituted, the district court may, at any time within said six months, vacate or modify its decree, but if such decree shall not have been vacated or modified, unless proceedings are then pending with that end in view, the original decree shall at the expiration of six months become final without any further action of the court."

In the case of Everson v. Everson, 101 Neb. 705, 164 N. W. 717, this court construed section 1606, Rev. St. 1913, which is analogous to section 42-340, R. S. 1943, "to mean that during the six months' period the action is still pending before the court; that the trial court has power over it similar to that which trial courts

have always exercised over their judgments during the term; that it is not a final order in any sense except for the purposes of appeal, but more in the nature of an interlocutory order which the court can, at any time, for good reason, vacate or modify." See Dudgeon v. Dudgeon, *supra;* Williams v. Williams, 146 Neb. 383, 19 N. W. 2d 630; Carpenter v. Carpenter, 146 Neb. 140, 18 N. W. 2d 737; 27 C. J. S., Divorce, § 168, p. 806; 17 Am. Jur., Divorce and Separation, § 450, p. 370; Blakely v. Blakely, *supra;* Faris v. Hope, *supra;* Colick v. Colick, *ante* p. 201, 26 N. W. 2d 820.

One of the purposes of the law in fixing a definite period between the entry of the decree of divorce, which has been held in this state to be in the nature of an interlocutory order, and the time that the divorce decree becomes absolute, is to give the spouses an opportunity to perfect a reconciliation which the law always favors. That being true, the marital relation as resumed by the parties after the entry of the decree of divorce, which is in the nature of an interlocutory order, should be protected by the court, and the beneficient purpose of the law furthered when possible. See Olson v. Superior Court, 175 Cal. 250, 165 P. 706, 1 A. L. R. 1589; Faris v. Hope, *supra.*

When a decree of divorce is rendered it does not become operative until six months thereafter. During the period of time from the rendition of the decree until it becomes final, as provided by law, the bonds of matrimony which previously existed between the parties are not dissolved. Before the decree of divorce became final in the instant case, the parties reconciled their differences and resumed the status of husband and wife.

"Reconciliation is a state of mind to be determined from all the evidence, including rational inferences, the real question before the court being whether the circumstances as a whole showed a mutual intention to effect a reconciliation and unite in mending the break

in the matrimonial yoke." Gump v. Gump, 42 Cal. App. 2d 64, 108 P. 2d 21.

This brings us to the question as to whether or not the trial court, or this court, is privileged to entertain the defendant's petition to vacate and set aside the decree of divorce entered April 14, 1941.

This court is cognizant of sections 25-2001 to and including 25-2008, R. S. 1943, and the parts thereof providing that the district court shall have the power to vacate or modify its own judgments or orders after the term at which such judgments or orders were made, for fraud practiced by the successful party in obtaining the judgment or order. Further, that such action to do so must be commenced within two years, unless the party entitled thereto be an infant or person of unsound mind, and then within two years after the removal of such disability. We are likewise cognizant of the holding in Hoeppner v. Bruckman, 129 Neb. 390, 261 N. W. 572, and other cases holding the same, stating the exception to section 25-2008, R. S. 1943, as follows: "The only exception to the statutory limitation of two years is where the fraud was not discovered within that period." However, under the peculiar circumstances of the instant case, the following authorities are applicable and govern: The power to set aside judgments in original suits and proceedings is ordinarily exercised subject to restrictions imposed by general rules of law and equity, or statute, by courts of equity. In this state it has been declared a court of general jurisdiction, independently of an express statute, has power to set aside a decree of divorce fraudulently procured after the term at which it was granted. See Wisdom v. Wisdom, 24 Neb. 551, 39 N. W. 594, 8 Am. St. Rep. 215.

In Pavlik v. Burns, 134 Neb. 175, 278 N. W. 149, this court held: "Statute enumerating grounds under which a judgment may be vacated after expiration of term at which judgment was rendered does not provide

exclusive remedy, but such grounds are concurrent with independent equity jurisdiction."

The word "concurrent" means joint and equal in authority. See State v. Johnson, 170 N. C. 685, 86 S. E. 788; Rose v. Sprague, 248 Ky. 635, 59 S. W. 2d 554.

"Where the circumstances call for equitable relief, a decree may, upon petition in equity, be set aside by a court of equity having jurisdiction of the parties and of the subject-matter of the suit, after expiration of the term at which it was rendered." Pavlik v. Burns, *supra.*

The relationship of husband and wife is a very close, sacred, and confidential one, built and founded upon love, respect, and reliance. The plaintiff, to induce the defendant to return and live with him in the relationship of husband and wife, made promises that distinctively changed the conditions under which they formerly lived. He kept these promises, all but the most vital one. When they returned to live together in such relationship the defendant was privileged to transact business, sign checks using the plaintiff's name, and go on vacations with him. She made joint tax returns with him and entered into a conveyance of real estate, using his name. She relied upon him and should have under the circumstances. He held her out publicly and socially as his wife, by his conduct from September 12, 1941, until May 31, 1945, when they parted. The parties forgave each other all of their differences. The plaintiff condoned any misdeeds or wrongs he alleged the defendant committed against him. The grounds upon which he obtained his divorce then, in effect, became a nullity. Any contention that the plaintiff agreed to take the defendant back to his home and live with her as his mistress or demimonde is inconceivable.

The foregoing discloses that the plaintiff lulled the defendant into a sense of false security. The evidence is clear and convincing that he perpetrated a fraud upon the defendant and upon the court.

The precise question here presented has not hereto-

fore been before this court. In this connection, the defendant has cited cases from other jurisdictions where questions of a similar nature have been determined. Later in the opinion we will quote from such jurisdictions language we deem appropriate to the instant case. We have noted the distinction in the statutes of the several jurisdictions and the statutes in this state with reference to the finality of divorce decrees and what is required in some states before divorce decrees become final.

In Berger v. Berger, 44 R. I. 295, 117 A. 361, the court held: "The resumption of marital relations by the parties after a decision in a divorce petition and before entry of final decree, is a condonation of the offence of the husband and the court could not enter final decree thereafter * * *."

In Kronman v. Kronman, 129 Cal. App. 10, 18 P. 2d 712, the court held: "The obtaining of a final decree of divorce, after a reconciliation and resumption of marital relations subsequent to the entry of an interlocutory decree, without notice or knowledge of the other spouse, is extrinsic fraud, not only as to the other spouse, but also as to the court granting the same, since it is effected through concealment from the court, * * * of facts which the party requesting the final decree is bound to disclose, and which if disclosed would render improper the granting and impossible the procurement of the final decree."

In Cary v. Cary, 144 App. Div. 846, 129 N. Y. S. 444, the court said: "If the fact of the voluntary cohabitation had been known to the court at the time of the entry of the final judgment, the final judgment would undoubtedly have been denied. The fact that it was concealed from the court at that time gives full warrant to the court, upon the discovery of this fact after the entry of final judgment, to vacate and set aside the same."

In Kahn v. Kahn, 126 Misc. 44, 213 N. Y. S. 324, in

speaking of the same kind of concealment of facts as appears in the instant case, the court said: "The concealment was in effect a fraud upon the court, and the motion to vacate the judgment is granted."

In 3 Nelson, Divorce and Annulment (2d ed.), § 28.07, p. 134, it is stated: "Occasionally, of course, there is an actual reconciliation and forgiveness. In that event, if the court is advised of it, a final decree of divorce should not be entered. * * *

"The problem is one of whether the parties have become so reconciled as to have fully resumed relations as man and wife with the intention that they be permanent, obviating the necessity or desire for termination of the marriage and making its continuance a matter of social propriety and probable success. The factors involved are less legal than social, and such few decisions as there are only emphasize the incongruity of seeking to place divorce suits on the same plane as those to quiet title or replevin a chattel for unpaid instalments of the purchase price."

The record in the instant case shows a continuous living together in the relationship of husband and wife by the plaintiff and defendant from September 12, 1941, to May 31, 1945. We are convinced that under the circumstances and the evidence in this case it was the plaintiff's duty, when he condoned the misconduct of his wife upon which he obtained the decree of divorce and the parties reconciled their differences, to have informed the district court accordingly. The reconciliation having occurred prior to the decree of divorce becoming absolute, the plaintiff's failure to so notify the court constituted a fraud perpetrated by him on the court. We further believe that had the court known the full circumstances it would, in the exercise of its sound discretion, have set aside and vacated the decree of divorce obtained on April 14, 1941, by the plaintiff.

The cases of Carpenter v. Carpenter, *supra,* and Colick v. Colick, *supra,* are cited by the plaintiff on the theory

that since the decree of divorce becomes absolute at the expiration of six months without further action of the court, the resumption of marital relations within that period does not prevent the decree from becoming final or operative at the expiration thereof; that the proceedings to vacate the decree of divorce within six months period from the rendition thereof is not ex parte in nature, and notice must be given to the other party to enable such party to be heard if desired. In the instant case no such notice was given the defendant, and plaintiff contends she is bound to know the law on the subject.

We find nothing in the foregoing cases that, applied to the circumstances and the evidence in the case at bar, would upset the substantive law of this state and deny the right of a party to resort to a court of equity to vacate a decree of divorce obtained against such party by fraud, after the divorce becomes absolute. Nor do we find anything in the cited cases that would bar a court of equity from vacating a decree of divorce when the facts disclose a fraud was perpetrated on the court. Courts are protected by law when such instances occur. Reconciliation of the parties was not involved in the two cited cases.

Where parties, as here, continue their marriage and start to do so before the decree of divorce becomes absolute, or in other words notwithstanding the divorce, upon what rule or reasonable hypothesis should decrees erroneously determining otherwise remain of record? We think of none. In this connection, see Jordan v. Jordan, 105 Colo. 171, 96 P. 2d 13; Githens v. Githens, 78 Colo. 102, 239 P. 1023, 43 A. L. R. 547. To so hold would make a farce of judicial procedure and open the door to unlimited fraud and imposition on innocent and trusting persons. The result would be to make the law an instrument of oppression and a trap for the unwary, and oftentimes would develop intolerable situations involving innocent children and creditors in good faith,

to say nothing of the parties themselves, in inextricable confusion. Nothing but harm would result for all concerned.

We conclude, for the reasons given in this opinion, that the decree of the district court in finding generally in favor of the plaintiff and against the defendant should be, and is hereby, reversed; that the decree of divorce procured by the plaintiff, against the defendant on April 14, 1941, be, and is hereby, set aside and vacated, and the district court is directed to enter judgment accordingly.

In view of our holdings, other assignments of error need not be determined.

JUDGMENT ACCORDINGLY.

RALPH B. MEREDITH, APPELLANT, v. EDITH O. MEREDITH, APPELLEE.

29 N. W. 2d 643

Filed November 14, 1947. No. 32283.

1. **Divorce.** Unfounded and malicious accusations of infidelity, when made by the husband against the wife, may constitute extreme cruelty.
2. ———. Whether accusations of infidelity made by one spouse against the other constitute extreme cruelty within the meaning of the statute must be determined by the facts of each particular case. In no case will they be given that effect unless they are shown to be either unfounded or malicious.
3. ———. Any unjustifiable conduct on the part of either the husband or wife, which so grievously wounds the mental feelings of the other, or so utterly destroys the peace of mind of the other as to seriously impair the bodily health and endanger the life of the other, or such as utterly destroys the legitimate ends and objects of matrimony, constitutes "extreme cruelty" although no physical or personal violence may be inflicted, or even threatened.
4. **Appeal and Error.** When the evidence on material questions of fact is in irreconcilable conflict, this court will, in determining the weight of the evidence, consider the fact that the trial court observed the witnesses and their manner of testifying, and must have accepted one version of the facts rather than the opposite.

APPEAL from the district court for Lincoln County: I. J. NISLEY, JUDGE. *Affirmed in part and in part reversed and remanded with directions.*

Beatty, Clarke & Murphy, for appellant.

C. L. Baskins, for appellee.

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

WENKE, J.

Appellant, Ralph B. Meredith, who was plaintiff below, appeals from the decree of the district court for Lincoln County awarding the appellee, Edith O. Meredith, who was defendant below, a divorce on her cross-petition. Appellant complains that the court's findings are contrary to the evidence and that the judgment entered is contrary to the evidence and the law.

The trial court found: "* * * that said plaintiff has wrongfully and without just cause, on numerous occasions charged the defendant with wrongful conduct and with committing adultery; * * *."

We have said in Sample v. Sample, 82 Neb. 37, 116 N. W. 953: "Unfounded and malicious accusations of infidelity, when made by the husband against the wife, have frequently been held to constitute such cruelty." And, "Whether accusations of infidelity made by one spouse against the other constitute extreme cruelty within the meaning of the statute must be determined by the facts of each particular case. In no case will they be given that effect unless they are shown to be either unfounded or malicious." See Oertle v. Oertle, 146 Neb. 746, 21 N. W. 2d 447.

We do not think the record sustains the court's findings. In fact, the record shows that she was actually guilty thereof.

The court further found: "* * * that the plaintiff has been guilty of extreme cruelty towards said defendant

and cross-petitioner; * * * that he became so jealous and suspicious of said cross-petitioner that it became impossible for said cross-petitioner, * * * to live with said plaintiff and that the acts and conduct of said plaintiff destroyed the marital relation existing between said parties."

We have said: "'Any unjustifiable conduct on the part of either the husband or wife, which so grievously wounds the mental feelings of the other, or so utterly destroys the peace of mind of the other, as to seriously impair the bodily health and endanger the life of the other, or such as utterly destroys the legitimate ends and objects of matrimony, constitutes "extreme cruelty" as defined in section 7, chapter 25, Compiled Statutes, although no physical or personal violence may be inflicted, or even threatened.' Ellison v. Ellison, 65 Neb. 412, 91 N. W. 403." Oertle v. Oertle, *supra.*

We do not think the record will sustain the finding made by the trial court. In fact, if anyone was guilty of conduct that destroyed the legitimate ends and objects of matrimony it was the appellee. Appellee should not have been granted a divorce and her cross-petition should have been dismissed.

Was the trial court right in denying the appellant a divorce and dismissing his petition? This matter is here for trial de novo but, of course, where applicable, we apply the rule that: "'When the evidence on material questions of fact is in irreconcilable conflict, this court will, in determining the weight of the evidence, consider the fact that the trial court observed the witnesses and their manner of testifying, and must have accepted one version of the facts rather than the opposite.' Dier v. Dier, 141 Neb. 685, 4 N. W. 2d 731." Brown v. Brown, 146 Neb. 908, 22 N. W. 2d 148.

But here, as to the principal issue, there is no material conflict in the evidence except the appellee's denial thereof. Without going into unnecessary detail, which would serve no useful purpose, it can be said that the

facts and circumstances established by the evidence, even including some statements made by the appellee, clearly show that appellee spent the night of August 3, 1946, with Fred H. Meredith, appellant's brother, in room 22 of the Platte Hotel at Gothenburg, Nebraska, and, during the night, she was intimate with him. On this evidence the appellant was entitled to a divorce and, under the provisions of section 42-318, R. S. 1943, the appellee should not be allowed alimony.

As to that part of the decree awarding the appellee custody of the son, Ralph Eugene, born February 28, 1943, and allowing the sum of $15 per month for his support, we think the trial court was justified. The record shows this child was injured at birth; that he has not completely recovered therefrom; that appellee, with the assistance of her mother, has given the child good care; and it is evident the child will, while in appellee's custody, continue to receive proper care and attention. Appellant should be given reasonable opportunities to visit the child. In view of giving the custody of the child to the mother we approve that part of the decree awarding her the household goods.

The decree of the trial court, insofar as it dismisses the appellant's petition and awards the appellee a divorce and alimony, is reversed with directions to the trial court to dismiss appellee's cross-petition and grant appellant a divorce on the grounds of adultery. The balance of the decree, which awards the custody of the minor child to the appellee, directs the appellant to pay $15 per month for the child's care, and awards the household goods to the appellee, is affirmed. The costs of this action, both here and in the trial court and including an attorney fee of $100 allowed appellee's counsel here, are taxed to appellant.

AFFIRMED IN PART,
REVERSED IN PART, WITH DIRECTIONS.

ALMA PIERSON, APPELLEE, V. T. C. JENSEN ET AL., APPELLANTS.

29 N. W. 625

Filed November 14, 1947. No. 32267.

1. **Domicile.** Whether change of legal residence is effected by removal from one place to another depends on the intention of the party. Evidence examined and held that at commencement of this action plaintiff's legal residence was Lancaster County.
2. **Automobiles.** Conditions affecting visibility of a motorist impose upon the driver the duty to exercise a degree of care commensurate with existing circumstances.
3. ———. It is negligence as a matter of law for a motorist to drive an automobile so fast on a highway at night that he cannot stop in time to avoid a collision with an object within the area lighted by his lamps.
4. **Negligence.** Where the evidence clearly shows that the plaintiff's negligence was more than slight when compared with any possible negligence of the defendant, the trial court should direct a verdict for the defendant.

APPEAL from the district court for Lancaster County: JEFFERSON H. BROADY, JUDGE. *Reversed and dismissed.*

Baylor, Bloss & Evnen, for appellants.

Davis, Stubbs & Healey, for appellee.

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

KROGER, District Judge.

Plaintiff brought this action in the district court for Lancaster County for personal injuries, hospitalization, and medical expenses against defendant. Trial was had to a jury and a verdict was returned in favor of the plaintiff. Motion for new trial was filed and overruled. From the verdict, judgment, and order overruling the motion for a new trial the defendants appealed.

The defendants have assigned as grounds for reversal a number of errors, but in view of the disposition of this case it is only necessary to consider two of them.

The first is that the plaintiff was not a resident of Lancaster County at the time of the filing of her petition, and the second, that the court erred in not sustaining the defendant's motion for a directed verdict at the close of plaintiff's evidence and at the close of all of the evidence.

The following facts are undisputed. On August 12, 1945, the defendant Robert Gillming was operating a truck-trailer, owned by defendant T. C. Jensen, on Nebraska Highway No. 2, proceeding from Kearney, Nebraska, to Lincoln, Nebraska; said truck was loaded with 23 head of cattle and one horse. The trailer portion of the truck was equipped with a stock rack, the rear of which was painted white and was equipped with red clearance lights at each corner and a cluster of three red lights and red tail light directly below the bed of the trailer; in addition there were reflectors at each corner a few inches above the bed of the trailer. The bed of the trailer was four feet above the ground and the stock rack extended approximately five and a half feet above the bed. Plaintiff was driving a club sedan from Loup City, Nebraska, to Lincoln, Nebraska, by way of Highway No. 2. In the car with plaintiff were Shirley Thelander and Richard Bauer, all three occupying the front seat. At a point between one and a quarter and one and a half miles west of Seward, Nebraska, the car plaintiff was driving collided with the rear end of the truck operated by the defendant Gillming, as a result of which the plaintiff suffered the injuries and damages complained of.

The evidence of plaintiff was that she took over the operation of the car at Aurora, Nebraska, and drove from there to the point of the accident; that she was driving at approximately 40 miles per hour; that the car was in good operating condition and had proper headlights; that she was temporarily blinded by the bright lights of a car approaching from the east and that the first she saw of the truck was when it was

approximately one car length or fifteen feet ahead of her. Plaintiff testified that the truck did not have any lights, that she saw no reflectors, and that in her opinion it was standing still. In this she was corroborated by Shirley Thelander, a niece, who testified that she had been asleep and that the first thing she can remember before the crash occurred was that the distance was very short between the car she was in and the truck; that the lights of the truck were not lighted and it looked to her as though the truck was stopped; that approximately one-half of the trailer was occupying the paved portion of the highway, the remainder being on the shoulder of the highway. The other passenger, Richard Bauer, was unable to throw any light on the matter as he was asleep before and up to the time of the collision.

The evidence of the defendants was that at approximately one mile west of the scene of the accident the defendant Gillming had driven the truck off the highway onto the shoulder and stopped, but left the motor running for about a half hour to charge the battery, as he noticed his lights were beginning to dim; that at the end of half an hour he again pulled onto the highway, traveled about a mile when he again noticed his lights were growing dim, and again he proceeded to move the truck onto the shoulder of the highway; that he had succeeded in getting the tractor portion of the truck off the highway but that about one-half of the rear of the trailer was still thereon when the collision occurred; that his lights were still lighted, both the headlights and the lights on the trailer, at the time of the collision; that the car which plaintiff was driving wedged under the left rear portion of the trailer, the center of the bumper apparently striking the left rear wheels of the trailer; and that, except for those broken by the collision, the lights on the truck-trailer were still lighted some minutes after the crash.

The undisputed evidence further shows that the accident happened at approximately 10:30 p. m., that the

weather was clear, the road was dry, and that the road at that point and for some distance in either direction was practically level.

Regarding the question as to plaintiff's residence, the testimony of plaintiff is that she had lived in Lincoln for about two years before the filing of her petition; that she voted in Lancaster County, Nebraska; and that in June 1946, sometime after the filing of her petition, she went to make her home with her brother in Valley County, until such time as she could again work, when it was her intention to return to Lincoln. This evidence stands undisputed. It is true that in her testimony plaintiff referred to Valley County as being her home, but it is clear from reading the entire testimony that she was referring to the place where she was raised and where her relatives lived, and not to her legal residence. From all the evidence in the record we find that plaintiff's residence was in Lancaster County at the time she commenced her suit.

The other assignment of the defendants, which we will now consider, presents a more serious question. From the record it is evident that if the defendant Gillming was guilty of any negligence, it would have to be his attempting to operate the truck on the highway after he first discovered that his lights were growing dim. There is no evidence that the lights had ever caused any difficulty before that time, or that he had any warning that they were about to fail. At the time he first noticed his lights dimming he was within two and a half miles of Seward. He stopped the truck, left the motor running for about a half hour to charge his battery, and then proceeded down the highway. After having gone only a short distance he noticed that they were again growing dim and he attempted to again pull off the highway, but the collision occurred before he could complete the operation. The evidence of the plaintiff discloses that she was driving at a speed of about 40 miles per hour, and that she did not see the truck of defendant until

it was about 15 feet in front of her. She excuses her failure to see the truck by stating that she was momentarily blinded by lights of an approaching car and that immediately upon passing the approaching car she was confronted with the truck ahead of her, some 15 feet away, with which she had no opportunity then of avoiding a collision. This court has held that "the existence or presence of smoke, snow, fog, mist, blinding headlights or other similar elements which materially impair or wholly destroy visibility are not to be deemed intervening causes but rather as conditions which impose upon the drivers of automobiles the duty to assure the safety of the public by the exercise of a degree of care commensurate with such surrounding circumstances." Fairman v. Cook, 142 Neb. 893, 8 N. W. 2d 315. It would seem reasonable to assume that had the plaintiff been keeping a proper lookout she would have seen the defendant's truck before the car with the bright headlights approaching from the east reached the truck. At that time the lights of the approaching car would silhouette the truck and that must have occurred when the plaintiff was less than 200 feet from the truck.

In the case of Roth v. Blomquist, 117 Neb. 444, 220 N. W. 572, this court announced that "As a general rule it is negligence as a matter of law for a motorist to drive an automobile so fast on a highway at night that he cannot stop in time to avoid a collision with an object within the area lighted by his lamps." Since that decision, some exceptions to the general rule have been recognized, but at no time has this court disaffirmed the rule laid down in Roth v. Blomquist, *supra.* If it is possible to classify the exceptions that have since been made, it perhaps could be said that the exceptions apply in those instances where the motorist, acting as a reasonable and prudent person, was justified in believing that no danger existed, or where the situation creating the danger is in the nature of a trap.

In this case the plaintiff argues that the decision of

Miers v. McMaken, 147 Neb. 133, 22 N. W. 2d 422, is controlling. The facts have a great deal of similarity. There is this difference, however. In Miers v. McMaken the evidence disclosed that the body of the truck extended back over the wheels some considerable distance and all of the unit except one corner of the trailer was off the pavement. It was not shown how high the body was above the road, or whether an approaching motorist had any reason to anticipate that the truck body extended onto the paving.

With reference to the lack of lights on the rear of the trailer, there was the testimony of the plaintiff and her niece, each stating that there were no lights burning on the rear of the truck. In that connection it must be remembered that plaintiff also testified that she was driving about 40 miles per hour and that she first saw the truck when it was about 15 feet away. She admitted that when her deposition was taken, a very short time before the trial, she had stated that when she first saw the truck it was only a matter of inches away. The niece had been asleep and testified that when she awakened she did not have time to make any outcry or give any warning between the time she first saw the truck and the collision. Considering the instant that could only have elapsed between the discovery of the truck on the highway and the collision, the testimony regarding the lack of lights is not impressive; particularly is this true in view of the testimony of the witness Kenneth Haas, who testified that he lived near the place where the accident occurred, that he reached the scene of the accident in a minute or a minute and a half after the crash and the lights of the truck were on and were not turned off until flares had been placed.

From a consideration of all of the evidence we find that the negligence of the plaintiff, when compared with any possible negligence on the part of the defendants, which we do not decide, was more than slight as a matter of law, and the defendants' motion for a di-

rected verdict should have been sustained. For the reasons given, the judgment of the district court is reversed and the action dismissed.

