Nebraska Supreme Court Online Library
www.nebraska.gov/apps-courts-epub
09/16/2026 10:59 AM CDT

REPORTS OF CASES

IN THE

Supreme Court of Nebraska

JANUARY TERM, 1938

VOLUME CXXXIV

HENRY P. STODDART
OFFICIAL REPORTER

CLAFLIN PRINTING COMPANY
LINCOLN, NEBRASKA
1938

Copyright A. D. 1938

By HENRY P. STODDART, REPORTER OF THE SUPREME COURT,

For the benefit of the State of Nebraska

SUPREME COURT

DURING THE PERIOD OF THESE REPORTS

CHARLES A. GOSS, Chief Justice
WILLIAM B. ROSE, Associate Justice
GEORGE A. EBERLY, Associate Justice
L. B. DAY, Associate Justice
BAYARD H. PAINE, Associate Justice
EDWARD F. CARTER, Associate Justice
FREDERICK W. MESSMORE, Associate Justice

HENRY P. STODDART.....Reporter
GEORGE H. TURNER.....Clerk
ELBERT M. WHITE.....Deputy Clerk
RICHARD C. HUNTER.....Attorney General
BARLOW NYE.....Administrative Assistant
FRANCIS V. ROBINSON.....Assistant Attorney General
EDWIN VAIL.....Assistant Attorney General
GEORGE W. AYRES.....Assistant Attorney General
BERT L. OVERCASH.....Assistant Attorney General
HARRY S. GRIMMINGER.....Assistant Attorney General
CLINTON J. CAMPBELL.....Assistant Attorney General
ROBERT D. FLORY.....Assistant Attorney General

JUDICIAL DISTRICTS, AND DISTRICT JUDGES OFFICIATING AT THE ISSUANCE OF THIS VOLUME

Number of District	Counties in District	Judges in District	Residence of Judge
First	Johnson, Nemaha, Pawnee and Richardson.	Virgil Falloon	Falls City
Second	Cass, Otoe and Sarpy.	Wilmer W. Wilson	Neb. City
Third	Lancaster.	Jefferson H. Broady Ellwood B. Chappell John L. Polk Frederick E. Shepherd	Lincoln Lincoln Lincoln Lincoln
Fourth	Burt, Douglas and Washington.	William A. Day Francis M. Dineen James M. Fitzgerald Charles Leslie Herbert Rhoades John A. Rine Willis G. Sears Arthur C. Thomsen John W. Yeager	Omaha Omaha Omaha Omaha Tekamah Omaha Omaha Omaha Omaha
Fifth	Butler, Hamilton, Polk, Saunders, Seward and York.	Lovel S. Hastings Harry D. Landis	David City Seward
Sixth	Boone, Colfax, Dodge, Merrick, Nance and Platte.	Louis Lightner Frederick L. Spear	Columbus Fremont
Seventh	Fillmore, Nuckolls, Saline and Thayer.	Robert M. Proudfit	Friend
Eighth	Cedar, Dakota, Dixon and Thurston.	Mark J. Ryan	Pender
Ninth	Antelope, Cuming, Knox, Madison, Pierce, Stanton and Wayne.	Charles H. Stewart Adolph E. Wenke	Norfolk Stanton
Tenth	Adams, Clay, Franklin, Harlan, Kearney, Phelps and Webster.	Lewis H. Blackledge Frank J. Munday	Hastings Red Cloud
Eleventh	Blaine, Garfield, Grant, Greeley, Hall, Hooker, Howard, Loup, Thomas, Valley and Wheeler.	Edwin P. Clements Ernest G. Kroger	Ord Grand Island
Twelfth	Buffalo, Custer, Logan and Sherman.	Bruno O. Hostetler	Kearney
Thirteenth	Arthur, Banner, Cheyenne, Dawson, Deuel, Keith, Kimball, Lincoln and McPherson.	Isaac J. Nisley J. Leonard Tewell	North Platte Sidney
Fourteenth	Chase, Dundy, Frontier, Furnas, Gosper, Hayes, Hitchcock, Perkins and Red Willow.	Charles E. Eldred	McCook
Fifteenth	Boyd, Brown, Holt, Keya Paha and Rock.	Robert R. Dickson	O'Neill
Sixteenth	Box Butte, Cherry, Dawes, Sheridan and Sioux.	Earl L. Meyer	Alliance
Seventeenth	Garden, Morrill and Scotts Bluff.	George W. Irwin	Gering
Eighteenth	Gage and Jefferson.	Cloyde B. Ellis	Beatrice

PRACTICING ATTORNEYS

Admitted since the Publication of Vol. 133

ACKERMAN, JAMES N.
ADAMS, THOMAS H.
ALEXANDER, WILLIAM THOMAS
ANDERSON, BENJAMIN J.
BECKENHAUER, KENNETH H.
BENDA, VELDA E.
BERGE, WOODROW L.
BICKEL, MYRON O.
BISHOP, JOHN L.
BLEVENS, IVAN A.
BODE, ROBERT F.
BUELL, CONRAD J.
BULGER, ROBERT JOHN
BURNS, FRANCIS LEONARD
CALLAND, WARREN W.
CHAMBERLIN, GERALD BRUCE
CHAMBERLIN, LEONARD C.
CHURCHILL, DARRELL O.
CLEARY, JAMES T.
COLE, CARROLL F.
COLWELL, WILLIAM F.
COOK, ALLEN
CRUISE, THEODORE S.
DECKER, RICHARD K.
DEWELL, BERNARD
DUGAN, CARL M.
DURFEE, SCHUYLER D.
DURKEE, BERT R.
EAGLETON, PAUL WILLIAM
EGERMAYER, GEORGE W.
EGGEN, ARNOLD W.
EGGERT, ROBERT F.
EITEL, J. VICTOR
FELTZ, FIRMIN Q., JR.
FISHER, CHESTER HENRY
FLANSBURG, CHARLES
FOUCHEK, FLORENCE A.
FROMM, LEONARD WILLIAM
FURLONG, N. RAYMOND
GANNON, LUCILLE M.
GARRETSON, THOMAS STEPHEN
GASSAWAY, HORACE IRVING
GIBBS, OKLEY HERRELL
GLEASON, JAMES JOHN
GOECKEL, LAWRENCE E.
GONDERINGER, C. NORMAN
GRIBBLE, BERNARD BENJAMIN
GRIFFEE, FRANK PHILO
GURSKE, HAROLD L.
HANEY, ROBERT W.
HOLLSTEIN, EDMUND W.
HORAN, JOHN A.
HOWELL, JAMES G.
INSERRA, JOSEPH P.
JENSEN, ERNEST A.
KAPLAN, LOYAL GEORGE
KASTL, ERNEST
KEAN, PAUL J.
KEANE, JOHN WILLIAM
KELLEY, ROBERT LEE
KILLMAR, JAMES JOHN
KILMURRY, EDWARD JAMES
KNEIFL, PHILIP R.
KRECULOV, RUSSELL
LANAGAN, WILLIAM D.
LEBENS, HAROLD R.
LINDBURG, FREDERICK A.
LONG, JOHN JAMES
LOVELL, RUSSELL E.
LUNDGREN, HOWARD M.
LYMAN, JACK ELWELL
LYNAM, WILLIAM EDWARD
LYNCH, PATRICK W.
MCFARLAND, WILFRED MYERS

McLaughlin, Kathleen E.
McMahon, J. Leo
McManus, Owen J.
McMillan, Harry W.
Moodie, Pliny M.
Moriarity, Edward
Morse, William Perry
Moses, Richard S.
Munson, John I.
Nelson, Edward Alfred
Nuquist, Robert E.
Nyberg, Philip H.
O'Keefe, Bernard J.
Osenbaugh, Katherine D.
Panebianco, Anthony P.
Panebianco, Joseph F.
Patz, Hazel H.
Person, Richard E.
Petersen, George William
Peterson, Henry George
Peterson, Henry W.
Pettygrove, Paul E.
Pickett, Anne
Rahn, Charles H.
Ramsey, William C., Jr.
Redle, William D.
Reier, Carl E.
Rex, Marvin E.
Reynolds, Lee Jess
Riley, Thomas John
Roscow, Robert J.
Ruda, Joseph A.
Saxton, Robert H.
Schnurpel, Hans A.
Scott, James
Serpe, Joseph C.
Simon, Edwin O.
Smith, Richard W.
Stager, Floyd P.
Stines, Richard
Taylor, Charles E.
Thorngren, Lorentz E.
Turner, Max C.
Twohig, Richard Edward
von Brandenfels, Pauline F.
Wagoner, John A.
Walker, Daniel
Welch, Leo Edward
Wellensiek, Otto H.
Woodle, Chauncey R.
Youtz, Edwin Stanton

TABLE OF CASES REPORTED

Abbott, O'Connor v. 471
Aden v. Aden 810
Aden, In re Estate of 810
Alesio v. Lococo 461
Apfel v. General American Life Ins. Co. 408
Avondale v. Sovereign Camp, W. O. W. 717

Bailey v. Lund 319
Balster v. Keller 469
Barish-Sanders Motor Co. v. Fireman's Fund Ins. Co. 188
Barstow v. City Nat. Bank of Lincoln 607
Beatty, Gramann v. 568
Benton, DeSoe v. 371
Bernhard v. Prudential Ins. Co. 402
Black v. Neill 764
Boe, State v. 162
Bolker v. State 255
Bonacci v. Cerra 476
Bonacci v. Cerra 588
Bosheck v. Gappa 485
Brandon, Zimmer v. 311
Brant, Chalupnik v. 465
Brinn & Jensen Co., Peterson v. 909
Brisbin v. E. L. Oliver Lodge No. 335 517
Brown v. Davenport Holding Co. 455
Brown-McDonald Co., Wilson v. 211
Buchanan v. Rahmeyer 331
Buffalo County, Kennedy v. 744
Burns, Pavlik v. 175
Burton, Village of, Nebraska State Bank Liquidation Ass'n v. 623
Busch, Shanle v. 903

Carlson, Occidental Bldg. & Loan Ass'n v. 574
Casady, Rogers v. 227
Central West Public Service Co., Donker v. 892
Cerra, Bonacci v. 476
Cerra, Bonacci v. 588
Chalupa, In re Estate of 918
Chalupa v. Moline 918

Chalupnik v. Brant 465
Chrisman v. Daniel 326
Christensen, Nelson v. 769
Citizens Bank, Federal Land Bank v. 252
City Nat. Bank of Lincoln, Barstow v. 607
City of Fairbury, Cornhusker Electric Co. v. 248
City of Friend, Hall v. 652
City of Lincoln v. Steffensmeyer 613
City of North Platte, Hupfer v. 585
Clark Co., Shamp v. 73
Collins v. Hughes & Riddle 380
Conservative Savings & Loan Ass'n v. Mancuso 779
Continental Co. v. Eilers 278
Cooper, Kimball v. 536
Cornhusker Electric Co. v. City of Fairbury 248
County Fire Ins. Co., Parish v. 563
Cover, Gilmore v. 559
Cox v. Greenlease-Lied Motors 1
Cox v. State 751
Crandell, Jorgensen v. 33
Cronkleton v. Hastings Theatre & Realty Corporation 168
Crystal Refrigerator Co., Long v. 44

Dahl, Nissen v. 794
Dalton v. Woodward 915
Daniel, Chrisman v. 326
Davenport Holding Co., Brown v. 455
Dawson County v. Whaley 509
Dawson County Irrigation Co., Riesland v. 773
Department of Banking v. McMullen 338
Department of Banking v. Modrow 336
DeSoe v. Benton 371
DeSoe, In re Estate of 371
Deuel County State Bank, Empson v. 597
Dietz Hill Development Co., Wheeler v. 448
Dixon County, Schulz v. 549
Donisthorpe v. Vavra 157
Donker v. Central West Public Service Co. 892
Downs v. Downs 457
Drainage District, Mooney v. 192

Eastridge Club, First Trust Co. v. 785
Eilers, Continental Co. v. 278
Election Canvassing Board, Mehrens v. 151
Ellsworth Corporation v. Stratbucker 246
E. L. Oliver Lodge No. 335, Brisbin v. 517
Empson v. Deuel County State Bank 597

Ericson v. Nebraska-Iowa Farm Investment Co. 391

Fairbury, City of, Cornhusker Electric Co. v. 248
Farmers Elevator Co. v. Peck 305
Farmers Irrigation District, Preston v. 503
Faulkner, Pierson v. 865
Federal Land Bank v. Citizens Bank 252
Federal Land Bank v. Soehl 254
Feldt v. Wanek 334
Fidelity & Deposit Co., Starr v. 240
Fireman's Fund Ins. Co., Barish-Sanders Motor Co. v. 188
First Trust Co. v. Eastridge Club 785
First Trust Co. v. Smith 84
Fitzsimmons v. Gilmore 200
Fonda v. Northwestern Public Service Co. 430
Friend, City of, Hall v. 652

Gage County Electric Co., Huston v. 805
Gappa, Bosheck v. 485
Gardner v. Metropolitan Utilities District 163
Geiger, Hoffman v. 643
General American Life Ins. Co., Apfel v. 408
General American Life Ins. Co. v. Omaha Nat. Bank 698
Gilmore v. Cover 559
Gilmore, Fitzsimmons v. 200
Glens Falls Indemnity Co., Russell v. 631
Globe Indemnity Co., New Masonic Temple Ass'n v. 731
Gramann v. Beatty 568
Greenamyre v. Thurston County 558
Greenlease-Lied Motors, Cox v. 1

Hall v. City of Friend 652
Hamaker v. Middaugh 440
Hamp, Hole v. 259
Hastings Theatre & Realty Corporation, Cronkleton v. 168
Hatteroth, State v. 451
Heeter v. Nisi 209
Hinnenkamp v. Metropolitan Life Ins. Co. 846
Hoffman v. Geiger 643
Hole v. Hamp 259
Hughes & Riddle, Collins v. 380
Hupfer v. City of North Platte 585
Huston v. Gage County Electric Co. 805
Hylton v. Krueger 66

In re Estate of Aden 810
In re Estate of Chalupa 918

In re Estate of DeSoe 371
In re Estate of Kajewski 485
In re Estate of Mathews 607
In re Estate of Nissen 794
In re Estate of Ohlsen 769

Jensen v. Romigh 890
John Hancock Mutual Life Ins. Co., Schultz v. 885
Johnson v. Shuler 25
Jorgensen v. Crandell 33

Kajewski, In re Estate of 485
Keller, Balster v. 469
Kennedy v. Buffalo County 744
Kimball v. Cooper 536
Kirk v. Tackett 759
Kitchen Bros. Hotel Co., Leon v. 137
Klug, Nolan v. 860
Knoche v. Pease Grain & Seed Co. 130
Kraemer v. New York Life Ins. Co. 445
Krings, Strehlow v. 82
Krotter, Meister v. 293
Krueger, Hylton v. 66
Kulhanek v. Kulhanek 349

Landy Clark Co., Shamp v. 73
Lautenschlager v. Lautenschlager 577
Leaders v. Sarpy County 817
Leon v. Kitchen Bros. Hotel Co. 137
Lilienthal v. Platte Valley Public Power and Irrigation District 281
Lilley, Westcoatt v. 376
Lincoln, City of, v. Steffensmeyer 613
Lococo, Alesio v. 461
Long v. Crystal Refrigerator Co. 44
Long, Mutual Benefit Life Ins. Co. v. 186
Long, Mutual Benefit Life Ins. Co. v. 187
Lorenzen v. Stobbe 796
Luckhardt, Woelk v. 55
Lund, Bailey v. 319
Lyders, Mackechnie v. 682

McCosh, State v. 780
McMullen, Department of Banking v. 338
Mackechnie v. Lyders 682
Mancuso, Conservative Savings & Loan Ass'n v. 779
Marconnit, State v. 898
Marshall, Neble v. 280

Mathews, In re Estate of 607
Matthews, Whaley v. 875
Mehrens v. Election Canvassing Board 151
Meister v. Krotter 293
Metropolitan Life Ins. Co., Hinnenkamp v. 846
Metropolitan Utilities District, Gardner v. 163
Middaugh, Hamaker v. 440
Miller, Myers v. 824
Miller, Rotzin v. 8
Modrow, Department of Banking v. 336
Moline, Chalupa v. 918
Mooney v. Drainage District 192
Mutual Benefit Life Ins. Co. v. Long 186
Mutual Benefit Life Ins. Co. v. Long 187
Myers v. Miller 824

Neble v. Marshall 280
Nebraska-Iowa Farm Investment Co., Ericson v. 391
Nebraska State Bank Liquidation Ass'n v. Village of Burton 623
Nebraska State Railway Commission, Rodgers v. 832
Neill, Black v. 764
Nelson v. Christensen 769
Nelson, Nordeen v. 707
New Masonic Temple Ass'n v. Globe Indemnity Co. 731
New York Life Ins. Co., Kraemer v. 445
Nisi, Heeter v. 209
Nissen v. Dahl 794
Nissen, In re Estate of 794
Nolan v. Klug 860
Nordeen v. Nelson 707
North Platte, City of, Hupfer v. 585
Northwestern Public Service Co., Fonda v. 430

Occidental Bldg. & Loan Ass'n v. Carlson 574
O'Connor v. Abbott 471
Ohlsen, In re Estate of 769
Ohme v. Thomas 727
Omaha & C. B. Street R. Co., Peterson v. 322
Omaha Nat. Bank, General American Life Ins. Co. v. 698
Oswald, Ryan v. 265

Parish v. County Fire Ins. Co. 563
Patrick, Stolinski v. 804
Pavlik v. Burns 175
Pease Grain & Seed Co., Knoche v. 130
Peck, Farmers Elevator Co. v. 305
Peterson v. Brinn & Jensen Co. 909

Peterson v. Omaha & C. B. Street R. Co. 322
Pierson v. Faulkner 865
Platte Valley Public Power and Irrigation District, Lilienthal v. 281
Platte Valley Public Power and Irrigation District, Shelby v. 354
Preston v. Farmers Irrigation District 503
Prudential Ins. Co., Bernhard v. 402

Rahmeyer, Buchanan v. 331
Railway Express Agency, Summers v. 237
Ray v. Sanitary Garbage Co. 178
Riesland v. Dawson County Irrigation Co. 773
Rodgers v. Nebraska State Railway Commission 832
Rogers v. Casady 227
Romigh, Jensen v. 890
Romine v. West 274
Rotzin v. Miller 8
Rumelin, Village of Utica v. 232
Russell v. Glens Falls Indemnity Co. 631
Ryan v. Oswald 265

Sanitary Garbage Co., Ray v. 178
Sarpy County, Leaders v. 817
Schultz v. John Hancock Mutual Life Ins. Co. 885
Schulz v. Dixon County 549
Shamp v. Landy Clark Co. 73
Shanle v. Busch 903
Shelby v. Platte Valley Public Power and Irrigation District 354
Shuler, Johnson v. 25
Smith, First Trust Co. v. 84
Soehl, Federal Land Bank v. 254
Sovereign Camp, W. O. W., Avondale v. 717
Sowards, State v. 159
Stanton v. Stanton 660
Starr v. Fidelity & Deposit Co. 240
State, Bolker v. 255
State, Cox v. 751
State v. McCosh 780
State, ex rel. Hunter, v. Boe 162
State, ex rel. Hunter, v. Hatteroth 451
State, ex rel. Hunter, v. Marconnit 898
State, ex rel. Wright, v. Sowards 159
State, ex rel. Zeilinger, v. Thompson 739
Steffensmeyer, City of Lincoln v. 613
Stobbe, Lorenzen v. 796
Stolinski v. Patrick 804
Stratbucker, Ellsworth Corporation v. 246
Strehlow v. Krings 82

Stuart, Utilities Ins. Co. v. 413
Summers v. Railway Express Agency 237

Tackett, Kirk v. 759
Ternes v. Watke 798
Thomas, Ohme v. 727
Thompson, State v. 739
Thurston County, Greenamyre v. 558

Utica, Village of, v. Rumelin 232
Utilities Ins. Co. v. Stuart 413

Vavra, Donisthorpe v. 157
Village of Burton, Nebraska State Bank Liquidation Ass'n v. 623
Village of Utica v. Rumelin 232

Wanek, Feldt v. 334
Watke, Ternes v. 798
West, Romine v. 274
Westcoatt v. Lilley 376
Whaley, Dawson County v. 509
Whaley v. Matthews 875
Wheeler v. Dietz Hill Development Co. 448
Wilson v. Brown-McDonald Co. 211
Woelk v. Luckhardt 55
Woodward, Dalton v. 915

Zimmer v. Brandon 311

CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

JANUARY TERM, 1938

CHARLES F. COX, APPELLEE, V. GREENLEASE-LIED MOTORS, APPELLANT.

277 N. W. 819

FILED FEBRUARY 18, 1938. No. 30131.

1. **Sales:** WARRANTY. "Any affirmation of fact or any promise by the seller relating to the goods is an express warranty if the natural tendency of such affirmation or promise is to induce the buyer to purchase the goods, and if the buyer purchases the goods relying thereon." Comp. St. 1929, sec. 69-412.
2. **Evidence.** The owner of personal property is qualified by reason of that relationship to give his estimate of its value.
3. **New Trial:** VERDICT: IMPEACHMENT. "Affidavits of jurors may not be received to contradict anything essentially inhering in the verdict itself." *De Porte v. State Furniture Co.*, 129 Neb. 282, 261 N. W. 419.
4. **Sales:** WARRANTY: BREACH: MEASURE OF DAMAGES. The measure of damages in the case of a breach of warranty of quality is the difference between the value of the goods at the time of delivery to the buyer and the value they would have had if they had answered to the warranty.
5. ———: ———: ———: NOTICE. "Without attempting to lay down a general rule of construction as to the substance of the notice of the breach of warranty which the buyer must give, after acceptance of the goods, in order to hold the seller liable, it seems clear that it must refer to particular sales, so far as that is practicable; that it must at least fairly advise the seller of the alleged defects, and that it must be such as to repel the

inference of waiver. Although it need not necessarily take the form of an express claim for damages or threat of such, it ought to be reasonably inferable therefrom that the buyer is asserting a violation of his legal rights." *Nashua River Paper Co. v. Lindsay*, 249 Mass. 365, 144 N. E. 224.

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

Gaines, McLaughlin & Gaines and *Harold A. Palmer*, for appellant.

Rosewater, Mecham, Shackelford & Stoehr, contra.

Heard before GOSS, C. J., ROSE, EBERLY, PAINE, CARTER and MESSMORE, JJ., and WILLIAM A. DAY, District Judge.

GOSS, C. J.

This is an appeal from a judgment against defendant for $1,000 for damages for a breach of warranty. Plaintiff alleged that, on February 9, 1935, he purchased a La Salle sedan from defendant at an agreed price of $1,805, paying $1,250 in cash and receiving $555 credit for his trade-in Cadillac car. He alleged oral misrepresentations by defendant's salesman to the effect that the car was of the finest workmanship and material; that its motor would without strain propel it at more than 90 miles an hour, that it would climb any hills found on main highways in this section without laboring and without loss of speed and power; that it had rapid acceleration and pick-up, and that it was mechanically perfect in all respects. Plaintiff further alleges that he relied on and believed such representations and warranties and was thereby induced to purchase the car on the terms before stated; that immediately thereafter the car was found not as represented and warranted; that the starting mechanism on the car failed to start the car; that the car lacked power and could not be run at any reasonable rate of speed and could not climb ordinary hills without losing power to such an extent that it was necessary to shift from high to intermediate and some times to low gear; that the carburetor was defective and out of adjustment and could not be adjusted in such a manner

that the motor would deliver reasonable power in operation; that the body developed squeaks and rattles, that the doors did not fit and would not keep out drafts, that the top and windshield were not waterproof, but, when it rained, it would leak and run down upon the occupants of the car, that the lights on the dash and instrument board and the speedometer and windshield wiper were defective and did not operate properly, and that the motor of the car became noisy and out of adjustment; that because of these defects plaintiff was not able to drive the car satisfactorily, and that the car was not as warranted and represented.

Plaintiff further alleges that, upon discovering such defects, plaintiff notified defendant, offered to return the car, and stopped payment of the check which he had given for its payment and demanded a return of his own Cadillac car, but that defendant, in order to induce plaintiff to keep the La Salle car, represented and warranted to plaintiff that the car was merely in need of minor adjustments, which it could and would make without delay, and that, if plaintiff would keep the car and continue to permit the defendant to make such adjustments as were necessary from time to time, defendant would live up to defendant's warranty and put the car in exactly the condition in which it was warranted to be at the time the car was sold. Plaintiff alleges that the adjustments did not eliminate the defects, alleges damages and prays for the same in the sum of $1,100.

Defendant answered, denying the existence of any warranty beyond what is claimed to be the usual warranty of the factory producing the automobile, and alleges that the La Salle automobile was in all respects as represented and warranted and that defendant has at all times been ready and willing to make good any defects that might exist therein; that defendant did make several minor repairs and adjustments as are frequently necessary in breaking in a new car, and outside thereof there was nothing wrong with the car, and defendant asks that plaintiff's petition be dismissed.

The first assignment of error is that the court failed to sustain defendant's motion for a directed verdict at the close of all the evidence. There was ample evidence to support the allegations of the petition as to the defects in the car and that it did not come anywhere near the representations of Mr. Fraser, the salesman who sold the car and had many subsequent dealings with plaintiff in relation thereto. The car was delivered to plaintiff at his home on Saturday, February 9, 1935, and was kept overnight in a heated garage. The next morning plaintiff tried unavailingly for 15 minutes to start it. Defendant called Mr. Fraser, who came with a mechanic and succeeded in getting the car started. The next morning witness tried to start the car and it would not start. He called a cab and was taken to his office and called defendant and notified the bookkeeper not to attempt to cash the check as he was stopping payment on it because the car was unsatisfactory. He called the bank and stopped payment. Mr. Fraser and another man from defendant's office came to plaintiff's office and induced him to keep the car on statements that defendant was responsible and would guarantee that the car would be made perfect or they would give plaintiff a new car or call the deal off. He finally told them that, if defendant would so guarantee the car, he would rescind the order to stop payment on the check and let it be paid, which he did. The representations at the time the car was sold were testified to both by Mr. and Mrs. Cox. Those on the following Monday were testified to by Mr. Cox and were substantially as admitted by Mr. Fraser, who was a witness at the trial. The record is replete with instances in which the car was defective. The car would not start and plaintiff had numberless disappointing and in some instances humiliating experiences in that respect. The doors did not fit, would not keep out the cold air, and had to have windstrips put in; the roof and windshield permitted rain to come into the car when it rained and came down on the occupants and discolored the upholstery; the speedometer got out of order and never could be entirely

remedied; the spark plugs had to be changed twice in the first 6,000 miles and a new generator had to be installed in about the same distance. There was testimony that the car was in the shop for repairs many times. Plaintiff wrote several letters to defendant corporation but never received any answer. Defendant's assistant manager admitted the receipt of two of those letters. We think the evidence was sufficient to go to the jury.

It is true defendant claims that it did not make the warranties relied on by plaintiff, but the evidence shows that its salesman Fraser made the warranties and as agent for defendant induced plaintiff to purchase the car in the first instance and to keep the car on the promise that its defects would be made good. Plaintiff relied on the promise.

"Any affirmation of fact or any promise by the seller relating to the goods is an express warranty if the natural tendency of such affirmation or promise is to induce the buyer to purchase the goods, and if the buyer purchases the goods relying thereon." Comp. St. 1929, sec. 69-412.

It is assigned as error that the court erred in permitting plaintiff to testify to the value of the car at the time of purchase. It is settled in this state beyond the need of citation of authorities that the owner of personal property is qualified by reason of that relationship to give his estimate of its value.

The jurors, while considering the case, requested the bailiff to ask the court if they could return a verdict for plaintiff for less than $1,000, and when the bailiff returned he stated that the court said for the jury to read the instructions and, if they did not understand them, the court would give further instructions, but to do so would necessitate the calling in of attorneys for plaintiff and defendant. There was no further request from the jury so far as the record shows. This alleged refusal to assist the jury is assigned as error. We see no error there.

Error is assigned because the court refused to consider and respect the affidavits of eleven of the jurymen to the effect that they understood the instructions to require

them, if they found for plaintiff, to fix his damages at $1,000. This is said to refer to instruction No. 7, though there is nothing in that instruction, nor in any other, that fixes the damages at that or any other amount. That instruction plainly states the measure of damages, if any, as the difference between the value of the La Salle car, when delivered, and its value if it had been as warranted. Defendant now seeks to have the jury impeach their verdict by these affidavits. This may not be done.

"Affidavits of jurors may not be received to contradict anything essentially inhering in the verdict itself." *De Porte v. State Furniture Co.*, 129 Neb. 282, 261 N. W. 419. See *In re Estate of Alton*, 128 Neb. 411, 258 N. W. 871.

By instruction No. 7 the court told the jury that the measure of damages in the case of a breach of warranty of quality is the difference between the value of the goods at the time of delivery to the buyer and the value they would have had if they had answered to the warranty. This embodies the calls of subdivision 7, sec. 69-469, Comp. St. 1929, and was a correct statement of the law.

Defendant argues error in that, because there was no notice or advance threat of a claim for damages, plaintiff cannot recover. In the case of *Nashua River Paper Co. v. Lindsay*, 249 Mass. 365, 144 N. E. 224, the court said: "The statute does not attempt to define the kind of 'notice' of the breach of warranty that must be given within a reasonable time, in order to hold the seller liable. * * * Without attempting to lay down a general rule of construction as to the substance of the notice of the breach of warranty which the buyer must give, after acceptance of the goods, in order to hold the seller liable, it seems clear that it must refer to particular sales, so far as that is practicable; that it must at least fairly advise the seller of the alleged defects, and that it must be such as to repel the inference of waiver. Although it need not necessarily take the form of an express claim for damages or threat of such, it ought to be reasonably inferable therefrom that the buyer is asserting a violation of his legal rights."

In the present case defendant was promptly and fully advised of the facts that the car did not measure up to the warranties and that plaintiff had no intention of waiving his legal rights. Notice of plaintiff's exact claim for damages would have served no purpose, for defendant did not even answer his letters of complaint and the numerous telephone calls which the evidence shows he made complaining about the car.

Defendant argues that the court erred in excluding (as it did except for the purpose of affecting the credibility of plaintiff) the order signed by plaintiff for the car. Defendant wished to argue to the jury and here that the order contained a printed statement that the automobile "is sold under the standard warranty of the manufacturer and the purchaser hereby agrees that no other warranties have been expressed or implied." This was in finer print than the main part of the contract and was off to one side from the order, which had been filled in with ink to show the description of the car and the price and the allowance for the trade-in. The court admitted the exhibit only for the purpose of affecting the credibility of plaintiff, who had testified to express oral warranties made by or on behalf of defendant. In its answer defendant had not pleaded this printed contract in relation to the warranty, and therefore plaintiff claimed, and the trial court held, it was not within the issues. The purpose for which defendant seeks to use it is to negative the express oral warranties claimed by plaintiff to have been made when he purchased the car.

In *Omaha Feed Co. v. Rushforth,* 75 Neb. 340, 106 N. W. 25, it was said: "Where a party to a contract inserts a provision exempting him from fulfilling because of a condition which may afterwards arise, he must, when sued for a breach of the contract, plead in defense the existence of the condition in order to have the advantage thereof."

The oral warranties were all made and the check had been received in payment of the car before this order was signed.

In *Edgar v. Breck & Sons Corporation,* 172 Mass. 581,

52 N. E. 1083, a suit involving a warranty in the sale of bulbs, Judge Holmes said: "The contract was made when the parties made their oral agreement. It does not matter that at that time it was not evidenced by a memorandum in writing. * * * The general printed warning on the bill-head that the defendant did not warrant seeds could have no effect unless it led to the inference that the old contract had been rescinded and a new one substituted by mutual agreement." See *Ward v. Valker*, 44 N. Dak. 598, 176 N. W. 129, to the same general effect.

It is urged by defendant that the verdict and judgment are excessive. The argument is based on the claim that plaintiff had for a long time the use of a new car of a high class. But this argument loses sight of the almost continual trouble and annoyance to which plaintiff was put the while defendant was seeking vainly to put the car in satisfactory shape. The jury heard all the evidence and fixed the damages within authorized limits. We cannot say as a matter of law that they are excessive. The judgment is

AFFIRMED.

BEVERLY THOMAS ROTZIN, APPELLANT, V. A. R. MILLER ET AL., APPELLEES.

277 N. W. 811

FILED FEBRUARY 18, 1938. No. 29976.

1. Trusts: BREACH. Ordinarily, a trustee who takes trust property in his own name violates his duty as trustee.
2. ———. Where a trustee actually deals with trust property in the name of another, or by means of an agency which he himself controls, he will be deemed to have transacted the business in his individual name and as an individual.
3. ———. When it affirmatively appears that a trustee took title to the trust property in his individual name in good faith, and no loss resulted from his so doing, he is not liable for breach of trust. Restatement, Trusts, sec. 179, comment *d*.

APPEAL from the district court for Platte county: LOUIS LIGHTNER, JUDGE. Opinion on motion for rehearing of

case reported in 133 Neb. 4. *Former judgment of reversal vacated and judgment of district court affirmed.*

Lower & Sheehan, for appellant.

Reeder & Reeder and *Walter, Flory & Schmid, contra.*

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

CARTER, J.

This is a suit commenced by the beneficiary under a testamentary trust to recover from the trustees the original trust fund of $5,000. The trial court found in favor of the defendant trustees and plaintiff appeals.

On January 31, 1928, one David Thomas died leaving a will which provided in part as follows: "I give, devise and bequeath to each of my surviving grandchildren the sum of Five Thousand ($5,000) Dollars, subject to the following conditions that all who may be minors shall have their said $5,000 held in trust by my executors together with accumulations thereto until they shall reach their majority." The plaintiff, Beverly Thomas Rotzin, was one of five minor grandchildren entitled to share in the estate under this provision of the will.

The will appointed William H. Thomas and Thomas D. Thomas, sons of the testator, and A. R. Miller executors, and contained also the following provision: "I hereby authorize and empower the trustees hereunder to do any and all things necessary in the furtherance of their duties in court or otherwise in protecting the interests in their hands and I hereby authorize and empower my executors hereinafter named to sell, bargain, grant and convey any or all property of my estate and convert the same into cash in order to meet the bequests and conditions of this will, without order of the court."

On March 1, 1929, the defendants, while acting as executors, had in their possession $65,000 in cash belonging to the estate of David Thomas, deceased. The evidence of

the trustees is to the effect that they concluded to purchase good first mortgages on real estate because of the uncertainty of the then existing banking situation. The trustees thereupon purchased a number of first farm mortgages from the Omaha National Company through the Miller Allied Securities Company, of which A. R. Miller, one of the trustees, was president. The only mortgage purchased that has any bearing in the present case was one for $4,000 on a quarter-section of Antelope county land owned by Mary Jensen. It appears that A. R. Miller inquired of the Antelope State Bank of Neligh regarding the value of the land before the mortgage was purchased and that Ray Swanson of that institution advised that it was worth from $65 to $75 an acre, or a total of $10,400 to $12,000. The record further shows that the land was appraised by two other residents of Neligh at $10,400, which appraisal was before the trustees before the mortgage was purchased. It also appears that the land at the time was assessed at $7,500 and that this fact was considered by the trustees before the purchase was consummated. In addition to these precautions, the trustees procured a written agreement with the Omaha National Company by which the Omaha National Company agreed to repurchase the mortgage within six months at the full purchase price if, for any reason, the trustees desired to turn it back.

On July 5, 1929, the final decree of the probate court of Platte county was entered, based upon the final report of the executors showing that they held the trust fund in question as cash when in fact the $4,000 Jensen mortgage had been purchased with a part of the fund. Thereafter the executors continued to handle the funds as trustees and at all times showed the Jensen mortgage or Jensen land, and the income therefrom, as the property of the Beverly Thomas Rotzin trust fund. The record discloses that A. R. Miller kept an account of every transaction made on behalf of this trust estate, such account appearing in the record. In addition thereto, reports were filed with

the county judge by the trustees on January 15, 1931, March 15, 1932, March 1, 1933, March 1, 1934, and March 1, 1935, and in each the Jensen mortgage or the land secured by it appeared as the property of this trust. We necessarily conclude from this statement of the facts that the trustees used due care in the purchase of this mortgage, that the Jensen mortgage was at all times a part of the Beverly Thomas Rotzin trust account and that the trustees kept records and filed reports which correctly show the whole transaction.

Complaint is made that the executors had no right to purchase the mortgage while they were acting as executors and before they were formally appointed trustees and that they falsified in reporting the Jensen mortgage as cash. This contention might have merit if it had resulted or contributed to the loss which eventually occurred. The Jensen mortgage was purchased in March, 1929, and the executors had the option of returning it to the seller and receiving back their cash payment at any time during the following six months. Within the six months they had been formally appointed and had duly qualified as trustees. It would have been a simple matter to put the actual cash in the estate at the time it was settled had the occasion demanded, and subsequently to have repurchased this mortgage. We fail to see that these trustees acted dishonestly in this transaction, especially when they knew that they were shortly to be appointed trustees. Any irregularity in reporting cash in their final report as executors of the estate, when as a matter of fact they held this mortgage, bears no relation whatever to the loss sustained by the depreciation of the value of the property.

The evidence shows, however, that some time after the purchase of the Jensen mortgage the owners of the land secured thereby were unable to pay the interest thereon. Subsequently it became necessary to take over the land. This was done by having the owners deed the land to the Miller Allied Securities Company under date of September 14, 1932, the deed being recorded on November 9, 1932.

On November 26, 1932, the Miller Allied Securities Company deeded the land to the defendants as trustees, who placed the deed in the file of the Beverly Thomas Rotzin trust estate without recording it. Plaintiff contends that this method of handling the property was a violation of the trust that would make the trustees liable to the plaintiff for the original $5,000 cash trust fund when she reached her majority on August 12, 1933.

It is claimed by plaintiff that the land is now worth less than the amount of $4,000 and she refuses to accept it as the equivalent of $4,000 in her accounting with the trustees.

This court has held that when a trustee actually deals with his trust in the name of another, or by means of an agency which he himself controls, he will be deemed to have transacted the business in his individual name and as an individual. *In re Estate of Boschulte,* 130 Neb. 284, 264 N. W. 881. We necessarily conclude that the trustees, when they took the title to the land in the name of the Miller Allied Securities Company, an institution controlled by A. R. Miller, one of the trustees, fell within the rule of law applicable when a trustee takes the trust property in his own name. It is a fundamental rule of law that a trustee who takes trust property in his own name violates his duty as a trustee. Where, however, it appears affirmatively from the record that the breach of duty in no way contributed to the loss suffered by the trust estate, and the trustee acted in good faith, no liability attaches to the trustee.

An authoritative text states the rule as follows: "If the trustee takes title to the trust property in his individual name in good faith, and no loss results from his so doing, he is not liable for breach of trust. Thus, if the trustee of a mortgage accepts a conveyance of the property from the mortgagor, and in order to prevent a merger takes the conveyance in his individual name, acting in good faith and crediting the trust estate in his accounts with all receipts from the property, and the only objection to the transaction is that he took title in his own name, he is not liable

merely because the property depreciates in value. The breach of trust in such a case is merely a technical breach of trust, and no loss has resulted therefrom. If, however, he took title in his own name in bad faith, intending to misappropriate the property, he is liable for the full amount of the mortgage and interest thereon. Even if he acted in good faith, if a loss resulted from the fact that he took title in his own name, as for example if his personal creditors were thereby enabled to reach the property free of trust, he would be liable for the loss." Restatement, Trusts, sec. 179, comment *d.* See, also, *Freas' Estate,* 231 Pa. St. 256, 79 Atl. 513.

In our opinion, the record before us clearly demonstrates that the loss to the trust estate, if any, was the result of a depreciation in land values subsequent to the date of the purchase of the mortgage and was in no way caused by a breach of duty on the part of these trustees. The breaches of duty urged before this court, under the evidence contained in the record, are technical and in no way contributed to the loss. The trustees kept records and made reports which clearly show that there was no intermingling of the trust property with the private property of the trustees. The undisputed documentary evidence precludes the conclusion that the trustees could have substituted a poor investment for a good one to the injury of this plaintiff. At the time the trustees purchased the mortgage, it appeared to be a sound investment. It is only in the light of subsequent events which resulted in a great depreciation of real estate values generally that it could be charged that the trustees were in any manner guilty of bad judgment. They are not liable for failing to foretell this eventuality. The records, accounts, reports and other documentary evidence establish the fact that there was no breach of duty committed by the trustees for which liability attaches.

We have come to the conclusion that we erred in our former opinion, *Rotzin v. Miller,* 133 Neb. 4, 274 N. W. 190, and it is therefore vacated and set aside. For the reasons

herein contained, and after a consideration of all the evidence, we conclude that the judgment of the trial court was in all respects correct and it is

AFFIRMED.

ROSE, EBERLY and DAY, JJ., dissenting.

Being firmly convinced from the standpoints of law, equity, fact and justice that the opinion of the majority upon a trial *de novo* is wrong in every material respect, we are impelled to make a solemn protest against the decision.

The controversy is between plaintiff, who was a female minor, and three men of affairs, defendants, who acted for her during her minority and wrongfully since as trustees in handling for her $5,000 which they received for her from her grandfather under his duly probated will.

The record shows conclusively by uncontradicted evidence that defendants violated their duties as trustees in the following particulars: They practiced deceit and fraud in reporting their fiduciary transactions to the county court of Platte county; were guilty of negligence in investing trust funds in their individuals names in a mortgage on land in Antelope county and in the land itself, where they could not take proper care of that property without unnecessary expenses and losses; committed a breach of trust in the same transactions; held in their own names personally and managed trust property for more than three years after the trust had expired by its own terms; violated the rules of law and equity by acting for themselves and the beneficiary in the same transactions; refused to turn over to the beneficiary her trust property upon termination of the trust; acted in a dual capacity and thus created the temptation to violate their trust for their own benefit.

Defendants were executors under the will and accepted the trust created by it for the benefit of plaintiff. The sum of $5,000 was bequeathed to her on the condition that it should be held in trust by defendants, with accumulations, until she should reach her majority. The will itself authorized the trustees to convert testator's estate into cash

"in order to meet the bequests and conditions of this will." October 25, 1929, the three trustees receipted in writing to themselves as executors for $5,000 to be held in trust for plaintiff under the will. The answer of defendants to the petition for an accounting admitted that plaintiff and Walter Rotzin were married August 12, 1933, and that she then reached her majority. It is alleged in the answer of the trustees that on July 19, 1929, out of this 5,000-dollar trust fund, they allocated to the trust created by the will in favor of plaintiff the following:

"Note of Mary Jensen *et al.* secured by a first mortgage on the southeast quarter of section 7, township 26, range 6 west, in Antelope county, Nebraska, maturing March 1, 1934, bearing interest at 5½ per cent., principal sum, $4,000; accrued interest, $73.33."

Defendants were not plaintiff's trustees July 19, 1929, and did not then have power to act in that capacity or to allocate any mortgage or real estate to the trust created by the will in favor of plaintiff. Neither the mortgage on the land described nor the title thereto was ever in plaintiff or in the trustees for her or in the estate of testator. Testator never owned the mortgage. It was never assigned to his estate or to plaintiff or to the trustees for her. Trustee Miller testified that the 4,000-dollar item was carried as a cash item, his own words being: "We called that mortgage a part of the cash assets of the estate." That testimony was followed by the question, "But you didn't list it where any one could find it from an examination of that account?" He answered: "Not so far as other papers were concerned." He was then asked: "You didn't make any showing in the county court at the time that you signed receipt as trustee for Beverly Thomas to the effect that you had a mortgage from Mrs. Jensen did you?" To this he replied: "No, sir." Further questioning continued: "As a matter of fact you receipted for this $5,000 to Beverly Thomas as a cash item?" Answer: "Well, didn't say what it was—just $5,000." The trustees often reported this note and mortgage to the county court as an asset

of plaintiff's trust. It was never legally that, but in law and by record and possession was individual property of the persons who had been named as trustees. This conduct was a patent fraud upon the court and upon plaintiff. It proved a violation of trust and confidence reposed by testator in Miller as a "friend" and in the other trustees who were bound to testator and to plaintiff by the ties of blood.

Negligence in investing $4,000, of plaintiff's estate as defendants contend, before they became her trustees and consequent loss are facts shown by the evidence. Expensive trips from Columbus, Platte county, to protect the mortgage, to collect the rents and to look after the mortgaged land in Antelope county could not have been overlooked in the required exercise of diligence without negligence. Such trips were necessarily contemplated as factors in the transactions. Defendants proved this negligence by charging plaintiff and her trust property with such trips and expenses of a trustee as are indicated by the following items in their account: October 29, 1932, $7.50; January 11, 1933, $14.35; January 18, 1933, $5; April 11, 1933, $12; December 19, 1933, $13; January 23, 1934, $15.09; May 12, 1934, $5; May 17, 1934, $12.50; November 5, 1934, $3.50. Additional charges were made for services of a trustee. Besides, the trustees pleaded in their answer that the mortgage matured March 1, 1934, which was after the trust relation expired by its own terms. They had no duties to perform as trustees after August 12, 1933, the date when plaintiff reached her majority, except to account to her for their fiduciary transactions and turn her trust property over to her, duties and bonded obligations still unperformed.

The failure to execute the trust according to its terms is shown by the evidence beyond a reasonable doubt. It was a condition of the will as well as of the trust itself that plaintiff's bequest of $5,000 with accumulations should be held in trust for her until she should reach her majority —a date admitted by defendants to be August 12, 1933.

They did not then nor at any subsequent time turn over to her the $4,000 with which they bought the mortgage on the Jensen land in Antelope county nor the title thereto. Instead, they took the title to that land in their own individual names. They resorted to plaintiff's trust funds to pay large sums for taxes and repairs on the same land, still held by title and possession in their own names, and are now, more than three years after expiration of the trust relation, and after the land has depreciated in value, offering, as they prayed in a court of equity, to convey the title from themselves to plaintiff, encumbered by a judgment against her for their services as trustees, for alleged overpayments to her, for costs and for services of their attorneys in procuring this and other relief for themselves. A universal rule of equity applicable to the undisputed evidence adduced by defendants has been correctly stated as follows:

" 'Unless otherwise agreed, an agent receiving or holding things on behalf of his principal is subject to a duty to the principal not to receive or deal with them so they will appear to be his own.' * * * Restatement, Agency, 900, sec. 398." *In re Estate of Boschulte,* 130 Neb. 284, 264 N. W. 881. Approved in *Rotzin v. Miller,* 133 Neb. 4, 274 N. W. 190.

Another principle, everywhere recognized as essential to public policy and to accountability of trustees in their relations of trust and confidence, follows:

"It is the duty of a trustee accepting money for the purpose of safe-keeping and investment to account for the investments and income, to report his fiduciary transactions to the beneficiary, and to surrender the trust funds in his hands upon the termination of the trust relation." *Baird v. Lane,* 115 Neb. 413, 213 N. W. 512. Followed by a unanimous court in *In re Estate of Boschulte,* 130 Neb. 284, 264 N. W. 881, and in *Rotzin v. Miller,* 133 Neb. 4, 274 N. W. 190.

Defendants as trustees lent to one of their number $100 belonging to plaintiff's trust estate. They also acquired title

to land in their own names as individuals. They thus attempted in the same transactions to serve two masters—themselves and plaintiff. The record shows they proved those facts and resulting loss in the land deals. The pertinent doctrine based on precedent, public policy, equity and justice has not been disturbed in former opinions. The following views were expressed by a unanimous court:

"It is firmly established, both by English and American courts, that a trustee is bound to perform faithfully the duties relating to his trust, and that in doing so he cannot allow his own interests to interfere. If he unites his personal and representative capacities, he confuses transactions which the law requires him to keep separate and distinct. If he attempts to acquire an individual interest in the subject-matter of his trust or agency, he creates a temptation to serve himself at the expense of the beneficiary or principal, and enters a realm where his secret purposes with reference to trust property or interests may escape judicial scrutiny." *Nebraska Power Co. v. Koenig,* 93 Neb. 68, 139 N. W. 839.

On the facts established herein without dispute, the law of accountability of the trustees to the beneficiary of the trust or *cestui que trust* was in Nebraska and now is elsewhere, as follows:

"Where a trustee takes title to trust property in his own name as an individual, the *cestui que trust* has the option to accept the investment or require the trustee to account for the purchase money with interest." *Freas' Estate,* 231 Pa. St. 256, 79 Atl. 513; 3 Bogert, Trusts and Trustees, sec. 596.

The nature of the transactions relating to the 4,000-dollar item, to the assignment of the Jensen mortgage and to the mortgaged land is not left in doubt by the record. The negotiations for the purchase of the mortgage were conducted by A. R. Miller, president of the Miller Allied Securities Company, a corporation for which he acted. He controlled it. This mortgage was purchased with $4,000 belonging to the estate of testator, David Thomas.

This is shown by a 4,000-dollar check and by testimony of Miller. The check was dated March 1, 1929, and was payable to Miller Allied Securities Company on account of Jensen first mortgage loan. It was signed "David Thomas Estate by A. R. Miller, Executor." It was indorsed on the back "Pay First National Bank, Columbus, Nebr., or order Miller Allied Securities Co. A. R. Miller, Pres. Leonard S. Miller, Secy-Treas." and marked paid by indorsee. Miller testified that the assignment was never recorded and that the purchase was on behalf of the estate of testator. It was the money of testator's estate, therefore, that was paid for the mortgage and not the trust money of plaintiff. The record shows that the mortgage was never assigned to plaintiff or to defendants as her trustees, that plaintiff was without knowledge of the assignment and that the Miller corporation was the assignee.

When the Jensen mortgagors were in default, they deeded the mortgaged land to the "Miller Allied Securities Company, Trustee," September 14, 1932, without disclosing any beneficiary or *cestui que trust.* The conveyance was made subject to a mortgage of $4,000, past-due interest and past-due taxes. This deed is in the bill of exceptions. The fact that it was finally recorded is immaterial in the determination of the case, because there was never any record evidence of title in plaintiff or in defendants as her trustees.

Another deed, dated November 26, 1932, purporting to convey this same land to Thomas D. Thomas, William H. Thomas and A. R. Miller, trustees, without indicating any beneficiary or *cestui que trust,* was signed "Miller Allied Securities Company, Columbus, Nebraska, Trustee, by A. R. Miller, President."

The word "trustee" following the name of grantee or grantor in a deed is merely *descriptio personæ,* and does not disclose a trust or beneficiary. Following is the rule of law and equity: "The mere insertion of 'trustee' after the name of grantee in a patent for land does not prevent the title from passing to the person named nor prevent

him from transferring it to another, where a trust or a beneficiary is not disclosed." *Perry v. Ritze,* 110 Neb. 286, 193 N. W. 758. See, also, *Farrell v. Reed,* 46 Neb. 258, 64 N. W. 959; *Thomas v. Carson,* 46 Neb. 765, 65 N. W. 899; *Andres v. Kridler,* 47 Neb. 585, 66 N. W. 649.

The same rule was recently stated in this form: "The insertion of the word 'trustee' after the name of the grantee in a real estate mortgage does not of itself establish the existence of such a trust relationship." *Parker v. Bourke,* 131 Neb. 617, 269 N. W. 102.

This Jensen land, therefore, is not trust property belonging to plaintiff. The title to it was never in her or in defendants as trustees for her. In law it is the property of the grantees named as individuals. They managed it more than three years after they were required in equity to turn her trust property over to her. In the meantime they used her trust money to pay large sums for taxes and expenses for repairs on their own premises. They have never yet tendered to her an executed deed to this land upon condition of her refunding overpayments, interest, costs and fees of attorneys.

The uncontradicted evidence, therefore, shows that defendants in their relations of trust and confidence pursued two different courses of iniquity. One course led through public records to the deed to themselves personally where their title permitted them to sell the land at a profit for their own benefit in the event of a boom in the value of farm lands. The other course led to their private files and accounts where they kept what falsely appears to be proofs that the land was part of plaintiff's trust property, so that it could be unloaded on her in the event of a loss. They were not induced to keep the land, because its value dropped and the only way to prevent a loss to themselves was to deed it to plaintiff encumbered by liens which they created in addition to her trust money which they used to pay taxes and expenses of repairs on the same land. Reservations in their deed show that the land was not sufficient security for $4,000 and that the investment will

result in a loss. There is testimony of defendant Miller to the same effect.

The depression covers a multitude of sins, but it is no justification for deceit and fraud, for negligence resulting in the loss of trust property, for breach of trust, for holding trust property in the name of the trustees, for violating the rules of law and equity that fix the accountability of trustees, for failure to perform their duties, for refusal to surrender trust property when the trust relation expires by its own terms and for creating the temptation to serve personal interests at the expense of a beneficiary.

The philosophy on which the rules of equity herein quoted are based came down from the Chancellor of Galilee who dictated the hallowed petition, "No man can serve two masters," and taught the sacred prayer, "Lead us not into temptation," a prayer heard at the firesides and in the churches of Christendom.

Courts of equity do not administer Divine law, but generally they have been scrupulous in observing rules of equity founded on the highest concepts of morality, honesty, justice, rectitude and righteousness. Measured by these standards, the judgment affirmed by the majority, when considered with the undisputed facts, is an anomaly without a former parallel in adjudicated cases. The trial court and the majority on appeal approved all the acts of defendants and required plaintiff to account to them for those acts. The district court entered a personal judgment in favor of defendants against plaintiff for the following items: Additional compensation, $24.50 included in overdraft, $146.55; further services for executing the trust, $50; attorney fees for defending this suit, $200; total, $396.55. This judgment by decree in equity was transported from the courthouse in Platte county across the county line to Antelope county as a lien on the land to which defendants hold the title in their own names. They are not required to convey it to her unless she pays the judgment. If she is unable to make the payment within 90 days, they are ordered to sell the land, pay to themselves the judgment

out of the sale price and turn any remaining proceeds of the sale over to her. This is the judgment affirmed by the majority. It defies the law of this and other states that plaintiff has the option to demand her $4,000 and interest or accept the title now in her trustees.

The reason given by the majority for their decision is stated in the syllabus as follows:

"When it affirmatively appears that a trustee took title to the trust property in his individual name in good faith, and no loss resulted from his so doing, he is not liable for breach of trust. Restatement, Trusts, sec. 179, comment *d.*"

The text-writer who gave utterance to that doctrine was not exercising the power of a court of equity to pronounce a judgment. It is contrary to the proper rule stated in another part of the same text and violates former rules unanimously adopted by this court. Besides, the facts assumed in the doctrine quoted are at variance with uncontradicted evidence in the record. The text violated reads:

"If the agent violates his duty to keep the funds of the principal distinct from his own and in the principal's name and if, while so improperly mingled (invested) or deposited in the agent's name, the fund suffers loss, whether or not the loss is due to the agent's wrongful act, he is subject to liability to the principal for the amount of the original fund with interest from the time of the breach of duty." Restatement, Agency, sec. 398, comment *d.*

This latter statement of the correct rule in equity was quoted and adopted by a unanimous court in *In re Estate of Boschulte,* 130 Neb. 284, 264 N. W. 881. Another rule of equity violated by the affirmance of the judgment below is here reproduced:

"The violation by a trustee of a duty laid upon it by law, whether wilful and fraudulent, or done through negligence or arising through mere oversight or forgetfulness, is a breach of trust." *Masonic Bldg. Corporation v. Carlsen,* 128 Neb. 108, 258 N. W. 44. Followed in *Rotzin v. Miller,* 133 Neb. 4, 274 N. W. 190.

An examination of the cases in which courts have held that a trustee may take and hold in his own name land purchased with trust money shows that the trustee either so acted by contract or in the interest of the beneficiary to protect the trust property. The opinions in such cases have no application whatever to the case at bar.

In Nebraska the rules of equity that hold trustees accountable for investing trust funds in mortgages or lands in their own individual names bind trustees as firmly as statutes of like import. In a recent case the consequences of violating such a statutory rule were considered in an opinion by the supreme court of Pennsylvania in which it was said:

"Appellant contends that the company acted improperly in continuing to carry the mortgage in its own name after allotting it to the estate, and that the mere execution of a declaration of trust on the books of its trust department was an insufficient compliance with section 29 of the Act of April 29, 1874, P. L. 73, as amended by the Act of May 9, 1889, P. L. 159, and by the Act of April 6, 1925, P. L. 152. With this we are entirely in accord. That act as amended requires that trust companies 'shall keep all trust funds and investments separate and apart from the assets of the companies, and all investments made by the said companies as fiduciaries shall be so designated as that the trust to which such investment shall belong shall be clearly known.' We are unable to agree with the opinion of the court below that the company's declaration of trust on its books was a sufficient compliance with the act. Where the trust to which the investment belongs is designated in no other way than by a declaration on the company's books, the allotment is 'clearly known' to no one except the company. While the act as amended in 1925 provides that a clear designation on the company's records shall be sufficient compliance in the case of a mortgage pool, the mortgage here had been taken out of the pool and put into the Yost trust. The company was therefore under the same duty in regard to it as in the case of any other

specific piece of property acquired for a specific trust. Whether it acquired the property from another or from itself, as in this case (a practice of which we do not approve but of which no complaint is here made), it should have taken title as trustee for the specific trust, by an instrument designating it as such and placed upon public record, so that all persons interested might be put upon notice of the trust: *Freas' Estate,* 231 Pa. St. 256; *Carr's Estate* (No. 1), 24 Pa. Superior Ct. 369; see Restatement, Trusts (Tentative Draft No. 2) section 174, comment *d.* Only when such precautions have been taken is the beneficiary properly protected from the danger of an unfaithful trustee's subsequently claiming the property as his own and from the possibility of attacks by the trustee's creditors. A failure of the company to realize that a mortgage allotted to a specific trust could not be treated like a mortgage in a pool, but imposed different duties upon it, would not, of course, serve to excuse it from the neglect of such duties.

"It is well settled that where a trustee invests trust money in property which he takes in his own name as an individual the beneficiary has the option to accept the investment or require the trustee to account for the money so invested, with interest: *Morris v. Wallace,* 3 Pa. St. 319; *Stanley's Appeal,* 8 Pa. St. 431; *Royer's Appeal,* 11 Pa. St. 36; *Freas' Estate, supra; Carr's Estate, supra;* see *McAllister v. Com.,* 30 Pa. St. 536; *Norris' Appeal,* 71 Pa. St. 106. We see no reason for changing so settled and salutary a rule. As was said in *Matter of Union Trust Co.,* 219 N. Y. 514, 'It has been quite universally held that a trustee should not invest trust funds in his own name. Such rule of law should not be abandoned, qualified, or in any way impaired. * * * There is no difference between a corporate trustee and an individual trustee in its or his duty in respect to investments. Trust funds should not only be kept independent of individual and other trust funds, but the investments thereof should, so far as possible, be clearly defined, and at all times stamped with the individual trust

to which they severally belong.' The trustee should not be permitted so to make an investment that he can call it his own today, if good, and tomorrow, if bad, ascribe it to the trust, or shift it from one trust to another, or leave it subject to attack by creditors as his individual property. Only by giving the beneficiary a right to make the trustee account for funds thus invested can a practice so fraught with danger be effectually prevented. Nor is the danger less where the trustee is a corporation than where the trustee is an individual." *Yost's Estate,* 316 Pa. St. 463, 175 Atl. 383.

The judgment pronounced by the majority is wrong in its entirety, and their opinion, if recognized as stating a general rule of law and equity, will jeopardize trust funds of inestimable value, scattered, as they are, over the world in different forms where they are not under the watchful eye of the owners.

In dissenting we are giving our views at length, owing to the vast importance of the decision which we regard as a disturbing factor in the former public policy of the state and as an invasion of the equitable rights of an innocent beneficiary.

ARTHUR E. JOHNSON, APPELLEE, V. CHARLEY L. SHULER ET AL., APPELLANTS.

277 N. W. 807

FILED FEBRUARY 18, 1938. No. 30186.

1. **Evidence.** "The existence of a written contract or instrument, duly executed between the parties to an action and delivered, does not prevent the party apparently bound thereby from pleading and proving that contemporaneously with the execution and delivery of such contract or instrument the parties had entered into a distinct oral agreement which constitutes a condition on which the performance of the written contract or agreement is to depend." *Norman v. Waite,* 30 Neb. 302, 46 N. W. 639.
2. ———. Where three written instruments, made and executed at the same time, relating to the same transaction, construed

together, fail, when inspected, to contain all the particulars necessary to make a perfect agreement, and, when taken as a whole, fail to express the whole arrangement between the parties, then, in that event, parol evidence is admissible to prove a distinct oral agreement, made contemporaneously with the written agreement.

3. **Mortgages.** The value of land as compared with the consideration paid for it is an important factor to be considered in construing the true nature of the transaction. *Snoke v. Beach*, 105 Neb. 127, 179 N. W. 389.

APPEAL from the district court for Dawson county: ISAAC J. NISLEY, JUDGE. *Reversed.*

Frank M. Johnson, for appellants.

T. M. Hewitt and *W. A. Stewart, Jr.*, *contra.*

Heard before GOSS, C. J., EBERLY, DAY, PAINE, CARTER and MESSMORE, JJ., and YEAGER, District Judge.

MESSMORE, J.

This is an appeal from the district court for Dawson county, wherein said court found for the plaintiff and set aside a certain reconveyance agreement as constituting a cloud on plaintiff's title to land, from which decree the defendants appeal.

Plaintiff's petition alleges the ownership of a certain quarter-section of land, and an arrangement made by him with defendants whereby plaintiff released a 7,000-dollar mortgage, accepted a warranty deed from the defendants, together with a farm lease running for three years, and an optional agreement to reconvey the premises upon defendants paying the sum of $1,005.38 delinquent interest and taxes, on or before March 1, 1936, and, in the event that defendants complied with such agreement, plaintiff would carry back a mortgage on said land in the sum of $7,000. The optional agreement was filed with the register of deeds by the defendants February 11, 1936, and this action is brought for the purpose of having the optional agreement declared null and void; asking that the cloud upon plaintiff's title be thereby removed, and that plaintiff be decreed to be entitled to immediate possession of said premises.

The defendants' answer alleges a separate and distinct oral agreement, made contemporaneously with the written agreement as set out in plaintiff's petition, and alleges that defendants sought to comply with and perform their part of the oral agreement, and have an equitable interest in said premises, and in a cross-petition realleges the subject-matter as contained in the answer, details the agreement, and that plaintiff fraudulently omitted and neglected to recite in said lease and option all the terms and conditions that were agreed to by the parties on September 16, 1932, and the value of the premises involved, asks for an accounting and credit on the mortgage indebtedness on account of rents paid during the crop years 1933, 1934, and 1935, and the placing of permanent improvements on the premises in the sum of $554.20, and for other equitable relief.

The answer to the cross-petition specifically denies the oral agreement, as alleged in such cross-petition, and that rents were to be applied on the payment of the mortgage, and denies that any part of the debt of $1,005.38 has been paid. The defendants' reply to plaintiff's answer to defendants' cross-petition is a general denial.

The evidence discloses that defendant Reta Shuler is a cousin of plaintiff and the parties had always been on friendly terms; that in 1929 the plaintiff loaned defendants the sum of $7,000, they being the owners of the fee title to the southeast quarter of section 13, township 10 north, range 23 west of the 6th P. M., in Dawson county, Nebraska; that defendants failed to pay the interest and taxes, as provided in such mortgage. According to plaintiff, he wanted the delinquent taxes and interest paid, amounting to $1,005.38, and the defendants wanted to save foreclosure of the mortgage; therefore, the warranty deed, the farm lease and the repurchase agreement were entered into, the plaintiff agreeing that if said sum of $1,005.38 should be paid on or before March 1, 1936, and rent paid in the customary terms, he would reconvey the land to the defendants, and take back a 7,000-dollar mortgage thereon.

Defendants contend that on or about September 16,

1932, plaintiff and his wife came out to the residence of the defendants and they talked the matter over. They agreed, as related by defendants but denied by plaintiff, that both of the parties were to keep an account of the rents received by plaintiff under such agreement, and if at any time the rents received by him were in an amount sufficient to reimburse plaintiff for the interest and taxes then in arrears, in addition to any other sums, such as taxes, insurance or water maintenance expended by plaintiff, he would reconvey the land to defendants and give them credit on the original 7,000-dollar loan for any excess over and above what was due; that they further agreed, in the event defendants were not able to redeem, that any money expended by them in maintaining the premises, in the way of permanent improvements and upkeep other than customary expenditures as tenants, would be refunded to defendants by plaintiff, and that the defendants were to keep account of such items. Defendants also understood that they were to pay 5 per cent. interest on the mortgage at all times up to the period of redemption. The next day the parties met at the office of plaintiff's attorney, where the warranty deed was executed by defendants, the farm lease and the agreement to repurchase were signed by the plaintiff and defendant Charley L. Shuler, and the defendants received the canceled mortgage, note and release of mortgage. As to what occurred in the attorney's office, defendant Shuler stated he objected to the lease for the reason that the language therein indicated to him that the plaintiff would have a right to mortgage his (Shuler's) part of the crop and that he would not be able to transact business as he desired. This provision was changed to meet Shuler's requirements. He also stated that he objected to the language used in the reconveyance agreement because it contained no provision for the application of the rents received by plaintiff on the past-due interest and taxes, together with any other sums which might be expended by the defendants during the term of said agreement; nor did it provide for the reimbursement to defendants for

any improvements they might place on the premises in the event they were unable to redeem, but that he was satisfied, when it was explained to him, that the words "pay or cause to be paid" meant that such rents were to be credited against the amount owing on the mortgage. This was denied by plaintiff and his attorney. The warranty deed showed the consideration to be the sum of $8,005.38, and contained this provision: "This deed is given for the purpose of canceling the mortgage given by the grantors to the grantee and no cash consideration in exchange therefor." The farm lease was in the customary terms of rent, and provided that the plaintiff was to pay one-third and the defendants two-thirds of the maintenance fee for water. The repurchase agreement provided for the payment of $1,005.38 during the term of the lease and the carrying back of the 7,000-dollar mortgage, but did not designate the length of time such mortgage would be carried back, or the rate of interest it would bear.

Defendant Charley L. Shuler testified that he met plaintiff on the street in Lexington in the spring of 1935 and asked for an accounting and reconveyance of the land to the defendants in accordance with their agreement; that plaintiff stated there was no need of doing it at that time; that they might just as well let it run for another year and then have a settlement; and that plaintiff stated that defendants could rest assured that he did not desire their land. This meeting is denied by plaintiff. In the spring of 1936 defendant Charley L. Shuler again requested an accounting from the plaintiff and was told by plaintiff that he wanted the money or the premises.

During the period of the lease, the defendants paid rent in the sum of $3,896.24. The plaintiff paid the taxes and water maintenance, and, according to the books kept by the defendants, there would be a total credit to plaintiff of $1,661.74. In addition thereto, the defendants expended the sum of $554.20 for permanent improvements on the premises, and $2,234.50 should be credited to the mortgage debt, which would leave a balance of $5,770.88, for which

amount, defendants contend, the plaintiff was to carry back a mortgage. This was allowing interest at 5 per cent. on the 7,000-dollar indebtedness to March 1, 1936.

On April 30, 1933, during the course of the lease, plaintiff's wife, in reply to a letter asking that wallpaper be furnished for the house on the farm, wrote as follows: "You wrote me about the paper. Now we don't hardly consider ourselves landlords for at least three years. While we expect rent which will hardly be the interest that you would be paying and you know that we haven't had interest for two years and have paid taxes for 2 years nearly three now * * * Arthur (the plaintiff) says our personal agreement was if you put anything on the place reasonable paid for it we were to keep track of it and if you couldn't redeem the place we were to pay you and same way we were to keep our account of what we put on and you were to pay us. I know the paper can't be so very much now you can go ahead and get the paper we will pay for it that way." This letter indicates that plaintiff considered himself only a qualified owner of the premises; that he did not consider himself as landlord nor the defendants as tenants, but that the relationship of creditor and debtor existed.

The evidence further discloses that the value of the land in question at the time of the execution of the original mortgage was $10,000. At the time of the execution of the instruments in question, September 17, 1932, it was from $9,000 to $11,000, and on the date of the alleged redemption period, March 1, 1936, from $11,000 to $11,500. The only statement of value appearing in the record *contra* is by the plaintiff, that the land was not worth the amount of the mortgage on September 17, 1932. The total indebtedness was $8,005.38, on September 17, 1932. There has always been an equity in the land, and on March 1, 1936, such equity was in excess of $2,000.

In this connection we quote from *Snoke v. Beach*, 105 Neb. 127, 179 N. W. 389, wherein this court said (p. 132): "The value of the land as compared with the consideration paid for it is also an important factor to be considered in

determining the true nature of the transaction. This of course is based upon the well-recognized trait of mankind to secure as nearly as possible a fair value for his property."

If the plaintiff should prevail, the result would be as follows: At the outset, plaintiff wanted paid his back taxes and interest, in the sum of $1,005.38. He has a 7,000-dollar mortgage on a quarter-section of land which was worth on March 1, 1936, from $11,000 to $11,500. His share of the rents was $3,896.24. On March 1, 1936, taking into consideration the value of the land which plaintiff would receive for his mortgage, crediting him with the amount of $1,661.74 for back taxes, interest and water maintenance, and giving him the net rent of $2,234.50, he would have approximately $4,000 more than the indebtedness against the land.

In view of the evidence, we believe that the oral contract made contemporaneously with the execution and delivery of the written agreements constituted a condition upon which the performance of the written contract or agreement was to depend. The rule is announced in *Norman v. Waite,* 30 Neb. 302, 46 N. W. 639, as follows: "The existence of a written contract or instrument, duly executed between the parties to an action and delivered, does not prevent the party apparently bound thereby from pleading and proving that contemporaneously with the execution and delivery of such contract or instrument the parties had entered into a distinct oral agreement which constitutes a condition on which the performance of the written contract or agreement is to depend." This holding was followed in *Exchange Bank v. Clay Center State Bank,* 91 Neb. 835, 137 N. W. 845. See, also, *Davis v. Sterns,* 85 Neb. 121, 122 N. W. 672.

And in *Seminole Bond & Mortgage Co. v. Investors Realty Co.,* 127 Neb. 193, 254 N. W. 732, we held: "Parol evidence is inadmissible to vary the terms of a written agreement, complete on its face, but such evidence may be received to show that a written obligation has been dis-

charged in accordance with the terms of a contemporaneous parol agreement, when such parol agreement was a condition precedent upon which the written obligation was executed."

Plaintiff cites several cases on the question of the admissibility of parol evidence to prove a collateral or contemporaneous oral agreement, all of which are the law in this state. In *Weidenfeld v. Olson,* 132 Neb. 303, 271 N. W. 806, we held: "Parol evidence is inadmissible to prove a collateral or contemporaneous oral agreement to vary or contradict the terms of a written lease, which, upon inspection, appears to be a complete contract, embracing all the particulars necessary to make a perfect agreement and designed to express the whole arrangement between the parties." And to the same effect is *Spiegal & Son v. Alpirn,* 107 Neb. 233, 185 N. W. 415. In the latter case it was said (p. 245): "The test which most of the courts have applied to determine whether parol evidence is admissible to prove a collateral agreement is whether or not the writing appears upon inspection to be a complete contract, embracing all the particulars necessary to make a perfect agreement and designed to express the whole arrangement between the parties, and whether or not the parol evidence is consistent with, and not contradictory of, the written instrument."

Construing the three written instruments together, and upon an inspection of them, we do not feel that they embody the complete contract between the parties; neither do they contain all the particulars necessary to make a perfect agreement, and they do not, taken as a whole, express the whole arrangement between the plaintiff and defendants. From all the evidence and the circumstances, we believe that the parol testimony was admissible.

The reconveyance agreement is indefinite and uncertain as to the length of time the mortgage was to run and the rate of interest it was to bear. We are convinced that the relationship of creditor and debtor existed as between the plaintiff and defendants. Therefore, the relief as prayed

by plaintiff is denied. In view of the relationship of creditor and debtor so established, and as disclosed by the record, the defendants are entitled to have credited on their indebtedness to the plaintiff the sum paid to plaintiff as rent in the amount of $3,896.24, and said amount for rents is to be credited as follows: (1) $1,005.38 delinquent taxes and interest to September 17, 1932; (2) 5 per cent. interest on $7,000 from September 17, 1932, to date of settlement; (3) taxes and water maintenance paid by plaintiff subsequent to September 17, 1932, to date of settlement; (4) any amount of said rents remaining over and above such amounts thereof to be credited on the original 7,000-dollar indebtedness. The remaining amount is due plaintiff for which he has an equitable lien on the real estate of the defendants and an adequate equitable remedy provided by law. Without prejudice to plaintiff to enforce said lien, the judgment of the district court is

REVERSED.

HAZEL DELL JORGENSEN ET AL., APPELLANTS, V. ARTHUR F. CRANDELL ET AL., APPELLEES.
277 N. W. 785

FILED FEBRUARY 18, 1938. NOS. 30065, 30066.

1. **Husband and Wife:** CONTRACTS. Whether or not a husband and wife may contract with each other under modern statutes depends upon the nature of the statute in force in the jurisdiction whose law governs the occasion and the construction that the courts of such jurisdiction put upon the statute applicable.
2. **Contracts:** LAW GOVERNING. The validity of a contract, the obligations thereof, and the capacity of the parties thereto are to be determined by the *lex loci contractus* unless there is something in the contract which is prohibited by express statute or infringes upon some positive rule of public policy.
3. **Property.** The principle that the *lex rei sitæ*, as such, governs as to real property is subject to an exception as to obligations which, although in relation to real property, do not directly affect the title to or interest in the property itself.

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

Cook & Cook, for appellants.

York & York and *F. J. Byrd, contra.*

Heard before GOSS, C. J., ROSE, EBERLY, PAINE, CARTER and MESSMORE, JJ., and CHAPPELL, District Judge.

CHAPPELL, District Judge.

This is an action by plaintiffs Hazel Dell Jorgensen and William Jorgensen, her husband, appellants, to partition 80 acres of land in Dawson county, Nebraska, and an appeal from a part only of the final decree of the county court of Dawson county, Nebraska, entered in In re Estate of George W. Crandell, deceased. Both cases were consolidated and tried together by agreement of the parties. The trial court denied partition and affirmed the final decree of the county court. Upon appeal to this court, both cases are consolidated by stipulation for the purposes of brief, argument and decision. They involve like questions of law and fact, and this opinion disposes of both cases.

The questions presented for our determination are (1) the validity of a postnuptial agreement made by and between George W. Crandell and Euphemia C. Crandell, his wife, in Los Angeles, California, on December 24, 1918, and (2) the validity of an election by the guardian of the widow to renounce the will of her deceased husband, which will was made in conformity with the postnuptial agreement, and take under the statutes of Nebraska. It is conceded that, if the postnuptial agreement was valid and enforceable in Nebraska, it is decisive of both questions.

Keeping this in mind, we find from an examination of the record that George W. Crandell and Euphemia C. Crandell were married in Nebraska on March 9, 1909. No issue resulted from their marriage, but each, at the time, had grown children of a previous marriage and certain separate money, interests and real property in their own right. In 1914 they moved to Los Angeles, California, where they lived together as husband and wife until May,

1931, when the wife, ill, went to a sanitarium where she stayed until after the husband's death on July 20, 1931. In August, 1931, the wife returned to Nebraska with her daughter Hazel Dell Jorgensen, appellant, and on September 8, 1931, the county court of Dawson county, Nebraska, appointed one Carl E. Faught her guardian because of incompetency by reason of old age. The wife died on September 14, 1931.

On December 24, 1918, while living in California as husband and wife, they entered into a postnuptial agreement which provided in substance that, in consideration of their mutual covenants and wishes, the properties which they then possessed and which they would obtain in the future, except as therein mentioned, should be their separate estate respectively and go to their legal heirs or as they might see fit to thereafter convey or bequeath same respectively; that certain described real estate and all that he should acquire in the future would be the husband's estate, and his wife quitclaimed therein all the interest that she might have in said property and all property which he might thereafter possess, including her right of inheritance; that certain other described property and all that she should acquire in the future would be the wife's separate estate, and the husband, likewise, quitclaimed to her, including his right of inheritance. In consideration of the foregoing, the wife granted her husband a life estate in certain described property, a part of her separate estate in California, that he might enjoy the income therefrom during his lifetime, and the husband granted his wife a life estate in and to the 80 acres in Dawson county, Nebraska, a part of his separate estate, that she might enjoy the income therefrom during her lifetime. The contract then provided: "It is the intention of this agreement and mutually understood by and between both parties that by these presents each party forfeits to each other respectively their right of inheritance in and to all properties * * * of which each party shall respectively become possessed in the future, excepting that each party shall receive a life

estate only as mentioned in the foregoing. It is mutually understood that this agreement is made for the purpose of preserving to the heirs of each party respectively all properties of which the respective parties are now possessed or shall obtain in the future."

Thereafter on May 31, 1919, they both lawfully made, executed and delivered a deed for certain real property jointly owned by them in Los Angeles county, California, to the husband, which reads in part: "This deed is given to carry out the mutual agreement of the parties hereto; that said property shall become vested in the grantee, as the grantee's sole and separate property, free from all interest, title or claim of the grantor now existing or which may hereafter arise by reason of the marital relation of said parties, and is so accepted by said grantee. To have and to hold to the said grantee, his heirs or assigns forever." On November 3, 1925, the wife made her will with a codicil thereto as of February 28, 1928, and on June 13, 1930, the husband made his will, all in conformity with and reaffirming the postnuptial agreement. Appellant was present when her mother's will and the codicil were made, knew their contents, and testifies that her mother was competent at that time and thereafter until about the time of her return to Nebraska. She knew that her mother bought and sold real property in her own right and had her own bank account while living in California, having made some investigation of their respective properties at times when she visited them there. After the wife's death, her will and codicil were probated in Los Angeles county, California, and Dawson county, Nebraska. Appellant acted as executrix as provided in the will to the close of administration of the estate, and then took all the mother's separate property as sole devisee under the will,—her four brothers having been left only one dollar each.

After the husband's death, his will was probated in Los Angeles county, California, on August 17, 1931, and the estate duly closed without an election by the widow in that jurisdiction to renounce the will and take under the statute.

At the time of appointment of a guardian for the wife September 8, 1931, the county court of Dawson county, Nebraska, in its order, recited that the husband's will had been admitted to probate in Los Angeles county, California, but that it had not yet been filed in Dawson county, Nebraska, where the deceased husband owned the lands in controversy; that it was for the best interests of the widow to renounce the will and take under the statute; that the guardian should procure a duly authenticated copy of the will and its probate as soon as possible and file it, together with a formal renunciation, in the name of the widow. The husband's will, by ancillary proceedings, was later probated in Dawson county, Nebraska, but, in the meantime, the widow's death occurred on September 14, 1931, after which the guardian filed a purported renunciation and election for her therein as guardian in her lifetime. The county court, upon hearing, found that the election was ineffectual to constitute a valid renunciation of the will or an election on behalf of the widow to take under the statute, and that the postnuptial agreement barred and estopped the widow and the appellant, her devisee, from claiming any interest in the estate of George W. Crandell, deceased, under the laws of Nebraska. The district court affirmed these findings and judgment of the county court.

Before this decree was entered, appellants filed an action in the district court for Dawson county, Nebraska, against all the children devisees of George W. Crandell, deceased, and Hazel Dell Jorgensen as executrix of her mother's estate, to partition the real estate involved, claiming a one-fourth interest by reason of the alleged validity of the renunciation and election heretofore described, and alleged invalidity of the postnuptial agreement in Nebraska. Upon trial, the district court found the postnuptial agreement to be valid and binding under the laws of California and not illegal or against public policy in Nebraska, and that it should be recognized and enforced in Nebraska; that it did not purport to convey land in Nebraska, but barred

and estopped the widow inheriting or claiming any lands of her husband or any interest therein in Nebraska, and found generally for the defendant devisees.

It is admitted that section 158 of the Civil Code of California was in full force and effect at all times, and that it provides: "Either husband or wife may enter into any engagement or transaction with the other, or with any other person, respecting property, which either might if unmarried; subject, in transactions between themselves, to the general rules which control the action of persons occupying confidential relations with each other, as defined by the title on trusts."

As early as 1883, in *Schuler v. Savings & Loan Society,* 64 Cal. 397, 1 Pac. 479, the supreme court of California, after quoting this statute, said: "Under this law husband and wife are not one in respect to the separate, joint or common property, which may have been acquired by either; they are coequals, and each is allowed to contract with the other in regard to such property, as either might contract with a stranger. The rights of either in respect to such property are substantially equivalent, differing chiefly in the single circumstance that the husband, being still considered the head of the family, is entitled to manage and control the property of the wife for the benefit of both, and to dispose of the common property, except for the purpose of defrauding the wife of her rights therein. The transaction between the husband and wife, relating as it did to real property of which they were joint owners, was, therefore, one in which they could engage with each other." In *Vieux v. Vieux,* 80 Cal. App. 222, 251 Pac. 640, the court said: "By agreement between husband and wife the status of any property owned by them may be changed from separate to community, and *vice versa.*" See, also, *Corker v. Corker,* 87 Cal. 643, 25 Pac. 922; *Young v. Young,* 126 Cal. App. 306, 14 Pac. (2d) 580; *Hoeck v. Greif,* 142 Cal. 119, 75 Pac. 670; *Perkins v. Sunset Telephone & Telegraph Co.,* 155 Cal. 712, 103 Pac. 190.

Whether or not a husband and wife may contract with

each other under modern statutes depends upon the nature of the statute in force in the jurisdiction whose law governs the occasion and the construction that the courts of such jurisdiction put upon the statute applicable. 30 C. J. 671. This court has said that the validity of a contract, the obligations thereof, and capacity of the parties thereto are to be determined by the *lex loci contractus* unless there is something in the contract which is prohibited by express statute or infringes upon some positive rule of public policy. *Delahaye v. Heitkemper,* 16 Neb. 475, 20 N. W. 385; *Benton v. German-American Nat. Bank,* 45 Neb. 850, 64 N. W. 227; *Farmers State Bank v. Butler,* 101 Neb. 635, 164 N. W. 562. See, also, 30 C. J. 726.

In *Polson v. Stewart,* 167 Mass. 211, 45 N. E. 737, Justice Holmes, in a similar case, where the agreement was made in North Carolina, said: "But it is said that the laws of the parties' domicil could not authorize a contract between them as to land in Massachusetts. Obviously this is not true. It is true that the laws of other states cannot render valid conveyances of property within our borders which our laws say are void, for the plain reason that we have exclusive power over the *res.* * * * But the same reason inverted establishes that the *lex rei sitæ* cannot control personal covenants, not purporting to be conveyances, between persons outside the jurisdiction, although concerning a thing within it." The principle that the *lex rei sitæ,* as such, governs as to real property is also subject to an exception as to obligations which, although in relation to real property, do not directly affect the title to or interest in the property itself. Annotation, 18 A. L. R. 1558; 12 C. J. 478.

In *Kocher v. Cornell,* 59 Neb. 315, 80 N. W. 911, discussing the question of whether or not a wife had bound her separate estate when all that she had was a prospective inheritance of real property from her husband after his death, this court said: "A mere hope of succession to an estate is not property." The real estate involved was always the fee simple property of the husband. As part

of the postnuptial agreement he gave the wife a life estate therein which the evidence shows she enjoyed throughout her life as contemplated by the parties. Aside from the life estate granted therein, the wife had a mere hope of succession to real property, an estate, should the husband's death be precedent, which she waived by the provisions of the postnuptial agreement. We believe the postnuptial agreement to be contractual only as mutual personal covenants in so far as waiver of inheritance is concerned, and, being valid and enforceable in California, it is valid and enforceable in Nebraska. We find that it is not prohibited by an express statute and that it is not contrary to the public policy of this state. The natural tendency of all courts now is to permit as broad a field as possible for contractual relationships by married women under existing statutes.

To concede that the postnuptial agreement in its form is an attempted conveyance of real property in Nebraska places the appellant in no better position. The agreement itself is a legal conveyance of real property in Nebraska if the wife then had a present property right therein. See sections 76-103 and 30-105, Comp. St. 1929. We said as early as *Furrow v. Athey*, 21 Neb. 671, 33 N. W. 208: "A deed of conveyance of real estate, executed by the husband directly to the wife, in the absence of fraud, and when neither the rights of creditors nor subsequent purchasers intervene, will convey to her such real estate without the intervention of a third party as trustee." The circumstances in the case at bar disclose nothing but good faith. The rights of creditors and subsequent purchasers or innocent parties are not involved. The language of the contract constitutes a grant each to the other *in præsenti*. See, also, *Neneman v. Rickley*, 110 Neb. 446, 194 N. W. 447.

The signatures of the husband and wife thereon were properly identified. Their genuineness is not controverted. The instrument was duly acknowledged as husband and wife before a notary public with seal attached, as required

by the laws of California. Section 76-206, Comp. St. 1929, provides in part: "In all cases provided for in section 76-204 of this chapter, if such acknowledgment or proof is taken before * * * a notary public or other officer using an official seal, the instrument thus acknowledged or proved shall be entitled to be recorded without further authentication." The certificate of acknowledgment of a notary public of another state under his official seal is sufficient proof of the execution of a deed of lands in Nebraska for its admission in evidence in an action pending in Nebraska. *Galley v. Galley,* 14 Neb. 174, 15 N. W. 318. A deed of lands situated in this state, executed in another state and acknowledged there before a notary public who attaches his official seal to the certificate of acknowledgment, is presumed to have been executed in accordance with the laws of that state and, though not witnessed, is entitled to be received in evidence in this state without other proof that the grantors therein actually executed and delivered the deed. *Schields v. Horbach,* 49 Neb. 262, 68 N. W. 524; *Dorsey v. Conrad,* 49 Neb. 443, 68 N. W. 645. See, also, sections 76-204, 76-215, Comp. St. 1929.

The postnuptial agreement was thus properly acknowledged, and the acknowledgment should have been received in evidence as a part of the agreement itself. We consider the fact that it was not recorded until after the death of the parties of no importance under the circumstances. Delivery is presumed from the facts and circumstances appearing in the evidence. 18 C. J. 413; *Issitt v. Dewey,* 47 Neb. 196, 66 N. W. 288; *Brown v. Westerfield,* 47 Neb. 399, 66 N. W. 439; *Home Fire Ins. Co. v. Collins,* 61 Neb. 198, 85 N. W. 54; *Ladman v. Ladman,* 130 Neb. 913, 267 N. W. 188. Their mutual covenants, quitclaims by each party of all interest in the other's property and the grant of life estates therein, were sufficient consideration for the agreement. *Wulf v. Wulf,* 129 Neb. 158, 261 N. W. 159; 30 C. J. 637. Therefore, we find nothing in the laws of Nebraska which make this an invalid conveyance if conceded to be real property.

The wills of husband and wife, made in conformity with the postnuptial agreement, have both been probated in California and Nebraska. A will executed under an agreement founded upon a valuable consideration is contractual as well as testamentary. In the latter aspect it may be revoked without the consent of the beneficiary, but not in the former. *Nelson v. Schoonover,* 89 Kan. 388, 131 Pac. 147. A will duly executed in pursuance of an agreement based upon a valuable consideration becomes itself, in a sense, an enforceable contract. 1 Schouler, Wills (6th ed.) sec. 691. The probate of a will is conclusive unless reversed, and equity cannot vacate the same. *Williams v. Miles,* 63 Neb. 859, 89 N. W. 451. The probate thereof cannot be collaterally attacked. *Kirk v. Bowling,* 20 Neb. 260, 29 N. W. 928. See, also, *Andersen v. Andersen,* 69 Neb. 565, 96 N. W. 276; *Byron Reed Co. v. Klabunde,* 76 Neb. 801, 108 N. W. 133. A will is not evidence of title unless probated. *Pettit v. Black,* 13 Neb. 142, 12 N. W. 841. The converse thereof is that, when probated, it is evidence of title. See section 30-221, Comp. St. 1929. Both wills, made in conformity with and a part performance of the contract, having now been probated, vested all the separate real property of the husband in his devisees therein, and all the separate property of the wife in appellant, her devisee therein. Appellant, having taken as sole devisee of her mother's will, must now abide by its provisions and is barred from recovery in this action. It is only land not lawfully devised that will be inherited under the statute of descent from a deceased spouse. Comp. St. 1929, sec. 30-101. We find that a married woman's liability to be estopped by her contracts is coterminous with her capacity to contract. If the contract is valid, she is estopped. 30 C. J. 776. An heir stands in privity with an ancestor, and an estoppel enforceable against the ancestor is likewise enforceable against the heir. 21 C. J. 1182. In the case at bar the wife of George W. Crandell, being estopped by her postnuptial agreement, together with the circumstances of ratification, recogni-

zance and performance, then appellant, sole devisee under her will, already probated and made in conformity with the contract, is also estopped from repudiating the postnuptial agreement and from claiming to inherit any part of George W. Crandell's estate.

The parties lived together nearly 10 years before they made the contract and conformed to it by performance for more than 12 years thereafter until death. It was made, we must assume from the evidence, to promote peace and harmony between the parties and their respective children, and was without disadvantage to any of the parties. It was reasonable in its terms, entered into with a full opportunity for and, in so far as we can determine, with knowledge of the facts, and it has now been fully executed. We find generally that courts of equity give full force and effect to such contracts because it would be inequitable to permit the surviving spouse, their heirs or devisees, to assert marital rights thereafter. 13 R. C. L. 1373, sec. 419; 30 C. J. 670; *In re Estate of Lauderback,* 106 Neb. 461, 184 N. W. 128; *Marty v. Marty,* 111 Kan. 120, 206 Pac. 324; *Keller v. Keller,* 121 Kan. 520, 247 Pac. 433, 49 A. L. R. 113; *Eberhart v. Rath,* 89 Kan. 329, 131 Pac. 604; *Kohler v. Kohler,* 316 Ill. 33, 146 N. E. 476; *Fennell's Estate,* 207 Pa. St. 309, 56 Atl. 875.

We conclude that a married woman who has made a valid postnuptial agreement with her husband while both are residents of California, which is equitable and free from fraud, and they lived together as husband and wife for many years thereafter without rescinding, repudiating or questioning the agreement, but recognized and ratified the same by later making deeds and wills in harmony therewith, and the same was fully performed, and both parties died, and their wills were both admitted to probate, the husband having died first, the wife before her death is estopped to renounce the husband's will and elect to take under the law of inheritance in Nebraska, and her devisee is estopped to claim the invalidity of the postnuptial agreement. Equity will not countenance the repudiation of this

solemn postnuptial agreement. The widow being deprived of the right to elect, we will not discuss the contentions of the parties with reference to the legal effectuality thereof.

The findings and judgments of the district court in both cases were right, and its judgments are

AFFIRMED.

KATHERINE LONG, APPELLEE, V. CRYSTAL REFRIGERATOR COMPANY, APPELLANT.

277 N. W. 830

FILED FEBRUARY 18, 1938. No. 30112.

1. **Trial:** DIRECTION OF VERDICT. If the evidence essential to plaintiff's recovery is not clearly disproved by the undisputed physical facts and conditions, or if such evidence cannot be sustained by the clearly perceived and undisputed inferences from sensation, the trial court should not direct a verdict for the defendant.
2. **Negligence.** The owner of a building is chargeable with defects, which are reasonably within his knowledge, in the construction thereof, and for inherent weakness either in material or construction, and also for such defects in maintenance of which he had actual notice or which have existed for such a length of time as to charge him with knowledge thereof and afford him reasonable opportunity to correct such defects, and if such defects cause injury to any person lawfully in the vicinity, the owner is liable for any damages ensuing therefrom.
3. ———. A building maintained by an owner on a public street in a negligent manner of construction or repair is a public nuisance. The owner is liable for the injury proximately caused by such negligence to those lawfully in the vicinity. If any intervening cause occurs which might have reasonably been anticipated by the owner, such intervening cause will not interrupt the connection between the original cause and the injury therefrom. Winds which are usual at the time and place are conditions which reasonably could have been anticipated and will not relieve from liability an owner so guilty of the original act of negligence.
4. ———: ACT OF GOD. In order that an act of God may excuse the owner for his acts of negligence in construction or maintenance of a building, such act must be the sole cause of the injury, and if the act of God and the negligence of the owner

are concurring causes of an injury, the owner who is guilty of the negligence is liable for damages for the injury.

5. **Evidence** examined and found to support the verdict of the jury.
6. **Appeal.** "One may not complain of misconduct of adverse counsel if, with knowledge of such misconduct, he does not ask for a mistrial, but consents to take the chances of a favorable verdict." *Triplett v. Lundeen*, 132 Neb. 434, 272 N. W. 307.
7. **Witnesses.** On redirect examination, the circumstances surrounding the making of a statement brought out on cross-examination may be shown.

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

Robins & Yost, for appellant.

Abbott, Dunlap & Abbott and *John P. Corbett, contra.*

Heard before GOSS, C. J., EBERLY, DAY, PAINE, CARTER and MESSMORE, JJ., and MUNDAY, District Judge.

MUNDAY, District Judge.

This action was brought by the plaintiff, Katherine Long, to recover for personal injuries received by her on August 30, 1934, claimed as a result of the negligence of the defendant and appellant, Crystal Refrigerator Company, in the construction and maintenance of a monitor on its warehouse. The monitor was torn from the warehouse by a windstorm and carried to the home of the plaintiff, where she was injured.

The warehouse was owned and controlled by the defendant at Fremont, Nebraska. It was constructed in 1922 and was repaired in 1925, when, as the result of a snow-load, the roof sagged in places. The defendant claims the building was in first-class condition at the time of the storm, but the plaintiff claims it was defective at that time. The building was 208 feet long and 128 feet wide. The side walls of the building were 8 feet high with a general incline of about 46 feet to a point where the monitor wall starts at a height of 24 feet. The peak of the roof of the monitor was about 33 feet high. The building was built in 16-foot bays with the monitor over the 2 center bays, with

the side walls of the monitor about 4 feet high. The monitor extended the full length of the building. These side walls were windows with the exception of necessary wood to said windows; each window-frame was approximately 32 inches wide.

In her petition the plaintiff claimed that the defendant was the owner and in possession and full control of the building; that the monitor thereof was carelessly and negligently erected and maintained by the defendant, in that it was not secured to the other parts of the building so the same could withstand the pressure of such wind as is usually and ordinarily experienced in the locality where said building is located; that the defendant neglected to fasten the monitor to the remainder of the building by bolts, hooks or adequate fastenings; that the defendant failed to support the walls, roof and monitor by studding, rafters, joints and braces that were necessary; that continued pressure and weight on the various parts of said building gradually weakened it and the monitor and caused the building to become loose and insecure; that when said building gradually became in a loose and insecure position the defendant carelessly and negligently did not repair, strengthen and correct the defective condition; that the building was a public nuisance.

The plaintiff further set out in her petition that the defendant negligently and carelessly allowed about 50 per cent. of the windows to become broken and remain broken in said monitor, so as to allow the wind to blow in under its roof, and to exert pressure thereon from below; that on August 30, 1934, the plaintiff was the owner of a residence property in the city of Fremont, over a block from the premises of the defendant, and that on said date the wind of a velocity not unusual in the vicinity of said residence, and at a velocity which could reasonably have been anticipated by the defendant, blew off the monitor from said warehouse and deposited it upon the property of the plaintiff, injuring her and fracturing her third and fourth dorsal vertebræ.

For answer defendant denied each and every allegation not admitted, and admitted that on said date there was a windstorm which removed the monitor of the defendant's warehouse and carried it for a distance of approximately 400 feet. Defendant further alleged that the windstorm was extraordinary and unprecedented and could not have been anticipated in the construction, upkeep or care of the warehouse, and the injuries of the plaintiff were not the result of any negligence on the part of the defendant, and were not the result of any defect in material, workmanship, construction or maintenance, but the sole and proximate result of an act of God; that the monitor was erected and maintained at all times in a proper manner to withstand all wind which could reasonably have been anticipated, and that the defendant had no notice of any and there were no defects in workmanship, material, construction or maintenance of said building at any time. The reply was a general denial.

The trial of the issues was had to a jury, which returned a verdict in favor of the plaintiff and against the defendant in the sum of $1,925.

There are many errors assigned for reversal of the judgment of the trial court, but the principal errors may be briefly summarized in substance: (a) That the evidence of plaintiff should be rejected and disregarded as it is opposed to the unquestioned and unquestionable laws of nature that lie within the court's judicial knowledge, and is clearly in conflict with scientific principles as established by the laws of physics and mechanics; that the evidence essential to plaintiff's recovery was clearly disproved by the physical facts and conditions; that the damage was caused by a windstorm of unusual velocity for which the defendant was not liable; (b) that there were no visible or apparent defects of maintenance or construction of which the defendant was chargeable; (c) that the evidence in this case is insufficient to support a verdict in favor of the plaintiff and against the defendant; (d) that the plaintiff planned a deliberate statement to the jury to advise the

jury that defendant carried insurance covering the injury to plaintiff.

The defendant on this appeal does not complain of the instructions or any ruling on the evidence.

The evidence does not definitely disclose the weight of the monitor. One of plaintiff's witnesses stated the weight and later on cross-examination stated he was speaking of the maximum weight that it could be, but that he did not know the gauge of the steel used in the monitor. But even though the witness had given an estimate as to the weight of the monitor, the manner in which it was torn from the building, the kind and velocity of a wind that would convey the monitor such a distance, and all other facts and circumstances connected with the removal of the monitor to plaintiff's residence do not present such questions as to which the court could have taken judicial notice and knowledge of the scientific principles of physics or mechanics involved, and apply them as a matter of law and dispense with the jury.

The attorneys for the appellant with painstaking labor and much diligence have set out and briefed the facts of the case. Some of the facts as to the kind of a wind, the effects of the wind, the manner of construction, maintenance and repair of the building, and the character of plaintiff's injuries are not in dispute. Therefore, it is not necessary to set out all the evidence. The type of evidence and the dispute of much of it show that the physical facts were not such as the court could have passed upon without the assistance of the jury. Thus, Rodman Brown, chief engineer of the building department of Omaha, who, if not an expert witness, was a skilled witness, stated in part as follows: "The construction itself is very light. It only weighs a few pounds per square foot and when the wind once gets up under there and lifts the roof just like one of these gliders behind an airplane get going at a high velocity and they will coast. Those gliders will soar for a long period of time. This was carried up by this gust or sweep and just simply floated until finally another change

of the wind direction caused it to tilt and when it tilted it just fell on edge."

The appellant correctly contends that this court does not hesitate to set aside a verdict where the undisputed physical facts and conditions clearly disprove the evidence essential for the plaintiff to recover, or where the evidence supporting a judgment is clearly disputed by such physical facts and conditions. *Hessler v. Bellamy,* 128 Neb. 571, 259 N. W. 514. But this rule is applicable only when the physical facts and conditions can clearly be perceived by undisputed inferences from sensation.

This view we take of the above contention, therefore, makes the many authorities cited by appellant beside the point.

The appellant contends that all defects proved in the construction or maintenance were not visible but were latent, and that defendant is not responsible therefor. To this proposition also many authorities are cited, including *Kitchen v. Carter,* 47 Neb. 776, 66 N. W. 855, and *Knies v. Lang,* 116 Neb. 387, 217 N. W. 615.

In *Kitchen v. Carter, supra,* an action was brought to recover for negligence in procuring or allowing the use of poor, inferior material in the building of the third story of the annex of the Paxton Hotel in Omaha and its faulty and defective construction. The first paragraph of the syllabus is:

"The owner of real property in exercising his own tastes and inclinations as to the character of a building he will erect thereon, has no right to build and maintain a structure which, by reason of defects or inherent weakness either in material or construction, is liable to fall and do injury to an adjoining owner or the public."

In the opinion is a quotation from Wood, Nuisances, 140, sec. 109:

"While a man has a right to follow his own tastes and inclinations as to the style and character of the building that he will erect upon his own land, yet he has no right to erect and maintain there a building that is dangerous, by

reason of the materials used in, or the manner of its construction, or that is inherently weak or in a ruinous condition and liable to fall and do injury to an adjoining owner or the public. Such a building on a public street is a public nuisance, and is a private nuisance to those owning property adjoining it; and if the building falls and inflicts injury upon the adjoining owners or their property, or to any one who is lawfully in its vicinity, the owner is liable for all the consequences that ensue therefrom."

The plaintiff's evidence tended to show that the ventilator was not properly constructed and was placed at the top of a long, slanting, metal roof which sloped towards the walls and eaves of the building for about 46 feet and concentrated the pressure of the wind on its weakest point; that it was not properly fastened together; that about one-third of the windows on the west side of the monitor were out, so that the wind could come in; that it was necessary to construct against a wind pressure of from 25 to 40 pounds to the square foot, which would be a 60 to 90 mile wind. The greater part of these alleged facts was disputed by the defendant's evidence. Also, there was evidence that winds should have been anticipated by the defendant of a velocity which the evidence tended to show the velocity of the wind in the instant case was.

In a well-known text is the following language:

"If the occurrence of the intervening cause might reasonably have been anticipated, such intervening cause will not interrupt the connection between the original cause and the injury. Under such rule the ordinary forces of nature and condition of the weather, such as cold, heat, wind, or a rainstorm or snowstorm, which are usual at the time and place, are conditions which reasonably could have been anticipated, and will not relieve from liability the person guilty of the original negligent act or omission." 45 C. J. 934.

"The notice of defect or danger which is necessary in order to impose liability for negligence need not be actual, for negligently remaining ignorant of that which it is one's

duty to know has the same effect as actual knowledge and in such case one is said to have implied or constructive notice. That is to say, where a person is under a duty to discover or to know of a defect or danger, and could discover it by the exercise of due care, the condition having existed for a sufficient time to have enabled him to discover it, actual knowledge thereof is imputed to him so far as the question of his negligence is concerned, or, what amounts to the same thing in practical effect, his failure to discover the defect or danger is regarded as negligence." 45 C. J. 653.

There was evidence tending to show that the defendant had actual notice that many windows were out of the monitor for 30 days or more before the storm. At least this was such evidence, if believed, that notice might be inferred and would be constructive notice.

The defendant as owner of the building was not an insurer against an accident, but it is held to exercise reasonable care and prudence to keep it safe for the purpose for which it was constructed. When a defect in the maintenance of the building is shown, and it is also shown that the defect as it existed was known to the owner prior to the accident, or that it had existed for such a time prior thereto as to charge the proprietor with notice thereof and afford him reasonable opportunity to repair the defect, the owner is liable for the injury caused by such defect. *Broadston v. Beddeo Clothing Co.*, 104 Neb. 604, 178 N. W. 190.

Defendant contends that only persons on abutting property are entitled to recover damages for injury in cases of the nature similar to the instant case. We do not agree with this contention. While the usual case is for injury to persons on abutting property, it does not necessarily follow that such must be the fact in order to hold the owner for negligence in the construction and maintenance of a building. The building, if constructed and maintained negligently, was a private nuisance to persons owning property adjoining, and a public nuisance to others lawfully in the vicinity. If it was blown down on account of defendant's

negligence, the defendant was liable for all proximate consequences that ensued therefrom. If the negligent act was the proximate cause of plaintiff's injury, the defendant is liable in damages for the usual consequences of the act whether the particular consequences that followed the negligent act were actually contemplated or not. *Benedict Pineapple Co. v. Atlantic Coast Line R. Co.*, 55 Fla. 514, 46 So. 732.

Does the evidence support the verdict for the plaintiff and against the defendant? The defendant urges that the wind and not the negligence of the defendant was the cause of plaintiff's injury. Of course, the burden of proof was on the plaintiff to establish that the proximate cause of plaintiff's injury was the defendant's negligence. The defendant contends the fact that other buildings in the immediate vicinity were not damaged does not prove that it was not an unusual windstorm, as this court recognizes the freakishness with which storms act. As supporting this proposition it cites *George A. Hoagland & Co. v. Insurance Co.*, 131 Neb. 105, 267 N. W. 239. It is true that the opinion in this case states that the freakish character of wind and the way it shifts and rises in a particular part of the country are matters of common knowledge, but paragraph 2 of the syllabus in this case states: "Whether a wind has attained the proportions of a windstorm is a question of fact to be determined from the evidence." Paragraph 3 of the syllabus states that, when the evidence is in conflict on this question, it is for the jury to determine.

The owner of a building is not responsible for an act of God and is not an insurer of the safety of his premises. To this proposition the *Kitchen* case above was cited and cases from other jurisdictions. There is no dispute of this proposition. But whether or not the wind was an ordinary, usual wind, or an unusual wind and an act of God, or whether or not the injury was caused by an act of God concurring with the negligent acts of defendant were questions which were undoubtedly submitted to the jury correctly, as no complaint is made of the court's instructions, and

were all questions for the jury's determination. If the windstorm was of such severity as to come within the definition of an act of God, still the defendant would be liable if his negligence concurred with an act of God. 45 C. J. 736. In *Davis v. Union P. R. Co.*, 99 Neb. 769, 157 N. W. 964, the following language is used:

"In a suit for damages for personal injuries, an act of God is no defense if defendant's negligence was a concurrent cause of plaintiff's injuries."

The jury viewed the premises in question and considered the whole evidence under the instructions of the court. The question of the proximate cause of plaintiff's injury was for the jury's determination.

It is contended that the plaintiff did not suffer any injuries other than a bruising and shaking up in this accident, and that the plaintiff's pain and suffering were due to anemia. There was professional testimony as to the plaintiff's physical condition and also some lay testimony. This, too, was for the jury to consider. The evidence is examined and we think in every way supports the verdict of the jury.

The appellant claims that the plaintiff carefully planned a deliberate statement to the jury to advise the jury that the defendant carried insurance covering the injury to the plaintiff and that this was error entitling the defendant to a new trial. It seems as though defendant's counsel interrogated the plaintiff about a proof of loss she had made out before an insurance adjuster on an insurance policy covering windstorm damage. As a further cross-examination of the plaintiff, the defendant's attorney produced a signed statement and asked the plaintiff if she had not signed it, to which she answered she had. He also asked her if the statement was not one which she had made, to which she answered: "I do not think so." Plaintiff's attorneys on permission were then given leave to examine the plaintiff as to the statement and asked her: "How did you happen to sign it?" She answered: "The only thing I know is when that insurance man came out from Omaha

that day he had wrote down a lot of stuff. I was sick and he had asked me to sign it and I refused to sign it and he said, 'Wouldn't you rather sign it and get $1,500 than take it to the lawyers and get nothing?' " A little later the defendant's attorney moved that the answer be stricken, and later by another motion asked that the entire answer be stricken and the jury instructed to disregard it. The court sustained the defendant's motions and instructed the jury as follows: "Gentlemen of the jury, the answer to the last question you will be required to disregard that answer made by Mrs. Long." Apparently this satisfied the defendant's attorneys and the controversy regarding this testimony appeared to be closed. No motion was made by counsel for defendant for a mistrial or for any other action by the court with respect to it. The defendant identified the exhibit and showed the plaintiff the signature, and while it was not offered in evidence, it undoubtedly seemed reasonable to think that it would be so offered. When the plaintiff was asked as to whether or not it was her signature, it would follow that on redirect examination she would be permitted to bring out the circumstances surrounding the making of the statement which she had signed. In 70 C. J. 709, it is stated:

"It is proper on redirect examination to bring out the circumstances surrounding * * * or the making of a statement brought out on cross-examination."

Furthermore, the defendant should have made all objections it had to the statement or answer by the plaintiff. If the defendant intended to rely upon this answer as a basis for mistrial, it was incumbent upon it to make such objection and motion at the time. A party is not permitted to proceed with the trial without objection and speculate on the outcome of the jury's verdict, and, if unfavorable, contend that a mistrial should have been declared, when he did not ask for the same at the time. 4 C. J. 717; *Chamberlain v. Brown,* 25 Neb. 434, 41 N. W. 284; *Ellsworth v. City of Fairbury,* 41 Neb. 881, 60 N. W. 336; *Triplett v. Lundeen,* 132 Neb. 434, 272 N. W. 307.

Finding no error in the record, the judgment of the district court is

AFFIRMED.

WILLIAM WOELK ET AL., APPELLEES, V. WALTER J. LUCKHARDT, ADMINISTRATOR, ET AL., APPELLANTS.
277 N. W. 836

FILED FEBRUARY 18, 1938. No. 30156.

1. Wills: PROBATE. The admission of a will to probate by the county court does not determine to whom the personal property of the estate will be distributed.
2. ———: ———: ESTOPPEL. Nor does such admission to probate estop the rightful owners of the testator's property from securing an order of distribution of property which is not disposed of by the will.
3. ———: CONSTRUCTION. The court in construing a will must if possible ascertain the intent and purpose of the testator as disclosed by the language of the will and then give effect thereto if not contrary to law.
4. ———: ———: ORAL EVIDENCE. Oral testimony cannot be received to explain the intent of the use of words in a will when such words have a fixed meaning in law. The words "her heirs and assigns forever" have a certain and definite meaning in law.
5. ———: "RELATION." The word "relation," as used in section 30-229, Comp. St. 1929, providing that, when a devise or legacy is made to a child or other relation of testator, and the devisee or legatee dies before testator, having issue surviving testator, such issue shall take the estate given by the will in the same manner as the devisee or legatee would have taken, unless the will directs a different disposition, means kindred of the blood only, and excludes a wife.

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

Harry R. Ankeny, for appellants.

H. J. Whitmore and *William Niklaus, contra.*

Heard before GOSS, C. J., ROSE, DAY, PAINE, CARTER and MESSMORE, JJ., and MUNDAY, District Judge.

MUNDAY, District Judge.

This is an appeal by Walter J. Luckhardt, administrator with will annexed of the estate of John Luckhardt, deceased, and others, from an order of the district court for Lancaster county in a proceeding in equity, wherein the district court as an appellate court reversed and set aside an order of the county court directing said administrator to make a partial distribution of the personal property of said estate.

John Luckhardt died testate in Lancaster county, Nebraska, in March, 1935. His last will and testament was made in 1920. The sole legatee and executrix of said will, Amalia Luckhardt, wife of John Luckhardt, died in 1934. Before her marriage to Luckhardt she had previously been married and had two sons by the former marriage, who are the appellees herein. By her marriage to John Luckhardt she had four children. The will was offered for probate by petition in the usual form by Walter J. Luckhardt. The petition, among other things, set out the death of the aforesaid executrix and legatee and named the six children as interested parties. The county court admitted the will to probate and appointed Walter J. Luckhardt administrator with will annexed. No appeal was taken from this order. So far the proceedings were amicable. In April, 1935, said administrator filed an inventory showing the amount of the assets of the estate as $111,505.76. Later said administrator filed a petition in the county court praying for an order permitting him to make a partial distribution of the personal assets of the estate to the four children of John and Amalia Luckhardt. The appellees, William and Samuel Woelk, then filed a petition in the county court asking that said distribution be made to all the six children of said Amalia Luckhardt as substitutionary legatees under said will. The question was squarely raised in the county court, whether all six children of Amalia Luckhardt were entitled to participate in the distribution of the estate, or only the four children of Amalia Luckhardt, who were the issue of her marriage

with John Luckhardt. The county court ordered the distribution to the four children of John Luckhardt. The appellees herein appealed to the district court, where the cause was tried on the same pleadings as in the county court. The district court reversed the order of the county court and held that each of the six children of Amalia Luckhardt was entitled to share equally in the distribution. The four children of John and Amalia Luckhardt with said administrator have appealed to this court.

The appellees contend in substance the decree of the district court should be affirmed because (1) the order of the county court admitting the will to probate and appointing Walter J. Luckhardt as such administrator inherently found that the will in question made a disposition of all of the estate of the deceased to the six issues of Amalia Luckhardt, share and share alike, as substitutionary legatees and devisees in the place of Amalia Luckhardt, the sole legatee and devisee named in the will, and that the question as to who shall take the estate of the testator thus became a matter finally adjudicated before the commencement of these immediate proceedings; (2) that if the question of whether the six children of Amalia Luckhardt were substitutionary legatees and devisees and entitled to take the estate of the testator under the will was not finally determined by said order of the county court referred to under (1) above, the said six children were independently substitutionary legatees and devisees in the place and stead of Amalia Luckhardt, (a) because it was the intention of the testator by the terms of his will that they would thus be takers in her place and stead, and (b) because by force of the statute, section 30-229, Comp. St. 1929, Amalia Luckhardt was a relation of the testator, and her six children, as her issue surviving the testator, would take the estate of the testator by operation of the statute, share and share alike.

The appellees devote considerable space in their brief to the first proposition above. They assert that the judgment should be sustained because, in substance, to distrib-

ute the estate only to the issue of John and Amalia Luckhardt is a collateral impeachment of the prior proceedings of the county court in admitting the will to probate and the appointment of said administrator; that for the four children of John Luckhardt to take all the property is inconsistent with the inferential finding that followed the probate of the will, viz., that there is property to be disposed of by the will.

They also contend that such implied and inferential finding is necessary, for the decree of probate has nothing else to support it, and therefore the appellants are estopped to assert there was no property to pass by the will and that the question as to who shall take the property under the will is *res adjudicata.*

The appellants have not favored us with a brief on the propositions last above set out. The county court made no special mention of this contention as to estoppel and *res adjudicata* in its decree, nor did the district court, although the latter court made a very full and detailed finding as to the intent of the testator and as to its construction of section 30-229, Comp. St. 1929, and as to the meaning of the word "relation."

In re Estate of Strelow, 117 Neb. 168, 220 N. W. 251, is cited by appellees. In this case there was no clause revoking a former will as in the instant case. In the instant case the will provides: "And I do hereby revoke all and every former will by me made." Such a revoking clause might be sufficient reason for the probate of a will. *Dudley v. Gates,* 124 Mich. 440, 83 N. W. 97; *In re Estate of Strelow, supra.* However, we do not believe the admission of a will to probate and the appointment of the administrator estops an interested party from having a construction of the terms of a will by the county court for the purposes of the order of distribution or by the district court on appeal therefrom. Such was the procedure in the instant case. The appellees took part in this procedure. An order of distribution by the county court is necessary in both testate and intestate estates. Provision is made for appeal from

such an order to the district court. It was not necessary for the county court to determine to whom the property should be distributed at the time the will was admitted to probate or when the administrator was appointed. Nor was it done in the instant case. So the fact that the will was admitted to probate does not estop the rightful owners of the property of the testator from securing an order of distribution.

This brings us to the construction of the disputed clause in the will: "I give, devise and bequeath, unto my beloved wife Amalia Luckhardt all the property, real and personal, and effects of every name and nature which I now have, may die possessed of, or may be entitled to, her heirs and assigns forever." There was no residuary clause.

It is axiomatic to say that the intention of the testator controls in the construction of a will if it is consistent with the rules of law. Comp. St. 1929, sec. 76-109. But the plain and certain rules of law should not be set aside except in favor of an equally plain and certain disposition of the testator. *In re Estate of Hanson,* 118 Neb. 208, 224 N. W. 2. Do the words "her heirs and assigns forever" in the will describe the nature of the estate given to the beneficiary, or do they describe the persons who are to take? Or, putting it differently, are they words of limitation or purchase? Under the common law the words were used to indicate that the entire property was given absolutely, and, if real estate, that it was given in fee simple. By statute in this state such words are no longer necessary to convey the fee title. Formerly these words were an intensified form of expression of an absolute gift. Although not now necessary to convey title, they are still quite often used to give greater certainty that a devise was intended to be absolute.

The court in *Jackson v. Alsop,* 67 Conn. 249, 34 Atl. 1106, uses this language: "Where the word 'assigns' is added to the word 'heirs,' it is almost impossible to read the whole phrase otherwise than as words of limitation, and not as intended to create an estate in any other person.

2 Redfield on Wills, 82; *Grafftey v. Humpage,* 1 Beavan, 46; *Holloway v. Clarkson,* 2 Hare, 521, 523."

In *Loveren v. Donaldson,* 69 N. H. 639, 45 Atl. 715, a similar phrase was under consideration and the following language used: "But the use of the words 'her heirs and and assigns forever,' immediately following the name of the devisee or legatee, are not alone sufficient to express this intention and to prevent a lapse. These words have a well-settled construction, by which they are held to be merely words of limitation used to describe the nature of the estate given to the beneficiary, and not to express an intention that a lapse should be avoided by the substitution of the heirs in place of a predeceased devisee or legatee. Where words and terms like these have a well-settled and well-understood meaning, they will not be given a different one, unless it appears that the testator employed them in a different sense and intended to express a different meaning. *Cressey v. Wallace,* 66 N. H. 566." See *Matter of Clark,* 175 N. Y. 139, 67 N. E. 212.

Therefore, we conclude the inference to be drawn from the phrase "her heirs and assigns forever" as used in the instant case is not sufficient to show other intent than the original meaning of the words at common law, that the words are of limitation and are not to be used in a substitutionary sense.

The appellants complain because the trial court permitted the introduction of evidence showing the surrounding circumstances importing into the will an intention to substitute as devisees all the children of the primary devisee and legatee. They maintain that since the will was not ambiguous in its terms it was unnecessary to resort to such testimony of surrounding circumstances in order to ascertain its meaning. The rule in this state has been clearly defined. Where words in a will are unambiguous, no evidence, however strong, should be considered to prove an unexpressed intention varying from that which the words taken in their primary sense indicate. *In re Estate of Wirsig,* 128 Neb. 297, 258 N. W. 467; *In re Estate of Han-*

son, supra; In re Estate of Hunter, 132 Neb. 454, 272 N. W. 318; *In re Estate of Nelson,* 132 Neb. 376, 272 N. W. 219; Comp. St. 1929, sec. 76-109. The rule is in accordance with the general rule. *Gilmore v. Jenkins,* 129 Ia. 686, 106 N. W. 193; *Jackson v. Alsop, supra.* We conclude that the oral evidence of the surrounding circumstances should not have been admitted by the trial court to determine the testator's intent.

As to the meaning of the word "relation" in section 30-229, Comp. St. 1929, the appellants contend that this word applies only to a devisee or legatee of the blood or kindred of the testator. On the other hand, the appellees contend that the statutes of descent in this state, construed with section 30-229, prohibit a lapsing of the devise or legacy and make the wife a "relation," since this court has held that under the statutes of descent the wife is an heir of the husband.

Section 30-229 provides: "When a devise or any legacy shall be made to any child or other relation of the testator, and the devisee or legatee shall die before the testator, having issue who shall survive the testator, such issue shall take the estate so given by the will in the same manner as the devisee or legatee would have done if he had survived the testator, unless a different disposition shall be made or directed by the will." Section 30-101, Comp. St. 1929, provides, in substance, that the real estate of any person dying leaving a wife or husband surviving shall descend in part to the surviving husband or wife. Section 30-103, Comp. St. 1929, provides for the interest of the surviving spouse in personal property. These are the statutes of descent and distribution. Under these statutes this court has held that either spouse may be an heir of the other. *In re Estate of Hanson,* 118 Neb. 208, 224 N. W. 2; *In re Estate of Rosenbery,* 132 Neb. 883, 273 N. W. 805.

It might throw light on the subject to determine how statutes similar to section 30-229 were construed by other courts. In 1914 the supreme court of Michigan in *Menard v. Campbell,* 180 Mich. 583, 147 N. W. 556, held that a wife

was an heir of a husband under the statutes of descent of that state. In 1923, in the case of *In re Spier's Estate,* 224 Mich. 658, 195 N. W. 430, on the question of lapsing, it is stated: "Counsel are agreed that on principle as well as authority we should hold that the word 'relation,' as used in this section, means kindred by blood only and excludes husbands, wives, stepchildren, and the like. We, therefore, content ourselves with calling attention to the authorities, and they seem to be uniform, so holding. *Esty v. Clark,* 101 Mass. 36, 3 Am. Rep. 320; *Horton v. Earle,* 162 Mass. 448, 450, 38 N. E. 1135; *Curley v. Lynch,* 206 Mass. 289, 292, 92 N. E. 429; *Worcester Trust Co. v. Turner,* 210 Mass. 115, 120, 96 N. E. 132; *Keniston v. Adams,* 80 Me. 290, 14 Atl. 203; *Cleaver v. Cleaver,* 39 Wis. 96, 20 Am. Rep. 30; *Sackman v. Campbell,* 10 Wash. 533, 39 Pac. 145. * * * In our opinion, the devise and bequest to the husband in the second paragraph lapsed and passed into the residue of her estate."

The Washington supreme court in *In re Renton's Estate,* 10 Wash. 533, 39 Pac. 145, a somewhat similar case, stated: "Counsel argue with great force and much plausibility that in this state a regard for the wife is so strongly displayed by the statutes relating to descent and community property that a different position should be taken. The statutes of descent, it is said, make the wife an heir of her husband. Gen. Stat. secs. 1480, 1482, 1495. But, while all this is true, we feel no impulse coming from the statute towards enlarging its provisions."

The supreme court of Wisconsin in *Cleaver v. Cleaver,* 39 Wis. 96, in passing on the phrase "child or other relation" in the statute of that state against lapsing, uses the language: "Child or other relation must signify child, or other relation of like character as a child; that is, other relation of the testator's blood. 'When particular words are followed by general ones, the latter are to be held as applying to persons and things of the same kind as those which precede.'"

The supreme court of Ohio, in *Schaefer v. Bernhardt,* 76 Ohio St. 443, 81 N. E. 640, in construing the word

"relative" in a statute against lapsing, said: "An examination of the cases collected in the briefs and others shows that, the question not being affected by the context or by related provisions, the decisions have quite uniformly regarded the word in statutes of this character as applying only to those who are related by consanguinity to the testator. Support for the contrary view cannot be derived from the statutes entitling the husband to participate in the property which had belonged to the deceased wife," etc. See *Estate of Sowash,* 62 Cal. App. 512, 217 Pac. 123.

In 1869 Massachusetts had the following statute on lapsing, as shown by the opinion in *Esty v. Clark,* 101 Mass. 36: "When a devise of real or personal estate is made to a child or other relation of the testator and the devisee dies before the testator, leaving issue who survived the testator, such issue shall take the estate so devised, in the same manner as the devisee would have done had he survived the testator." In this case the wife had been married twice and had a child by each marriage. She was devisee of her second husband's will and predeceased him. The same question arose as in the instant case. The court in its opinion in determining the meaning of the word "relation" discusses the meaning of the word as it had previously been used in wills, and sets out a quotation from 2 Jarman, Wills (4th Am. ed.) 45, wherein it is stated that, in order to keep a bequest in a will to a "relation" from becoming void because it is indefinite and vague, recourse is had to the statutes of distribution as to personal property in case of intestacy. The court also sets out authorities which held that the word meant blood relation and quotes Lord Hardwicke (*Davies v. Bailey,* 1 Ves. Sen. 84) to the effect that the word is properly used to express kindred "by blood." Then the court quotes *Storer v. Wheatley's Executors,* 1 Pa. St. 506, wherein it is held a wife does not come within the terms of "my nearest relations or connections," and then concludes: "Whatever may be thought of the reasoning of the court in that case, there seems to be no authority for holding that the word 'relation,' in its strict legal and

technical sense, includes husband or wife. On the contrary, authorities are found very direct and explicit to the point that they are not 'relations.' Thus in 2 Williams on Executors, 1004, it is laid down that 'no person can regularly answer the description of "relations" but those who are akin to the testator by blood. A wife therefore cannot regularly claim under a bequest to her husband's relations, nor a husband as a relation to his wife.' So in 2 Jarman on Wills, 49, it is said that 'a gift to next of kin or relations does not include a husband or wife.' Both these writers refer for authority to numerous cases cited from the reports." The opinion in the case does not give the provisions of the statute of descent in Massachusetts at that time. However, in the state report of the case, the law brief of counsel, set out above the opinion, who contends that the child by the first marriage or stepchild should take his moiety along with the other child, is in part as follows: "Gen. Sts. c. 94, sec. 16; for by this statute a widow is entitled as much and in the same manner to her share as are those of kin by blood to the intestate. Formerly the widow was not considered as taking her share by force of the statute of distribution, as her portion of the personal property came to her by a decree of the judge of probate. St. 1783, c. 36, sec. 3." So the supreme court of Massachusetts undoubtedly considered a somewhat similar statute of distribution as considered in the instant case and regarded it as not controlling. In 1910, *Esty v. Clark, supra,* is approved in *Curley v. Lynch,* 206 Mass. 289, 92 N. E. 429, and the same conclusion reached as to the meaning of the term "relation."

Massachusetts, Michigan and Wisconsin cases are of particular interest as to statutes providing for the collection and administration of estates of deceased persons in Nebraska, for our statutes with reference to such matters derive their origin in the first place from Massachusetts. It has been claimed that they came to us by way of New Hampshire, Michigan and Wisconsin. But whether this is correct or not, it is a fact that a number of the most im-

portant provisions are identical with the laws of Massachusetts which date back for many years.

We cannot, in any way, see how the Nebraska statutes of descent giving the wife the right to receive an interest in her husband's estate have in any way enlarged the provisions of section 30-229, preventing lapsing of devises or legacies. It is true that there is an intimate relation between husband and wife and such ties of affinity are often stronger than those between kinsmen, but the question is whether this is the relation mentioned in the statute against lapsing mentioned above. The provisions of sections 30-101 and 30-103, Comp. St. 1929, permitting the wife to receive an interest in her husband's estate, are personal to her and are prompted by a consideration of what is considered due her under the advanced and modern ideas of justice and the proper consideration of the marital relation. But section 30-229 in no way affects the wife's interest in the subject of the devise or the legacy, but is for the sole purpose of giving what is considered due the issue of the devisee surviving the testator. The purpose and end sought in the statutes against lapsing are entirely different than the end sought by the statute of descent and distribution. It is true that formerly most statutes of descent and distribution made the heirs or kindred of the deceased the beneficiaries, but it does not necessarily follow that because a wife is added to the list of persons so taking under the statutes of distribution she therefore becomes a "relation" of the deceased husband in the sense in which the word "relation" is used in section 30-229. The legislature by statute may permit any person to inherit or receive a share in the decedent's estate, and in that sense the person so receiving is an heir of the decedent. An heir at law is simply one who succeeds to the estate of the deceased person. If the words "other relation," as used in the statute, are construed to be those persons of the same character as a "child," then the devise naturally goes only to those of the blood of the testator. But if the words are construed to mean the relationship of affinity, the statute might take

the devise away from the kindred of the testator and give it to strangers of the testator's blood. That would in part be true in the instant case. The statute against lapsing was never intended to make provision for a stranger to the blood of a testator. A child or other relative, if of a kindred blood, is the natural person for consideration by a testator, and the words of the statute mean that the devise or legacy is intended to go to other relatives of the same kind and character as the testator's child, that is, relatives by consanguinity and not by affinity. 2 Paige, Wills, sec. 1252; 69 C. J. 1063.