REVERSED AND DISMISSED.

ROSAMOND RASMUSSEN ET AL., APPELLANTS, V. TRICO FEED MILLS, APPELLEE.

29 N. W. 2d 641

Filed November 14, 1947. No. 32309.

1. **Partnership.** Ordinarily a working partner is not entitled to compensation for injuries suffered while engaged in work and labor incident to the operation of the business.
2. ———. For many purposes in Nebraska a partnership is an entity distinct from the parties composing it, but the entity is not a party to a contract between the partners.
3. **Workmen's Compensation.** Section 48-115, R. S. 1943, defining an employee as "Every person in the service of an employer," contemplates two persons, the employer and the employee. It does not contemplate a dual relationship in one.
4. **Partnership.** Ordinarily, when a partner renders service to the partnership, as is required of him in the partnership contract, he performs his obligation as a member of the partnership, and is not acting as a servant or employee.

APPEAL from the district court for Kearney County: FRANK J. MUNDAY, JUDGE. *Affirmed.*

B. H. Bracken and *Fred S. Martin,* for appellants.

Harold A. Prince, for appellee.

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

THOMSEN, District Judge.

Appellants seek reversal of the district court's judgment of dismissal, affirming on appeal a like result by the Nebraska Workmen's Compensation Court in a compensation case. Recovery is sought for the death of George

Rasmussen, occurring while he was engaged in work at the Trico Feed Mills. The Trico Feed Mills was a partnership, composed of three men, each of whom had an equal investment. Rasmussen was one of the partners. Of the partners, Rasmussen alone devoted his time to the enterprise. He was the general manager. For this he received $250 per month in addition to his equal share of the profits. The $250 per month was charged as an expense item in the semi-annual partnership accounting. The determining question is: Was Rasmussen an employee of Trico Feed Mills? If he was, the appellants are entitled to recover.

Ordinarily a working partner is not entitled to compensation for injuries suffered while engaged in work and labor incident to the operation of the business. Ellis v. Joseph Ellis & Co., (Eng.) 1 (1905) K. B. 324; LeClear v. Smith, 207 App. Div. 71, 202 N. Y. Supp. 514; Auten v. Unemployment Compensation Commission, 310 Mich. 453, 17 N. W. 2d 249; Chambers v. Macon Wholesale Grocer Co., 334 Mo. 1215, 70 S. W. 2d 884; Dezendorf v. National Casualty Co. (La. App.) 171 So. 160; In re Montgomery & Son, 91 Ind. App. 21, 169 N. E. 879; Chandler v. Harris, 47 Ga. App. 535, 171 S. E. 174; annotations to 15 A. L. R. 1288, 25 A. L. R. 376, 44 A. L. R. 1217, 47 A. L. R. 843, 81 A. L. R. 654, and 137 A. L. R. 6. Only Oklahoma appears as a dissent to this weight of authority. Ohio Drilling Co. v. State Industrial Commission, 86 Okla. 139, 207 P. 314. In the 25 years since that decision no other state than Oklahoma has seen fit to approve it; some have criticized it as unsound. United States Fidelity & Guarantee Co. et al., v. Neal, 188 Ga. 105, 3 S. E. 2d 80; Chambers v. Macon Wholesale Grocer Co., *supra.*

Various reasons compel the courts to reach the conclusion that an injured working partner cannot recover, but these may be summed up in what is said by the California court in Cooper v. Industrial Accident Commission, 177 Cal. 685, 171 P. 684: "* * * the law rela-

tive to compensation as between master and servant, or employer and employee for injuries suffered by the latter, contemplates two persons standing in this opposed relation, and not the anomaly of one person occupying the dual relation of master and servant, employer and employee, plaintiff and defendant, person entitled to a judgment or award in his favor and person bound to pay a part thereof out of his own proportionate share of the partnership property and the balance, amounting possibly to the whole thereof, out of his own individual estate. Evidently the Workmen's Compensation Act did not contemplate these anomalies in its ample and detailed provisions for compensation to injured workmen and to those dependent upon them."

As deviating from this general rule appellants present the partnership as an entity in Nebraska and the statutory definition of employee, and reason that because of his "compensation for such services" Rasmussen was an employee of the partnership. Our statute, section 48-115, R. S. 1943, defines an employee to be "Every person in the service of an employer who is engaged in any trade, occupation, business, * * * under any contract of hire, * * *." For many purposes a partnership in Nebraska is an entity distinct from the parties composing it. Richards v. Leveille, 44 Neb. 38, 62 N. W. 304; Campbell v. Farmers & Merchants Bank of Elk Creek, 49 Neb. 143, 68 N. W. 344; Clay, Robinson & Co. v. Douglas County, 88 Neb. 363, 129 N. W. 548; § 67-306, R. S. 1943. In the case at bar, Rasmussen was the general manager. His relationship to the business and to his partners was fixed by the partnership contract. The identity, powers, and liabilities of the partners are not lost in the partnership entity (Uniform Partnership Act, art. 3, § 67-301 et seq., R. S. 1943), and it is clear that the partnership contract is not with the entity, but with the individuals.

Here the partnership contract provided that Rasmussen should be active manager and as such devote all of

his time to the business. For this he was to receive $250 per month "until a different amount is agreed upon by the parties hereto." The other partners were not required to devote any time. Rasmussen was experienced in conducting a grain elevator and in milling and mixing feeds; the business of the partnership was to be dehydrating, milling, and mixing feeds all according to the partnership contract. He was given full power to conduct the business about as he chose, even to the extent of borrowing as much as $5,000 to conduct its activities. Eventually he had approximately 20 employees whom he superintended. The $250 per month was disposed of in the partnership contract in a semi-annual accounting, the contract providing: "In preparing such account, there shall be charged to the expense account the salary paid to the first party and all other expenses of the business, and also all losses and other charges incident or necessary to the carrying on of the partnership, but no expenditures made in the acquisition of capital goods." This pay for his time was but a practical accounting-means of off-setting the failure of the other two partners to devote their time to the business and was due to Rasmussen as a member of the partnership. As said in the Ellis case, *supra,* it is but "a mode of adjusting the amount that must be taken to have been contributed to the partnership assets by a partner who has made what is really a contribution in kind," and this, regardless of whether the payment comes from profits or general assets.

Such partnership contract is usual in practice and experience. In common comprehension the relationship of the parties would not be changed; the working partner would still be regarded as an employer. The multitude of cases decided all one way attest the soundness of the controlling elementary principle. But observe Rasmussen's own interpretation of his status. He had practically sole control of the business and yet, without knowledge of his partners, did not include a pre-

mium for himself in the compensation insurance. He made no payments in social security tax for himself as an employee. His failure to deduct the $250 per month as an expense item in making out income tax returns may have been due to the revenue department's refusal to consider such as deductible, and therefore should carry no weight. But it must never have occurred to Rasmussen that he was in any sense an employee, and his interpretation, agreeing with current thought, should be some index to his status.

Analyzing the work Rasmussen did as a test, no evidence appears, and probably none can be shown, that any of his work and all the time he devoted to the enterprise was not that contemplated by the title of "general manager." If placing a belt on a motor, the act which resulted in his death, was outside of the scope of a general manager's work, it was not work for which he was separately paid. Nor did the $250 per month allowed to him in the contract require any work other than that in which he represented himself and his partners in the furtherance of the business and as fixed in the contract by which the partnership arose.

The statutory definition speaks of "in the service of an employer." § 48-115, R. S. 1943. But the statutory definition contemplates two persons, the employer and the employee, the master and the servant. It does not contemplate a dual relationship in one.

Appellants are not entitled to recover. The decision and judgment of the district court is right and is affirmed.

AFFIRMED.

JACOB SELL, APPELLEE, V. DAISY C. SELL, APPELLANT.
29 N. W. 2d 877

Filed November 28, 1947. No. 32233.

1. **Divorce.** Whether a divorce from bed and board or an absolute

divorce shall be granted is a question vested in the sound discretion of the trial court.

2. ———. The trial court, in exercising its sound discretion to allow or refuse to allow permanent alimony, will consider the respective ages of the parties to the marriage, their earning ability, the duration of and the conduct of each during the marriage, their station in life, the circumstances and necessities of each, as well as their health and physical condition, whether the property was accumulated before or after the marriage, and all other circumstances pertinent to the case.
3. ———. Although no personal violence is threatened, yet constant nagging by a husband or wife, about conduct which is above reproach, may be so unreasonable as to utterly destroy the peace of mind, ruin all legitimate objects of matrimony, and constitute a ground for divorce as extreme cruelty "by other means," as defined in section 42-302, R. S. 1943.
4. ———. It is impossible to lay down a general rule as to the degree of corroboration required in a divorce action as each case must be decided on its own facts and circumstances.
5. ———. There may be extreme cruelty justifying a decree of divorce without physical injury or violence. Unjustifiable conduct on the part of the husband or wife, which utterly destroys the legitimate ends and objects of matrimony, may constitute extreme cruelty.
6. **Appeal and Error.** When the evidence on material questions of fact is in irreconcilable conflict, this court will, in determining the weight of the evidence, consider the fact that the trial court observed the witnesses and their manner of testifying, and must have accepted one version of the facts rather than the opposite.

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

Merril R. Reller and *Gerald W. Davis,* for appellant.

Richard O. Johnson, for appellee.

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

MESSMORE, J.

This is a divorce action. In the district court the plaintiff was granted an absolute decree of divorce upon the grounds of extreme cruelty and the defend-

ant's cross-petition for separate maintenance was dismissed. From this judgment the defendant appeals.

For convenience, the appellant will hereinafter be referred to as defendant, and the appellee as plaintiff.

The record shows that the plaintiff and defendant were married March 22, 1940, and separated February 28, 1946. At the time of trial, in September 1946, plaintiff was 44 years of age and the defendant 47. The plaintiff, for thirty years or more, has been employed as a railroad fireman. The plaintiff and defendant have been acquainted for a number of years, she having been previously divorced. We are not here concerned with their previous acquaintance and conduct.

The plaintiff testified that immediately from and after the marriage to the date of separation, the defendant was guilty of extreme cruelty toward him on numerous occasions, which consisted in the main of accusing him of being out with other women, cursing him, using excessive profanity, belittling his family, comparing him with her previous husband and members of her family in a belittling manner, profanely making light of his nationality, and accusing him of giving some of his wages to his mother, profanely referring to her in a derogatory manner. This course of conduct on the defendant's part was continuous. On many occasions the plaintiff was forced to leave home and go to hotels after coming in from his run on the railroad because the defendant accused him of breaking her rest, and at other times he stayed with members of his family on such occasions.

The defendant denied the plaintiff's testimony with respect to the extreme cruelty charged against her.

It would serve no useful purpose to set out in further detail the conflicting evidence given by the parties to this suit as to their many bitter controversies over simple events of home life of which the bill of exceptions is replete.

The instant case is one of that class of cases in which

an opportunity to both hear and see the witnesses as they testify places the trial court in a much better position to know the weight and credibility that should be given to the testimony than a reviewing court can possibly be from reading the transcript and bill of exceptions. This court tries the case de novo, and yet we have said that, where the testimony of witnesses upon the vital questions involved is conflicting, this court will consider the fact that an experienced trial judge observed the witnesses and their manner of testifying and accepted one version of the facts rather than the other. In the instant case, we believe the trial court had a very definite advantage over the members of this court by observing the witnesses and their manner of testifying and determining the truthfulness or untruthfulness of the stories as told by them. See Clough v. Clough, 132 Neb. 748, 273 N. W. 31; Sutherland v. Sutherland, 132 Neb. 558, 272 N. W. 549; Hild v. Hild, 135 Neb. 896, 284 N. W. 730.

The defendant assigns as error that the testimony of the plaintiff was insufficiently corroborated. In determining the sufficiency of the evidence in divorce cases it is impossible to lay down a general rule as to the degree of corroboration required since each case must be decided upon its own facts. See Green v. Green, *ante* p. 19, 26 N. W. 2d 299.

From an examination of the record, we conclude that there is sufficient corroboration of the plaintiff's testimony to warrant the judgment of the trial court in granting the plaintiff an absolute divorce in the instant case.

One of the assignments of error is that the trial court should have granted a decree of separate maintenance to the defendant under the facts as disclosed by the record.

"The trial court is vested with sound discretion in determining whether a divorce from bed and board, or an absolute divorce, should be granted, and in a

majority of the cases an absolute divorce is to be preferred." Wetenkamp v. Wetenkamp, 140 Neb. 392, 299 N. W. 491. See, also, Sutherland v. Sutherland, *supra;* Phillips v. Phillips, 135 Neb. 313, 281 N. W. 22.

Although no violence is threatened, yet harping and nagging, continued for years by either a husband or wife, concerning conduct above reproach, may be so unreasonable as to utterly destroy the legitimate ends and objects of matrimony, and constitute extreme cruelty "by other means," as defined in section 42-302, R. S. 1943. See Brown v. Brown, 130 Neb. 487, 265 N. W. 556; Faris v. Faris, 107 Neb. 214, 185 N. W. 347; Oertle v. Oertle, 146 Neb. 746, 21 N. W. 2d 447; DeWaal v. DeWaal, *ante* p. 756, 29 N. W. 2d 371.

The defendant asserts as error that the trial court erred in allowing insufficient alimony to the defendant. From an analysis of the record it appears that the defendant received temporary alimony in the sum of $600; attorney's fee, suit money and costs of bill of exceptions and transcript, and the printing of briefs in her behalf, which amounted to approximately $352.85, and also obtained war savings bonds belonging to the parties in the amount of $225. She was awarded, as permanent alimony, the sum of $300 and household furniture of the claimed value of $1,500. The plaintiff was awarded a 1938 Buick automobile which had been sold by the defendant during the trial for $650 and which the court ordered to be returned, surrendered and delivered to the plaintiff. In addition thereto, he was awarded a United States Treasury check in the amount of $198.86, free and clear of claims of the defendant, wearing apparel, clothing, tools, and any and all records relating and pertaining to the plaintiff's employment, free and clear of any claims of the defendant. The value of the estate the parties accumulated amounted to approximately $4,150 at the time of trial.

The amount of permanent alimony to be awarded to a wife on divorce rests on the sound discretion of the

trial court. See section 42-318, R. S. 1943. See, also, Saum v. Saum, 144 Neb. 842, 14 N. W. 2d 844.

From the record in the instant case we conclude the trial court did not abuse its discretion in the awarding of the permanent alimony to the defendant in the instant case.

Defendant's attorney was allowed an adequate attorney's fee in the trial court, and additional allowance is requested for service in this court. Defendant has elected to make this appeal. Plaintiff has been required to pay the costs of appeal and to support the defendant during its pendency. We see no reasonable justification for the appeal. Under these circumstances, the allowance of an attorney's fee is denied. See Eicher v. Eicher, *ante* p. 173, 26 N. W. 2d 808.

The judgment of the district court is affirmed.

AFFIRMED.

ESTELLA PITTMAN, APPELLEE, V. WARD PITTMAN, APPELLANT.

29 N. W. 2d 790

Filed November 28, 1947. No. 32264.

1. **Divorce.** No decree of divorce shall become final or operative until six months after trial and decision except for purposes of review.
2. ———. In a divorce action if no appeal shall be taken within three months from trial and decision the court may within six months vacate or modify the decree.
3. ———. The right to vacate or modify a decree of divorce within six months is not absolute but must be exercised within a sound judicial discretion.
4. ———. In order that it may be said that the court exercised a sound judicial discretion in vacating or modifying a decree of divorce good reason therefor must be shown and it must also be shown that such action would not produce an unconscionable result.
5. ———. Section 42-340, R. S. 1943, permits the application to vacate or modify a decree of divorce within six months from

the trial and decision to be made by either party to the action.

6. ———. The following statement in the opinion in Dudgeon v. Dudgeon, 142 Neb. 82, 5 N. W. 2d 133, is disapproved: "We conclude that in the absence of legal collusion * * * the prevailing spouse may have a decree of divorce in his or her favor vacated and set aside as a matter of right, if application therefor is made within six months after rendition, unless some unconscionable result would be produced thereby."

7. ———. On a severance of a marriage by divorce the court is required to take into consideration the estate of each party at the time of the marriage, their respective contributions since the marriage, the duration of the marriage, the wife's loss of interest in the husband's property by virtue of the divorce, the social standing, the comforts, and luxuries which the wife would probably have enjoyed except for the divorce, the conduct of the parties leading to the divorce, the party to which the divorce is granted, the ages and condition of health of the parties, and all other pertinent facts and circumstances, and in this light award an amount which appears to be fair and equitable.

8. **Husband and Wife.** 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 by reason of ignorance, passion, or improvidence.

9. **Judgments.** In a case where it is made to appear that the court failed to properly scrutinize a contract between husband and wife, made after and in consequence of severance of the marital relation and permanent separation, which contained provisions for division of property and mutual releases of rights and obligations relative thereto, which contract was approved by the decree, and it is further made to appear by application within six months of the trial and decision that an unconscionable advantage was taken through fraud or intimidation, or by reason of ignorance, passion, or improvidence, such decree may be set aside.

APPEAL from the district court for Douglas County: JAMES M. FITZGERALD, JUDGE. *Reversed and remanded with directions.*

John C. Mullen and *Edward J. Tangney,* for appellant.

Penelope H. Anderson, for appellee.

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

YEAGER, J.

This is an appeal from an order of the district court overruling a motion of the defendant, Ward Pittman, to vacate and set aside a decree of divorce obtained by Estella Pittman, plaintiff, by default, and to allow the defendant to file an answer in the divorce action.

The history essential to an understanding of the matters presented by the appeal herein is the following as shown by the record.

On June 6, 1946, plaintiff filed a petition for divorce in the district court wherein she charged the defendant in general terms with cruelty. In the prayer she prayed for divorce, the restoration of her former name, and general equitable relief.

Before the filing of the petition the parties together went to the office of the attorney who represented the plaintiff in the divorce action. There it was agreed that plaintiff should institute action for divorce and that the defendant would not contest the application.

In the office of the attorney a petition was drawn which was signed by the plaintiff. On the same day a voluntary appearance was drawn which was signed by the defendant. At the same time an affidavit was made by the defendant that he was not in the military service of the United States. All of the three instruments were filed on the same day by the attorney.

From the record here it appears that at that time the parties told the attorney they had made a property settlement. The full details appear not to have been disclosed at that time, however, it appears that defendant told the attorney that in settlement he had con-

veyed his interest in the home of the parties to the plaintiff. The parties had prior to the time of transfer of interest by defendant to plaintiff held the title to the home in joint tenancy.

After the filing of the petition the defendant had conferences with the attorney which, apparently in July 1946, culminated in the execution of a written agreement between the plaintiff and defendant settling their property rights in case of the granting of a divorce. The agreement provides that it is subject to the approval of the court.

In the agreement it was recited that title to the home was in plaintiff and that she was to continue to hold it as her own property. Defendant agreed to pay the balance of the indebtedness against it. Defendant agreed to turn over to plaintiff a paid-up insurance policy for $1,000 against which there was a loan of $70 which defendant agreed to pay. The defendant also agreed to pay to plaintiff $50 a month beginning on the 3rd day of August and continuing monthly thereafter during the lifetime of plaintiff or until she should remarry.

The defendant failed to file an answer in the action. Hearing was had on the petition and a decree was entered July 12, 1946, granting to plaintiff a divorce and approving the agreement containing the property settlement. The agreement was attached to the decree.

At the time of the marriage neither of the parties had any property or estate except that plaintiff had sufficient furniture and household goods for use in a five-room house. Apparently neither obtained anything thereafter by inheritance. Everything that the parties had at the time of the divorce had been accumulated out of the earnings of the defendant except for earnings of plaintiff during a period of perhaps two years during the war. During this period defendant contributed nothing to the personal needs or wants of plaintiff but on the other hand her earnings were not contributed

to the joint or common accumulations of the parties. She retained her savings as her own.

The effect of the decree and the agreement was to confirm in plaintiff title to the home which was purchased in 1941 for $3,950, on which there was a balance due of $140 which the defendant was required to pay; to leave plaintiff the beneficiary of $800 cash savings which had been turned over to plaintiff some time before the commencement of the divorce action; to leave her a $1,000 paid-up insurance policy; to allow her alimony at the rate of $50 per month as long as she should live or until remarriage; to leave her a 1936 Chevrolet automobile; and to allow her all of the household furniture and equipment. The household goods are not mentioned in the decree nor in the agreement but the attitude of the defendant as it appears from his testimony is that such was the intention of the parties. The defendant was left only a Model A 1931 Ford automobile, a $1,500 life insurance policy on which he had paid premiums for 12 years, and his salary of $2,400 per year against which was, as has been pointed out, a charge of $50 per month and an additional charge of $210 to discharge the balance due on the home and the loan against the $1,000 life insurance policy.

The motion to vacate was filed within six months from date of entry of the decree thus conferring jurisdiction on the district court to vacate or modify the decree. The right to exercise jurisdiction was of course conditioned on the grounds alleged and proved being sufficient for that purpose.

Section 42-340, R. S. 1943, provides that no decree of divorce shall become final or operative until six months after trial and decision except for purposes of review. The section provides further that if no appeal shall be taken within three months the district court may within the six months modify the decree.

In Carpenter v. Carpenter, 146 Neb. 140, 18 N. W. 2d 737, it is pointed out that the right granted under the

statute to vacate or modify a decree within six months is not absolute but must be exercised within a sound judicial discretion. As pointed out in the opinion in order that it may be said that the court has exercised a sound judicial discretion good reason must be shown for setting aside or modifying the decree and it must be further shown that setting it aside or modifying it would not produce an unconscionable result.

In that case the application to vacate the decree, which application was denied, was made by the prevailing party or the one who obtained the decree and the opinion discusses the powers granted from the viewpoint of application made by a prevailing party.

In the case at bar the application was made by the losing party which calls, as a reading of the statute makes clear, for no different interpretation and application than if made by a prevailing party. It will be observed that the statute grants to no party any right within the period of six months but only grants control over the decree by the court within that period.

In the opinion in Dudgeon v. Dudgeon, 142 Neb. 82, 5 N. W. 2d 133, in interpretation of section 42-340, R. S. 1943, this court said: "We conclude that in the absence of legal collusion * * * the prevailing spouse may have a decree of divorce in his or her favor vacated and set aside as a matter of right, if application therefor is made within six months after rendition, unless some unconscionable result would be produced thereby." This statement is disapproved since it reads into the statute a right which may not, either in specific language or reasonable implication, be found therein.

The statute correctly interpreted and applied permits either party to a divorce action within six months of the date of entry of decree to make application to have the decree set aside or modified, and the court for good cause shown may in the exercise of sound discretion set it aside or modify it.

In this case the losing party made the application.

Grounds for vacation of the decree were in substance that the agreement which was approved by the court was unconscionable and oppressive in that plaintiff was given a grossly excessive portion of the property of the parties; that the property division was inequitable; and that unfair advantage was taken of the defendant in the making of the agreement and that though he signed it, it did not represent his intention or understanding and that in the making of the agreement he was imposed upon by the attorney for the plaintiff.

By the standards established by the precedents of this court had this case come here on appeal from a decree of the district court where alimony and division of property had been decreed without an agreement in those respects no difficulty would have arisen in arriving at a conclusion that the settlement was inequitable, unfair, grossly excessive in favor of plaintiff, and oppressive.

The precedents of this court have not sustained decrees wherein there has been exacted of divorced husbands vastly more than an equal share of the accumulations acquired during the married life of the parties.

While there are no exact standards for alimony and division of property the principle is well settled that what is done in these respects must be reasonable.

The appropriate rule requires the court to take into consideration the estate of each party at the time of the marriage, and their respective contributions since, the duration of the marriage, the wife's loss of her interest in the husband's property by virtue of the divorce, the social standing, comforts, and luxuries of life which the wife would probably have enjoyed except for the enforced separation, the conduct of the parties leading up to the divorce, to which party the divorce is granted, their age and condition of health, and all other facts and circumstances, and award an amount in alimony which appears to be fair and equitable between the parties. See Swolec v. Swolec, 122 Neb. 837, 241 N. W. 771; Phillips v. Phillips, 135 Neb. 313, 281 N. W. 22;

Specht v. Specht, *ante* p. 325, 27 N. W. 2d 390. Obviously the force of this rule was not observed when the agreement was executed and equally obviously the rule was not observed when the agreement was approved.

This case however does not come here on appeal from a decree fixing alimony and making a division of property but on application to have set aside a decree which approved a written agreement wherein the parties themselves agreed upon the property rights which should obtain after divorce.

In the light of this fact and the other facts and circumstances disclosed by the record, did the district court abuse its discretion by refusal to grant the application for vacation of the decree? We are of the opinion that it did.

There was an agreement and the court did nothing more than to approve the agreement. Such agreements should not be lightly regarded, but, as has been pointed out, should be scrutinized and controlled to the end that the division of property and the other provisions shall not be inequitable, unfair, and unreasonable. Such contracts are subject to approval by the courts and should not be approved unless they are fair and reasonable and properly protect the interests of the parties. Koser v. Koser, *ante* p. 277, 27 N. W. 2d 162. This agreement failed to protect the interests of the defendant herein and it should have been rejected by the court.