There is no doubt that the testator and his stepsons, the appellees, were on the best of terms and that the appellees manifested a filial attitude towards him. However, those facts are not relevant under the circumstances above indicated. In the instant case we think the sentiment expressed in *Cleaver v. Cleaver, supra,* is quite pertinent: " 'It is an unfortunate case, but the law is clear. The legacy lapsed by the death of the legatee in the life of the testator.' The statute 'does not reach the present case, and we are sorry for it.' "

We, therefore, conclude that the trial court was in error in its construction of the will and that only the four children of the testator and Amalia Luckhardt should share in the distribution. The judgment of the district court is reversed and the case remanded, with directions to enter judgment for the appellants in accordance with this opinion.

REVERSED.

HARRY I. HYLTON, ADMINISTRATOR, APPELLANT, V. EMMA KRUEGER ET AL., APPELLEES.

277 N. W. 792

FILED FEBRUARY 18, 1938. No. 30035.

1. **Annuities.** Where grandparents convey certain real property to their grandchildren and in the deed of conveyance expressly

reserve to themselves an annuity provided for by separate instrument which is referred to in the deed and which instrument is on file with the county clerk of the county wherein the land is situated, and such annuity is not paid, the reservation is a lien or charge upon the land and may be foreclosed in a court of equity to satisfy all unpaid payments of the annuity.

2. ———. Where a contract and a deed are executed simultaneously as a part of one transaction and in the contract there is a provision for a stipulated annuity which is referred to in the deed, the effect of such stipulation is the same as if it were in the deed of conveyance.

3. **Vendor and Purchaser.** Grantees in a deed must take notice of all facts affecting the title of the property granted to them and disclosed to them by a prior recorded instrument.

APPEAL from the district court for Polk county: HARRY D. LANDIS, JUDGE. *Reversed.*

Benton Perry, for appellant.

Campbell & Campbell and *Mills & Mills, contra.*

Heard before ROSE, EBERLY, DAY, PAINE and CARTER, JJ., and RINE, District Judge.

RINE, District Judge.

This is a suit brought in the district court for Polk county, Nebraska, by the appellant, Harry I. Hylton, as administrator with the will annexed of the estate of Eva Krueger, deceased, hereinafter referred to as plaintiff, to foreclose an equitable lien that plaintiff claims to have upon a half section of land in Polk county, Nebraska, for accrued annuity payments which plaintiff contends were reserved to the grantors in a deed of conveyance to which further reference will be made later in this opinion. The following facts are alleged in the petition:

On April 11, 1917, August Krueger and his wife, Eva Krueger, were the owners of the real estate upon which the lien is claimed. Shortly prior to this date Fred Krueger, the son of said owners, died leaving as his heirs his widow, Emma Krueger, and his children, Amanda Bredehoft, Adella Krueger, Harold Krueger, Walter Krueger and Erwin Krueger, all of whom are made defendants. On the 11th day of April, 1917, these owners simultaneously exe-

cuted two instruments. One of these instruments is a contract-lease referred to in the petition as exhibit A. The other is a deed of conveyance referred to in the petition as exhibit B. Exhibit A was filed for record with the county clerk of Polk county, Nebraska, April 27, 1917, at 3:00 o'clock p. m., and exhibit B was filed for record with the county clerk of Polk county, Nebraska, on April 27, 1917, at 3:15 o'clock p. m. Exhibit A is a contract and lease between said August Krueger and Eva Krueger, hereinafter referred to as grantors, and defendant Emma Krueger. It contains a lease and provisions for an annuity. It provides for the leasing of the property involved in this suit to Emma Krueger from April 11, 1917, to May 26, 1937. The lease, however, is to terminate at an earlier date should the defendant Emma Krueger die prior to the death of both of the grantors, or should a default be made in the conditions of the lease. Upon the happening of either of these events, the lease is to terminate immediately. It provides for an annuity payment of $300 a year, payable on or before the 1st day of January, 1918, and on the 1st day of each and every year thereafter, payable first to grantor August Krueger during his lifetime and, in the event of his death prior to the death of grantor Eva Krueger, then payments shall likewise accrue and be made to said Eva Krueger during her lifetime. It provides that these annuity payments are to be made by the defendant Emma Krueger so long as she lives, irrespective of the termination of the lease, and that upon the death of said Emma Krueger "the said children or the guardian of said children shall nevertheless continue so as aforesaid to pay them, the said lessors, or the survivor of them, said annuity of $300 for their support and maintenance."

The contract also sets out that, in consideration of the leasing of the premises to defendant Emma Krueger as provided for therein and the conveyance of the premises by grantors to defendant children, the defendant Emma Krueger renounces, relinquishes and conveys whatever claim she may have, whether well founded or not, in said

premises to the grantor August Krueger. As to the nature of the conveyance to be made to the defendant children, the contract states: "It being understood that said conveyance to the children shall be subject to the said lease and also subject in any event to the annuity agreement in said lease contained."

In exhibit B, the deed of conveyance which is the foundation of defendant children's title to the property in question, there is this reservation: "This conveyance is made subject however to a lease (of said described premises) heretofore made this day by us the said grantors to Emma Krueger the surviving widow of said Fred Krueger, deceased, which contains an annuity contract or agreement in favor of us the said grantors or the survivor of us, *which annuity is hereby reserved.*"

The petition contains the further allegations that said Eva Krueger departed this life on the 6th day of August, 1935, and that the plaintiff is the duly qualified and acting administrator with will annexed of her estate, and that as such administrator he is entitled to the possession of all the assets belonging to said estate; that said Eva Krueger was at the time of her death the surviving widow of said August Krueger who had departed this life on or about the 31st day of May, 1926; that these annuity payments were expressly reserved from the grant of the real estate to said children and were made a lien and a condition upon said grant; that, upon the execution of exhibit B, defendant Emma Krueger and defendant children entered into possession and ownership of said real estate and ever since said date have been the owners of and in possession of said real estate, subject, however, to the annuity payments set forth in the petition; that since the 11th day of April, 1917, the said August Krueger and Eva Krueger during their lifetime had a lien upon the real estate for the full amount of said annuity payments, and that said lien is a part of the assets of the estate of Eva Krueger, deceased; that the title of defendants at all times since said 11th day of April, 1917, has been subject to such lien; that

the annuity payments were made to said August Krueger up to and including the annuity payment due on the 1st day of January, 1926; that said August Krueger died on the 31st day of May, 1926, and that thereupon the annuity payments theretofore made to said August Krueger became due and payable to said Eva Krueger who succeeded to all rights of defendant August Krueger in the premises and became entitled to said payments of said annuity and became the holder of the lien, reservation and charge upon said premises as set forth in plaintiff's petition; that on and after the death of said August Krueger and on and after the 1st day of January, 1926, no payments of said annuity have been made to said August Krueger or to his estate, or to Eva Krueger, or to her estate; that the total sum of the unpaid annuity payments and interest at the time of the death of said Eva Krueger amounted to $3,780, which sum at that time was due, owing and payable, and unpaid, to said Eva Krueger; that no proceedings at law have been filed or have been had against any of the defendants for the recovery of said money or any part thereof. The plaintiff then prays for a determination of the amount due plaintiff on said lien and annuity payments, for judgment against the defendants for the amount found due thereon, and that said judgment in the sum found due plaintiff be decreed to be a first lien upon the real estate involved and prior to any other lien upon said property other than taxes, if any, and for the foreclosure of said lien.

Defendant Emma Krueger filed a demurrer to the petition of plaintiff for the reason that several causes of action had been improperly joined therein. As the question raised by her demurrer is not important here, we will make no further reference thereto. Defendant children filed a demurrer to the petition of the plaintiff for the following reasons and upon the following grounds:

"(1) That the plaintiff's exhibit A and B, attached to and made a part of the plaintiff's petition, neither separately, nor together, constitute the annuity payments pro-

vided in the lease, exhibit A, or reserved in the deed, exhibit B, a lien upon the interest of these defendants in the real estate described in the petition, and that the allegations of the plaintiff's petition that such annuity payments were and are liens or charges thereon are legal conclusions of the pleader.

"(2) That the petition of the plaintiff fails to state facts sufficient to constitute a cause of action against these defendants or any of them."

This demurrer was sustained, and the plaintiff having elected to stand upon his demurrer and refusing to plead further, the case was dismissed, from which action this is an appeal.

For the purposes of this case, all the allegations of the petition well pleaded are assumed to be true.

These two instruments were clearly executed as a part of one transaction. Their context clearly indicates that. They were both executed at about the same time and were filed for record within fifteen minutes of each other, the deed of conveyance being filed last. The contract exhibit A defined what the annuity payments were to be. The deed of conveyance transferred the property involved to defendant children with a reservation in favor of the grantors, which reservation is expressly stated therein. In these circumstances but one conclusion can be drawn; that is, that the grantors never granted away the entire title free of encumbrance to defendant children.

The following principles of law are applicable here: Where a contract and a deed are entered into simultaneously as a part of one transaction, as in this case, and in the contract there is a provision for a stipulated annuity which is referred to in the deed, the effect of such stipulation is the same as if it were in the deed of conveyance. *Peters v. Peters,* 62 S. Dak. 563, 255 N. W. 466. The intention of the grantors in a deed must be interpreted in the light of all the attending circumstances, and where a recorded instrument is referred to in a subsequent deed, it becomes a part of the subsequent deed to the extent necessary to

clarify the provisions of the subsequent deed. Grantees in a deed must take notice of all facts affecting the title to the property granted to them and disclosed to them by a prior recorded instrument. *W. T. Carter & Bro. v. Davis,* 88 S. W. (2d) (Tex. Civ. App.) 596. "Clauses in a conveyance of real property providing for the support and maintenance of a person are usually determined as to their effect by a construction of the entire instrument, one clause may be construed as a personal covenant, another a charge on rents and profits of the land, or another a lien or charge on the land itself." *Marsh v. Marsh,* 200 N. Car. 746, 158 S. E. 400. A grantor has the right to reserve a charge upon land conveyed for the maintenance of the grantor and such charge is a continuing lien upon the title of the grantee. *Bonebrake v. Summers,* 193 Pa. St. 22, 44 Atl. 330. Reservations of the kind involved here are liens on the land and not mere personal charges against the grantees. *Wall v. Wall,* 126 N. Car. 405, 35 S. E. 811. Generally, all reservations in a deed, unless otherwise expressed, operate in favor of grantor. *Burns v. Bastien,* 174 Okla. 40, 50 Pac. (2d) 377. What was said by us in *Bankers Life Ins. Co. v. Ohrt,* 131 Neb. 858, 270 N. W. 497, might with equal force be said of the claimed lien here. There we said: "While it did not constitute a mortgage, yet it was contemplated by the form of the contract and the vehicle through which it was expressed that it should be a charge upon the land." The foregoing cases correctly announce the rule governing this case. Certain rights in this real property were reserved by the grantors in the deed of conveyance. Those rights were never conveyed. They were reserved by the grantors as a charge upon the property conveyed, to assure them that the annuities provided for would be paid.

The petition of the plaintiff stated a cause of action. The trial court erred in sustaining the demurrer of the defendant children and in dismissing the case. The judgment of the trial court is reversed and the cause is remanded to the district court for further proceedings.

REVERSED.

ANNA SHAMP, APPELLANT, V. LANDY CLARK COMPANY, APPELLEE.

277 N. W. 802

FILED FEBRUARY 18, 1938. No. 30301.

1. **Statutes:** CONSTRUCTION. When the language of a statute is clear and unambiguous, courts will not by construction usurp the function of the law-making body and give it a meaning not intended or expressed by the legislature.
2. **Workmen's Compensation:** TRIAL: FORUM. After there has been a proper waiver of rehearing before the workmen's compensation court and an appeal has been taken to the district court, then by stipulation of the parties the case may be submitted to the district court of any county in the state.
3. ———: JUDGMENT: APPEAL. The legislature by the use of clear and unambiguous terms and language expressed the intent that, after a hearing was had before a judge of the compensation court and a party thereto desired a rehearing, he had in the first instance the right to a rehearing before the compensation court, but such party had the alternative right to waive such rehearing, whereupon he was entitled to an appeal directly to the district court.
4. ———: ———: ———. A party who accepts the judgment of a single judge of the compensation court may not insist upon a rehearing before the full compensation court where the opposing party waives such rehearing and takes an appeal directly to the district court.
5. ———: ———: ———. In case of a hearing before the judge of the compensation court where findings and judgment are rendered and one party accepts such findings and judgment and the other does not, but, in accordance with law, waives rehearing before the compensation court, such party may have an appeal directly to the district court.
6. ———: "ACCIDENT." The word "accident" as used in the workmen's compensation act shall, unless a different meaning is clearly indicated by the context, be construed to mean an unexpected or unforeseen event happening suddenly and violently with or without human fault and producing at the time objective symptoms of an injury. Comp. St. 1929, sec. 48-152, as amended by section 42, ch. 57, Laws 1935.
7. ———: PROOF. Where any one or more of the essential elements of an accident is absent, there can be no recovery for accidental injury or death under the workmen's compensation statutes.
8. ———: BURDEN OF PROOF. The burden of proof in compen-

sation cases is upon the claimant to show with reasonable certainty that the employee sustained injury or death from an accident which arose out of and in the course of employment.

9. ———: ———. "When an employee dies suddenly and mysteriously while engaged in his work, the burden of proof that his death was an accident arising out of his employment rests upon the claimant for compensation, and such proof must amount to something more than mere guess." *Mullen v. City of Hastings*, 125 Neb. 172, 249 N. W. 560.

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

William Niklaus and *Albert P. Schwarz*, for appellant.

Hall, Cline & Williams and *Flavel A. Wright, contra.*

Heard before GOSS, C. J., EBERLY, DAY, PAINE, CARTER and MESSMORE, JJ., and YEAGER, District Judge.

YEAGER, District Judge.

This is an action wherein the plaintiff and appellant seeks to recover compensation on account of the death of her husband, Ole Shamp, from the Landy Clark Company, a corporation, defendant and appellee, under the workmen's compensation law of the state of Nebraska. The action was originally and properly instituted in the compensation court of the state in Lincoln, Lancaster county, Nebraska. A trial was had before a judge of the compensation court and in due and proper form after trial an award of compensation was made in favor of appellant herein and against appellee.

After the award was made, and within the time provided by law, the appellee performed all necessary steps for appeal and filed a waiver of rehearing before the compensation court, whereupon an appeal was taken directly to the district court for Lancaster county, Nebraska, said county being the one in which the claimed cause of action and right of recovery arose.

Upon the filing of the statutory petition for appeal to the district court in compensation cases by the appellee herein, the appellant herein filed objections to the jurisdiction of the district court, wherein it was asserted that

the district court had no power to entertain the appeal since there was no stipulation which was concurred in by appellant waiving the right to have the case reheard by the workmen's compensation court and consenting to a trial *de novo* in the district court. The objection was overruled by the district court, whereupon issues were joined. The appellant preserved her objections in her further pleadings.

On the issues joined a trial *de novo* was had in the district court which resulted in a denial of a right of recovery by the appellant against the appellee and findings and judgment, proper in form, against appellant and in favor of appellee. From this judgment the appellant brings the case to this court for review.

The facts, to the extent that it is necessary to state them, are substantially as follows: On December 3, 1935, Ole Shamp, a man of the age of 49 years, the husband of appellant, was employed by the appellee to haul coal from the yards of appellee to its customers at a daily wage of $3. He worked the 3d and 4th days of December. Late on the afternoon of the 4th he loaded three tons of coal on the truck he was then using and operating and drove from the yards of appellee which were located at Thirty-third and Y streets in Lincoln, Nebraska, to 1830 L street in said city. After the load of coal had been partly unloaded, a woman was passing 1830 L street and was attracted by sounds coming from the truck. On investigation Ole Shamp was found crumpled up and lying upor the coal which remained in the truck. Apparently, from the record, within a few minutes and without regaining consciousness Shamp died. The record indicates that none of the acts or movements of Shamp was observed by any one from the time he left the coal-yard of appellee until after he had collapsed in the truck as above indicated. The body was removed to an undertaking establishment where it was embalmed, and thereafter on the 6th of December, 1935, an autopsy was conducted upon the body by Doctor George W. Covey. The autopsy was conducted in the presence of Doctor Edwin R. Ryerson.

The record presents four assignments of error, but only two of them require consideration.

Appellant contends in her first assignment that the court erred in overruling plaintiff's motion to dismiss defendant's petition on appeal and application for rehearing. In other words, it is the contention of appellant that the district court was without jurisdiction to entertain an appeal direct to the district court from a judge of the workmen's compensation court without the consent of the appellant. This requires an examination of certain provisions of the workmen's compensation statutes.

Section 48-174, Comp. St. Supp. 1935, contains the provisions which control the matters under consideration herein, and the portions applicable are as follows: "(4) At the expiration of the time fixed for filing the answer the court shall assign one of the judges of said court to hear the cause and make such findings, and such orders, awards or judgments as said court or judge is authorized by law to make, and such findings, orders, awards and judgments shall be signed by the judge before whom such proceedings were had. * * * (5) Either party at interest who refuses to accept the findings, order, award or judgment of the said judge may, within fourteen days after the date thereof, file with the said court an application for a rehearing, plainly stating the errors on which such party relies for reversal or modification. * * * Provided, however, that in any case the employer or the injured employee, or his dependents, as the case may be, may waive rehearing before the compensation court and in such case any appeal shall be directly to the district court of the county in which the accident occurred; provided, however, upon the written stipulation of the parties in the case the matter may be submitted to the district court of any county in the state."

The appellant contends that a proper construction of the above-quoted statutory provisions requires a stipulation of the parties before a rehearing may be had in the district court. An analysis will show that this contention is baseless. The language is clear and unambiguous and by

context and punctuation the stipulation referred to deals only with the locus of the trial after proceedings are pending in the district court. This court has repeatedly held: "When the language of a statute is clear and unambiguous, courts will not by construction usurp the function of the law-making body and give it a meaning not intended or expressed by the legislature." *State v. Bishop,* 123 Neb. 481, 243 N. W. 658. See *State v. First State Bank of Alliance,* 122 Neb. 502, 240 N. W. 747; *Gibson v. Peterson,* 118 Neb. 218, 224 N. W. 272; *State v. Heupel,* 114 Neb. 797, 210 N. W. 275. The fair purport of the language is that, after there has been a proper waiver of rehearing before the workmen's compensation court and an appeal has been taken to the district court, then by stipulation of the parties the case may be submitted to the district court of any county in the state.

It is urged by appellant that an appeal may not be taken to the district court from an award of a single member of the workmen's compensation court unless the right to a rehearing before the full compensation court is waived by both parties. As authority she cites *City of Lincoln v. Nebraska Workmen's Compensation Court,* 133 Neb. 225, 274 N. W. 576. The particular language which it is necessary to construe is the following: "Provided, however, that in any case the employer or the injured employee, or his dependents, as the case may be, may waive rehearing before the compensation court and in such case any appeal shall be directly to the district court of the county in which the accident occurred." It will be noted the language clearly states that either party, "as the case may be, may waive rehearing before the compensation court," and that there is no joinder of waiver required.

It appears then that the inescapable meaning of this language is, and the evident intent of the legislature was, that when a hearing was had before a judge of the compensation court and a party thereto desired a rehearing, he had in the first instance the right to a rehearing before the compensation court, but he likewise had a right to

waive such rehearing, whereupon he was entitled to an appeal directly to the district court. The statute clearly indicates that waiver by but one party is necessary. If there had been any other intent, the conjunction "and" instead of "or" would have been employed. If a waiver is required by only one party, then logic and reason could point only to the party seeking the rehearing as the one required to waive rehearing before the compensation court. In this case appellant did not seek a rehearing and did not join in the requested rehearing of the appellee.

The case of *City of Lincoln v. Workmen's Compensation Court, supra,* is not authority upon any of the fundamental propositions in this case and the views herein expressed do not in any wise conflict with any of its holdings. The facts of that case were briefly as follows: One Ben Swadley instituted action in the workmen's compensation court against the city of Lincoln. A hearing was had before one of the judges in which findings and judgment were rendered in favor of Swadley, but not to the extent prayed for. He filed a due and regular application for a rehearing before the full compensation court. Subsequently the city of Lincoln waived a rehearing before the compensation court and took an appeal direct to the district court. Thereafter the city instituted an action in the district court in the nature of prohibition, the object and purpose of which was to prevent the compensation court from proceeding with the rehearing. The prayer of the city of Lincoln was denied, and the court said: "The right of either party to compensation proceeding to refuse to accept judgment of single judge and to secure rehearing by entire compensation court is paramount to and exclusive of right of appeal to district court from such original decision." (274 N. W. 576.) This language is not broad enough to admit of the construction that a party who does accept the judgment of a single judge of the compensation court has the right to insist upon a rehearing before the full compensation court.

It is therefore our conclusion that in case of a hearing

before a judge of the compensation court, where findings and judgment are rendered and one party accepts such findings and judgment and the other does not, and, in accordance with law, waives a rehearing before the compensation court, such party may have an appeal directly to the district court.

Having now determined the question of the right of appeal in this case adversely to the appellant, it becomes necessary to determine the question of whether or not the court erred in its finding and judgment on the merits, by which findings and judgment it was determined that Ole Shamp came to his death by reason of heart disease, rather than by accident arising out of and in the course of his employment.

The evidence is clear and without dispute that, if there was an accident, it was not seen by any witness, and if there was an accident, it must be inferred from the fact that Shamp was found in collapse in the truck and from the post mortem findings of the autopsy examiners.

The position or superficial condition of the body presents nothing of evidentiary value on this question. The doctors called by appellant and appellee are in substantial agreement as to the post mortem findings. They agree that the cause of death was aortic stenosis, with left ventricular dilatation and hypertrophy and sudden myocardial failure. The only difference is that appellant's doctor uses the term "acute" ventricular dilatation. Aortic stenosis is a narrowing of the valve leading from the left ventricle of the heart into the aorta, and according to Dr. Edwin R. Ryerson, a physician called by appellant, might be caused by inflammation, calcification or sclerosis or hardening of the blood vessels. The same witness stated that this was a case of calcification with the three leaves of the aortic valve stuck together to *some extent,* and that the condition had been developing over a long period of time. Hypertrophy is described as enlargement of the heart muscle due to increased exercise. By left ventricular dilatation is meant "*enlarged and dilated,*" and in this case it

resulted from the fact that the blood was unable to pass from the left ventricle into the aorta fast enough.

In an analysis of the post mortem findings, Dr. Ryerson, appellant's physician, was permitted to testify to a number of possible causes which might have resulted in the disclosed findings, but none of these went beyond conjecture. He has summed up his conclusions in an answer to a question by the court appearing at the bottom of page 53 of the bill of exceptions, as follows: "It is a condition that causes death and the condition he had causes death, sudden death, and we know that that condition develops from some unusual experience or an overload on the heart, as in this case, that it is called upon to function, it couldn't do it, it failed, just simply couldn't carry the load and the man died because the heart could not function as it should." This is a fair summary of the evidence most favorable to appellant, upon which the trial court was required to find, if it was required to so find, that Ole Shamp came to his death as the result of accident sustained in the course of his employment.

The word "accident" as used in compensation cases is defined by statute and the definition has been approved by this court, and as so defined is an unexpected or unforeseen event happening suddenly and violently with or without human fault and producing at the time objective symptoms of injury. Comp. St. 1929, sec. 48-152, as amended by section 42, ch. 57, Laws 1935; *Lang v. Gage County Electric Co.*, 133 Neb. 388, 275 N. W. 462.

The death of Ole Shamp was unsuspected and unforeseen and happened suddenly, but there is a lack of evidence from which it may properly be inferred that there was any violence, within the meaning of the law, connected with the death. It follows necessarily that, where any one or more of the essential elements of an accident is absent, there can be no recovery for accidental injury or death under the workmen's compensation statutes.

In recent cases this court followed the long-established rule that the burden of proof in compensation cases is

upon the claimant to show with reasonable certainty that the employee sustained injury or death from an accident which arose out of and in the course of employment. *Amos v. Village of Bradshaw,* 128 Neb. 514, 259 N. W. 374. This burden appellant has not sustained in this case.

The record herein discloses no act or event, either directly or inferentially, which would tend to disclose anything which occurred from the time Shamp left the coal-yard until he was found crumpled upon the portion of the load of coal he was unloading. Within the meaning of the law, all of these things remain a mystery. This court has laid down and followed the rule: "When an employee dies suddenly and mysteriously while engaged in his work, the burden of proof that his death was an accident arising out of his employment rests upon the claimant for compensation, and such proof must amount to something more than mere guess." *Mullen v. City of Hastings,* 125 Neb. 172, 249 N. W. 560.

There is no evidence in the record to indicate that Ole Shamp did not come to his death during ordinary exertion required of him to perform his work in the ordinary manner. The rule, then, to be applied is that an injury or death is not compensable as an accident under the compensation act when sustained during the ordinary exertion required to perform the employee's duties in the ordinary and normal manner. *Gilkeson v. Northern Gas Engineering Co.,* 127 Neb. 124, 254 N. W. 714.

We conclude that the judgment of the district court was correct and it is

AFFIRMED.

ROBERT R. STREHLOW, APPELLANT, V. EMIL KRINGS ET AL., APPELLEES.
277 N. W. 784

FILED FEBRUARY 22, 1938. No. 30161.

Reversal. The decision in this case is ruled by the decision in *First Trust Co. v. Smith*, p. 84, *post*. The judgment of the district court is reversed and the cause remanded.

APPEAL from the district court for Boone county: LOUIS LIGHTNER, JUDGE. *Reversed.*

Battelle, Strehlow & Morearty, Wagner, Wagner & Albert and *O. F. Walter*, for appellant.

John T. Curran and *Raymond P. Medlin, contra.*

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

GOSS, C. J.

This is an appeal from a judgment granting defendants a further moratorium, under Legislative Bill No. 4, Laws 1937; Laws 1937, ch. 42, Comp. St. Supp. 1937, ch. 20, art. 21.

By the record and by the assignments of error, plaintiff challenges the validity of the act as repugnant to and in contravention of the "due process clause" (art. I, sec. 3) of the Nebraska Constitution, of that provision of the state Constitution (art. I, sec. 13) which grants to appellant a remedy in the courts in due course of law and that justice shall be administered without denial or delay, and that it violates the "contract clause" (art. I, sec. 16) of the state Constitution; and that it impairs the obligation of the contract in violation of section 10, art. I of the Constitution of the United States, and violates the "equal protection" and "due process clauses" of section 1 of the Fourteenth Amendment to the Constitution of the United States.

The record shows that suit was begun December 16, 1935, by Becher, Hockenberger & Chambers Company to

foreclose a $16,000 mortgage on 480 acres in Boone county. Defendants filed no answer and decree for upwards of $18,000 was entered January 27, 1936; defendants filed request for statutory stay of nine months; plaintiff assigned the decree to Robert R. Strehlow and he was substituted as plaintiff; on November 7, 1936, an order of sale was issued; on November 17, 1936, defendants filed a request for a moratory stay; on December 14, 1936, the sheriff sold the land to Robert R. Strehlow for $20,192.43 (said to be the amount of the mortgage debt); January 25, 1937, moratorium was granted to March 1, 1937; on March 2, 1937, defendants filed a request for a further moratorium until March 1, 1939, to which plaintiff filed objection, specifically setting out constitutional objections about as heretofore recited; April 12, 1937, the district court granted the moratorium until March 1, 1939, or until the further order of the court, and fixed the rental value, chiefly in a share of the crops, to be paid by defendants. From that order the appeal was taken.

No evidence was taken. On both sides the case is argued purely as a matter of law arising on the record.

The questions are the same as those involved in the recent case of *First Trust Co. v. Smith,* p. 84, *post,* 277 N. W. 762, where they were elaborately discussed in the opinion, and where it was held that the Nebraska moratory law, as amended in 1937, contravenes the spirit and express terms of sections 13 and 16, art. I of our state Constitution, and is wholly invalidated thereby. It would serve no useful purpose to repeat the argument. It is sufficient to say that the case at bar is ruled by the principles expressed in the opinion in *First Trust Co. v. Smith, supra.*

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

REVERSED.

FIRST TRUST COMPANY OF LINCOLN, TRUSTEE, APPELLANT, v. WALTER C. SMITH ET AL., APPELLEES.

277 N. W. 762

FILED FEBRUARY 22, 1938. No. 30218.

1. **Statutes:** AMENDMENT: CONSTRUCTION. "The section of an act properly amended should be construed precisely as though it had been originally enacted in its amended form." *State v. Hevelone*, 92 Neb. 748, 139 N. W. 636.
2. ———: ———: REPEAL. "Where, by amendment and repeal, the words of a former statute or section of a statute are changed in some respects, but it is intended that the statute shall continue to operate, it is not strictly a repeal, but a continuation of the former law as amended." *Morgan v. City of Falls City*, 103 Neb. 795, 174 N. W. 421.
3. **Constitutional Law.** This court will not anticipate a question of constitutional law in advance of the necessity of deciding it, and will not formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.
4. **Statutes:** CONSTRUCTION. "Provision expressing legislative intent as to the separability of the various parts of a statute is an aid merely to judicial interpretation." *Hubbell Bank v. Bryan*, 124 Neb. 51, 245 N. W. 20.
5. ———: ———. "The legislative intent is the cardinal rule in the construction of statutes." *Hubbell Bank v. Bryan, supra.*
6. **Constitutional Law:** EMERGENCY LEGISLATION. Legislation expressly by its terms based upon the existence of a definite emergency therein declared, or other state of facts to uphold it, may never possess validity if an obvious and vital mistake has occurred in the truth of the declaration upon which it is founded, or may cease to operate if the emergency ceases or the facts change, even though valid when passed. And this court, by virtue of its inherent powers constitutionally conferred, in its application of such statute, may ascertain as it sees fit any fact that is merely a ground for laying down a rule of law.
7. **Mortgages.** The factual and legislative situation existing on the 16th day of February, 1937, and since continuing, examined and *held* insufficient to constitute a "temporary emergency." *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U. S. 398, 78 L. Ed. 413.
8. **Courts.** "Decisions of supreme court of United States construing provisions of federal Constitution are not binding on state court in construing similar provisions of state Constitution." *Wilson Banking Co. Liquidating Corporation v. Colvard*, 172 Miss. 804, 161 So. 123.

9. ———. "The United States supreme court and the supreme court of this state are peers. The decisions of the former upon the federal Constitution and laws are binding on the latter; the decisions of the latter upon the Constitution and laws of Nebraska are binding on the former." *Franklin v. Kelley*, 2 Neb. 79.

10. **Constitutional Law:** INTERPRETATION. The meaning of a Constitution is fixed when it is adopted. It is not different at any subsequent time when a court has occasion to pass upon it. The court is therefore to declare the law as written, leaving it to the people by constitutional amendment to make such changes as new circumstances may require.

11. ———: ———. In the interpretation of the Bill of Rights of our state Constitution, the court will consider its history, the development of the evil sought to be restrained by its provisions, the established laws, usages and customs of the country at the time of its adoption, and the scope of the remedy its terms imply.

12. **Mortgages:** MORATORIUM. This moratorium, it may be said, is a postponement of fulfilment of obligations enumerated therein, decreed by the state through the medium of the legislature and the courts. Applying to a restricted class of debtors, it is in its nature essentially special, and in its essence is the application of the sovereign power.

13. **Constitutional Law:** INTERPRETATION. In the absence of expressed contrary intention, the adoption of a statutory or constitutional provision from another state accepts the meaning of such adopted provision that it carried in the context of which it originally formed a part and, if it had been previously construed by the courts of such state, the judicial determination thus made.

14. ———: ———. In adopting sections 9 and 12, art. I of the Nebraska Constitution in 1866, and their readoption as sections 13 and 16, art. I of the Constitution of 1875 by the electorate of the state, the then settled judicial interpretation and meaning of these clauses were also adopted.

15. ———: ———. Emergency does not create power. It does not increase granted power or remove or diminish the restrictions imposed upon power granted or reserved. The grants of power by the Constitution to the state government and the limitations of the powers thus granted by the restrictions of such Constitution were determined in the light of emergency, and they are not altered by emergency.

16. ———: ———. Sections 13 and 16, art. I of the Nebraska Constitution, retain their original virility and constitute present binding limitations on the exercise of governmental powers,

legislative, executive or judicial, which "emergency" may not impair, destroy or modify.

17. ———: MORTGAGES. The Nebraska moratorium law, as amended in 1937, Laws 1937, ch. 42 (a six-year act) contravenes the spirit and express terms of sections 13 and 16, art. I of our Constitution, and is wholly invalidated thereby.

APPEAL from the district court for Lancaster county: LINCOLN FROST, JUDGE. *Reversed.*

Hall, Cline & Williams, for appellant.

J. A. Brown and *W. O. Brown, contra.*

Perry W. Morton, amicus curiæ.

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

EBERLY, J.

This is an appeal from the judgment of the district court for Lancaster county, presented here as a case stated settled and allowed by trial court.

The appellant contests the validity of chapter 42, Laws 1937, being the last amendment to the Nebraska moratorium law, as being repugnant to the "contract clause," U. S. Const. art. I, sec. 10, to the "due process clause" and the "equal protection clause" of section 1, of the Fourteenth Amendment to the federal Constitution; and also as repugnant to, and in contravention of, the following provisions of the Constitution of the state of Nebraska, viz., the "contract clause," article I, sec. 16; the "due process clause," article I, sec. 3; section 13, art. I in that it deprives appellant of its remedy by due course of law and denies to appellant the administration of justice without denial or delay; and, lastly, that it violates section 21, art. I. The district court sustained the act, and plaintiff appeals.

The record discloses that on May 1, 1929, the defendants, Walter C. Smith et al., made, executed and delivered to plaintiff, the First Trust Company of Lincoln, their promissory note, by the terms of which they promised to pay

to the order of said company $8,000 with interest at 6 per cent. per annum payable semiannually until maturity or default, and at the rate of 10 per cent. thereafter. The principal was payable, $2,000 May 1, 1930, $3,000 May 1, 1931, and $3,000 May 1, 1932. To secure the payment of these sums, and conditioned for the performance of the contract evidenced by such note, the defendants on the said 1st day of May, 1929, duly executed to the plaintiff their mortgage deed and thereby mortgaged to it the premises here in suit; and in addition also in such mortgage they covenanted and agreed to pay any and all taxes or assessments levied upon the aforesaid note or upon the mortgage securing the same, as well as upon the mortgaged premises, and also obligated themselves to procure, deliver and keep in force insurance policies upon the mortgaged premises, "for not less than $10,000, loss payable to the mortgagee, its successors or assigns, as their interest may appear." The mortgage further stipulated that "time is of the essence of this contract," and upon a failure to perform the mortgagors' covenants by them, including prompt payment of principal and interest when due, the whole indebtedness secured thereby, at the option of the mortgagee, its successors or assigns, should immediately become due and payable; and that immediately upon commencement of suit in foreclosure, the mortgagee, its successors or assigns, should be entitled to possession of said premises, and all rents and profits derived from said premises should, upon default of any of the provisions of this mortgage, be applied on the debt secured thereby. Said mortgage was duly recorded, as by law provided, and on May 1, 1932, the mortgage indebtedness having been reduced to $3,000, by agreement in writing bearing date of May 1, 1932, the time of payment of said indebtedness and the terms of the writing evidencing the same were duly extended so that the amount secured thereby was to be paid as follows: $500 May 1, 1933, $500 May 1, 1934, $500 May 1, 1935, $500 May 1, 1936, and $1,000 May 1, 1937, and the interest thereon during said extension was to be paid at the rate of

6 per cent. per annum. On account of failure of the mortgagors to pay interest and taxes as covenanted by them, plaintiff exercised its stipulated option and proceedings for foreclosure of the mortgage were commenced in the district court for Lancaster county on February 9, 1934, and a decree of foreclosure and order of sale were entered in this cause on April 12, 1934, adjudging plaintiff's mortgage to be a first lien on the premises in suit, and that there was due thereon $3,354.38 with interest at 10 per cent. from April 2, 1934. On April 27, 1934, the statutory written request for nine months' stay was filed by the mortgagors. Thereafter, on application of the mortgagors, a further order of stay until March 1, 1937, was entered in said cause under the provisions of chapter 41, Laws 1935, the Nebraska moratorium act then in force, conditioned on the payment of rental in the sum of $50 a month.

On the termination of this period an additional stay was again applied for by the defendants, pursuant to the moratorium amendment of 1937, Laws 1937, ch. 42, which was challenged by plaintiff upon the constitutional grounds hereinbefore set forth. On May 8, 1937, the trial court sustained Legislative Bill No. 4, Laws 1937, ch. 42, and granted a further moratorium stay to March 1, 1938, conditioned on the payment of a monthly rental of $50 a month. It further appears from the record that the moratorium rentals have been paid to and including February 28, 1937; that taxes for the years 1929 to 1936 have never been paid by the defendants; and after application of all moratorium rents to defray the same, there remains unpaid taxes "as of March 2, 1937," amounting to $1,600. By stipulation of the parties it is agreed that the value of the mortgaged property, as of March 2, 1937, was between $8,500 and $12,000. It appears by necessary implication that this judicial action in effect denied the enforcement of the specific covenants contained in the mortgage deed, except in so far as might be covered by the annual rental as fixed by the order of the trial court.

The moratorium act under consideration commences with

the enactment of chapter 65, Laws 1933, approved March 2, 1933. This act recited the declaration of the existence of an emergency by the governor of the state, and a like determination by the legislature. It contained seven sections.

By section 1 it was commanded: "In all actions now pending or hereafter commenced for the foreclosure of real estate mortgages, deeds of trust, land sale contracts or on notes secured thereby * * * while this act is in effect, the court shall, upon application of the owner or owners of said real estate or persons liable on said mortgages * * * or notes secured thereby, made at any time after the decree of foreclosure or judgment is rendered and before confirmation of the sale of the premises, unless upon hearing on said application, good cause is shown to the contrary, order that all further proceedings in such action be stayed until the first day of March, 1935." (Then followed directions governing the enforcement of the act.)

Section 2 required the recommendation of conciliation.

Section 3 provided: "This act shall expire and shall be of no force and effect from and after twelve o'clock midnight, March 1, 1935."

Section 4 was a legislative declaration of intent that all instruments affected by the act should be submitted "to the ordinary regular course of justice and to pursue in substance existing remedies with respect thereto."

Section 5 was occupied in legislative declaration of emergencies and the invocation of the police power of the state.

In 1935 the foregoing legislation was, by amendment, in effect extended to March 1, 1937, by chapter 41, Laws 1935, approved February 27, 1935, this being "An act to amend" the moratorium law of 1933.

By such 1935 act section 1 of the act of 1933, with certain amendments not material to the questions here presented, was in effect amended and reenacted, extending the concluding date of stay to March 1, 1937.

Section 3 of the act of 1933 was amended to read as

follows: "By its own specific limitations in this section contained, this act shall expire and shall be of no force and effect from and after twelve o'clock midnight, March 1, 1937."

The remainder of the act of 1933 was continued in force.

Two years still later, by the enactment of chapter 42, Laws 1937, approved February 16, 1937, being "An act to amend" the moratorium law as amended in 1935, section 1 of the act of 1933, as amended by section 1 of the act of 1935, was again amended and reenacted, and stay of proceedings provided thereby extended from March 1, 1937, to March 1, 1939, and other changes made therein not material to the questions now under consideration.

Section 1 of the act of 1937 contained a legislative declaration of emergency.

Section 3 of this last amendatory enactment is as follows: "Notwithstanding any more general or special law respecting actions at law on notes secured by real estate mortgages, deeds of trust or land sale contracts, or on contracts secured by real estate mortgages, deeds of trust or land sale contracts, from and after the passage and approval of this act, the court shall, upon application of the owner or owners of such real estate or person or persons liable on such notes or contracts, secured as aforesaid, made within twenty days after the rendition of judgment on such actions at law, enter an order staying all sales under execution against the property of the judgment debtor or judgment debtors for a period of nine months from and after the rendition of such judgment, whenever the judgment debtor or judgment debtors shall, within twenty days after the rendition of such judgment, file with the clerk of the court a written request for the same: Provided, if the judgment debtor or judgment debtors make no such request within twenty days, the sale under execution shall immediately be had after the expiration thereof. The court shall, at the expiration of such stay, unless upon hearing, for good cause shown to the contrary,

further order that all further proceedings in such actions at law shall be stayed until the first day of March, 1939, or so long as this act is in effect under such conditions, provisions and terms as the court may deem just and equitable: Provided, the provisions of this act shall not apply to any mortgage, deed of trust, land sale contract, or note secured thereby, executed subsequent to March 1, 1934, nor shall it apply to any owner or owners who acquired the real estate subsequent to March 1, 1934. All applications for stays heretofore filed under the provisions of sections 20-21,159 to 20-21,164, Comp. St. Supp. 1933, as amended by chapter 41 of the Session Laws of Nebraska for the year 1935, shall be considered as filed under the provisions of this act and it shall be unnecessary in such cases to file new applications therefor."

Other provisions of the original act of 1933, by necessary implication, are again continued in force and effect, and section 6 reenacts the provision found in all former enactments that, if any section, clause or part of the act should be adjudged invalid, such judgment should not affect nor invalidate the remainder of the act, etc.

The form of the present moratorium legislation and the history of the enactments thereof involve two rules of statutory construction, viz.:

(1) "The section of an act properly amended should be construed precisely as though it had been originally enacted in its amended form." *State v. Hevelone,* 92 Neb. 748, 139 N. W. 636. See, also, *In re Heirship of Robinson,* 119 Neb. 285, 228 N. W. 852.

(2) "Where, by amendment and repeal, the words of a former statute or section of a statute are changed in some respects, but it is intended that the statute shall continue to operate, it is not strictly a repeal, but a continuation of the former law as amended." *Morgan v. City of Falls City,* 103 Neb. 795, 174 N. W. 421. See, also, *Hiddleson v. City of Grand Island,* 115 Neb. 287, 212 N. W. 619.

It, therefore, follows that in the instant case we are dealing with a six-year moratorium statute, which has yet

until March 2, 1939, to run, and not with a two-year moratorium act of which eleven months have expired.

This case is presented by the appellant to this court solely upon the constitutional questions involved, and the relief sought is the determination that the moratorium statute of Nebraska, as amended in 1937, is unconstitutional. The appellees insist that powers created by the statute challenged are rights supported by the emergency which its terms declare.

Ordinarily, the constitutionality of a statute will not be determined on review where the question to be determined was not presented below. *Pill v. State,* 43 Neb. 23, 61 N. W. 96. But the record here discloses a full compliance with this controlling principle of judicial review. This was necessary, for the court will not anticipate a question of constitutional law in advance of the necessity of deciding it, and will not formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied. *Howarth v. Becker,* 131 Neb. 233, 267 N. W. 444.

The effect of section 6 of the act under consideration, which relates to the separability of the various parts of the statute under consideration, presents a question which has heretofore engaged the attention of this court. The result of its consideration is well epitomized in *Hubbell Bank v. Bryan,* 124 Neb. 51, 245 N. W. 20, in the following language.

"Provision expressing legislative intent as to the separability of the various parts of a statute is an aid merely to judicial interpretation.

"'The legislative intent is the cardinal rule in the construction of statutes.' *King of Trails Bridge Co. v. Plattsmouth Auto & Wagon Bridge Co.,* 114 Neb. 734."

Preliminary to constitutional questions presented by the appellant is the determination of the force and effect of the legislative declaration of emergency found in section 1 of the act of 1937. Is the legislative determination of its continuance for the period fixed by legislative declara-

tion conclusive on the courts? The 1937 act proceeds on the theory that the existence of the emergency recited therein is a complete and adequate justification for the enactment of the amended law and its continued vitality thereafter. But a necessary corollary to this proposition is, emergency being essential to its continuance, the cessation of the emergency terminates the law supported thereby. In consideration of this question with reference to the federal Constitution, the rule as announced by the supreme court of the United States is controlling, and where it relates to similar provisions of the state Constitution it becomes at most but persuasive.

In *Chastleton Corporation v. Sinclair*, 264 U. S. 543, 68 L. Ed. 841, Justice Holmes has suggested that under these circumstances, so far as the declaration of emergency looks to the future, it involves the exercise of the powers of prophecy. The test of prophecy given by Holy Writ is: "If the thing follow not, nor come to pass, that is the thing which the Lord hath not spoken." Deut. 18:22. The test of prophecy, it would seem, whether legislative or otherwise, is therefore determinable in the present after the future has become the past, by those who are then required to act upon it or whose action is controlled by it, in the light of then existing circumstances.

Such *Chastleton* case is quite in point. It was one of the rent cases determined by the supreme court of the United States in 1924, and arose out of the following legislative situation:

"The original act of October 22, 1919, ch. 80, title II, 41 St. 297, considered in *Block v. Hirsh*, was limited to expire in two years. Sec. 122. The act of August 24, 1921, ch. 91, 42 St. 200, purported to continue it in force, with some amendments, until May 22, 1922. On that day a new act declared that the emergency described in the original title II still existed, reenacted with further amendments the amended act of 1919, and provided that it was continued until May 22, 1924. Act of May 22, 1922, ch. 197, 42 St. 543."

In discussing the force and effect of the legislative declaration, Justice Holmes, in delivering the opinion of the supreme court of the United States in such *Chastleton* case, to which none dissented, said, in part:

"We repeat what was stated in *Block v. Hirsh,* 256 U. S. 135, 154, as to the respect due to a declaration of this kind by the legislature so far as it relates to present facts. But even as to them a court is not at liberty to shut its eyes to an obvious mistake, when the validity of the law depends upon the truth of what is declared. 256 U. S. 154. *Chas. Wolff Packing Co. v. Court of Industrial Relations,* 262 U. S. 522, 536. And still more obviously so far as this declaration looks to the future it can be no more than prophecy and is liable to be controlled by events. A law depending upon the existence of an emergency or other certain state of facts to uphold it may cease to operate if the emergency ceases or the facts change even though valid when passed. *Perrin v. United States,* 232 U. S. 478, 486, 487; *Missouri v. Chicago, B. & Q. R. Co.,* 241 U. S. 533, 539, 540. In *Newton v. Consolidated Gas Co.,* 258 U. S. 165, a statutory rate that had been sustained for earlier years in *Willcox v. Consolidated Gas Co.,* 212 U. S. 19, was held confiscatory for 1918 and 1919. * * *

"We need not inquire how far this court might go in deciding the question for itself, on the principles explained in *Prentis v. Atlantic Coast Line Co.,* 211 U. S. 210, 227. See *Gardner v. The Collector,* 6 Wall. 499; *Town of South Ottawa v. Perkins,* 94 U. S. 260; *Jones v. United States,* 137 U. S. 202; *Travis v. Yale & Towne Mfg. Co.,* 252 U. S. 60, 80. These cases show that the court may ascertain as it sees fit any fact that is merely a ground for laying down a rule of law, and if the question were only whether the statute is in force today, upon the facts that we judicially know we should be compelled to say that the law has ceased to operate."

It follows, without consideration of the constitutional questions presented by this record, that the controlling rules applicable to the instant case, are: That legislation

expressly by its terms based upon the existence of a definite emergency therein declared, or other state of facts to uphold it, may never possess validity if an obvious and vital mistake has occurred in the truth of the declaration upon which it is founded, or may cease to operate if the emergency ceases or the facts change, even though valid when passed. And this court, by virtue of its inherent powers constitutionally conferred, in its application of such statute, may ascertain as it sees fit any fact that is merely a ground for laying down a rule of law.

Proceeding further, and for the present excluding constitutional considerations, in logical sequence the next question presented under the principles just discussed is the present validity of the Nebraska moratorium law, as amended in 1937, considered as an emergency measure, whose commands and sanctions are necessarily conditioned on the present existence and continued sufficiency of the facts set forth in section 1 thereof.

Appellees contend that principles announced in *Home Bldg. & Loan Ass'n v. Blaisdell,* 290 U. S. 398, 78 L. Ed. 413, necessitate the affirmative, and fully support the validity of the provisions here considered. The legislation under consideration in such *Blaisdell* case was chapter 339, Laws of Minnesota for 1933, and came before the supreme court of the United States as an appeal from a judgment of the supreme court of Minnesota sustaining the statute, rendered on July 7, 1933. 189 Minn. 422, 249 N. W. 334. Chief Justice Hughes, in the majority opinion of the supreme court of the United States, quotes approvingly the following from the opinion of the state supreme court, as a factual basis which supports the legislation then before the court, viz.:

"Not only they (members of the legislature), but the courts must be guided by what is common knowledge. It is common knowledge that in the last few years land values have shrunk enormously. Loans made a few years ago upon the basis of the then going values cannot possibly be replaced on the basis of present values. We all know that

when this law was enacted the large financial companies, which had made it their business to invest in mortgages, had ceased to do so. No bank would directly or indirectly loan on real estate mortgages. Life insurance companies, large investors in such mortgages, had even declared a moratorium as to the loan provisions of their policy contracts. The President had closed banks temporarily. The congress, in addition to many extraordinary measures looking to the relief of the economic emergency, had passed an act to supply funds whereby mortgagors may be able within a reasonable time to refinance their mortgages or redeem from sales where the redemption has not expired. With this knowledge the court cannot well hold that the legislature had no basis in fact for the conclusion that an economic emergency existed which called for the exercise of the police power to grant relief."

To this should be added the following from a concurring opinion of Justice Olsen of the Minnesota supreme court: "Millions of the people's money were and are yet tied up in closed banks and in business enterprises."

Taken as an entirety these statements, in connection with other recitals of this opinion, afford proper basis for the conclusion that the then world-wide business and financial crisis had attained such proportions as to substantially interrupt and effectually destroy the ordinary and usual course of business and finance.

It is obvious from the foregoing quotations, as well as from the majority opinion of Chief Justice Hughes as an entirety, that, under such surrounding circumstances, the continued due and regular enforcement of contracts to which the Minnesota moratorium applied by courts, both federal and state, in the orderly course of judicial procedure, would result in the sacrifice of the property involved at judicial sale prices far below its actual and reasonable value. This constituted the crux of the exigency.

In such *Blaisdell* case the following appears: "As the supreme court of Minnesota said, the economic emergency which threatened 'the loss of homes and lands which fur-

nish those in possession the necessary shelter and means of subsistence' was a 'potent cause' for the enactment of the statute."

"Emergency" is defined specifically as a perplexing contingency or complication of circumstances. That this conclusion is true is seen in the fact that the only remedy applied or sought to be applied by the legislation under consideration was in the nature of a stay of the postponement of the consummation of the necessary legal proceeding to secure regular enforcement.

The majority opinion in such *Blaisdell* case postulates that the protective power of the state, the police power, may only be invoked in this case, and the relief afforded and justified by an emergency, temporary in nature, in order not to contravene the federal constitutional provisions, could only be of a character appropriate to that emergency, and could be granted only upon reasonable conditions.

In *Worthen Co. v. Kavanaugh,* 295 U. S. 56, 79 L. Ed. 1298, Justice Cardozo, after distinguishing that case from the facts in the *Blaisdell* case, says, in part: "A different situation is presented when extensions are so piled up as to make the remedy a shadow. * * * What controls our judgment at such times is the underlying reality rather than the form or label. The changes of remedy now challenged as invalid are to be viewed in combination, with the cumulative significance that each imparts to all. So viewed they are seen to be an oppressive and unnecessary destruction of nearly all the incidents that give attractiveness and value to collateral security." See, also, *Worthen Co. v. Thomas,* 292 U. S. 426; *Louisville Joint Stock Land Bank v. Radford,* 295 U. S. 555.

Recurring to the recitals of facts made in the *Blaisdell* case in support of the Minnesota moratorium, and bearing in mind that all transactions entered into since March 1, 1934, are wholly excluded from the Nebraska moratorium, as amended in 1937, now under consideration, and that we are dealing with a six-year moratorium in the present

case, and a moratorium of but two years in extent was before the courts in the *Blaisdell* case, it must be admitted that land values have not been restored to the prices they had attained prior to March 1, 1934, and that maximum farm loans made on the speculative basis that obtained during some of the years prior to that date cannot now be refinanced. It also may be accepted as true that the state of Nebraska in the year 1936 experienced an unprecedented drouth and that certain parts of the state suffered from insect pests. But we are required to take notice of the fact that under the emergency farm mortgage act of May 12, 1933, 48 St. at Large, 41, ch. 25 (and as subsequently amended), the Federal Land Banks and the Land Bank commissioner were empowered to loan farmers 75 per cent. of the normal value of their land at 4½ per cent. interest for the first five years and 5 per cent. thereafter, and no repayment of principal was to be required for five years (*Louisville Joint Stock Land Bank v. Radford,* 295 U. S. 555, 55 Sup. Ct. Rep. 854, note 4); and that mortgage loans made to farmers by this agency aggregated $2,661,-558,017, as of March 31, 1935, and their work has not ceased. Large financial companies have reentered the mortgage investment field. Ninety-seven per cent. of all banks closed by the President in March, 1933, in due time reopened with capital unimpaired, and all deposits entrusted to their care preserved without loss. Since 1934 the banks of the nation have been entrusted with deposits in unprecedented amounts. Other loaning agencies of the federal government have been engaged in the work of refinancing farm mortgages. Failed banks and financial institutions whose insolvency occurred prior to March 1, 1934, have been largely liquidated. Insurance companies have long since abandoned the protection of moratoria, and continue their business as contemplated by their contracts. Millions of dollars in the hands of investors are awaiting investment under conditions assuring safety and preservation of principal and prompt payment of interest and principal, according to terms of contracts made. Millions

of dollars have been invested since March 1, 1934, in short term paper yielding less than 1 per cent. per annum. It appears that there is no crisis now prevailing which involves a general paralysis of business and finance, and that the unfortunate condition now confronting us is strictly a "continued depression."

Admitting that certain mortgagors whose obligations were created prior to March 1, 1934, secured their loans upon a basis of land values which prevents their mortgages being now refinanced, even as to them, as an actual fact, no temporary emergency exists supporting the validity of the present Nebraska moratorium, as is substantially required by the principles announced in *Home Bldg. & Loan Ass'n v. Blaisdell, supra.*

It must be remembered that the prerequisite to the enforcement of our moratorium statute, as amended in 1937, is that only such mortgagors or owners as have an interest in their lands over and above the liens against them are entitled to relief under its terms. Such, indeed, has been the construction given by courts to similar legislation. *Home Bldg. & Loan Ass'n v. Blaisdell,* 290 U. S. 398, 78 L. Ed. 413; *Blaisdell v. Home Bldg. & Loan Ass'n,* 189 Minn. 422, 249 N. W. 334; *Bukowski v. Travelers Ins. Co.,* 196 Minn. 31, 264 N. W. 217; *Falk v. Massachusetts Mutual Life Ins. Co.,* 196 Minn. 341, 265 N. W. 60; *National Bank of Aitkin v. Showell,* 195 Minn. 273, 262 N. W. 689; *Young v. Penn Mutual Life Ins. Co.,* 192 Minn. 446, 256 N. W. 906; *Clark v. Hass,* 129 Neb. 112, 260 N. W. 792; *Howarth v. Becker,* 131 Neb. 233, 267 N. W. 444; *First Trust Co. v. Rathbone,* 132 Neb. 211, 271 N. W. 428.

In the first session of the 74th congress there was duly enacted "An act to amend an act entitled, 'An act to establish a uniform system of bankruptcy throughout the United States,' approved July 1, 1898, and acts amendatory thereof and supplementary thereto." 49 St. at Large, 942, ch. 792. This act was approved August 28, 1935. It was amendatory and supplementary to the amendatory act of March 3, 1933, 47 St. at Large, 1467, ch. 204. It now forms

a part of chapter 8, title 11 of the bankruptcy act. 11 U. S. C. A. ch. 8, sec. 203. The legislation as thus amended is designed to aid victims of the general economic depression. It provided as an exercise of the bankruptcy powers conferred by our national Constitution a system of legal remedies, the enforcement of which is vested in the federal courts, which adequately protect every right of farmer debtors and landowners, and which in terms the Nebraska amendatory moratorium act of 1937 sought to secure. From the standpoint of the farmer debtor and agricultural landowner this federal legislation is wider in scope and more beneficial in results than the state legislation now under consideration here. All such real estate mortgages, irrespective of date of execution, are included within its terms, and the mortgage, deed of trust, land sale contract, or note secured thereby, executed subsequent to March 1, 1934, is not discriminated against. Without attempting to recite all of the provisions of these federal enactments, it may be said that upon the filing of a proper petition in a federal district court an attempt at conciliation is provided for the benefit of all parties. In the event of a failure of conciliation, the act provides that the bankruptcy court shall have sole jurisdiction and control of the property involved, and a three-year stay against all other proceedings in all courts, both state and federal, is allowed the petitioner for the purpose of his rehabilitation under the bankruptcy clause of the Constitution, upon the conditions set forth in said act, including the condition that he pay a reasonable rental semiannually for that part of the property of which he retains possession. This legislation is not subject to the "contract clause" of either the state or federal Constitution, and its authorization by the express terms of the federal Constitution was expressly recognized in *Wright v. Vinton Branch of Mountain Trust Bank,* 300 U. S. 440.

It is also well settled that "The paramount power to enact legislation regulating the subject of bankruptcies is conferred by the federal Constitution upon the congress

of the United States. The states are without authority to make or enforce laws which deal with a phase of the subject already covered by federal statutes. Furthermore, a state may not pass or enforce laws to complement a federal bankruptcy act or to provide additional or auxiliary regulations." 6 Am. Jur., Bankruptcy, sec. 3. See, also, *International Shoe Co. v. Pinkus*, 278 U. S. 261, 73 L. Ed. 318.

Therefore, without reference to, or determination of, the effect of the bankruptcy law, as amended in 1935, as a denial of the right of a state to further legislate on matters within its scope, but based solely on the intrinsic nature of the remedy provided thereby, it is clear that a "temporary emergency" created by an impending judicial sale at ruinous judicial sale prices is adequately provided against, and completely terminated. It is equally obvious that the existence of a "temporary emergency" (on the basis of which the moratorium was approved in the *Blaisdell* case, *supra*,) in view of the factual and legislative situation here existing is clearly disproved.

The foregoing is limited in its application to the assignments of errors in the record before us pertaining to the federal Constitution.

This court, in *Bell v. Niemann*, 127 Neb. 762, 257 N. W. 69, having under consideration the validity of the Nebraska moratorium act of 1933, in a case where only federal questions were presented, announced as the controlling rule the following: "The supreme court of the United States is the judicial tribunal of last resort to determine whether a moratory law of a state impairing the obligation of mortgage contracts violates that part of the federal Constitution providing that no state shall pass any law impairing the obligation of contracts, and its negative ruling on that question is binding on the supreme court of Nebraska." However, this court limited the effect of the decision then made by this language (p. 764): "Whether the Nebraska moratory act violates the Nebraska Constitution is a question not presented to the district court in this case and consequently it is not determinable in the supreme court

on an appeal in the same case, but is left open for future consideration."

In the instant case the record discloses that the validity of the Nebraska moratorium act of 1937 under the provisions of our Nebraska Constitution is for the first time properly presented and now invokes the decision of this court thereon. In this connection it will be remembered that "Decisions of supreme court of United States construing provisions of federal Constitution are not binding on state court in construing similar provisions of state Constitution." *Wilson Banking Co. Liquidating Corporation v. Colvard,* 172 Miss. 804, 161 So. 123.

See, also, *Commonwealth v. Wilkins,* 243 Mass. 356, 138 N. E. 11; *Kennemer v. State,* 154 Ga. 139, 113 S. E. 551; *State v. Pluth,* 157 Minn. 145, 195 N. W. 789; *People v. Mayen,* 188 Cal. 237, 205 Pac. 435; *State v. Chin Gim,* 47 Nev. 431, 224 Pac. 798; *People v. Defore,* 213 App. Div. 643, 211 N. Y. Supp. 134; *Hall v. Commonwealth,* 138 Va. 727, 121 S. E. 154; *People v. Richer,* 127 Misc. Rep. 410, 217 N. Y. Supp. 303; *Alford v. State,* 170 Ala. 178, 54 So. 213; *Rothschild & Co. v. Steger & Sons Piano Mfg. Co.,* 256 Ill. 196, 99 N. E. 920; *Cooper v. Norfolk S. R. Co.,* 161 N. Car. 400, 77 S. E. 339; *Cleveland, etc., R. Co. v. Blind,* 182 Ind. 398, 105 N. E. 483; *Gore v. State,* 24 Okla. Cr. Rep. 394, 218 Pac. 545; *Towle v. Forney,* 14 N. Y. 423; *Lebanon Bank v. Mangan,* 28 Pa. St. 452; *McClure v. Owen,* 26 Ia. 243.

This principle was approved by this court in *Billings v. State,* 109 Neb. 596, 191 N. W. 721. And its affirmance was necessarily involved in the early case of *Franklin v. Kelley,* 2 Neb. 79, wherein we held: "The United States supreme court and the supreme court of this state are peers. The decisions of the former upon the federal Constitution and laws are binding on the latter; the decisions of the latter upon the Constitution and laws of Nebraska are binding on the former."

Unquestionably, this rule is invocable and applicable when the question presented necessitates the consideration of cognate provisions of the state Constitution, some of

which are not embraced in the federal Constitution, and especially so where the Constitutions involved differ essentially in their origin and development. The following constitutes an approved résumé of the accepted principles which govern in the construction of state Constitutions:

"A cardinal rule in dealing with written instruments is that they are to receive an unvarying interpretation, and that their practical construction is to be uniform. A Constitution is not to be made to mean one thing at one time, and another at some subsequent time when the circumstances may have so changed as perhaps to make a different rule in the case seem desirable. A principal share of the benefit expected from written Constitutions would be lost if the rules they established were so flexible as to bend to circumstances or be modified by public opinion. It is with special reference to the varying moods of public opinion, and with a view to putting the fundamentals of government beyond their control, that these instruments are framed; and there can be no such steady and imperceptible change in their rules as inheres in the principles of the common law. Those beneficent maxims of the common law which guard person and property have grown and expanded until they mean vastly more to us than they did to our ancestors, and are more minute, particular, and pervading in their protections; and we may confidently look forward in the future to still further modifications in the direction of improvement. Public sentiment and action effect such changes, and the courts recognize them; but a court or legislature which should allow a change in public sentiment to influence it in giving to a written Constitution a construction not warranted by the intention of its founders, would be justly chargeable with reckless disregard of official oath and public duty; and if its course could become a precedent, these instruments would be of little avail. The violence of public passion is quite as likely to be in the direction of oppression as in any other; and the necessity for bills of rights in our fundamental laws lies mainly in the danger that the legislature will be in-

fluenced, by temporary excitements and passions among the people, to adopt oppressive enactments. What a court is to do, therefore, is *to declare the law as written,* leaving it to the people themselves to make such changes as new circumstances may require. The meaning of the Constitution is fixed when it is adopted, and it is not different at any subsequent time when a court has occasion to pass upon it." 1 Cooley, Constitutional Limitations (8th ed.) 123.

In *Henry v. Cherry & Webb,* 30 R. I. 13, 73 Atl. 97, we find the following: "The court has always held that it is not at liberty to construe into the Constitution new principles which did not exist at the time of its adoption; and when the form of words used in the Constitution is borrowed from an older source, it comes laden with its previous meaning."

In conformity with the principles thus announced, this court is committed to the view that, "In the construction of a Constitution the rule is, 'its terms must be taken in the ordinary and common acceptation, because they are supposed to have been so understood by the framers and by the people who adopted it. This is unquestionably the correct rule of interpretation. It, unlike the acts of our legislature, owes its whole force and authority to its ratification by the people; and they judged it by the meaning apparent on its face according to the general use of the words employed, when they do not appear to have been used in a legal or technical sense.'" *State v. Bacon,* 6 Neb. 286. See, also, *State v. Lancaster County,* 6 Neb. 474; *Hamilton Nat. Bank v. American Loan & Trust Co.,* 66 Neb. 67, 92 N. W. 189; *State v. Lincoln Traction Co.,* 90 Neb. 535, 134 N. W. 278.

A proper application of the foregoing principles supports the conclusion that the meaning of constitutional guaranties does not change, and in the interpretation of the Bill of Rights of our state Constitution the court will consider its history, the development of the evil sought to be restrained by its provisions, the established laws,

usages and customs of the country at the time of its adoption, and the scope of the remedy its terms imply. *State v. Chicago, B. & Q. R. Co.,* 112 Neb. 248, 199 N. W. 534; *State v. McMullen,* 119 Neb. 739, 230 N. W. 677; *Elmen v. State Board of Equalization and Assessment,* 120 Neb. 141, 231 N. W. 772.

If we accept the principles of interpretation here discussed, the controlling issues presented in the instant case are not difficult.

Appellant bases its claim of rights upon sections 13, 16, and 21 of our Bill of Rights. The language of these provisions is clear, the meaning not really in dispute. On this basis appellant challenges the validity of the present Nebraska moratorium law as transgressing its constitutional rights thus defined.

That the Nebraska moratorium act impairs the "obligation of contracts," and is thus embraced within the prohibitions of section 16 of our Bill of Rights, is unquestionably established by the authorities. *Blaisdell v. Home Bldg. & Loan Ass'n,* 189 Minn. 422, 249 N. W. 334; *Travelers Ins. Co. v. Marshall,* 124 Tex. 45, 76 S. W. (2d) 1007; *Home Bldg. & Loan Ass'n v. Blaisdell,* 290 U. S. 398, 78 L. Ed. 413; *Green v. Biddle,* 8 Wheat. (U. S.) 1, 5 L. Ed. 547; *Bronson v. Kinzie,* 1 How. (U. S.) *311, 11 L. Ed. 143; *Edwards v. Kearzey,* 6 Otto (U. S.) 595, 24 L. Ed. 793; *McCracken v. Hayward,* 2 How. (U. S.) *608, 11 L. Ed. 397.

This is admitted by appellees, both in their brief and in their argument presented at the bar of this court. Their rejoinder is that the legislature has power to pass laws which impair the obligation of contracts and violate the sections of the state Constitution referred to, and that an economic emergency or crisis is sufficient to call such power into action; that such emergency exists, and thereby the Nebraska moratorium is sustained.

This moratorium, it may be said, is a postponement of fulfilment of obligations enumerated therein, decreed by the state through the medium of the legislature and the

courts. Applying to a restricted class of debtors, it is in its nature essentially special, and in its essence is the application of the sovereign power. The situation is not novel. The principles embodied in section 13 of our Bill of Rights find due acknowledgment and recognition in the provisions of the Magna Charta of 1215. Of the right of every Englishman to apply to the courts of justice for redress of injuries, as early as 1765, Blackstone says:

"Since the law is in England the supreme arbiter of every man's life, liberty, and property, courts of justice must at all times be open to the subject, and the law be duly administered therein. The emphatical words of Magna Charta (c. 29) spoken in the person of the king, who in judgment of law (says Sir Edward Coke, 2 Inst. 55) is ever present and repeating them in all his courts, are these: *nulli vendemus, nulli negabimus, aut differemus rectum vel justitiam*: 'and therefore every subject,' continues the same learned author, 'for injury done to him *in bonis, in terris, vel persona,* by any other subject, be he ecclesiastical or temporal, without any exception, may take his remedy by the course of the law, and have justice and right for the injury done to him, freely without sale, fully without any denial, and speedily without delay.' " 1 Cooley's Blackstone (3d ed.) *141.

These provisions were expressly incorporated into our legislation by the Nebraska territorial act, approved March 16, 1855. They were substantially adopted by the suffrage of the people as section 9, art. I of the Constitution of this state in 1866, and again were readopted by the electorate as section 13, art. I of the Constitution of 1875. *State v. Barney,* 133 Neb. 676, 276 N. W. 676. So, too, the contract clause of section 16 of our Bill of Rights may with equal truth be said, in a historical sense, to evidence the exercise of police power, and to have originated in an economic and financial emergency greater indeed than that from which we are now suffering. On this subject Chief Justice Hughes, in delivering the majority opinion in *Home Bldg. & Loan Ass'n v. Blaisdell, supra,* says, in part:

"But the reasons which led to the adoption of that clause, and of the other prohibitions of section 10 of article I, are not left in doubt and have frequently been described with eloquent emphasis. The widespread distress following the revolutionary period, and the plight of debtors, had called forth in the states an ignoble array of legislative schemes for the defeat of creditors and the invasion of contractual obligations. Legislative interferences had been so numerous and extreme that the confidence essential to prosperous trade had been undermined and the utter destruction of credit was threatened. 'The sober people of America' were convinced that some 'thorough reform' was needed which would 'inspire a general prudence and industry, and give a regular course to the business of society.' The Federalist, No. 44. It was necessary to interpose the restraining power of a central authority in order to secure the foundations even of 'private faith.' The occasion and general purpose of the contract clause are summed up in the terse statement of Chief Justice Marshall in *Ogden v. Saunders,* 12 Wheat. pp. 213, 354, 355: 'The power of changing the relative situation of debtor and creditor, of interfering with contracts, a power which comes home to every man, touches the interest of all, and controls the conduct of every individual in those things which he supposes to be proper for his own exclusive management, had been used to such an excess by the state legislatures, as to break in upon the ordinary intercourse of society, and destroy all confidence between man and man. The mischief had become so great, so alarming, as not only to impair commercial intercourse, and threaten the existence of credit, but to sap the morals of the people, and destroy the sanctity of private faith. To guard against the continuance of the evil was an object of deep interest with all the truly wise, as well as the virtuous, of this great community, and was one of the important benefits expected from a reform of the government.' "

That this brief résumé of the situation is entirely ac-

curate is borne out by all contemporary history, as well as by writers of a later period, as will be seen in the appended note to the decision last above cited.

The times of this period were primitive; people were largely engaged in agriculture, and the transactions involved were confined to classes comparatively few in number. Analysis discloses that the controlling question arising, with which the public mind was then occupied, involved the consummation and performance of contracts, and satisfaction of obligations, involving the payment of money and the enforcement of securities therefor. This limited sphere thus embraced the subjects directly within the contemplation and actual knowledge of those who originally framed the "contract clause" which appears in modern constitutions. Naturally the original framers were not in position to consider new circumstances which could not have been anticipated by them, but which nevertheless may or may not be governed by the general rule which that provision establishes.

Madison briefly epitomized the situation existing during the years immediately prior to the adoption of the federal Constitution, as follows: "Violations of contracts had become familiar in the form of depreciated paper made a legal tender, of property substituted for money, of instalment laws, and of the occlusions of the courts." 3 Beveridge, Life of John Marshall, 558, note.

The language employed by Marshall, as quoted above by Chief Justice Hughes, was addressed to a consideration of the "contract clause" of the federal Constitution. But the fundamental facts on which this decision is based had a wider influence. The inevitable effects upon the prosperity and well-being of the peoples of that period by unlimited and unregulated moratoria interposed in various forms by sovereign power, exercised by the former colonies, which was terminated by the adoption of the federal Constitution, had enlisted a lively interest and continued effort to escape the natural penalties the situation imposed, which long continued to occupy the public mind. This may be

evidenced by the fact that article 2 of Ordinance of July 13, 1787, for the government of the territory of the United States northwest of the Ohio river, enacted by the Continental Congress, provided, in part: "In the just preservation of rights and property, it is understood and declared, that no law ought ever to be made, or have force in the said territory, that shall, in any manner whatever, interfere with, or affect private contracts or engagements, *bona fide,* and without fraud previously formed." 4 Journal of Congress, 1774-1788, p. 753. Further, the Constitution of the Southern Confederacy unanimously formed in 1861 expressly adopted as part thereof the "contract clause" of the federal Constitution. Also, guaranties against the return of the unfortunate situation were incorporated in the Constitutions of each new state as it was formed and admitted into the Union. Thus, the state of Tennessee on February 6, 1796, adopted its state Constitution, under which it was admitted to the Union. Section 4, art. X thereof, reads as follows:

"The declaration of rights hereto annexed, is declared to be a part of the Constitution of this state, and shall never be violated on any pretence whatever. And to guard against transgression of the high powers which we have delegated, we declare, that every thing in the bill of rights contained and every other right not hereby delegated, is excepted out of the general powers of government, and shall forever remain inviolate."

Section 17, art. XI of that Declaration of Rights, embraces the exact words of our own section 13, art. I, save and except it includes (without) "sale," which ours omits.

Section 20 of such art. XI provides: "That no retrospective law, or law impairing the obligation of contracts, shall be made." See I Scott, Laws of Tennessee, 1715-1820.

It is quite evident that the existing powers of legislation by declaration of emergency to assume to exercise police power for the purpose of modifying the effect of constitutional provisions was not contemplated by the

framers of the Tennessee Constitution. Andrew Jackson, subsequently chief justice of the supreme court of Tennessee and President of the United States, was a member of that convention.

This section 17, art. XI of the Constitution of Tennessee, above referred to, came before the supreme court of that state in *Fisher's Negroes v. Dabbs*, 6 Yerg. (Tenn.) 119. Without detailing the facts and issues, it may be said, a unanimous court, that lived with slavery, believed in the institution as such, and naturally possessed the prejudices that the situation created, held the constitutional provision applied to slaves for the lawful protection of their rights against the terms of an act of the legislature in contravention thereof.

In 1821 the "contract" and "open court" clauses were construed by the Tennessee supreme court in *Townsend v. Townsend*, Peck (Tenn.) 1. The case grows out of the attempt of the legislature to deal with the national economic and financial depression of 1819, which included the application of a two-year stay to antecedent contracts. The Tennessee court held the principles controlling to be, in substance: "The legislature may alter remedies; but they must not, so far as regards antecedent contracts, be rendered less efficacious or more dilatory than those ordained by the law in being when the contract was made, if such alteration be the direct and special object of the legislature, apparent in an act made for the purpose." Hence, an act to suspend execution for two years unless the plaintiff would indorse thereon that he would receive bank paper in discharge of his judgment was repugnant to the clauses of the Constitution now under consideration. Haywood, J., in delivering this opinion in the *Townsend* case, says, in part:

"Our state Constitution, art. 11, sec. 7, ordains 'that all courts shall be open, and every man for an injury done him in his lands, goods, person, or reputation, shall have remedy by course of law, and right and justice administered without sale, denial, or delay.' This clause relates

to every possible injury which a man may sustain and which affects him in respect to his real or personal property, or in respect to his person or reputation, and includes the right which is vested in him to demand the execution of a contract; which being a personal right to a chattel is, when performance is denied or withheld, an injury to him in his goods or chattels. And with respect to it right and justice is to be done, without sale, denial, or delay. In Magna Charta this restriction is upon royal power; in our country it is upon legislative and all other power. We must understand the meaning to be that, notwithstanding any act of the legislature to the contrary, every man shall have 'right and justice' in all cases, 'without sale, denial, or delay.' "

In like manner, Ohio was admitted into the federal Union under a state Constitution adopted in 1802. In part, it reads as follows: "That the general, great, and essential principles of liberty and free government may be recognized and forever unalterably established, we declare:" In section 7, art. VIII thereof, we find our own section 13 verbatim, and in section 16 a provision that "no *ex post facto* law, nor any law impairing the validity of contracts, shall ever be made," etc. Section 28 is: "To guard against the transgressions of the high powers, which we have delegated, we declare, that all powers not hereby delegated, shall remain with the people." See 1 Chase, Statutes of Ohio, 1788-1833.

The following provisions of our own Constitution are of importance in this instant case, viz.:

"We, the people, grateful to Almighty God for our freedom, do ordain and establish the following declaration of rights and frame of government, as the Constitution of the state of Nebraska."

Section 13, art. I, provides: "All courts shall be open, and every person, for any injury done him in his lands, goods, person, or reputation, shall have a remedy by due course of law, and justice administered without denial or delay."

Section 16, art. I, is as follows: "No bill of attainder, *ex post facto* law, or law impairing the obligation of contracts, or making any irrevocable grant of special privileges or immunities shall be passed."

Section 21, art. I, recites: "The property of no person shall be taken or damaged for public use without just compensation therefor."

Section 26, art. I, is: "This enumeration of rights shall not be construed to impair or deny others, retained by the people, and all powers not herein delegated, remain with the people."

The adoption of each of the state Constitutions above referred to was not an isolated event. The substantial identity of the language employed, as well as the records and aspirations of the peoples who thus acted, evidence a historical connection and establish the unanimity of purpose and intent of those concerned.

The situation invokes the application of the rule that, in the absence of expressed contrary intention, the adoption of a statutory or constitutional provision from another state accepts the meaning of such adopted provision that it carried in the context of which it originally formed a part and, if it had been previously construed by the courts of such state, the judicial determination thus made. *Goble v. Simeral,* 67 Neb. 276, 93 N. W. 235; *Medow v. Riggert,* 132 Neb. 429, 272 N. W. 238; *Becker County Sand & Gravel Co. v. Wosick,* 62 N. Dak. 740, 245 N. W. 454; *In re Hammond,* 83 Neb. 636, 120 N. W. 203; *State v. McMullen,* 119 Neb. 739, 230 N. W. 677. Thus, the principles of construction declared by the courts of Tennessee in 1821 in *Townsend v. Townsend, supra,* become an approved precedent for the courts of Nebraska.

It appears that the precedents in this jurisdiction, both in the interpretation of the "contract clause" and the "open court" requirement of the state Constitution, while not always referring to this authority, have substantially conformed to the doctrine announced therein. *American Bldg. & Loan Ass'n v. Rainbolt,* 48 Neb. 434, 67 N. W. 493;

Kearney County v. Taylor, 54 Neb. 542, 74 N. W. 965; *Hessen Siak Shams v. Nebraska State Bank,* 48 Fed. (2d) 894; *Travelers Ins. Co. v. Ohler,* 119 Neb. 121, 227 N. W. 449; *Douglas County v. Vinsonhaler,* 82 Neb. 810, 118 N. W. 1058; *Fitch v. Martin,* 80 Neb. 60, 113 N. W. 796; *Burnham v. Bennison,* 121 Neb. 291, 236 N. W. 745; *Rentschler v. Missouri P. R. Co.,* 126 Neb. 493, 253 N. W. 694; *Wilfong v. Omaha & C. B. Street R. Co.,* 129 Neb. 600, 262 N. W. 537.

It will also be noted that the doctrine of the *Townsend* case is in harmony with the principles announced by the supreme court of the United States, in a series of well-considered cases, whose soundness had gone unchallenged for more than seventy-five years. *Bronson v. Kinzie,* 1 How. (U. S.) *311, 11 L. Ed. 143; *McCracken v. Hayward,* 2 How. (U. S.) *608, 11 L. Ed. 397; *Gantly's Lessee v. Ewing,* 3 How. (U. S.) 707, 11 L. Ed. 794; *Howard v. Bugbee,* 24 How. (U. S.) 461, 16 L. Ed. 753; *Gunn v. Barry,* 15 Wall. (U. S.) 610, 21 L. Ed. 212; *Walker v. Whitehead,* 16 Wall. (U. S.) 314, 21 L. Ed. 357; *Edwards v. Kearzey,* 96 U. S. 595, 24 L. Ed. 793; *Barnitz v. Beverly,* 163 U. S. 118, 41 L. Ed. 93; *Bradley v. Lightcap,* 195 U. S. 1, 49 L. Ed. 65.

Then, too, it must be conceded that in adopting sections 9 and 12, art. I of the Nebraska Constitution in 1866, and their readoption in 1875 (as sections 13 and 16, art. I) by the electorate of the state, the settled judicial interpretation of these clauses was also adopted. *Stein v. Morrison,* 9 Idaho, 426, 75 Pac. 246; *State v. Henry,* 37 N. M. 536, 25 Pac. (2d) 204; *State v. Sullivan,* 283 Mo. 546, 224 S. W. 327; *Morgan v. State,* 51 Neb. 672, 71 N. W. 788; *Travelers Ins. Co. v. Marshall,* 124 Tex. 45, 76 S. W. (2d) 1007.

The meaning of a Constitution is fixed when it is adopted, and it is not different at any subsequent time when a court has occasion to pass upon it. The theory of our political system is that the ultimate sovereignty is in the people, from whom all legitimate authority springs. Therefore, all power of government in this republic is vested

in the people in their collective capacity, the electorate. They collectively, acting through the medium of Constitutions, create such governmental agencies, endow them with such powers, and subject them to such limitations as in their wisdom will best promote the common good. With reference to the governmental agencies so created by them, the fundamental power to grant, the power to license, and the power to reserve, exercisable by the people, are coequal. A limitation, a reservation, and a grant, expressed in the terms of a Constitution, are equally the exercise of the sovereign power. Nor can these fundamental principles be modified or in any manner controlled by the invocation by a state governmental agency of the doctrine of police power, if the power it seeks to exercise it has not in fact received, and is in any manner inconsistent with the express terms of the state Constitution. For section 26 of our Bill of Rights, in clear and unmistakable language, provides: "All powers not herein delegated, remain with the people."

Indeed, the so-called state police power is not an entity. Its actual essentials are not of recent origin. It is not a power mysteriously nebulous, a separate or a distinct manifestation of governmental authority. It is not superior to state Constitutions so that it may properly be said that, though an act of a governmental agency may be unconstitutional, still it may be justified under the police power, as though the same police power were a divinely mysterious governmental attribute of superior rank to the Constitution itself. As a term of legal nomenclature, it appears that it was originally introduced by Chief Justice Marshall to identify a legal concept which was subsequently referred to by the supreme court of the United States as no more nor less than the powers of government inherent in every sovereignty to the extent of its dominions,—the power to govern men and things. And so far as emergency by the exercise of police power authorizing what otherwise would be opposed to constitutional provisions, the answer of precedents is: "Emergency does not create

power. Emergency does not increase granted power or remove or diminish the restrictions imposed upon power granted or reserved. The Constitution was adopted in a period of grave emergency. Its grants of power to the federal government and its limitations of the power of the states were determined in the light of emergency and they are not altered by emergency." *Home Bldg. & Loan Ass'n v. Blaisdell, supra.*

Sections 13, 16, and 26, art. I of our Constitution, are definite limitations on the power of the legislature, and invalidate all legislative action that exceeds the limitation they define or impairs the exercise of the powers they declare. The true meaning of the text of these articles of our Bill of Rights remains as it was when they were adopted.

The identical language (now appearing as sections 13 and 16, art. I of our Constitution), in 1821, in the courts of Tennessee, invalidated the efforts of the legislature of that state attempting to impair the obligations of contracts previously made, by attaching thereto a two-year stay; and likewise, in 1834, in the same courts, it secured just protection of the rights of slaves to have justice administered without denial or delay, by striking down legislation designed to deny to them the remedy of open courts. Furthermore, in our own times, this same language was sustained by this court as requiring that justice be administered as provided by its terms (*Burnham v. Bennison, supra*); and as a guarantee to the wage earner of a prompt hearing in a court of competent jurisdiction with such recompense as his just rights entitled him (*Rentschler v. Missouri P. R. Co., supra*).

Thus, these provisions (sections 13 and 16, art. I of the Nebraska Constitution), whose origin antedates the days of King John of England, still retain their original virility, and constitute present binding limitations on the exercise of governmental powers, legislative, executive or judicial, which "emergency" may not impair, destroy or modify.

Therefore, the conclusion is inescapable that the Nebraska moratorium law, as amended in 1937 (a six-year act), contravenes the spirit and express terms of sections 13 and 16, art. I of our Constitution, and is wholly invalidated thereby.

It follows that the trial court erred in the judgment entered in the instant case, and such judgment is reversed and the cause remanded for further proceedings in harmony with this opinion.

REVERSED.

PAINE, J., dissenting.

As the opinion adopted by the majority of the court does not express my views, I am filing this dissent.

I will state the facts of the case briefly. Smith borrowed $8,000 of the First Trust Company of Lincoln on May 1, 1929, at 6 per cent. interest. He finally paid off down to $3,000 of the principal, and the time was extended on the balance. Foreclosure proceedings were started February 9, 1934, upon his failure to pay interest and taxes, and a decree was promptly entered on April 12, 1934, finding the amount due on the mortgage of $3,354.38, with interest at 10 per cent. First the regular nine months' stay was granted, and later a moratorium stay, which allows Smith to remain in possession of the property upon the payment of $50 a month rent. There is in this case a large equity, for it is stipulated that the value of the mortgaged property is between $8,500 and $12,000.

This case brings to this court the question whether the Nebraska moratorium law is a valid law. The decision with which I do not agree is based on the finding that "the factual and legislative situation existing on the 16th day of February, 1937, *and since continuing*" is insufficient to constitute a temporary emergency.

This moratorium law, as found in Legislative Act No. 4, passed by the legislature of 1937, provided in section 1, in substance, that there is an economic crisis, world-wide in extent; that Nebraska experienced an unexpected drouth, that part of the state suffered from insect pests; all of

which taken together resulted in a practical total loss of the 1936 crop, and threatened a collapse of real estate values in the state; that such a condition was dangerous to the general welfare and prosperity of the state of Nebraska and its people. The act then provided in substance that, after a decree of foreclosure is rendered, if good cause is shown, the court may leave the owner in possession, providing he pays a fair rental, income, or profit to the clerk of the district court for the mortgagee, and further providing for taxes, interest, and upkeep. It provides that this moratorium law expires at midnight March 1, 1939.

The decision which I do not support holds that this law contravenes the spirit and express terms of two sections of the Bill of Rights, to wit, sections 13 and 16, art. I of the Constitution. Section 13 reads: "All courts shall be open, and every person, for any injury done him in his lands, goods, person, or reputation, shall have a remedy by due course of law, and justice administered without denial or delay." And section 16 reads: "No bill of attainder, *ex post facto* law, or law impairing the obligation of contracts, or making any irrevocable grant of special privileges or immunities shall be passed."

It may be frankly admitted that this moratorium law may cause a little delay before the owner can be deprived of the possession of his property. But, in some states, a stay of 18 months, instead of nine months as in Nebraska, is allowed before confirmation of the foreclosure sale, and such longer delays have been upheld by the courts.

When the question of the validity of such a moratorium law came before the United States supreme court in the famous *Blaisdell* case from Minnesota (290 U. S. 398) Chief Justice Hughes, in writing the opinion, adopted by the court, upholding the right of the legislature of Minnesota to enact a moratorium law similar to our Nebraska law, embodied in his opinion this statement:

"But into all contracts, whether made between states and individuals, or between individuals only, there enter con-

ditions which arise not out of the literal terms of the contract itself; they are superinduced by the preexisting and higher authority of the laws of nature, of nations or of the community to which the parties belong; they are always presumed, and must be presumed, to be known and recognized by all, are binding upon all, and need never, therefore, be carried into express stipulation, for this could add nothing to their force. Every contract is made in subordination to them, and must yield to their control, as conditions inherent and paramount, wherever a necessity for their execution shall occur."

One of the conditions to which a contract must yield is that of a great emergency, sufficient to warrant the legislature in passing a special act for the general welfare of all the people, in which case the exact terms of a contract between individuals may be slightly modified. When this moratorium act was pending before our legislature, it is stated in the brief of the appellee that, "After it was referred to the judiciary committee, public hearings were had before that committee on several occasions. At such hearings many prominent persons, interested on one side or the other, appeared, and the measure was discussed pro and con and from every possible angle and viewpoint." It was then decided by the Nebraska legislature that such an emergency existed as justified the legislature in passing this law.

May we glance at the conditions generally, and especially in Nebraska as of a year ago, when the law was enacted, as well as conditions "since continuing."

The United States weather bureau published a report stating that not since 1930 has Nebraska received the normal average rainfall of 22.66 inches; that the average for 1936 was 14.42 inches, and for 1937 it was 17.76 inches, and that one Nebraska station reported the lowest rainfall in 50 years.

Dr. H. Clyde Filley, economist of the Nebraska College of Agriculture at Lincoln, recently gave out the statement: "The outlook today on the farms of Nebraska is the *worst*

it has been for a generation. Over more than one-half of the state there is practically no moisture in the subsoil within five or six feet of the surface. The exceptions to this are along the Missouri river, in the other river valleys, in the irrigated districts and in a few counties in northeastern Nebraska. Last year there was only about one-third of a corn crop; on more than a third of the farms of Nebraska there are at this time no hogs at all, in fact there are the fewest hogs in Nebraska for many years. The majority of the farmers are finding it necessary to buy corn, or other concentrates, for there is practically no reserve grain on the farms this year."

It is common knowledge that land values in Nebraska have shrunk enormously; that whole townships of grazing land in the cattle country have changed hands at prices of a dollar to three dollars an acre; that farms in tested irrigation districts in the Platte valley have sold far below their cost. In a recent instance, the owner of a fine piece of irrigated beet land, with no improvements, had finally invested $210 an acre before the ditch bonds were paid off. She tried for two years to effect a sale by every means at hand, and finally sold the land on long-time payments, at low interest, for $75 an acre; and many such cases are known to all.

As I set out on page 456 of my dissent in *Steinacher v. Swanson,* 131 Neb. 439, 268 N. W. 317, there was a total of 225,273 tracts of real estate advertised by the 93 county treasurers of Nebraska for public sale for the delinquent taxes, amounting to over $46,000,000 in the fall of 1935. The present tax situation is very much worse, for no outside buyers can now be found except in isolated instances, and many Nebraska counties and cities are at the present time bringing blanket foreclosure suits to realize something on such delinquent taxes. Has such a condition ever existed in Nebraska before?

Nebraska is also greatly affected by general conditions because serious business declines are still under way, although there has already been a loss in the values of the

stocks listed on Wall street in the last eight months of more than thirty billion dollars, according to a leading financial journal. In a statement of J. J. Pelly, head of the Association of American Railroads, he declares that the railroads are in a critical financial condition, suffering reduced tonnage, declining revenues with rising wages, higher taxes, and increased costs of everything they have to buy. These facts make the future value of all railroad securities most uncertain.

In the Business Bulletin of the Cleveland Trust Company for February 15, 1938, Colonel Leonard P. Ayers, the famous statistician, in referring to the present recession, which began in August, 1937, says:

"The federal reserve index of the volume of industrial production dropped from 117 in August to 84 in December, or 33 points in four months. At the beginning of the great depression in 1929 and 1930 the same index moved downward for 13 months before it had lost 33 points, instead of doing it in four months as it did this time."

He then tells us that only three business declines in the last 100 years have been comparable to this abrupt depression, for this rapid decline has been exceeded but once, i. e., in the panic of 1893, and has only been approached twice, which was in the panics of 1907 and 1920. He then positively states: "Business confidence has suffered a more rapid decline since last spring than in any recent previous period of similar duration."

Such well-established facts should not be overlooked by this court, and they prove that this present moratorium law of Nebraska which we are considering is justified when it takes effect at a time of such a rapid decline in business as to have been only equaled once in the last 100 years, which amply supports the declaration of the legislature that this is such an emergency as warrants the enactment of this moratorium law.

In Nebraska, as a result of numerous foreclosures, life insurance companies and trust companies, as well as the trust funds of estates and colleges, are all becoming loaded

up with farms taken in exchange for real estate mortgages, and which they are not prepared to profitably operate. In fact, in many cases they find the former owner is the best possible person to manage the farm they have taken over. Why is it declared to be violative of our Bill of Rights for the legislature to permit an extension of time before the mortgagee gets possession of the farm? For, as a rule, such a mortgagee does not want the farm itself, but only wants the money and interest due on the loan secured by the farm.

The effect of economic and financial distress is widespread, and to show that Nebraska is not standing alone in seeking in this dire emergency to afford some slight relief by means of a legitimate moratorium law, I find that in 1934, in an article in 2 George Washington Law Review, 487, it is said that by 1934 the following 25 states had enacted moratorium laws to meet the emergencies existing in the respective states: Arizona, Arkansas, California, Idaho, Illinois, Iowa, Kansas, Michigan, Minnesota, Montana, Nebraska, New Hampshire, New Jersey, New York, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota, Texas, Vermont, West Virginia, and Wisconsin. During the last four years many more states have been added to this list, and such moratorium laws have been repeatedly upheld by the decisions of courts of last resort.

In entire disregard of the actual facts of the present widespread agricultural and financial distress, this moratorium law is declared unconstitutional, on the ground that it is based upon an emergency, without the facts necessary to uphold it, and on the further ground that a vital mistake was made by the legislature in setting out the declaration upon which it is founded. In my humble opinion, the legislature of Nebraska was exceedingly careful to rather understate the actual conditions as they existed a year ago, which conditions have grown worse so rapidly that the present business decline has only been equaled once in the last 100 years; so, whatever may have

been thought of the unfortunate situation which existed four years ago and two years ago, the present financial and agricultural collapse is so much more intense as proves it now to be the great emergency which fully justifies the present moratorium law under the careful pronouncement of Chief Justice Hughes in the *Blaisdell* case.

It is admitted by all who have studied the situation that business will not be good in Nebraska until we have at least one good crop, for Nebraska is primarily an agricultural state, and cannot have good times unless the farmers are prosperous.

In 6 R. C. L. 97, sec. 98, it is said that all the presumptions are in favor of the constitutionality of a statute, and if there is doubt it must be decided in favor of its validity, for each intendment is in favor of its constitutionality, unless the contrary is made to appear *beyond a reasonable doubt.* And in section 100: "It has been said that the courts should not conjure up theories to overturn and overthrow the solemn declarations of the legislative body."

In chapter 7, Cooley, Constitutional Limitations (6th ed.), 219, it is said: "Before proceeding to annul, by judicial sentence, what has been enacted by the law-making power, it should clearly appear that the act cannot be supported by any reasonable intendment or allowable presumption."

In the opinion of Judge Pound in *People v. LaFetra,* 230 N. Y. 429, 130 N. E. 601, it is said: "Whether or not a public emergency existed was a question of fact, debated and debatable, which addressed itself primarily to the legislature. That it existed; promised not to be presently self-curative, and called for action, appeared from public documents and from common knowledge and observation. If the law-making power on such evidence has determined the existence of the emergency and has, in the main, dealt with it in a manner permitted by the constitutional limitations upon legislative power, so far as same affect the class of landlords now challenging the statutes, the legislation should be upheld."

Judge Pound also held in the same case: "Emergency laws in time of peace are uncommon but not unknown. Wholesale disaster, financial panic, the aftermath of war, * * * earthquake, pestilence, famine and fire, a combination of men or the force of circumstances may, as the alternative of confusion or chaos, demand the enactment of laws that would be thought arbitrary under normal conditions. * * * Although emergency cannot become the source of power, and although the Constitution cannot be suspended in any complication of peace or war, * * * an emergency may afford a reason for putting forth a latent governmental power already enjoyed but not previously exercised."

These statements were made by Judge Pound in holding constitutional a statute suspending for two years in the city of New York possessory remedies to regain possession of real property.

"In construing an act of the general assembly, such a construction will be placed upon it as will tend to advance the beneficial purposes manifestly within the contemplation of the general assembly at the time of its passage; and courts will hesitate to place such a construction upon its terms as will lead to manifestly absurd consequences, and impute to the general assembly total ignorance of the subject with which it undertook to deal." *Brewster v. Wooldridge,* 100 Ga. 305, 28 S. E. 43, cited in 2 Lewis' Sutherland, Statutory Construction, 913, sec. 490.

This court has afforded relief to the owners of Nebraska mortgages in almost every instance when it was proved that the value of the land was less than the amount of the mortgage debt standing against it. *Clark v. Hass,* 129 Neb. 112, 260 N. W. 792; *First Trust Co. v. Stenger,* 130 Neb. 750, 266 N. W. 642; *Srajhans v. Mares,* 130 Neb. 924, 267 N. W. 82; *State Life Ins. Co. v. Heffner,* 131 Neb. 700, 269 N. W. 629; *Keller v. Griffith,* 132 Neb. 393, 272 N. W. 203; as well as many others.

In a case brought by this same appellant, it was said such postponement by a moratorium was not intended to

enable the debtor to realize some speculative value out of the real estate or to delay indefinitely the day of reckoning. *First Trust Co. v. Airdale Ranch & Cattle Co.*, 131 Neb. 475, 268 N. W. 362. It would follow that one who has simply purchased an equity of redemption would be denied any delay under moratorium, and the mortgagee would promptly receive his confirmation.

Even in a case after a moratorium had been granted, and it was found that the mortgage debt amounted to $160,446.39 and the real estate had only a value of $100,000, it was held by this court that moratorium stays are at all times under the control of the court, and may be reexamined, and, upon good cause being shown, may be modified or vacated. *Security Mutual Life Ins. Co. v. Herpolsheimer Bldg. Co.*, 132 Neb. 149, 271 N. W. 343.

The holdings of this court have in the past been uniform that a moratorium stay is not granted to every one as a matter of right, but is only available to those who can show an equity in their land, as was recognized by Judge Donohoe, of the United States district court for Nebraska, in *Union Central Life Ins. Co. v. Hoffman*, 18 Fed. Supp. 830, in which he added: "This is a matter, not of private concern, but of great public interest." And further said: "The mortgagor is familiar with the property, and presumably vitally interested in preserving ownership thereof and ready to exert himself to the uttermost to that end."

The First Trust Company might have been delayed for a few months by this moratorium stay if it had not been held invalid, but its decree is for $3,354.38, drawing 10 per cent. interest, with $50 a month rent in the meantime, and it is stipulated that its security in this case is worth from $8,500 to $12,000. I fail to see how appellant could have been injured in any way by abiding by the law passed by the legislature.

The right of a state to exercise its power to give temporary relief, when urgent public distress has been brought about by six years of drouths, insect pests, and economic and financial depression, is not, in the opinion of many

state and federal judges, such an abuse of the power of sovereignty that a carefully considered moratorium law, of the same general character as enacted by many other states from the Atlantic to the Pacific, should be struck down by the court as an unwarranted act of the legislature.

In my opinion, this moratorium law was proper emergency legislation, fully justified by the conditions set out, and it has prevented, up to this time, widespread evictions of distressed farmers and homeowners, who have in many cases by this beneficial law been able to save their homes, as the legislature wisely provided.

CARTER, J., concurring separately.

I concur fully with the majority opinion in this case, but, in view of the contents of the dissenting opinion subsequently filed, I deem it necessary to express my views with reference thereto.

The question involved in this case is whether the Nebraska moratorium law of 1937 is repugnant to section 16, art. I of the Constitution of this state, providing that "no bill of attainder, *ex post facto* law, or law impairing the obligation of contracts, or making any irrevocable grant of special privileges or immunities shall be passed."

The provision of the Constitution that no law impairing the obligation of contracts shall be passed does not admit of more than one interpretation. If this provision meant, at the time it was adopted, that the terms of a contract for the payment of money could not be altered by a state statute for the relief of unfortunate debtors by postponing payment or enforcement during an economic or financial emergency, obviously it means the same now. The majority opinion in this case demonstrates that it was the intent of the people of this state when they adopted their Constitution, and continuing up to the present time, to prohibit the passage of such a law. They did not say that such legislation was prohibited *except in case of dire stress and extreme emergency.* The passage of such a law was prohibited by the supreme law of this state under all conditions and under all circumstances.

The language of the provision is plain and concise. The writer of the dissenting opinion says that courts, in construing a statute, "will hesitate to place such a construction upon its terms as will lead to manifestly absurd consequences, and impute to the general assembly total ignorance of the subject with which it undertook to deal." I have no fault to find with this statement of the law, but, in applying the same rule to the constitutional provision under consideration, I say that we as a court cannot impute to the people of this state total ignorance of the subject with which they were dealing when they included this clause in the Constitution, especially when it was included with full knowledge of the interpretation that had been placed upon it by many courts at that time.

In the famous case of *Ex parte Milligan,* 4 Wall. (U. S.) 2, Mr. Justice Davis ably stated the law, in a case in which it was argued that a grave emergency, the Civil War, gave rise to the exercise of power to deprive a citizen charged with crime of a right to a jury trial, in the following words: "Time has proved the discernment of our ancestors; for even these provisions, expressed in such plain English words, that it would seem the ingenuity of man could not evade them, are now, after the lapse of more than seventy years, sought to be avoided. Those great and good men foresaw that troublous times would arise, when rulers and people would become restive under restraint, and seek by sharp and decisive measures to accomplish ends deemed just and proper; and that the principles of constitutional liberty would be in peril, unless established by irrepealable law. The history of the world had taught them that what was done in the past might be attempted in the future. The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigen-

cies of government. Such a doctrine leads directly to anarchy or despotism, but the theory of necessity on which it is based is false; for the government, within the Constitution, has all the powers granted to it, which are necessary to preserve its existence; as has been happily proved by the result of the great effort to throw off its just authority."

In *Dred Scott v. Sandford,* 19 How. (U. S.) 393, Chief Justice Taney said that, while the Constitution remains unaltered, it must be construed now as it was understood at the time of its adoption; that it is not only the same in words but the same in meaning, "and as long as it continues to exist in its present form, it speaks not only in the same words, but with the same meaning and intent with which it spoke when it came from the hands of its framers, and was voted on and adopted by the people of the United States. Any other rule of construction would abrogate the judicial character of this court, *and make it the mere reflex of the popular opinion or passion of the day.*" (Italics ours.)

In the case of *People v. Blodgett,* 13 Mich. 127, the court said:

"But it may easily happen that specific provisions may, in unforeseen emergencies, turn out to have been inexpedient. This does not make these provisions any less binding. Constitutions cannot be changed by events alone. They remain binding as the acts of the people in their sovereign capacity, as the framers of government, until they are amended or abrogated by the action prescribed by the authority which created them. It is not competent for any department of the government to change a Constitution, or declare it changed, simply because it appears ill adapted to a new state of things. * * *

"Restrictions have, it is true, been found more likely than grants to be unsuited to unforeseen circumstances. * * * But, where evils arise from the application of such regulations, their force cannot be denied or evaded; and the remedy consists in repeal or amendment, and not in false constructions."

In *Steinacher v. Swanson,* 131 Neb. 439, 268 N. W. 317, we quoted with approval the following language from the case of *State v. Fischl,* 94 Mont. 92, 20 Pac. (2d) 1057: "It must be remembered that the provisions of the Constitution are mandatory and prohibitory unless otherwise expressed, and these provisions read the same whether in fair weather or in foul. The proposition that an emergency justifies a removal of constitutional safeguards is an egregious fallacy. A safeguard once let down inevitably must lead to mischief. If one be let down, why not another? 'And many an error, by the same example, will rush into the state.' Our duty is clear. Each of us upon assuming office took an oath 'to support, protect, and defend the Constitution of the state of Montana,' and from this obligation we shall not shrink."

If we arbitrarily disregard the constitutional provision prohibiting the passage of a law impairing the obligation of contracts, on the ground that an emergency exists, or for any other reason, what will we do when the freedom of the press is interfered with by legislative enactment? What will the result then be when free speech, freedom of religion, the right to trial by jury, and our other constitutional guaranties are interfered with? Will it be a sufficient answer to say that such interference is justified because the legislature in its wisdom has declared that an emergency exists? Such an argument is not only unsound from a legal standpoint, but it rocks the very foundation of our constitutional form of government.

The writer of the dissenting opinion bases his whole contention on the theory that an emergency exists. He frankly concedes that the contract in question was impaired, but that emergent conditions justify constitutional violation. As has been many times said, "Emergency does not create power, but it may authorize the use of power." But how can it authorize the use of power that is plainly and clearly prohibited by constitutional provision? There can be but one answer unless we assume that there is an inherent power in government that transcends all consti-

tutional authority. And if such power exists, why should we have a Constitution? If a declaration and proof of an emergency can break the restraining chains of the Constitution, why have a Constitution? If the government created by the sovereign people may become superior to its creators, our hopes of a free constitutional government rest only upon the natural restraints of the persons whom we invest with authority.

The writer of the dissenting opinion devotes much space in showing that our economic and financial condition is very bad and that it constitutes a grave emergency. I fully agree that our economic and financial situation is for all practical purposes as bad as it has been outlined. But such a situation is not limited in effect to mortgagors who mortgaged their lands prior to March 1, 1934. What of those persons who have mortgaged their properties since that date and who are entitled to no relief under this act? The conditions noted are so far reaching as to affect mortgagees as well as mortgagors. Why should frugal persons who have saved and invested in farm mortgages expecting to live off the income in their declining years be required to suffer in order that a mortgagor who has breached his contract may have a respite? Why should those persons who have purchased bonds secured by real estate suffer additional hardships in order that one who has violated his contract to pay a just debt should retain both the borrowed money and the security? What rule of fairness requires those dependent upon the income from farm mortgages, including widows, orphans, beneficiaries of trusts and wards of guardians, to give up, not only their income, but the principal as well, in order that a mortgagor may have additional time to save an investment that did not prove to be sound? I fully agree that mortgagors have suffered by conditions as they now exist, but I fail to find any rule of law or reason advanced in the dissenting opinion that warrants protection to one class at the expense of all the others affected thereby.

I necessarily conclude that the prohibition against the

impairment of contracts by the legislature is so clear that it is only by an unwarranted judicial distortion of its plain provisions that the moratory law could be upheld. The meaning of the constitutional provision is so clear that it is not subject to construction. The idea that an existing emergency could change its meaning is clearly disproved by a reading of the simple language contained in the provision itself. The holdings of our court in the past have been consistent with the majority opinion.

MINNIE M. KNOCHE, ADMINISTRATRIX, APPELLEE, V. PEASE GRAIN & SEED COMPANY ET AL., APPELLANTS.
277 N. W. 798

FILED FEBRUARY 22, 1938. No. 30193.

1. **Evidence.** Ordinarily, the speed of a motor vehicle is not a matter of exclusive expert knowledge and skill and any one with a knowledge of time and distance, and an opportunity to formulate the basis for an opinion, is a competent witness to give an estimate.
2. **Appeal.** Where it appears that a witness had no opportunity to formulate a basis for an opinion as to the speed of a motor vehicle, it is error to permit him to give an estimate.
3. ———. "Where a question of fact that is material to the case is submitted to the jury by the trial court, upon which there is no evidence to support a finding, it constitutes prejudicial error." *Roseland v. Chicago, M., St. P. & P. R. Co.*, 130 Neb. 637, 265 N. W. 882.

APPEAL from the district court for Gage county: FREDERICK W. MESSMORE, JUDGE. *Reversed.*

Story & Thomas, John H. Roper and *Rinaker, Delehant & Hevelone,* for appellants.

Hubka & Hubka, contra.

Heard before GOSS, C. J., ROSE, DAY, PAINE and CARTER, JJ., and YEAGER, District Judge.

CARTER, J.

This action was brought by Minnie M. Knoche, special

administratrix of the estate of John Henry Knoche, deceased, to recover damages for the death of John Henry Knoche alleged to have been caused by the negligence of the driver of a truck belonging to the defendant. The verdict of the jury was for plaintiff in the sum of $5,000. The trial court required a remittitur of $1,000 with which plaintiff complied. Judgment was thereupon entered for $4,000. Defendant's motion for a new trial was overruled and from this order an appeal is taken. Plaintiff filed a cross-appeal claiming that the trial court erroneously required the remittitur and praying that this court sustain the verdict for the full $5,000.

The evidence discloses that the deceased was traveling west on Court street in the city of Beatrice and at the intersection of Court and Bluff streets made a left turn to the south apparently with the intent of proceeding south on Bluff street. The truck, belonging to the Pease Grain & Seed Company, was traveling east on Court street. At the intersection in question, the car and truck collided, causing the death of John Henry Knoche, the driver of the car.

Plaintiff contends that the driver of the truck failed to keep a proper lookout, that he failed to yield the right of way to the deceased, that defendant failed to have sufficient brakes upon its truck, that the truck was driven at an excessive rate of speed, and that it was not equipped with booster brakes as required by statute. The defendant claims that the deceased failed to signal his intention to make a left turn, that he angled across or cut the corner of the intersection contrary to law, and that he entered the intersection at a time when the truck was proceeding through it.

The plaintiff called as a witness one Arthur Engler who testified that he was standing near a window in a filling station located on the southwest corner of the intersection and that, upon hearing the crash resulting from the collision, he looked up and saw what happened from then on. He testified that he did not see the truck before the col-

lision occurred. This witness was permitted to testify over objection that in his opinion the defendant's truck was traveling "right at 40 to 45 miles an hour" when it came into the intersection. Subsequently this witness testified that he considered how the truck pushed the car around, the fact that the truck proceeded on and broke off a telephone pole, and the tracks made by the truck, in determining its rate of speed. He testified that the truck traveled 12 or 13 feet during the time he saw it and that "it was just a flash like that and he was right under that pole." Plaintiff produced no other evidence of excessive speed except that which the circumstances surrounding the accident disclosed. The truck driver testified that he was not driving over 20 miles an hour. The question of excessive speed of the truck was submitted to the jury. The evidence that the truck was traveling 40 to 45 miles an hour was improperly admitted. In *Bergendahl v. Rabeler*, 133 Neb. 699, 276 N. W. 673, we said: "This court has held that the speed of an automobile is not a matter of exclusive expert knowledge or skill and that any one with a knowledge of time and distance is a competent witness to give an estimate. *Patterson v. Kerr*, 127 Neb. 73, 254 N. W. 704; *Serratore v. Miller*, 130 Neb. 908, 267 N. W. 159. But it is very evident from the record that these witnesses had no reasonable time, means, distance or opportunity to formulate a basis for an opinion as to the speed of defendant's car." The plaintiff claims that the testimony of the witness as to what happened after the collision was sufficient to provide the foundation for his testimony. Testimony based on these facts would be a mere conclusion of fact and an attempt to impinge upon the province of the jury. The question of the speed of the truck is one of the important issues in the case. The only evidence of excessive speed, other than a conclusion which might be drawn from the circumstances surrounding the accident, is that of the witness Engler. We are obliged to hold that this evidence was prejudicial to the rights of the defendant and constituted reversible error.

The trial court also instructed the jury with reference to the use of defective brakes when as a matter of fact there was no evidence by any one that the brakes on either the truck or the automobile were defective. We have repeatedly held: "Where a question of fact that is material to the case is submitted to the jury by the trial court, upon which there is no evidence to support a finding, it constitutes prejudicial error." *Roseland v. Chicago, M., St. P. & P. R. Co.*, 130 Neb. 637, 265 N. W. 882. See, also, *Mannion v. Talboy*, 76 Neb. 570, 107 N. W. 750; *Tighe v. Interstate Transit Lines*, 130 Neb. 5, 263 N. W. 483.

The record shows that the gross weight of the truck and its load exceeded 12,000 pounds. It further shows that the truck was not equipped with "power brakes, auxiliary brakes, or some standard booster brake equipment," as required by section 39-11,106, Comp. St. Supp. 1935. The trial court properly instructed the jury on this point, but the contention that the failure of the defendant to comply with this section of the statute justified the giving of the instruction complained of relative to defective brakes is without merit.

We have come to the conclusion that the trial court erred in the respects noted and that, under the circumstances of this case, the rights of the defendant were prejudiced thereby. The judgment of the trial court is therefore reversed and the cause is remanded for a new trial in accordance with the rules of law set forth in this opinion.

REVERSED.

PAINE, J., dissenting.

This decision holds that the admission of the evidence of Engler as to the speed of the truck was prejudicial, and the judgment is reversed.

The point involved is one which will come up frequently, and in my opinion is not free from doubt.

There are any number of decisions that, in considering the speed of an automobile and the competency of a witness to testify thereto, permit one to take into consideration skid marks and circumstances portraying the physi-

cal facts immediately after the accident, and a person seeing the crash, basing his opinion on all of the conditions and circumstances as he saw them, and virtually following through the accident, should be permitted to testify.

"The question as to the opportunity of a witness to judge, under the particular circumstances, the speed of an automobile, has been held, as a general rule, to go to the weight of his testimony rather than to its admissibility." 5 Am. Jur. 860, sec. 651.

"Statements based upon observation of witnesses who saw the progress of the car do not constitute the sole medium of proof upon this point. Various factors, such as skid marks, distance traveled after impact, force of impact, etc., are pertinent in arriving at an estimate of the rate of speed of an automobile." 5 Am. Jur. 850, sec. 630.

"It is clear that one who has had experience with objects moving at speed, as an experienced railroad engineer, or one who has operated an automobile for some time and observed the speedometer, may testify as to the speed of an automobile, and the opinion may be based on the distance it skidded." Babbitt, Motor Vehicle Law (4th ed.) 1670, sec. 2306.

"It is not essential to establish the negligence of a motorist, who has injured a traveler in the operation of his machine, that eyewitnesses of the accident be produced. Circumstantial evidence may constitute adequate proof of negligence." 10 Blashfield, Cyclopedia of Automobile Law and Practice (Perm. ed.) 152, sec. 6555.

"It has been held that a witness will not be permitted to give his opinion of the speed of an automobile upon a particular occasion, where he was not an observer, and the only information he has on which to base his estimate is the track of the machine on the pavement. On the contrary, such evidence has been held to be proper. The distance which a certain car has skidded in the attempt to stop it should furnish some basis for the opinion of an expert, and skid marks may be considered by the jury

on the question of speed." 15-16 Huddy, Cyclopedia of Automobile Law (9th ed.) 347, sec. 180.

We find the case of *Lewis v. Miller*, 119 Neb. 765, 230 N. W. 769, in which it was held: "A witness who has shown himself qualified to give an opinion as to the speed of a moving automobile may express an opinion as to the speed a car is moving, although the same be coming directly toward him, such fact not affecting the competency of his testimony but rather the weight to be given the same."

Our court in the case of *Showers v. Jones Co.*, 126 Neb. 604, 253 N. W. 902, held: "Where the rate of speed of an automobile is the question, the time and place with reference to the scene of the accident as of which evidence is admissible rests largely in the discretion of the court, and, unless abused, its ruling will not constitute reversible error."

In the case of *Patterson v. Kerr*, 127 Neb. 73, 254 N. W. 704, our court, in considering the proposition of speed, stated: "The defendant was competent to testify as to the speed of the car. 'A witness who sees a moving car, and possesses a knowledge of time and distance, is competent to express an opinion as to the rate of speed.' "

In the discussion upon this proposition in the same case, the court cites and quotes the case of *Owens v. Iowa County*, reported in 186 Ia. 408, 169 N. W. 388, wherein it was held: "Testimony of one, several hundred yards directly in front of an automobile in the nighttime, as to the speed thereof, might be of little value, but should not be excluded on that account." (169 N. W. 388.)

When an independent observer of a moving object expresses an opinion as to speed, the testimony is received and appraised according to the means of the observer and the standards he has. *Coffee v. Omaha & C. B. Street R. Co.*, 79 Neb. 286, 112 N. W. 589.

Arthur Engler operated a filling station at the southwest corner of the intersection where the collision occurred. He was standing at his cash register, heard the

crash, instantly looked out of the window, saw the cloud of dust, and saw the truck continue east, taking the automobile with it. The truck dropped the car off, and kept going around 50 to 55 feet from where the collision occurred. "Q. When you saw this Ford 8 truck going into that intersection, do you know about how fast that truck was traveling? A. I do. Q. What is that opinion? A. I would judge right at 40 to 45 miles an hour." He testifies that there was a telephone pole at the southeast corner of the street on the south side, and that he saw the truck as it shattered the base of the pole and left it swinging back and forth; that after the truck broke off the telephone pole, which was 8 to 10 inches through, it continued on east in its course about 38 feet before it came to a stop.

If a close observer watches a heavy truck pushing a lighter car along for some distance, then it veers off and cuts off a heavy telephone pole, and then he sees it continue 38 feet after doing that until it can be brought to a stop, he has observed sufficient of the speed, power, and momentum of such truck to be able to give the jury a positive idea of the speed of the truck just before the crash as it came into the intersection. It would be physically impossible for a car moving at 5, 10, 20, or 30 miles an hour to do the things which this witness saw the car do, and from the physical facts which he observed, and from his experience with cars and judging speed, it does not appear to me that it was prejudicially erroneous for him to give his estimate of the speed of the car just before the crash.

But, assuming that the witness Engler could not testify to the speed, yet the undisputed evidence is that Knoche was in the intersection first, had made his turn to the left, and was proceeding in the direction in which he had a perfect right to go, and which right the law gave him. The defendant had, under the circumstances, no business in the intersection at that time and under the conditions. It would make no difference about the brakes, or the speed, or anything else in this connection. He just did

not have a right to be there under the law, and certainly the only question would be the amount of damage, if any, that the widow of this blacksmith, killed by this truck, would be entitled to recover. This apparently is all there is to the lawsuit: The rights of the respective parties in the intersection. Defendant's own witness placed Knoche there, stated he gave the signal, and there is no evidence to the contrary. In my opinion, the judgment should have been affirmed.

S. J. LEON, APPELLEE, V. KITCHEN BROTHERS HOTEL COMPANY, APPELLANT.

277 N. W. 823

FILED FEBRUARY 22, 1938. NO. 30144.

1. **Judgment.** During the trial of a case, the court overruled a motion for directed verdict for plaintiff and submitted case to jury. Jury returned verdict for defendant. Plaintiff filed motion for judgment notwithstanding verdict. Court at same term sustained motion in part and entered judgment for plaintiff for a portion of amount claimed. *Held,* that the trial court had jurisdiction to vacate, set aside, amend or correct any judgment or orders made by it at the same term.
2. **Evidence.** Justice does not require a court or jury to accept as absolute verity any statement of a witness not contradicted by direct testimony. Circumstantial evidence is equally competent with direct testimony; their relative convincing powers as against each other are for the jury's determination.
3. **Innkeepers:** "GUEST." Plaintiff and his wife, prior to the alleged loss from his room, had lived at defendant's hotel for nearly two years, under agreement whereby he was given a monthly rate, received a bill every week with percentages figured according to the days, and paid the bill weekly; it all figuring up at end of the month to the agreed monthly rental. He registered at hotel; was assigned rooms; was furnished the same service and accommodations as transient patrons of hotel. He had no other home or domicile and was not a traveler; but so far as actual relationship between plaintiff and management of the hotel was concerned, it was identical with that existing between the hotel management and temporary guests, except that he was charged, and paid, as above specified. *Held,* that the plaintiff and his wife were "guests" within the meaning

of section 41-118, Comp. St. Supp. 1935, and section 41-119, Comp. St. 1929, with rights and liabilities governed thereby.

4. ———: BURDEN OF PROOF. 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.

5. ———: LIABILITY TO GUEST. A platinum wrist watch is neither an article of "jewelry," nor an article of "personal ornament," within section 41-118, Comp. St. Supp. 1935, exempting operators of hotels who have provided metal safe fit for custody of money, jewelry, personal ornaments, etc., and who keep suitable locks on sleeping rooms, and a copy of law posted in ten places in hotel, from liability for loss of the guest's property specified therein, where guest does not offer to deliver it for custody in such metal safe.

6. ———: ———. A lady's Tiffany diamond ring and a lady's 14-carat Tiffany wedding ring band are articles of "jewelry" and "personal ornament," and held to be within the provisions of said section 41-118, Comp. St. Supp. 1935, requiring that they be delivered to keeper of hotel for custody in metal safe, regardless of specific use to which rings may be available and adapted, or the occasion which may have brought them into possession of owner, or the fact that they may be part of owner's ordinary wearing apparel.

7. ———: ———. In a case involving said section 41-118, Comp. St. Supp. 1935, if a proprietor of a hotel has complied with the requirements on his part by furnishing metal safe, suitable locks, and posting notices, a guest's failure to deliver money, claimed to have been lost from his room, to keeper of hotel for custody in metal safe, *held*, to relieve the proprietor of the hotel of liability therefor, notwithstanding the amount of money, considering guest's financial standing, his business connections and requirements of hotel life, may have been a reasonable sum for the guest to carry on his person or retain in his room.

8. ———: ———. Section 41-118, Comp. St. Supp. 1935, provides: "Provided, however, that the proprietor of such business place, shall not be obliged to receive from any one guest for deposit in such safe or vault, any property hereinbefore described, exceeding a total value of $300, and shall not be liable for the value of any such property in excess of $300, whether receipted for or not." *Held*, that such proviso limits the liability of the proprietor of the hotel for all property lost by guest to the sum of $300, in the absence of pleading and proof of actual negligence; and, further, that by its terms, it applies to all property whether receipted for or not.

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

Finlayson, Burke & McKie, for appellant.

Leon & White and *Louis E. Lipp, contra.*

Heard before GOSS, C. J., ROSE, EBERLY, PAINE, CARTER and MESSMORE, JJ., and ELDRED, District Judge.

ELDRED, District Judge.

This action was instituted by S. J. Leon, appellee and cross-appellant, herein referred to as plaintiff, against Kitchen Brothers Hotel Company, a corporation, appellant and cross-appellee, herein referred to as defendant, to recover the value of personal property alleged to have been lost in the Paxton Hotel in Omaha while the plaintiff and his wife were living at said hotel. The petition alleges that about July 22, 1935, plaintiff and his wife were guests at defendant's Hotel Paxton, occupying rooms 1021-1024. As a first cause of action it is alleged that plaintiff's wife had on her person, as a part of her ordinary wearing apparel and wearing outfit, one lady's Tiffany diamond ring of the value of $498.50, one lady's 14-carat Tiffany wedding ring band of the value of $10, and one lady's platinum diamond wrist watch of the value of $285; that on said date when retiring for the night she removed said articles from her person and placed the same in her purse on a dresser in a sleeping room constituting a part of rooms 1021-1024; and that said articles were missing when she awoke the following morning. Plaintiff alleges that his wife assigned her claim for the loss of said property to him. In the second cause of action plaintiff alleges that he removed $60 from his person on retiring on said date, and placed the same upon the dresser in said sleeping room; and that said money was missing the next morning. As applicable to both causes of action, it is alleged that there were no suitable locks or bolts on the doors of the sleeping rooms used by plaintiff and his wife; and that keys were available to numerous persons other than plaintiff and his wife, contrary to their wishes and without

their consent, and that defendant knew, or should have known, of said facts.

The answer of the defendant admits it operated the Paxton Hotel, and alleges that as a hotel keeper it complied with the provisions of the statutes of Nebraska with reference thereto. It also alleges that plaintiff and his wife failed to deliver said articles to the defendant for safe-keeping; and further denies that plaintiff and his wife were guests, but alleges that they were tenants and lessees, leasing the premises occupied by them from month to month on a monthly rental basis, and denies generally all other allegations. The reply was general denial.

On trial to jury, after the taking of evidence had been completed, plaintiff moved the court that the jury be instructed to return a verdict in his favor in the amount of $840, which motion was overruled and case submitted to the jury. Verdict was returned for defendant. Plaintiff thereupon moved for judgment in the sum of $840, notwithstanding verdict of the jury. Motion was sustained in part, and the court found the plaintiff entitled to recover from defendant for the following items: Wrist watch, $285, wedding ring, $10, and cash, $60, total $355, for which judgment was rendered. Motions of both plaintiff and defendant for a new trial were overruled. Defendant has appealed. Plaintiff has filed cross-appeal.

The first proposition urged by defendant is that judgment notwithstanding the verdict may be rendered only when statements in the pleadings, without the introduction of evidence, require a judgment in favor of one of the parties. Section 20-1315, Comp. St. 1929, and a number of decisions of this court are cited in support of this contention. But this case comes within the exception to this general rule announced in *Netusil v. Novak*, 120 Neb. 751, 235 N. W. 335, where it is said:

"During the trial of a case, the court overruled a motion to direct a verdict for defendant and submitted the case to the jury. The jury returned a verdict for plaintiff and judgment was entered thereon. A motion for new trial

was filed and argued, whereupon, at the same term, the court, on its own motion, set aside the verdict of the jury and the judgment and dismissed the action. *Held*, that the trial court had the right and power to vacate, set aside, amend or correct any judgments or orders made by it at the same term."

Defendant urges that an issue for the jury was presented on question of loss of property. While the plaintiff seeks to apply the rule that, when an allegation is supported by competent testimony, which is uncontroverted and uncontradicted, it is error to submit the same to the jury as a question for their determination. The rule urged by plaintiff is to be followed when the facts justify its application. However, direct testimony may be controverted by circumstantial evidence. The administration of justice does not require the establishment of a rule which would compel the court or jury to accept as absolute verity every statement of witness not contradicted by direct evidence. In this case the plaintiff was the only witness who testified as to the loss. There was no contradiction of his testimony by direct evidence. Under the nature of the case, the evidence as to any loss was wholly within the knowledge of the plaintiff (and his wife, who did not testify), and of such a nature that direct contradictory evidence could not ordinarily be found or presented; but, there were circumstances in evidence which the jury, as triers of the facts, were entitled to consider in arriving at their verdict. It appears from the bill of exceptions that plaintiff and his wife and son occupied a suite of three rooms; the hallway was on the west of these rooms; the living room on the south end of the suite; plaintiff's bedroom immediately north of living room; son's room north of plaintiff's bedroom. Between plaintiff's bedroom and living room there were no locks or bolts upon the door. Plaintiff testified he returned to the apartment about 11:30 at night; entered through room 1024, the living room; turned the two inside bolts so as to fasten the door; before retiring checked bolts on that door again; also checked bolts on door into son's bedroom

and found both doors bolted by both bolts on each door. Son's room was vacant that night, son being out of the city. Only two doors led to the corridor from this suite of rooms, one from living room and one from son's room. The lower lock was one that the key would open from the outside, the regular Yale lock. The middle lock was a turn bolt that would turn from the inside. The third, the top lock, was what they call the night bolt, a bolt you turn from the inside, but did not go through the door, and could not be reached from the outside at all. There were no transoms over the doors. Rooms on tenth floor; no access from the street. Windows had usual fastenings. In morning both bolts on both doors turned so doors could open. Wife had put rings in small coin purse in pocket in large purse that opened with a snap. On dresser where purse and money were left were some rather fragile perfume bottles. They were in the center of the dresser; the money was on one side and the purse on the other. Heard no disturbance during the night. Witness and wife were sleeping in this room. No light came on in the room. Before retiring had been in bathroom and closet; came through living room and had been in son's bedroom. Jewelry had been taken from inside of purse and purse left there.

The jury were entitled to consider not only the interest of the witness and the probability or improbability of his testimony, but also to consider all the facts and circumstances surrounding the transaction as disclosed by the evidence in the case, in connection with the direct testimony, in arriving at their verdict. Circumstantial evidence is equally competent with direct testimony; their relative convincing powers as against each other being for the jury's determination. We conclude that the issue as to the ownership of the property should have been submitted to the jury for their determination.

Defendant also urges that issue as to the value of the property, under the evidence, was for the jury. Only one witness testified as to its value. So far as appears from

record, he was a disinterested witness; he fixed specific valuations on the several items and his testimony was in no manner contradicted or controverted by either direct testimony or circumstantial evidence. As to that issue the evidence was such that different minds could not reasonably have drawn different conclusions. "It is not error for the court in an instruction to assume as true facts that are established by the evidence without controversy." *Major v. Harrison,* 132 Neb. 363, 272 N. W. 201.