In addition to a consideration of the fact that the agreement was on its face unfair and inequitable when weighed against the precedents for division of estates by divorce decree, we think that the manner in which it came about ought to be considered in determining whether or not the trial court abused its discretion in failing to set aside the decree.

The agreement was prepared by the attorney for plaintiff and at least some parts were induced by suggestions of the attorney contrary to the desire theretofore entertained by the defendant. At least the

delivery over of the $1,000 paid-up insurance policy depended upon the urging of the attorney.

It is not our purpose to impugn the motives or to question the integrity of this attorney. Indeed, there is nothing in the record which would furnish any excuse or justification for such a purpose. Our purpose is only to say that these two were not on even terms with relation to the matter under consideration by them, she being an attorney at law presumably informed as to the precedents for division of property and alimony in decrees for divorce, and he presumably being without knowledge or information in that regard, and the court should have considered this along with all other considerations in determining whether or not the decree should have been set aside.

This court has said: "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. See, also, Ladman v. Ladman, 130 Neb. 913, 267 N. W. 188; Koser v. Koser, *supra.*

There is no evidence in this case of fraud or intimidation in the procurement of the agreement but it does appear that plaintiff obtained an unconscionable advantage on account of the ignorance of the defendant which under the facts and circumstances as disclosed by the record entitles him to the relief prayed in the motion to set aside the decree and to allow him to answer the petition.

The order of the district court overruling the motion of defendant to vacate and set aside the decree of divorce granted to plaintiff is reversed and the case is remanded to the district court with directions to sustain the same and to vacate and set aside the decree and further to allow defendant to answer the petition in the divorce action to the end that the right to divorce and alimony and division of property may be decided on the merits.

REVERSED AND REMANDED WITH DIRECTIONS.

WILLIAM J. RITTER ET AL., APPELLEES, V. DRAINAGE DISTRICT NO. 1 ET AL., APPELLANTS AND CROSS-APPELLEES. CLARENCE L. MEYER ET AL., INTERVENERS, APPELLEES AND CROSS-APPELLANTS.

29 N. W. 2d 782

Filed November 28, 1947. No. 32223.

1. **Drains.** Drainage districts, the validity of whose incorporation is confirmed by the district court, are formed for the purpose of having lands within the limits of the district reclaimed and protected from the effects of water by drainage or otherwise.
2. ———. It is the mandatory duty of the board of supervisors of a drainage district, organized by proceedings in the district court prior to May 27, 1935, to improve and repair its drainage system within the limit of its power, if, after final construction, it becomes "out of repair, obstructed, inefficient, or destructive from any cause" which duty equity courts have the power and duty to enforce.
3. ———. As applicable to such districts, the language "out of repair, obstructed, inefficient, or defective from any cause" is inclusive of erosion by unusual floodwaters or otherwise, as well as every other reason, element, or cause substantially impairing or destructive of the purposes for which the drainage district was organized and its system constructed.
4. ———. The right and duty of a drainage district and its supervisors to improve and repair and keep its system in repair is not limited to making good its defects in the precise place of its original construction, when the nature of the soil and general topography do not admit of successful operation there, but includes the right and duty to make the system affirmatively serve the purposes for which it was licensed to be constructed.

5. ———. The method of financing improvements and repairs of a drainage system and the plans for accomplishing the result, are ordinarily within the discretion of the board of supervisors of the district, but it must act, and its acts must be commensurate with its legal duty.
6. **Bridges: Highways.** When the governing boards of a county and a drainage district fail to agree respecting the building and maintenance of bridges and approaches thereto over drainage ditches which intersect or cross county highways, it becomes the duty of the drainage district and its supervisors to construct such bridges and approaches and restore the highway to its former state as nearly as may be under the supervision of the county board, whose duty it shall be to maintain the same after such construction by the district.

APPEAL from the district court for Otoe County: THOMAS E. DUNBAR, JUDGE. *Affirmed as modified.*

Otto H. Wellensiek and *Moran & James,* for appellants.

Tyler & Frerichs, for appellees.

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

CHAPPELL, J.

Plaintiffs, who originally brought this action for themselves and all others similarly situated, were landowners within the limits of defendant drainage district, the regularity of whose incorporation under its charter in 1910, pursuant to the legislative act of 1905 and amendments thereto, had been theretofore confirmed by the district court and by this court. Drainage District v. Wilkins, 93 Neb. 567, 141 N. W. 151.

Benefit assessments levied upon plaintiffs' lands had been paid to the district, and they sought in equity to enjoin defendants, including the clerk of the district court of Otoe County, from holding an election to vote on dissolution of the district, pursuant to chapter 51, Laws of Nebraska, 1933, § 1, p. 268, now section 31-375, R. S. 1943.

Plaintiffs also sought a mandatory injunction ordering

defendant district and its supervisors, also defendants, to repair its drainage system, which, after final construction, had allegedly been permitted by the district to become out of repair, obstructed, inefficient, and defective for drainage purposes, and no longer protected their lands or crops from damages by water.

The trial court sustained special and general demurrers to plaintiffs' petition and the cause came to this court on appeal, where it was reversed and remanded for further proceedings. Ritter v. Drainage District, 137 Neb. 866, 291 N. W. 718.

In doing so, this court concluded that the 1933 legislative act would not be permitted, even if an attempt to do so were disclosed therein, to operate retrospectively and permit dissolution of defendant district, because to do so would invalidate or impair the obligation of contracts and interfere with vested rights.

Likewise, the court, relying upon Mooney v. Drainage District, 126 Neb. 219, 252 N. W. 910, and Mooney v. Drainage District, 134 Neb. 192, 278 N. W. 368 (certiorari denied, 305 U. S. 622, 83 L. Ed. 398, 59 S. Ct. 84), in construing section 31-463, Comp. St. 1929, as a part of defendant district's charter, also concluded that if at any time after final construction of the improvement, defendant's drainage system became out of repair, inefficient, or defective for any reason from any cause, it was the contractual as well as statutory duty of the district to improve and repair it within the limit of its power, so that it would serve the purposes for which it was constructed and the landowners would receive the benefits for which their lands were assessed.

After the cause was remanded and before trial on the merits, appellees Meyer herein, by permission of the trial court, filed a petition in intervention. Concededly, interveners were all landowners within the limits of defendant district and persons similarly situated with plaintiffs. Their lands in Sections 30 and 31, Township 7, Range 13, Otoe County, Nebraska, were

traversed from northwest to southeast by defendant district's drainage ditch, designated as the main channel of the Little Nemaha River, which eventually discharged its waters under a county highway bridge on the south side of Section 31.

In their petition, interveners alleged substantially that the original ditch had been permitted by defendants to become out of repair, obstructed, inefficient, and defective in that the dikes erected on both sides of the ditch had been washed away and damaged by erosion cutting down the banks of the ditch, obstructing it, and causing large new bends to be formed in the course of the channel, widening the ditch as it crossed interveners' lands, thereby destroying and engulfing several acres of their valuable farm crops and lands outside the original ditch right-of-way, and encroaching upon and threatening to engulf and destroy their valuable farm improvements.

It was also alleged in substance that such conditions had washed out and destroyed the west approach to the county highway bridge on the south side of Section 31, thereby impairing access to interveners' lands, increasing the distance therefrom to Talmage from 1¾ miles to 3¼ miles, and requiring them to drive four miles from their home on the east side of the ditch to cultivate their lands on the west side thereof.

The prayer was that defendant district and its supervisors be ordered to repair, reconstruct, straighten, and relocate the ditch, and restore the highway west of the bridge, and for equitable relief.

Defendant answered, and, among other things, denied any obligation to restore or maintain the approach to the county highway bridge, denied that the ditch was out of repair, obstructed, inefficient, or defective for drainage purposes, and alleged that its condition was caused by unusual flood waters which were not recurrent.

Interveners' reply, in the nature of a general denial,

made the issues complete, and the cause proceeded to trial thereon without objection. Evidence was adduced at length by the parties, and the trial court, having twice viewed the locus in quo, made specific findings of fact as well as conclusions of law, and entered its decree.

Many basic findings of fact were concededly correct. Among those were the validity of defendant district's incorporation, the official capacity of defendant supervisors, the respective ownership by interveners of described lands within the limits of the district, the payment of benefit assessments levied thereon, the origin and course of the ditch, designated as the main channel of the Little Nemaha River, in a southeasterly direction, ultimately crossing Sections 30 and 31, and discharging its waters on the south side of the latter section, where it had washed out the west approach to the bridge, and that the total benefits lawfully assessed against lands within the district for construction, maintenance, and repair of said ditch and works exceeded by $200,000 the total assessments theretofore levied and collected for all purposes, which sum was greatly in excess of the amount which would be required to repair the ditch and correct its alleged defects.

On the other hand, the legal justification for certain other findings of fact and conclusions of law, with adjudications based thereon, were questioned by both interveners and defendants. In that regard, the trial court found substantially that in certain described particulars, the drainage ditch, after construction, had been permitted by defendant district to become out of repair, obstructed, inefficient, and defective from a point directly opposite the mouth of a small lateral ditch on the east bank thereof, approximately midway of Section 31, south under the county highway bridge on the south side of said section, which condition had destroyed several acres of interveners' valuable farm lands, imperiled their farm improvements, and destroyed the west approach to the bridge. The court found that

north from the lateral above described, the ditch had become stabilized, and did not order defendants to make any repairs or to keep the ditch in repair from that point north in either Sections 30 or 31.

The decree in substance ordered and enjoined defendants to proceed without unnecessary delay to remove and eliminate a described convex point of land which had been permitted to protrude into the ditch on the west side thereof, opposite the mouth of the lateral above described, and remove all trees and obstructions below the west high bank of the ditch, and employ such other means, repairs, and constructions as might be necessary in conformity with good engineering practices to divert the flow of water in the ditch from its easterly bank and to maintain said ditch repairs and construction in such manner as to prevent cutting and erosion thereof.

The decree likewise ordered and enjoined defendants to construct a new straight ditch, approximately 1,100 feet in length from and on the west side of the existing ditch, northwest to southeast between two designated points, such ditch to be of sufficient depth and capacity as to prevent diversion of the flow of water through the old ditch and thereby prevent washing and erosion along the easterly bank thereof at the bend north and northwest of the farm improvements of interveners Meyer.

The decree also ordered and enjoined defendants to deepen and restore the channel of the ditch under the bridge on the south boundary line of Section 31, and construct such works and repairs in that portion of the ditch extending north from the bridge for approximately 550 feet as would be required to connect with and cause the flow of water therein to continue in approximately a straight line from the southern extremity of the above-described new 1,100-foot straight ditch to and through the channel under the bridge.

The decree further ordered and enjoined that defend-

ants should restore, rebuild, and maintain the approach to the bridge from the west end thereof to the west bank of the ditch in such manner as to accommodate and permit the maintenance of the public highway over and across the bridge.

Defendants' motion for new trial was overruled, and they appealed to this court. Interveners cross-appealed.

In defendants' brief, they assigned seven alleged errors of the trial court. However, assignments of error numbered 4 and 7 respectively were not discussed in the brief, and one other alleged error discussed in the brief was not assigned as error. We find that none of the latter were plain errors affecting the result. Therefore, in conformity with Rules, Supreme Court, 8a (4): "* * * consideration of the cause will be limited to errors assigned and discussed."

Defendants' assignments of error coming within the latter category were in substance that the trial court's decree was contrary to law and not sustained by the evidence. On the other hand, interveners' assignments of error upon their cross-appeal were in substance that the trial court erred in ordering only a limited amount of corrective work to be done west and south of the mouth of the lateral heretofore described, erred in finding that the ditch in Section 31 had become stabilized north of that point, erred in making no finding relative to the ditch in Section 30, and that the decree relative to the north half of Section 31 and in Section 30 was contrary to law and not sustained by the evidence. We conclude that the trial court's decree should be affirmed as modified herein.

With reference to defendant's duty, it should be stated at the outset that Ritter v. Drainage District, *supra,* is the law of the case and controlling here upon that question. In other words, it was clearly the mandatory duty of defendant district and its supervisors to keep the ditch in repair, and if, after final construction, it became out of repair, obstructed, inefficient, or defective for any

reason from any cause, its duty to improve and repair it within the limit of its power was mandatory and one which equity courts had the power and duty to enforce. See, also, both opinions of Mooney v. Drainage District, *supra.*

In Richardson County v. Drainage District, 113 Neb. 662, 204 N. W. 376, this court went so far as to conclude, in promulgating a rule applicable here, that the right and duty of the supervisors of a drainage district to keep its drainage system in repair was not limited to making good its defects in the precise place of its original construction, when the nature of the soil and the general topography did not admit of successful operation there, but included the right and duty to make the system effectively serve the purposes for which it was licensed to be constructed. See, also, both opinions of Mooney v. Drainage District, *supra.*

Since 1905, drainage districts organized by proceedings in the district court have been permitted to do so, for the purpose of having the lands embraced within the district "* * * reclaimed and protected from the effects of water, by drainage or otherwise." § 31-301, R. S. 1943. Those very purposes were incorporated in Article III of defendant district's charter by use of the following language: "* * * to protect and reclaim in so far and to the extent that said proposed improvements will do so the lands within the limits of said district as hereinafter described, and any lands which may at any time be legally brought within said district, from the overflow or flood waters of said streams, * * * and to maintain and protect said improvements."

Since 1905 the statute has specifically provided for the appointment of overseers for the purpose of preserving any ditch, drain, dike, or other works erected or constructed by drainage districts organized by proceedings in the district court, whose duty it should be to remove all obstructions from the drainage ditches,

drains, or watercourses, and keep such works in good repair. § 31-365, R. S. 1943.

The language "* * * out of repair, obstructed, inefficient, or defective from any cause," appearing in section 31-463, Comp. St. 1929, which was a part of defendant district's charter, manifestly included erosion, whether caused by unusual floodwaters or otherwise, as well as every other reason, element, or cause substantially impairing or destructive of the very purposes for which defendant district was organized and its works constructed. To hold otherwise in the case at bar and thereby sustain defendants' contentions would require landowners within the district to pay for an injury instead of a benefit, invalidate or impair the obligations of contract, interfere with vested rights, and take their property without just compensation. Ritter v. Drainage District, *supra*. Section 31-463, Comp. St. 1929, as amended by chapter 74, Laws of Nebraska, 1935, § 1, p. 258, effective May 27, 1935, which now appears as section 31-364, R. S. 1943, has no application in the case at bar.

The factual situation presented here is unusual in that the supervisors of defendant district have admittedly never appointed overseers as provided by statute, and have made no substantial effective effort whatever for more than a quarter of a century to perform their plain legal duty to keep in repair or repair the ditch involved. We call attention to the fact that a drainage district is a public corporation. The duties of its officials involve the protection of both public and private interests and their performance is imperative.

Above Sections 30 and 31 the ditch was constructed on a series of long straight lines for approximately 15 miles. However, the ditch traversing approximately the last mile over Sections 30 and 31 was not similarly constructed as originally planned, but ultimately consisted of alternate portions of the old bed of the Little Nemaha River and four connecting cut-offs, which still

left a series of bends in the river channel itself, at each of which the water coming down in volume from above Sections 30 and 31 was forced to change direction and impinge upon the concave porous soil banks of the ditch, causing the conditions hereinafter described.

The cut-offs as originally constructed were 16 to 18 feet deep, with a sub-channel 3 feet deep and 5 feet wide. The main ditch therein was 16 feet wide at the bottom, with bank slopes 1 foot horizontal to 1 foot vertical, making the ditch 48 feet wide at the top. Its waste banks, 20 feet on each side, were piled 15 feet back from the edge of the ditch, leaving 15-foot berms, making an overall width of 118 feet on a 132-foot right-of-way.

The record discloses that at the time of the trial, the drainage ditch had generally eroded and become obstructed and was continuing and would continue to erode and be obstructed, whether at floodtide or otherwise, at all points, but particularly at or near the several concave bends. The waste banks and berms had gradually disappeared. The ditch was then 175 feet wide at its narrowest point, and extended from that width up to approximately 200, 300, 400 and even 600 feet. At the south highway bridge on Section 31, the ditch was approximately 300 feet wide, leaving an unspanned, washed-out, open distance of 175 feet, between the west end of the bridge and the west bank of the channel. At the bend just north of the improvements of interveners Meyer in Section 31, which were then in imminent danger of engulfment therein, the ditch was approximately 600 feet wide. At that time, the ditch had encroached upon and engulfed 23½ acres of valuable farm lands, only 9 acres of which were in the original right-of-way.

The aerial photographs and others appearing in the record affirm the facts orally adduced as above set forth, and conclusively demonstrate that the ditch involved had, after construction, "become out of repair, ob-

structed, inefficient, or defective" not only in the south half of its length in Section 31, as found by the trial court, but also in a similar manner, although to a lesser degree, in the north half of its length in Section 31 and in Section 30, particularly at and between bends 1, 2, and 3, the apparent beginning of the present trouble. There is evidence that the east approach of the bridge on the north side of Section 31 between bends 1 and 2 is even now in danger of destruction. With reference to the ditch in the north half of Section 31 and in Section 30, the question was not whether the ditch was stabilized but whether or not it had been permitted to become out of repair, obstructed, inefficient, or defective from any cause. We find that it had.

We turn then to a brief discussion of the trial court's decree, which, after making specific findings, ordered and enjoined defendant district and its supervisors not only to repair the ditch, but ordered them to do so in conformity with a specific plan. The probable adequacy or efficiency thereof, or of the plan proposed by interveners' engineers we need not discuss.

In Mooney v. Drainage District, 126 Neb. 219, 252 N. W. 910, this court ordered the district to enlarge or increase the carrying capacity of the outlet of its drainage canal. In doing so, it was said: "The method of financing the proposition and the plan for accomplishing the improvement lie within the discretion of the district board. The district court did not, nor will this court, attempt to interfere with this discretion, but the district must act and its acts must be commensurate with its duty."

Under the circumstances of this case, the method and manner of performing and conforming with the district's lawful duty presents an engineering as distinguished from a judicial problem, which defendant district and its supervisors, with the advice of competent engineers must effectively solve and make efficiently effective without unnecessary delay, in order that the interveners

and other landowners within the district may receive the benefits for which their lands were assessed.

Bearing that in mind, we conclude that after finding that the drainage ditch was out of repair, obstructed, inefficient, and defective, and the manner thereof, the trial court should order and enjoin defendant district and its supervisors to act forthwith without unnecessary delay and perform their duty to improve and repair the ditch and keep and maintain it in repair, by the employment of such plans, manner, means, repairs, improvements, and construction as may be necessary in conformity with good engineering practices, to accomplish the result which the law requires as shall be provided in the trial court's decree in conformity with this opinion.

Since we have concluded that defendant district and its supervisors should be ordered to repair the ditch, remove obstructions therefrom, and put it in efficient and effective condition, the next step thereafter will naturally be the restoration of the bridge and approaches thereto over the county highway on the south side of Section 31 where the ditch does and must of necessity continue to cross the county highway. The remaining question presented then is upon whom does that duty rest?

Defendants contended that decision of that question was controlled by an agreement between the district and Otoe County executed on March 12, 1915, in conformity with section 1, chapter 172, Laws of Nebraska, 1913, p. 524, now section 39-805, R. S. 1943, which allegedly imposed the duty to maintain bridges and approaches over the highways within the district upon the county. On the other hand, interveners, although admitting execution of the agreement, contended that its provisions had no application to the bridge involved, and that it was the statutory duty of the district, having crossed or intersected the highway, to restore the bridge and its approaches.

Bearing in mind the above contentions, we have ex-

amined the agreement and conclude that it was inclusive only of bridges specifically designated therein, resulting from and necessitated by the original plans for construction of defendants' drainage system and such other bridges as might be required as the result of a change of plans for such original construction, rather than that it should apply to all other bridges required in the future by reason of an intersecting or crossing of the highway after defendants' drainage system had been constructed.

The bridge involved, inclusive of its approaches, belongs in the latter category, and, a fortiori, the duty to restore it is controlled by statute, and not by the agreement, as argued by defendants.

We are not concerned here, with the ordinary duty of a county to construct and maintain bridges and approaches over its highways which have been impaired by natural causes or the county's statutory duty to maintain bridges and approaches after construction thereof by a drainage district over a county highway. The case at bar involves the statutory duty of a drainage district to restore a county highway to its former state as nearly as may be when intersected or crossed by its ditch, which here imposes a duty to restore the west approach to the county bridge, or, if necessary, to construct a new bridge or any necessary portion thereof, inclusive of approaches.

In that connection, chapter 161, Laws of Nebraska, 1905, § 23, p. 628, now respectively appears as sections 31-352 and 31-353, R. S. 1943.

Section 31-352, R. S. 1943, provides: "In order to effect the drainage of the district, the board is authorized to clean out and remove all obstructions from the bed of any stream, * * * or other watercourse in the district; to straighten or shorten and deepen or widen the course of any stream or to abandon the bed of any stream and construct a new channel therefor; and to fill up any channel, or part of a channel, of any stream,

* * * or other watercourse, in order to turn the direction of the volume of water, or to concentrate the water, so as to deepen and form a main channel."

The district and its supervisors are now required to again exercise that authority by reason of their own omission, fault, neglect, and failure to repair or keep the ditch in repair in conformity with their duty clearly enunciated by this court in this very case itself on April 12, 1940, some two years prior to destruction of the approach to the bridge and the ditch's change of course, intersecting and crossing the highway at another point to the west thereof.

By reason thereof, the ditch has not only already intersected and crossed the highway as effectively as if perfected by a dragline, but also must be said to be required to do so again by reason of the necessity of the district and its supervisors exercising the authority above conferred, and that hereinafter recited in conformity with their duty to improve and repair the ditch.

Section 31-353, R. S. 1943, as applicable here, provides: "The board shall have the power to construct the works across any * * * highway, * * * which the route of the ditches may intersect or cross, in such manner as to afford security for life and property, but the board shall restore the same, when so crossed or intersected, to its former state as nearly as may be, or in a manner not to impair its usefulness unnecessarily."

Upon every horn of the dilemma, the district and its supervisors are required to restore the bridge and its approaches in such manner as to accommodate and permit the maintenance of the public highway over and across the same.

Chapter 172, Laws of Nebraska, 1913, § 1, p. 524, to which reference was heretofore made, appeared as section 2983, Rev. St. 1913 and section 2734, Comp. St. 1922, until it was amended in particulars not important here by chapter 172, Laws of Nebraska, 1929, § 1, p. 586. It

thereafter appeared as section 39-821, Comp. St. 1929, now section 39-805, R. S. 1943.

Lest it be further argued by defendants that such section imposed the duty to restore the bridge and its approaches upon the county, we will briefly discuss its application in the light of our elimination of the contractual provisions thereof. Section 39-805, R. S. 1943, provides in part: "Whenever any public highway within this state shall cross or be crossed by any ditch or channel of any public drainage * * * district * * * it shall be the duty of the drainage * * * district to build the necessary bridges and approaches, (under the supervision of the county board) and restore the highway in question to its former state as nearly as may be as it was laid out prior to the construction of the ditch or channel in question, and it shall be the duty of the county * * * involved to maintain said bridges and approaches; * * *."

It will be noted that when a highway is crossed by a ditch such as the one involved, it becomes the duty of the district to restore the highway to its former state by building necessary bridges and approaches thereover under the supervision of the county board, after which it becomes the duty of the county to maintain the same. As a matter of fact, then, it will be observed that the duty of the county to maintain the bridge and approaches involved is not presented for decision in this case, since the drainage district has not yet constructed the same. Consequently, we conclude that the trial court should have ordered the defendant district and its supervisors, after the ditch has been efficiently improved and repaired, to proceed without unnecessary delay and restore and rebuild the approach to the bridge involved, or, if necessary, that they construct a new bridge or any necessary portion thereof, inclusive of the approaches thereto, over the highway, under the supervision of the county board.

For the reasons heretofore stated, the decree and judg-

ment of the trial court is hereby affirmed as modified, with directions to enter a decree in conformity with this opinion. Costs are taxed to defendant.

AFFIRMED AS MODIFIED.

GARFIELD STARNES, PLAINTIFF IN ERROR, V. STATE OF NEBRASKA, DEFENDANT IN ERROR.

29 N. W. 2d 795

Filed November 28, 1947. No. 32311.

1. **Rape.** Whether or not prosecutrix resisted advances of defendant to the extent of her ability is a question of fact, and where her testimony, if believed, would indicate that she had so resisted, a verdict based on such testimony will not be set aside.
2. **Criminal Law.** Where the jury finds against the defendant on his defense of alibi, the verdict will not be disturbed where the record contains ample evidence to sustain the verdict.
3. **Juries.** That the list of persons from which jury panel was selected was submitted by county board less than fifteen days before opening of the term is not ground for challenge to the array, unless the defendant can show that he was prejudiced thereby.
4. **Rape.** Whether or not prosecutrix made complaint within a reasonable time after the alleged offense depends upon the facts and circumstances of each particular case.
5. ———. Evidence of neighbors of prosecutrix, identifying defendant and describing the condition of his clothes within a short time of when the offense was committed, was competent as corroborative of the testimony of prosecutrix.
6. **Appeal and Error.** Errors occurring at the trial that do not prejudice the defendant or cause a miscarriage of justice are not grounds for reversal.
7. **Criminal Law.** Record examined and sentence found to be excessive. Sentence reduced from ten years to five years.