It is urged by defendant that plaintiff and his wife were not "guests" of the Paxton Hotel, but tenants or lessees. As to this, the plaintiff testified he paid $150 a month; that he was billed by the day; and received a bill every week with the percentages figured according to the days; that he paid the bill every week, and it all figured up at the end to $150 a month. This evidence was in no manner controverted. Defendant cites *Pullman Co. v. Lowe,* 28 Neb. 239, 44 N. W. 226, wherein the syllabus states that the term "guest" is defined, but might have more accurately stated, discussed. Defendant apparently stresses the following statement from that opinion: "In short, any one away from home receiving accommodations at an inn as a traveler is a guest, and entitled to hold the innkeeper responsible as such. This we think is a correct definition of the word 'guest,' and we adopt the same." But in the opinion in that case the court also states: "The supreme court of Connecticut defines the word 'guest' as follows: 'A "guest" is one who patronizes an inn as such. But it is said that none but a traveler can be a guest at an inn in the legal sense.' We do not suppose that the court intended in the definition above quoted to lay stress upon the word traveler. It (the word guest) is used in a broad sense to designate those who patronize inns." This last statement we deem to properly define the word "guest" as now generally used and understood. Furthermore, the statute here involved was not then in force. In 1921 the legislature passed chapter 27, Laws 1921, here involved; one section thereof being amended in 1935, being

now designated as section 41-118, Comp. St. Supp. 1935, and section 41-119, Comp. St. 1929. Both parties to this controversy cite different provisions of the foregoing sections. By that act, all distinction as to liability and rights of hotels, apartment houses and rooming houses was abrogated and such places of business placed in one classification; all provisions of said law being applicable alike to keepers of hotels, apartment houses and rooming houses. By section 41-119, Comp. St. 1929, it is provided:

"For the purpose of this act, a *bona fide* guest shall mean and include all persons who have registered on a register, provided for such purpose, by hotels and rooming houses, whether assigned a room or rooms, or not, or occupants of apartments, or patrons of restaurants, or persons who have signified their intention in writing to become a guest of such hotel, restaurant, apartment house or rooming house."

The plaintiff and his wife come within the term "guest" as there defined. Whether that portion of defendant's premises occupied by the plaintiff and his wife is to be treated as a hotel, apartment house or rooming house is not material. It appears from the record that the defendant signed the hotel register and was assigned to a room. He had no other home or domicile and was not a traveler. But he was treated in the same manner with the same rights and privileges and furnished the same service and accommodations as other guests. So far as the actual relationship between the management of the hotel and plaintiff is concerned, it was identical with that existing between the hotel and temporary guests, except that he was charged, and he paid therefor, as heretofore specified. In a New York case involving analogous facts, evidence held to establish that plaintiff was a "guest" and not a "roomer." *Hart v. Mills Hotel Trust,* 144 Misc. 121, 258 N. Y. Supp. 417.

"Operator of 9 or 10-room establishment which was operated like hotel with separate keys for each room, and which catered to transients and local guests who were re-

quired to register, was 'innkeeper,' and hence responsible under statute for effects of guest which were stolen by servants or strangers, notwithstanding that guest rented room by week and that his home was in city in which establishment was located; particularly where operator posted innkeeper's rules." *Babin v. Thormander,* 167 So. (La. App.) 241.

"Plaintiff, who, prior to alleged theft of money from his room, had lived in defendant's hotel for about a year, under an arrangement whereby he was given a lower rate than that of transient guests, and paid his bills usually once each month, while transient guests paid each day, or at end of each week, held a 'guest,' rather than a 'roomer,' as respects defendant's liability for such loss." *Driskill Hotel Co. v. Anderson,* 19 S. W. (2d) (Tev. Civ. App.) 216. See *Kieffer v. Keough,* 188 S. W. (Tex. Civ. App.) 44.

While the holdings in other jurisdictions as to who come within the term "guest," in the absence of statutory provision, are not harmonious; in view of our statute, under the facts in this case, we conclude that the plaintiff and his wife were guests at the hotel, and that their rights, as well as the rights of defendant, are to be determined by the provisions of such statute.

Plaintiff complains of the failure of the court, by the instructions to jury, to place upon defendant the burden of proving facts essential to exempt it from liability under the statute. This complaint appears to be well founded. This court states the rule on such question in the opinion in *Dunbier v. Day,* 12 Neb. 596, 607, 12 N. W. 109, as follows: "When the fact of loss having occurred within the inn is established, which devolves upon the guest, the burden of showing it to be within one of these exceptions rests upon the innkeeper." This seems to be in accord with the general rule which is announced in 32 C. J. 559: "Whether innkeepers are held liable as insurers of goods of their guests, or only for negligence, proof that goods of a guest have been lost or injured makes out a *prima facie* case of liability and casts on the innkeeper the burden of

establishing such facts as will exonerate him. Thus the burden of proving plaintiff's contributory negligence is on the innkeeper. Also where an innkeeper claims the benefit of a statute, altering his common-law liability, the burden is on him to show compliance with the statute."

It is further urged by the plaintiff that the evidence offered was insufficient to show a compliance by the hotel company with the provisions of the statute to exempt it from liability for loss. That question, under the evidence, was a question of fact for determination by the jury; and, as there may be further testimony thereon, if the case is retried, this court will express no opinion as to the weight or the sufficiency of the evidence appearing in this record on that question.

On the part of plaintiff it is contended that the provisions of the statute (Comp. St. Supp. 1935, sec. 41-118) for the exemption of innkeeper from liability to the guest for loss of "money, bank notes, jewelry, articles of gold and silver manufacture, precious stones, personal ornaments, railroad mileage checks or tickets, negotiable or other valuable papers, and bullion" were not intended to cover watches, wedding bands and engagement rings, and a reasonable sum of money, being property which is usually carried and worn as a part of the ordinary apparel and outfit of a person, or is ordinarily carried and is convenient for use by travelers. The statute referred to provides:

"No person, firm or corporation, operating a hotel, restaurant, apartment house or rooming house, who constantly has in his place of business a metal safe or vault in good order, and fit for the custody of money, bank notes, jewelry, articles of gold and silver manufacture, precious stones, personal ornaments, railroad mileage checks or tickets, negotiable or other valuable papers, and bullion; and who keeps on the doors of the sleeping rooms used by guests, suitable locks or bolts, and on the transoms and windows of said rooms, suitable fastenings; and who keeps a copy of this section printed in distinct type, constantly

and conspicuously posted in not less than ten places in all, in said place of business, shall be liable for the loss or injury to such property suffered by any guest, unless such guest has offered to deliver the same to such keeper of hotel, restaurant, apartment house or rooming house, for the custody in such metal safe or vault, and the proprietor of such business has omitted or refused to take it, and deposit it in such safe or vault for custody, and to give such guest a receipt therefor."

Reference is made in briefs of counsel as to the construction placed on this section by the trial court on entering the judgment notwithstanding the verdict from which appeal was taken. The record is silent as to how the trial court arrived at its conclusion, and counsel appear to have different theories with reference thereto; but from the findings it would seem quite apparent how the result was obtained. This action is for the recovery of losses claimed to have been sustained by two different parties. The trial court found plaintiff entitled to recover for two items in the first cause of action, that is, watch, $285, and wedding ring, $10, total, $295; and on second cause of action, cash, $60, the only item involved therein, making the total recovery awarded plaintiff $355. Whether this recovery was awarded on the theory that defendant had not proved compliance with provisions of statute essential to relieve it of liability, or that the property was not such as guest required to deposit, is not apparent. No mention is made in the findings of the court as to the Tiffany diamond ring, which the evidence discloses to have been of the value of $485, the petition claiming $498.50 therefor, and no recovery is allowed for that item. The court may well have concluded, as the defendant contends, that under the issues in this case defendant would not be liable for that item in any event; there being no charge of actual negligence as a proximate cause of the alleged loss, and the property exceeding the value of $300. By section 41-118, Comp. St. Supp. 1935, following the provision above quoted, it is provided:

"Provided, however, that the proprietor of such business place, shall not be obliged to receive from any one guest for deposit in such safe or vault, any property hereinbefore described, exceeding a total value of $300, and shall not be liable for the value of any such property in excess of $300, whether receipted for or not."

The wording of this provision of the statute is definite. By the first clause it is provided that the hotel company shall not be obliged to receive from any one guest for deposit in its safe any of the property described in said section exceeding a total value of $300. Under such provision the defendant in this case would have been under no obligation to have accepted from the plaintiff the ring designated in petition as lady's Tiffany diamond ring, perfect top Wesselton, of the value of $498.50. The second clause of said subdivision provides that the hotel company "shall not be liable for the value of any such property in excess of $300, whether receipted for or not." We are at a loss to see how any language could be made plainer, where it was the intention to relieve the hotel company of liability for the value of any property in excess of $300. In a case involving the construction of a statute almost identical, the supreme court of Maine, in an action in which the evidence failed to show that the hotel company had complied with the conditions of the statute by posting the notices, held that the proviso limited the liability of the hotel company for all property lost by guest to the sum of $300; and, further, that by its terms, it applied to all property, whether received for safe-keeping or not. *Wagner v. Congress Square Hotel Co.*, 115 Me. 190, 98 Atl. 660. We conceive this to be the correct construction to be placed upon the statute here involved.

Is a platinum watch included within the articles specified in said statute? It is not specifically mentioned. If it cannot be held to be within the specification of "jewelry," or "personal ornament," there is no other article or specification in statute that could possibly include a platinum watch. The statute being in derogation of the common law must

be strictly construed; its application is to be limited to the particular species of property named; and, while in its construction its object and purpose may be taken into consideration, it cannot be extended in its operation and effect so as to include articles of property not fairly within its terms. There is nothing in the statute to indicate that the words there used are to be given any meaning other than that in which they are ordinarily used and understood. A watch is not ordinarily considered as "jewelry" nor as a "personal ornament," but a timepiece, an article of utility, carried for use and convenience. *Ramaley v. Leland,* 43 N. Y. 539, 3 Am. Rep. 728; *Hart v. Mills Hotel Trust, supra*; *Kennedy v. Bowman Biltmore Hotel Corporation,* 157 Misc. 416, 283 N. Y. Supp. 900. The authorities are not in entire accord on this question, but when the difference in the wording of the statutes is considered, as well as the material of which the watch involved is made, there is not so much difference as might at first appear. In some instances the statute includes in its description "valuable articles," which has been held to include watches. While in other instances, watches with a gold case have been held to come within the provision "articles of gold and silver manufacture;" although the authorities are not in harmony upon that. Whatever conclusion might be reached, were the watch here involved a gold case watch, is not important. It is obvious that a platinum watch does not fall within the description of any of the articles specified in said section. If the legislature had intended to include in the statute an article of such general and common use as a watch, we think it would have used the word "watch."

Plaintiff contends that the two rings, that is, one lady's Tiffany diamond ring, blue white, perfect top Wesselton, and one lady's 14-carat Tiffany wedding ring band, being part of her ordinary wearing apparel, do not come within the articles specified in said section. No authority for so holding has been cited by plaintiff. Among the articles included in the statute are "jewelry" and "personal orna-

ments." If they, the rings, do not fall within such specifications, the statute could have but little application. Regardless of the specific use to which these rings may be available and adapted, or the occasion which may have brought them into possession of the owner, it is obvious that they are both "jewelry" and articles of "personal ornament," and manifestly included within the specified articles which must be deposited with the hotel in safe provided for that purpose, under the law here involved, if a guest desires to place the responsibility for their safekeeping upon the hotel company. In *Jones v. Savannah Hotel Co.*, 141 Ga. 530, 81 S. E. 874, 51 L. R. A. n. s. 1168, the supreme court of Georgia, in considering such question, states:

"It may seem somewhat of a hardship to require a traveler on retiring at night to deposit articles of personal adornment, like those involved in the present case; but the statute is absolute and must be complied with, else the innkeeper will be relieved from liability for the loss of such articles. The statute was not enacted for the benefit of travelers; for without it they could rely on the common-law liability of the innkeeper. Its purpose was to relax the stringent rule of the common law, so as to permit the innkeeper to protect himself against liability under certain circumstances."

The responsibility of the hotel keeper under the statute here involved is always subject to the provision of that statute limiting the liability of the proprietor of a hotel to a valuation of $300.

Plaintiff further contends that the $60 in money which he is seeking to recover by the second cause of action did not come within the provision of said law, for the reason that such an amount of money, considering the plaintiff's financial standing, his business connections and requirements of hotel life, was a reasonable sum which he was not required to deposit with the hotel company under the provisions of said statute. The statute makes no such exception. Its language is clear and explicit. If the legislature

had intended such an exception as is contended for, it would have been easy to have so provided. But, if the legislature intended, as we conclude it did, to relieve the hotel company from responsibility for all money and articles mentioned, on compliance, on its part, with the provisions of said statute, it would certainly have been difficult to have more clearly expressed their intention than by the language used. There is no evidence of any different intent to be derived from the terms of the statute. Where a hotel company has complied with the provisions specified by the statute for the purpose of relieving it from liability for the money and articles of a guest specified therein, if a guest, on account of convenience to himself, sees proper to retain his money on his person or in his own room, he does so at his own risk in the absence of pleading and proof of actual negligence on the part of the hotel company. We can put no other construction on this statute without disregarding its plain terms and interpolating something into the statute that is not there. *Rains v. Maxwell House Co.*, 112 Tenn. 219, 79 S. W. 114; *Hart v. Mills Hotel Trust*, 144 Misc. 121, 258 N. Y. Supp. 417.

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

REVERSED.

PETER MEHRENS, APPELLEE, V. ELECTION CANVASSING BOARD OF DOUGLAS COUNTY ET AL., APPELLANTS.
278 N. W. 252

FILED FEBRUARY 25, 1938. No. 30174.

Elections. In an election contest on the ground that, through "ignorance and mistake" of election officers, enough illegal votes were cast in a voting precinct to change the result of the election, the burden is on contestant to prove the casting of the illegal votes and also the candidates for whom they were cast.

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

Swarr, May & Royce, James T. English and *Jack W. Marer,* for appellants.

Benjamin S. Baker, Edward Shafton and *William Raab, contra.*

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

ROSE, J.

This is an election contest between Peter Mehrens, plaintiff and contestant, and George W. Pratt, defendant and contestee, in the district court for Douglas county to determine which one of the two was elected a member of the board of education of the school district of Omaha at the general election November 3, 1936. Both were eligible and their names were printed on the official ballots with the names of 42 other candidates for membership on the school board. Electors were at liberty to vote for six candidates only—the number to be elected.

Each party to the contest pleaded that he was elected and that the other was defeated. The main issue between the two, therefore, was: Who was elected? The burden of proof was on contestant.

The issue of illegal voting was confined to the single voting precinct of Dundee, where school district ballots were handed to some of the electors residing in the voting precinct, but outside the school district, returned to the judges of election and by them placed in the ballot box.

Approximately one-third of the Dundee voting precinct is outside the Omaha school district, but all of it is in Douglas county. Ballots were cast by 772 voters in Dundee precinct and two-thirds of them resided within the school district. Contestant Mehrens received 74 votes in Dundee precinct and contestee Pratt 132 votes therein. Other candidates for membership fell behind. Excluding that portion of the school district outside of Dundee precinct, contestant received 16,985 votes and contestee 16,936.

The Douglas county canvassing board canvassed the

school district votes with results as follows: Dundee precinct, Pratt, 132; Mehrens, 74. School district of Omaha, Pratt, 17,068; Mehrens, 17,059. The election of Pratt as one of six members of the school board was certified by the canvassing board to the Douglas county election commissioner who issued to him a certificate of election. The ballots cast for school district officers in Dundee precinct by nonresidents of the school district did not show by whom any vote was cast nor did any other record of the election show that fact.

The facts outlined were either shown by stipulation of the parties to the contest or were established by other evidence. Upon a spirited trial the district court found that at least 98 illegal votes were cast at the school district election in Dundee precinct; that the election officers therein committed fraud in giving school district ballots to nonresidents of the school district, in receiving them, in placing them in the ballot box with legal ballots and in counting the illegal ballots; that such fraud and the illegal ballots cast were sufficient to change the result of the election. One of the findings reads thus:

"The court further finds that there is no way by which, from all the facts in the case, there can be determined the number of illegal votes cast at said election for the said members of the said board of education; the court further finds that all votes cast at said election for members of the school board in said precinct should be disregarded and set aside and not counted for either of the said candidates, Peter Mehrens or George W. Pratt."

It was decreed that George W. Pratt, contestee, was not elected and that Peter Mehrens, contestant, was elected. The election commissioner was ordered to issue a certificate of election to Mehrens. Pratt appealed.

The position of contestee on appeal is illustrated by excerpts from the law of election contests as he understands it:

"While it is well settled that where enough illegal votes are cast at an election to change the result or leave it in

doubt the election is void, yet it is equally well settled that the result of an election will not be disturbed because of illegal votes received unless the aggregate of such votes would change the result. If the true result can be ascertained by eliminating the illegal votes the election will be upheld. In order to reject illegal votes it must appear for whom they were polled; they cannot be taken from the majority candidate unless it is proved that they were polled for him. Neither should the entire vote of a precinct be rejected because of illegal votes cast, where there has been no effort to purge the returns of such votes by showing for whom they were cast." 20 C. J. 182.

"The contestant had the burden, and that burden was only partially sustained by showing that illegal votes were cast. In order to make out his case he must show for whom they were cast." *Napier v. Cornett,* 24 Ky. Law Rep. 576, 68 S. W. 1076.

This doctrine is in harmony with the law of Nebraska. The statute relating to election contests provides:

"The court may require any person called as a witness who voted at such election to answer touching his qualifications as a voter; and if he was not a qualified voter in the county where he voted, then to answer for whom he voted; and if the witness answer such questions, no part of his testimony on that trial shall be used against him in any criminal action." Comp. St. 1929, sec. 32-1030.

The remedy by contest is available, "When illegal votes have been received or legal votes rejected at the polls sufficient to change the result." Comp. St. 1929, sec. 32-1002.

Contestant, in making his case on the controverted issue that illegal votes sufficient to change the result of the election were placed in the ballot box and counted, was required to prove both the illegal voting and the candidates for whom the illegal votes were cast. *White v. Slama,* 89 Neb. 65, 130 N. W. 978; *Mosiman v. Weber,* 107 Neb. 737, 187 N. W. 109. There is no evidence to identify any candidate for whom illegal votes were cast. By rejecting the entire

vote of Dundee precinct for school district officers on the ground that 98, or at most 102, illegal votes were cast, 514 legal electors therein were disfranchised at the school district election after they gave lawful expression at the ballot box to their choice for school officers. These legal voters did not commit any election fraud or any other wrongful act. It is the policy of the law to protect them in their civil rights. That is a purpose for which courts were established. Their processes may be directed to illegal voters to learn the truth in the administration of justice. The candidates themselves were not guilty of any fraud that forfeited their rights. There is no evidence that any election officer or other person intentionally attempted to influence any voter in the casting of a ballot or to corrupt the election. The parties to the contest stipulated:

"By ignorance and mistake the election officials in said Dundee precinct, on November 3, 1936, gave school board ballots containing the names of all candidates for members of the board of education of the school district of Omaha to approximately one hundred of the electors of said Dundee precinct who resided in that part of said Dundee precinct which is not within said school district of Omaha."

There is no evidence of a sinister purpose on the part of any one to perpetrate an election fraud. It is true, as found by the trial court, that at least 98 illegal votes were polled, but that alone, with the "ignorance and mistake" of election officers in furnishing and counting illegal ballots, did not make a case in favor of contestant. He was required, in addition, to prove by the best evidence obtainable the identity of the candidates for whom those illegal votes were cast. The statute and judicial precedents so contemplate. Comp. St. 1929, sec. 32-1030; *White v. Slama,* 89 Neb. 65, 130 N. W. 978; *Todd v. Cass County,* 30 Neb. 823, 47 N. W. 196. The election records did not disclose the identity of the candidates for whom the illegal ballots were cast. The secrecy of the ballot prevented that, but the door to other sources of information was open to contestant and the court. The election commissioner was

asked on the witness-stand to explain the method of conducting the election in Dundee precinct November 3, 1936, and answered:

"As the voter presents himself at the polling place, they ask him if he lives there and he must sign on Poll Book No. 1, give his name and address. After he has done that another clerk copies that name from this record on Poll Book No. 2. Poll Book No. 2 comes back to our office. Book No. 1 stays there and is sealed up and can only be opened up under a court order, as you have seen here, and these numbers are numerical right down the line as they come. As they come they are put right down in order in this book."

Poll Book No. 2 contained the names and addresses of the illegal voters as officially copied from the poll book wherein each voter, legal or illegal, in numerical order, wrote his own name and address. This was a public record of voters available to contestant before and pending the election contest. This public record, a map of the school district and reasonable diligence on the part of contestant could have been made a means of discovering the identity of the illegal voters. No effort was made to bring any of them into court to testify for whom they voted for members of the school board or whether school district ballots generally were returned unmarked to the judges of election. Litigants and courts are not helpless when such information is essential to the administration of justice.

The failure to identify the candidates for whom the illegal votes were cast under the circumstances disclosed was a fatal defect in contestant's case. The only judgment which could properly have been pronounced under the evidence was a dismissal of the election contest. This conclusion makes the discussion of other questions unnecessary. The judgment of the district court is reversed. A judgment of dismissal will be entered on appeal at the costs of plaintiff and the cause remanded for enforcement thereof pursuant to statute. Comp. St. 1929, sec. 20-1926.

REVERSED AND DISMISSED.

LOUISE B. DONISTHORPE, GUARDIAN, ET AL., APPELLEES, V. FRANK VAVRA, JR.: TENA VAVRA, APPELLANT.
278 N. W. 151

FILED FEBRUARY 25, 1938. No. 30231.

Appeal: PARTIES. "All parties to a cause tried in the district court who may be affected by the modification or reversal of the judgment must be made parties in the proceedings to review the said cause in the supreme court." *Barkley v. Schaaf*, 110 Neb. 223, 193 N. W. 267.

APPEAL from the district court for Fillmore county: ROBERT M. PROUDFIT, JUDGE. *Motion to dismiss sustained.*

Waring & Waring, for appellant.

Guy A. Hamilton, contra.

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

EBERLY, J.

This is a suit in equity to foreclose a real estate mortgage, commenced in the district court for Fillmore county by Louise B. Donisthorpe, the duly appointed, qualified, and acting guardian of Elizabeth H. Donisthorpe, incompetent, and John Wittmack, plaintiffs, against Frank Vavra, Jr., Tena Vavra, his wife, La Vera Vavra and Charles B. Hroch, administrator of the estate of Frances Vavra, deceased, defendants.

To the petition of plaintiffs, the defendants Frank Vavra, Jr., and Tena Vavra, his wife, filed their joint motion to make more definite and certain. This motion was thereafter denied.

This was followed by a joint demurrer presented in behalf of Frank Vavra, Jr., and Tena Vavra, his wife, which, in turn, was overruled.

Thereupon, on leave obtained, said Frank Vavra and his wife filed a joint answer.

Thereafter a hearing on the merits was had, and a judgment for foreclosure and sale, as prayed, in favor of plain-

tiffs and against the defendants, was entered by the trial court. A motion for a new trial was filed by Tena Vavra alone, which was overruled on the 12th day of May, 1937.

On May 17, 1937, there was filed by Frank Vavra, Jr., defendant, and subscribed by him alone, a written request for a nine months' stay.

On July 8, 1937, the defendant Tena Vavra filed in this court a transcript on appeal, accompanied by a præcipe on appeal which concludes, as follows: "In the court below the above-named Louise B. Donisthorpe, guardian of Elizabeth H. Donisthorpe, incompetent, and John Wittmack were plaintiffs and are appellees in this court. In the court below the above-named Tena Vavra, his wife, was defendant and is the appellant in this court."

The cause was docketed on appeal in strict obedience to the terms of the præcipe, and the name of Frank Vavra, Jr., as neither plaintiff nor defendant is thus docketed.

Appellant, as sole appellant, filed her brief on August 6, 1937, and the name of Frank Vavra, Jr., does not appear in the title thereof, and neither is the service of such brief upon him in any manner disclosed by the record.

On November 6, 1937, appellees filed in this court their motion to dismiss. We find it necessary to consider but one of the grounds relied upon, viz.: "That all the parties interested in the judgment sought to be reversed, as shown by the record, have not been brought before the court."

It is quite apparent that Frank Vavra, Jr., has an interest in the decree appealed from, and is a necessary party to this appeal. The rule appears to be: "Generally speaking, all the parties to the cause below, including interveners, should be parties in proceedings upon appeal." 2 Standard Encyclopedia of Procedure, 215.

Sections 20-317 and 20-318, Comp. St. 1929, are applicable to appellate proceedings, and are as follows:

Section 20-317: "Any person may be made a defendant who has or claims an interest in the controversy adverse to the plaintiff, or who is a necessary party to a complete

determination or settlement of the question involved therein."

Section 20-318: "Of the parties to the action, those who are united in interest must be joined as plaintiffs or defendants; but if the consent of one who should have been joined as plaintiff cannot be obtained, he may be made a defendant, the reason being stated in petition."

We have long been committed to the doctrine: "All parties to a cause tried in the district court who may be affected by the modification or reversal of the judgment must be made parties in the proceedings to review the said cause in the supreme court." *Barkley v. Schaaf,* 110 Neb. 223, 193 N. W. 267. See, also, *Wolf v. Murphy,* 21 Neb. 472, 32 N. W. 303; *Curten v. Atkinson,* 29 Neb. 612, 46 N. W. 91; *Hendrickson v. Sullivan,* 28 Neb. 790, 44 N. W. 1135; *Collins Mfg. Co. v. Seeds Dry Plate Co.,* 55 Neb. 576, 75 N. W. 1099; *Dickens v. Dickens,* 174 Ala. 305, 56 So. 806; *Hook v. Mercantile Trust Co.,* 95 Fed. 41, 36 C. C. A. 645; *Fagan v. Hook,* 134 Ia. 381, 390, 105 N. W. 155, 111 N. W. 981; *Wolfenbarger v. Britt,* 105 Neb. 773, 181 N. W. 932; *Reilly v. Merten,* 125 Neb. 558, 251 N. W. 114; *Bliss v. Farmers Grain & Stock Co.,* 127 Neb. 147, 254 N. W. 725.

It follows that as Frank Vavra, Jr., is a necessary party to the appeal, the motion to dismiss must be sustained.

MOTION TO DISMISS SUSTAINED.

STATE, EX REL. WILLIAM H. WRIGHT, ATTORNEY GENERAL, PLAINTIFF, V. CECIL V. SOWARDS, DEFENDANT.

278 N. W. 148

FILED FEBRUARY 25, 1938. No. 30068.

1. **Attorney and Client:** DISBARMENT. The misconduct of an attorney indicative of moral unfitness sufficient to deny an applicant admission to the bar, even if the act is not committed in a professional capacity, justifies disbarment.
2. ———: ———. An attorney upon his admission to practice law assumes certain obligations and duties, and in their performance he must conform to certain standards in regard to

clients, to the courts, to the profession, and to the public.

3. ———: ———. In general, it may be stated that a conviction of a felony or misdemeanor involving moral turpitude as such term is defined by the statutes is conclusive evidence warranting disbarment.

4. ———: ———. The purpose of a disbarment proceeding is not so much to punish the attorney as it is to determine in the public interest whether he should be permitted to practice.

Original proceeding by the state, on the relation of the attorney general, to disbar the defendant. *Judgment of disbarment.*

Richard C. Hunter, Attorney General, Milton C. Murphy and *Francis V. Robinson,* for plaintiff.

Cecil V. Sowards, W. F. Wehmiller and *E. L. Hyde,* for defendant.

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

DAY, J.

The attorney general has filed this proceeding for disbarment against Cecil V. Sowards. The complaint is that on or about December 8, 1936, he was convicted of two felonies. An answer admits the convictions described, but alleges that the judgments of conviction are not final and absolute. The answer also alleges that at the time he was only a clerk and was not employed as an attorney. This court appointed the Honorable Bern R. Coulter as referee, who held an open public hearing. A motion now requests that we enter a judgment on the report of the referee.

At the time of the conviction of embezzlement he was employed by the Resettlement Administration, and was charged with embezzling the sum of $150. He was tried in the district court for Cheyenne county on the 2d day of December, 1936, and the jury returned a verdict finding the defendant guilty of embezzlement. He was also charged with another embezzlement of $35, and was tried to a jury

which convicted him on December 7, 1936. The sentence and judgment in each of the two felony cases were entered on the 8th day of December, 1936, and no appeal was taken from the judgment. In the first case he was sentenced to the penitentiary for eighteen months, and in the second case for a period of a year. In the instant case the defendant was called as a witness in his own behalf, and offered to explain the misapplication of the funds which were the basis of the claim against him. The referee sustained the objection of the state to this line of testimony on the theory that the sentence of the jury and the judgment in the criminal case were conclusive as to these matters, and for the further reason that the defendant was not charged in this proceeding with a misapplication of funds, but with conviction of these two felonies, which conviction had become final and absolute.

At the time of this hearing before the referee, the defendant was serving a sentence in the penitentiary. No appeal was taken within the statutory time. It was also found as a fact that the defendant was acting as a clerk and not as an attorney at the time of the wrongful acts.

The referee in his report makes the following conclusions of law: The misconduct of an attorney indicative of moral unfitness sufficient to deny an applicant admission to the bar, even if the act is not committed in a professional capacity, justifies disbarment. *State v. Scoville,* 123 Neb. 457, 243 N. W. 269.

An attorney upon his admission to practice law assumes certain obligations and duties, and in their performance he must conform to certain standards in regard to clients, to the courts, to the profession, and to the public. *State v. Ireland,* 125 Neb. 570, 251 N. W. 119.

In general, it may be stated that a conviction of a felony or misdemeanor involving moral turpitude as such term is defined by the statutes is conclusive evidence warranting disbarment. *State v. Scoville, supra.*

The purpose of a disbarment proceeding is not so much to punish the attorney as it is to determine in the public

interest whether he should be permitted to practice. *State v. Ireland, supra.*

The report of the referee as to findings of fact and conclusions of law is approved and adopted by this court. The judgment is that admission of Cecil V. Sowards is canceled, and his name stricken from the roll of attorneys. It is further ordered that Cecil V. Sowards is enjoined from practicing law directly, or indirectly through his agents or attorneys.

JUDGMENT OF DISBARMENT.

STATE, EX REL. RICHARD C. HUNTER, ATTORNEY GENERAL, PLAINTIFF, V. JOSEPH B. BOE, DEFENDANT.

278 N. W. 144

FILED FEBRUARY 25, 1938. No. 30080.

Attorney and Client: DISBARMENT. An attorney is subject to disbarment because of delinquency in accounting to clients for money received in his professional capacity, in violation of his duty to the public.

Original proceeding by the state, on the relation of the attorney general, to disbar the defendant. *Judgment of disbarment.*

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

Joseph B. Boe, pro se.

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

DAY, J.

The attorney general began a disbarment proceeding against Joseph B. Boe by filing an original complaint in this court that the defendant has pursued a course of conduct in his practice that has violated his oath of office, and that he has failed to discharge his duty to the public. This court appointed the Honorable Floyd E. Wright as referee,

who, after a full public hearing, reported to this court a finding of fact and conclusions of law.

The complaint specifically charged that in ten different instances the defendant had, as an attorney, failed to account to his client for money which he had received in a professional capacity. In brief, the finding of facts of the referee found that the defendant admitted eight of the charges, and denied only two of them. These two charges were contested and depended upon disputed evidence, and the referee found that the evidence did not sustain them.

In his finding of law, the referee found that the defendant had violated his oath as an attorney, and failed to discharge his duty to his clients and to the public.

It has been held by this court that an attorney is subject to disbarment because of delinquency in accounting to clients for money received in his professional capacity, in violation of his duty to the public. *State v. Priest,* 118 Neb. 47, 223 N. W. 635. All of the charges filed in this case reveal a course of conduct on the part of the defendant indicative of his attitude toward his duty as an attorney to his clients and to the public. It is therefore the judgment of this court that we approve the finding of fact and the conclusions of law of the referee herein, and it is ordered that the admission of the defendant, Joseph B. Boe, to the bar of this state shall be canceled and his name stricken from the roll of attorneys and counselors at law; that the defendant is enjoined from practicing law directly, or indirectly through his agents, or other attorneys.

JUDGMENT OF DISBARMENT.

MATILDA M. GARDNER, APPELLEE, V. METROPOLITAN UTILITIES DISTRICT OF OMAHA, APPELLANT.

278 N. W. 137

FILED FEBRUARY 25, 1938. No. 30225.

1. **Negligence.** "Negligence" is a lack of due care under the circumstances.

2. ———. One entering a darkened room on own premises where a trapdoor to the cellar steps is liable to be open, without ascertaining whether the door is open or shut, is guilty of more than slight negligence as a matter of law.
3. **Trial.** A plaintiff in a personal injury case should not appear in court upon a stretcher, or attended by a nurse, when the physical condition does not require it.
4. **Damages.** Evidence that a judgment secured as damages for personal injuries has not been paid is not admissible in another action to recover damages for personal injuries.

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

Dana B. Van Dusen, for appellant.

Henry F. Pedersen and *Gray & Brumbaugh, contra.*

Heard before GOSS, C. J., EBERLY, DAY, PAINE, CARTER and MESSMORE, JJ., and FALLOON, District Judge.

DAY, J.

Matilda M. Gardner brings this action for damages for personal injuries sustained by a fall through a trapdoor in her house on the theory that it was negligently left open by a district meter reader. She recovered a judgment for $10,000 in the trial court.

The first and most serious question presented by this appeal is the liability of the district for the accident. There was no one else present when the plaintiff fell down the cellar steps through the trapdoor. Briefly, the story as told by the record is that a meter reader for the district called at the home of Mrs. Gardner for the purpose of reading the meter. She admitted him to the kitchen, and he went down cellar through the trapdoor to read the meter, and then left the premises. There is a dispute in the evidence that he found the trapdoor open, but there is no dispute about the fact that he did not close it. Soon after the visit of the meter reader, the plaintiff went to a near-by grocery store, and returned to her kitchen with groceries. While trying to put them away in the pantry she fell through the trapdoor and down the cellar steps.

In order that the situation may be better understood,

the premises are described. The pantry door opened directly from the kitchen. The floor of the pantry was a trapdoor "2′ - 0½″ X 4′ - 9″," which, when opened, revealed the steps to the cellar. In the basement where the water meter was located was a furnace room. In this room was a hot water heater. Here was stored the coal, and here also was kept about a ton of lead which Mrs. Gardner's sons used in their business as painters. The usual entrance to the cellar was by the steps covered by the trapdoor in the pantry. This trapdoor and the cellar steps were maintained by Mrs. Gardner upon her own premises.

It is undisputed that the accident occurred in premises leased by plaintiff as a home, and that the trapdoor and cellar steps were maintained and used by her as the only way of access to the basement. This was the average home basement with its room in constant use. The hot water heater, a common type which required lighting and extinguishing each time it was used, was located here, as was also the furnace which heated the home. It was considered by the plaintiff as a proper place to keep the coal used for fuel. The plaintiff's sons found it a convenient place to store about a ton of white lead used in their painting business. The plaintiff cannot ignore the hazards of the entry to such a basement, and place the entire burden upon one whose casual duty requires its use. There is a duty resting upon the plaintiff to exercise ordinary care for her own safety. If her negligence was more than slight as related to the accident, and the resultant injury, she cannot recover. In this connection her own testimony defeats her recovery; it is that she stepped into a darkened room, the floor of which was a trapdoor likely to be open, without ascertaining whether it was open or closed, and fell down the cellar steps in her own home. The record reveals that it was the usual way, continually and constantly used by her and her family, to pass to the basement. Her negligence in stepping into the darkened room, where she well knew that the floor was a trapdoor regularly opened upon the cellar steps, was more than slight negligence and de-

feated her recovery. She was not entitled to rely solely upon the belief that no one would leave it open. It was her duty to use the ordinary means at her disposal to ascertain whether it was open or closed. She knew of its dangers, and it was her duty to exercise some care to avoid the hazard for her own safety.

In *Martin v. Davis,* 111 Pa. Super. 420, 170 Atl. 307, the well-established rule was stated that "negligence is lack of due care under the circumstances," and that the house owner was not negligent where a domestic servant fell down a stairway while groping for a light switch.

In an almost identical case, *Swanson v. Schoenhofen Brewing Co.,* 215 Ill. App. 185, the court held: "Entering a dark room where a trapdoor leading into a cellar is liable to be open, without using the means at hand to ascertain whether the trapdoor is open or shut, is negligence *per se.*" A bartender, who had worked in a saloon for two years and seven months, fell into a cellar through a trapdoor in a dark room adjoining the bar. The reasoning of that case leads to the inevitable conclusion that one who enters a darkened room containing a trapdoor, as in this case, is negligent *per se.* There are many other similar cases, as when one steps through an elevator door and the elevator is not there. But if more than natural reason is needed to maintain the proposition, those cited seem to be sufficient, particularly when none is cited clearly to the contrary.

Recently the court, in *Van Avery v. Platte Valley Land & Investment Co.,* 133 Neb. 314, 275 N. W. 288, held that even a stranger to the premises must exercise ordinary care for his own safety. How much more is one logically responsible for one's own safety where he daily uses and is familiar with the premises.

Because of the reliance of the appellee in *Pomerene Co. v. White,* 70 Neb. 171, 97 N. W. 232, some notice should be taken of that case. It is not in conflict with the rule here adopted because the circumstances are entirely different. In the *Pomerene* case the trap in the middle of the floor

was only an emergency opening rarely opened. The trap-door did not, as in the present case, cover almost the entire floor of the pantry. In this case the door was the floor when shut, and when opened it was the ordinary opening to the stairs to the basement.

In view of the foregoing conclusion, it would not be necessary ordinarily to discuss the complaint that the verdict is excessive, but it is merely mentioned as it may hereafter be of some importance. The plaintiff, a woman sixty-eight years of age, had an expectancy of about ten years. She was not permanently injured, and her pain was slight. The evidence, if believed by the jury, is not sufficient to sustain such a large verdict.

In this connection, mention might be made of the fact that the plaintiff was brought into court upon a stretcher. This was calculated to influence the jury and impress them with her serious condition. She was attended by a nurse in uniform. A doctor, who was a witness, looked after her. During the recess, she was wheeled into the hall of the courthouse where the jury were at liberty. The record does not disclose any necessity for such solicitude and care for the plaintiff. The trial judge, of course, did not know at the time that this was not necessary. It amounted to a representation on the part of the plaintiff as to her condition. She had been injured months ago, and had never had a nurse. She had lived with her two sons without a woman in the house. A physician had ministered to her infrequently. She had gone down-town upon at least two occasions. This was a trial, and the unusual incident no doubt influenced the jury and tended to increase the size of the verdict.

The defendant offered in evidence the files of other cases. This was admissible for the purpose of showing the plaintiff's physical condition before the accident. In one of these cases a default and judgment were rendered, at least in her presence, in favor of plaintiff for injuries sustained in a previous accident. Immaterial to the issues here is the evidence that it was never paid. Of course it

was not offered for the purpose, but it was in fact an invitation to the jury to require the defendant to pay the delinquent judgment.

In view of the fact that the negligence was more than slight, and that the plaintiff cannot recover under the circumstances shown by the record, the verdict cannot stand, and the case should be dismissed.

REVERSED AND DISMISSED.

GEORGE G. CRONKLETON, RECEIVER, APPELLEE, V. HASTINGS THEATRE & REALTY CORPORATION, APPELLANT: RALPH E. BRYANT ET AL., APPELLEES.

278 N. W. 144

FILED FEBRUARY 25, 1938. No. 30277.

1. **Bills and Notes.** A promissory note is not negotiable unless it is payable to order or bearer. Comp. St. 1929, sec. 62-101.
2. **Assignments:** NOTICE. Notice to the obligor is immaterial unless the party liable on the assigned chose in action has acquired some defense subsequent to the assignment.
3. ———: CHOSES IN ACTION: DEFENSES. The assignee of a chose in action generally acquires no greater rights than those of the assignor, and takes it subject to all the defenses existent at the time.
4. ———: ———: ———. "Ordinarily, an assignee of a chose in action takes the same right as was possessed by, and subject to the same defenses and equities which could be enforced against, his assignor at the time of the assignment, and such defenses and equities accruing thereafter in the absence of notice to the debtor of such assignment." *Union Nat. Bank v. Village of Beemer*, 123 Neb. 778, 244 N. W. 303.
5. ———: ———: ———. Defenses arising against the assignor, after notice of the assignment, cannot be set off against the claim of the assignee.

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

Loren H. Laughlin, for appellant.

Tibbets, Canaday & Hewitt and *Stiner, Boslaugh & Stiner, contra.*

Heard before GOSS, C. J., EBERLY, DAY, PAINE, CARTER and MESSMORE, JJ., and ELDRED, District Judge.

DAY, J.

This is a suit to foreclose a second mortgage on real estate located in Hastings. The trial court found for the receiver of the bank, and entered a decree from which the "Hastings Theatre & Realty Corporation" appeals. In the beginning of this transaction Bryant owned some vacant property in the heart of the city which he sold to the company. This second mortgage was given subject to a first mortgage as a part of the purchase price. The company gave the first mortgage to secure money to build a combination hotel and theater building. The hotel portion was rented to Bryant at a stipulated rental. Bryant held notes for $70,000 secured by this second mortgage as the purchase price of his real estate. He was lessee of a part of the building erected thereon, and was indebted to the company for a stipulated amount of rent. On January 4, 1929, he assigned these notes to the then president of the First National Bank of Hastings in trust to sell certain bonds or notes against them to third persons to pay the indebtedness due the bank from him. The conflicting claim between the receiver of the said bank and the successor trustee to the former president of the bank as to priorities under the trust agreement, and the second mortgage, are not in controversy in this suit, because they united here against a common opponent. Bryant did not pay his rent in full in 1932, and paid nothing after January 1, 1933. He continued to occupy the building with a hotel, and at the time of the trial was owing under his lease the sum of approximately $40,000. The claim before this court is made by the company that the accrued rental should be set off against the company's indebtedness to Bryant, as represented by the notes secured by this second mortgage.

The receiver of the bank filed his petition in January, 1936, on the theory that the nonpayment of interest on the notes accelerated the payment of all, although the first of

a series of ten notes was not due until September 1, 1936.

It is the contention of the appellant company that the sale by Bryant of the real estate and the lease to him by the company constituted one transaction, and together they made an arrangement for mutual credit between them. Two theater men, who later formed the "Hastings Theatre & Realty Corporation," were interested in a theater on this property, and negotiated with the owner who desired a hotel there. The result was an agreement between them for the sale, erection of a building, and the lease. On the 15th of February, 1926, Monroe and Bard, acting as individuals, entered into a written agreement with Bryant for the sale of the real estate for $70,000 of notes, secured by this second mortgage, subject to a first mortgage of $125,000, which was to be a part of the money used to erect a hotel and theater building. Bryant agreed to lease a portion of the building by executing an attached lease when the building was inclosed. The building was to be ready for occupancy September 1, 1926. The notes were executed in a series, the first for $7,000 being due September 1, 1936, and one of $7,000 due each year thereafter until the sum of $70,000 was paid. It does not seem necessary to set out in full the contract and the attached lease, because the chief question relates to the right of set-off of the amount of accrued rent against the amount due on the notes secured by this second mortgage. This was evidently one contract and included the several instruments, but let us examine the evidence to determine if there was any arrangement for mutual credit between Bryant and the company.

It is not disputed that these were nonnegotiable notes. The notes of the company were made payable only to Bryant. By our statute a promissory note is not negotiable unless it is payable to order or bearer. Comp. St. 1929, sec. 62-101. It is argued this evidences that an arrangement was made by the parties to the agreement for mutual credit between them. On the other hand, the notes secured by the mortgage consist of a series of ten notes each for

$7,000, the first of which was due September 1, 1936, and one each year thereafter. The building was to be finished if possible by September 1, 1926, but the lease which was to be signed when the building was inclosed was not signed until March 7, 1927, for a term of fifteen years beginning April 1, 1927. The term of the lease and the period during which the mortgage indebtedness would mature did not approximately coincide. The rent due in the meantime was much more than any amount due on the mortgage notes. The rent was due almost ten years before the first principal note matured. This would in effect have made the mortgage debt payable before the time stipulated in the notes. This negatives the contention that there was any intention to make an arrangement for mutual credit. Such an idea is not expressed in any of the several written instruments signed by the parties. It was not contemplated by them at the time. The subsequent acts of the parties indicate that no agreement between the company and Bryant was made relative to mutual credit. Although no rent was paid after January 1, 1933, and the rent was not paid in full for 1932, the company paid the interest on these notes until May 1, 1933. This is significant evidence that there was no arrangement for mutual credit. Other acts of officers of the company in evidence do not require further comment.

It is argued however that the receiver and trustee, as assignees, had no greater rights against the company than their assignor, Bryant, and are subject to all the equities and defenses of the company against Bryant. These notes were assigned to the bank as collateral security by Bryant about November 21, 1928, and were in the collateral note case of the bank when it closed on October 5, 1931. Cronkleton became receiver thereafter, and took charge of the assets of the bank, including these notes. The assignment was made to the bank as collateral to Bryant's notes, which amounted on February 1, 1937, to $31,384.57. It is evident that these notes were assigned either to the bank or to the trustee. The applicable statutory provisions are:

"An action by the assignee of a thing in action shall be without prejudice to any set-off or other defense *existing* between the original parties; but this section shall not apply to negotiable bonds, promissory notes, or bills of exchange, transferred in good faith, and upon good consideration before due." Comp. St. 1929, sec. 20-303. "When cross-demands have existed between persons under such circumstances that if one had brought an action against the other a counterclaim or set-off could have been set up, neither can be deprived of the benefit thereof by the assignment or death of the other, but the two demands must be deemed compensated, so far as they equal each other." Comp. St. 1929, sec. 20-818.

Now the appellant company takes the position that notice is not so important, since the notes are subject to a set-off under any circumstances. We do not follow its reasoning or its conclusions. It has been stated by a recognized authority: "(1) An assignee's right against the obligor is subject to all limitations of the obligee's right, to all absolute and temporary defenses thereto, and to all set-offs and counterclaims of the obligor which would have been available against the obligee had there been no assignment, provided that such defenses and set-offs are based on facts existing at the time of the assignment, or are based on facts arising thereafter prior to knowledge of the assignment by the obligor. (2) Except as stated in subsection (3), an assignee's right against the obligor is subject to all set-offs and counterclaims which would have been available against the assignee if he were the original obligee." Restatement, Contracts, sec. 167.

Among cases cited in the annotations is that of *Henefin v. Live Stock Nat. Bank,* 116 Neb. 331, 217 N. W. 91. It supports the general rule stated in the text quoted, and is particularly applicable to our problem here. That rule is followed in *Citizens Nat. Bank v. Rawley,* 131 Neb. 10, 267 N. W. 151, and there stated in the following language: "Notice is immaterial unless the party liable on the assigned contract has after the assignment acquired some defense. As

to such defenses, the assignment takes effect from the time notice is given the obligor and not from the time of the assignment."

Certainly the assignee of a chose in action (as each note in this case) generally acquires no greater rights than those of the assignor, and takes it subject to all the defenses existent at the time. See the discussion of this rule in 4 Am. Jur. 304 and 305, and the many cases cited thereunder, including the Nebraska case of *Henefin v. Live Stock Nat. Bank, supra.* The *Henefin* case involved a check, indorsed and deposited in one bank, and drawn on another. The factual situation as to the ownership of the check was in dispute, but when that was once determined, there was no great difficulty with the law applicable. The case is reviewed in 6 Neb. Law Bulletin, 416. It is cited with approval in other cases. Long ago this court stated the rule in another way when it said: "School district warrants do not possess the qualities of negotiable paper, and the purchaser thereof takes them subject to all equities existing against the original holder." *State v. Melcher,* 87 Neb. 359, 127 N. W. 241. This latter case and the *Henefin* case are cited, followed and approved more recently by this court in *Lincoln Nat. Bank & Trust Co. v. School District,* 124 Neb. 538, 247 N. W. 433.

There was no defense against the notes at the time of the assignment. They were not due, and the rent was due periodically during that time. The notes would not have been an offset against the rent because they were not due.

It has been held by this court: "Ordinarily, an assignee of a chose in action takes the same right as was possessed by, and subject to the same defenses and equities which could be enforced against, his assignor at the time of the assignment, and such defenses and equities accruing thereafter in the absence of notice to the debtor of such assignment." *Union Nat. Bank v. Village of Beemer,* 123 Neb. 778, 244 N. W. 303.

A well-known authority discusses this question as fol-

lows: "Until the debtor receives notice of the assignment, or, as the rule is sometimes stated, until he has knowledge of such facts concerning the same as are sufficient to put him on inquiry, he may deal with the assignor as if no assignment had been made. He may pay the assignor, even though the debt is not due at the time he makes such payment, or he may pay a subsequent assignee of whose assignment he has notice, or any person vested with apparent authority to receive payment, or an attaching creditor of the assignor under order of the court, the whole or any part of the debt. The debtor may subject the chose in the hands of the assignee to all equities against the assignor * * * prior to the time when he received notice of the assignment; *but as to equities arising thereafter the rule is otherwise.*" 5 C. J. 978.

At another place, this same authority discusses the question under the subject of set-off and counterclaim as follows: "Demands arising in favor of defendant against the assignor after notice of the assignment cannot be set off or counterclaimed against the claim of the assignee, at least where such subsequently accruing claims are independent of their origin, not arising from the same contract or transaction as the assigned claim, and even though they had their origin in transactions previous to the giving of notice." 57 C. J. 485.

There are many authorities cited under these last two quotations in Corpus Juris, and they indicate that the great weight of authority supports the rule. No cases have come to our notice which are contrary. The rule applicable to this case is that defenses arising against the assignor, after notice of the assignment, cannot be set off against the claim of the assignee.

The trial court found from conflicting evidence that the "Hastings Theatre & Realty Corporation" had notice or knowledge of facts which charged it with notice of the assignment as to the receiver as of October 31, 1932, and the trustee is charged with notice as of the 25th of January, 1933. As far as the issues in this case are con-

cerned, it is immaterial, and no great complaint is made to that finding by the appellant. In fact, the dispute is only about a few months, anyhow.

It is our conclusion, therefore, that there is no error in the record, and that the offset offered as a defense was not available against the assignee.

AFFIRMED.

CHARLES PAVLIK, SR., APPELLEE, V. NORMAN BURNS, SHERIFF: THOMAS PROKOP, APPELLANT.
278 N. W. 149

FILED FEBRUARY 25, 1938. No. 30232.

1. **Judgment**: VACATION. 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.
2. ———: RELIEF IN EQUITY. 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 Knox county: CHARLES H. STEWART, JUDGE. *Affirmed.*

James P. Marron and *D. E. Rissler*, for appellant.

Arthur L. Burbridge and *Leigh & Krajicek, contra.*

Heard before GOSS, C. J., ROSE, DAY, PAINE, CARTER and MESSMORE, JJ., and FALLOON, District Judge.

PAINE, J.

This is an action in equity to enjoin defendant and the sheriff from enforcing a judgment against plaintiff on the ground that such judgment was obtained by fraud. The trial court set the judgment aside, enjoined defendant from collecting it, and granted plaintiff a new trial in the original action, with 30 days to file an answer therein. Defendant appeals.

For many years the parties to this suit lived near Verdigre, Nebraska. On April 7, 1925, the plaintiff herein signed a promissory note as surety with his brother-in-law, Charles S. Mlady, to assist him in borrowing $3,500 from the defendant herein.

On May 1, 1933, the defendant secured a judgment upon said note in the amount of $4,572.31, with interest at 10 per cent., and when it was attempted to levy an execution on plaintiff's land he saw an attorney for the first time, and this suit was brought.

It appears from the evidence of plaintiff and his witnesses that, when defendant in this case brought suit on the note and summons was served on him by the sheriff, he went right over to see defendant, and asked what about it, and was answered: "I'll not sue you and it will never come to judgment. You don't need to bother about it." The son, Charles Pavlik, Jr., and his wife testified they called defendant over to their car one day and asked him about it, and they testify that defendant assured them: "Tell Mr. Pavlik not to worry. I'm not going to do anything to him." This was also soon after the summons had been served on the plaintiff.

The fraud alleged is that defendant promised he would not take a judgment, or attempt to collect the note from plaintiff herein, in the suit he had brought on the note; that, in violation of that promise, he did take judgment and did attempt to collect it.

On the other hand, the defendant relies on the holdings of this court to the effect that a court of equity will not relieve a party from a judgment which he might have prevented but for his own negligence. *Shufeldt v. Gandy*, 34 Neb. 32, 51 N. W. 302. And, further, that it is a general rule that a court of equity will not set aside a judgment rendered in a case where the party complaining had full notice and knowledge of the pendency of the suit and took no steps to protect his interest at that time. *Campbell v. Harvard State Bank*, 103 Neb. 562, 173 N. W. 587.

The defendant charges that no fraudulent intent is

shown, which is a necessary element of every actionable fraud, and that, in order to enjoin the enforcement of a judgment, it must be shown, not only that the judgment debtor has a valid defense, but that he was prevented from interposing it by fraud, mistake or accident, and without fault on his part. *Losey v. Neidig*, 52 Neb. 167, 71 N. W. 1067; *City of Broken Bow v. Broken Bow Water-Works Co.*, 57 Neb. 548, 77 N. W. 1078.

It is then charged that plaintiff has failed to resort to his statutory remedy provided in section 20-2001, Comp. St. 1929.

The authorities appear to hold that, if the petition fails to set forth that the facts were not discovered within the two-year period from the date of the trial, and fails to show any reason for extending the two-year period, equity will be powerless to relieve.

However, in a recent case of *Howard Stove & Furnace Co. v. Rudolf*, 128 Neb. 665, 260 N. W. 189, Chief Justice Goss held: "The provisions of section 20-2001, Comp. St. 1929, enumerating grounds under which judgments may be set aside after the expiration of the term at which they were rendered, are concurrent with independent equity jurisdiction."

This being a clear case for equitable relief on the ground of fraud, let us also consider that the note became due April 7, 1927. No payments were ever made on the note by the plaintiff, nor did he ever acknowledge his liability in writing, either before or after the running of the statute of limitations. At any rate, the plaintiff should have an opportunity to set up his defense and be heard thereon. The plaintiff was deprived of his day in court by being lulled into security by the direct promises made repeatedly by defendant that no harm would come to him if he paid no attention to the summons which had been served on him. This was fraud.

Finding no error in the record, the judgment of the district court is

AFFIRMED.

RUBY RAY ET AL., APPELLANTS, V. SANITARY GARBAGE COMPANY, APPELLEE.

278 N. W. 139

FILED FEBRUARY 25, 1938. No. 30327.

1. **Action.** "Where a right has been created by statute which did not exist at the common law, the legislature may impose restrictions thereon, and the conditions so imposed qualify and are an integral part of the act and must be fully complied with in the manner therein prescribed." *Duhrkopf v. Bennett*, 108 Neb. 142, 187 N. W. 813.
2. **Limitation of Actions.** "No exception can be claimed in favor of minors in a statutory provision limiting the time for commencing actions given by such statute, unless they are expressly mentioned by the statute as excepted." 37 C. J. 1021.
3. ———: WORKMEN'S COMPENSATION. "Where no exception is provided by the statute, the requirement for the filing of a claim within a specified time applies to a minor dependent of an employee, whose failure to comply with the act precludes him from recovering compensation." 71 C. J. 1025.
4. **Workmen's Compensation:** LIMITATION OF ACTIONS. The workmen's compensation act, relating to the filing of claims for compensation, makes no exception in favor of minor dependents as to the limitation of time for filing claims and removal of their legal disability, and such sections must be construed as written, and any change therein to include such minor dependents must be accomplished by legislative enactment.
5. ———: ———. Where, in the course of his employment, an employee is injured on October 4, 1931, and his death occurs on October 15, 1931, and his widow fails to file a claim for compensation within one year from such employee's death, and remarries on November 28, 1932, and no claim is filed in behalf of minor dependents by next friend or guardian until September 26, 1936, such claim is barred by the statute of limitations, as provided in section 48-138, Comp. St. 1929.

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

Homer L. Kyle and *Clifford L. Rein,* for appellants.

Hall, Cline & Williams, contra.

Lloyd E. Chapman and *Holeman & Holeman, amici curiæ.*

Heard before GOSS, C. J., ROSE, DAY, PAINE, CARTER and MESSMORE, JJ., and FALLOON, District Judge.

MESSMORE, J.

This is an appeal from the district court for Lancaster county, dismissing plaintiffs' action, and holding that such action was barred by the statute of limitations. We are first concerned with the statute of limitations as it affects the plaintiffs' action.

Wallace B. Ray, an employee of defendant company, was injured in the course of his employment in an accident on October 4, 1931. He died on October 15, 1931. At that time he was living with his wife and one minor child. Subsequently, another child was born to deceased's widow, who remarried November 28, 1932. Both minor children were of tender years, being five and four years of age, respectively, at the time this action was filed on September 26, 1936, by the next friend and legal guardian of the minors and the administratrix of deceased's estate. On the trial of this cause a compensation judge dismissed the case as barred by the statute of limitations. The compensation court also dismissed the case, as did the district court, for the same reason. Plaintiffs contend that such dismissal constitutes error and rely on the proposition that the minor children of tender years were mentally and legally incapacitated to sue until such time as they obtained a next friend or legal guardian; that the widow of deceased failed to file a claim, as required by the workmen's compensation law, and, on her remarriage, the minor children, dependents of the deceased, are entitled to any compensation that may be owing.

The following are the sections of the statute involved and requiring our consideration: Section 48-132, Comp. St. 1929, reads: "If an injured employee is mentally incompetent or is a minor at the time when any right or privilege accrues to him under this article, his guardian or next friend may, in his behalf, claim and exercise such right or privilege." Section 48-133, Comp. St. 1929, as

amended by section 21, ch. 57, Laws 1935, is in part as follows: "Or in case of death of the employee, or in event of his physical or mental incapacity, within six months after death or the removal of such physical or mental incapacity," etc. The words "within six months after death" apply to the time of filing the claim.

Section 48-138, Comp. St. 1929, reads: "In case of personal injury, all claim for compensation shall be forever barred unless, within one year after the accident, the parties shall have agreed upon the compensation payable under this act, or unless, within one year after the accident, one of the parties shall have filed a petition as provided in section 3680 (48-139) hereof. In case of death, all claims for compensation shall be forever barred unless, within one year after the death, * * * one of the parties shall have filed a petition as provided in section 3680 (48-139) hereof. * * * In the event of legal disability of an injured employee, said limitation shall not take effect until the expiration of one year from the time of removal of such legal disability."

It will be noted that from the date of the death of the deceased employee until this action was filed nearly five years had elapsed, and from the date of the remarriage of deceased's widow nearly four years had elapsed. Clearly, the statute has run against the plaintiffs' action, unless this court can so interpret the compensation law as to give to it a liberal construction, extending the statutory time to meet the conception of plaintiffs' contention.

Plaintiffs contend that in the exception the term "legal disability," both by definition and by previous history of its use in law, includes minority or infancy, and that the term "injured employee" includes dependents of the deceased employee; and plaintiffs concurrently contend that the concluding exception in section 48-138, Comp. St. 1929, should be construed to read: "In the event of the mental incompetency, mental incapacity or minority of an injured employee or his dependent or dependents in case of death, said limitation shall not take effect until the expiration of

one year from the time of removal of such mental incompetency, mental incapacity, or minority." It is also contended by plaintiffs that sections 48-133 and 48-138, Comp. St. 1929, are to be construed together; that so construing said sections and placing the meaning thereof in one sentence would make it read as follows: "In death cases the claim for compensation must be made in six months and the petition for compensation filed in one year from the death of the employee or the removal of any legal disability of the claimant."

There can be no doubt of the legal disability of the minors in this case, and no objection can be had to construing the statutes together as contended. We must, however, recognize that the language of both sections 48-133 and 48-138, *supra,* fails to include minor dependents, and to include minor dependents would require language to be written into the act.

Plaintiffs cite *Walgreen Co. v. Industrial Commission,* 323 Ill. 194, 153 N. E. 831. In that case the petitioner admitted that no claim for compensation was made by or on behalf of the injured boy until almost four years after the accident happened, but based her contention on a paragraph of the compensation act of Illinois as follows: "In case an injured employee shall be incompetent at the time when any right or privilege accrues to him under the provisions of this act, a conservator or guardian may be appointed, pursuant to law, and may, on behalf of such incompetent, claim and exercise any such right or privilege with the same force and effect as if the employee himself had been competent and had claimed or exercised said right or privilege; and no limitations of time by this act provided shall run so long as said incompetent employee is without a conservator or a guardian."

Plaintiffs review the above case in detail and their analysis is correct. However, it must be remembered that the Illinois court was construing a statute that expressly provided, in case an injured employee shall be incompetent, that no limitation of time by the act provided shall run so

long as said incompetent employee is without a conservator or guardian, and the court declared that minority was incapacity. We do not have the same act in Nebraska, nor the same limitations as set forth in the section of the statute quoted.

Plaintiffs cite *Chase v. Ulster & D. R. Co.*, 215 App. Div. 581, 214 N. Y. Supp. 615, wherein it was held: "'Next friend,' within workmen's compensation law 1914, sec. 116, as it existed in May, 1922, providing that limitation shall not run against minor dependent, unless minor has committee, guardian, or next friend, is one who had already performed services for minor respecting matter in hand, and not one who might perform them in future." In construing the act in question in the case cited, we find language very specific: "No limitation of time provided in this chapter shall run as against any person who is mentally incompetent or a minor dependent so long as he has no committee, guardian, or next friend." The above case is not analogous to the case at bar. It specifically mentions minor dependents and involves an additional statute of limitations directly affecting such dependent minors.

Plaintiffs cite *Southern R. Co. v. Grigsby*, 155 Tenn. 285, 292 S. W. 3. In that case it was held (292 S. W. 3): "Detailed and specific treatment of subject of limitation of actions, under workmen's compensation act, * * * must control and limit general and broad provisions * * * providing that right to compensation shall be forever barred unless notice is given and claim made within one year after accident." The above case was based on a provision of the Tennessee act, providing that a minor's claim is barred unless suit is filed within one year after the date of notice in writing, given by the employer to the bureau, stating his willingness to pay compensation when it is shown that the death is one for which compensation is payable. Suffice it to say that we have no such provision in the Nebraska law, and the above case does not meet the situation with which we are confronted in the case at

bar. The statute itself made the exception in favor of the minor employee. The claim of a minor dependent was not involved.

Plaintiffs cite *Follmer v. Nuckolls County,* 6 Neb. 204, wherein it was said: "Words are to be interpreted with reference to the general object and scope of the statute," citing *State v. Button,* 25 Wis. 109. Plaintiffs also cite *Hevelone v. City of Beatrice,* 120 Neb. 648, 234 N. W. 791, wherein this court held: " 'In the exposition of statutes, the reason and intention of the lawgiver will control the strict letter of the law when the latter would lead to palpable injustice or absurdity.' *Kelley v. Gage County,* 67 Neb. 6."

We have set forth sufficiently the contention of the plaintiffs and their citations of authority that are pertinent to the issue here involved. There can be no denial that this court zealously safeguards the rights of minors under the law in construing the law as written. In this case we are met with an exclusive, independent act. The sections of the statute referred to are specific as to the time claim should be filed, and contain no exception tolling the statute in favor of a dependent minor. We find expression of this court on the subject in *City of South Omaha v. McGavock,* 72 Neb. 382, 100 N. W. 805, wherein it was said (p. 384): "Where a statute grants a new remedy, and at the same time places a limitation of time within which the person complaining must act, the limitation is a limitation of the right as well as of the remedy, and, in the absence of qualifying provisions or saving clauses, the party seeking to avail himself of the remedy must bring himself strictly within the limitations." The above holding was followed in *Gengo v. Mardis,* 103 Neb. 164, 170 N. W. 841.