ERROR to the district court for Buffalo County: E. G. REED, JUDGE. *Affirmed as modified.*

Dryden & Jensen, for plaintiff in error.

Walter R. Johnson, Attorney General, and *C. S. Beck*, for defendant in error.

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

KROGER, District Judge.

Plaintiff in error, hereinafter referred to as defendant, was charged in an information with the crime of rape and entered a plea of not guilty. After a trial of several days duration the jury returned a verdict of guilty, upon which verdict he was sentenced to the penitentiary for a term of ten years. From that verdict and sentence this appeal is prosecuted.

The defendant sets out eight assignments of error and they will be disposed of in the order of their assignment.

The prosecuting witness is a married woman, the mother of two small children. She was 20 years of age and weighed about 140 pounds. The defendant was 37 years of age, married and the father of two children, and weighs approximately 160 pounds. Defendant was engaged in the cleaning of cesspools and septic tanks and on December 11, 1946, was operating east and north of Kearney, Nebraska, going from place to place, making inquiries as to the need for his services.

Prosecutrix and her husband occupied a tenant house on a farm operated by Dale Stubblefield and located one-half mile north and one mile west of Shelton, Nebraska. According to her evidence the crime was committed sometime between 3 and 4 p. m. of December 11, 1946, in said tenant house.

The defendant's first assignment of error is that the evidence is insufficient to sustain a verdict of guilty. This assignment is based upon the fact that there were no marks upon the body of the prosecutrix, none of her clothing was torn and her two small children, one aged two years and the other seven months, who were asleep in the dwelling, were not awakened. It is argued that there could not have been such resistance on the part of the prosecutrix as would constitute the crime of rape.

The evidence of prosecutrix on that phase of the case is that the defendant appeared at the door of her dwelling and inquired of her the whereabouts of the Stubblefields and whether or not she knew of any place where cesspool cleaning might be needed; that the defendant then inquired whether or not he might come in to have lunch; when this was refused he asked her to take his card and when she opened the door to receive it the defendant forced his way into the house, notwithstanding an effort on her part to hold the door against him; that when inside of the house "he grabbed me on the shoulder again, and told me if I didn't quit fighting he would have to get tough." She further testified that she continued struggling and imploring the defendant to desist until after the offense was complete. Prosecutrix further testified that when he took her into the bedroom "I was hollering as loud as I could," and when questioned as to what he said, she replied: "If I didn't shut up he would knock me cold." She testifies she was in fear, not only for herself but for her children, and that she had at no time ceased resisting.

While bruises and torn clothing would be evidence of resistance on the part of prosecutrix, their absence do not necessarily indicate consent. It must be borne in mind that defendant had demonstrated his superiority in strength by forcing the door when the prosecutrix was trying to prevent his entrance; that he also threatened her by informing her if she did not "quit fighting" he would "get tough," and would "knock her cold." Under the evidence in this case it was a question of fact for the jury to decide whether prosecutrix had resisted the advances of the defendant to the extent of her ability, and the evidence is sufficient to sustain their finding that she did so. The defendant also attempted to establish an alibi by producing evidence to the effect that he was back in Kearney before 3 o'clock on the afternoon in question and for that reason it would have been impossible for him to have been the person guilty

of the crime. This again raises a question of fact under conflicting testimony, which question the jury has resolved against the defendant, and there is ample evidence in the record to sustain this finding.

The second assignment of error is that the court erred in overruling defendant's challenge to the array. The record discloses that the jury panel had been selected for the March 1946 term of court and was quashed by the trial court because no women were included. The court ordered a new list to be submitted by the county board, which was done. There is no contention that the panel was not properly selected from this list, but it is contended that the selection was not made within the time required by section 25-1605, R. S. 1943. There is no showing made that the defendant was in any manner prejudiced by the failure to quash the panel, and in the absence of such a showing no error will be presumed. Fetty v. State, 118 Neb. 169, 223 N. W. 955.

Defendant's third assignment is that the court erred in failing to grant a mistrial because of the introduction in evidence of statements made by the prosecutrix which were no part of the res gestae. This has reference to the testimony of the prosecutrix and her husband that she made complaint to him on his return from work at 6 p. m., some hours after the offense was alleged to have been committed, and the evidence of the village marshal of Shelton, Nebraska, that prosecutrix made complaint to him when he came to the farm at about seven p. m. None of these witnesses attempted to give any of the details of the complaint made by the prosecutrix, simply testifying that a complaint had been made to the effect "that a man had attacked her."

In this connection it must be borne in mind that prosecutrix was alone with her two small children on the afternoon in question until about 4:30 p. m., when the son of the Stubblefields returned from school; that prosecutrix did not deem it proper to tell him what had happened, as he was a boy of only 16 years of age.

Other than that there was no opportunity for her to make complaint to anyone until shortly after 6 p. m., when her husband and Mr. Stubblefield came back from work. We are of the opinion that the complaint was made within a reasonable time after prosecutrix had an opportunity to do so, and that there was no error in admitting the evidence complained of.

The fourth assignment is that the court erred in permitting the introduction of other crimes than that upon which defendant was being prosecuted. This has reference to the testimony of two ladies living northwest of the Stubblefield farm, one of whom testified the defendant came to her home around 1:15 p. m. of December 11, 1946, at which time she noticed that his trousers were wide open. The other witness testified that the defendant came to her home about 2:30 p. m. of that date, that defendant had on work clothes, and that his trousers were open. This testimony was important in identifying the defendant as being the same person who appeared at the home of the prosecutrix that afternoon, and was corroborative of her testimony that at that time defendant's trousers were open. It was not offered as evidence of separate offenses, and since it was proper for the purpose for which it was offered, there was no error in receiving it.

The fifth assignment is that the court erred in commenting in the presence of the jury on certain evidence offered by the defendant. We have examined the record and find that this situation arose during a discussion between court and counsel as to whether or not certain matters had been gone into in previous examination. There was nothing in the discussion to indicate to the jury how the court felt in the matter, and it is difficult to see how the defendant could have been prejudiced by any remarks made by the court. In addition the court gave a cautionary instruction to the jury, informing them not to consider any statements or

rulings of the court as an indication of how the court felt regarding the case.

Defendant's sixth assignment is that the court erred in refusing defendant's counsel the right to receive from the prosecution copies of statements of certain witnesses, taken by the prosecution before the trial. It is not necessary to pass on this assignment as the record discloses that the prosecution offered defendant's counsel the original of such statements, which he did not accept, and further that defendant's counsel had a copy of such statements and used the same in the examination of the witnesses in question.

Defendant further assigns as error the fact that the prosecution was permitted to inquire of defendant about having been taken by the sheriff of Buffalo County, Nebraska, to the homes of various people living northwest of Shelton, Nebraska. While the competency of this evidence is questionable, there could be no possible prejudice to the defendant, as it was shown by at least four witnesses that the defendant had been in that vicinity the day in question. The defendant's own testimony indicated that he was in that general territory, but since it was to him a strange neighborhood he claimed no definite recollection of having been at any specific place.

The final assignment of defendant is that the sentence is excessive in this case. After a consideration of the circumstances, as shown by the record, we have reached the conclusion that there is merit in this assignment. The sentence is reduced from ten years to five years and the judgment is affirmed as modified.

AFFIRMED AS MODIFIED.

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12. In a law action findings of fact made by the court have the same force and effect as the verdict of a jury. If there is competent evidence to support them, such findings will not be disturbed on appeal. *Moore v. Schank* 228

13. Judgment will not be reversed by reason of any error or defects in the pleadings or proceedings which do not affect the substantial rights of the adverse party. *Moore v. Schank* 228

14. Where the excessive amount in a judgment is subject to exact determination, a remittitur may be required as a condition of affirmance for the correct amount. *Moore v. Schank* 228

15. When transcript of probate proceedings in the county court is filed in district court, such court has jurisdiction of the appeal and proceeds in like manner as upon appeals from the county court in civil actions. *In re Estate of Lindekugel* 271

16. Appeals from civil actions in county court are taken in the same manner as from a justice of the peace. *In re Estate of Lindekugel* 271

17. On appeal in civil case from judgment of county court or justice of the peace, plaintiff is required to file his petition within 50 days from the rendition of the judgment. *In re Estate of Lindekugel* 271

18. When plaintiff fails to file petition on appeal within 50 days from date of rendition of judgment in lower court, and good cause is not shown for failure to do so, sustaining of motion to nonsuit plaintiff

will not be reversed on appeal. *In re Estate of Lindekugel* 271

19. When no prejudicial error appears from a consideration of the instructions as a whole, judgment will not be reversed because a more accurate statement of the law might have been made. *Wright v. Cameron* 292

20. Instructions are to be considered together. When so construed, if as a whole they fairly state the law applicable to the issues presented by the pleadings and the evidence in support thereof, error cannot be predicated thereon. *Wright v. Cameron* 292

21. Failure to give requested instructions is not error where other instructions given by the court fairly and correctly cover the matters set forth in the requested instructions. *Blanchard v. Lawson* 299

22. The inadvertent substitution of one word for another in an instruction is at most harmless error, when it is clear from the instruction itself or from the record and other instructions given that the jury could not have been confused or misled thereby. *Blanchard v. Lawson* 299

23. Instructions should be considered together in order that they may be properly understood, and when, as an entire charge, they properly submit the issues to the jury, the verdict will not be set aside for harmless error in one of them. *Blanchard v. Lawson* 299

24. Where the giving of an instruction is assigned as error but there is no discussion of the assignment in the briefs and no error is readily apparent on the face of the instruction, the assignment will not be further reviewed. *Blanchard v. Lawson* 299

25. If an examination of all the instructions given by the trial court discloses that they fairly and correctly state the law applicable under the evidence, error cannot be predicated thereon. *Blanchard v. Lawson* 299

26. Where there is no prejudicial error found in the record and the verdict of a jury has sufficient competent evidence to support it, the judgment will be affirmed. *Blanchard v. Lawson* 299

27. An action in equity for an accounting is triable de novo on appeal to the Supreme Court. *Schmidt v. Henderson* 343

28. Where a case has been reversed for error in instructing a verdict for the defendant and remanded

generally, the holding that the plaintiff is entitled to have the case submitted to the jury becomes the law of the case upon a second trial, where the evidence is substantially the same. *Kline v. Metcalfe Construction Co.* 357

29. Rulings on the admission of testimony can only be reviewed by the Supreme Court when, either by general or specific assignment in the motion for new trial, they are called to the attention of the trial court. *Kline v. Metcalfe Construction Co.* 357

30. On appeal to the Supreme Court, actions in equity are triable de novo, subject to the consideration that the Supreme Court will consider 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. *O'Brien v. Fricke* 369
Watkins v. Waits 543

31. When a case is sent back by the Supreme Court to the trial court with specific directions, the trial court has no alternative except to follow the directions given in the manner set forth therein. *De Lair v. De Lair* 393

32. Appeal from county court or justice of the peace must be taken within 30 days unless prevented by some act or neglect of officers of the court. *Haley v. Fleming* 407

33. A litigant may not voluntarily accept payment of the part of a judgment or decree which is in his favor and thereafter prosecute an appeal from the part which is against him. *Nuss v. Nuss* 417

34. The acceptance of the return of money held in custodia legis will not be considered such voluntary acceptance of payment of part of judgment so as to prevent prosecution of an appeal. *Nuss v. Nuss* 417

35. Where a jury has been waived in a law action, the findings of the district court have the effect of a verdict. If there is evidence to support the findings, and there is no error in the proceedings, the judgment will be affirmed. *Fahrenbruch v. Peter Kiewit Sons' Co.* 460

36. Error in instructions not prejudicial to the complaining party and not affecting the verdict does not require reversal. *Spaulding v. Howard* 496

37. Error must affirmatively appear in the record. *Hampton v. State* 574

38. Whenever the facts stated in the record are consistent with the duty of the court, and nothing is shown to establish a contrary theory, it will be assumed that the court acted properly and all things were rightly done. *Hampton v. State* 574

39. An instruction will not be held to be prejudicially erroneous merely because of a harmless imperfection which cannot reasonably be said to have confused or misled the jury to the prejudice of the party complaining. *Hampton v. State* 574

40. Error cannot be predicated on a failure to give an instruction on the question of intoxication of the defendant as affecting criminal intent unless a request was made for such a charge and the request denied. *Hampton v. State* 574

41. While an action in equity must be tried de novo in Supreme Court and independent conclusion reached, the Supreme Court will give consideration to the fact that the trial court made a personal inspection of the premises involved and observed the witnesses and their manner of testifying. *Probert v. Grint* 666

42. The Supreme Court is without jurisdiction to entertain an appeal from the district court unless notice of appeal is filed in the office of the clerk of the district court within three months after the rendition of judgment or decree or within three months from the overruling of a motion for a new trial in the cause. *Ehlers v. Neal* 697

43. Errors assigned but not argued will be considered as waived. *Moore v. State* 747
Hameyer v. State 798

44. When the evidence is conflicting the verdict of the jury will not be set aside, unless it is shown to be clearly wrong. *In re Estate of Renter* 776

45. The ruling on an objection, wherein the ruling resides in the sound discretion of the court, is not available as ground for reversal unless discretion was abused to the prejudice of the party interposing the objection. *Hameyer v. State* 798

46. Errors which do not prejudice the substantial rights of the defendant will be disregarded. *Hameyer v. State* 798

47. Errors occurring at the trial that do not prejudice the defendant or cause a miscarriage of justice are not grounds for reversal. *Starnes v. State* 888

Assault and Battery.

In an action for assault and battery, recovery is limited to compensatory damages. Evidence of threats or words and acts of provocation are not admissible in mitigation thereof. *Horky v. Schroll* 96

Assignments.

1. Covenants against assignment or underletting are not favorably regarded by the courts and are liberally construed in favor of the lessee. *Chesnut v. Master Laboratories* 378
2. The scope of a prohibition against an assignment in a lease will not be enlarged by the courts, and the covenant will not be considered as violated by any technical transfer that is not fairly and substantially an assignment. *Chesnut v. Master Laboratories* 378

Attachment.

An officer in possession of personal property under an order of attachment becomes liable for the value of the use of the property during the period it is wrongfully retained by him after the attachment has been dissolved. *Schneider v. Daily* 413

Attorney and Client.

1. Statute does not authorize the allowance of an attorney's fee in an action to compel reinstatement of life insurance policy. *Cunningham v. Northwestern Mutual Life Ins. Co.* 250
2. The fee allowed for the service of an attorney in a divorce action should be sufficient to adequately compensate for the service necessary to be performed. *Specht v. Specht* 325
3. On appeal in a divorce action from the amount of the fee allowed to an attorney the Supreme Court will interfere only to correct patent injustice where the allowance is clearly excessive or insufficient. *Specht v. Specht* 325
4. In order to obtain allowance of attorney's fee under statute, party must plead and prove compliance with conditions precedent required. *Haley v. Fleming* 407
5. An attorney who represents a county in a tax foreclosure action is eligible to become a purchaser of land obtained by the county at a tax foreclosure

sale when the transaction between the county and the attorney has no relation to the foreclosure proceeding. *Dent v. City of North Platte* 718

Automobiles.

1. Where witness had no opportunity to formulate a basis therefor, it was error to permit him to give an estimate of speed of a motor vehicle. *Tews v. Bamrick and Carroll* 59
2. Where witness had reasonable time, means, distance, and opportunity to formulate a basis therefor, witness could testify as to his opinion of speed of motor vehicle. *Tews v. Bamrick and Carroll* 59
3. Driver of automobile must use reasonable care in its operation. When pedestrians are numerous and traffic congested, degree of care required must be commensurate with danger reasonably to be anticipated. *Tews v. Bamrick and Carroll* 59
4. Lawfulness of speed of motor vehicle, within the limits fixed by law, is determined by the further test of whether or not the speed was greater than was reasonable and prudent under the conditions then existing. *Tews v. Bamrick and Carroll* 59
5. What is a reasonable speed depends on circumstances and surrounding conditions. What would be reasonable and safe under some circumstances might be dangerous and improper under other circumstances. *Tews v. Bamrick and Carroll* 59
6. Warning devices on motor vehicles must not only be installed but also used. The duty to sound a signal warning of the approach of a motor vehicle depends largely on the circumstances of the particular case. *Tews v. Bamrick and Carroll* 59
7. The fact that a child runs into the side of an automobile does not automatically relieve the driver and owner of liability. If the driver did not take such precautions as ordinary care under the circumstances required and such conduct was the proximate cause of the injury, liability may exist. *Tews v. Bamrick and Carroll* 59
8. Negligence of driver of automobile is not ordinarily imputed to his guest, but the guest may be responsible for his own negligence. *Hamblen v. Steckley* 283
9. Invited guest owes duty to warn driver of automobile of known approaching danger, unless it appears that warning would be of no avail, or that the driver observed or should have observed the danger as well

as the guest. Failure to give such warning by the guest may constitute contributory negligence. *Hamblen v. Steckley* 283

10. Invited guest, with knowledge of approaching danger, must protest to host if there is time and opportunity, unless it appears such protest would be of no avail. Failure so to do may constitute contributory negligence. *Hamblen v. Steckley* 283

11. An instruction reciting the provisions of statutes regulating and controlling the speed of motor vehicles should include therein all the material applicable statutory limitations and qualifications to enable the jury to observe and understand the duty of drivers at the time and place in question. *Hamblen v. Steckley* 283

12. An adult son of the owner of a family purpose automobile who was on vacation visiting his parents, and while so doing used the automobile for his own purposes with the owner's consent, was not a member of the owner's family within the scope of the family purpose doctrine. *Piechota v. Rapp* 442

13. If a driver confronted with an emergency turns his car to the left in an attempt to avoid a collision, the question of negligence is for the determination of the jury. *Spaulding v. Howard* 496

14. It is the duty of an automobile driver to keep such a lookout ahead that he will see an obstruction or a vehicle as soon as it is illuminated by the lights of his automobile. It is his duty to have his automobile under such control, under the driving conditions then existing, that he can stop it in time to avoid a collision with an object in the area lighted by its lights. *Allen v. Clark* 627

15. Conditions affecting visibility of a motorist impose upon the driver the duty to exercise a degree of care commensurate with existing circumstances. *Pierson v. Jensen* 849

16. It is negligence as a matter of law for a motorist to drive an automobile so fast on a highway at night that he cannot stop in time to avoid a collision with an object within the area lighted by the lights of the automobile. *Pierson v. Jensen* 849

Banks and Banking.

1. Par Check law deals not with charges for collection but with charges incident to paying and in that connection requires that if drawee state banks clear

checks drawn upon them, it must be done at par, without deduction of a so-called exchange charge from remittances therefor to forwarding banks. *Placek v. Edstrom* 79

2. When a drawee bank charges the amount of a check drawn upon it to the account of its depositor, it pays the check to itself as agent for the holder or forwarding bank, and thereafter holds such funds in a fiduciary capacity as such agent. *Placek v. Edstrom* 79

3. When a check is charged to the account of a customer by a bank, the check is then paid, but it is only cleared when the proceeds received therefrom by the drawee bank are properly remitted in full to the forwarding bank. *Placek v. Edstrom* 79

4. Bank collection code and Par Check law relate to the same or closely allied subjects, having a common purpose or the same general purpose as component parts of the same general banking scheme or plan, are in pari materia, and although enacted at different times, should be construed together. *Placek v. Edstrom* 79

5. The business of banking, although for private profit, is preeminently public in nature, and a proper subject of reasonable legislative regulation under the police power of the state, which is supreme except as limited by fundamental law. *Placek v. Edstrom* 79

6. The possession of a canceled bank check by the drawer, who testifies that on the day of its date he made and delivered it to the drawee, is sufficient proof prima facie of the payment of the amount named in the check. *Hameyer v. State* 798

Bills and Notes.

1. Where a note signed by an accommodation maker is paid from the assets of his estate after his decease, the administrator has a cause of action against the accommodated party to recover the amount paid. *Mead Co. v. Doerfler* 75

2. One who makes payment of promissory note to a third person not the owner of the note and not in possession of it, at a place other than the place of payment designated therein, assumes the burden of proving the authority of such third person to collect the money. *Meier v. Geldis* 234

Bridges.

Where parties in interest cannot agree with respect thereto, drainage district must construct bridges and approaches where highway crosses drainage ditch, and county has the duty to maintain same after construction. *Ritter v. Drainage District No. 1* 873

Cemeteries.

1. In the purchase of a plot in a cemetery the purchaser is bound by the vested rights of others of which he has actual or constructive knowledge. *Kesselman v. Goldsten* 452
2. The survey and platting of real estate in a cemetery and the sale of plots therein with reference to the plat constitutes a common-law dedication of the passageways notwithstanding the plat and survey has not been recorded. *Kesselman v. Goldsten* 452
3. By purchase of a lot in a platted cemetery the purchaser obtains an easement for the free and unobstructed use of the passageways therein. *Kesselman v. Goldsten* 452
4. When a lot in a platted cemetery adjoining a passageway has once been sold for burial purposes, the lot and alley being designated on the plat, the passageway may not be interfered with or modified by the owners of the cemetery or by any other person or persons. *Kesselman v. Goldsten* 452

Common Law.

1. The courts have the power to modify the common law, adopting such of its principles as are applicable and rejecting such others as are inapplicable. *In re Estate of Lewis* 592
2. The adoption by statute of the common law of England does not admit of an unqualified application of all of its rules without regard to local circumstances and the then present and enlightened conception of reason and justice, for the common law is applicable only insofar as it is suited to the genius, spirit, and objects of its intentments affecting the society of the state. *In re Estate of Lewis* 592

Constitutional Law.

1. Section 10, article I, Constitution of the United States, has reference only to laws enacted after the making of contracts, the obligations of which are claimed to be impaired. *Placek v. Edstrom* 79

2. Par Check law does not impair the obligations of any contract between drawee banks and any other person, either depositor or holder, and it is not repugnant to impairment of contract clause of Constitution of the United States. *Placek v. Edstrom* 79
3. Par Check law is not violative of section 14, article III, Constitution of Nebraska. *Placek v. Edstrom* 79
4. No provision of the Constitution of the United States was ever intended to take from states the right to properly exercise their police powers which generally extend to all the great public needs which are lawfully recognized as immediately necessary to promote the public welfare. *Placek v. Edstrom*..... 79
5. Par Check law being valid in classification, is a reasonable exercise of the police power of this state, therefore not repugnant to due process clause of state and federal Constitutions. *Placek v. Edstrom* 79
6. Section 20, article IV, Constitution of Nebraska, is self-executing in the absence of specific legislative action but the Legislature has the right to prescribe by law how the railway commission shall proceed and what authority it may exercise in the regulation and general control of common carriers. *Chicago & N. W. Ry. Co. v. County Board of Dodge County* 648

Continuances.

Where due diligence by the moving party has not been shown, the ruling of the trial court overruling a motion for a continuance for the purpose of securing additional evidence will not be disturbed. *Frese v. Michalec* 567

Contracts.

1. To establish an express contract there must be shown what amounts to a definite proposal and an unconditional and absolute acceptance thereof. *Kline v. Metcalfe Construction Co.* 357
2. When a party makes an offer with certain terms or conditions but accepts an acceptance or counter offer which is not completely responsive to the proposal he is bound by the contract thus made and cannot fall back on his original proposal in case of subsequent disagreement. *Kline v. Metcalfe Construction Co.* 357
3. A condition precedent in the law of contracts either may be a condition which must be performed before the agreement of the parties shall become a

binding contract or it may be a condition which must be fulfilled before the duty to perform an existing contract arises. *O'Brien v. Fricke* 369

4. A contract, the fulfillment of which by express or implied agreement is made to depend upon the act or consent of a third person over whom neither party has any control, cannot ordinarily be enforced unless the act is performed or the consent given and except for the fault of the promisor, reasons given for failure or refusal to act or give consent are immaterial. *O'Brien v. Fricke* 369
5. A void contract is one without legal effect or force, and incapable of ratification. *Webber v. Spencer* 481
6. A mere statement by a party to an executory contract, made prior to breach by him, to the effect that he cannot and will not perform, on the date for performance or thereafter, not acted upon by the vendor, does not constitute an abandonment of his rights acquired by the contract. *Lang v. Todd* 726
7. Where one party to an executory contract, before time for performance by him has arrived, unequivocally states that he will not perform, the other party may either treat such renunciation as an abandonment or breach of contract, by affirmative election then made so to do, or may treat such renunciation as inoperative, await the time of performance, and then hold the one party responsible for all consequences of nonperformance, including specific performance in a proper case. In case he elects to keep the contract alive, it lives for the benefit of both parties, and he remains subject to all his obligations under it, and enables the one party to complete the contract, notwithstanding his previous renunciation, with the same effect as if such renunciation had never been made. *Lang v. Todd* 726
8. A clause in a contract making time of the essence thereof may be waived by the subsequent acts of the parties. *Lang v. Todd* 726
9. Where acts to be performed by parties to a contract are mutual and dependent, and are to be performed concurrently, one party must at least be able and willing to perform at time of performance, in order to enable him to declare a default on account of nonperformance by the other. *Lang v. Todd* 726

Corporations.