Our statutes and sections thereof relating to the workmen's compensation law make no exception in favor of a minor dependent, and, in fact, no right of limitation is extended to a minor dependent until such time as he obtains a next friend or guardian; reference is only to an injured employee. Therefore, to make the act apply to

minor dependents in removing a legal disability until a next friend or guardian should be obtained would require that this court write into the act that which other legislatures have seen fit to write therein. *Walgreen Co. v. Industrial Commission, supra*; *Chase v. Ulster & D. R. Co., supra.* We are also cognizant of the proposition of law that, in construing the workmen's compensation act, this court will construe it liberally so that its beneficent purposes will not be thwarted by technical refinement. Such interpretation applies to the act as written and not to the addition of words that require an extension of limitation expressly written in the statute. Under the law we give a broad and comprehensive meaning to all statutes, in order to arrive at the legislative intent. By so doing, we cannot go to the length of placing in the act that which the legislature did not supply. We find expression for this statement in the case of *Park v. School District,* 127 Neb. 767, 257 N. W. 219, wherein we said (p. 772): "While, as applied to the questions presented by this record, the statutory provisions above quoted are to be liberally construed, yet we must approach the questions so presented, 'having full regard for the fact that, under the division of powers found in the Constitution, our duty is not to enact but to expound the law (as written), not to legislate (to include a class not contained in the statute of limitations of judicial rule in supplying language to meet the situation) but to construe legislation; to apply the law as we find it, to maintain its integrity as it has been written by a coordinate branch of the state government. If the law as written works hardships in a special class of cases the remedy lies with the branch of the government charged with the duty of enacting laws. If one does not protect himself and his rights under the law as written it is his misfortune, and this court should not, by judicial legislation, for the purpose of relieving that misfortune, write into the statute a provision that the legislature has not seen fit to enact." The above holding was followed in *Price v. Burlington Refrigerator Express Co.,* 131 Neb. 657, 269 N. W. 425.

In *Duhrkopf v. Bennett,* 108 Neb. 142, 187 N. W. 813, this court said (p. 144): "It appears that under the express provisions of the workmen's compensation act, hereinbefore cited, plaintiff's suit is barred. * * * The remedy provided by the act being complete in itself and being a departure from the common-law remedy, the period of limitation for beginning suit which is named in the act controls, to the exclusion of the general act of limitations with respect to the time within which actions generally may be commenced."

The general rule is stated in 37 C. J. 1021, as follows: "No exception can be claimed in favor of minors in a statutory provision limiting the time for commencing actions given by such statute, unless they are expressly mentioned by the statute as excepted." We also find this language in 71 C. J. 1025: "Where no exception is provided by the statute, the requirement for the filing of a claim within a specified time applies to a minor dependent of an employee, whose failure to comply with the act precludes him from recovering compensation."

The rule is fundamental and recognized in Nebraska that, where the legislature has created a new right and fixed a statute of limitations which contains no saving clause, the general statute of limitations has no bearing.

We believe that to hold as contended for by plaintiffs would amount to legislation by judicial rule, and that the relief asked for should be addressed to the legislature.

For the reasons given in this opinion, the judgment of the district court is

AFFIRMED.

MUTUAL BENEFIT LIFE INSURANCE COMPANY, APPELLANT, V. CARL LONG ET AL., APPELLEES.

278 N. W. 270

FILED MARCH 4, 1938. No. 30201.

Mortgages: MORATORIUM. In a suit in equity to foreclose a mortgage on land, a moratorium granted under the void moratory act as amended in 1937 (Comp. St. Supp. 1937, sec. 20-21,168) is reversible on appeal. *First Trust Co. v. Smith, ante*, p. 84, 277 N. W. 762.

APPEAL from the district court for Stanton county: DE WITT C. CHASE, JUDGE. *Reversed.*

Galvin, Byers & Sullivan, Moyer & Moyer and *Perry W. Morton,* for appellant.

A. E. Wenke, contra.

Heard before GOSS, C. J., ROSE, DAY, PAINE, CARTER and MESSMORE, JJ., and WILLIAM A. DAY, District Judge.

ROSE, J.

This is a suit in equity to foreclose a mortgage for $16,000 on a quarter-section of land in Stanton county. On account of an unpaid debt of $16,233.04, a decree of foreclosure was entered May 27, 1935. Under the moratory act as amended in 1937 the district court granted a moratorium staying a judicial sale of the mortgaged premises until March 1, 1939. Plaintiff appealed.

The moratory act as amended in 1937 (Laws 1937, ch. 42, sec. 3, Comp. St. Supp. 1937, sec. 20-21,168) has been held void. *First Trust Co. v. Smith, ante,* p. 84, 277 N. W. 762. It follows that the district court was in error in granting the moratorium from which the appeal was taken. The judgment granting defendant such relief is therefore reversed and the cause remanded for further proceedings.

REVERSED.

MUTUAL BENEFIT LIFE INSURANCE COMPANY, APPELLANT, V. JAKOB LONG ET AL., APPELLEES.
278 N. W. 270

FILED MARCH 4, 1938. No. 30202.

Mortgages: MORATORIUM. "In a suit in equity to foreclose a mortgage on land, a moratorium granted under the void moratory act as amended in 1937 (Comp. St. Supp. 1937, sec. 20-21,168) is reversible on appeal. *First Trust Co. v. Smith, ante,* p. 84, 277 N. W. 762." *Mutual Benefit Life Ins. Co. v. Long, ante,* p. 186, 278 N. W. 270.

APPEAL from the district court for Stanton county: DE WITT C. CHASE, JUDGE. *Reversed.*

Crossman, Munger & Barton, Varro H. Rhodes, Fay H. Pollock and *Perry W. Morton,* for appellant.

A. E. Wenke, contra.

Heard before GOSS, C. J., ROSE, DAY, PAINE, CARTER and MESSMORE, JJ., and WILLIAM A. DAY, District Judge.

ROSE, J.

This is a suit in equity to foreclose a mortgage on a quarter-section of land in Stanton county for an unpaid debt of $16,086.32. A decree of foreclosure was rendered February 21, 1936. Under the moratory act as amended in 1937 the district court granted a moratorium staying a judicial sale of the mortgaged premises until March 1, 1939. Plaintiff appealed.

The moratory act as amended in 1937 (Laws 1937, ch. 42, sec. 3, Comp. St. Supp. 1937, sec. 20-21,168) has been held void. *First Trust Co. v. Smith, ante,* p. 84, 277 N. W. 762. It follows that the district court was in error in granting the moratorium from which the appeal was taken. The judgment granting defendants such relief is therefore reversed and the cause remanded for further proceedings.

REVERSED.

BARISH-SANDERS MOTOR COMPANY, APPELLANT, V. FIREMAN'S FUND INSURANCE COMPANY, APPELLEE.
278 N. W. 374

FILED MARCH 4, 1938. No. 30118.

1. Insurance: POLICY: CONSTRUCTION. The rule to construe ambiguous or inconsistent terms of an insurance contract in favor of insured, because insurer selected the language used, does not justify the imposing of insurance risks not assumed.
2. ———: ———: ———. "Under policy insuring against loss or damage to goods while loaded for shipment, or in transit on described truck, by 'collision' of truck with any other automobile, vehicle, or object, insurer *held* not liable for damage to goods on top of load which came in contact with overhead bridge, where no part of truck itself came in contact with bridge." *Mendelsohn v. Automobile Ins. Co.*, 290 Mass. 228, 195 N. E. 104.
3. ———: ———: ———. When, by express terms, a limited collision coverage of cargo was specifically added to the policy, it cannot be extended by construction beyond the limitations contained in the language thus employed.

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

Johnsen, Gross & Crawford, for appellant.

Swarr, May & Royce, contra.

Heard before GOSS, C. J., EBERLY, DAY, PAINE, CARTER and MESSMORE, JJ., and TEWELL, District Judge.

EBERLY, J.

This is an appeal from the judgment of the district court for Douglas county sustaining a demurrer to plaintiff's amended petition, on the ground that the same did not state facts sufficient to constitute a cause of action. The action is one at law upon a "Transportation Floater" policy. It is not a suit in equity to reform the policy, and to recover upon the instrument so reformed. Plaintiff's petition properly pleads the terms of the policy in suit, and attached to its pleading, with due reference, is a photographic copy of the policy. As the basis for its claim

for indemnity, plaintiff alleges that four automobiles, constituting a cargo covered by the terms of the insurance policy, while en route and in transit, while "passing beneath an overpass near Iowa City, Iowa," collided with and struck said overpass, and three of said automobiles were damaged in the sum of $1,056.10. The items of damage suffered are itemized, but there is no allegation that the vehicle on which the automobiles damaged were being carried collided with the overpass and the right to damages is predicated solely on the collision of the cargo or load.

The policy in suit is known as a "Transportation Floater" policy. By its terms, it insures certain goods and merchandise, including automobiles, trucks, and farm machinery in transit, against certain specified perils. The terms of the policy appear in part in the printed provisions of the form employed, and in part in typewritten additions thereto. "Transportation Endorsement C," attached to and constituting a part of the policy in suit, so far as material to this controversy, as part of the printed provisions embraces the following:

"This policy insures (except as hereinafter provided) only against direct loss or damage by:

"(a) Fire and Lightning;

"(b) Explosion;

"(c) Tornado and Cyclone; Windstorm & Hail;

"(d) Accidental collision of the vehicle with any other vehicle or object, excluding, however, contact with any portion of the roadbed, curbing, rails or ties of street, steam or other railroad, any stationary object while backing for loading or unloading,"

The photographic copy attached to the petition discloses that in addition to item "(d)" quoted above, which terminates with a comma, the original blank policy as part of item "(d)" contains the words "and collision of the load with any object." It also appears that the last-quoted words were stricken at the time the policy was written, with the use, as plaintiff's brief informs us, of red ink.

Plaintiff's contention may be summarized in the following words, quoted from its brief, viz.:

"Beginning with the word '*excluding*' is a series of phrases separated by commas, until the end of the paragraph. The last phrase 'and collision of the load with any object' is stricken out. If a plain reading and understanding of the English language means anything, the phrase 'and collision of the load with any object' is an exclusion in the original printed form. When it was deleted by the agent, the 'exclusion' no longer being a part of the policy contract, that hazard so excluded became 'covered.' A simple statement of the situation is to the effect that the striking of an 'exclusion' has the effect of making 'coverage.' "

But the meaning of item "(d)," after the clause quoted was stricken out, still remains clear and definite. The language is not ambiguous. It plainly does not include damages occasioned by load or cargo collision as part of the coverage of the policy.

"The rule to construe ambiguous or inconsistent terms of a life insurance contract in favor of insured, because insurer selected the language used, does not justify the imposing of insurance risks not assumed." *Himelbloom v. Metropolitan Life Ins. Co.*, 128 Neb. 52, 257 N. W. 525. See, also, *Stone v. Physicians Casualty Ass'n*, 130 Neb. 769, 266 N. W. 605.

A similar situation involving the construction of similar language was presented in the case of *Mendelsohn v. Automobile Ins. Co.*, 290 Mass. 228, 195 N. E. 104, wherein the supreme judicial court of Massachusetts announced the rule, viz.:

"Under policy insuring against loss or damage to goods while loaded for shipment, or in transit on described truck, by 'collision' of truck with any other automobile, vehicle, or object, insurer *held* not liable for damage to goods on top of load which came in contact with overhead bridge, where no part of truck itself came in contact with bridge."

But, it would seem that item "(k)" which follows item

"(d)" in the same division of the policy in suit, and which is a typewritten addition of coverage to the printed form, also supplies a negative answer to plaintiff's contention. It reads as follows:

"Loading and unloading hazards due to perils specified above, and in addition, *damage by collision* or overturning of cargo *while being loaded or unloaded.*"

The effect of item "(k)" was to increase the insurance coverage by adding thereto damages for collision of cargo while being loaded or unloaded. It is a very limited collision liability, but nevertheless it is, to the extent of its terms, strictly and wholly repugnant to the printed provision, viz., "excluding * * * collision of the load with any object." The Century Dictionary and Cyclopedia definition for "collision" includes "the meeting and mutual striking or clashing of two or more moving bodies, or of a moving body with a stationary one." Therefore, when the latter provision of limited liability for collision damages was added by item "(k)," reasonable care on the part of the draftsman would dictate the striking of the provision of the printed form repugnant thereto. This was necessary to harmonize the terms of the instrument after this typewritten addition thereto was made. Under these circumstances the "striking out" of the last clause of item "(d)" is not the creation of an extended coverage.

When by express terms a limited collision coverage of cargo was specifically added to the policy, it cannot be extended by construction beyond the limitations contained in the language thus employed. The controlling maxim is: "*Expressum facit cessare tacitum.*" Broom's Legal Maxims (9th ed.) p. 420.

It follows, therefore, that the judgment of the district court is in all respects correct, and it is

AFFIRMED.

JAMES P. MOONEY ET AL., APPELLEES, V. DRAINAGE DISTRICT NO. 1 OF RICHARDSON COUNTY ET AL., APPELLANTS.

278 N. W. 368

FILED MARCH 4, 1938. No. 30049.

1. **Constitutional Law.** Landowners *held* to have acquired vested property rights by payment of legal assessments on their lands by a public drainage district for drainage proving to be ineffective because the district failed to comply with the valid judgment of a court ordering it to enlarge the outlet to the drainage system.
2. ———. "The private rights of parties which have been vested by the judgment of a court cannot be taken away by subsequent legislation, but must be thereafter enforced by the court regardless of such legislation." *Hodges v. Snyder*, 261 U. S. 600.
3. ———. An amendatory or repealing legislative act may release penalties imposed for the protection or benefit of the state under a former statute, but private property rights acquired under a statute and established by the valid judgment of a court are not subject to legislative invasion by means of a new statute.
4. In *Mooney v. Drainage District*, 133 Neb. 197, 274 N. W. 467, opinion and judgment directed by it vacated on rehearing.

APPEAL from the district court for Richardson county: JOHN B. RAPER, JUDGE. Opinion on motion for rehearing of case reported in 133 Neb. 197. *Former opinion vacated and judgment of district court affirmed.*

Flansburg, Lee & Sheldahl and *Archibald J. Weaver*, for appellants.

Jean B. Cain, Kennedy, Holland, De Lacy & Svoboda and *Edson Smith, contra.*

George H. Heinke, amicus curiæ.

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

EBERLY, J.

This is a suit in equity for a mandatory injunction to prevent Drainage District No. 1 of Richardson county and the supervisors thereof, defendants, from dissolving the drainage district before they comply with an affirmed

judgment of the district court for Richardson county, requiring them to enlarge the outlet of their drainage system between Burlington railroad bridge 64 and the Missouri river to the minimum carrying capacity of 20,000 cubic feet of water a second. James P. Mooney and others similarly situated, plaintiffs, are owners of lands which were assessed by the district for drainage benefits.

The former judgment of the district court for Richardson county required defendants to increase the capacity of the outlet to a minimum of 11,000 cubic feet of water a second. From this judgment defendants appealed to the supreme court, and plaintiffs appealed from the order limiting the minimum capacity to 11,000 cubic feet of water a second. On appeal the supreme court found, referring to the legislation on the subject:

"That a district organized under this act has the power to construct a drainage system and to maintain, improve, and repair it, within the limit of the appraised benefits to the land within the district; that whenever such drainage system becomes out of repair, defective, or inefficient for any reason, it is its duty to improve and repair it, within the limit of its power, so that it may serve the purpose for which it was constructed, and to the end that the landowners may receive the benefits for which the land is assessed.

"That the drainage system of the defendant district has become defective and inefficient because the outlet below bridge 64 is too small to properly care for water brought down by the ditches and canals of the district, and to prevent flooding of plaintiffs' land; that such condition can be remedied and proper improvements and repairs can be made by the district within the limit of its powers." *Mooney v. Drainage District,* 126 Neb. 219, 233, 252 N. W. 910.

After discussing the evidence, it was further found on appeal in the former case that the increase in the capacity of the outlet as fixed by the court below was inadequate. The following appears in the opinion in that case:

"We therefore hold that the findings and decree of the district court should be modified to require the defendant district to enlarge the outlet of its drainage system between bridge 64 to the Missouri river to a minimum carrying capacity of 20,000 cubic feet per second, and that, as so modified, the finding and judgment should be affirmed." *Mooney v. Drainage District,* 126 Neb. 219, 234, 252 N. W. 910.

A formal judgment was entered on these findings and later a mandate was issued, directing the district court to carry into effect its judgment as modified. Judgment on the mandate ordered compliance with the affirmed judgment. Before defendants complied therewith, the legislature changed the drainage law to read as follows:

"If at any time after the final construction of such improvement the same shall become out of repair, obstructed, inefficient, or defective from any cause, *except such as are the result of the use of said improvements as a joint outlet for other systems of drainage improvements,* the board of supervisors, if in its discretion it is practicable and feasible to make such repairs, remove such obstructions and correct such inefficiencies, may order an assessment upon the lands and property benefited by the drainage system for the purpose of placing the same in proper and suitable condition for drainage purposes." Comp. St. Supp. 1935, sec. 31-463.

Construing this provision of the new act to take from the drainage district and its officers the power to enlarge the outlet to their drainage system, they declined to make the improvements ordered.

At this stage of the litigation plaintiffs commenced the case at bar, a new suit in equity, giving a history of the equitable relief already granted to them in the former suit, pleading that defendants were planning to dissolve the drainage district without performing their adjudicated duties to increase the capacity of the outlet to their drainage system, refusing to obey the decree and mandate of the courts, alleging the change in the law did not relieve

them from the performance of their adjudicated duties, and praying for equitable relief by means of a mandatory injunction to prevent the injuries enumerated and the invasion of the adjudicated property rights of plaintiffs.

Defendants answered at great length the petition for an injunction, but their principal defense was the new statute, which they construed to take from them the power to increase the capacity of the outlet to their drainage system. The district court sustained a demurrer to the answer, and defendants, electing to stand thereon, were ordered to comply fully with the former orders and were enjoined from dissolving the drainage district and from taking any steps to do so until they enlarge the outlet as directed and discharge the other outstanding indebtedness of the district. From this judgment in the present case, defendants appealed to the supreme court, where a former opinion contains a statement of the facts in detail. *Mooney v. Drainage District,* 133 Neb. 197, 274 N. W. 467.

Defendants insist that the district court erred in sustaining the demurrer to the answer and in granting the injunction. The controlling question may be condensed to this form: Did plaintiffs acquire such rights and defendants incur such obligations as cannot be taken away by the change in the drainage laws?

Defendants in their answer herein admitted the judicial proceedings in which they were ordered to increase the capacity of the outlet to their drainage system. In specific terms they answered further:

"These defendants further say that after the entry of judgment on the mandate, on November 19, 1934, they, as supervisors of said district, proceeded in all good faith to comply with said judgment and order, * * * but that before definite action could be taken and contract rights established, the legislature repealed the provisions of the statute upon which said judgment was based."

Referring to the change in the law defendants state their position as follows:

"A drainage district is a public corporation. It is a

little community within itself. It is composed of the landowners, who elect directors and rule the district through popular vote. The duties of the board of supervisors are prescribed by statute. The district is a department of government, with the sovereign power of taxation. The income of the district is applied under the direction of the statute. The county treasurer is the custodian of its funds; his disbursements are regulated as in the case of other public moneys. Such a drainage district, being a public corporation and creature of the legislature, is one over which the legislature has a particularly full power. Every landowner who becomes a member of such district does so with the implied understanding, and with the recognition, of the necessary reservation of power in the legislature to amend and alter the powers, rights and privileges of the district.

"No person can have a vested right in the continuance of any law, or in the continuance of the power delegated to the district to exercise the sovereign right of taxation. The legislature may terminate the powers of the district and withdraw the power of taxation whenever, in its judgment, it is deemed advisable, and before the board of supervisors has so acted within those powers or taken such steps as would create contractual or vested rights under the existing law.

"That the legislature has full control over such public corporations, and may withdraw the power at any time before the board has exercised it, is, we believe, fully borne out by the decisions hereinafter cited in this brief. The amended law is broad in its terms and must be so interpreted. It looks backwards as well as forwards. It says: 'If at any time after the final construction of such improvement the same shall become out of repair,' that the board shall not have power to enlarge its channels in order to accommodate the increased volume of water poured into the ditch from other districts.

"It prohibits that action, as applied to this particular ditch, at any time subsequent to the original construction of its ditches in 1906."

The foregoing quoted paragraphs are taken from the brief of defendants, as showing their position. The power of the state to change the law to release penalties already imposed for its benefit and to withdraw from public corporations the authority to assess lands benefited by public improvements was presented fully in connection with decisions cited. The power to release, by means of a new statute, penalties imposed for the benefit of the state is recognized in the recent case of *Tukey v. Douglas County*, 133 Neb. 732, 277 N. W. 57. The repeal, even, of a statute abolishing capital punishment without a saving clause may set free a malefactor upon whom the death penalty had been imposed, power to execute the judgment having been lost. It is also recognized law that rights and liabilities created by statute may be taken away by a subsequent statute operating prospectively. In the former opinion discussing these problems in this case, the theory and argument of defendants were adopted, the demurrer of plaintiffs to the answer of defendants overruled and the judgment granting the injunction reversed. *Mooney v. Drainage District*, 133 Neb. 197, 274 N. W. 467.

After a reargument the questions for determination were reexamined. The rights now claimed by plaintiffs do not involve penalties which the legislature may waive on behalf of the state. The amendment of the drainage law cited is not limited to prospective operation. Its effect, if operating retroactively, as argued by defendants, and as held in the reported opinion herein, is to set aside a district court judgment affirmed by the supreme court. The judgment was entered and affirmed according to law in the due exercise of judicial power conferred by the Constitution and statutes upon the courts. Lands of plaintiffs in the drainage district were assessed for drainage and the assessments were paid. What plaintiffs acquired by paying their assessments for benefits was a property right in the improvement of their lands by drainage. It was adjudicated in the former suit as follows:

"It was the intent of the legislature in the enactment of

the provisions of article 4, ch. 31, Comp. St. 1929, to impose a duty on drainage districts organized thereunder to maintain and keep in repair the drainage systems constructed under the powers given them by such act, to the end that landowners whose land was assessed for the construction of such system on the basis of expected benefits from such construction may be protected in the enjoyment of such benefits." *Mooney v. Drainage District,* 126 Neb. 219, 252 N. W. 910.

It was also adjudicated in the same former suit that defendants failed to grant the relief to which plaintiffs were entitled under the drainage law and that failure of duty in that respect resulted in the flooding of plaintiffs' lands and the impairment of drainage for which they paid. It was further adjudicated that defendants had the necessary power and means to increase the capacity of the outlet to 20,000 cubic feet of water a second. Plaintiffs were not reduced to a status limited to a mere connection with the drainage district. They had individual property rights which they acquired by payment of assessments and these rights extended to the enlargement of the drainage outlet. The failure to recognize acquired individual property rights of drainage accruing to plaintiffs and to consider the judgment for costs seems to be fatal defects in the argument that power to make the improvement ordered was lost by the change in the law. The better view seems to be that such rights, when adjudicated, should be classed in the law as vested private property rights beyond legislative invasion. An eminent text-writer stated the law as follows:

"The power to open or vacate judgments is essentially judicial. Therefore, on the great constitutional principle of the separation of the powers and functions of the three departments of government, it cannot be exercised by the legislature. While a statute may indeed declare what judgments shall in future be subject to be vacated, or when or how or for what causes, it cannot apply retrospectively to a judgment already rendered and which had

become final and unalterable by the court before its passage. Such an act would be unconstitutional and void on two grounds; first, because it would unlawfully impair the fixed and vested rights of the successful litigant; and second, because it would be an unwarranted invasion of the province of the judicial department." 1 Black, Judgments (2d ed.) sec. 298.

Judge Cooley expressed the same view:

"Legislative action cannot be made to retroact upon past controversies, and to reverse decisions which the courts, in the exercise of their undoubted authority, have made; for this would not only be the exercise of judicial power, but it would be its exercise in the most objectionable and offensive form, since the legislature would in effect sit as a court of review to which parties might appeal when dissatisfied with the rulings of the courts." 1 Cooley, Constitutional Limitations (8th ed.) 190.

As recently as 1922, the supreme court of the United States said:

"The private rights of parties which have been vested by the judgment of a court cannot be taken away by subsequent legislation, but must be thereafter enforced by the court regardless of such legislation." *Hodges v. Snyder*, 261 U. S. 600.

The state by an amendatory or repealing legislative act, operating retroactively, as already explained, may release penalties imposed for the protection or benefit of the state under a former statute. By the same method the state may abandon its own claims and rights, if not forbidden by the Constitution. But private property rights acquired under statutes and established by valid judgments of courts are not subject to legislative invasion by means of new statutes. Judgments for costs recovered by private individuals against public corporations for nonperformance of duties and obligations and adjudicated property rights of individuals under statutes are not lost by operation of subsequent statutes amending or repealing the former statutes under which such rights were granted and ad-

judicated. *State of Pennsylvania v. Wheeling and Belmont Bridge Co.*, 18 How. (U. S.) 421; *Ettor v. Tacoma*, 228 U. S. 148; *The Clinton Bridge*, 10 Wall. (U. S.) 454; *United States v. Klein*, 13 Wall. (U. S.) 128; *Coombes v. Getz*, 285 U. S. 434.

The drainage district is not dissolved, nor can it be, until it discharges its outstanding obligations, including the affirmed judgment requiring it to protect the private property rights of plaintiffs by increasing the capacity of the outlet to its drainage system to 20,000 cubic feet of water a second.

The former opinion and judgment herein are vacated and the judgment of the district court is

AFFIRMED.

PAINE, J., dissents, for the reasons set out in former opinion, *Mooney v. Drainage District*, 133 Neb. 197, 274 N. W. 467.

KATHERINE H. FITZSIMMONS, APPELLEE, V. HUBERT GILMORE ET AL., APPELLANTS.
278 N. W. 262

FILED MARCH 4, 1938. No. 30249.

Licenses. Under the facts disclosed by this record, even if the original license granted by defendants to plaintiff's predecessors in title rested wholly in parol, and the terms thereof being now in dispute and not established by the evidence, the open entry on the defendants' premises by the licensee (pursuant to and in conformity with the terms of such license and with actual knowledge of the licensor), the constructing of the improvement here in suit, substantial in material and permanent in plan, at the sole cost of the licensee, followed by thirty years' continuous and undisturbed use under claim of right, render such license wholly irrevocable.

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

John F. Rohn, for appellants.

Robins & Yost, contra.

Heard before GOSS, C. J., EBERLY, DAY, PAINE, CARTER and MESSMORE, JJ., and TEWELL, District Judge.

EBERLY, J.

This is a suit in equity to enjoin defendants from removing certain water and sewer pipes, which, in 1906, had been installed by plaintiff's predecessors in title in and across the church grounds of defendants, and which, in 1936, under the authority and direction of such defendants, had been in part removed and in part destroyed.

Plaintiff, by her pleadings, asks for a complete restoration of the *status quo* as existing prior to this interruption and for recompense for injuries suffered thereby. Defendants joined issue by general denial, and, in addition, pleaded affirmatively certain facts, and prayed also for denial of plaintiff's prayer for relief, and "that plaintiff be required to remove all water and sewer pipes from the defendants' property forthwith, or in the alternative that the defendants be permitted to remove all of said pipes and other property belonging to plaintiff from the defendants' property described herein, and that the plaintiff be enjoined from placing or attempting to place any water or sewer pipes upon or under any portion of the defendants' property above described."

Trial was had which resulted in a finding and judgment for plaintiff. Defendants appeal.

The pleadings, in connection with the evidence, disclose that plaintiff and her predecessors in title had, for more than thirty years, owned and occupied the north half of lots 5 and 6 in block 93 of the original town (now city) of Fremont, Nebraska; that the defendant corporation during the same period owned and occupied the south half of the same lots; and that during the same period the city water mains and public sewer had been continuously maintained along the public street paralleling the south boundary of defendants' lots. It also appears, without substantial contradiction, that the sewer and water pipes in

suit were originally emplaced and laid from these water and sewer mains by a licensed plumber of the city of Fremont in and across the south half of lots 5 and 6, then owned and occupied by defendant church, pursuant to an official permit granted by municipal authority on March 31, 1906, and said water and sewer pipes terminated at and were connected with a dwelling-house situated on the north half of the described lots. Part of this improvement was a stop box placed near the intake from the city water main, and a grease trap situated south and east of the residence of plaintiff, both at all times in plain view. This permit was secured by plaintiff's predecessors in title then residing in the dwelling-house last referred to. The improvement was made under the authority and direction of plaintiff's predecessors in title, and was completed on July 2, 1906, on which date it was left by the constructing plumber with "the water left turned on." Plaintiff alleges that these acts were performed and authorized by a consent in writing of the defendant church, and also by oral consent thereof duly given. From and after their installation until the summer of 1936, substantially without interruption, these water and sewer pipes continuously performed their essential functions for plaintiff and her predecessors in title occupying the residence herein referred to. In 1920-1922, the exact date not being definitely stated, plaintiff testifies that she employed a plumber who went upon the church property and made excavations thereon for the purpose of repairing the pipes. During the thirty-year period, the record is silent as to objections or protest of defendants as to construction, maintenance, or continuation of this improvement across the church land of defendants. The evidence in the record tends to support the inference that knowledge of the existence of these water and sewer pipes beneath the surface of the church grounds had been, by lapse of time, wholly lost to those charged with the transaction of the church's business and the care of its property. In October, 1936, in making excavations on their lands for improvements of their religious edifice,

the workmen employed by defendants, and those engaged in that work, came in contact with the pipes in suit, and severed and in part removed them. This was done without plaintiff's consent. Negotiations were had between the parties to this suit, the ultimate termination of which was an election on part of defendants to terminate all rights which plaintiff might possess in their premises, and in pursuance to such election an unconditional demand was made upon plaintiff to remove from defendants' premises the pipes and improvements in suit, but no compensation was paid or tendered to plaintiff. The present suit is brought by plaintiff to establish and perpetuate rights which, for thirty years, had been uninterruptedly enjoyed by plaintiff and those through whom she derived her possession. The defendants' contention is that no rights have ever been conferred by them upon any one, save by "a mere oral license," revocable by its inherent nature, and which has been duly revoked, and the affirmative relief which defendants demand is predicated on that fact.

While the pleadings designate Fitzsimmons as plaintiff and the Christian Church and its officers as defendants, yet the form as well as the substance of the issues disclose that both are "moving parties," asking affirmative relief. Indeed, it must be admitted that the first attack on the *status quo* which had continued thirty years was made by the defendants. By their forcible action taken, they had created a situation which rendered the litigation inevitable. The applicable maxim is, equity looks through forms to substance.

Without reference to the correctness of the name by which defendants' pleading is designated, the situation invokes the rule that, while the burden of proof is generally on the plaintiff, still, "Where a defendant pleads an affirmative defense or sets up in his answer facts in avoidance, the burden of proof is upon him. So, too, the burden of proving allegations in a cross-bill necessary to entitle defendant to affirmative relief rests upon him to the same extent as if he had brought an original action." 22 C. J. 74.

Lydia Gaeth, a witness, testified that she was married to Otto Gaeth on April 15, 1906; that, March 1 preceding, the construction of their residence on the north half of the lots (on the south half of which the church property is located) began; that the details of making that improvement were carried out by her husband; that the ditches were excavated across the church property and remained open several days; that the water and sewer pipes were laid therein by a plumber hired by her husband, and were in due time closed up.

While Mrs. Gaeth was not able to qualify as a competent witness as to the arrangement made with defendant church covering the placing of the pipes in the church ground, and her testimony on that subject was stricken out as hearsay, it is quite obvious, in the light of the surroundings, that such pipes were installed openly, under a claim of right, and paid for by her husband; and the use of the water and sewer system continued uninterrupted and without protest from any one for the three and a half years during which she and her husband occupied these premises as their home. In fact, both parties allege, in substance, that the water and sewer pipes were laid in their present position, under a license and permit, by plaintiff's predecessors in title, but no competent evidence has been introduced by either party as to the consideration given, whether the permission or grant was oral or written, or what the terms and conditions of the same were. Mrs. Gaeth's evidence is also that her husband who owned the property and personally looked after all the details of this building died in 1931. This man, in view of the situation established by the evidence, necessarily possessed complete knowledge of the transaction that resulted in putting in improvements, including the rights, if any, the extent of the same, and the manner and method by which they were obtained from the defendant church in 1906. Mrs. Gaeth could not now state the names of the board officers of defendant church as constituted in 1906. It is also established by uncontradicted evidence that a plumber employed by plain-

tiff, a Mr. Fletcher, repaired the water system across the church premises about a year or two after Armistice Day (1919), and that for that purpose excavations were made in the church yard; but that this man had left Fremont some years ago, and his whereabouts were at the time of the trial unknown. It appears without serious question that the occupants of this residence property continuously enjoyed the water and sewage system installed in and across the church premises, without interruption, for thirty years last past.

So, also, defendants' pleading setting forth that the water and sewer pipes were laid in their present situation by plaintiff under a license or permit granted by the defendant church, and alleging the limitations and conditions, fairly established as a fact that action for that purpose was actually had by the appropriate church authorities prior to the installation of this improvement in 1906. In the natural and regular course of business a church record made substantially contemporaneously would evidence the action taken. If, through inadevertence, no such record was actually made, or if originally made it had been, in the course of thirty years, lost or destroyed, then the actual participants in granting such permit, who were presumably members of the defendant corporation, if still living, would doubtless be able to establish what was done by competent parol evidence. At all events, this proof, whether found in the private corporate records of the church, or within the memory of its membership, was peculiarly within the possession of defendants. But, though definite and positive allegations covering these matters are set forth in defendants' pleading, we find they tender no evidence in support thereof as to the matters here discussed.

In view of the entire record, considered in connection with the time that has elapsed since 1906, it would seem that the application of the following principles is invoked, viz.:

"In the administration of justice it is often wise to

place the burden of producing evidence on the party best able to sustain it, and ambiguity, concealment, or evasion react with peculiar force on a pleader who asserts a fact and fails to produce the evidence, which, if his assertion were true, would be in his possession. Hence it is very generally held that where the party who has not the general burden of proof possesses positive and complete knowledge concerning the existence of facts which the party having that burden is called upon to negative, or where for any reason the evidence to prove a fact is chiefly, if not entirely, within his control, the burden rests on him to produce the evidence." 22 C. J. 81.

Whatever the actual extent of plaintiff's rights may in fact be, they have been vested for thirty years. They are not executory, but executed. It appears that defendants never questioned the use made of their premises until the three decades had fully elapsed. In the natural course of events, evidence that once existed is not now obtainable. Three persons, who, if alive, would be important witnesses in this case, have, according to the evidence, departed this life. This action is one in equity. Plaintiff asks only that the *status quo* be continued as it has existed for thirty years. Defendants ask for restoration as the situation was in 1906 and prior thereto.

But, "Equity regards stale claims with disfavor and long lapse of time, unexplained, even when not of itself a bar to relief, operates by way of evidence against the justice of the right asserted, and not only subjects plaintiff's case to severer scrutiny than it would otherwise receive, and exacts of him a higher degree of proof than would otherwise be required, but moves the court to look with more indulgence on the evidence adduced by defendant. Long lapse of time, if unexplained, may create or justify a presumption against the existence of validity of plaintiff's right and in favor of the adverse right of defendant; or a presumption that if plaintiff was ever possessed of a right, it has been abandoned or waived, or has been in some manner satisfied, or that plaintiff has assented to or ac-

quiesced in the adverse right of defendant; or a presumption that the evidence of the transaction in issue has been lost or become obscured, or that conditions have changed since the right accrued, and that in consequence the adverse party would be prejudiced by its enforcement." 21 C. J. 226.

In the discussion of this question, another text states, in part: "Where important evidence in behalf of the defendant has been lost during the delay of the complainant, he will generally be barred from relief. The loss may result from the death or incapacity of some of the witnesses. Again, the delay may be so long that under the circumstances many of the important facts have become obscured. To allow a complainant relief in such cases would frequently risk a great hardship to innocent parties. Consequently, the courts decline to interfere." 4 Pomeroy, Equity Jurisprudence (4th ed.) p. 3425. And, see, also, note 68 appearing under the foregoing text, p. 3425.

Then again, "It is an ancient and well-settled doctrine of the common law that a mere license, whether by deed or by parol, is revocable at pleasure." 17 R. C. L. 576, sec. 89. But, to this rule there always has been two recognized exceptions, viz.: Where the license is executed, and where by reason of the expenditures by the licensee on the strength of the license, it would otherwise be inequitable to permit the licensor to effect a revocation. 17 R. C. L. 576, sec. 89.

Thus it was that, "in an action on the case," recovery was denied where the area which belonged to the defendant's house had been inclosed and covered by a skylight placed above the plaintiff's window by means of which the light and air were prevented from entering plaintiff's window, but with the express consent and approbation of plaintiff obtained before the inclosure was made, and plaintiff also gave leave to have part of the frame-work nailed against his wall. But some time after it was finished plaintiff objected to it and gave notice to have it removed. *Winter v. Brockwell,* 8 East, 308. In the last-cited case,

Lord Ellenborough, C. J., stated that the license given by the plaintiff to erect the skylight having been acted upon by defendant, and expenses incurred, could not be recalled and the defendant made a wrong-doer, at least without putting him in the same situation as before by offering to pay all the expenses which had been incurred in consequence of it. See, also, *Woodbury v. Parshley,* 7 N. H. 237, 26 Am. Dec. 739; *LeFevre v. LeFevre,* 4 Serg. & Raw. (Pa.) *241; *Giles v. Simonds,* 15 Gray (Mass.) 441, 77 Am. Dec. 373.

On this record defendants contend that the rights possessed by plaintiff are revocable, "at the will of the licensor, whatever expenditures licensee may have made, provided the licensee has reasonable notice and opportunity to remove his fixtures and improvements." This wholly ignores the situation created by the lapse of thirty years as disclosed by the evidence in this case. These facts and conditions, fairly established, appeal strongly to the conscience of a court of equity for the continued maintenance of the *status quo,* after important witnesses are dead and the essential elements of the original transaction are vague and undetermined by the proof.

We have carefully considered the discussion of certain Nebraska cases by defendants in their brief, and in learned argument at the bar of this court. We do not find defendants' contention convincing. Besides, for more than a quarter of a century these cases have announced a principle which at this time constitutes a rule of property in this state.

From these authorities, so discussed by defendants, we deduce the conclusion that, even if the original license granted by defendant church to plaintiff's predecessors rested wholly in parol, the open entry on the church premises by the licensee (pursuant to and in conformity with the terms of such license and with actual knowledge of the licensor), the constructing of the improvement here in suit, substantial in material and permanent in plan, at the sole cost of the licensee, followed by thirty years un-

disturbed use, under the facts disclosed by this record, render such license wholly irrevocable. *Arterburn v. Beard*, 86 Neb. 733, 126 N. W. 379; *Gilmore v. Armstrong*, 48 Neb. 92, 66 N. W. 998; *Johnson v. Sherman County Irrigation, Water Power and Improvement Co.*, 71 Neb. 452, 98 N. W. 1096; *Severson v. McKenzie*, 122 Neb. 827, 241 N. W. 774; 2 Tiffany, Real Property (2d ed.) p. 1208.

It follows that the judgment of the district court and its decree as entered are approved.

AFFIRMED.

WILLIAM C. HEETER, APPELLANT, V. SAM NISI ET AL., APPELLEES.

278 N. W. 271

FILED MARCH 4, 1938. No. 30228.

1. **New Trial.** The statute requiring a motion for a new trial to be filed during the term at which the verdict, report or decision is rendered is mandatory.
2. ———. Where a motion for a new trial is filed after the adjournment of the term, it is a nullity even if filed within three days of the rendition of the verdict, report or decision appealed from, unless it is within the exceptions stated in section 20-1143, Comp. St. 1929.

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

Mossman, Anderson & Meissner and *John A. McKenzie*, for appellant.

Wear, Boland & Nye, contra.

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

CARTER, J.

This is an action to recover damages for personal injuries alleged to have been sustained by plaintiff at Hiawatha, Kansas, on February 18, 1935, while plaintiff was riding in an automobile owned by the defendant Nisi and

operated by the defendant Pattavina. At the close of plaintiff's case, the defendants moved to dismiss the action for the reason that the evidence was insufficient to sustain the allegations of plaintiff's petition, which motion was sustained and the action dismissed. From the overruling of his motion for a new trial, plaintiff appeals.

The record discloses that the action was dismissed by the trial court on April 30, 1937, and that a motion for a new trial was filed on May 3, 1937. The record further shows that the trial was had at the February, 1937, term of court and that said term adjourned *sine die* on May 1, 1937.

The section of the statute applicable to the above facts is as follows: "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." Comp. St. 1929, sec. 20-1143. Newly discovered evidence is not alleged as a ground for a new trial in the motion filed, nor is there any showing that its filing in due time was unavoidably prevented.

In *Carmack v. Erdenberger*, 77 Neb. 592, 110 N. W. 315, this court held: "The statute requiring a motion for a new trial to be in writing and filed during the term at which the 'verdict, report or decision' is rendered, and, except for the cause of newly discovered evidence, within three days after the verdict or decision is rendered, unless unavoidably prevented, is mandatory."

In *Harris v. Jennings*, 64 Neb. 80, 89 N. W. 625, this court said: "A motion for a new trial must, in all cases, except for newly discovered evidence, be filed at the term at which the finding or decision sought to be vacated by the motion is rendered. When a motion for a new trial is overruled, because not filed within the time required by statute, all matters necessarily included therein as grounds

for a new trial are unavailing on review by proceedings in error."

Other cases to the same effect are *Murten v. Garbe*, 93 Neb. 589, 141 N. W. 146; *Splittgerber Bros. v. Skinner Packing Co.*, 119 Neb. 135, 227 N. W. 446.

We are therefore obliged to hold that a motion for a new trial must be filed at the same term of court that the verdict, report or decision was rendered, and, in addition to this requirement, within three days from the rendition of the verdict, report or decision appealed from. 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. In the case at bar the motion for a new trial was filed within three days after the rendition of the judgment but not within the same term of court. The filing of the motion for a new trial therefore availed the plaintiff nothing. The pleadings are sufficient to sustain the judgment rendered, and, under such circumstances, it ought to be and hereby is

AFFIRMED.

HAROLD E. WILSON, APPELLANT, V. BROWN-MCDONALD COMPANY ET AL., APPELLEES.

278 N. W. 254

FILED MARCH 4, 1938. No. 30329.

1. **Workmen's Compensation:** COMPENSABLE INJURIES. Section 48-121, Comp. St. 1929, after detailing the degree of disability, the awards therefor, and the specific schedule of awards for the loss of certain members of the body, and the loss of use and function of such members, uses this language: "Should the employer and employee be unable to agree upon the amount of compensation to be paid in cases not covered by the schedule," etc. This language, construed and given a liberal construction, as required within the meaning and interpretation of the workmen's compensation law of Nebraska, includes severe facial disfigurement.
2. ———: ———. Section 11, ch. 57, Laws 1935, provides: "All disputed claims for workmen's compensation shall be submitted to the Nebraska workmen's compensation court for a finding, award, order or judgment." This provision *held* to include

cases not covered by the schedule contained in section 48-121, Comp. St. 1929.

3. ———: COMPENSATION COURT: JURISDICTION. Section 6, ch. 57, Laws 1935, provides that the compensation court may adopt all reasonable rules necessary for carrying out the intent and purpose of the act, and shall administer and enforce all of the provisions of the Nebraska workmen's compensation law and acts amendatory thereof, except such as are committed to the courts of appellate jurisdiction.

4. ———. In view of the language used in section 48-121, Comp. St. 1929, and in section 6, ch. 57, Laws 1935, pertinent to a disputed question between the employer and the employee "in cases not covered by the schedule," an appellate court, in trying the case *de novo*, has power and authority to determine the rights of the respective parties under the law relating to cases not covered by the schedule in such workmen's compensation act.

5. ———: COMPENSABLE INJURIES. Disfigurement resulting from severe third-degree burns to the face is to be considered in the light of the general statutory purpose to provide compensation for personal injuries, and is within the meaning of the language contained in section 48-121, Comp. St. 1929, viz., "in cases not covered by the schedule."

6. ———: ———. It is the consequences of disability flowing from personal injury that the workmen's compensation act of Nebraska seeks to alleviate. Comp. St. 1929, secs. 48-101, 48-121.

7. ———: ———. Impairment of ability to earn may result from ineligibility to obtain work to do, as well as from inability to do procurable work.

8. Master and Servant: WORKMEN'S COMPENSATION LAW: CONSTRUCTION. It has long been the policy of this court to give a liberal construction to the workmen's compensation law, so that its beneficent purposes may not be thwarted by technical refinement of interpretation. *Maryland Casualty Co. v. Geary*, 123 Neb. 851, 244 N. W. 797.

9. ———: ———: TOTAL DISABILITY. "A workman, who, solely because of his injury, is unable to perform or to obtain any substantial amount of labor, either in his particular line of work, or in any other for which he would be fitted except for the injury, is totally disabled within the meaning of the workmen's compensation law." *Wingate v. Evans Model Laundry*, 123 Neb. 844, 244 N. W. 635.

10. ———: ———: MEDICAL AND HOSPITAL SERVICES. Where the evidence discloses that further medical, hospital and surgical services would not definitely improve the condition of an injured

employee, and where such improvement would be conjectural, the employer's liability, under section 48-120, Comp. St. 1929, to furnish reasonable medical and hospital services and medicines, as and when needed, ceases.

11. ———: ———: PENALTY. "Where a reasonable controversy exists between an employer and an employee, as to the former's liability under the workmen's compensation act, the employer is not liable for the penalty for waiting time during the time the cause is pending in the courts for final determination." *Claus v. DeVere*, 120 Neb. 812, 235 N. W. 450.

12. ———: ———: ATTORNEY'S FEES. An allowance of attorney's fees to employee's attorney is erroneous, where the evidence discloses that an employer has not refused or neglected to pay compensation, or appealed from an award made to the employee by the workmen's compensation court or the district court. Comp. St. Supp. 1937, sec. 48-125.

APPEAL from the district court for Merrick county: LOUIS LIGHTNER, JUDGE. *Reversed, with directions.*

H. G. Wellensiek, for appellant.

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

Heard before GOSS, C. J., ROSE, EBERLY, CARTER and MESSMORE, JJ., and WILLIAM A. DAY, District Judge.

MESSMORE, J.

This is an appeal from the district court for Merrick county, wherein such court affirmed an award made by the compensation court, and in addition thereto allowed attorney's fees for the claimant's attorney in the sum of $300. The claimant appeals to this court from such award and finding as made by the district court, and the defendants cross-appeal on the question of attorney's fees. The pleadings are proper in form to present the issues contended for in this court.

A brief summary of the evidence, as disclosed by the record, follows: The accident in question occurred on September 7, 1931. The claimant had graduated from high school; had received one and a half years of college education; was 20 years old at the time of the accident;

had done retail sales work in a grocery store, clothing store and in obtaining work for a laundry. His wages were $75 a month. He had worked steadily for a period of two years. The accident was caused when the claimant was taking some papers to be burned in an incinerator back of the store of the Brown-McDonald Company, and when he put the papers into a barrel that was used as an incinerator there was an explosion, as a result of which he received severe third-degree burns over his entire face. He received emergency treatment, was taken by ambulance to St. Francis Hospital in Grand Island, Nebraska, remained there for three months under the care of doctors; then placed in the care of a plastic surgeon, at Milwaukee, Wisconsin, remained there from January, 1932, until the beginning of August, 1935, a great portion of which time was spent at St. Mary's Hospital in Milwaukee, and subsequently he was sent to a hotel in Milwaukee. The insurance carrier paid the sum of $11.54 a week as compensation up to August 10, 1935, when payments ceased. The insurance carrier then endeavored to procure a settlement with the claimant, in which they offered him $800 in full settlement, which was declined.

There appears in the record the testimony of John Knickrehm, retail grocer, of E. E. Clark, grocer, of the managers of the Brown-McDonald store and the Penney store, and of L. S. Norstedt, a merchant, and R. Tooley, a merchant, to the effect that they would not employ the claimant in their places of business on account of his facial disfigurement, which is described as "terrible." The only employment that the claimant has had since the accident was invoicing for a few days. Some argument is made to the effect that the claimant has not made a sincere effort to obtain employment. The fact remains that the concerns for whom he worked at the time of his accident, and which employ many people in the different departments of their business, such as bookkeepers, clerks, and deliverymen, have not reemployed the claimant. The plastic surgeon's testimony is that the appearance of claimant's

face is steadily improving and the skin is looking better; that the surgical treatments stopped on August 10, 1935, and that the disfigurement would gradually lessen; that it was difficult to estimate the amount of surgical work that may be required, but that a person suffering from facial disfigurement is ordinarily sensitive about it, and where there is some detail work to be done, if it can be done handily after a certain healing period, then it might be the thing to do; that he had not discharged the claimant.

The testimony of the doctor, called for defendant, is, in substance, that the claimant is not suffering from any physical disability and is not physically incapacitated to perform manual labor. The witness believed that the disfigurement could be lessened by a further operation, and that it was a handicap to claimant in employment where he would have to meet the public, but that he had such a personality that people would learn to like him; that certain plastic treatment ought to be had because the "inner angle of his left eye is broadened, that can be brought down, his left eye can be rather easily fixed;" that the condition of his skin is better.

This case is tried *de novo* in this court. The record discloses that, previous to the award made by the compensation court and the district court, there had been expended compensation to the claimant for 204 weeks, amounting to the sum of $2,354.16, and in addition thereto medical expenses in the sum of $10,924.91, or a total expenditure of $13,279.07. The hearing before the compensation court was had on November 25, 1936, award being made on March 16, 1937, granting claimant temporary total disability at $11.54 a week from September 7, 1931, to November 25, 1936, less $2,354.16 paid, plus $190 paid out by the claimant for living expenses, and the compensation court found that claimant was not entitled to compensation for disfigurement and made no allowance for attorney's fees. Claimant then appealed to the district court, praying for a modification and additional compensation; that is, for total temporary disability, until his permanent dis-

ability was ascertained; for total permanent disability; for additional medical and surgical and hospital treatments; for 50 per cent. penalties for compensation unpaid; and for attorney's fees. The district court sustained the compensation court in its findings and allowed $300 attorney's fees.

The claimant seeks to reverse the finding and holding of the district court that the claimant was not entitled to compensation for permanent total disability for severe facial disfigurement.

The workmen's compensation act of the state of Nebraska does not contain specific language having to do with facial disfigurement of a severe nature. Claimant cites section 48-121, Comp. St. 1929. This section provides a schedule of compensation, established for injuries resulting in disability. It then gives a résumé of the amount of wages and *per centum* thereof that may be recovered for total disability not to exceed 300 weeks; provides for total disability for the lifetime of the employee and fixes the *per centum* for partial disability followed by total disability, and for disability partial in character, with the exception of particular cases which are set out in subdivision 3 of said section. Subdivision 3 fixes amounts for disability resulting from permanent injury, in addition to the amount paid for temporary disability; "provided, however, the compensation for temporary disability shall cease as soon as the extent of the permanent disability is ascertained;" then fixes compensation for the loss of certain members of the body, and further fixes compensation, amount thereof and the length of time such payments are to run, for the loss of the use and function of certain members of the body, etc.

In section 48-121, Comp. St. 1929, we find this language: "Should the employer and the employee be unable to agree upon the amount of compensation to be paid *in cases not covered by the schedule,* the amount of compensation shall be settled according to the provisions of section 3680 (48-139)." (Italics ours.) Section 48-139 has been repealed

(Laws 1935, ch. 57, sec. 24), and in place thereof we have section 13, ch. 57, Laws 1935, which section enlarges upon section 48-139 to some extent, qualifies the procedure and makes some addition thereto, but retains the remedy provided in section 48-139 in all cases of dispute with reference to workmen's compensation. In addition thereto, section 11, ch. 57, Laws 1935, provides: "All disputed claims for workmen's compensation shall be submitted to the Nebraska workmen's compensation court for a finding, award, order or judgment."

Section 48-101, Comp. St. 1929, contains this provision: "When personal injury is caused to an employee by accident arising out of and in the course of his employment," etc. Thus, where an employee receives personal injuries in the course of his employment, section 48-121, Comp. St. 1929, provides for compensation to be paid him for such personal injuries. The personal injury in this particular case not having been designated by the act, we then refer to that part of the act, as above set out, namely, "*in cases not covered by the schedule,*" which necessarily means all other cases that are not designated in the schedule but which would naturally fall within the provisions of the act.

Section 6, ch. 57, Laws 1935, provides, in substance, that the compensation court may adopt all reasonable rules necessary for carrying out the intent and purpose of the act, and shall administer and enforce all of the provisions of the Nebraska workmen's compensation law and acts amendatory thereof, except such as are committed to courts of appellate jurisdiction. The appellate court, in a trial *de novo,* would then have the same power and authority, as granted to the compensation court by law, to fix the degree of disability and determine the award, if any, due claimant.

In the case of *Everhardt v. Newark Cleaning & Dyeing Co.,* 117 N. J. Law, 581, 189 Atl. 926, involving disfigurement of an employee's face badly scarred by acid, the New Jersey supreme court held the facial disfigurement

not compensable, even though it lessened the employee's earning power, since the New Jersey statutes provided for compensation for disability and for disability alone, disability defined in that case being that which disqualifies an employee from doing work, in whole or in part. The opinion was filed by the supreme court of New Jersey February 6, 1937, and was definite in that if disfigurement, standing alone, is to be made the basis of compensation the same must be done by the legislature and not by an extension of the act by judicial construction. The opinion cited provisions of the New Jersey statutes, which we shall later refer to. The case of *Everhardt v. Newark Cleaning & Dyeing Co.* was subsequently taken to the court of errors and appeals of New Jersey, and an opinion in that court released on September 22, 1937, in which the holding by the supreme court of New Jersey was reversed. *Everhardt v. Newark Cleaning & Dyeing Co.*, 119 N. J. Law, 108, 194 Atl. 294.

It is contended by the appellees that the holding in the *Everhardt* case in the court of errors and appeals was to the effect that because said court had, in a memorandum opinion 15 years previously, permitted recovery for facial disfigurement, the nonexercise of the amendatory power by the legislature during the intervening period is sufficient legislative acquiescence and ratification. A careful reading of the opinion by the court of errors and appeals discloses the following: The New Jersey act provided for compensation according to a schedule which is contained in paragraph 11 of such act, which paragraph was amended by Pamph. L. 1928, p. 281, section **236-11, Comp. St. Supp. 1930, and provides (a) "for injury producing temporary disability," (b) "for disability total in character and permanent in quality," and (c) "for disability partial in character, but permanent in quality," to be based on the extent of such disability. This latter subdivision then goes on to schedule specific compensation for loss of a member, or where the usefulness thereof or of any physical function is permanently impaired proportionate compensation shall

be paid. Similar language appears in our compensation law. Comp. St. 1929, sec. 48-121.

Referring to the language "in all lesser or other cases involving permanent loss," which appears in the new Jersey law, the court of errors and appeals, in *Everhardt v. Newark Cleaning & Dyeing Co.*, 119 N. J. Law, 108, 194 Atl. 294, said: "If it be held that the significance of the adjective 'lesser' is limited by the prior provisions for arbitrary allowances for the loss of a member or physical function, without regard to actual disability during the prescribed compensation period, the subsequent adjective 'other,' qualifying the same noun 'cases,' is demonstrative of a legislative purpose to include all other personal injuries 'involving permanent loss,' in the sense of disability." The construction of this language in the New Jersey court seems to be the principal reason for the court's decision. While the language in our statute is not identical with that of the New Jersey statute, it is so closely related that there is very little distinction, if any, in the meaning of the various types of relief granted. Instead of using the words "*in all lesser or other cases involving permanent loss*," as found in the New Jersey compensation law, the Nebraska law, after setting forth the schedule, uses the words: "Should the employer and the employee be unable to agree upon the amount of compensation to be paid *in cases not covered by the schedule*."

The test of liability, as stated by the New Jersey court of errors and appeals in the *Everhardt* case, "is not the immediate impairment of earning power; it is rather the loss ensuing from personal injury which detracts from the 'former efficiency' of the workman's 'body or its members in the ordinary pursuits of life.' " The English case of *Ball v. William Hunt & Sons, Ltd.*, (1912) App. Cas. 496, 5 B. W. C. C. 459, was cited in the opinion. Without discussing the English case, suffice it to say that the court placed an interpretation on the British workmen's compensation act, permitting recovery for facial disfigurement, when the act had no specific provision therefor. The House

of Lords has apparently settled the question because it has, in unequivocal terms, laid down the proposition that incapacity for work may mean physical inability to do work so as to earn wages, or it may mean inability to secure employment, due to the belief of employers in the unfitness of the workman to perform work owing to the injuries they perceive he has sustained. The court was interpreting the 1906 British workmen's compensation act which was a prototype of the New Jersey act, as stated in the *Everhardt* case. The New Jersey court of errors and appeals, in allowing recovery in the *Everhardt* case, followed the English case of *Ball v. William Hunt & Sons, Ltd., supra.*

Appellant cites *Beal v. El Dorado Refining Co.*, 132 Kan. 666, 296 Pac. 723. Plaintiff in that case suffered injuries constituting a partial loss of the sight of one eye, and a partial loss of hearing in both ears, and was disfigured for life. The supreme court of Kansas applied the schedule and permitted recovery for the disfigurement, holding that impairment of earning power may result in ineligibility to obtain work to do, as well as inability to perform the work. The court in that case was interpreting paragraph 22 of the Kansas workmen's compensation act (R. S. Supp. 44-510), and permitted recovery for disfigurement under paragraph 22, wherein we find this language: "*Should the employer and the employee be unable to agree upon the amount of compensation to be paid in any case of injury not covered by the schedule,* the amount of compensation shall be settled according to the provisions of this act as in other cases of disagreement." (Italics ours.) Then follow certain provisos, which it is unnecessary to relate here. The value of this Kansas case to the case at bar is to disclose that the language in the Kansas compensation act is similar to that in section 48-121, Comp. St. 1929, wherein it was stated, "*in cases not covered by the schedule.*" Neither our compensation act nor that of Kansas covered facial disfigurement, but recovery was permitted by the supreme court of Kansas in the above case under almost

the identical language as contained in section 48-121, *supra*.

Appellant cites *Ossic v. Verde Central Mines*, 46 Ariz. 176, 49 Pac. (2d) 396, filed September 23, 1935. In the state of Arizona disfigurement was included in the original compensation act, which was adopted and included in the Constitution of the state. The court said in the opinion that the legislature recognized that all injuries were not covered by the schedule in Arizona, and that "for unscheduled injuries, either total or partially permanent in their nature, compensation shall be awarded in accordance with the facts of the case." The value of the cited case is that the Arizona court stressed the fact that one must look to the act itself and its meaning, and if there be no specific provisions relative to the subject-matter, the general purpose of the act should be so construed as to effectuate that purpose in justice to all interested parties.

Appellant cites *Maryland Casualty Co. v. Geary*, 123 Neb. 851, 244 N. W. 797, wherein this court said (p. 855): "It has long been the policy of this state to give a liberal construction of the workmen's compensation law, so that its beneficent purposes might not be thwarted by technical refinement of interpretation." And appellant also cites *McGuire v. Phelan-Shirley Co.*, 111 Neb. 609, 197 N. W. 615; *Baade v. Omaha Flour Mills Co.*, 118 Neb. 445, 225 N. W. 117; *Speas v. Boone County*, 119 Neb. 58, 227 N. W. 87, holding to like effect.

Appellant cites *Wingatè v. Evans Model Laundry*, 123 Neb. 844, 244 N. W. 635, wherein we held: "A workman, who, solely because of his injury, is unable to perform or to obtain any substantial amount of labor, either in his particular line of work, or in any other for which he would be fitted except for the injury, is totally disabled within the meaning of the workmen's compensation law." This holding is quoted in *Flesch v. Phillips Petroleum Co.*, 124 Neb. 1, 244 N. W. 925. In the above cases, the injuries sustained by the employees related to bodily functions which prevented them from carrying on the work for which they had been previously trained. The principle of

law announced would be the same and apply to any injury suffered by an employee.

Appellees contend that to allow claimant to recover for total disability would amount to judicial legislation, in supplying that which the legislature had failed to include in the act. They cite *Hyett v. Northwestern Hospital,* 147 Minn. 413, 180 N. W. 552, filed December 24, 1920. The Minnesota compensation act did not contain a provision covering facial disfigurement. The plaintiff sought to bring an action for common-law negligence. The court held, in effect, that, having predicated his action on the compensation act, he could not bring an action for common-law negligence; that, if the compensation act did not cover facial disfigurement, it was within the province of the legislature to so amend the act. The act was amended in 1923 to cover facial disfigurement and an award made therefor.

Appellees cite *Boyer v. Crescent Paper Box Factory,* 143 La. 368, 78 So. 596. Without detailing the facts in that case, except to say that plaintiff was severely injured when she caught her hair in some machinery and was scalped, the original compensation act did not provide for compensation for disfigurement to the face or head. The plaintiff contended that she did not come within the provisions of the act. Subsequently, the act was amended to cover facial disfigurement of a serious and permanent nature. The court held that the subsequent amendment, which included the injury suffered by the plaintiff, did not affect her previous right to maintain a common-law action outside of the original act, where said action was started previously to the amendment.

In *Shinnick v. Clover Farms Co.,* 169 App. Div. 236, 154 N. Y. Supp. 423, cited by appellees, the compensation act did not provide for recovery for the loss of a part of an ear. The court said: "If the schedules do not cover the injury suffered by an employee he does not fall within the purview of the act and cannot claim compensation under it, for the act provides no scale or gauge by which to de-

termine what compensation should be provided." It was said that such an injury, having no tendency to impair the efficiency of the injured person in his employment, was not covered by the act.

In *Matter of Sweeting v. American Knife Co.*, 226 N. Y. 199, 123 N. E. 82, cited by appellees, the court held that an amendment to the workmen's compensation act providing for an award for serious facial or head disfigurement was constitutional so far as facial disfigurement was related to the loss of earnings. In *American Knife Co. v. Sweeting*, 250 U. S. 596, which affirmed *Matter of Sweeting v. American Knife Co., supra,* the court said (p. 601):

"Even were impairment of earning power the sole justification for imposing compulsory payment of workmen's compensation upon the employer in such cases, it would be sufficient answer to the present contention to say that a serious disfigurement of the face or head reasonably may be regarded as having a direct relation to the injured person's earning power, irrespective of its effect on his mere capacity for work.

"Under ordinary conditions of life, a serious and unnatural disfigurement of the face or head very probably may have a harmful effect upon the ability of the injured person to obtain or retain employment. Laying aside exceptional cases, which we must assume will be fairly dealt with in the proper and equitable administration of the act, such a disfigurement may render one repulsive or offensive to the sight, displeasing, or at least less pleasing, to employer, to fellow employees, and to patrons or customers."

We have quoted the above language to disclose the trend of thought in such cases.