1. A president of a corporation has no general inherent authority to contract for the corporation, nor to control its property, funds, or management. *Electronic Development Co. v. Robson* 526
2. An officer or director of a corporation will not be permitted without authority to divert corporate property to the payment or securing of a debt of the corporation to himself. *Electronic Development Co. v. Robson* 526
3. Officers of a corporation as such cannot enter into a contract on its behalf by which they dispose of its assets or grant the right to or use of its facilities to the extent of terminating its ability to operate. Authority for any such transaction must come from stockholders and directors. It is not the ordinary business of the corporation that officers may transact. *Electronic Development Co. v. Robson* 526
4. An officer or director of a corporation occupies a fiduciary relation towards the corporation and its stockholders. *Electronic Development Co. v. Robson* 526

Courts.

1. When transcript of probate proceedings in the county court is filed in district court, such court has jurisdiction of the appeal and proceeds in like manner as upon appeals from the county court in civil actions. *In re Estate of Lindekugel* 271
2. Appeals from civil actions in county court are taken in the same manner as from a justice of the peace. *In re Estate of Lindekugel* 271
3. On appeal in civil case from judgment of county court or justice of the peace, plaintiff is required to file his petition within 50 days from the rendition of the judgment. *In re Estate of Lindekugel* 271
4. When plaintiff fails to file petition on appeal within 50 days from date of rendition of judgment in lower court, and good cause is not shown for failure to do so, sustaining of motion to nonsuit plaintiff will not be reversed on appeal. *In re Estate of Lindekugel* 271
5. Consent of parties cannot confer upon a court jurisdiction of the subject matter of an action. *Schmidt v. Henderson* 343
6. As a general rule, one having no right or interest

to protect cannot invoke the jurisdiction of the court as a party plaintiff in an action. *Davies v. De Lair* 395

7. The clerk of the county court is authorized to execute a certificate to the transcript of the proceedings of the county court. *Haley v. Fleming* 407
8. The judgment of a court upon a subject within its general jurisdiction, but which is not brought before it by any statement or claim of the parties and is foreign to the issues submitted for determination, is a nullity. *Drieth v. Dormer* 422
9. The provisions of the district court code of civil procedure have no application to the municipal court in matters for which specific provision is made in the act defining and controlling procedure in the municipal court. *O'Grady v. Volcheck* 431

Criminal Law.

1. The trial court's action on the question of probation is discretionary and not reviewable. *Skelton v. State* 30
2. The common-law writ of error coram nobis to bring into the record facts which were unknown to the defendant at the time of trial through no lack of reasonable diligence on his part, which, if known at the time of the trial, would have resulted in a different judgment, exists in this state. *Swanson v. State* 155
3. The purpose of a writ of error coram nobis is to enable the court to recall some adjudication, made while some fact existed which, if before the court, would have prevented rendition of the judgment, and which, through no fault of the party, was not presented. *Swanson v. State* 155
4. The application for a writ of error coram nobis must set out the facts which would have prevented the rendition of the judgment and the evidence by which the existing facts can be proved, and must allege facts showing due diligence. *Swanson v. State* 155
5. An application for a writ of coram nobis will be denied, in the absence of a showing that the alleged acts of inefficiency on the part of the petitioner's counsel upon which the motion for the writ was predicated were not known, or by the exercise of reasonable diligence could not have been known, by the petitioner, before the close of the trial. *Swanson v. State* 155

6. Where the facts alleged in an application for a writ of error coram nobis are known to the applicant before or during the progress of the trial, or could have been known by the exercise of reasonable diligence, the writ must be denied. *Swanson v. State* 155
7. When a defendant in a felony case makes timely application for the production of a witness at his trial, or of the evidence such witness will give, and it is material to his defense, the court, or a judge thereof, should grant the request and, if necessary, allow a continuance of the trial until such evidence can be obtained. *Dolen v. State* 317
8. An arbitrary refusal by the court to grant a proper request of a defendant in a felony case for the production of a witness, or his evidence by deposition, to the prejudice of such defendant, indicates an abuse of discretion. *Dolen v. State* 317
9. It is the general rule that a reasonable time for the preparation of a defendant's case must be allowed in a felony case between the time of the appointment of counsel by the court for an indigent defendant and the date of trial. *Dolen v. State* 317
10. To sustain a conviction in a criminal case the record must contain evidence sufficient to establish beyond a reasonable doubt that the accused is guilty of the offense with which he was charged and convicted. *Pettijohn v. State* 336
11. Where evidence has been admitted that the defendant and the complaining witness were outdoors in a yard when a shot was fired from a gun in the hands of defendant, and evidence has also been admitted as to what was said by defendant and complaining witness immediately prior to and after the shot was fired, and no one else being shown to have been present, evidence of parties nearby, who at the time and place heard the words and the shot and related the words heard, but did not identify the parties nor the voices as those of the complaining witness and defendant, is admissible as circumstantial evidence. *Hampton v. State* 574
12. Where a photograph illustrates or makes clear some controverted issue in the case, a proper foundation having otherwise been laid for its reception in evidence, it may properly be received, even though it may present a gruesome spectacle. *Hampton v. State* 574
13. The rule that generally threats made against a

third person by a defendant prior to the commission of a crime are not admissible as evidence against a defendant held not applicable under the circumstances related in the opinion. *Hampton v. State* 574

14. Error cannot be predicated on a failure to give an instruction on the question of intoxication of the defendant as affecting criminal intent unless a request was made for such a charge and the request denied. *Hampton v. State* 574

15. The Habitual Criminal Act does not create a new and separate criminal offense for which a person may be separately sentenced. *Gamron v. Jones* 645

16. Where a person convicted of a felony is sentenced for a period less than the minimum provided by law, such sentence is erroneous in failing to impose the minimum penalty, but is valid to the extent pronounced. *Gamron v. Jones* 645

17. To charge a statutory offense, the information or complaint must contain a distinct allegation of each essential element of the crime as defined by the law creating it, either in the language of the statute or its equivalent. *Fredericksen v. Dickson* 739

18. The defendant in a criminal action may not secure a reversal because an instruction was more favorable to him than the law applicable to the charge made requires. *Luster v. State* 743

19. Under our code of criminal procedure the law does not distinguish between principals in the first and second degrees, and whoever aids, abets, or procures another to commit any offense may be prosecuted and punished as if he were the principal offender. *Moore v. State* 747

20. The same rule as to the information, conduct of the case, and punishment, applicable to a principal in fact now governs his aider, abettor, or procurer, and no additional facts need to be alleged in an information against the latter than are required against his principal. *Moore v. State* 747

21. The pretense or pretenses relied on to constitute the crime of obtaining money by false pretenses must relate to a past event or an existing fact. *Hameyer v. State* 798

22. Any representation, assurance, or promise in relation to a future transaction, however false and fraudulent it may be, may not be the basis of a

prosecution for obtaining money by false pretenses. *Hameyer v. State* 798

23. By rule of procedure in criminal cases the court in the exercise of a sound discretion should, where the prosecution is based upon the correctness or incorrectness of certain records or documents, on application of the defendant, allow an inspection of such documents or records. *Hameyer v. State* 798

24. Where guilt of a defendant depends upon the intent, purpose, or design with which the act was done, or upon guilty knowledge thereof, collateral facts in which he bore a part occurring before and leading up to the transaction complained of may be examined for the purpose of establishing such guilty intent, design, purpose, or knowledge, even though such facts show the commission of another crime. *Hameyer v. State* 798

25. Crimes are established by statute. In prosecuting a violation thereof it is necessary for the information to allege and the State must prove those elements which are essential to constitute the crime. The fact that the information includes nonessential matters does not make the proof thereof necessary and they need not be submitted to the jury. However, if they are submitted no error arises by reason thereof for the defendant cannot complain if a greater burden is placed upon the State than the statute requires. *Fullerton v. State* 811

26. Where the jury finds against the defendant on his defense of alibi, the verdict will not be disturbed where the record contains ample evidence to sustain the verdict. *Starnes v. State* 888

27. Record examined and sentence found to be excessive. Sentence reduced from ten years to five years. *Starnes v. State* 888

Damages.

In an action for assault and battery, recovery is limited to compensatory damages. Evidence of threats or words and acts of provocation are not admissible in mitigation thereof. *Horky v. Schroll* 96

Death.

Where an only child, born out of wedlock, dies intestate without issue, the mother is next of kin under Lord Campbell's Act. *Piechota v. Rapp* 442

Deeds.

1. Whether or not a deed was delivered is ordinarily a question of the intent of the grantor, to be determined from all the facts and circumstances. *Kellner v. Whaley* 259
2. No particular act or form of words is necessary to constitute a delivery of a deed. Anything done by the grantor from which it is apparent that a delivery was intended, either by words or acts, or both combined, is sufficient. *Kellner v. Whaley* 259
3. The possession of a deed by the grantee, in the absence of opposing circumstances, is prima facie evidence of delivery, and the burden of proof is on him who disputes this presumption. *Kellner v. Whaley* 259
4. A presumption of delivery exists in favor of a grantee who is unable to explain how he came into possession of the deed because disqualified from testifying on account of the death of the grantor. *Kellner v. Whaley* 259
5. The fact that the grantee kept the deed without recording for a number of years, allowed the grantor to remain in possession, and made no claim to the property until after the grantor's death, does not necessarily overcome the presumption of delivery, when the deed, fully executed, is in his possession. *Kellner v. Whaley* 259
6. Evidence examined and held sufficient to constitute delivery of deeds in question. *Kellner v. Whaley*.... 259
7. Where a grantor conveys land in consideration of an agreement of the grantee to care for the grantor during his lifetime, and the grantee neglects or refuses to comply with the contract, the deed may be set aside and the title quieted in the grantor. *Lewelling v. McElroy* 309

Descent and Distribution.

1. The right to inquire into and determine the indebtedness of a legatee of an estate, and to order a deduction of the same from the legacy, is an incident to the authority of the court to make settlement and distribution of a decedent's estate. *In re Estate of Williams* 208
2. Where an only child, born out of wedlock, dies intestate without issue, the mother is next of kin under Lord Campbell's Act. *Piechota v. Rapp* 442

Divorce.

1. It is impossible to lay down a general rule as to the degree of corroboration required in a divorce action as each case must be decided on its own facts and circumstances. *Green v. Green* 19
2. There may be extreme cruelty justifying a decree of divorce without physical injury or violence. Unjustifiable conduct on the part of the husband or wife, which utterly destroys the legitimate ends and objects of matrimony, may constitute extreme cruelty. *Green v. Green* 19
3. In deciding 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, 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 and from all of such elements determine the rights of the respective parties. *Green v. Green* 19
4. As the welfare of the child is the one question of primary consideration to which all others must yield, the court must examine the evidence in the light of the age of the child and its future needs of every nature. The question of its custody involves the study, not alone of the proposed home and its entire surroundings, but the temporal welfare of the child, as to food, clothing, discipline, and if of tender years, careful nursing and medical attention when required, together with its secular and religious education and training. *Gorsuch v. Gorsuch* 122
5. 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, 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. *Schrader v. Schrader* 162
6. Where a divorce decree provides for the payment of stipulated sums monthly for the support of a minor child or children, contingent only upon a subsequent

order of the court, marriage, or the reaching of majority, such payments become vested in the payee as they accrue. The courts of this state are without authority to reduce the amounts of such accrued payments. *Schrader v. Schrader* 162

7. Where an award for child support is made in one amount for each succeeding month for more than one child, it will be presumed to continue in force for the full amount until the youngest child reaches his majority. The proper remedy, if this be deemed unjust, is to seek a modification of the decree in the court which entered it on the basis of the changed circumstances. *Schrader v. Schrader* 162

8. In a divorce action the decree for child support is at all times subject to review in the light of changing conditions, regardless of the particular language of the award. Either party may, upon sufficient showing of changed conditions, apply to the district court for modification of the order made with respect to allowance for child support. *Schrader v. Schrader* 162

9. An application for a change with respect to an allowance for support and maintenance of minors, as provided in a decree of divorce, made at any time after the decree has been entered must be founded upon new facts or circumstances which have arisen subsequent to the entry of the decree. In the absence of such facts and circumstances the matter will be deemed res adjudicata. *Schrader v. Schrader* 162

10. Upon the granting of an absolute divorce the trial court has the legal right to assign the property, both real and personal, acquired during the marriage, by the joint efforts of the parties, between the parties as the equities require. *Schrader v. Schrader* 162

11. Condonation is forgiveness for the past upon condition that the wrongs shall not be repeated. It is dependent upon future good conduct. The repetition of the offense revives the wrong condoned. *Eicher v. Eicher* 173

12. Where condonation is relied upon as a defense, it should be pleaded. Where a repetition of the wrong condoned is relied upon, it should be pleaded. *Eicher v. Eicher* 173

13. Where attorney for wife was allowed an adequate fee for services in trial court, and wife's appeal

from decree is frivolous, allowance of further fee will be denied. *Eicher v. Eicher* 173

14. In a divorce suit, where the court has jurisdiction of the parties, it has power to adjust all their respective property interests. *Colick v. Colick* 201

15. The right of a prevailing spouse to have a divorce decree set aside during the six-months' period pending finality thereof is not an absolute but a qualified right. *Colick v. Colick* 201

16. During the six-months' period after rendition of decree of divorce, the control of such a decree is within the sound judicial discretion of the trial court, but good reason must be shown for setting it aside, and such action must not be permitted to produce an unconscionable result, thereby misusing the judicial process. *Colick v. Colick* 201

17. What constitutes good reason for setting aside a decree of divorce or what constitutes an unconscionable result prohibiting it depends upon the facts and circumstances of each particular case. *Colick v. Colick* 201

18. Where a husband and wife are permanently separated, and there are 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. If the provisions are fair and reasonable the agreement may be enforced by the courts. *Koser v. Koser* 277

19. Equitably it is improper, in an action for divorce where the parties have agreed upon a settlement of their property rights and provided by contract for the support and maintenance of the wife, for the court to set aside the contract and impose a heavier obligation upon the husband without first affording him an opportunity to be heard thereon. *Koser v. Koser* 277

20. The disposition of minor children and provision for their support in an action wherein a divorce is granted is not controllable by agreement of the parties but by the court on the facts and circumstances as disclosed to it. *Koser v. Koser* 277

21. The decree of the trial court in a divorce action insofar as minor children are concerned is never final in the sense that it cannot be changed but is subject to review at any time in the light of changing conditions. *Koser v. Koser* 277

22. The fixing of alimony in a divorce action is always

to be determined by the facts of each case. *Specht v. Specht* 325

23. In fixing alimony in a divorce case the court will take into consideration the estate of each party at the time of the marriage, the respective contributions thereafter, the duration of the marriage, the wife's loss of her interest in the husband's property by virtue of the divorce, the social standing, comforts, and luxuries of life which the wife would probably have enjoyed except for the enforced separation, the conduct of the parties leading to the divorce, the party to whom the divorce is granted, the age and condition of health of the parties, and all other facts and circumstances, and make an award which appears to be fair and equitable. *Specht v. Specht* 325

24. The fee allowed for the service of an attorney in a divorce action should be sufficient to adequately compensate for the service necessary to be performed. *Specht v. Specht* 325

25. On appeal in a divorce action from the amount of the fee allowed to an attorney the Supreme Court will interfere only to correct patent injustice where the allowance is clearly excessive or insufficient. *Specht v. Specht* 325

26. A decree of divorce shall not be granted solely on the declarations, confessions, or admissions of the parties, but the court shall require other satisfactory evidence of the facts constituting grounds for divorce. *Nuss v. Nuss* 417

27. A divorce from the bonds of matrimony may not be granted unless the evidence as to the grounds for divorce is corroborated. *Nuss v. Nuss* 417

28. Special statute relating to process in divorce actions is controlling. *Simon v. Simon* 620

29. Service by leaving a copy of the summons at the usual place of residence of a defendant is sufficient to give the court jurisdiction of the party served. *Simon v. Simon* 620

30. The fixing of alimony in a divorce case is always determined by the facts and circumstances of each case, and in doing so the court will take into consideration all relevant factors and make an award which appears to be fair and equitable. *Jensen v. Jensen* 689
Sims v. Sims 771
Sell v. Sell 859
Pittman v. Pittman 864

31. Although no personal violence is threatened, yet constant nagging by a husband or wife, about conduct which is above reproach, may be so unreasonable as to utterly destroy the peace of mind, ruin all legitimate objects of matrimony, and constitute a ground for divorce as extreme cruelty "by other means." *DeWaal v. DeWaal* 756
Sell v. Sell 859

32. Alimony is not only support for a divorced wife, but it may be considered an equitable division of their property. Great latitude is allowed the trial court, not alone in fixing its amount, but also in determining the manner of its payment. The court may provide that, in case of the death of the wife, the husband's estate shall only be liable for a definite, certain amount. *DeWaal v. DeWaal* 756

33. In a divorce suit where the court has jurisdiction of the parties, it has power to adjust all their respective property interests. *Sims v. Sims* 771

34. Upon the granting of an absolute divorce, the trial court has the legal right to assign the property, both real and personal, acquired during the marriage by the joint efforts of the parties, between the parties as the equities require. *Sims v. Sims* 771

35. Provisions in a divorce decree for the custody and support of minor children are at all times subject to future modification by the trial court upon appropriate application by either party, and a proper showing of subsequently occurring changed circumstances and conditions justifying it. *Sims v. Sims* 771

36. Society has an interest in the marital status, its continuance and its dissolution. Thus divorce is not favored or encouraged but is discouraged. *Shinn v. Shinn* 832

37. One of the important purposes of the law requiring six months to elapse between the entry of a decree of divorce, which in this state is in the nature of an interlocutory order, and before the same becomes final is to give the spouses a chance to effect a reconciliation, which the law favors. *Shinn v. Shinn* 832

38. Reconciliation is a state of mind to be determined from all the evidence, including rational inferences, the real question before the court being whether the circumstances as a whole showed a mutual intention

to effect a reconciliation and unite in mending the break in the matrimonial yoke. *Shinn v. Shinn* 832

39. The interest of the state in the preservation of the marital relation makes it an interested party in divorce proceedings. Any action of the principals which conceals the true facts and circumvents this is against public policy, and is a fraud upon the court. *Shinn v. Shinn* 832

40. If prior to the date a decree of divorce becomes absolute the parties resume marital relations and reconcile their differences, and the successful party in the divorce action permits the decree to become final without notice or knowledge of the other spouse, such action constitutes extrinsic fraud, not only as to the other spouse, but also as to the court, since it is effected through concealment from the court of such facts as the party who permitted the decree to become final in his favor is bound to disclose, and which, if disclosed, would render impossible the finality of the decree. *Shinn v. Shinn* 832

41. Unfounded and malicious accusations of infidelity, when made by the husband against the wife, may constitute extreme cruelty. *Meredith v. Meredith* 845

42. Whether accusations of infidelity made by one spouse against the other constitute extreme cruelty within the meaning of the statute must be determined by the facts of each particular case. In no case will they be given that effect unless they are are shown to be either unfounded or malicious. *Meredith v. Meredith* 845

43. Any unjustifiable conduct on the part of either the husband or wife, which so grievously wounds the mental feelings of the other, or so utterly destroys the peace of mind of the other as to seriously impair the bodily health and endanger the life of the other, or such as utterly destroys the legitimate ends and objects of matrimony, constitutes "extreme cruelty" although no physical or personal violence may be inflicted, or even threatened. *Meredith v. Meredith* 845

44. Whether a divorce from bed and board or an absolute divorce shall be granted is a question vested in the sound discretion of the trial court. *Sell v. Sell* 859

45. It is impossible to lay down a general rule as to the degree of corroboration required in a divorce action as each case must be decided on its own facts and circumstances. *Sell v. Sell* 859

46. There may be extreme cruelty justifying a decree of divorce without physical injury or violence. Unjustifiable conduct on the part of the husband or wife, which utterly destroys the legitimate ends and objects of matrimony, may constitute extreme cruelty. *Sell v. Sell* 859
47. No decree of divorce shall become final or operative until six months after trial and decision except for purposes of review. *Pittman v. Pittman* 864
48. In a divorce action if no appeal shall be taken within three months from trial and decision the court may within six months vacate or modify the decree. *Pittman v. Pittman* 864
49. The right to vacate or modify a decree of divorce within six months is not absolute but must be exercised within a sound judicial discretion. *Pittman v. Pittman* 864
50. In order that it may be said that the court exercised a sound judicial discretion in vacating or modifying a decree of divorce good reason therefor must be shown and it must also be shown that such action would not produce an unconscionable result. *Pittman v. Pittman* 864
51. Statute permits the application to vacate or modify a decree of divorce within six months from the trial and decision to be made by either party to the action. *Pittman v. Pittman* 864

Domicile.

Whether change of legal residence is effected by removal from one place to another depends on the intention of the party. *Pierson v. Jensen* 849

Drains.

1. Statute requires a certain number of landowners to petition for the formation of a drainage district, dependent upon the number of owners of real estate embraced within the district. The statute does not require that the number of signers be designated in the petition and, not having required such fact to be set forth, the same may be established by order of the county board acting upon the petition in creating the drainage district. *Chicago & N. W. Ry. Co. v. Payne Creek Drainage District* 139
2. The county board may fix the boundaries of a drainage district as set forth in the petition to the

board when, after hearing all of the evidence in support of the petition and being fully advised in the premises, it finds that the proposed boundaries as set forth in the petition are reasonable and proper, and that the best interests of the district will be promoted and justice and equity be done to all persons by establishing and fixing the boundaries of the district as set forth therein. *Chicago & N. W. Ry. Co. v. Payne Creek Drainage District* 139

3. When a ballot for the formation of a drainage district affirmatively discloses that the voter is the owner of the number of acres voted, the mere fact that such voter may have written down the nature of the instrument by which he acquired title on the ballot in answer to "nature of title to or interest in above," does not invalidate the ballot. *Chicago & N. W. Ry. Co. v. Payne Creek Drainage District* 139

4. When the canvassing board certifies a true and correct exhibit of the votes cast for the formation of a drainage district and the board of directors, naming the place of the election and the date thereof, and the fact that the ballots are on file in the county clerk's office in accordance with the provisions of the law, it is sufficient compliance with the statute. *Chicago & N. W. Ry. Co. v. Payne Creek Drainage District* 139

5. Where the required number of directors of a drainage district are elected as provided by law, and one fails to qualify, the remaining duly elected and qualified directors may fill the vacancy by appointment. *Chicago & N. W. Ry. Co. v. Payne Creek Drainage District* 139

6. Where two tracts of land were assessed one-half unit each and the balance of the units were assessed in conformity with the statute and not proportionately out of line with the assessment of benefits for the tract involved, and such assessment constituted no change in the taxes on any of the tracts of land, the report of the drainage district board on fixing the benefits may constitute an irregularity in such respect but is not a jurisdictional defect. *Chicago & N. W. Ry. Co. v. Payne Creek Drainage District* 139

7. Where the record affirmatively discloses that the directors of a drainage district acted officially in the publication of required notices, substantial

compliance with statute has been had. *Chicago & N. W. Ry. Co. v. Payne Creek Drainage District* 139

8. The statutes make no requirements as to the qualifications of the engineer selected by the board of directors of a drainage district. The qualifications of such engineer can only be attacked directly, and not collaterally. *Chicago & N. W. Ry. Co. v. Payne Creek Drainage District* 139

9. Statutory provision requiring detailed plans of public works does not require an estimate of cost. An estimate of cost is only required under another statutory provision when the cost of the contemplated work exceeds 20 percent of the assessed value of the lands assessed for such improvements. *Chicago & N. W. Ry. Co. v. Payne Creek Drainage District* 139

10. Where the plaintiff fails to allege in its petition for an injunction that the cost of the contemplated work for a public improvement equals or exceeds 20 percent of the assessed value of the land embraced within a drainage district and that an estimate of the cost of such work be furnished, such matter is not to be determined when a demurrer to the petition is considered on appeal. Since the issue was not raised in the proceedings for the organization of a drainage district, the proceedings are not subject to collateral attack. *Chicago & N. W. Ry. Co. v. Payne Creek Drainage District* 139

11. Where a bona fide attempt has been made to organize a drainage district, the legality of its organization cannot be collaterally attacked for irregularities and defects not affecting the jurisdiction of the tribunal by which it was created. *Chicago & N. W. Ry. Co. v. Payne Creek Drainage District* 139

12. Drainage districts, the validity of whose incorporation is confirmed by the district court, are formed for the purpose of having lands within the limits of the district reclaimed and protected from the effects of water by drainage or otherwise. *Ritter v. Drainage District No. 1* 873

13. It is the mandatory duty of the board of supervisors of a drainage district, organized by proceedings in the district court prior to May 27, 1935, to improve and repair its drainage system within the limit of its power, if, after final construction, it becomes "out of repair, obstructed, inefficient,

or destructive from any cause" which duty equity courts have the power and duty to enforce. *Ritter v. Drainage District No. 1* 873

14. As applicable to such districts, the language "out of repair, obstructed, inefficient, or defective from any cause" is inclusive of erosion by unusual floodwaters or otherwise, as well as every other reason, element, or cause substantially impairing or destructive of the purposes for which the drainage district was organized and its system constructed. *Ritter v. Drainage District No. 1* 873

15. The right and duty of a drainage district and its supervisors to improve and repair and keep its system in repair is not limited to making good its defects in the precise place of its original construction, when the nature of the soil and general topography do not admit of successful operation there, but includes the right and duty to make the system affirmatively serve the purposes for which it was licensed to be constructed. *Ritter v. Drainage District No. 1* 873

16. The method of financing improvements and repairs of a drainage system and the plans for accomplishing the result, are ordinarily within the discretion of the board of supervisors of the district, but it must act, and its acts must be commensurate with its legal duty. *Ritter v. Drainage District No. 1* 873

17. Where parties in interest cannot agree with respect thereto, drainage district must construct bridges and approaches where highway crosses drainage ditch, and county has the duty to maintain same after construction. *Ritter v. Drainage District No. 1* 873

Easements.