Appellees cite *Hull v. United States Fidelity & Guaranty Co.*, 102 Neb. 246, 166 N. W. 628, where a lineman, while working on a pole, fell to the ground and sustained a compound fracture of his left thigh bone and other injuries. As a result, his left leg was shortened an inch or more and his left knee and ankle were rendered stiff and incapable

of normal motion. He had no other business than that of a telephone lineman and was disabled thereafter from following that occupation. This court permitted recovery for the loss of a leg, 50 per cent. of the amount of his wages for 200 weeks, stating that the compensation for permanent loss of the use of a leg, unaccompanied by any other physical injury or loss of health, cannot exceed the amount specified under the law. This recovery was under a schedule as provided by law for the loss of a leg.

Appellees also cite *Schroeder v. Holt County,* 113 Neb. 736, 204 N. W. 815. The court held, under subdivision 3, sec. 3044, Comp. St. 1922 (now section 48-121, Comp. St. 1929): "An employee who receives an injury not affecting any other part of his person, but totally and permanently destroying the use of one leg, is only entitled to recover as if the leg had been removed." Such injuries may be so defined and classified that the appropriate compensation may, with a fair average of justice, be estimated in advance. Cases of severe facial disfigurement have their special problems. It is difficult, but not impossible, to define and classify the injuries.

The above cases can be distinguished from the case at bar, in that the instant case is not covered by schedule, but recovery is permitted by the use of the language, "in cases not covered by the schedule," contained in section 48-121, Comp. St. 1929, which leaves the matter of award and the degree of disability for this court to determine. In this connection we must remember that the legislature, when it enacted the compensation act, took from the claimant his common-law action for damages for negligence. Is it reasonable to believe that the legislature intended no compensation for him, leaving him without a remedy? The word "disability" in the law means impairment of earning capacity and not loss of a member. *Matter of Marhoffer v. Marhoffer,* 220 N. Y. 543, 116 N. E. 379. Disability has been defined as being that which disqualifies an employee from doing work, in whole or in part. *Everhardt v. Newark Cleaning & Dyeing Co.,* 119 N. J. Law, 108, 194 Atl. 294.

In the instant case, the evidence discloses that the claimant was severely burned about the face and shockingly disfigured. To say the least, his facial appearance and disfigurement are of such a character that he will be greatly handicapped in procuring employment in the open labor market. The evidence adduced in the record is clear in this respect. There can be no doubt of his total disability prior to the time the payments of compensation ceased. He had worked as a salesman for grocery and clothing concerns and had solicited business for a laundry. He had worked steadily for a period of two years. Such employment was the only employment for which he was equipped. His injuries are the sole and only reason for his inability to obtain or perform work in the line for which he has been trained or is fitted. If he obtained employment, he could not perform the work. The very nature of his work would require him to meet the public, where appearance most assuredly would seriously handicap him in using his ability as a salesman and place him at a great disadvantage in competition with other salesmen, and, in fact, would rule him out altogether.

Appellees set forth many occupations and professions that claimant might learn and follow, most of which would require a degree of technical knowledge and training, for which he is totally unfitted, and his prospects of earning a livelihood in such occupations would be speculative and conjectural.

Appellees cite several instances where different states have amended their compensation laws to cover facial disfigurement of a severe nature, and have fixed therein the length of time payments were to run and the maximum amount to be paid therefor, and point out that the claimant has received more than any of such states allow for disfigurement. Apparently, this is true, and, without question, appellees have made a sincere effort to rehabilitate the claimant to take his place in the world. Without repeating, suffice it to say that the very nature of the third-degree burns, resulting in the severe facial disfigurement

of the claimant, totally and permanently disable him, and for the reasons stated in this opinion we believe that he was totally disabled from the date of the accident, and that, as provided by section 48-121, Comp. St. 1929, he is entitled to recover for a period of 300 weeks for total disability the sum of $11.54 a week, the same constituting 66 2/3 per cent. of his wages at the time of the injury, and after the period of 300 weeks he is entitled to receive 45 per cent. of the amount of his wages at the time of the injury, or the sum of $7.79 a week, for the remainder of his life for total disability. Comp. St. 1929, sec. 48-121. Defendants are to be credited with compensation paid.

The appellant contends that he is entitled to additional medical, surgical and hospital expenses. An examination of the evidence in this respect clearly discloses that the assistance that may be given by the plastic surgeon would, to a minor extent, be in the appearance of the claimant, and that improvement is doubtful.

The appellant contends that penalties should be assessed against defendants. A reasonable controversy existed between the claimant and the defendants, and an examination of the record discloses that the conduct of the defendants was, at no time, such that a penalty should be attached. Without citing the cases, we are convinced that a reasonable controversy existed between the claimant and the defendants. *Claus v. DeVere,* 120 Neb. 812, 235 N. W. 450.

An allowance of attorney's fees to employee's attorney is erroneous where the evidence discloses that an employer has not refused or neglected to pay compensation, and has not appealed from an award made to the employee by the workmen's compensation court, or the district court.

The judgment of the district court is hereby reversed, and such court is directed to enter judgment in conformity with this opinion.

REVERSED.

ALPHA ROGERS, APPELLANT, V. GAYLE CASADY ET AL., APPELLEES.
278 N. W. 267

FILED MARCH 4, 1938. No. 30204.

1. **Specific Performance.** Where it is sought to enforce an oral agreement of a person now deceased to convey or devise lands, the proof to establish the circumstances of such oral agreement must be clear, satisfactory and convincing.
2. **Appeal.** 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.
3. **Witnesses.** A witness is not disqualified merely because of being related to the plaintiff; relationship to the adverse party may affect his credibility, but not his competency as a witness.

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

William Niklaus, for appellant.

Jack Devoe and *W. A. Robertson, contra.*

Heard before GOSS, C. J., ROSE, DAY, PAINE, CARTER and MESSMORE, JJ., and WILLIAM A. DAY, District Judge.

WILLIAM A. DAY, District Judge.

This is an appeal from the district court for Lancaster county, Nebraska, from a judgment denying the plaintiff specific performance of an alleged oral contract between the plaintiff and Fred W. Casady, now deceased, the action being brought by the plaintiff against Gayle Casady, as son and sole heir at law of Fred W. Casady and the administrator of the estate of said deceased, and Matilda Casady, wife of Gayle Casady.

The plaintiff alleges as her cause of action against the defendants that in the fall of the year 1932 Fred W. Casady, by parol agreement, hired the plaintiff as a housekeeper and nurse to attend the household duties at his farm home during the remainder of his natural life, and

agreed to give or leave to the plaintiff, as compensation for such services, all of his property, both real and personal, of which he was possessed at the time of his death. She further alleges that she accepted this offer, and devoted all her time and attention to acting as housekeeper and nurse to said Fred W. Casady until the time of his death on the 2d day of June, 1936. The defendants, for their answer, deny generally these allegations.

The lips of Fred W. Casady having been sealed in death, and those of the plaintiff, Alpha Rogers, having been sealed by the law, the plaintiff offers the testimony of one principal witness, I. E. Wollman, her brother-in-law, in proof of her alleged contract with the deceased. This testimony consisted of three conversations which are alleged to have occurred between the deceased and this witness for the plaintiff. This is the only direct evidence offered as to the actual making of the contract in 1932. The witness Wollman testified that he had been acquainted with Mr. Casady for some time, and that in June, 1932, he had his first conversation with him relative to the employment of Mrs. Rogers, in which Mr. Casady told him that he wished Mrs. Rogers to work for him, and that he would pay her no salary, but, "'If she will stay and do my work and look after me and tend to me when I am sick and stay right here until I kick off,' that was his word, 'kick off,' 'She can have everything there is here. I have nobody else to leave it to,' he says." He further testified that at a subsequent time he had another conversation with the deceased Casady, as follows: "Well, I asked him how he made it with Mrs. Rogers, and he says, 'I put that proposition up to her just like I told you, the same thing, and she accepted it,' and she says, 'I think we will get along fine,' and she went out on that contract." He further testified that on a subsequent date, in the presence of his wife, the decedent, Mr. Casady, and the plaintiff, a further conversation took place, as follows: "I says to him, I says, 'Did she go out with the same understanding you talked to me about at my office?' He says, 'Yes, sir.' Well, I says, 'Don't you

think you ought to have a written statement of that fact so it would be better for both of you?' And he said, 'No,' he says, 'You are a witness to this,' and he says, 'I will leave it to you, if you are good enough to leave it to me.' I says, 'It is all right.' Well, I says, 'It is perfectly satisfactory to me then. I don't want no trouble about it on my part, she could go out;' and turned around and asked her if that was what Fred told her, * * * and she said, 'Yes,' that is what he told her."

The plaintiff called sundry witnesses who testified of alleged statements made by the deceased Casady at a later time as to what he intended to do with his property, and to the effect that he intended to give his property to Alpha Rogers, the plaintiff, but not that he was indebted to the plaintiff in any way. No further testimony was offered relative to any contract existing between the plaintiff and the decedent Fred W. Casady. It is also to be noted that two of the witnesses who gave this class of testimony are a sister and a brother-in-law, respectively, of the plaintiff.

To meet this testimony, the defendants offered the testimony of a Mr. J. W. Easton, for the purpose of impeaching the testimony of Mr. Wollman, the brother-in-law and witness for the plaintiff. Mr. Easton gave his occupation as superintendent of the Iowa-Nebraska Light & Power Company, and testified, in substance and effect, that he was present in the bank at Havelock, Nebraska, at a time when the safety deposit box of the deceased Fred W. Casady was opened; that he had a conversation with Mr. Wollman, which was as follows: "I asked him if he thought there was a will made out and some place by Mr. Fred Casady, and he said that he didn't know of any will. In fact, he said 'I have never heard Mr. Casady say anything about the farm or what is to become of it or anything of that nature. I never have heard a conversation in which Mr. Casady made a statement as to what he wanted done with the farm.'"

The defendants also offered the testimony of two additional disinterested witnesses, to the effect that the plain-

tiff made statements that all she expected was wages, and that she expected to leave the farm and seek employment elsewhere upon the death of Fred W. Casady. The defendants also offered in evidence a statement in the handwriting of Alpha Rogers, the plaintiff, on a calendar, which reads, "Fred gave me check." The defendants further offered in evidence the written notice to tenants of Fred W. Casady, signed by the plaintiff, in which she recognizes them as tenants of Fred W. Casady, which the defendants claim discredits the plaintiff's contention that she was the owner and had the possession of the farm in 1932; and they further offered the testimony of several witnesses which clearly shows she had nothing to do with the farm and did not have possession of it until the death of Fred W. Casady, when she took possession of the same. This testimony tends to show that all leases for the years 1935 and 1936 were made by the tenants with Fred W. Casady.

The defendants further offered in evidence proof of the filing of a claim by the plaintiff in the county court covering all of the time that she was at the Casady place, and for all the services that she rendered Fred W. Casady between 1932 and 1936.

At the time that the first conversation took place between the plaintiff's witness Wollman and the deceased with reference to the employment of the plaintiff by the deceased, the plaintiff herself was not present, and there is no showing made that Mr. Wollman was an agent for the plaintiff. The same is true as to the second conversation. The only time when the plaintiff was present at any conversation between Wollman and the decedent Casady was at the third conversation, which took place at Mr. Wollman's home in the fall of 1932. This conversation, the vital part of which has heretofore been quoted, is not sufficiently broad, we think, to establish the plaintiff's case, in that it fails to state an oral agreement which is clear, satisfactory and convincing, nor is the evidence submitted in this case sufficient to establish an oral agreement clearly and by a preponderance of the evidence. *McEntarffer v. Payne,* 107

Neb. 169, 185 N. W. 329; *Johnson v. Kern,* 117 Neb. 536, 225 N. W. 38; *Young v. Gillen,* 108 Neb. 311, 187 N. W. 900; *Rine v. Rine,* 100 Neb. 225, 158 N. W. 941; *Overlander v. Ware,* 102 Neb. 216, 166 N. W. 611; *Weber v. Crabill,* 123 Neb. 88, 242 N. W. 267; *Johnson v. Riseberg,* 90 Neb. 217, 133 N. W. 183; *Remaly v. Sweet,* 106 Neb. 327, 183 N. W. 663; *Hajek v. Hajek,* 108 Neb. 503, 188 N. W. 181; *Smith v. Raubach,* 121 Neb. 703, 238 N. W. 314; *Moore v. Moore,* 58 Neb. 268, 78 N. W. 495.

In considering the testimony of the defendants' witnesses offered in opposition to the plaintiff's testimony by way of impeaching statements, and in considering the weight of this testimony, we must necessarily 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. *McEntarffer v. Payne,* 107 Neb. 169, 185 N. W. 329.

In the consideration of the plaintiff's evidence, it should be borne in mind that the plaintiff's three principal witnesses were brothers-in-law and a sister, respectively. While this relationship does not affect their competency as witnesses, it may affect their credibility, and undoubtedly this fact was borne in mind by the learned trial judge who heard this case. *Rine v. Rine,* 100 Neb. 225, 158 N. W. 941.

We are not unmindful of the fact that plaintiff and appellant has cited many cases in her brief in support of the proposition that an oral agreement to convey real estate will be specifically enforced where the evidence of such agreement is clear and satisfactory and the plaintiff has fully performed on his part, and its nonfulfilment on the one hand would amount to a fraud on the party who has fully performed it. *Weber v. Crabill,* 123 Neb. 88, 242 N. W. 267; *Moline v. Carlson,* 92 Neb. 419, 138 N. W. 721.

A careful reading of the cases above cited by the appellant in her brief will reveal that in all of the cases so cited the evidence offered in support of the alleged oral contracts to give or devise lands in return for personal services was clear, convincing and satisfactory, and that the courts

in these cases so found. However, we are agreed that the evidence in this case falls short of being clear, convincing and satisfactory, and that the plaintiff fails to maintain her burden of proof by a clear preponderance of the evidence. Therefore, considering the case as a trial *de novo*, and giving due attention to all direct evidence, facts and circumstances appearing in the record, we are impressed that the plaintiff has failed to prove her case by a clear preponderance of the evidence, and has failed to establish the oral agreement by evidence that is clear, satisfactory and convincing. *McEntarffer v. Payne*, 107 Neb. 169, 185 N. W. 329; *Goodlett v. Banning*, 127 Neb. 325, 255 N. W. 9; *Petersen v. Hitchcock*, 128 Neb. 381, 258 N. W. 669; *Remaly v. Sweet*, 106 Neb. 327, 183 N. W. 663; *Smith v. Raubach*, 121 Neb. 703, 238 N. W. 314; *Ward v. Hislop*, 122 Neb. 15, 238 N. W. 769; *Powers v. Norton*, 103 Neb. 761, 174 N. W. 223.

It therefore follows that this court is in accord with the judgment of the district court denying the plaintiff relief and directing the dismissal of her cause of action, which judgment is therefore hereby

AFFIRMED.

VILLAGE OF UTICA, APPELLEE, V. DALE RUMELIN, APPELLANT.
278 N. W. 372

FILED MARCH 11, 1938. No. 30230.

1. **Licenses:** COMPLAINT. A complaint as to the violation of a city ordinance, which charges an offense substantially in the language of the ordinance, and in such language that a person of ordinary intelligence may understand what is intended, is sufficient.
2. **Jury.** "A prosecution for a violation of a city ordinance, which does not embrace an offense made criminal by the common law or by the laws of this state, is, while in form a criminal prosecution, in fact a civil proceeding to recover a penalty. In such a proceeding, the defendant is not entitled to a jury trial." *McLaughlin v. State*, 123 Neb. 861, 244 N. W. 799.
3. **Constitutional Law:** LICENSES. Under the facts stated in the

opinion, it is held that the occupation tax here involved is not unreasonable nor confiscatory.

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

William Niklaus, for appellant.

McKillip & Barth, George R. Mann and *A. Leavens, contra.*

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

GOSS, C. J.

Defendant was convicted and fined for selling bread products from a truck in Utica without paying the occupation tax.

The amended complaint is in three counts. Each charged defendant with separate sales in Utica by wholesale to a retailer from a truck, without paying the occupation tax levied by the village ordinance. It is conceded that the occupation tax was not paid. The evidence shows that defendant made sales of the products baked by Smith Baking Company of Lincoln, selling at wholesale to business men in the towns along his route, including Utica. Smith Baking Company owned the truck which defendant drove and paid him a salary for his services. Orders were not taken in advance, but he sold the product as opportunity offered in the place where he was at the moment. There were 16 towns on his particular route.

By ordinance 172 the Village of Utica revised all of its then existing ordinances on January 28, 1936, and caused them to be published as the Municipal Code of the Village of Utica, Nebraska. This is in evidence. The subject of chapter 6 is "Occupation Tax." Section 1 provides: "For the purpose of raising a revenue there is hereby levied an occupation tax upon each and every occupation and business carried on within the corporate limits of the Village of Utica, as hereafter specified and enumerated." And section 2 levies the tax upon various occupations. Subdi-

vision B of that section fixes the applicable tax in these words: "Bread, pastry or baking products * * * Sellers of at wholesale, from truck, automobile or other vehicle, per day $1. Same, per year, $10."

The first assignment of error is that the court erred in overruling defendant's motion to dismiss the original and amended complaint.

The first point in the motion to quash and to dismiss the complaint is that it does not show that the alleged offense was committed within the territorial limits of the village of Utica. The complaint charges and the evidence shows that defendant made the sales in Utica.

The second point in the motion to dismiss is that the complaint does not refer to or identify any particular ordinance or section thereby alleged to have been violated and does not refer to any ordinance by number, by date of passage or adoption. While it is true that the complaint did not identify the ordinance by number, it did identify it in language hereinbefore stated. The defendant is presumed to know the law. The fact that it was for an occupation tax and for the sale of bread from a truck at wholesale in the village of Utica would seem a sufficient identification. Certainly the requirements as to pleading of ordinances are no more detailed than the pleading of statutes in a criminal case. It was held in *Sandlovich v. State,* 104 Neb. 169, 176 N. W. 81, that an information, which charges an offense substantially in the language of the statute, and in ordinary, concise language so that a person of average intelligence may know what is intended, is sufficient. Many other cases might be cited. The classical case in Nebraska criminal law holding that complicated and technical forms have been abolished here and that it is only necessary to charge a person in ordinary and concise language so as to apprise him of what he stands charged is that of *Nichols v. State,* 109 Neb. 335, 191 N. W. 333. In that case, while affirming the judgment of conviction, Judge Rose criticized the involved verbiage of the form of information occupying a page and a half of the

printed report and suggested a form condensed to less than six lines. That opinion rendered a valuable service to the profession and to the administration of the criminal law. The suggested form of information is used almost entirely now. We think the point of defendant here is without merit and that the complaint sufficiently identified the ordinance in question.

The third point, that the complaint does not allege that any ordinance has been duly adopted and passed by the village, is sufficiently covered by the description of the "occupation tax levied by the village of Utica," aided by the charge that the failure to pay the tax was contrary to the ordinance; the fourth point, that it was not alleged that any tax had been levied, is plainly covered by the complaint.

The second assignment of error is that the court erred in refusing a jury trial. The complete answer to this is found in *McLaughlin v. State,* 123 Neb. 861, 244 N. W. 799, wherein it was held:

"A prosecution for a violation of a city ordinance, which does not embrace an offense made criminal by the common law or by the laws of this state, is, while in form a criminal prosecution, in fact a civil proceeding to recover a penalty. In such a proceeding, the defendant is not entitled to a jury trial."

It is assigned that the penalty of $25 a day was erroneous because arbitrary, oppressive, excessive, and unreasonable and amounted to taking defendant's property without due process of law in violation of section 1, art. XIV of the Constitution of the United States. The fine of that amount on each of the three counts was imposed by the trial court because defendant arbitrarily refused to comply with the ordinance. As a fine we cannot say that was erroneous. The ordinance itself was apparently reasonable. It levied an occupation tax of only $10 a year on the occupation followed by defendant, or $1 a day if he wished to follow it only for a day.

It must be remembered that defendant's company was in competition with other bakers from cities outside of Utica

as well as with local bakers. Figures were given on behalf of his company, showing, after every possible element of cost was considered, that on all bread manufactured and sold by the company there was one-eighth of a cent profit on each loaf, and that if the company paid the occupation tax of $10 there would be only $2.48 profit left each year. So it cannot be said that the occupation tax is wholly confiscatory. The figures were those given by an officer of the company and they were difficult to question. There was a chance to increase the business done. No figures allocated costs to Utica business or to that done in any particular town or city.

A somewhat parallel case was that of *Gooch Food Products Co. v. Rothman,* 131 Neb. 523, 268 N. W. 468, involving an occupation tax on similar business in York. There the ordinance fixed the occupation tax on sellers from truck at wholesale at $2 a day and at $10 a year. The evidence shows the net profit by the Gooch company in York to be about 15 cents a day. It was held not to be confiscatory and to be valid.

Defendant cites *Petersen Baking Co. v. City of Fremont,* 119 Neb. 212, 228 N. W. 256. In that case plaintiff for itself and for another who assigned its claim each paid $300 a year occupation tax and successfully sued to recover the amounts on the ground that the tax was so excessive and confiscatory as to amount to a prohibition to do business. A mere comparison of the taxes there and here shows that the case is of no value as a rule governing this case.

Under the rule laid down in *Gooch Food Products Co. v. Rothman, supra,* this court declines to declare the ordinance void, because it has not been shown that the tax is unreasonable or confiscatory.

The judgment of the district court is

AFFIRMED.

ALBERTA SUMMERS, ADMINISTRATRIX, APPELLEE, V. RAILWAY EXPRESS AGENCY, APPELLANT.

278 N. W. 476

FILED MARCH 11, 1938. No. 30349.

1. **Workmen's Compensation:** HOSPITAL AND MEDICAL SERVICES. Section 48-120, Comp. St. 1929, as amended by section 19, ch. 57, Laws 1935, makes the employer liable for reasonable hospital and medical services and medicines, when needed and approved by the compensation commissioner.
2. ———. Under section 48-122, Comp. St. 1929, as amended by section 40, ch. 57, Laws 1935, if death results from injuries and the deceased employee leaves one or more persons wholly dependent, the compensation shall be two-thirds of the wages received at the time of the injury, but not more than $15 nor less than $6 a week, unless the employee was receiving less than $6 a week, in which case the compensation shall equal such wages. This compensation shall be paid during dependency, not exceeding 325 weeks from the date of the accident causing the injury; burial benefits are limited to $150.
3. ———: JOINT EMPLOYMENT. Section 48-129, Comp. St. 1929, provides that, where an employee is employed jointly by two employers, one of whom falls within the provisions of the workmen's compensation law and one who is not within the provisions of the workmen's compensation law, the obligation of that one within the workmen's compensation law is to pay only that proportion of the entire compensation which his proportionate wage liability bears to the entire wages of the employee.
4. ———. Where the workmen's compensation law fixes the amount of compensation, such compensation can be measured only in the manner directed by the statute. *Johnson v. David Cole Creamery Co.*, 109 Neb. 707, 192 N. W. 127.

APPEAL from the district court for Lincoln county: J. LEONARD TEWELL, JUDGE. *Reversed, with directions.*

Beeler, Crosby & Baskins and *Robert B. Crosby,* for appellant.

E. H. Evans and *Urban Simon, contra.*

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

GOSS, C. J.

The Railway Express Agency appeals from a compensation award in the district court, as it had appealed to that court from an award of the compensation commissioner. The only question involved is the amount of the compensation due from defendant.

The district court found that Asa Summers was, when injured in an accident on September 12, 1936, then engaged in his joint employment by the Union Pacific Railroad Company and the Railway Express Agency; that he died September 13, 1936, as a result of the injuries so received in the course of his employment and arising therefrom, leaving his widow and three minor children; that he received wages of $29.16 a week, of which the Railway Express Agency paid him $17.44 a week (and he was entitled to compensation of $11.63 a week), and the Union Pacific Railroad Company paid the balance; that the Union Pacific Railroad Company was not subject to the workmen's compensation law; that plaintiff was entitled to $11.63 a week for 325 weeks from September 13, 1936, with statutory burial benefits of $150 and all hospital bills, for which judgment was ordered.

The assignments of error suggest that the court erred in computing the weekly wage of Summers as $29.16 and state that it was $29.74, but no point of this is made in the argument nor of other discrepancies in the trial court's computations. These assignments clearly raise, and the argument on behalf of defendant insists, that the court erred in not limiting the liability of the Railway Express Agency to 60 per cent. of the $15 a week admitted compensation or $9 a week for 325 weeks, to $90 or 60 per cent. of $150 for burial benefits, and to 60 per cent. of all medical, hospital and doctor's bills.

The evidence shows that the employee was in the joint employment of the Railway Express Agency, which paid 60 per cent. of his wages, and of the Union Pacific Railroad Company, which paid 40 per cent. of his wages. Formerly each paid separately, but during the last two

years the checks for his wages were received from the Railway Express Agency but the Union Pacific Railroad Company contributed its percentage on each pay-day in accordance with a written contract between the two companies. It must be inferred that the employee knew about this joint employment because the railroad company deducted from time to time certain charges for payments made by it on his account to organizations to which he belonged, such as for insurance. The evidence shows and it is not disputed that when Summers was injured he was moving a truck on which were conveyed items for both the railroad company and the express agency.

Section 48-120, Comp. St. 1929, as amended by section 19, ch. 57, Laws 1935, makes the employer liable for reasonable hospital and medical services and medicines, when needed and approved by the compensation commissioner.

Under section 48-122, Comp. St. 1929, as amended by section 40, ch. 57, Laws 1935, if death results from injuries and the deceased employee leaves one or more persons wholly dependent, the compensation shall be two-thirds of the wages received at the time of the injury, but not more than $15 nor less than $6 a week, unless the employee was receiving less than $6 a week, in which case the compensation shall equal such wages. This compensation shall be paid during dependency, not exceeding 325 weeks from the date of the accident causing the injury; burial benefits are limited to $150.

Section 48-129, Comp. St. 1929, provides that, where an employee is employed jointly by two employers, one of whom falls within the provisions of the workmen's compensation law and one who is not within the provisions of the workmen's compensation law, the obligation of that one within the workmen's compensation law is to pay only that proportion of the entire compensation which the proportionate wage liability bears to the entire wages of the employee.

Where the workmen's compensation law fixes the amount of compensation, such compensation can be measured only

in the manner directed by the statute. *Johnson v. David Cole Creamery Co.*, 109 Neb. 707, 192 N. W. 127.

Both the compensation court and the district court erred in applying the law which we have briefly stated. The entire wages paid to Asa Summers under his joint employment by the Union Pacific Railroad Company and the Railway Express Agency, defendant herein, called for compensation limited to $15 a week for 325 weeks of dependency, plus burial benefits limited to $150. By section 48-129, Comp. St. 1929, the legislature required the compensation payable to be proportioned to the wages paid by an employer who came under the provisions of the law in such a way that his business would be taxed only for the percentage of the employee's wages paid by him. The only employer here who came under that law was the Railway Express Agency. It paid 60 per cent. of the wages and is therefore liable for only that percentage of the derivable compensation based on the wages, and a like per cent. of the burial charges and the medical and hospital fees, if any. Therefore, on that basis, defendant was liable for only $9 a week for 325 weeks and for $90 of the burial benefits allowed.

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

REVERSED.

JOHN STARR, ADMINISTRATOR, APPELLEE, V. FIDELITY & DEPOSIT COMPANY OF MARYLAND, APPELLANT.
278 N. W. 478

FILED MARCH 11, 1938. No. 30191.

1. **Courts.** Under the Constitution and statutes of Nebraska, the county court has exclusive original jurisdiction of all matters relating to the settlement of the estates of deceased persons.
2. **Executors and Administrators:** FINAL ACCOUNT. When a county court acquires jurisdiction of the subject-matter and of the parties in a proceeding to settle the estate of decedent, its

final judgment therein as to the amount due the estate from the administrator is not reviewable except on direct appeal and is not open to collateral attack except for fraud.

3. ———: BOND: LIABILITY OF SURETIES. "The liability of the sureties on an administration bond is not affected by the fact that they were induced to sign the bond through the fraud or misrepresentation of the principal, of which the beneficiaries of the estate in whose interest the liability is sought to be enforced are innocent." 24 C. J. 1059.

APPEAL from the district court for Harlan county: LEWIS H. BLACKLEDGE, JUDGE. *Affirmed.*

Shelburn & Russell, for appellant.

John Starr, pro se.

Heard before GOSS, C. J., ROSE, DAY, PAINE, CARTER and MESSMORE, JJ., and YEAGER, District Judge.

ROSE, J.

This is an action on the 5,000-dollar bond of J. G. Thompson, administrator of the estate of John W. Davidson, deceased, to recover from the surety, Fidelity & Deposit Company of Maryland, defendant, $4,943.61 with interest for which the principal in the bond failed to account.

John W. Davidson died November 7, 1931, and J. G. Thompson was appointed administrator of his estate January 29, 1932. On the same day Thompson's bond with the Fidelity & Deposit Company of Maryland, surety, was executed and approved. Thompson, principal in the bond, died July 31, 1935. Later, his daughter, Ethel K. Thompson, was appointed administratrix of his estate, and as such she was futilely directed by the county court to pay to John Starr, now administrator of the estate of the deceased Davidson, $4,943.61, the amount due the Davidson estate from the Thompson estate with interest. To recover that sum from the surety on the fidelity bond of J. G. Thompson, administrator of the Davidson estate, John Starr, present administrator of the Davidson estate under appointment December 5, 1935, brought the present action in the district court for Harlan county.

In the answer of the surety to the petition on the bond, it is alleged that J. G. Thompson, from May 11, 1922, until the death of Davidson, an incompetent person, was his duly appointed, bonded and acting guardian; that as such he collected, misapplied, embezzled or lost all the assets of the ward's estate except $75 which he properly expended; that no final report of the guardian or settlement of his accounts as such was ever made; that J. G. Thompson was insolvent from the time he was appointed administrator until his death; that his report to the county court showing assets in his hands as administrator was false and was made to defraud his surety.

In a reply to the answer, plaintiff pleaded that defendant was concluded by the adjudication in the county court to the effect that Thompson as administrator was chargeable with the assets enumerated in his report and account.

The parties to the action on the bond waived a jury. Upon a trial of the cause, the district court found that the estate of J. G. Thompson, deceased, owed John Starr, present administrator of the Davidson estate, $4,943.61 with interest from February 18, 1936, or $5,240.10, and that defendant as surety on the bond was liable for the penalty named therein or for $5,000. From a judgment in favor of plaintiff therefor defendant appealed.

Is the surety on the bond concluded by the finding and judgment of the county court that the Thompson estate owes the Davidson estate $4,943.61 with interest? This is the controlling issue in the case.

The county court is by the Constitution and statutes of the state given exclusive original jurisdiction of all matters relating to the settlement of estates of deceased persons. When a county court acquires jurisdiction of the subject-matter and of the parties in a proceeding to settle an estate of decedent, its final judgment therein as to the amount due the estate from the administrator is not reviewable except on direct appeal and is not open to collateral attack except for fraud. *Fitzgerald v. Fitzgerald & Mallory Construction Co.*, 48 Neb. 386, 67 N. W. 158; *Boales v.*

Ferguson, 55 Neb. 565, 76 N. W. 18; *Smith v. Estate of Bayer,* 95 Neb. 488, 145 N. W. 1030; *State v. O'Connor,* 102 Neb. 187, 166 N. W. 556; *Pinn v. Pinn,* 108 Neb. 822, 189 N. W. 371; *In re Estate of Ramp,* 113 Neb. 3, 201 N. W. 676.

The testimony of the county judge and the record of the county court "In the Matter of the Estate of John W. Davidson, deceased" prove that a citation from that court was directed January 6, 1936, to the surety, Fidelity & Deposit Company, defendant, herein, to Ethel K. Thompson, administratrix of the Thompson estate, and to Eva M. Thompson, Mayma Thompson, and Ethel K. Thompson, the heirs at law of the deceased Thompson, notifying them to file in the county court on or before January 20, 1936, an account of the receipts and disbursements of J. G. Thompson as administrator of the Davidson estate from the date of his report December 15, 1932, to the date of his death, July 31, 1935, together with a true and complete inventory of all the assets of the Davidson estate and a complete record of the affairs thereof. The administratrix and the heirs at law were further notified by the citation that, upon a hearing, an order would be made directing payment of the money due from the Thompson estate to the Davidson estate and that delivery of other assets from the former to the latter would be required. This citation was served by the sheriff on the surety, the administratrix and the heirs at law named. The date set for the hearing in the county court was January 20, 1936. The hearing was continued from January 20, 1936, to February 10, 1936, and from the latter date to February 18, 1936. The county court then had before it as court records at the hearing the inventory of J. G. Thompson, as administrator of the Davidson estate, and the appraisement of two duly appointed and acting appraisers, all under oath, showing that, on May 12, 1932, Thompson as such administrator had enumerated assets of the Davidson estate aggregating $5,259.85. There was also before the county court at the same hearing the administrator's report of J. G. Thomp-

son on December 15, 1932, under oath, showing his receipts as $5,259.85 and his expenditures as $99.32. While the schedule, appraisement and report were never formally approved as such, no one objected to them at the time and they were apparently taken as evidence of the facts stated therein. On all the evidence adduced at the hearing, the findings and judgment of the county court in response to the citation are as here copied:

"On this 18th day of February, 1936, the above entitled matter came on for an accounting and settlement of the accounts of J. G. Thompson, deceased, with the estate of John W. Davidson, deceased, as former administrator thereof, and John Starr, administrator *de bonis non* of said estate appearing in person, and Ethel K. Thompson, administratrix of the estate of J. G. Thompson, deceased, appearing by Ralph P. Wilson, her attorney, and from the evidence introduced the court finds:

"That said J. G. Thompson, at the time of his death, was the duly appointed, qualified and acting administrator of the estate of said John W. Davidson, deceased; that said J. G. Thompson is chargeable with $5,027.49 of funds of said estate and is entitled to credit for a total sum of $868.88, leaving a balance due said estate from said J. G. Thompson of $4,158.61, with interest thereon at 7% per annum from January 29, 1933, to August 10, 1933, and at 6% per annum thereafter.

"It is therefore ordered and adjudged that Ethel K. Thompson, administratrix of the estate of J. G. Thompson, deceased, pay to John Starr, administrator *de bonis non* of the estate of John W. Davidson, deceased, the sum of $4,943.61."

This judgment was not void. The county court had jurisdiction of the subject-matter and of the necessary parties. The surety had notice of the proceedings and of the hearing. At the time it made no objection to the proceedings or to the evidence or to the judgment of the county court. There was no appeal.

At the trial of the action on the bond in the district

court, the surety attempted to prove a defense by extrinsic evidence that the principal in the bond squandered or lost the Davidson estate as guardian and not as administrator and that consequently the surety was not liable for the loss. Evidence of that nature contradicted the inventory, the appraisement, the report of the administrator and the judgment of the county court. Such evidence was at first admitted by the district court but was afterward disregarded in the determination of the case on the ground that the surety was concluded by the judgment of the county court.

When the bond was given the court record of the proceeding in which it was executed and filed showed that the administrator, Thompson, was then chargeable with Davidson assets aggregating nearly $5,000. That sum was the penalty in the bond. For the protection thereof the bond was given. The court record, disclosing the assets which the administrator stated under oath that he had received, was available to the surety and gave notice of the nature and extent of the undertaking required. Obligee and beneficiary were not guilty of any fraud invalidating the judgment of the county court. The law applicable has been stated as follows:

"The liability of the sureties on an administration bond is not affected by the fact that they were induced to sign the bond through the fraud or misrepresentation of the principal, of which the beneficiaries of the estate in whose interest the liability is sought to be enforced are innocent." 24 C. J. 1059.

The conclusion is that both principal and surety are bound by the judgment of the county court. In this view of the facts and the law, discussion of other questions argued becomes unnecessary.

There is no cross-appeal to present a claim by plaintiff for interest increasing the judgment beyond $5,000. Error prejudicial to defendant has not been found in the record.

AFFIRMED.

ELLSWORTH CORPORATION, APPELLEE, V. ALBERT STRATBUCKER ET AL., APPELLANTS.
278 N. W. 381

FILED MARCH 11, 1938. No. 30209.

1. **Quieting Title.** Under the law of Nebraska, a suit in equity is maintainable to quiet in plaintiff title to land while he is in possession of it.
2. ———. In a suit in equity to quiet in plaintiff title to land in his possession as against defendants who claim some interest therein, uncontradicted testimony by the holder of the legal title that he conveyed it to plaintiff, if admitted in evidence without objection, may be sufficient to make a *prima facie* case in favor of plaintiff as against defendants who prove no interest in or title to the land and no right to affirmative relief.
3. **Adverse Possession.** The plea of title to land by adverse possession, to be effective, must be proved by actual, open, exclusive and continuous possession under claim of ownership for the full statutory period of ten years.

APPEAL from the district court for Washington county: JAMES M. FITZGERALD, JUDGE. *Affirmed.*

Henry Mencke and *John A. McKenzie,* for appellants.

William J. Maher, contra.

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

ROSE, J.

This is a suit in equity to quiet in plaintiff title to lands in Washington county and to enjoin defendants from trespassing thereon or otherwise interfering therewith. The land is situated near the Missouri river and is particularly described in the petition. The actual controversy is limited to a strip of land 305.1 feet long north and south and 69 feet wide east and west and is in the southeast corner of lot 11, section 27, township 17, range 13. Ownership, title and trespass are the issues. Plaintiff, the Ellsworth Corporation, claims lot 11, including the strip of land in dispute. Defendants, Albert Stratbucker and wife, claim the land adjoining lot 11 on the east, including

the small strip described. The facts relating to the respective claims of the parties are pleaded in detail.

Upon a trial of the cause, the district court found the issues in favor of plaintiff, quieted its title and enjoined defendants from claiming any interest in the premises in dispute and from interfering with the ownership and possession of plaintiff. Defendants Stratbuckers appealed.

Plaintiff proved title in Truman E. Stevens, December 9, 1913, by warranty deeds of that date to him from Knud Larsen and Sene Larsen, husband and wife, who were then owners of lot 11 and holders of the legal title thereto. Grantee in those deeds, who thus became the owner of the land described therein and holder of the legal title thereto, testified at the trial that plaintiff is a corporation of which he has been president and managing agent since its organization; that the description in the deeds covered lot 11; that he conveyed to plaintiff the title which he acquired by the deeds; that he and plaintiff have been in exclusive possession under them since 1913. The deeds conveying the title to Stevens were delivered to him, accepted and recorded and are in the record as evidence.

Defendants contend that title from Stevens to plaintiff was not proved, since there is in the record no evidence of a conveyance in writing to that effect. As already explained, plaintiff proved title in Stevens. Without objection he testified he conveyed it to plaintiff and in that particular he was uncontradicted. According to his testimony the conveyance made was effective to give possession to plaintiff, a grantee making no complaint of the character of the conveyance. Title was a material issue in the case. Stevens, the owner, president and managing agent of plaintiff, a corporation, stated on the witness-stand as a fact, without objection, that he conveyed the land to plaintiff. Under the circumstances it is fair to infer that a deed from Stevens to plaintiff was not offered in evidence because there was no objection to his testimony that he conveyed the premises to plaintiff. In a suit in equity, the evidence was sufficient to make a *prima facie* case in favor of plain-

tiff, when the claims interposed by defendants are considered.

The action is not ejectment but a suit in equity which is maintained to quiet title under the law of Nebraska while plaintiff is in possession. Defendants argue that plaintiff's title fails because a deed from Stevens to plaintiff is missing and that it must rely upon the strength of its own title and not upon the weakness of that of its adversary. In this connection the claims of defendants must be scrutinized. They pleaded adverse possession, but an examination of the record on that issue fails to prove they were in actual, open, exclusive and continuous possession of the strip of land in controversy under claim of ownership for the full statutory period of ten years. Adverse possession by defendants, therefore, was not proved. *Williams v. Lantz,* 123 Neb. 67, 242 N. W. 269. They failed also to prove title or other interest in themselves. Having no defense to plaintiff's cause of action and no valid claim for affirmative relief in equity, plaintiff, as against them, made a *prima facie* case for the quieting of title. The decision on appeal is the same as in the court below.

AFFIRMED.

CORNHUSKER ELECTRIC COMPANY, APPELLEE, V. CITY OF FAIRBURY, APPELLANT.

278 N. W. 379

FILED MARCH 11, 1938. No. 30194.

1. **Electricity.** The legislature has not lodged the power to regulate electric rates in the railway commission, and the courts have no power to assume that function.
2. **Constitutional Law.** The function of fixing rates for a public utility is legislative in character, and the courts can only interfere upon a clear showing that constitutional rights have been invaded.
3. **Electricity.** Even if the court has authority to enjoin discrimination between customers of a municipal electric plant, one who purchases current for resale is not in a class with another who purchases current for power in his own plant.

APPEAL from the district court for Jefferson county: FREDERICK W. MESSMORE, JUDGE. *Reversed and dismissed.*

Frank M. Rain, Perry, Van Pelt & Marti and *E. A. Wunder,* for appellant.

Hartigan & Skultety, contra.

Heard before GOSS, C. J., ROSE, DAY, PAINE and CARTER, JJ., and YEAGER, District Judge.

DAY, J.

This is a suit to enjoin the city of Fairbury from discontinuing the electric service furnished the appellee by its electric plant, and to find the rates charged "exorbitant, unreasonable, discriminatory, unfair and unlawful," and to require the city to fix a reasonable, fair and lawful rate for the service. The trial court found that the only issue involved is whether the rate charged is discriminatory, and found that "in consideration of the investment made for the respective lines and of the sale of electrical energy to large consumers" there is discrimination. The city appeals to this court from that finding.

In 1931 the Fairchild Clay Products Company operated a gravel pit six miles east of Fairbury, and the Weblemoe Sand and Gravel Company operated a pit two miles west of Fairbury. They both desired to operate with electric power, and each entered into contracts with the city of Fairbury, and each constructed its own line from the city limits to its own plant. The electricity furnished each was metered at the city limits. The line to the Weblemoe plant was later extended to the village of Gladstone, and was incorporated as the Fairbury-Gladstone Company. The village of Jansen had purchased electricity from the city of Fairbury, which was metered at the city limits, and carried over lines owned by the village. The Fairbury-Gladstone Company purchased this line and changed the name to that of the Cornhusker Electric Company. Subsequently this company extended its line from Jansen to Harbine and Ellis, and furnished electricity to these villages and farms along the line.

In 1934 and 1935 these contracts, both with the Fairchild company and the Cornhusker company, expired. In the meantime, a new act of the legislature authorized the municipality to build electric lines beyond the city limits. The city executed a new contract with the Fairchild company, whereby it purchased the line and agreed to furnish electricity metered at the Fairchild plant at the Fairbury power rate. This cost the city of Fairbury about $12,000 upon which the amortization is fixed at about $1,000 a year by engineers. There was substation expense and transformer loss, and the Fairchild company was relieved of its original investment and its taxes thereon.

When the Cornhusker contract expired, it demanded that its rate be adjusted to conform to the rate given the Fairchild plant, taking into account the difference in the city's investment. This the city refused to do, and threatened to terminate the electric service.

In the first place, let us make clear the fact that the appellee is not a competitor of the Fairchild company. The Weblemoe Sand and Gravel Company is a competitor of the Fairchild company. The Cornhusker Electric Company, in so far as this case is concerned, is an electric distribution company, and is not engaged in any other business. It sells current to the Weblemoe company. There is no similarity between the service furnished to the appellee and the Fairchild company.

The Fairchild company has a contract, while the Cornhusker company has none. One has been negotiated, but never consummated. The former uses the electricity for power to operate its plant, while the latter resells much of the current to others; the one has a meter at its plant, while the other has a meter at the city limits.

Paraphrasing the language of a leading case cited, we state that the legislature has not lodged the power to regulate rates in the railway commission, and the courts have no power to assume that function. *Wapsie Power & Light Co. v. City of Tipton,* 197 Ia. 996, 193 N. W. 643.

In a state where the railway commission is charged

with the duty of fixing rates charged for electricity, the court held that the function of making rates is legislative in character, and the courts may only interfere upon a clear showing that constitutional rights have been invaded. *San Joaquin Light & Power Corporation v. Railroad Commission,* 175 Cal. 74, 165 Pac. 16. There is no contention that the court should fix the rate here, and the question will not be discussed further; but see *City of Knoxville v. Knoxville Water Co.,* 212 U. S. 1.

But, says the appellee, the reasonableness of this rule is not involved, as the only question presented here is whether the Cornhusker company is being discriminated against. It relies upon *Public Service Co. v. Southern Power Co.,* 179 N. Car. 18, 101 S. E. 593. In that case reported in 12 A. L. R. 304, in the syllabus it was said: "The courts are not without power and procedure to prevent discrimination between consumers by a public service corporation." In the opinion of this case it was said: "The real point in this case is not whether the rates charged any one are exorbitant, nor is it sought to have the rates fixed by the courts. The sole object of this proceeding is to forbid discrimination between purchasers in like conditions." And: "The sole question in this case is not what is a reasonable rate, nor are the courts called upon to fix the rate (not in the first instance at least), but shall the defendant be required to sell its current to all alike, without discrimination in prices, when under like conditions."

Of course, it is contended that the city of Fairbury operating an electric plant, a business affected with a public interest, is obliged to serve the consumers impartially and without discrimination. It is held here however that, assuming only for the sake of argument that the court has the authority, the Cornhusker Electric Company and the Fairchild company are not purchasers of current under like conditions. The former purchases current for resale; the latter buys it for power to use in its plant. They do not purchase electricity under similar conditions. They are not customers in the same class. Even if the

court has authority to enjoin discrimination between customers of a municipal electric plant, one who purchases current for resale is not in a class with another who purchases current for power in his own plant.

Since there was no discrimination shown between the Cornhusker Electric Company and the Fairchild company, the judgment of the trial court was erroneous.

REVERSED AND DISMISSED.

FEDERAL LAND BANK OF OMAHA, APPELLEE, V. CITIZENS BANK OF OGALLALA ET AL., APPELLEES: FRED E. SOEHL ET AL., APPELLANTS.

278 N. W. 383

FILED MARCH 11, 1938. No. 30237.

1. **Mortgages:** MORATORIUM. A moratory stay under the provisions of section 20-21,159, Comp. St. Supp. 1937, is properly denied when it appears that the amount of the mortgage lien exceeds the value of the real estate secured by the mortgage.
2. ———: ———. In determining whether the value of the mortgaged lands exceeds the amount of the mortgage lien, it is improper to consider a value that is peculiar to the mortgagor and not to the mortgagee.

APPEAL from the district court for Arthur county: ISAAC J. NISLEY, JUDGE. *Affirmed.*

L. A. DeVoe, Beeler, Crosby & Baskins and *Robert B. Crosby,* for appellants.

Beatty, Maupin, Murphy & Derry, William C. Ramsey, Franklin L. Pierce, Philip M. Wellman and *William W. Graham, contra.*

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

CARTER, J.

This is an appeal from an order of the district court for Arthur county refusing to grant a moratory stay under

the provisions of section 20-21,159, Comp. St. Supp. 1937.

The real estate involved consists of 640 acres of grazing land. The present amount due under the decree of foreclosure, including unpaid taxes, is $2,472.20. The evidence as to the value of the land is substantially as follows: S. E. Adkins testifies for plaintiff that it is worth $2,000 or less. Ray Cardwell testifies for defendant and estimates its value between $2,000 and $2,200. The defendant states that it is worth $3,200.

It is a well-settled rule of this court that, where it appears that the amount of the mortgage lien exceeds the value of the land secured by the mortgage, it is proper for the trial court to deny a moratory stay. *Clark v. Hass,* 129 Neb. 112, 260 N. W. 792; *Equitable Trust Co. v. Groves,* 133 Neb. 177, 274 N. W. 457. We necessarily come to the conclusion that the trial court had ample evidence before it to sustain the findings made. We also conclude that the evidence shows that the value of the land is less than the amount of the liens against it.

Defendant contends that the value of the land is greater by virtue of its use in connection with other near-by and adjacent lands with which it was formerly used. Conceding for the sake of argument that this is true, it must be borne in mind that the mortgagor separated it from the other tracts when he executed a separate mortgage upon it. The security that it provides for the plaintiff is that which it will bring at foreclosure sale as it is described in the mortgage. In determining its value for the purpose of deciding whether a moratory stay should be granted, we must necessarily treat it on the same basis as the parties treated it when the mortgage was executed. Under such circumstances, a value that is peculiar to the mortgagor and not to the mortgagee cannot be considered.

The judgment of the trial court is correct and it is

AFFIRMED.

FEDERAL LAND BANK OF OMAHA, APPELLEE, V. FRED E. SOEHL ET AL., APPELLANTS: FIRST NATIONAL BANK OF LEWELLEN ET AL., APPELLEES.
278 N. W. 384

FILED MARCH 11, 1938. No. 30238.

Judgment affirmed on authority of *Federal Land Bank v. Citizens Bank, ante,* p. 252, 278 N. W. 383, released herewith.

APPEAL from the district court for Arthur county: ISAAC J. NISLEY, JUDGE. *Affirmed.*

L. A. Devoe, Beeler, Crosby & Baskins and *Robert B. Crosby,* for appellants.

Beatty, Maupin, Murphy & Derry, William C. Ramsey, Franklin L. Pierce, Philip M. Wellman and *William W. Graham, contra.*

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

CARTER, J.

This is an appeal from an order refusing to grant a moratory stay under the provisions of section 20-21,159, Comp. St. Supp. 1937.

The real estate involved consists of 640 acres of Arthur county land. The amount due under the decree of foreclosure, including unpaid taxes, is $2,949.34. The evidence as to value is substantially as follows: S. E. Adkins testified that the land is worth $3,000. W. R. Curtis testified that he had offered $2,400 for the land and that it would be worth more if used in connection with adjacent lands. The defendant estimates its value at $5,120, and Ray Cardwell, a witness called by the defendant, estimates its value at $3,200. Under the authority of *Federal Land Bank v. Citizens Bank, ante,* p. 252, 278 N. W. 383, released herewith, we hold that a moratory stay was properly denied.

The contention is also made that the value of the land is greater than the amounts herein set out by virtue of its

use in connection with adjacent lands. That such value is not competent in a proceeding such as we have before us was also determined in *Federal Land Bank v. Citizens Bank, supra.*

We find no error in the record and the judgment is

AFFIRMED.

DAVE BOLKER V. STATE OF NEBRASKA.
278 N. W. 377

FILED MARCH 11, 1938. No. 30210.

1. **Infants:** DELINQUENCY. Evidence examined and *held* sufficient to prove beyond a reasonable doubt the guilt of the defendant as charged in the information. Comp. St. 1929, sec. 43-221.
2. ———: ———. Prosecuting witness shown by the evidence to be a delinquent minor, as defined by section 43-201, Comp. St. 1929, in connection with section 43-221, Comp. St. 1929.

ERROR to the district court for Douglas county: HERBERT RHOADES, JUDGE. *Affirmed.*

Alfred A. Raneri and *Raymond T. Coffey,* for plaintiff in error.

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

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

MESSMORE, J.

Plaintiff in error (hereinafter referred to as defendant) was informed against for the offense of aiding, abetting and encouraging a delinquent child in her delinquency. A jury returned a verdict of guilty, and after overruling defendant's motion for a new trial, the trial court imposed a jail sentence of 6 months and a fine of $500 against the defendant, from which sentence and fine he prosecutes error to this court.

Without detailing the evidence at great length, it estab-

lishes that Dorothy Young was a delinquent minor, born December 6, 1919, and was at the time of filing of the complaint approximately 17 years, 2 months, of age. She registered at the Plaza Hotel in the city of Omaha February 1, 1937, paid one dollar for a room and was assigned to room 704 by the defendant, who was one of the owners of the Plaza Hotel, night clerk and manager thereof. The girl, Dorothy Young, upon preparing for bed, heard a knock at the door of her room and answered it, when she met the defendant who informed her that they kept girls in the hotel that were "hustling girls," and asked her if she would like to work there. She informed him to the contrary. Subsequently, she received a telephone call to go down on the second floor and meet a man, and thereafter for a period of one week, while she stayed in the hotel, the defendant procured "dates" for her. From this point on, the evidence is replete with the story of her prostitution, her conduct with other girls in the hotel, and her subsequent removal to a house of prostitution, where the defendant procured other "dates" for her at different hotels. The evidence establishes the bad reputation of the Plaza Hotel.

Defendant denied all of the foregoing facts and contended that he was not on duty at the time the girl registered, and there is some evidence that she is presumed to have registered under another name, which signature is denied by her in the record. The evidence details certain sordid and repulsive facts which we deem unnecessary to relate. Suffice it to say that the foregoing constitutes a sufficient portrayal of the evidence to meet the requirements of this case.

Defendant groups the first two assignments of error: That the court erred in admitting, over objection of defendant, certain evidence; and that the verdict is not sustained by sufficient evidence and is contrary to law.

The defendant was informed against under section 43-221, Comp. St. 1929, which is in part as follows: "In all cases where any child shall be a delinquent or dependent

child, as defined by the statute of this state, * * * or any other person responsible for, or by any act encouraging, causing or contributing to the delinquency or dependency of such child, shall be guilty of a misdemeanor." This section is taken in conjunction with section 43-201, Comp. St. 1929, which is in part as follows: "For the purpose of this article the words 'dependent child' and 'neglected child' shall mean any child under the age of eighteen years, who * * * has not proper parental care or guardianship, or is growing up under such circumstances as would tend to cause such child to lead a vicious or immoral life; * * * or who is found living in any house of ill fame or with any vicious or disreputable persons. * * * The words 'delinquent child' shall include any child under the age of eighteen years who violates any law of this state or any city or village ordinance, * * * or who knowingly associates with thieves, vicious or immoral persons, or who is growing up in idleness or crime, or who knowingly visits or enters a house of ill repute; * * * or who wanders about the streets in the nighttime, without being on any lawful business or occupation."

Defendant's complaint is that the evidence was prejudicial in that it would meet the conception of an offense to be charged under section 28-907, Comp. St. 1929, which is in part as follows: "Whoever shall procure a female inmate for a house of prostitution, or assignation, or whoever shall induce, encourage, inveigle, or entice a female person to become a prostitute; or whoever by promises, threats, violence or by any device or scheme, shall cause, induce, persuade, * * * or entice a female person to become an inmate of a house of prostitution or shall procure a place for a female as inmate in a house of prostitution, or any place where prostitution is practiced, encouraged or allowed," etc.

After a careful reading of sections 43-221 and 43-201, Comp. St. 1929, in their entirety, we are convinced that any act or inducement brought about by any person that contributes to the delinquency of a minor is pertinent as

evidence to be considered in a case brought under said section 43-221, and that, if the evidence should go to an extent that it might prove a greater offense than that charged, it is not violative of the lesser charge.

In 16 C. J. 588, it is said: "Evidence which is relevant to defendant's guilt is not rendered inadmissible because it proves or tends to prove him guilty of another and distinct crime. It often happens that two distinct offenses are so inseparably connected that the proof of one necessarily involves proving the other, and in such a case, on a prosecution for one, evidence proving it cannot be excluded because it also proves the other."

Defendant cites *Wallace v. State*, 91 Neb. 158, 135 N. W. 549, on the proposition that, where a statute is general in its terms and a later statute makes some of the elements of the former statute a specific crime, such later statute must govern. Therefore, defendant contends, the prosecution in this case should have been brought under section 28-907, Comp. St. 1929, and was not properly brought under section 43-221, Comp. St. 1929.

The above case is not analogous to the proposition here under consideration. The Nebraska statute carefully defines what constitutes a neglected and delinquent child, and on the charge of aiding in the delinquency of the child the defendant was tried. While some of the same evidence would be admissible under section 28-907, Comp. St. 1929, if the defendant had been informed against under that statute, the same elements are not inconsistent under section 43-221, Comp. St. 1929.

Defendant sets forth in his brief certain remarks made by the trial judge which he contends were prejudicial and erroneous, and cites 16 C. J. 827, as follows: "Remarks made by the trial judge in the jury's hearing, in making rulings, will have the same effect as formal instructions; and the judge must be careful, in his conduct of the case, that he says and does nothing in the presence of the jurors while the case is progressing which can be construed to the prejudice either of the prosecution or of accused." And

defendant also cites 16 C. J. 829, as follows: "The court may properly caution, correct, admonish, and to a certain extent, criticize counsel during the case, provided it is done in such manner as not to subject counsel to contempt or ridicule, or to prejudice accused in the minds of the jurors."

Reading the record in its entirety and recognizing that the remarks made by the trial judge during the course of the examination of witnesses were made primarily to the attorneys and for the purpose of preserving order, we believe that, while such remarks were not as dignified as they should have been, they were not prejudicial to the defendant. Counsel for defendant, as the record portrays, was not subjected to contempt, ridicule or prejudice on account of the remarks made by the trial judge; nor is there any fact portrayed by the record in this case which discloses that the jury were prejudiced by such remarks.

While the brief of the defendant criticizes language used in a certain instruction, which was not pressed in oral argument before this court, we have examined the instructions, considered them together and construed them as a whole, and believe that, under such construction, they fairly and accurately state the law, and that there is no prejudicial error contained therein.

From an examination of the entire record, we believe the verdict of the jury and the sentence and fine imposed by the court should stand.

AFFIRMED.

PERRY L. HOLE, APPELLEE, V. JACK L. HAMP, APPELLANT.
278 N. W. 480

FILED MARCH 11, 1937. No. 30187.

1. **Landlord and Tenant:** LEASE: CANCELATION: TENDER. A tender of money made as a condition precedent to the cancelation of a lease, made at the proper time and refused, remains effective if left open and at the time of commencement of action is de-

posited with the clerk of the district court in which such action is commenced.

2. ———: ORAL AGREEMENT: BURDEN OF PROOF. The burden of proof is on the defendant to prove by a preponderance of the evidence the existence of an alleged oral agreement and what he is entitled to recover, if anything, under the terms of such agreement.

3. Appeal. In equity actions involving questions of fact where there is an irreconcilable conflict in the evidence, in determining the weight of evidence this court will consider the fact that the trial court observed the witnesses and their manner of testifying.

4. ———. When a law action is tried to the court, findings of fact have the same effect as findings of a jury. They will not be set aside unless clearly wrong.

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

McCarthy & McCarthy and *William P. Warner*, for appellant.

W. V. Steuteville and *Sidney T. Frum, contra.*

Heard before GOSS, C. J., EBERLY, DAY, PAINE, CARTER and MESSMORE, JJ., and YEAGER, District Judge.

YEAGER, District Judge.

This is an action in equity which was instituted in the district court for Dakota county, Nebraska, by Perry L. Hole, plaintiff, who is appellee herein, against Jack L. Hamp, defendant, who is appellant herein. The purpose of the action is to effect the cancelation of a lease upon lands in said Dakota county, which lands were owned by plaintiff and which were occupied under lease by the defendant, and to enjoin the defendant from committing waste thereon.

A statement of the facts necessary to the determination of this case is as follows: On or about the 26th of August, 1933, plaintiff and defendant entered into a written lease which was to become effective March 1, 1934, and extend over a period of five years, or until March 1, 1939. The lease provided for an annual cash rental payable to plaintiff by defendant, and also contained a cancelation clause

by the terms of which the defendant agreed to deliver up the premises at the beginning of any year except the first year, provided plaintiff gave written notice of cancelation during the months of May, June and July of the preceding year and paid to defendant the sum of $1,000.

On July 17, 1936, the plaintiff, through his agent, gave defendant notice of cancelation to become effective on March 1, 1937, and made a tender of the specified $1,000. The defendant refused to accept the tender and refused to execute in writing a formal agreement of cancelation to take effect on March 1, 1937, which said formal agreement of cancelation was set forth and provided for in the lease.

The facts stated are alleged in the petition of plaintiff and are also admitted by defendant in his pleadings and testimony. Plaintiff further alleges in his petition that, after the service of notice of cancelation, the defendant proceeded to commit waste upon the land by selling and disposing of trees which were situate upon the land.

The prayer is for cancelation of the lease, for an accounting of rentals for 1936, and for timber sold after July 17, 1936, that being the date of notice of cancelation of the lease, and an injunction to prevent waste and destruction of buildings and improvements.

The defendant, in his answer, denies the commission of waste and denies that he sold or disposed of any trees after July 17, 1936. In addition to his answer, defendant has filed a counterclaim and cross-petition which will be hereinafter referred to as cross-petition. In his answer and cross-petition, the defendant alleges that on or about the 1st of May, 1934, he had a subsequent oral agreement with the plaintiff wherein it was agreed that, if the defendant improved the land, fences and buildings and cleared and seeded more land than was required of him, and provided plaintiff sold the land before the expiration of the full term of the lease, plaintiff would pay him for excess improvements, clearing and seeding, and that plaintiff would not cancel the lease without making such payment. He further alleged that pursuant to such agreement he made improve-

ments and cleared and seeded additional land, the cost of which aggregated the sum of $1,503.94 His prayer was for dissolution of injunction, the dismissal of plaintiff's petition, judgment for $1,503.94, and for the $1,000 tendered by plaintiff.

The trial was to the court on all of the issues presented, and at its conclusion a decree was entered finding in favor of plaintiff and decreeing a cancelation of the lease as prayed. The defendant was enjoined from removing any repairs, fencing, windmill or improvements and from in any other manner interfering with or destroying anything on the land in question. The cross-petition of the defendant was dismissed with a finding that the evidence did not sustain the answer and cross-petition.

The record is clear and without dispute that, in the absence of proof of the existence of the alleged oral agreement of May 1, 1934, the plaintiff was entitled to the relief prayed in his petition. The existence of any such agreement is denied by plaintiff. The defendant, his wife and his wife's mother have testified as to the time, place and terms of the agreement. The defendant testified in response to questions as follows: "Q. Where was this conversation? A. In the house. Q. In the dining-room? A. Yes. Q. Before you left the table? A. I had mentioned to Mr. Hole that morning I had to have a new windmill and there would have to be 5 or 6 miles of new fence built. I said, 'Mr. Hole, how much have you got to put into it and we will go ahead?' 'Mr. Hamp,' he said, 'I am financially embarrassed.' He said to go ahead and do the best you could, and I said, 'What if you sell the place?' 'Mr. Hamp,' he said, 'I am not going to sell this place. I am going to keep it. But if I do sell this place I will protect you and pay you for every additional thing you put on over and above the lease.' Q. Who was present? A. My wife and mother-in-law. Q. Well, what was said about that? A. What do you mean? Q. Anything further said about it? A. No, that was the conversation. He told me he would protect me and pay me for all additional work."

Mrs. Hamp testified as follows: "Q. Tell that conversation. A. They was talking about improvements around the place, and Jack said to Mr. Hole that they had to have a new windmill, they didn't have no water. The other one didn't supply enough water for the cattle. Jack said he had to put in a lot of new seeding and that the sunflowers were so thick in places you couldn't raise nothing on it. And then they got to talking about the fences, couldn't hold the cattle out all the time and couldn't keep the cows in. Mr. Hole said he didn't have no money to put in the place, but for Jack to go ahead and do that work. Jack said, 'What will I do if you sell the place?' Mr. Hole said he didn't have any intention of selling, but if he did, he would pay Jack for everything he put on it."

Mrs. Schuster, the mother-in-law, testified as follows: "Q. You may tell the court what conversation you heard. A. They was talking about the fences on the place would all have to be new and a windmill put up, and all the seeding that had to be done; and Mr. Hole told Mr. Hamp he didn't have the money to put those things in, and Jack said, 'If I put them in and you sell the place, what will I do?' They talked a while and Mr. Hole said, 'Just go ahead with the work and do things, and if I sell the place I will pay you for it.' "

The answer and cross-petition are in terms equitable. They are in terms equitable since they set forth that plaintiff agreed that on or about May 1, 1934, he would not exercise the option to cancel the lease without first compensating defendant for improvements, repairs, clearing and seeding, in excess of the requirements of the written lease.