1. A decree granting a prescriptive right to an easement for a roadway over the land of another protects only the reasonable use of the way as it was used over the period which gave the prescriptive right. *Drieth v. Dormer* 422

2. A decree, to the extent that it purports to extend the right of a dominant tenant in an easement for a roadway acquired by prescription beyond reasonable use thereof as it was used over the period when the right was being acquired, is invalid and no rights flow therefrom. *Drieth v. Dormer* 422

3. The creation of a private way by prescription does not take away from the owner of the land over

which it passes any portion of the fee of the soil. *Drieth v. Dormer* 422

4. A private way acquired by prescription carries with it only such incidents as are necessary to its reasonable enjoyment. *Drieth v. Dormer* 422
5. The owner of land over which a private way has been acquired by prescription has the right to the use of the way for any purpose so long as he does not interfere with the right of passing resting in the owner of the easement. *Drieth v. Dormer* 422
6. When an easement for a drainage ditch which is exempt from taxation has not been taken into consideration in taxing the real property across which such ditch runs, and when the exempt and the nonexempt parts of said property can be separated, this should be done, and the correct amount of taxes legally due on the nonexempt portion of said real estate be apportioned to it. *Reed v. County of Douglas* 505

Elections.

1. When a ballot for the formation of a drainage district affirmatively discloses that the voter is the owner of the number of acres voted, the mere fact that such voter may have written down the nature of the instrument by which he acquired title on the ballot in answer to "nature of title to or interest in above," does not invalidate the ballot. *Chicago & N. W. Ry. Co. v. Payne Creek Drainage District* 139
2. When the canvassing board certifies a true and correct exhibit of the votes cast for the formation of a drainage district and the board of directors, naming the place of the election and the date thereof, and the fact that the ballots are on file in the county clerk's office in accordance with the provisions of the law, it is sufficient compliance with the statute. *Chicago & N. W. Ry. Co. v. Payne Creek Drainage District* 139

Embezzlement.

1. A fine in an embezzlement prosecution assessed against an officer charged with the collection of public money operates as a judgment at law on all of the estate of the party convicted and is enforceable by execution. *Canada v. State* 115
2. The lien of a fine in an embezzlement prosecution

operates against the property of the defendant within the county from the time of docketing the case by the clerk of the court wherein the conviction was obtained and the fine imposed. *Canada v. State* 115

Equity.

1. The basic reason for equitable jurisdiction in an action for an accounting is inadequacy of remedy at law. *Schmidt v. Henderson* 343
2. Equity jurisdiction is not available for ordinary cases of mutual accounts between creditor and debtor but it is available where intimate or confidential relations of the parties are involved. *Schmidt v. Henderson* 343
3. On appeal to the Supreme Court, actions in equity are triable de novo, subject to the consideration that the Supreme Court will consider 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. *O'Brien v. Fricke* 369
4. Equity will not interfere with a judgment on a mere showing of a nominal or technical violation of the plaintiff's rights; substantial injury must be shown. *Davies v. De Lair* 395
5. Statute enumerating grounds under which a judgment may be vacated after expiration of term at which judgment was rendered does not provide exclusive remedy, but such grounds are concurrent with independent equity jurisdiction. *Shinn v. Shinn* 832
6. Where the circumstances call for equitable relief, a decree may, upon petition in equity, be set aside by a court of equity having jurisdiction of the parties and of the subject matter of the suit, after expiration of the term at which it was rendered. *Shinn v. Shinn* 832

Evidence.

1. Where witness had no opportunity to formulate a basis therefor, it was error to permit him to give an estimate of speed of a motor vehicle. *Tews v. Bamrick and Carroll* 59
2. Where witness had reasonable time, means, distance, and opportunity to formulate a basis therefor,

witness could testify as to his opinion of speed of motor vehicle. *Tews v. Barmick and Carroll* 59

3. Admission of cumulative evidence is within discretion of trial court. Error cannot be predicated thereon unless such discretion is abused. *Horky v. Schroll* 96

4. "Admissions" in the law of evidence are concessions or voluntary acknowledgments made by a party of the existence of certain facts. *Kellner v. Whaley* 259

5. An admission should possess the same degree of certainty as would be required in the evidence which it represents, and hence mere conjectures or suggestions as to what might have happened if certain circumstances had occurred, are not competent. *Kellner v. Whaley* 259

6. Evidence examined and held sufficient to constitute delivery of deeds in question. *Kellner v. Whaley* 259

7. A letter written by a public officer stating what the records of his office disclose is not competent evidence of the facts stated. *Kline v. Metcalfe Construction Co.* 357

8. The admission of evidence based on skid marks as to the speed of a car, as detailed in the opinion, held prejudicial error. *Piechota v. Rapp* 442

9. The admission of evidence as to the possible earning capacity of a deceased child, under the facts as detailed in the opinion, held to permit the jury to calculate plaintiff's damages upon a purely speculative, uncertain, and conjectural basis, and to be prejudicial error. *Piechota v. Rapp* 442

10. Where the evidence shows that the deceased child lived with and assisted her grandmother, it was not error to permit the mother (plaintiff) to testify that the grandmother was dependent on the mother for support. *Piechota v. Rapp* 442

11. A plea of guilty entered by the defendant in a criminal action may be used against him as an admission that he committed the acts charged against him, in any subsequent action to which he is a party and which involves the same subject matter. *Piechota v. Rapp* 442

12. That a matter is judicially noticed means merely that it is taken as true without the offering of evidence by the party who should ordinarily have done so. It has no other effect than to relieve one

of the parties of the burden of resorting to the usual forms of evidence. *Piechota v. Rapp* 442

13. As a general rule, an issue as to the existence or occurrence of a particular fact, condition, or event may be proved by evidence as to the existence or occurrence of particular facts, conditions, or events under the same or substantially similar circumstances. *Ellis v. Union P. R. R. Co.* 515

14. Where evidence has been admitted that the defendant and the complaining witness were outdoors in a yard when a shot was fired from a gun in the hands of defendant, and evidence has also been admitted as to what was said by defendant and complaining witness immediately prior to and after the shot was fired, and no one else being shown to have been present, evidence of parties nearby, who at the time and place heard the words and the shot and related the words heard, but did not identify the parties nor the voices as those of the complaining witnesses and defendant, is admissible as circumstantial evidence. *Hampton v. State* 574

15. Where a photograph illustrates or makes clear some controverted issue in the case, a proper foundation having otherwise been laid for its reception in evidence, it may properly be received, even though it may present a gruesome spectacle. *Hampton v. State* 574

16. The rule that generally threats made against a third person by a defendant prior to the commission of a crime are not admissible as evidence against a defendant held not applicable under the circumstances related in the opinion. *Hampton v. State* 574

17. Statute providing for inspection and copy of documents is a part of the Civil Code and has no application to proceedings in criminal cases. *Hameyer v. State* 798

18. An objection to evidence made for the first time after it has been received and the witness from whom it was elicited excused comes too late and it may not be considered as ground for reversal. *Hameyer v. State* 798

19. Photographs which illustrate a fact in issue are admissible in evidence. *Hameyer v. State* 798

20. Enlargements of photographs which may make proportions plainer and serve to illustrate testimony

of witnesses on facts in issue are admissible in evidence. *Hameyer v. State* 798

21. Where documentary evidence is offered or a question is asked an objection is properly overruled unless it is good as to the entire document or question. *Hameyer v. State* 798

Executions.

1. The denial of an application for a special execution to secure the return of the property only is a denial of a substantial right and constitutes a final order from which an appeal may be taken. *Barstow v. Wolff* 14
2. As a general rule, in the absence of a statute expressly granting such right, the land and property of the state or its agencies or political subdivisions is not subject to seizure under general execution. General statutory provisions making property subject to execution are construed to apply only to the property of private persons or corporations, and not to that of the state or its governmental subdivisions. *County of Madison v. School District No. 2* 218

Executors and Administrators.

1. When the administrator refuses or neglects to bring an action, the creditors of the estate ordinarily are entitled to do so. Under such circumstances they are subrogated to the rights of the administrator. *Mead Co. v. Doerfler* 75
2. The right to offset an indebtedness owing by a legatee to the estate and apply it to the legacy may be properly asserted in the county court having exclusive, original jurisdiction over the administration of estates. *In re Estate of Williams* 208
3. An executor may lease decedent's land until debts have been paid and the estate settled. A lease for a longer period of time is voidable, but not void, and may be ratified by the heirs. *Chesnut v. Master Laboratories* 378

False Pretenses.

1. The pretense or pretenses relied on to constitute the crime of obtaining money by false pretenses must relate to a past event or an existing fact. *Hameyer v. State* 798

2. Any representation, assurance, or promise in relation to a future transaction, however false and fraudulent it may be, may not be the basis of a prosecution for obtaining money by false pretenses. *Hameyer v. State* 798
3. In a charge of obtaining money by false pretenses proof that the defendant received a check, draft, or a certificate of deposit which was paid is not a variance from the charge. *Hameyer v. State* 798

Fines.

1. A fine in an embezzlement prosecution assessed against an officer charged with the collection of public money operates as a judgment at law on all of the estate of the party convicted and is enforceable by execution. *Canada v. State* 115
2. The lien of a fine in an embezzlement prosecution operates against the property of the defendant within the county from the time of docketing the case by the clerk of the court wherein the conviction was obtained and the fine imposed. *Canada v. State* 115
3. If the sentence in an embezzlement action exceeds two years the lien of the fine in such action does not attach to a homestead interest not exceeding in value $2,000, and such fine may not be enforced against the homestead interest unless the same, being still owned, is abandoned as a homestead. *Canada v. State* 115

Forcible Entry and Detainer.

1. The action of forcible entry and detainer is a statutory proceeding and original jurisdiction thereof is conferred on justices of the peace, county courts, and municipal courts. *Schmidt v. Henderson* 343
2. District courts are without original jurisdiction in actions of forcible entry and detainer. *Schmidt v. Henderson* 343

Fraud.

1. Direct evidence is not essential to establish fraud. It may be inferred from circumstances; but such inference must not be guesswork or conjecture, but the rational and logical deduction from the circumstances proved. *Herlan v. Bleck* 816
2. Fraud is never presumed and the party alleging

and relying thereon must prove it. However, what constitutes fraud is a matter of fact in each case. Courts content themselves with determining from the facts in each case whether fraud does or does not exist, for whatever satisfies the mind and conscience that fraud has or has not been practiced is sufficient. *Herlan v. Bleck* 816

Frauds, Statute of.

1. Every contract for the leasing of land for a longer period than one year is void unless the contract or some note or memorandum thereof is in writing and signed by the party by whom the lease is made. *Schmidt v. Henderson* 343
2. An oral lease for only one year but entered into prior to the beginning of the term is void under the statute. *Schmidt v. Henderson* 343
3. An oral lease for one year entered into before the commencement of the agreed term, though void, becomes valid on entry into possession at or after the commencement of the agreed term. *Schmidt v. Henderson* 343
4. Specific performance of an oral contract to convey real estate may not be decreed on the basis of part performance unless the acts of part performance by the promisee, in relation to the subject matter, in and of themselves unequivocally indicate the existence of the contract alleged and cannot be accounted for on any other reasonable hypothesis. *Kesselman v. Goldsten* 452
   Smith v. Kinsey 786
5. Specific performance of an oral contract to convey real estate may be decreed if there have been acts of part performance by the promisee, in relation to the subject matter, and the acts of part performance in and of themselves unequivocally indicate the existence of the alleged contract and cannot be accounted for on any other reasonable hypothesis. *Kesselman v. Goldsten* 452
6. By express provisions of statute, trusts arising by implication or by operation of law are excepted from the operation of the statute of frauds. *Watkins v. Waits* 543
7. Both resulting and constructive trusts fall within the exception to the statute of frauds excepting from its operation trusts arising by operation of law. *Watkins v. Waits* 543

8. Every contract for the leasing for a longer period than one year, or for the sale of any lands, is void under the statute of frauds 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. *Baker v. Heavrin* 766
Smith v. Kinsey 786
9. The statute of frauds does not abridge the powers of a court of equity to compel the specific performance of agreements in cases of part performance. *Baker v. Heavrin* 766
10. In order that an oral contract for the sale of real estate may be enforced by a court of equity, the evidence must disclose a contract clear, satisfactory, and unequivocal in terms; that there was part performance; that the thing done constituting part performance was referable to the contract and not such as might be referable to some other or different contract; and that the thing done in part performance was some act recognizable as a basis in equity for granting relief. *Baker v. Heavrin* 766
11. Part payment of the consideration of an oral contract for the sale of real estate unaccompanied by other acts of part performance is insufficient as a basis for a decree of specific performance of the contract. *Baker v. Heavrin* 766
12. In an action for specific performance of an oral contract where one is claiming the estate of a deceased person the evidence of such contract and its terms must be clear, satisfactory, and unequivocal. *Smith v. Kinsey* 786

Gifts.

1. The essential elements of a gift inter vivos are donative intent, delivery, and acceptance. *In re Estate of Scott* 182
2. Once it is ascertained that it was the intention of the donor to make a gift inter vivos of an undivided interest in a chattel or chose in action, and all is done under the circumstances which is possible in the matter of delivery, the gift will be sustained. *In re Estate of Scott* 182
3. Delivery may be symbolical or constructive if as nearly perfect and complete as the nature of the property and the attendant circumstances will permit. *In re Estate of Scott* 182

Guaranty.

1. A guaranty is a collateral undertaking by one person to answer for the payment of a debt or the performance of some contract or duty in case of the default of another person who is liable for such payment or performance in the first instance. *In re Estate of Williams* 208
2. A guaranty is collateral to, and made independently of, the principal contract which is guaranteed; and the guarantor's liability is secondary rather than primary or original. *In re Estate of Williams* 208
3. Where a guarantor, who has entered into a contract of guaranty at the request of, or with the consent of, the principal obligor, pays or is compelled to pay his principal's debt, the law raises an implied promise, unless there is an express one, on the part of the principal to reimburse the guarantor, and on the payment of the debt the guarantor at once has a right of action against the principal for reimbursement of the amount which he has paid, with interest thereon at the legal rate. *In re Estate of Williams* 208
4. Where the guaranty is made at the principal's request or with his consent, since the principal knows the terms under which payment is to be made and that he has not made payment, no duty rests on the guarantor to notify the principal that he has made the payments when due. *In re Estate of Williams* 208

Guardian and Ward.

1. The purposes for which a guardian may be authorized to sell real estate of his ward upon obtaining a license therefor are set forth by statute, which must be complied with to enable the guardian to sell his ward's real estate. *Webber v. Spencer* 481
2. Before a guardian may proceed to sell the real estate of his ward he must obtain a license to sell from the district court. *Webber v. Spencer* 481
3. Failure on the part of a guardian to comply with statutory provisions to sell the lands of his ward renders a contract for sale thereof void and against public policy. *Webber v. Spencer* 481
4. A contract by a guardian to sell his ward's land in advance of legal authority is contrary to public policy and void. *Webber v. Spencer* 481
5. The rule of caveat emptor applies to a purchaser

under a contract of sale of an insane ward's lands as well as a guardian's sale of the real estate of a ward. *Webber v. Spencer* 481

6. There are distinctions between the rights, powers, and duties of a guardian and those of a trustee, in that a trustee has title to the trust property with an equitable interest in the beneficiary, whereas a guardian has no title, but only certain powers and duties to handle therewith for the ward's benefit, the ward having the title. *Webber v. Spencer* 481

7. Where a surety on a guardian's bond is compelled to make good a loss to the property of the ward which is in excess of the value thereof, and by doing so makes the estate of the ward whole in such respect, under these circumstances the surety is subrogated to all rights and interests of the ward in such property. *Webber v. Spencer* 481

Habeas Corpus.

Habeas corpus will not lie to secure the release of the person from a sentence to imprisonment for a period less than the minimum penalty provided for the offense until the sentence so imposed is served. *Gamron v. Jones* 645

Highways.

1. To establish a highway by prescription there must be a user by the general public under a claim of right, and which is adverse to the occupancy of the owner of the land, of some particular or defined way or track, uninterruptedly, without substantial change, for a period of time necessary to bar an action to recover the land. *Gilliland v. County of Frontier* 636

2. Where parties in interest cannot agree with respect thereto, drainage district must construct bridges and approaches where highway crosses drainage ditch, and county has the duty to maintain same after construction. *Ritter v. Drainage District No. 1* 873

Homesteads.

1. If the sentence in an embezzlement action exceeds two years the lien of the fine in such action does not attach to a homestead interest not exceeding in value $2,000, and such fine may not be enforced

against the homestead interest unless the same, being still owned, is abandoned as a homestead. *Canada v. State* 115

2. A homestead, as defined by statute, once established, is presumed to continue as such, and the burden of proving a waiver, loss, or abandonment thereof, is upon the party asserting such waiver, loss, or abandonment. *Karls v. Nichols* 712

Homicide.

1. Statutes on murder and manslaughter define the degrees of the crime of criminal homicide, a single offense, and prescribe the duty of the court and jury in ascertaining the degree and imposing sentence. *Moore v. State* 747
2. The unlawful killing constitutes the principal fact but the condition of the mind or attendant circumstances determine the degree or grade of the offense, and the greater of the degrees includes the lesser degrees, they being necessarily involved as a constituent part of the higher crime. *Moore v. State* 747
3. Consequently, if the information charges murder in the first degree, a conviction of murder in the second degree, or manslaughter, may lawfully be sustained, although the evidence was sufficient to have sustained a verdict of murder in the first degree. *Moore v. State* 747
4. Where an information charges the crime of murder in the first degree, murder in the second degree and manslaughter are included in the charge, the degree ordinarily being for the jury, and where the evidence and circumstances of the killing are such that different inferences may properly be drawn therefrom as to the degrees, it becomes the duty of the court to submit the different degrees to the jury for them to draw the inferences. *Moore v. State* 747

Husband and Wife.

1. A husband may act as agent of his wife in contracting for materials to be used in making improvements on her property, and the question of agency is one of fact to be determined from all the circumstances of each particular case. *Mead Co. v. Doerfler* 75
2. 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 scrutinze 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 by reason of ignorance, passion, or improvidence. *Pittman v. Pittman* 864

Improvements.

The Occupying Claimants Act does not protect from the enforcement of a lien against real estate upon which improvements have been placed without compensation for such improvements. *Wightman v. City of Wayne* 700

Indictments and Informations.

1. To charge a statutory offense, the information or complaint must contain a distinct allegation of each essential element of the crime as defined by the law creating it, either in the language of the statute or its equivalent. *Fredericksen v. Dickson* 739
2. In a charge of obtaining money by false pretenses proof that the defendant received a check, draft, or a certificate of deposit which was paid is not a variance from the charge. *Hameyer v. State* 798
3. A variance between the allegations in the information and the evidence offered in proof thereof is not fatal unless it is material to the merits of the case or such as is prejudicial to the defendant. *Fullerton v. State* 811

Infants.

A child of tender years is not chargeable with contributory negligence. *Tews v. Bamrick and Carroll* 59

Injunctions.

1. Where the plaintiff fails to allege in its petition for an injunction that the cost of the contemplated work for a public improvement equals or exceeds 20 percent of the assessed value of the land embraced within a drainage district and that an estimate of the cost of such work be furnished, such

matter is not to be determined when a demurrer to the petition is considered on appeal. Since the issue was not raised in the proceedings for the organization of a drainage district, the proceedings are not subject to collateral attack. *Chicago & N. W. Ry. Co. v. Payne Creek Drainage District* 139

2. Injunction affords a proper remedy to relieve from the continuing damage of recurring floods which are the proximate result of such a dam or dike construction. *Frese v. Michalec* 567

Innkeepers.

1. Where a hotel company claims the benefit of a statute altering its common-law liability, the burden is on it to show compliance with the provisions of such statute on its part. *Roger Wurmser, Inc. v. Interstate Hotel Co.* 660
2. A statute regulating or limiting the liability of an innkeeper applies only to his common-law liability as an insurer and has no application where the cause of action of the guest is based solely on the negligence of the innkeeper in caring for property entrusted to him. *Roger Wurmser, Inc. v. Interstate Hotel Co.* 660
3. Where, as here, it is admitted that the plaintiff's salesman failed to inform the defendant's employees, with whom he left and entrusted his sample case, that it contained precious stones of the value of $187,755.04, such failure to inform the defendant's employees as to its contents is more than slight negligence as a matter of law and bars the plaintiff's right to recover because of its own contributory negligence. *Roger Wurmser, Inc. v. Interstate Hotel Co.* 660

Insane Persons.

1. Applications for admission of dipsomaniacs to a state hospital for the insane must be in writing in the nature of an information, verified by affidavit. Hearing must be had and commitment made according to statutory provisions relating to dipsomaniacs and not those relating to insane persons generally. *In re Application of Cupita* 555
2. Where it appears that the proceedings of the commissioners of insanity were so irregular as not to justify the detention of the patient, the patient

then, by order of court, should be returned to the sheriff of the county from which he came, and new proceedings should be had before the commissioners of insanity of the county. *In re Application of Cupita* 555

Insurance.

1. The evidence is reviewed and a finding made that a premium payment on a life insurance policy was made in time. *Cunningham v. Northwestern Mutual Life Ins. Co.* 250
2. Stipulations in a contract of life insurance inserted for the benefit of the insurer may be waived by it. *Cunningham v. Northwestern Mutual Life Ins. Co.* 250
3. Statute does not authorize the allowance of an attorney's fee in an action to compel reinstatement of life insurance policy. *Cunningham v. Northwestern Mutual Life Ins. Co.* 250
4. Unless the policy specifically provides otherwise the term "due proof of death" as used in a policy of life insurance does not require any particular form of proof which the insurer might arbitrarily demand, but such a statement of facts which, if established in court, would require payment of the claim or some portion thereof. *O'Neil v. Union National Life Ins. Co.* 469
5. In transactions relating to insurance contracts, a party is generally required to exercise the same ordinary care and prudence as in any other business transaction. *Reid v. Bankers Life Co.* 604
6. If an insured makes application for and accepts a life insurance policy which is issued and delivered in accordance therewith, the beneficiary in a suit at law upon the instrument cannot ordinarily have it enforced otherwise than according to its terms. *Reid v. Bankers Life Co.* 604
7. Where such a contract of life insurance was antedated by agreement of the parties, as shown by the application and policy, it is binding upon them as of that date, and the controlling premium payment dates are those recited therein. *Reid v. Bankers Life Co.* 604
8. Although an application for a life insurance policy issued and delivered in accordance therewith may state that the policy shall not take effect until the application is approved by the insurer or until the

first premium is paid or until the policy is issued or delivered, the effective date of the policy and the premium payment dates provided for in the policy control in the absence of inconsistency, ambiguity, mistake, fraud, or statutory prohibition, regardless of the date such dependent event occurred. *Reid v. Bankers Life Co.* 604

Intoxicating Liquors.

1. Applications for admission of dipsomaniacs to a state hospital for the insane must be in writing in the nature of an information, verified by affidavit. Hearing must be had and commitment made according to statutory provisions relating to dipsomaniacs and not those relating to insane persons generally. *In re Application of Cupita* 555
2. Where it appears that the proceedings of the commissioners of insanity were so irregular as not to justify the detention of the patient, the patient then, by order of court, should be returned to the sheriff of the county from which he came, and new proceedings should be had before the commissioners of insanity of the county. *In re Application of Cupita* 555

Judgments.

1. The alternative money judgment provided for by statute affords a measure of relief only when the property cannot be returned. *Barstow v. Wolff* 14
2. A defendant in such a case is entitled to exhaust the powers of the court in securing a return of his property before he is obliged to accept the alternative money judgment. *Barstow v. Wolff* 14
3. An order is not final when the substantial rights of the parties involved in the action remain undetermined and when the cause is retained for further action. In such a case, the order is interlocutory. *Barry v. Wolf* 27
4. Where a bona fide attempt has been made to organize a drainage district, the legality of its organization cannot be collaterally attacked for irregularities and defects not affecting the jurisdiction of the tribunal by which it was created. *Chicago & N. W. Ry. Co. v. Payne Creek Drainage District* 139
5. Where the excessive amount in a judgment is subject to exact determination, a remittitur may be required

as a condition of affirmance for the correct amount. *Moore v. Schank* 228

6. Matters expressly, or by distinct and necessary implication, adjudicated at a former hearing will not be considered again in the same case. *De Lair v. De Lair* 393
7. It is not sufficient for a party seeking the vacation of a judgment or decree to show that it was obtained by the fraud of his adversary, but he must go farther and show that the failure to obtain a just decision is not attributable to his own fault or negligence. *Davies v. De Lair* 395
8. It is, as a rule, not sufficient to allege generally that due diligence has been used, but the facts constituting diligence must be set out. *Davies v. De Lair* 395
9. A litigant may not voluntarily accept payment of the part of a judgment or decree which is in his favor and thereafter prosecute an appeal from the part which is against him. *Nuss v. Nuss* 417
10. A judgment of the municipal court obtained by fraud, prejudice, or undue means may be set aside by that court only within four days of the entry thereof by that court. *O'Grady v. Volcheck* 431
11. On the setting aside of a judgment of the municipal court for fraud, prejudice, or undue means a new trial shall be granted and a date set for a new trial and the opposite party given at least three days' notice thereof. *O'Grady v. Volcheck* 431
12. The municipal court has no power to vacate or set aside its judgments obtained by fraud, prejudice, or undue means except such as is provided by statute. *O'Grady v. Volcheck* 431
13. The proper function of a nunc pro tunc order is to correct a record which has been made so that it will truly record the action had, which through inadvertance or mistake has not been truly recorded. *O'Grady v. Volcheck* 431
14. A nunc pro tunc order is one the design and purpose of which is to make the record speak the truth. *O'Grady v. Volcheck* 431
15. The purpose of a nunc pro tunc order is not to correct, change, or modify affirmative action previously taken by the court. *O'Grady v. Volcheck* 431
16. A party may not be vexed more than once for the same cause of action, and the doctrine of res

judicata includes not only the things which were determined in the former suit, but also any other matter properly involved which might have been raised and determined therein. *Wightman v. City of Wayne* 700

17. An adjudication upon a claim for general equitable relief bars, under the principles of res judicata, a renewal of such claim in a subsequent action involving the same subject matter. *Wightman v. City of Wayne* 700

18. Statute enumerating grounds under which a judgment may be vacated after expiration of term at which judgment was rendered does not provide exclusive remedy, but such grounds are concurrent with independent equity jurisdiction. *Shinn v. Shinn* 832

19. Where the circumstances call for equitable relief, a decree may, upon petition in equity, be set aside by a court of equity having jurisdiction of the parties and of the subject matter of the suit, after expiration of the term at which it was rendered. *Shinn v. Shinn* 832

20. Where decree approving an unfair separation agreement was obtained through fraud or intimidation, or by reason of ignorance, passion, or improvidence, such decree may be set aside. *Pittman v. Pittman* 864

Juries.

1. Where two or more persons are severally indicted or informed against for the commission of an offense arising out of the same incident so that the same witnesses and testimony will necessarily be used against each and separate trials are had, jurors who sat in the trial of one are thereby disqualified to sit in the trial of another. *Bufford v. State* 38

2. When the trial court erroneously fails to sustain the proper challenge of a juror for cause a reversal will not result unless it is made to appear that the error brought injury to the accused. *Bufford v. State* 38

3. Where the authority of a person to represent another becomes material during a trial of an action at law and the evidence upon that point is conflicting, the issue is one of fact for the determination of the jury. *Mead Co. v. Doerfler* 75

4. A verdict may be set aside as excessive by the trial court or on appeal only when it is so clearly exorbitant as to indicate that it was the result of passion, prejudice, mistake, or some means not apparent in the record, or it is clear that the jury disregarded the evidence or rules of law. *Horky v. Schroll* 96

5. The question of whether or not a party is entitled to a trial by jury is determinable by the nature of the case at its inception. *Schmidt v. Henderson* 343

6. That the list of persons from which jury panel was selected was submitted by county board less than fifteen days before opening of the term is not ground for challenge to the array, unless the defendant can show that he was prejudiced thereby. *Starnes v. State* 888

Landlord and Tenant.

1. Where, by the terms of a lease, rent is reserved in a share of the crops, the landlord and tenant are tenants in common of growing crops. *Schmidt v. Henderson* 343

2. Covenants against assignment or underletting are not favorably regarded by the courts and are liberally construed in favor of the lessee. *Chesnut v. Master Laboratories* 378

3. The scope of a prohibition against an assignment in a lease will not be enlarged by the courts, and the covenant will not be considered as violated by any technical transfer that is not fairly and substantially an assignment. *Chesnut v. Master Laboratories* 378

4. Forfeitures of estate under leases are not favored in law and the right to forfeit must be clearly stipulated. If a forfeiture has not been stipulated for, a covenant or condition which is merely implied, or an express one not clearly within the forfeiture clause, will not sustain a claim of forfeiture for breach. *Chesnut v. Master Laboratories* 378

5. The restriction against an assignment of a lease may be waived by the acts or conduct of the lessor in recognition of the validity of an assignment, as where, with knowledge of the facts, the lessor permits an assignee to remain in possession, and accepts subsequently accruing rents from him when

the lessor is vested with knowledge of the alleged breach of the lease. *Chesnut v. Master Laboratories* 378

6. Where the owners of property sue for damages and predicate their cause of action upon a written lease, they have thereby ratified the lease as a valid contract binding upon them and the party sued. *Chesnut v. Master Laboratories* 378

Limitations of Actions.

1. In this state the statute of limitations is a statute of repose; it prevents recovery on stale demands. If the petition in an action sets forth facts which show upon its face that it is barred by statute, and in avoidance thereof further facts are alleged to remove the bar of the statute, all of which are positively denied by the answer, together with the added allegations that the cause of action is barred by the statute of limitations, the plaintiff cannot recover without first establishing the facts so alleged in avoidance. *In re Estate of Anderson* 436
2. A voluntary payment upon a claim otherwise barred by the statute of limitations is one that was intentionally and consciously made and accepted as part payment of the particular indebtedness in question under such circumstances as would warrant a clear inference that the debtor assented to and acknowledged the greater debt to be due as an existing liability. *In re Estate of Anderson* 436

Master and Servant.

1. The Placement and Unemployment Insurance Act is to be liberally construed so that its beneficent purposes may be accomplished. This rule of construction applies to the law and not to the evidence. The rule does not dispense with the necessity of claimant establishing a right to the benefits of the act, nor does it permit an award of benefits where the requisite showing that claimant is entitled to the benefits of the act is lacking. The act cannot be extended by construction to noncompensable claims. *Hunter v. Miller* 402
2. Registration for work under the act, alone, is not sufficient to show a prima facie right to the benefits of the act. *Hunter v. Miller* 402
3. A hard and fast rule as to when a claimant is available for work under the Placement and Unem-

ployment Insurance law cannot be adopted. It depends upon the facts and circumstances of each case. *Hunter v. Miller* 402

Municipal Corporations.

Under statute, service as a member of the police department for 20 years or more in the aggregate and age of 50 years or over must concur while the member is in active service to entitle him to the benefits of the act. *Vanous v. City of Omaha* 685

Negligence.

1. In an action for negligence the burden is on the plaintiff to show that there was a negligent act or omission by the defendant and that it was the proximate cause of plaintiff's injury or a cause which proximately contributed to it. *Tews v. Bamrick and Carroll* 59
2. A child of tender years is not chargeable with contributory negligence. *Tews v. Bamrick and Carroll* 59
3. Negligence of driver of automobile is not ordinarily imputed to his guest, but the guest may be responsible for his own negligence. *Hamblen v. Steckley* 283
4. Invited guest owes duty to warn driver of automobile of known approaching danger, unless it appears that warning would be of no avail, or that the driver observed or should have observed the danger as well as the guest. Failure to give such warning by the guest may constitute contributory negligence. *Hamblen v. Steckley* 283
5. Invited guest, with knowledge of approaching danger, must protest to host if there is time and opportunity, unless it appears such protest would be of no avail. Failure so to do may constitute contributory negligence. *Hamblen v. Steckley* 283
6. Slight negligence actually means small or little negligence, while gross negligence means just what it indicates, gross or great negligence, that is, negligence in a very high degree. *Hamblen v. Steckley* 283
7. If the defendant's wrongful act is the proximate cause of a compensable injury to the plaintiff, then the question whether the defendant could or should have foreseen the result becomes immaterial. The principle established would certainly not be less true

where the act complained of is not mere negligence, but a willful tort. That defendant could not foresee nor anticipate plaintiff's injury, therefore, avails him nothing. *Wright v. Cameron* 292

8. If a driver confronted with an emergency turns his car to the left in an attempt to avoid a collision, the question of negligence is for the determination of the jury. *Spaulding v. Howard* 496

9. If the defendant pleads that the plaintiff was guilty of contributory negligence, or that the accident resulted solely from his negligence, the burden is upon the defendant to prove those defenses, and does not shift during the trial of the case, but he should receive the benefit of the plaintiff's evidence tending to prove those issues. *Spaulding v. Howard* 496

10. Where reasonable men might draw different conclusions from the evidence, negligence is a question for the jury. *Spaulding v. Howard* 496

11. To recover under the Federal Employers' Liability Act, plaintiff must establish by a preponderance of the evidence that defendant was negligent in one or more of the particulars as alleged in his petition, and that such negligence was in whole or in part the proximate cause of his injuries. *Ellis v. Union P. R. R. Co.* 515

12. Assumption of risk is ordinarily an affirmative defense and unless made an issue by the pleadings and evidence, no instruction should be given thereon. *Ellis v. Union P. R. R. Co.* 515

13. In actions to recover damages under the Federal Employers' Liability Act, the defense of assumption of risk has been removed from the law only if the risk involved was in whole or in part caused by or resulted from defendant's negligence. *Ellis v. Union P. R. R. Co.* 515

14. As the Federal Employers' Liability Act is construed, the carrier cannot be relieved from the consequences of its own negligence by claiming that the employee assumed the risk thereof, but the carrier cannot be charged with or liable for those injuries which result from the usual risks incident to employment, notwithstanding its exercise of reasonable care, or for those solely caused by or resulting from plaintiff's own negligence, although his contributory negligence as a defense will only pro-

portionately diminish his recovery. *Ellis v. Union P. R. R. Co.* 515

15. In actions to recover under the Federal Employers' Liability Act, it is prejudicial error to instruct the jury without appropriate qualification that plaintiff cannot be held to have assumed the risk of his employment. *Ellis v. Union P. R. R. Co.* 515
16. It is the duty of an automobile driver to keep such a lookout ahead that he will see an obstruction or a vehicle as soon as it is illuminated by the lights of his automobile. It is his duty to have his automobile under such control, under the driving conditions then existing, that he can stop it in time to avoid a collision with an object in the area lighted by its lights. *Allen v. Clark* 627
17. Where contributory negligence is pleaded as a defense, but there is no evidence to support such defense, it is prejudicial error to submit such issue to the jury. *Allen v. Clark* 627
18. Where the evidence clearly shows that the plaintiff's negligence was more than slight when compared with any possible negligence of the defendant, the trial court shall direct a verdict for the defendant. *Pierson v. Jensen* 849

Negotiable Instruments.

The evidence on an issue of payment of a promissory note is examined and held not to present a jury question. *Steele v. Nemer* 8

New Trial.

1. When, in an equity case, the Supreme Court upon appeal directs the district court to enter a different judgment than the one appealed from, the defeated party may, within three days from the rendition of the judgment in the district court and within the term, file a motion for a new trial. *De Lair v. De Lair* 393
2. Whether a new trial should be granted upon the ground of newly discovered evidence depends upon the facts and circumstances of each case. *Severin v. State* 617
3. An application for a new trial must be made at the term the verdict, report, or decision is rendered, and, except for the cause of newly discovered evidence, material for the party applying,

which he could not, with reasonable diligence, have discovered and produced at the trial, shall be within three days after the verdict or decision was rendered, unless unavoidably prevented. *Ehlers v. Neal* 697

4. A motion for a new trial that is not filed within the time specified by statute is a nullity and of no force and effect. *Ehlers v. Neal* 697

Notice.

Where the record affirmatively discloses that the directors of a drainage district acted officially in the publication of required notices, substantial compliance with statute has been had. *Chicago & N. W. Ry. Co. v. Payne Creek Drainage District* 139

Officers.

1. Where the required number of directors of a drainage district are elected as provided by law, and one fails to qualify, the remaining duly elected and qualified directors may fill the vacancy by appointment. *Chicago & N. W. Ry. Co. v. Payne Creek Drainage District* 139
2. The statutes make no requirements as to the qualifications of the engineer selected by the board of directors of a drainage district. The qualifications of such engineer can only be attacked directly, and not collaterally. *Chicago & N. W. Ry. Co. v. Payne Creek Drainage District* 139

Parent and Child.

1. Since they are not absolute rights but must yield to the best interests of the child, the natural rights of a parent to the custody and control of his infant child are subject to the power of the state, and may be restricted and regulated by appropriate legislative or judicial action. *Gorsuch v. Gorsuch* 122
2. The state's power in this respect is based on its position as parens patriae, on the right of the child, as citizen and ward, to its protection, as well as upon the state's interest in its own perpetuation. *Gorsuch v. Gorsuch* 122
3. A father usually continues to be liable for the support of his minor children to the same extent after the divorce as before, and provisions in a

divorce decree for their suitable maintenance and support are entirely distinct from the allowances of specific alimony to the wife. *Sims v. Sims* 771

Parties.

1. A trial court is required to order new parties to an action when a determination of the controversy cannot be had without the presence of such parties. *Dent v. City of North Platte* 718
2. It is not error for the trial court to refuse to order new parties to an action unless it is made to appear that the controversy cannot be determined without the presence of such parties. *Dent v. City of North Platte* 718

Partition.

A lease of property held in common does not prevent partition. Partition of such property is subject to the rights of the lessee. *Schmidt v. Henderson* 343

Partnership.

1. Ordinarily a working partner is not entitled to compensation for injuries suffered while engaged in work and labor incident to the operation of the business. *Rasmussen v. Trico Feed Mills* 855
2. For many purposes in Nebraska a partnership is an entity distinct from the parties composing it, but the entity is not a party to a contract between the partners. *Rasmussen v. Trico Feed Mills* 855
3. Ordinarily, when a partner renders service to the partnership, as is required of him in the partnership contract, he performs his obligation as a member of the partnership, and is not acting as a servant or employee. *Rasmussen v. Trico Feed Mills* 855

Payment.

1. The evidence on an issue of payment of a promissory note is examined and held not to present a jury question. *Steele v. Nemer* 8
2. A debtor who makes payment to a third person not in possession of the note, without adequate inquiries regarding its ownership and the powers of such third person, is negligent in failing to use ordinary business caution, and when loss results it must fall on such debtor under the rule that

where one of two parties to a transaction must suffer loss through the misconduct of a third person, the burden must fall on the person whose negligence made the misconduct of the third person possible. *Meier v. Geldis* 234

Pensions.

Under statute, service as a member of the police department for 20 years or more in the aggregate and age of 50 years or over must concur while the member is in active service to entitle him to the benefits of the act. *Vanous v. City of Omaha* 685

Pleading.

1. The sustaining of a motion to make more definite and certain or to strike certain parts of a pleading, without further judicial action, does not constitute a final, appealable order. *Barry v. Wolf* 27
2. An order overruling a demurrer to a petition, in the absence of further proceedings, is not a final order reviewable on appeal. *Barry v. Wolf* 27
3. A general demurrer admits facts well pleaded, but not the conclusions of the pleader. *Swanson v. State* 155
4. Where condonation is relied upon as a defense, it should be pleaded. Where a repetition of the wrong condoned is relied upon, it should be pleaded. *Eicher v. Eicher* 173
5. Where it is clear that all of the evidence to sustain or defeat an issue was adduced by the respective litigants in an equitable action in the district court, it is competent on appeal for this court in the interests of justice to permit amended pleadings to be filed so as to conform to that proof. *Eicher v. Eicher* 173
6. Under statute, power is given the court to conform the pleadings to the proof, when the amendment does not substantially change the claim or defense. A judgment based upon such proof will not be reversed for the reason that such amendment has not actually been made. If the evidence, admitted without objection, clearly proves a claim or defense, the pleading will upon appeal be considered amended accordingly. *Eicher v. Eicher* 173
7. The court will, when possible, sustain the theory intended by the pleader. *Moore v. Schank* 228
8. The judgment of a court upon a subject within

its general jurisdiction, but which is not brought before it by any statement or claim of the parties and is foreign to the issues submitted for determination, is a nullity. *Drieth v. Dormer* 422

9. It is proper for the trial court within its sound discretion to allow amendments to the pleadings where, without any specific directions, the cause has been remanded generally. *Piechota v. Rapp* 442

10. When an answer to a petition consists of a general denial, the defendant may introduce such testimony as will tend to disprove the testimony of the plaintiff in support of his petition. For such purposes no other allegations in the answer are necessary. *Alberts v. Pickard* 764

Principal and Agent.

1. An act of an agent, although without actual authority from his principal, may be with such apparent authority as to bind his principal. *Kesselman v. Goldsten* 452
2. Apparent authority of an agent cannot be restricted or extended by bylaws or other instructions to the agent by the principal in the absence of notice. *Kesselman v. Goldsten* 452
3. Whatever an agent or employee does in the lawful exercise of his authority is imputable to the principal. *Kesselman v. Goldsten* 452

Process.

1. Special statute relating to process in divorce actions is controlling. *Simon v. Simon* 620
2. Service by leaving a copy of the summons at the usual place of residence of a defendant is sufficient to give the court jurisdiction of the party served. *Simon v. Simon* 620

Railroads.

1. To recover under the Federal Employers' Liability Act, plaintiff must establish by a preponderance of the evidence that defendant was negligent in one or more of the particulars as alleged in his petition, and that such negligence was in whole or in part the proximate cause of his injuries. *Ellis v. Union P. R. R. Co.* 515
2. In actions to recover damages under the Federal Employers' Liability Act, the defense of assump-

tion of risk has been removed from the law only if the risk involved was in whole or in part caused by or resulted from defendant's negligence. *Ellis v. Union P. R. R. Co.* 515

3. As the Federal Employers' Liability Act is construed, the carrier cannot be relieved from the consequences of its own negligence by claiming that the employee assumed the risk thereof, but the carrier cannot be charged with or liable for those injuries which result from the usual risks incident to employment, notwithstanding its exercise of reasonable care, or for those solely caused by or resulting from plaintiff's own negligence, although his contributory negligence as a defense will only proportionately diminish his recovery. *Ellis v. Union P. R. R. Co.* 515
4. In actions to recover under the Federal Employers' Liability Act, it is prejudicial error to instruct the jury without appropriate qualification that plaintiff cannot be held to have assumed the risk of his employment. *Ellis v. Union P. R. R. Co.* 515
5. The Nebraska State Railway Commission is a constitutionally created body and, under section 20, article IV, of the Constitution, is endowed with powers and duties which include the regulation of rates, service and general control of common carriers as the Legislature may provide by law. In the absence of specific legislation, the commission may exercise such powers and perform such duties. *Chicago & N. W. Ry. Co. v. County Board of Dodge County* 648
6. Statute makes provision for relocation of highway made necessary to eliminate railroad crossing (1) by agreement between railroad and county board, or (2) upon failure of such parties to agree by the State Railway Commission. *Chicago & N. W. Ry. Co. v. County Board of Dodge County* 648

Rape.

1. To constitute the crime of forcible rape upon a woman of the age of 18 years or upwards, possessed of her natural physical and mental powers and not terrified by threats or force, she must resist to the extent of her ability and persist in such actual resistance, by every means at her command, until the act is consummated. *Selvage v. State* 409

2. In a charge of forcible rape, where the testimony discloses that the woman, as a result of such attack, had a bruise above her eye, discolorations on her neck and back, a bruised and bleeding heel, and was hysterical when she made complaint of being raped to her doctor, such evidence is corroborative of her denial of consent to the act, and will support a verdict of guilty. *Prokop v. State* 582
3. Whether or not prosecutrix resisted advances of defendant to the extent of her ability is a question of fact, and where her testimony, if believed, would indicate that she had so resisted, a verdict based on such testimony will not be set aside. *Starnes v. State* 888
4. Whether or not prosecutrix made complaint within a reasonable time after the alleged offense depends upon the facts and circumstances of each particular case. *Starnes v. State* 888
5. Evidence of neighbors of prosecutrix, identifying defendant and describing the condition of his clothes within a short time of when the offense was committed, was competent as corroborative of the testimony of prosecutrix. *Starnes v. State* 888

Replevin.

1. A plaintiff in replevin against whom a judgment has been rendered owes the affirmative duty of returning the property replevied to the defendant. *Barstow v. Wolff* 14
2. Under such circumstances the plaintiff has no right to elect to keep the property and pay the value thereof in lieu of the return of the property. *Barstow v. Wolff* 14
3. The alternative money judgment provided for by statute affords a measure of relief only when the property cannot be returned. *Barstow v. Wolff* 14
4. A defendant in such a case is entitled to exhaust the powers of the court in securing a return of his property before he is obliged to accept the alternative money judgment. *Barstow v. Wolff* 14
5. The denial of an application for a special execution to secure the return of the property only is a denial of a substantial right and constitutes a final order from which an appeal may be taken. *Barstow v. Wolff* 14

Schools and School Districts.

The real property of a school district held and used for school purposes cannot be sold to satisfy the lien of a tax under the provisions of the tax foreclosure statute. *County of Madison v. School District No. 2* 218

Set-off and Counterclaim.

1. A counterclaim is a cause of action of a legal or equitable nature, in favor of the defendant, and arising out of the contract or transaction which is set forth in the petition as the foundation of the plaintiff's claim, thus giving the defendant the right to relief in the same action, to the end that a complete determination thereof may be had. *McGerr v. Marsh* 50
2. The term counterclaim is broader than recoupment, set-off, or cross-action, and secures to defendant the full relief which a separate action at law or in equity would have secured. *McGerr v. Marsh* 50

Sheriffs and Constables.

1. A sheriff by statutory provision has charge of the county jail and is custodian thereof and of the prisoners therein. *Flint v. Mitchell* 244
2. If in addition to his duties as sheriff the sheriff acts as jailer he is entitled to the fee provided by statute therefor. *Flint v. Mitchell* 244
3. Where a sheriff is in full and actual charge of the jail and of the service performed in connection therewith he is the jailer and is entitled to the statutory compensation for acting as jailer. *Flint v. Mitchell* 244
4. Under the statutes the sheriff, when acting as jailer, shall receive $1.50 per day for each day when there are prisoners confined in the county jail. *Flint v. Mitchell* 244

Specific Performance.

1. A court of equity has power to compel specific performance of an oral lease for more than one year where there has been part performance. *Schmidt v. Henderson* 343
2. Specific performance of a contract by a court of equity is not generally demandable or awarded as a matter of absolute legal right, but is directed

to and governed by the sound legal discretion of the court, dependent upon the facts and circumstances of each particular case. It will not be granted where enforcement would be unjust and may be denied when the party seeking it has failed to perform. *O'Brien v. Fricke* 369

3. In suits for specific performance, courts will not attempt to make a new contract for the parties litigant which they did not make themselves, or enforce new conditions which could not have been within the minds of the contracting parties, or enforce a contract which does not contain the substance of the agreement made by the parties. *O'Brien v. Fricke* 369

4. A party who seeks specific performance must show not only that he has a valid legally enforceable contract but also that he has substantially complied with its terms, by performing or offering to perform on his part the acts which formed the consideration of the undertaking on the part of defendant or that he is ready, able, and willing to perform his obligations under the contract and do whatever has been made a condition precedent on his part, or show a valid excuse for nonperformance of the covenants incumbent upon him. *O'Brien v. Fricke* 369

5. Specific performance of a contract for the sale of real estate will not be decreed where the agreement is not binding on both parties and the mutuality of obligation is not such that it may be legally enforced by either. *O'Brien v. Fricke* 369

6. Specific performance of an oral contract to convey real estate may not be decreed on the basis of part performance unless the acts of part performance by the promisee, in relation to the subject matter, in and of themselves unequivocally indicate the existence of the contract alleged and cannot be accounted for on any other reasonable hypothesis. *Kesselman v. Goldsten* 452
Smith v. Kinsey 786

7. Specific performance of an oral contract to convey real estate may be decreed if there have been acts of part performance by the promisee, in relation to the subject matter, and the acts of part performance in and of themselves unequivocally indicate the existence of the alleged contract and cannot be accounted for on any other reasonable hypothesis. *Kesselman v. Goldsten* 452

8. If one party to a contract cannot enforce substantial performance, a court of equity will not decree specific performance at the instance of the other party. The right to specific performance must be mutual and reciprocal. *Electronic Development Co. v. Robson* 526
9. In an action for specific performance of an oral contract where one is claiming the estate of a deceased person the evidence of such contract and its terms must be clear, satisfactory, and unequivocal. *Smith v. Kinsey* 786

States.

As a general rule, in the absence of a statute expressly granting such right, the land and property of the state or its agencies or political subdivisions is not subject to seizure under general execution. General statutory provisions making property subject to execution are construed to apply only to the property of private persons or corporations, and not to that of the state or its governmental subdivisions. *County of Madison v. School District No. 2* 218

Statutes.

1. A law is entitled to be considered remedial whether it remedies a defect of the common law or of a preexisting statute. *Placek v. Edstrom* 79
2. In a limited and restricted sense, a statute may be penal yet remedial in its nature if designed to remove a condition inimical to the public welfare. *Placek v. Edstrom* 79
3. In construing remedial statutes, there are three elements to be considered: (1) The old law, (2) the mischief, and (3) the remedy; and, unless restrained by constitutional authority, it is the duty of courts to so construe such acts as to suppress the mischief and advance the remedy. *Placek v. Edstrom* 79
4. In enacting a statute, the Legislature must be presumed to have had in mind all previous legislation upon the subject. In the construction of a statute courts must consider the preexisting law and any other laws relating to the same subject. *Placek v. Edstrom* 79
5. Where the general intent of the Legislature may be readily ascertained, yet the language used in

a statute gives room for doubt or uncertainty as to its application, courts may resort to historical facts or general information to aid them in interpreting its provisions. *Placek v. Edstrom* 79

6. Par Check law is not violative of section 14, article III, Constitution of Nebraska. *Placek v. Edstrom* 79
7. Specific statutory provisions relating to a particular subject control over general provisions and other parts of the law which otherwise were broad enough to cover the subject and generally where there is a conflict between the two the special will prevail. *Canada v. State* 115
8. A particular intention expressed in a legislative act, if in conflict with a general intention expressed in a later enactment, should be given effect, leaving the latter to operate only outside the former. *Canada v. State* 115
9. Long-continued practical construction of a statute by the officers charged by law with its enforcement is entitled to considerable weight in interpreting that law. *Flint v. Mitchell* 244
10. When specific legislation is enacted upon a subject in relation to the powers and duties of the State Railway Commission, such legislation preempts the field so occupied and thereby prescribes and controls the powers and duties of the commission. *Chicago & N. W. Ry. Co. v. County Board of Dodge County* 648
11. A legislative act complete in itself may supersede or repeal all preexisting acts or parts of acts in conflict therewith upon the same subject without numerically designating the particular sections so superseded or repealed. *Chicago & N. W. Ry. Co. v. County Board of Dodge County* 648
12. A preexisting statute will be considered as modified, superseded, or repealed by implication insofar as it is in conflict or inconsistent with a subsequently enacted statute, which is complete in itself, and inclusive of the same subject. *Chicago & N. W. Ry. Co. v. County Board of Dodge County* 648
13. When the Legislature subsequently enacts legislation making related preexisting laws applicable thereto, it will be presumed that it did so with full knowledge of such preexisting legislation and the judicial decisions of this court construing and applying it. *Chicago & N. W. Ry. Co. v. County Board of Dodge County* 648

14. When subsequently enacted legislation by reference incorporates related preexisting laws "insofar as same is applicable" that expression controls in determining the force or application of such adopted laws in a particular situation. *Chicago & N. W. Ry. Co. v. County Board of Dodge County* 648
15. Resort to contemporaneous construction of a statute by administrative bodies is neither necessary nor proper where the language used is clear, or its meaning can be ascertained by the use of intrinsic aids alone. *Vanous v. City of Omaha* 685

Subrogation.

1. Whether the doctrine of subrogation is applicable to a particular case depends upon the peculiar circumstances of such case. *Webber v. Spencer* 481
2. Where a surety on a guardian's bond is compelled to make good a loss to the property of the ward which is in excess of the value thereof, and by doing so makes the estate of the ward whole in such respect, under these circumstances the surety is subrogated to all rights and interests of the ward in such property. *Webber v. Spencer* 481

Taxation.

1. Statutory provisions authorizing assessments of special taxes against property benefited by public improvements are to be strictly construed, and it must affirmatively appear that the taxing authorities have taken all steps which the law makes jurisdictional; the failure of the record to show such proceedings will not be aided by presumptions. *Chicago & N. W. Ry. Co. v. Payne Creek Drainage District* 139
2. Where two tracts of land were assessed one-half unit each and the balance of the units were assessed in conformity with the statute and not proportionately out of line with the assessment of benefits for the tract involved, and such assessment constituted no change in the taxes on any of the tracts of land, the report of the drainage district board on fixing the benefits may constitute an irregularity in such respect but is not a jurisdictional defect. *Chicago & N. W. Ry. Co. v. Payne Creek Drainage District* 139
3. The lien of taxes on real property attaches at the

time provided by statute. *County of Madison v. School District No. 2* 218

4. Where a general tax has been levied and assessed on real property, and the title then vested in a governmental subdivision before the date fixed by statute for the tax to attach as a lien, the subdivision takes the property free of the tax burden. *County of Madison v. School District No. 2* 218

5. When a governmental subdivision purchases property upon which there exists a lien for taxes, the lien is not extinguished. It takes the property subject to the lien to the same extent as would a private purchaser. *County of Madison v. School District No. 2* 218

6. The real property of a school district held and used for school purposes cannot be sold to satisfy the lien of a tax under the provisions of the tax foreclosure statute. *County of Madison v. School District No. 2* 218

7. The law requires the assessor each year to add to the real estate assessment all real estate that shall have become subject to taxation since his last previous listing of property in the county, with the value thereof. *Reed v. County of Douglas* 505

8. Real estate must be valued for taxation purposes at its actual market value, and any excessive valuation of such property may, upon complaint of the owner, be corrected, first, by the county board of equalization, and, on appeal, by the district court. *Reed v. County of Douglas* 505

9. Where a tax is levied upon a tract of real estate as a whole, and a part of it is exempt, the assessment, if inseparable, is unauthorized and the whole tax is void. *Reed v. County of Douglas* 505

10. When an easement for a drainage ditch which is exempt from taxation has not been taken into consideration in taxing the real property across which such ditch runs, and when the exempt and the nonexempt parts of said property can be separated, this should be done, and the correct amount of taxes legally due on the nonexempt portion of said real estate be apportioned to it. *Reed v. County of Douglas* 505

11. An attorney who represents a county in a tax foreclosure action is eligible to become a purchaser of land obtained by the county at a tax foreclosure sale when the transaction between the county and

the attorney has no relation to the foreclosure proceeding. *Dent v. City of North Platte* 718

12. A deed issued in pursuance of a decree foreclosing the lien of general taxes has the effect of conveying title to the purchaser free and clear of liens of taxes or special assessments junior or inferior to the lien of general taxes and this is true even though the junior or inferior liens are not included in the foreclosure and the holder is not made a party. *Dent v. City of North Platte* 718

13. The remedy for failure to include junior or inferior liens in a foreclosure of the lien of general taxes or failure to make the holder thereof a party to the foreclosure action is an appropriate proceeding for redemption. *Dent v. City of North Platte* 718

Trial.

1. Where two or more persons are severally indicted or informed against for the commission of an offense arising out of the same incident so that the same witnesses and testimony will necessarily be used against each and separate trials are had, jurors who sat in the trial of one are thereby disqualified to sit in the trial of another. *Bufford v. State* 38

2. When the defendant in a jury trial moves for a directed verdict such motion must be treated as an admission of the truth of all material and relevant evidence favorable to the plaintiff and of all proper inferences to be drawn therefrom, and if it tends to sustain plaintiff's cause of action, the case should be submitted to the jury. *Tews v. Bamrick and Carroll* 59

3. Where the authority of a person to represent another becomes material during a trial of an action at law and the evidence upon that point is conflicting, the issue is one of fact for the determination of the jury. *Mead Co. v. Doerfler* 75

4. Where instructions as a whole are correct, harmless error in instructions separately criticized do not require a reversal. *Horky v. Schroll* 96

5. In a law action findings of fact made by the court have the same force and effect as the verdict of a jury. If there is competent evidence to support them, such findings will not be disturbed on appeal. *Moore v. Schank* 228

6. In a jury case where different minds may draw different conclusions or inferences from the adduced evidence, or if there is a conflict in the evidence, the matter at issue must be submitted to the jury, but where the evidence is undisputed, or but one reasonable inference or conclusion can be drawn from the evidence, the question is of law for the court. *Hamblen v. Steckley* 283
7. An instruction reciting the provisions of statutes regulating and controlling the speed of motor vehicles should include therein all the material applicable statutory limitations and qualifications to enable the jury to observe and understand the duty of drivers at the time and place in question. *Hamblen v. Steckley* 283
8. When no prejudicial error appears from a consideration of the instructions as a whole, judgment will not be reversed because a more accurate statement of the law might have been made. *Wright v. Cameron* 292
9. Instructions are to be considered together. When so construed, if as a whole they fairly state the law applicable to the issues presented by the pleadings and the evidence in support thereof, error cannot be predicated thereon. *Wright v. Cameron* 292
10. Failure to give requested instructions is not error where other instructions given by the court fairly and correctly cover the matters set forth in the requested instructions. *Blanchard v. Lawson* 299
11. The inadvertent substitution of one word for another in an instruction is at most harmless error, when it is clear from the instruction itself or from the record and other instructions given that the jury could not have been confused or misled thereby. *Blanchard v. Lawson* 299
12. Instructions should be considered together in order that they may be properly understood, and when, as an entire charge, they properly submit the issues to the jury, the verdict will not be set aside for harmless error in one of them. *Blanchard v. Lawson* 299
13. Where the giving of an instruction is assigned as error but there is no discussion of the assignment in the briefs and no error is readily apparent on the face of the instruction, the assignment will not be further reviewed. *Blanchard v. Lawson* 299
14. If an examination of all the instructions given by

the trial court discloses that they fairly and correctly state the law applicable under the evidence, error cannot be predicated thereon. *Blanchard v. Lawson* 299

15. As a general rule, after final hearing on the merits, leave will not be granted to either party to adduce evidence of any fact which existed prior to the closing of proofs, and was known or should have been known to the party or his counsel seeking the introduction of such additional evidence. This rule is, however, subject to exceptions, where the reason of the rule does not apply. *Lewelling v. McElroy* 309

16. Allowance of leave to adduce further proof is not a matter of right in the party but of sound discretion in the court, to be exercised cautiously and sparingly, and only under circumstances which demonstrate it to be indispensable to the merits and justice of the cause. *Lewelling v. McElroy* 309

17. The question of whether or not a party is entitled to a trial by jury is determinable by the nature of the case at its inception. *Schmidt v. Henderson* 343

18. Where the evidence is insufficient to sustain a verdict for plaintiff, dismissal of action is proper. *Kline v. Metcalfe Construction Co.* 357

19. 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. *Kline v. Metcalfe Construction Co.* 357

20. Evidence examined and held sufficient to sustain the judgment of the trial court. *Chesnut v. Master Laboratories* 378

21. The intentional production of false testimony will, in a proper case, justify the annulment of a decree or judgment which is the product of such testimony. *Davies v. De Lair* 395

22. It is proper for the trial court within its sound discretion to allow amendments to the pleadings where, without any specific directions, the cause has been remanded generally. *Piechota v. Rapp* 442

23. A motion for a directed verdict must for the purpose of decision thereon be treated as an admission of the truth of all material and relevant evidence submitted on behalf of the party against whom the motion is directed. *Spaulding v. Howard* 496

24. 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. *Spaulding v. Howard* 496

25. When instructions requested are substantially given in the charge prepared by the court on its own motion, it is not error to refuse to repeat them, though expressed in language different from that used by the court. *Spaulding v. Howard* 496

26. Instructions to the jury should be considered together that they may be properly understood and when, as an entire charge it appears that they do not limit recoverable negligence to that charged in plaintiff's petition, but authorize recovery for negligence generally, they will ordinarily be adjudged to be prejudicially erroneous. *Ellis v. Union P. R. R. Co.* 515

27. After the defendant has produced evidence and rested, the State generally is confined to rebutting evidence, but the court for good reason in furtherance of justice may thereafter permit the State to offer evidence in chief. It is within the sound discretion of the court to permit in rebuttal the introduction of evidence not strictly rebutting. *Hampton v. State* 574

28. An instruction will not be held to be prejudicially erroneous merely because of a harmless imperfection which cannot reasonably be said to have confused or misled the jury to the prejudice of the party complaining. *Hampton v. State* 574

29. While practical necessity can require the intervention of an interpreter between counsel, witness, and the jury, the need for such an appointment is left to the sound discretion of the trial court. *Prokop v. State* 582

30. An interpreter should be absolutely impersonal and translate the questions and answers between the counsel and witness so the jury will have the exact answers made by the witness on the stand. *Prokop v. State* 582

31. It is reversible error for the court to include, in its instructions to the jury, allegations of fact found in the pleadings but which have not been supported by any evidence. *Allen v. Clark* 627

32. The court's entire charge to the jury should be considered in determining whether a slight inaccuracy in the language of a particular instruction

is prejudicial. If the instructions to the jury, taken as a whole, correctly state the law, that is sufficient. *Luster v. State* 743

33. It is error to give an instruction which assumes a controverted material fact upon which there is a conflict of testimony. *Fullerton v. State* 811

34. All instructions given should be considered in determining whether a particular instruction is prejudicial. *Fullerton v. State* 811

35. Where instructions, considered as a whole, state the law fully and correctly, error will not be predicated thereon merely because a separate instruction, considered by itself, might be subject to criticism. *Fullerton v. State* 811

36. A trial judge has the same power to view the premises, on a trial without a jury, as exists in him to permit inspection in a jury trial, and such view or inspection is entitled to the same effect in both cases. *Birdwood Irrigation District v. Brodbeck* 824

Trusts.

1. A constructive trust is a relationship with respect to property, subjecting the person by whom the title to the property is held to an equitable duty to convey it to another on the ground that his acquisition or retention of the property is wrongful and that he would be unjustly enriched if he were permitted to retain the property. *In re Estate of Scott* 182

2. If a party obtains the legal title to property by virtue of a confidential relation, under such circumstances that he ought not, according to the rules of equity and good conscience, hold and enjoy the benefits, out of such circumstances or relations a court of equity will raise a trust by construction, fasten it upon the conscience of the offending party, and convert him into a trustee of the legal title. *In re Estate of Scott* 182

3. An antecedent debt is not such consideration as to have the effect of cutting off the trust against funds applied to the satisfaction thereof even though the creditor acts in good faith and without notice where he has not changed his position in relation to the person from whom the fund was received. *Meier v. Geldis* 304

4. There are distinctions between the rights, powers, and duties of a guardian and those of a trustee,

in that a trustee has title to the trust property with an equitable interest in the beneficiary, whereas a guardian has no title, but only certain powers and duties to handle therewith for the ward's benefit, the ward having the title. *Webber v. Spencer* 481

5. A fiduciary by abandoning his trust and by assuming toward the beneficiary a hostile attitude cannot change the legal consequences of former relations and conduct. *Electronic Development Co. v. Robson* 526

6. Outside of proper compensation and expenses, any advantage gained by a trustee, either in performing his duty or in betraying his trust, inures to the benefit of the beneficiary. *Electronic Development Co. v. Robson* 526

7. If a party obtains the legal title to property by virtue of a confidential relation, under such circumstances that he ought not, according to the rules of equity and good conscience as administered in chancery, hold and enjoy the benefits, a court of equity will raise a trust by construction and fasten it upon the conscience of the offending party and convert him into a trustee of the legal title. *Watkins v. Waits* 543

8. A constructive trust is a relationship with respect to property subjecting the person by whom the title to the property is held to an equitable duty to convey it to another on the ground that his acquisition or retention of the property is wrongful and that he would be unjustly enriched if he were permitted to retain the property. *Watkins v. Waits* 543

9. By express provisions of statute, trusts arising by implication or by operation of law are excepted from the operation of the statute of frauds. *Watkins v. Waits* 543

10. Both resulting and constructive trusts fall within the exception to the statute of frauds excepting from its operation trusts arising by operation of law. *Watkins v. Waits* 543

11. Evidence in the record examined and held sufficient to sustain the judgment of the trial court. *Watkins v. Waits* 543

12. An antecedent debt is not such consideration as to have the effect of cutting off the trust against funds applied to the satisfaction thereof even though the creditor acts in good faith and without notice where he has not changed his position in relation to

the person from whom the fund was received. *Meier v. Geldis* 561

13. A constructive trust is a relationship with respect to property subjecting the person by whom the title to the property is held to an equitable duty to convey it to another on the ground that his acquisition or retention of the property is wrongful and that he would be unjustly enriched if he were permitted to retain the property. *Smith v. Kinsey* 786

Unemployment Compensation Insurance.

1. The Placement and Unemployment Insurance Act is to be liberally construed so that its beneficent purposes may be accomplished. This rule of construction applies to the law and not to the evidence. The rule does not dispense with the necessity of claimant establishing a right to the benefits of the act, nor does it permit an award of benefits where the requisite showing that claimant is entitled to the benefits of the act is lacking. The act cannot be extended by construction to noncompensable claims. *Hunter v. Miller* 402
2. Registration for work under the act, alone, is not sufficient to show a prima facie right to the benefits of the act. *Hunter v. Miller* 402
3. A hard and fast rule as to when a claimant is available for work under the Placement and Unemployment Insurance law cannot be adopted. It depends upon the facts and circumstances of each case. *Hunter v. Miller* 402

Vendor and Purchaser.

1. The rule of caveat emptor applies to a purchaser under a contract of sale of an insane ward's lands as well as a guardian's sale of the real estate of a ward. *Webber v. Spencer* 482
2. A purchaser, having notice of a previous outstanding title in land, who purchases from one without notice, will be protected in his title by the want of notice in his vendor. *Mingus v. Bell* 735

War.

The Soldiers' and Sailors' Civil Relief Act does not require the appointment of an attorney to represent all persons in the services named in the act who become parties to actions commenced in court, but

only those who shall be in default of appearance. *Koser v. Koser* 277

Waters.

1. The owner of land having an irrigation appropriation priority established before April 4, 1895, upon which there has been no adjudication is entitled, on proper application and due notice to interested parties, to an adjudication thereon by the Department of Roads and Irrigation. *In re Claim Affidavit of Parsons* 239
2. The Department of Roads and Irrigation by statute exercises the same power to adjudicate irrigation priorities established prior to April 4, 1895, as did the Board of Irrigation. *In re Claim Affidavit of Parsons* 239
3. The Department of Roads and Irrigation has jurisdiction to hear, determine, and make adjudication upon irrigation appropriation rights and priorities, and in the absence of an appeal as provided by law, the orders made in a proper proceeding in reference thereto are final and binding upon the parties and their successors. *In re Claim Affidavit of Parsons* 239
4. An adjudication by the Department of Roads and Irrrigation upon irrigation appropriation rights and priorities, not appealed from, is res judicata upon later applications involving the same claims and the same parties or their successors. *In re Claim Affidavit of Parsons* 239
5. A stream which is accustomed to spill waters beyond its banks in times of high water and to flow over adjacent lands in its flood plane, and which floodwaters return to the stream at points farther down stream, remains a live stream, and the spilled waters so flowing out are floodwaters and not diffused surface waters. *Frese v. Michalec* 567
6. A riparian owner may not dam or dike against such floodwaters to the injury of adjacent owners of lands or crops growing thereon. *Frese v. Michalec* 567
7. Record examined and evidence held sufficient to sustain judgment of the district court. *Probert v. Grint* 666
8. If land is nonirrigable because of natural causes, it cannot lawfully be held in an irrigation district and

taxed to support an irrigation system. *Birdwood Irrigation District v. Brodbeck* 824

9. Whether or not a particular tract of land, from some natural cause, cannot be irrigated, is a question which may be raised at any time in a proper case. *Birdwood Irrigation District v. Brodbeck* 824

Wills.

1. It is the court's duty in the construction of a will 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. *In re Estate of Zents* 104
2. The intention of the testator must be ascertained from a liberal interpretation and comprehensive view of all the provisions of the will. No particular words, nor conventional forms of expression, are necessary to enable one to make an effective testamentary disposition of his property. *In re Estate of Zents* 104
3. A bequest in a will whereby the testator gives to his brother "all my interest in and to the HUB BAR * * *, which generally is the ownership of said business," is intended to, and does, convey to said brother the testator's one-half interest in both the cash in the till of said "Bar" and the bank deposit of said business. *In re Estate of Zents* 104
4. The right to offset an indebtedness owing by a legatee to the estate and apply it to the legacy may be properly asserted in the county court having exclusive, original jurisdicton over the administration of estates. *In re Estate of Williams* 208
5. The right to inquire into and determine the indebtedness of a legatee of an estate, and to order a deduction of the same from the legacy, is an incident to the authority of the court to make settlement and distribution of a decedent's estate. *In re Estate of Williams* 208
6. Residuary devisees are estopped to invalidate an option to purchase real estate inherited by will where the evidence affirmatively discloses that they have acquiesced in and ratified such option. *Chesnut v. Master Laboratories* 378
7. It is the court's duty in the construction of a will 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. *In re Estate of Lewis* 592

8. The intention of the testator is to be ascertained from a liberal interpretation and comprehensive view of all of the provisions of the will. *In re Estate of Lewis* 592

9. The general rules with reference to the interpretation of wills are fully applicable in determining whether a legacy, in any particular instance, is to be treated as demonstrative, general, or specific. *In re Estate of Lewis* 592

10. A specific legacy is a bequest of a specific thing or fund that can be separated out of all the rest of the testator's estate of the same kind so as to individualize it, and enable it to be delivered to the legatee as the particular thing or fund bequeathed. *In re Estate of Lewis* 592

11. A general legacy is one which is payable out of the general assets of a testator's estate, such as a gift of money or other thing in quantity, and not in any way separated or distinguished from other things of like kind. *In re Estate of Lewis* 592

12. A demonstrative legacy partakes of the nature of both a general and specific legacy; it is a gift of money or other property charged on a particular fund in such a way as not to amount to a gift of the corpus of the fund, or to evince an intent to relieve the general estate from liability in case the fund fails. *In re Estate of Lewis* 592

13. The will in the instant case, construed and interpreted under the rules of this state governing the construction and interpretation of wills, held to contain demonstrative legacies as well as general and specific legacies. *In re Estate of Lewis* 592

14. Probate is proving the instrument purporting to be a will to have been signed by the testator in the presence of at least two witnesses, who at his request signed the same as witnesses; and that the testator, at the time of the execution thereof was of sound mind. *In re Estate of Renter* 776

15. 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. *In re Estate of Renter* 776

16. Where contestants object to the probate of an in-

strument as the last will of an alleged testator on the ground that the instrument is not executed in manner and form as required by law, such objection includes the issue of whether the signature on the instrument was that of the alleged testator. *In re Estate of Renter* 776

17. Testimony of handwriting experts that the signature on an instrument offered for probate as a will is not the signature of the alleged testator, if based on sound reasons and circumstances supporting that theory, may be sufficient to overturn the testimony of subscribing witnesses that they saw the will signed. *In re Estate of Renter* 776

18. When an issue as to whether the signature on an instrument offered for probate as a will is that of the alleged testator is raised by pleadings and contested by evidence there is no presumption either in favor of witnesses or in favor of circumstances. *In re Estate of Renter* 776

Witnesses.

1. A mentally defective person is competent to testify as a witness if he has sufficient mental capacity to understand the nature and obligation of an oath and possessed of sufficient mind and memory to observe, recollect, and narrate the things he has seen or heard. If he has been committed to a state hospital and is an inmate thereof then there arises a prima facie presumption that he is incompetent as a witness. However, such presumption is rebuttable by the voir dire examination of the witness alone or aided by extrinsic evidence. The burden of rebutting the presumption of incompetency is on whoever offers him as a witness. *Skelton v. State* 30

2. The question of competency of a person to be a witness is left to the sound discretion of the trial judge, leaving to the jury to determine the credit that ought to be given to the testimony. *Skelton v. State* 30

Workmen's Compensation.

1. To sustain an award in a workman's compensation case it is sufficient to show that an injury, resulting from an accident arising out of and in the course of the employment, activated a dormant disease and

resulted in disability. *Dryden v. Omaha Steel Works* 1

2. Evidence showing the existence of a dormant disease, the happening of an accident of sufficient consequence to activate it followed by objective symptoms of such activation, and expert medical testimony that the accident activated the dormant disease and resulted in disability, is sufficient to sustain a finding that there was a causal connection between the employment and the disability. *Dryden v. Omaha Steel Works* 1

3. When an employee receives an accidental injury arising out of and in the course of the employment which activates a dormant disease, the failure to file a petition within a year is not a bar if the petition is filed within one year after the employee acquires knowledge of a compensable disability. *Dryden v. Omaha Steel Works* 1

4. A workman is not a farm laborer simply because at the moment he is doing work on a farm, nor because the task on which he is engaged happens to be what is ordinarily considered farm labor; but the whole character of his employment must be looked to to determine whether he is a farm laborer. *Oliver v. Ernst* 465

5. Statute defining an employee as "Every person in the service of an employer," contemplates two persons, the employer and the employee. It does not contemplate a dual relationship in one. *Rasmussen v. Trico Feed Mills* 855