An examination of the evidence quoted herein, which reflects fully the terms of the oral agreement, if there was an oral agreement, discloses that the cancelation of the written lease according to its terms was in nowise dependent upon the oral agreement. The defendant's evidence, when weighed in the most favorable light to defendant, supports no equitable ground of relief, but only an action at law

for the recovery of money expended for repairs, improvements, clearing and seeding in excess of the requirements of the written lease and $1,000 which had already been tendered and which tender had been kept good by deposit of the amount with the clerk of the district court. 62 C. J. 697; *Ahrens v. Fenton,* 138 Ia. 559, 115 N. W. 233; *Reed v. Armstrong,* 18 Ind. 446; *The Rossend Castle,* 30 Fed. 462; *Kansas City Transfer Co. v. Neiswanger,* 27 Mo. App. 356; *Taylor v. Brooklyn Elevated R. Co.,* 119 N. Y. 561, 23 N. E. 1106; *Mann v. Sprout,* 185 N. Y. 109, 77 N. E. 1018; *Sharpless & Co. v. Dobbins,* 1 Del. Co. Rep. (Pa.) 25; *Schnur v. Hickcox,* 45 Wis. 200.

The burden of proof was on the defendant to prove by a preponderance of the evidence the existence of the alleged oral agreement and what he was entitled to recover, if anything, under the terms thereof. *Cohen v. Swanson Petroleum Co.,* 133 Neb. 581, 276 N. W. 190; *Pierce v. Miller,* 107 Neb. 851, 187 N. W. 105.

On the question of the existence of the oral agreement, the trial court made a specific finding that the defendant had failed to prove the allegations of his answer and cross-petition so as to entitle him to judgment against the plaintiff in any sum whatsoever. If this finding on defendant's cross-petition shall be weighed in the light of the rule in equity actions, which is that on appeal in an equity action involving questions of fact where there is an irreconcilable conflict in the evidence, in determining the weight of evidence, this court will consider the fact that the trial court observed the witnesses and their manner of testifying, then we are not in a position to say that the court erred in weighing this question on which the defendant was required to sustain the preponderant burden. *Johnson v. Erickson,* 110 Neb. 511, 194 N. W. 670; *Otto v. Gunnarson Bros.,* 102 Neb. 613, 168 N. W. 361; *Enterprise Planing Mill Co. v. Methodist Episcopal Church,* 100 Neb. 29, 158 N. W. 386.

If, on the other hand, we are to consider the findings in the light of the rule in law cases, where the judge tries the facts without the interposition of a jury, that is, when

a law action is tried to the court, findings of fact have the same effect as findings of a jury, they will not be set aside unless clearly wrong (*Nelson v. Nelson,* 133 Neb. 458, 275 N. W. 829; *Citizens Ins. Co. v. Herpolsheimer,* 77 Neb. 232, 109 N. W. 160; *Miller v. Banner County,* 127 Neb. 690, 256 N. W. 639), then this court cannot on the record presented say that the finding was incorrect, since there is competent evidence on the part of the plaintiff, if believed, to support the finding that the claimed oral agreement was never entered into.

We find no error in the judgment of the district court and said judgment is

AFFIRMED.

DORIS RYAN, APPELLEE, V. PAUL OSWALD, APPELLANT.
278 N. W. 508

FILED MARCH 18, 1938. No. 30195.

1. **Pleading.** Section 20-701, Comp. St. 1929, authorizes a plaintiff to unite a cause of action growing out of a breach of contract of marriage and another in damages for seduction where both causes arise out of the same transaction.
2. **Breach of Marriage Promise.** "Where disease or physical disability rendering it unsafe or improper to marry has developed in either party to the contract, without intervening fault on the part of the other, subsequent to the making of the contract and before its consummation by marriage, such other party will be required to wait a reasonable time for a cure to be effected, and if such disease or disability proves to be of a permanent character, may refuse to carry out the contract." *Fellers v. Howe,* 106 Neb. 495, 184 N. W. 122.
3. **Seduction.** "Specifically, seduction is the act of inducing a woman to consent to unlawful sexual intercourse, by enticements which overcome her scruples." 57 C. J. 9.
4. **Appeal:** REMITTITUR. "Where the only reversible error appearing in the record is that the amount of the recovery is excessive, but not as the result of passion and prejudice of the jury, the court will affirm the judgment upon the excess being remitted." *Fellers v. Howe,* 106 Neb. 495, 184 N. W. 122.

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

Craft, Edgerton & Fraizer and *H. G. Wellensiek,* for appellant.

Prince & Prince, contra.

Heard before GOSS, C. J., ROSE, EBERLY, CARTER and MESSMORE, JJ., and WILLIAM A. DAY, District Judge.

GOSS, C. J.

Defendant appeals from a judgment for $10,000 against him.

The second amended petition, upon which the case was tried, sets up two causes of action for damages against defendant; one based on breach of promise of marriage and the other based on seduction under a promise of marriage.

The first cause of action alleged that both parties were over 18 years of age and had been keeping company for several months before May 23, 1933; that on said date defendant asked plaintiff to marry him and she accepted; that he promised to marry her and they were engaged to marry from the date named until about April 27, 1936; that from May 23, 1933, to March 18, 1934, defendant continually sought to seduce plaintiff under his promise of marriage and did finally carnally know her on or about March 18, 1934; that she was a chaste woman and had never had intercourse prior thereto with any man and that their relationship continued until about April 27, 1936, about which time defendant refused and has since continued to refuse to marry plaintiff and has breached his promise of marriage, to the damage and injury of the reputation, social standing and ability of plaintiff to support herself, for which damages she prays judgment.

The second cause of action is based upon substantially the same facts and prays damages for the seduction.

Defendant moved to require plaintiff to elect upon which count she would go to trial; one being said to be upon contract and the other for a tort. The overruling of this motion is assigned as error. Section 20-701, Comp. St. 1929, authorizes a plaintiff to unite a cause of action grow-

ing out of a breach of contract of marriage and another in damages for seduction where both causes arise out of the same transaction. 1 C. J. 1086; 1 C. J. S. 1255.

Defendant pleaded that the parties became engaged in October, 1933, but that no date for their marriage had ever been set. He alleged that on February 16, 1936, he noted serious mental delusions of plaintiff, that on February 22, 1936, she became mentally unbalanced and demented, and that this insanity grew constantly worse so that on February 24 a nurse was called to care for her, and on March 7, 1936, she was taken to Omaha and placed in a hospital under the care of a specialist, where she remained until April 24, 1936, when defendant brought her home; plaintiff's parents being without funds, defendant paid the doctors, nurses and hospital bills; that her parents filed an insanity information against her, she was adjudged insane and was taken to a sanitarium at Lincoln, where she remained incompetent and insane until about September 9, 1936; that until plaintiff became insane defendant had no thought but that they would marry, that the only time she suggested that they marry he told her he was not financially able to support her and she acquiesced and agreed with him, and that she frequently, when in her right mind, stated that she wanted to teach until 1938, before getting married; that defendant did not seduce plaintiff and never had sexual intercourse with her; that if her reputation for chastity has been impaired it has been brought about by her own statements or through the statements of her parents and relations and never by any statements of defendant; that after plaintiff's return from the hospital at Omaha, on April 24, 1936, up to May 10, 1936, defendant called on plaintiff seven times and on most of these occasions her mind was a total blank; defendant saw her on April 26 and April 28, 1936, and on neither occasion was marriage discussed between them; that about May 10, 1936, defendant stopped calling on plaintiff and did so because of the mental incompetency of plaintiff and because on May 6, 1936, her sister, having similar delusions, was

adjudged insane and was committed to the state hospital at Ingleside; that plaintiff never made any demand on defendant to marry her, that he never refused such a demand, that at all times from February 16, 1936, until May 10, 1936, when defendant stopped calling on her, she was insane and incompetent to enter into a marriage relation, and that by reason thereof and the insanity in her family defendant is released from his previous engagement to plaintiff. Defendant denies every allegation of the first and second causes of action not admitted by the answer.

The reply of plaintiff denies all allegations of new matter in the answer; alleges that her mental breakdown of February 22, 1936, was caused solely and only by worry over the fact that she believed she was pregnant by defendant and over the fact that defendant would not marry her, that she would lose her position as a teacher, that her reputation would be destroyed, and that under such circumstances defendant would not carry out his agreement to marry her; that the same things caused such a shock to her sister Beulah as to make her suffer temporarily a similar mental breakdown, but that the sister was confined only a few weeks and then was discharged as permanently cured; and that plaintiff is completely cured and has been perfectly normal since September 9, 1936.

Plaintiff and defendant were a country girl and boy, more than 18 years of age when they became engaged and about 21 at the time of trial. She was a school-teacher and he lived with his parents and helped to do the work on his father's farm. He admits the engagement and promise to marry and seeks to justify the breaking off between them because of her mental disturbance and his claim that there was insanity in her family. His testimony denies that he ever had sexual intercourse with her. She testified that for nearly a year after they became engaged he pleaded for sexual intercourse and that she finally yielded and they pursued that relation from some time in 1934 to January or February, 1936. She thought she was pregnant because she had overrun her period for about three weeks.

On February 21, 1936, her father sent for him and a family conference was held at her home. While he was not directly accused, he testified that plaintiff said: "You know what is wrong. I says: 'No; I don't.' And she said: 'Are you going to be a man.' And then her dad * * * says: 'I know what is wrong with her. * * * You take her and marry her and I will like you as well as I ever did.'" He testified that he did not answer the father. The evidence shows that on that night he took her to the house of his cousin, who was married to her sister. The next morning the four started out with the plan of being married at Grand Island or Hastings. Defendant stopped at his parents' home to change his clothes and then suggested that they go to Grand Island to see a doctor. The two girls went in to see a doctor at the hospital. They came out and reported that the doctor could not tell whether she was pregnant or not. They all went home and that night plaintiff and defendant started to Grand Island to get some medicine that the doctor had suggested, but on the way plaintiff refused to get the medicine. She testified that he said: "He couldn't get married now, because he didn't have any money."

Plaintiff and defendant both agree that she suffered a mental breakdown on February 22, 1936. Defendant took her to a hospital in Omaha March 7, 1936, where she remained several weeks. Defendant paid the bills and was attentive in his calls and correspondence. Later she was taken to Green Gables in Lincoln for treatment and evidently was cured of her mental troubles which she claims were brought about by worry over the belief that she was pregnant, and aggravated by his refusal on February 22, 1936, to marry her.

While she was in the Omaha hospital, defendant wrote her a letter, dated March 8, 1936, in which he said: "I am sorry for all the trouble I have caused you, more sorry than I will ever be able to tell you. Honey, if you will forgive me, I will feel so much better and some day we'll be happy together." When on the stand defendant testified

that the reason why he refused to marry plaintiff was that she had been insane ever since February 16, 1936. While it is true that, in the family conference heretofore referred to, the father did not expressly charge defendant with seducing his daughter, there was sufficient for the jury to infer the meaning of the conversation to defendant and his understanding of it. There was ample evidence, if believed by the jury, to prove the promise of defendant to marry, his seduction of plaintiff under the influence of that relation and his breach of the promise.

Defendant asks relief from his contract to marry on the ground that plaintiff had become mentally incompetent. A somewhat similar situation arose in *Fellers v. Howe*, 106 Neb. 495, 184 N. W. 122. There defendant had alleged that plaintiff was afflicted by a disease that rendered her unfit for the marriage relation. The trial court had given an instruction which was attacked and was criticized in the opinion, but was held not so prejudicially erroneous as to require a reversal. In discussing the rule the opinion said: "We think the better rule in such case is something like this: Where disease or physical disability rendering it unsafe or improper to marry has developed in either party to the contract, without intervening fault on the part of the other, subsequent to the making of the contract and before its consummation by marriage, such other party will be required to wait a reasonable time for a cure to be effected, and if such disease or disability proves to be of a permanent character, may refuse to carry out the contract. See 9 C. J. 339, sec. 31, and cases cited."

The evidence in the case at bar seems to indicate that plaintiff's mental disturbance was only temporary and was caused by the shock of defendant's conduct in being unwilling to marry her on or about February 22, 1936, in the state in which she believed herself to be on account of her relations with him. She carried on her suit in her own name. She testified at length. There is nothing in the evidence to lead to any other conclusion than that she was cured of any mental trouble. At the time of the trial she

was a freshman at college, partly working her way. Whether his refusal to marry plaintiff occurred in February or in April or May of that year is unimportant. While he was attentive to her and paid her bills at the Omaha hospital, it is apparent from the evidence that, after a date early in May, 1936, he ceased all personal attentions to her, and the evidence was sufficient for the jury to conclude that he had decided to break the contract some time in the first half of 1936. The jury might well have concluded from the evidence that there was no family insanity and that she had recovered in the fall of 1936 from a temporary mental breakdown, caused by the shock of his attitude.

Rulings of the trial court on the admission of evidence are assigned as error. Defendant was not allowed to cross-examine plaintiff as to whether she was pregnant on February 21, 1936, just after she had answered on cross-examination that she thought on that date that she was pregnant. When objection was sustained to this question on the ground that it was immaterial, defendant offered to show by plaintiff "that on February 21, when she thought she was pregnant, she was not pregnant." The offer was rejected. While we think the question might well have been allowed to be answered by plaintiff, yet we think there was no prejudicial error in the ruling, because plaintiff had already answered on cross-examination that she came around and had her period within the next week after February 22. This answer stands in the record. There is no claim in the pleadings or in the evidence that she was ever pregnant—she merely thought she was because so long a time had elapsed between her periods.

Another claim of error rests in the trial court's refusal to allow a large number of letters, 25 in all, to be admitted in evidence. These letters were all written to plaintiff by defendant. Previously, on behalf of plaintiff, there had been offered, and it had been received in evidence, one part from a letter, written by defendant to plaintiff at the hospital March 8, 1936, as follows: "I have resolved to do my

best to be the kind of a fellow you want me to be. I am sorry for all the trouble I have caused you. Honey, if you will only forgive me, I will feel so much better and some day we'll be happy together." When that part was offered and received, defendant offered the rest of the letter and it too was received. Later plaintiff was made defendant's witness and defendant sought to introduce the other letters she had received from defendant while in the hospital. They were excluded as immaterial and self-serving. None of them sought to explain or modify the statement quoted from the letter admitted in evidence. As we understand the evidence, she wrote him only once or at most twice while she was in the hospital, while he wrote her almost daily. We find no letter from her to him in evidence.

It is argued by defendant that plaintiff was not seduced, that she deliberately entered into and continued in this course of illicit love that lasted two years. The brief cites 57 C. J. 12: "Illicit or unlawful intercourse does not of itself constitute seduction. Mere reluctance on the part of the woman to commit the act is not sufficient to entitle her to recover." Another part of that same section says: "The essential elements of her cause of action is the act of seduction itself, which can be accomplished only by persuasion, flattery, deceit, false promises * * * on the part of defendant, by reason of which she is induced to yield to sexual intercourse." On this point defendant also cites *Rich v. Fulton,* 104 Neb. 262, 177 N. W. 175. That decision does not apply to the facts here because the woman there was a married woman who had brought an action for divorce from her husband but had not secured the divorce. It was held to be against public policy for her to enter into a contract of marriage unless her husband was divorced or dead; and in effect it was held that she was not seduced, but that her sexual indulgence was merely to gratify passion.

"Specifically, seduction is the act of inducing a woman to consent to unlawful sexual intercourse, by enticements which overcome her scruples." 57 C. J. 9.

Instruction No. 4 by the court is assigned as erroneous in part. That was a long instruction, consisting of four paragraphs, the first two reciting the findings that would justify the jury in rendering their verdict for defendant on the two causes of action. The third paragraph told the jury, if they found that plaintiff's mental derangement was due to defendant's refusal to carry out his promise to marry her when she believed she was pregnant, and that worry and the shock of the realization of the position she was in brought about her mental condition, then such mental derangement of plaintiff need not be justification for defendant's refusal to marry her, and their verdict should be for plaintiff on her first cause of action.

Then the court further told the jury in the same instruction that, if they found defendant did have sexual relations with plaintiff "as a result of his promises to marry her," then the verdict should be in favor of plaintiff on her second cause of action, notwithstanding they may also find her mental derangement was not caused by any act of defendant.

Defendant criticizes this instruction particularly because of the expression "as a result," saying there is no evidence that this could be as a result of his promise to marry her, that the evidence shows she yielded to him because she thought she would otherwise lose his love, that this was outside the evidence, and the like. It seems clear that the jury were not misled by this and that there was ample evidence to justify them in finding that the seduction took place because she yielded to his desires relying on his promise to marry her and because she felt she would lose his love if she did not so yield.

Defendant argues that insane people are not permitted to marry in this state, and that, if insanity appears in one party after the promise is made, it excuses the other. Granted, but this is not such a case and it was submitted on other issues. Then, too, plaintiff very evidently had only a temporary mental derangement, which the jury thought, apparently, under the evidence, had been brought

about by defendant's conduct. She had recovered in September, 1936, but defendant's love had cooled.

There are various other assignments of error. We have examined them and find they are not meritorious save that as to the excessiveness of the verdict.

The evidence as to specific damages to plaintiff is rather meager. Of course, damages are inferable from seduction of a chaste young woman, but the consequential damages arising out of the loss of her position as a teacher and of the publication of the fact of her seduction are not proved as facts but left to the jury also to infer from the evidence. Considering the whole case, we think the recovery is excessive, but not as the result of passion or prejudice, but rather as the result of too high an estimate by the jury. "Where the only reversible error appearing in the record is that the amount of the recovery is excessive, but not as the result of passion and prejudice of the jury, the court will affirm the judgment upon the excess being remitted." *Fellers v. Howe*, 106 Neb. 495, 184 N. W. 122.

We are of the opinion that justice will be subserved by a reduction of the judgment to $6,000. The order will therefore be that, if within 20 days from the releasing of this opinion plaintiff will file a remittitur of $4,000, the judgment so reduced will be affirmed for $6,000; otherwise, the judgment will stand reversed and a new trial ordered.

AFFIRMED ON CONDITION.

CARTER, J., and WILLIAM A. DAY, District Judge, dissent.

WILLIAM A. ROMINE, APPELLANT, V. SAMUEL A. WEST, APPELLEE.

278 N. W. 490

FILED MARCH 18, 1938. No. 30256.

Boundaries. Where a boundary, supposed to be the true line established by the government survey, is acquiesced in by the adjoining owners for more than ten years, it is conclusive of the location.

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

Cordeal, Colfer & Russell, for appellant.

Butler & James and *J. F. Ratcliff, contra.*

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

DAY, J.

This is an action in ejectment to recover a strip of land between two owners of adjoining real estate in Hitchcock county. The case was tried to a court and jury which, on February 10, 1937, rendered a verdict in favor of West. Romine, the instigator of the action, appeals to this court.

The appellant is the owner of the southwest quarter of the southeast quarter of section 4, in township 4 north of range 35 west of the sixth P. M. in Hitchcock county, Nebraska. Title was acquired by him from the former owner by warranty deed dated September 12, 1935, and recorded October 17, 1935. The appellee, West, is the owner by virtue of a deed dated August 31, 1926, delivered March 1, 1927, and recorded March 10, 1927, of the south half of the southwest quarter of section 4. This is a boundary dispute wherein each of the two adjoining landowners claims a strip 77 feet wide at the north end and 88 feet wide at the south end.

Romine acquired the tract in section 4, heretofore described in detail, about September 12, 1935. Prior thereto, and at Romine's request, Barnes, a deputy state surveyor, made a survey of other lands which threw some doubt upon the correctness of the boundary line in dispute. Within a month after the acquisition of this tract, Romine requested the state surveyor to make an examination of this tract, and within three months started this action.

The evidence is in dispute as to certain questions, but was submitted to a jury which determined these questions. It appears that it was fairly established by the record that, at the time appellant, Romine, purchased this land in 1935, there was a fence on the west side of the land, and

on the east side of the land owned by West. This fence was the boundary line between the two tracts at that time. Romine knew about this fence, and knew that defendant's land had been farmed and cultivated from 1917 or 1918 to a point 22 feet from the fence, leaving just enough space for a turn row, and the land he purchased had been farmed and cultivated to a point 8 feet from the fence since that time. The appellant, Romine, purchased his tract from Hochstettler, who testified that he was familiar with the boundary lines, and that they had not been changed during that period. He stated that there had been fences on the boundary line during the last 15 or 18 years, and that the location had never been changed; that he recognized the fence line as being the true boundary line; that he last visited the land in October, 1935, and the line fence was there in the same place that it had been during the years of his ownership of the land; that there had never been any claim made to him, while he owned the land, that the fence line was not the true line between the two properties.

Egle testified that he was acquainted with the Romine land, and that as a tenant of Hochstettler he farmed the land from 1915 to 1933; that he built the fence on the west side in October, 1918, by putting more posts between telephone posts on the supposed boundary line. The telephone line was built in 1907 or 1908, and seemed to be in perfect alignment with the place north of it.

Other witnesses testified, and their testimony is not sharply in conflict with this except as to details. The appellant complains that the adverse possession was based on a claim of right. The burden, of course, is upon the plaintiff (appellant), and he relied largely upon the recent survey to establish the boundary line between the parties. The defendant (appellee) claimed title by virtue of adverse possession. He effectually established that he had been in possession of this land in dispute since 1918, and that if the true boundary were otherwise there had been no realization of the fact since 1908.

A thorough annotator states: "The rule has been an-

nounced and reiterated that, where the owners of adjoining land occupy their respective premises up to a certain line, which they mutually recognize and acquiesce in as the boundary line for a long period of time,—usually the time prescribed by the statute of limitations,—they and their grantees are precluded from claiming that the boundary line thus recognized and acquiesced in is not the true one, although such line may not be in fact the true line according to the calls of their deeds." 69 A. L. R. 1491.

Another competent commentator says: "It is very generally held, however, that where the recognition and acquiescence have continued beyond the period fixed by the statute of limitations the presumption becomes conclusive, irrespective of the correctness of the boundary acquiesced in." 9 C. J. 245.

And again the same authority says: "Lines and corners long recognized and acquiesced in by adjoining owners will control courses and distances called for in their title deed or grants in case of conflict." 9 C. J. 247.

The rule long established in this jurisdiction is that where a boundary, supposed to be the true line established by the government survey, is acquiesced in by the adjoining owners for more than ten years, it is conclusive of the location. See *Clark v. Thornburg*, 66 Neb. 717, 92 N. W. 1056; *Pfeifer v. Scottsbluff Mortgage Loan Co.*, 105 Neb. 621, 181 N. W. 533; *Johnston v. Aden*, 109 Neb. 625, 192 N. W. 220.

The only question involved in the case is whether the appellee (defendant) holds title by adverse possession. The case is controlled by the rule of law announced. We have noticed, but not seriously considered, the contention that, in order to have adverse possession, the present owner of the land in the southwest quarter must tack his adverse possession to a former owner who held adversely, and this cannot be done because the deed of conveyance described only the land according to the government survey. The boundary between the two tracts should not be disturbed after an acquiescence of more than the statutory period.

AFFIRMED.

CONTINENTAL COMPANY OF LINCOLN, APPELLEE, V. HENRY F. EILERS, APPELLANT.

278 N. W. 497

FILED MARCH 18, 1938. No. 30235.

1. **Subscriptions.** A condition precedent contained in a subscription agreement must be complied with before liability attaches.
2. ———. When there has been a substantial compliance with such condition precedent a recovery may be had.
3. ———. A condition contained in a subscription agreement, that the agreement was not to be valid unless a sum total of $30,000 was signed, is substantially complied with where it appears that a part thereof was in signed pledges and the required balance was collected in cash.

APPEAL from the district court for Johnson county: FREDERICK W. MESSMORE, JUDGE. *Affirmed.*

Ginsburg & Ginsburg and *Raymond B. Morrissey,* for appellant.

Beghtol, Foe & Rankin, Jay C. Moore and *Robert S. Finn, contra.*

Heard before GOSS, C. J., EBERLY, DAY, PAINE and CARTER, JJ., and FALLOON, District Judge.

CARTER, J.

This action was brought by the plaintiff against the defendant, Henry F. Eilers, to recover upon a subscription to the St. John's Lutheran Church of Sterling, Nebraska. The trial resulted in a judgment in favor of the plaintiff. From this judgment, the defendant appeals.

The facts, so far as material to the question here presented, are substantially as follows: During the year 1929, St. John's Lutheran Church, through its proper officers, undertook to secure subscriptions to provide the necessary funds for the building of a new church. The defendant signed a note payable to the church in the amount of $1,000, payable in instalments, which contained the condition that "this agreement is not valid unless a sum total of $30,000 has been signed." The note was subsequently assigned to

the plaintiff as collateral to a loan made to the church. At the time this suit was commenced, signed pledges in the amount of $25,675 had been obtained, of which two in the net amount of $350 were improperly included for the purposes of this suit because of additional conditions written into the subscription notes. It is not disputed that valid signed pledges were obtained in the amount of $25,325. The church, however, received cash from other sources in the amount of $5,210. This cash item consists of $4,300 collected from oral pledges, and $910 obtained as cash donations and contributions from the parishioners of the church. The question for determination is whether the cash item of $5,210 may be properly added to the $25,325 in signed pledges in order to meet the condition of $30,000 in signed pledges as hereinbefore mentioned. If the $5,210 in cash can be included, plaintiff is entitled to recover; otherwise, defendant is entitled to judgment.

It is of course necessary that conditions precedent contained in a subscription contract be complied with in order to bind the subscriber. Whether or not a condition precedent has been complied with is tested by the situation existing at the time it is sought to enforce the subscription, not by that existing at the time of the signing of the instrument, in the absence of a specific limitation to the contrary in the subscription agreement. *Owenby v. Georgia Baptist Assembly,* 137 Ga. 698, 74 S. E. 56; *Irwin v. Lombard University,* 56 Ohio St. 9, 46 N. E. 63.

Subscription contracts are favored in law as calculated to foster public and quasi-public enterprises. As a matter of public policy, the courts are desirous that subscribers should not evade their deliberate promise of contribution, and their tendency therefore is to adopt such a rule as will sustain the subscription as a legal obligation. *Pass v. First Nat. Bank,* 25 Ala. App. 519, 149 So. 718; 25 R. C. L. 1398, sec. 4.

A literal compliance with a condition precedent is not required. Where there has been a substantial compliance, a recovery may be had. 60 C. J. 964. In the case at bar,

the defendant complains that the possession of $5,210 in cash in lieu of a like amount of signed pledges is not a compliance with the condition precedent. This contention is highly technical. It was clearly the intent of the defendant that his subscription agreement should become a binding obligation when the sum of $30,000 was pledged. Certainly he cannot be heard to complain because cash has been taken as a part of it instead of "signed" pledges. The collection of cash to make up the difference between the amount of signed pledges and the amount required to make the condition effective is a substantial compliance with the condition precedent contained in the agreement.

The facts disclose that the church has been built according to the original plan. The purpose of the undertaking has been accomplished. The necessary consideration to make the subscription note a binding agreement is therefore existent. The condition precedent was substantially complied with and the defendant cannot now evade his promise to pay the amount that he subscribed to the enterprise. The trial court was right in entering judgment for the amount found due on his subscription note. The judgment is

AFFIRMED.

HANS P. NEBLE, APPELLEE, V. E. A. MARSHALL, APPELLANT.
278 N. W. 489

FILED MARCH 18, 1938. No. 30244.

Mortgages: MORATORIUM. No authority exists by virtue of section 20-21,165, Comp. St. Supp. 1937, for granting a moratory stay in a proceeding to foreclose a land sale contract executed at a date subsequent to March 1, 1934.

APPEAL from the district court for Holt county: ROBERT R. DICKSON, JUDGE. *Affirmed.*

Cowan & Grady and *Emmet A. Harmon,* for appellant.

Julius D. Cronin, contra.

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

CARTER, J.

This is an appeal from an order of the district court for Holt county refusing to grant a moratory stay under the provisions of section 20-21,159, Comp. St. Supp. 1937.

The record in this case discloses that the contract of sale involved herein was executed on March 16, 1935. The moratory law provides as follows: "Provided, the provisions of this act shall not apply to any mortgage, deed of trust, land sale contract, or note secured thereby, executed subsequent to March 1, 1934, nor shall it apply to any mortgagor or mortgagors under any deed of trust who acquired the real estate subsequent to March 1, 1934." Comp. St. Supp. 1937, sec. 20-21,165.

It is clear that the district court is without authority to grant a moratory stay on a foreclosure of a land sale contract executed subsequent to March 1, 1934. It is conceded that the contract in the case at bar was executed subsequent to that date. The action of the trial court in denying the stay was therefore correct.

The judgment of the trial court is affirmed with leave granted to redeem any time before issuance of the mandate of this court.

AFFIRMED.

HENRY LILIENTHAL, JR., ET AL., APPELLEES, V. PLATTE VALLEY PUBLIC POWER AND IRRIGATION DISTRICT, APPELLANT.
278 N. W. 492

FILED MARCH 18, 1938. No. 30229.

1. **Eminent Domain:** DAMAGES. A circular letter, compiled by a consulting electrical engineer of a power company, based on experience, containing certain admonishments warning of danger, distributed generally to persons along the lines serviced by such company, where not heeding such admonishments would cause injury and damage to persons, live stock and property

by necessity in the vicinity of transmission lines carrying electric energy, and where such danger is imminent, actual and real, *held*, such evidence is admissible, not as an independent element of damage, but for the purpose of affecting the market value of the land immediately before and immediately after the obtaining of the easement and erection of transmission lines.

2. ———: ———. Where a transmission line cuts a farm into four irregular tracts and follows over plaintiff's land approximately 1 1/16 miles, rendering useless for farming purposes a strip of land 129 feet in width for that distance, and causing great inconvenience and disadvantage in farming said land, *held*, resulting damage to the 181.58-acre tract affected, in the amount of $4,085.40, is not excessive.
3. ———: ———. "The measure of damages for land taken for public use is the fair and reasonable market value of the land actually appropriated and the difference in the fair and reasonable market value of the remainder of the land before and after the taking." *McGinley v. Platte Valley Public Power and Irrigation District*, 133 Neb. 420, 275 N. W. 593.
4. ———: ———. "The jury in fixing the damages sustained by a landowner in consequence of the appropriation, or injury, of his property for a public use may take into account every element of annoyance and disadvantage resulting from the improvement which would influence an intending purchaser's estimate of the market value of such property." *Chicago, R. I. & P. R. Co. v. O'Neill*, 58 Neb. 239, 78 N. W. 521.
5. ———: ———. Where transmission lines pass a short distance from plaintiff's home, directly by his barn and over his feed yard, and cut portions of his farm into four irregular tracts, so that in his farming operations he is exposed and subject to danger, as are his live stock and other property, the necessity of working, living and keeping live stock and other property on said premises is a danger to which the general public is not exposed.

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

Beeler, Crosby & Baskins, E. H. Evans and *Robert B. Crosby*, for appellant.

Cleary, Suhr & Davis, contra.

Heard before GOSS, C. J., ROSE, EBERLY, DAY and MESSMORE, JJ., and FALLOON, District Judge.

MESSMORE, J.

This is an appeal from the district court for Merrick county wherein the jury awarded damages to the plaintiffs for the actual taking, under condemnation proceedings, of 5.17 acres of land and resulting damage to 181.58 acres of land, and other damages incident thereto.

Transmission lines of the defendant enter plaintiffs' land at a point in the northeast quarter of the northeast quarter of section 30, where the main transmission line from North Platte to Columbus enters their land and continues in a northeasterly direction over and across their land for a distance of 404 feet, where it leaves their land for a short distance, but again entering into the southwest quarter of section 20, where the line continues north over and across plaintiffs' land for a distance of 1,392.2 feet to the 5.17-acre tract, upon which is erected a substation. From the north side of the substation site the line again emerges and continues to the north for a distance of 119.4 feet, where it turns at an angle and continues to the north for a distance of 2,416 feet to the end of plaintiffs' land where it continues towards Columbus. From the substation is the line of the Central Power Company which emerges on the south side of the substation and continues in a southeasterly direction over and across plaintiffs' land for a distance of 1,679 feet. On the land described in section 30 there are improvements of the value of $4,000. In section 19 of said farm 40 acres are not touched by the defendant's lines; upon this tract is erected extensive improvements of the value of $6,970 which service the entire farm.

The easement for the 110 KV transmission line, located over and across the northeast quarter of the northeast quarter of section 30, has one 4-pole structure thereon, and the 110 KV transmission line, located over and across the west half of the southwest quarter of section 20, has two structures, one of which is a 4-pole and one a 2-pole structure. The easement for the 110 KV transmission line, located over and across the north half of the southwest quarter of section 20, has one 3-pole structure, a 6-pole

structure, and the third, fourth and fifth structures are 2-pole. The easement for the 33 KV transmission line, located over the west half of the southwest quarter of section 20, has two 2-pole structures.

There are two maps in evidence which fairly disclose the progress of the easement, and the briefs of the parties substantially concur in the course of the transmission lines over and across the plaintiffs' lands. The materials and equipment used on the transmission lines are the same as used on transmission lines of like character, the top wires of which are not insulated. The easement consists of a strip 29 feet in width and practically 1 1/16 miles in length. The exhibits disclose that the land is cut into four irregular tracts by the easement, and it might be stated at this time that a great portion of plaintiffs' land is pasture land, and, under the direction of defendant, no hay can be stacked within 50 feet of each side of the transmission line. Therefore, along a large portion of this easement we have a strip 129 feet in width.

The principal contention relates to exhibit 2, which is a circular letter, issued by the defendant company, compiled under the direction of its consulting engineer, and distributed generally to those persons along the transmission lines serviced by such company. No objection is raised to the other damages allowed by the jury, but defendant contends that the resulting damage to the 181.58-acre tract, amounting to $4,085.40, is excessive. The substation is located close to the buildings and would have a tendency to discourage buyers for the premises.

The value placed on the land in question before and after acquirement of the easement and the building of the transmission line is conflicting and presents a direct conflict in the evidence. Exhibit 2 contains certain admonishments and directions as to the conduct of persons in the vicinity of the lines and constitutes a warning to property owners along the right of way of the electric transmission system of defendant company. Exhibit 2 is as follows:

"We wish to warn all persons, who may approach the

transmission lines of this district for any purpose, of the danger of serious damage to themselves.

"The lines are insulated from the ground and are perfectly safe for all proper farming operations and for people passing under them. But the wire itself has no insulation and must not be tampered with.

"High voltage electric energy is dangerous and injury can result even though a direct contact is not made. No one should touch the poles, *nor the ground wire which extends down one side of the pole.* No one should come within 15 feet or permit tools, equipment used in farming, fish poles or any other thing to come within 15 feet of the wires. Kite strings, ropes and particularly metallic cables of any kind should be kept long distances away from all parts of the line. Hay should not be stacked nearer than 50 feet to the outside wires of the lines because either the hay stacker, or a man on top of the hay stack with a pitchfork in his hand, could easily come so close to the line as to receive a severe electrical shock. Do not attach fence wires to the poles.

"Direct contact with the wires is not necessary for serious shocks. This transmission line carries the highest voltage in the state of Nebraska and during wet weather conditions, electricity may pass to ground through a person's body for distances of 8 feet to 10 feet, unquestionably resulting in death.

"We are using every means to give this matter wide publicity, not because of danger to our lines but because of possible danger to life.

"Please help us in every way so that no serious damage or deaths will occur in the operation of this transmission system. Please read this letter to all members of your family and those employed by you, and particularly stress the danger to boys who might try to climb the poles or play in the vicinity of the transmission lines."

Defendant states that the purpose of exhibit 2 is to educate the public in the characteristics of a transmission line, and to impress the situation on the public by simple

precautions which soon become mechanical and a matter of routine in situations of this kind. Defendant offered expert testimony as to the clearance of the wires, being 14 feet 6 inches apart and 27 feet from the ground, and that there was no danger within a radius of 24 feet from the ground and no danger in conducting ordinary farming operations.

Defendant believes that this court should fix the rule involving damages resulting from the erection of transmission lines and acquiring of easements, in line with certain authorities, to meet the modern conception of the extended use of electric energy. The cases cited by defendant follow:

In *Illinois Power & Light Corporation v. Peterson,* 322 Ill. 342, 153 N. E. 577, it was said in the opinion (p. 349): "Since damages are recoverable only where there is a physical disturbance of a right of property, the fear of a remote and contingent injury which may possibly occur but the happening of which is altogether speculative and uncertain is not regarded by the law as an element entering into the damages which may be allowed to the owner. The damage must be direct and proximate and not such as is merely possible or may be conceived by the imagination." The evidence in the above case, held not to be proper, was the testimony of two witnesses who "thought that the existence of the tower and the transmission line would make the farm less salable and hence depreciate its value, but no facts were adduced upon which to base the opinion. Other elements of damage suggested were that the delivery of material to the tower site might compel the opening of fences;" that the entry of employees of the power company on the land might trample the crops, and the tower and line would be unsightly. None of the witnesses in the above case, it appeared, had any knowledge, acquired by experience or observation, of the effect of the existence of a power line on the market value of agricultural land. We fail to see wherein the foregoing case is analogous to the elements of damage as testified to in the case at bar.

In *Alabama Power Co. v. Keystone Lime Co.*, 191 Ala. 58, 67 So. 833, it was held: "Where a right of way for the erection or maintenance of towers, poles and wires for the transmission of electricity is condemned, the owner may recover compensation for the actual damages arising from depreciation in the value of his remaining land, caused by the presence of these things upon the right of way; but mere fears of people from their presence upon the right of way cannot be made a basis on which to predicate such depreciation or affect the amount of the recovery."

In *Chesapeake & Potomac Telephone Co. v. Red Jacket Consolidated Coal & Coke Co.*, 95 W. Va. 406, 121 S. E. 278, it was held: "In ascertaining damages to a landowner arising from the taking of an easement or right of way through his land, an element of damages is any danger that depreciates the value of the residue of the land resulting from the operations of the condemnor thereon, but such danger must be real, imminent and reasonably to be apprehended, and not remote or merely possible."

In *Missouri Power & Light Co. v. John Hancock Mutual Life Ins. Co.*, 58 S. W. (2d) (Mo. App.) 321, in discussing the admissibility of testimony of defendant's witnesses, wherein they based their conclusions as to the depreciation and market value upon certain facts, that wires and conductors strung across towers might break and cause injury to persons or live stock, and that towers might be blown down or fall over, the presence of the towers on the farm, that a transmission line would decrease the value of the farm and that they would not want the farm, such testimony was held to be improper.

In *Yagel v. Kansas Gas & Electric Co.*, 131 Kan. 267, 291 Pac. 768, the court refused an instruction that, in determining the depreciation in market value of the remaining land not taken, the jury could consider the element of fear in the minds of prospective purchasers of injury to persons or property, if any were likely, from breakage or falling of the high power wires, if this should depreciate the value of the property. The opinion in that case criticized *Tellu-*

ride Power Co. v. Bruneau, 41 Utah, 4, 125 Pac. 399, a case cited by appellees. The criticism was that the case was heard 20 years prior to the *Yagel* case, and that the latter case involved modern equipment and construction. In the *Yagel* case the trial court instructed as follows (p. 272): "The fear of a remote and contingent injury which may possibly occur because of the condemning and appropriation of a right of way across the land of plaintiff * * * the happening of which is remote, speculative and uncertain and merely possible, including accidents, action of the elements and acts of God over which defendant has no control, cannot form the basis for allowance of damages."

In *Kentucky Hydro-Electric Co. v. Woodard,* 216 Ky. 618, 287 S. W. 985, in discussing testimony the court stated (p. 635) "that, although the court and jury should take into consideration the opinions of witnesses as to values, such opinions should be tested by the facts on which the witnesses based those opinions, and if the opinions are based on facts which are recognized to be more or less speculative and remote, and as well somewhat fanciful, little, if any, weight need be given them, and they may be in large measure ignored." The witnesses of the appellees in that case admitted that "their estimation of the damages was in a large measure based on the fear the witness had of possible danger to persons arising out of the construction and maintenance of the line. They did not show that this fear was founded on experience, or was reasonable, or was based on the knowledge of how these lines were constructed and maintained. * * * Such fear * * * was that ill-defined, speculative and unreasonable fear. * * * These witnesses did not show that this fear, had it been of the proper kind, was so broad that it affected the market value of the property." The opinion also entertained the proposition (p. 631): "But if such fears be reasonable, not ill-defined, but founded on practical experience, and if they be entertained so generally as to enter into the calculations of all who propose to buy or sell, can it logically be said that they do not depreciate the market value of the property?"

Defendant contends that the admission of exhibit 2, creating the fear and danger, is based entirely upon hearsay statements; that none of the witnesses for the plaintiffs had technical knowledge or experience in matters of the kind in question and they were directly attributable to the warning sent out by the defendant. The defendant sought, on cross-examination, to explain the circular and its use. When it was introduced in evidence, the witness testifying thereto stated that he compiled it and sent it to the property owners and that it applied to construction of transmission lines, such as were being constructed across plaintiffs' land; that it applied primarily to the high voltage of the 110,000-volt line. We believe, under the circumstances as disclosed by the record, that exhibit 2 was admissible.

There are no decisions in the state of Nebraska setting out what elements of damages can be considered by the jury to land remaining after condemnation for the purposes of a power line. Several cases have been set forth in this opinion cited by appellant. While we have not included herein all of such cases, we have cited a sufficient number to apprise us of appellant's contention. We now cite some of the cases from other states that reflect plaintiffs' contention as to the testimony admissible in cases of this character.

In *Telluride Power Co. v. Bruneau*, 41 Utah, 4, 125 Pac. 399, criticized in *Yagel v. Kansas Gas & Electric Co., supra,* the court held: "In a proceeding to condemn a strip of land on which to erect poles bearing wires heavily charged with electricity, if the presence of the wires would expose persons and live stock on the land of defendant not taken to danger, and thus depreciate the market value of such land, defendant was entitled to show such fact." The measure of damages in condemnation cases is the same in Utah as in Nebraska. The opinion in the above case cited *Beckman v. Lincoln & N. W. R. Co.*, 85 Neb. 228, 122 N. W. 994.

In *Evans v. Iowa Southern Utilities Co.*, 205 Ia. 283, 218 N. W. 66, evidence of witnesses was admitted as to danger to the plaintiff, his family, danger to the stock and

damage to the crops while the line was being repaired, and the possibility of wires breaking and striking the plaintiff and members of his family in case of a sleet storm, and the fear a prospective purchaser might have by reason of the high voltage line on the premises. The court said (p. 289):

"It is true that, in general terms, the proper measure of damage is the depreciation in the market value of the property caused by the condemnation in the location and construction of the transmission line; but such damages will vary with the character of the property affected and the uses to which the property is applied. * * *

"It is true that whatever makes the farm in question a less desirable farm does affect its market value, notwithstanding the fact that the law provides for compensation in the first instance for crops damaged or destroyed in the construction and maintenance of the line.

"The appellant relies upon the rule of interpretation as announced by the supreme court of Illinois, which rule is not as liberal as the rule declared in this state from the earliest decisions. We have not and do not adopt the strict limitations as defined in the decisions relied upon by appellant."

The measure of damages in condemnation proceedings is the same in Iowa as in Nebraska.

"The measure of damages for land taken for public use is the fair and reasonable market value of the land actually appropriated and the difference in the fair and reasonable market value of the remainder of the land before and after the taking." *McGinley v. Platte Valley Public Power and Irrigation District,* 133 Neb. 420, 275 N. W. 593. See, also, *Stuhr v. City of Grand Island,* 124 Neb. 285, 246 N. W. 461.

Our court is committed to the rule: "The jury in fixing the damages sustained by a landowner in consequence of the appropriation, or injury, of his property for a public use may take into account every element of annoyance and disadvantage resulting from the improvement which would

influence an intending purchaser's estimate of the market value of such property." *Chicago, R. I. & P. R. Co. v. O'Neill,* 58 Neb. 239, 78 N. W. 521; *Kayser v. Chicago, B. & Q. R. Co.,* 88 Neb. 343, 129 N. W. 554.

We believe that the evidence discloses a great disadvantage to the farm lands of the appellees on account of the transmission lines of defendant, both in farming and on the market value; that exhibit 2 was properly admitted in evidence, in so far as it might affect the depreciation and value of the land on a resale, not as an independent item of damages, but under the general rule as set forth in Nebraska. We believe that exhibit 2 is founded on actual damage and injury that will accrue if the admonishments, based on past experience, are not heeded; that such elements of danger as stated therein are not remote, speculative or conjectural.

The jury had the opportunity of seeing the premises in question, and their view thereof may be considered as evidence upon which they based their verdict. A verdict based on the evidence, where the jury have been permitted to view the premises, will not be disturbed unless clearly wrong. *Fremont, E. & M. V. R. Co. v. Meeker,* 28 Neb. 94, 44 N. W. 79.

The evidence on the value of plaintiffs' premises immediately before and after the construction of defendant's lines, in so far as it relates to the resulting damage to the 181.58-acre tract, is in direct conflict. The value of plaintiffs' land is fixed generally at $100 an acre before the construction of defendant's line, and the depreciation in value after the construction of the line, as shown by plaintiffs' evidence, ranges from $10,000, as testified to by plaintiffs, to $9,000, as testified to by one, and $7,500, as testified to by another, witness for plaintiffs. The testimony of witnesses for defendant fixes the value of the land and the resulting damage thereto at much less.

In view of the facts as stated in this opinion and as disclosed by the record in this case, where we are confronted with a particular set of circumstances that are not incident

to the ordinary case where a line crosses an owner's land, we believe, in this case especially, and having in mind all of the evidence, facts and circumstances, that the verdict of $4,085.40 as resulting damage to the 181.58-acre tract affected is not excessive.

The appellant contends that there are no more dangers or hazards to the appellees than to the public in general and persons in the community, as the lines go along roads, over the streets of cities, over farm lands, enter upon premises where the improvements are located, and that such is a matter of common knowledge, and cites the rule that an owner cannot claim as elements of damage such as are suffered generally by the public or by those similarly situated, and that these are sufficient to reject the element of fear in this case. On the land in question run these lines which cut up portions of the farm and carry the highest voltage in the state of Nebraska,—a line capable of doing great damage and injury. The lines pass just a short distance from appellees' home, directly by their barn and over their feed yard. In every farming operation they are exposed and subject to danger, as are their live stock and property. The necessity of working, living and keeping live stock and other property on such premises is damage to which the general public is not exposed. The daily exposure to damage greatly lessens the desirability of this farm as a home.

For the reasons given in this opinion, we believe that the rule, as stated in Nebraska and as hereinbefore cited, is a just rule, and particularly so in the case at bar, and that the damages found by the jury, in considering all of the facts and circumstances, are not excessive.

AFFIRMED.

JOSEPH C. MEISTER ET AL., APPELLEES, V. DEAN KROTTER ET AL., APPELLANTS.
278 N. W. 483

FILED MARCH 18, 1938. No. 30241.

1. **Waters:** FLOWING LANDS. Evidence examined as to whether erection of dam in river was cause of overflow of upper proprietor's land, causing damage thereto, *held* to be in conflict and for jury to determine.
2. ———: ———: DAMAGES. The measure of damages resulting from the overflow of water onto a person's land, caused by the erection of a dam, is the difference in the value of the land immediately before and after the event which gives rise to the action.
3. **Trial.** Instructions examined as a whole, and when, taken together, they fairly and accurately state the law pertinent to the facts in the case, they are sufficient.
4. **Waters.** Dam erected on defendants' land *held* to be of permanent construction.

APPEAL from the district court for Hayes county: CHARLES E. ELDRED, JUDGE. *Affirmed on condition.*

C. M. Bosley and *Cordeal, Colfer & Russell,* for appellants.

Edmund D. Shipley, contra.

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

MESSMORE, J.

This is an appeal from the district court for Hayes county wherein a jury returned a verdict in the sum of $4,000 in favor of the plaintiffs for damages resulting to their land from an overflow alleged to have been caused by the erection of a dam by defendants. The court required a remittitur of $1,000 which was filed. The defendants have appealed.

The pleadings of the parties admit the ownership of the land in question in the respective parties, and the erection of the dam by the defendants. Plaintiffs' petition alleges, in substance, damages to the land caused by the erection of the dam in question by defendants, causing overflow on

plaintiffs' land, and set forth the elements of damage contended for, which will be covered later in the opinion. Defendants' amended answer contains a general denial, and alleges that the plaintiffs acquiesced in the building of the dam, and that the channel of the Frenchman river had not been raised above its former elevation; that sand and gravel had been removed from the river bed where it flows through plaintiffs' land, which deepened the channel of the river and lowered the natural level of water in said stream, so that the lands, which had been formerly subirrigated and for that reason productive, became barren and unproductive; that the dam was erected with authority of law, and the effect was to raise the water level in the Frenchman river substantially to its former height and to benefit the lands adjacent to the stream. The reply is, in effect, a general denial to the amended answer.

The evidence discloses that plaintiff Joseph C. Meister has lived in Hayes county since 1886 and has owned the land in question since 1915, the land being located about one-half mile north of the town of Palisade, Nebraska, described as the northwest quarter of section 31, township 5 north, range 33 west of the 6th P. M.; that highway 25, running from Palisade to highway 17, extends along the east side of this quarter-section on the half-section line; that the house is located 20 rods west of the road; that there are barns, sheds and other improvements near the house; that plaintiffs are engaged in the business of stock-raising and farming; that the land directly east, being the northeast quarter of section 31, is also owned by the plaintiffs.

The Frenchman river enters the land of plaintiffs in the northwest corner of the northwest quarter of said section 31, and adjacent thereto is the Culbertson irrigation ditch, which follows the Frenchman river. The river and irrigation ditch run across the north side of the two quarter-sections in question. The ditch is 40 feet in width, and its purpose is to divert the water from the Frenchman river at the northwest corner of the northwest quarter. It has

been in use for a period of more than 40 years, without change in location, dimensions or elevations. It continues across the north part of the northwest quarter in an easterly direction, and when it reaches the east side of the northwest quarter near highway 25 it runs northeast for a short distance and touches the north line of the quarter, then turns back in a southeasterly direction 60 to 70 rods, then runs almost straight south to the head-gate, which is located about 80 rods east of highway 25 and near the center of the northeast quarter of section 31. The ditch carries the entire flow of the Frenchman river from where it enters the plaintiffs' land and diverts the waters from the Frenchman river down to the head-gate. The ditch turns the corner and around the bend and runs nearly straight east and a little southeast and continues down the Frenchman river valley from the head-gate. The old Frenchman river channel runs from the northwest corner of the northwest quarter of section 31 along side of the ditch for 30 rods or more. The ditch turns slightly to the east, and the old river bed runs a little southeast until it meets the outlet of the ditch and crosses highway 25 about 70 rods south of the place where the ditch crosses said highway. The old river channel extends from this point a little southeast for about 60 to 65 rods, then turns in a southerly course, and runs almost straight south nearly to the county road. The road is across the south side of plaintiffs' land. There is a channel connecting the point where the river turns almost south to the county road and the head-gate in the ditch. This channel comes from the head-gate and empties into the old bed of the Frenchman river, which is the old Stinking Water channel. Stinking Water creek enters the northwest quarter of section 31 for a short distance west of highway 25, north from said quarter-section. The Frenchman river bed extends from where it leaves the plaintiffs' land on the south side thereof down to where it approaches the ditch a half-mile or so east of their land, runs a little southeast for about 20 rods, then turns east and south again into a bend on the Krotter

land, then turns back east right close to the side of the ditch. This point is about a half-mile from where the Frenchman river bed comes back right close beside the ditch east of the southeast corner of plaintiffs' land. Inclosed in the southwest corner of the northeast quarter of section 31, bounded on the east and north by the old Frenchman river bed, is a 20 to 25-acre tract of land formerly used for pasture, now used for a hog pasture, bedding and feed lot. There is a fence along the north side of the hog pasture, running east to where the river turns south.

From the time that plaintiffs acquired the land until the fall of 1930, the old river channel as it ran through the hog pasture was a narrow, low stream, 8 to 18 inches deep, 3 to 6 feet wide, which never froze up in the winter and was used for watering stock. Along this stream grew various kinds of shrubbery and trees, cotton, willow, and plum thickets. East of the hog pasture is an alfalfa patch consisting of 30 to 35 acres, in the southeast corner, bounded on the west by the river and the hog pasture, on the north by the Culbertson ditch, on the east and south by the half-section line. These two portions of land are the tracts involved in this action. The foregoing constitutes plaintiff Joseph C. Meister's description, which is fairly accurate with the exception of proximate distances that may vary some from other descriptions and the maps in evidence. The dam is located on the northeast corner of the south half of section 32. This dam is of concrete structure and extends from bank to bank of the Frenchman river, has concrete wing walls which extend upstream and downstream from the dam to converge the stream to a width of approximately 37 feet, has a concrete floor about one foot thick and extends downstream 20 feet or more. The footings are sunk in hard clay or bed rock. The dam rises to a crest of 5 feet 1 inch above the surface of the bed rock. The flow of the Frenchman river between the waste-gate and the dam passes over the barrier through all the year.

There are different estimates given in the testimony as

to the exact height of this dam. The wings on the dam are from 8 to 10 feet back of the dam. There are flash boards on the top of the dam on the north side. The concrete is about a foot higher on the south side of the dam than on the north side. There is an opening, 3 by 9 feet, right at the bottom of the dam. There are maps in evidence, one in the brief of appellants, one exhibit 3 made by Fred Krotter, and maps made by the engineers, some of which have to do with the topography, the elevations of the land at different points, and water-tables, which will be discussed hereinafter.

The testimony of the plaintiffs was to the effect that the damage started after the erection of the dam in 1930, when the water raised and spread over the bottom, which resulted in freezing up the small stream of water, shutting it off for live stock purposes, and compelling plaintiffs to cut holes in the ice to obtain water for live stock. Complaint was made to Mr. Krotter and his son Chauncey, who informed them that the ice would melt when the weather warmed up, and in the spring, when the ice did melt, the water spread over the bottom until it became muck and mire and continued so until late in the spring, or until water was taken out of the river and converted into the ditch, which is usually in April, thus leaving the hog pasture and feed lots unfit for use. The testimony further disclosed that some of the trees and shrubbery along the banks of the stream died, and that the land which had been planted to alfalfa grew crops to a height of only 6 to 8 inches. The evidence disclosed certain alkali substances in the soil of all of the land in that vicinity, belonging both to plaintiffs and defendants, and the value of the land in question immediately before and immediately after the construction of the dam.

Appellants contend that the petition of the plaintiffs is insufficient to warrant the court in presenting to the jury the measure of damages as presented, for the reason that no allegation in the petition states properly the measure of damages, and that said petition is confined, if at

all, just to damages that might result to the plaintiffs by virtue of hog-raising, and that no damages are claimed or properly pleaded for loss of crops, or as to the productivity of the land. An examination of the petition shows that it is sufficient to raise the question of damage, if any, to the land and the productivity thereof, as well as to the trees along the bank of the stream, and to the business of raising and feeding hogs. The evidence further discloses the different crops that have been raised on the land in question, the difficulty in getting a lister into the soil to list corn, and in bedding the hogs and using the land as a feeding ground, details of which it is not necessary to further state.

Appellants suggest that the reason for the lack of crops may be due to various causes, one of which is a dam erected by the plaintiffs on their land sufficient to span the Frenchman river, this dam being located in the northwest quarter of section 31, constructed in 1926, rebuilt in 1932, and washed out by a flood in 1935. It was used to impound water to enable plaintiffs to obtain ice. The dam was not permanent and not high, being about 3 feet in height. It is suggested that the flood of 1935 may have caused the condition that existed on plaintiffs' land. We scarcely believe that this position is correct, in view of the evidence.

The evidence discloses that a certain amount of gravel was taken from the bed of the Frenchman river on plaintiffs' land; that this did deepen the channel of the river, and that the reason for the construction of the dam by defendant Fred Krotter was to restore the water in the channel to its former level, to stop erosion and to benefit the lands generally. The evidence on erosion does not sustain the claim of erosion. Alluvial deposits of sand and gravel from the ditch were a constant occurrence and cast doubt on the claimed erosion.

Appellants suggest that the condition of the soil on plaintiffs' land, shown by their experts to contain alkali substances, was analogous to the condition of the soil on

defendants' land whereon crops had been raised during the same period of time in which plaintiffs claim they had raised no crops. Appellants contend that the water level in the river now is no higher than its normal level in 1924. The dam was erected in 1930, and appellants assert, as a matter of law, the right, under their theory of the evidence, to restore the original water level. Assuming, then, under the conditions, the absolute right of the defendants to erect the dam so as to raise the water level, which apparently is not challenged by plaintiffs, the question of fact for solution is whether the water level was raised beyond what was the normal flow before the claimed erosion, the latter covering a period between 1924 and 1928.

We now consider appellants' first assignment of error: That the verdict is contrary to the evidence, not sustained thereby and contrary to law, and that the plaintiffs are obligated to prove, by a preponderance of the evidence, that the obstruction of which they complain caused the damages sustained, citing *Harris v. Lincoln & N. W. R. Co.*, 91 Neb. 755, 137 N. W. 865, and other cases. On the burden of proof, there can be no doubt of the law. We believe the evidence in this case is in conflict. For years prior to the time of the construction of defendants' dam, there had been no damage to the land, the alfalfa field or hog pasture. The small stream did not freeze up and was valuable for the purpose of watering live stock. The trees were alive along the bank of the stream, and the testimony of Jasper Ray, a ditch rider from 1926 until he left after the construction of defendants' dam, substantiates the foregoing facts. He told of the difficulty that he had at the head-gate in controlling the water, and of his request to Fred Krotter in that regard; also of his difficulty in controlling the water at the head-gate after the erection of defendants' dam, compared with conditions before its erection. The natural slope and drainage in this area are from the northwest to the southeast. Jasper Ray testified that the water level in the sluice-way rose steadily until the water "got deeper on the floor of the head-gate * * * perfectly level."

This testimony would indicate an increase in the elevation. After the erection of the dam, according to Ray's testimony, the water was deep, making it hard to get to the head-gate. To overcome this difficulty he would request defendants to pull the flash boards from their dam, and, on compliance by them, he would adjust the head-gate. After the erection of the dam, the witness stated, he was unable to drain the ditch through the head-gate, and later they had to dam up the ditch to keep the water out. This trouble did not exist before the construction of the dam. On defendants' land was an open ditch, 50 to 60 rods in length, south of the ditch and northwest of the dam. When the flash boards were in the dam and the fishway was closed, water stood in the ditch, and when the dam was opened in July the ditch dried up and remained that way until the middle of September, and upon the closing of the dam water then appeared in the ditch, and by January of 1937 the water was backed up about half way in this ditch. The witness also testified that the river's water level was never lowered.

The appellants contend that the trial court erred in submitting the case to the jury, for the reason that the verdict is opposed to the undisputed physical facts and is in contradiction of physical laws,—citing *Dodds v. Omaha & C. B. Street R. Co.*, 104 Neb. 692, 178 N. W. 258; *Elwood v. Schlank*, 126 Neb. 213, 252 N. W. 828; and *Kalman v. Pieper*, 158 Wis. 487, 149 N. W. 203. The first case cited dealt with a carrier and passenger; the second was an action for personal injuries; and the third case dealt with master and servant; but these cases were cited by appellants for the principle of law announced.

Formidable expert testimony is offered, and it would unnecessarily lengthen this opinion to detail all of it; but, for the benefit of appellants' contention, we recite a part thereof briefly as follows: The dam as constructed does not cause water to overflow any portion of the northeast quarter of section 31, considering the ground levels of the land which vary from 6.25 feet at its lowest point to 10.82

feet at its highest point, in the alfalfa field, above the crest of the dam. The ground level of the hog pasture varies from 6.62 feet at its lowest to 11.08 feet at its highest point above the crest of the dam. On December 9, 1936, when all of the water of the Frenchman river was being wasted into the natural channel, the surface of the water in the stream as it flowed across the northeast quarter of section 31 varied from an elevation of 5.02 feet where the river crossed the south line of that quarter to an elevation of 6.95 feet at a point about 300 feet south of the head-gate above the crest of defendants' dam. On the same date the ground water on the northern part of the alfalfa field varied from an elevation of 6.58 feet, as measured in a test hole about 500 feet south of the head-gate, to an elevation of 4.13 feet, as measured in a test hole close to the southern bank of the Culbertson ditch, where it crosses the east line of the northeast quarter of section 31 above the crest of defendants' dam; and on the same date the elevation of the surface water as it flowed into the Frenchman river was lower than the ground water in the test holes directly west and higher than the ground water in the test hole directly east of the point in the river where it was measured. The elevation of the water in the test hole in the hog lot and pasture ranged from 5.35 feet, as shown by a point on exhibit 13, to 6.89 feet, while in the alfalfa field it ranged from 6.9 feet to 6.58 feet above defendants' dam, as .86 of a foot of water was flowing from the dam on that day. The ground waters in the hog lot and pasture varied from 4.49 feet to 6.03 feet, and in the alfalfa field 2.04 feet to 5.72 feet above the surface of the water in the river, as it flowed from defendants' dam. The above testimony was for the purpose of demonstrating that it was the water that flowed in the river, and not the defendants' dam, which affected the ground water, borne out from the fact that the elevation of the water flowing from the dam was lowered by the removal of the flash boards from .95 of a foot on March 22, 1937, to .21 of a foot on March 23, 1937; that the surface of the water

in the Frenchman river, where it flowed through plaintiffs' land, was actually higher than on the latter date. A general summary of the foregoing evidence in behalf of the defendants was to the effect that the elevation of the ground water in the hog lot was controlled by water that came from the west; that the elevation of the ground water in the alfalfa field was controlled by water in the Culbertson ditch and the Frenchman river, and that the elevations could not have been influenced by the dam. Other witnesses for defendants gave evidence as to the height and flow of waters and the nails on a bridge across Bobtail creek, from which the height at times may be inferred. This bridge is located on the section line at Bobtail creek, a distance of one-half mile south of the southernmost portion of plaintiffs' land. The elevation point was fixed as of 1915 when the bridge was built. No witnesses testified as to any continuous condition on the rainfall at various times.

While the testimony of the experts is impressive and instructive, still it presented facts to be submitted to the jury, and is entitled to the weight the jury might see fit to give it. Plaintiffs have shown the condition which existed before and after the construction of the dam. True, this is lay testimony, but testimony which is entitled to such consideration as the jury might see fit to give to it.

Taking into consideration the test holes dug in various parts of the land in which the water raised to heights above the level of the dam top, the water in the river upstream was also higher. Therefore, it is claimed, the river was retarded and its volume increased by the dam, and the river was so affected through plaintiffs' land. Of course, the whole stream to some extent would be affected; the water-table would be raised; so it does not follow that, because the test holes showed an elevation of water greater than the top of the dam, the damming of the water was not the cause of the water in the test holes. Some of the measurements showed water higher than the adjacent stream. The evidence is not conclusive that the water in

the test holes did not come from the stream. Its source may have been a higher point in the stream, the soil through which the water could more easily percolate. *Meister v. Krotter,* 131 Neb. 35, 267 N. W. 161.

Again, there are certain water-tables analyzed in the evidence, and from the figures the water levels in the various test holes increased from November to December, and increased still further from December to March. The question arises as to whether or not the dam impounded these waters and to some extent backed them up beneath the plaintiffs' land. We must remember that the dam raised the elevation of the water at the point where it was constructed and that, where such elevation is now 5 feet 1 inch, it was formerly 18 inches. Certain water levels were taken which will not be repeated in this opinion, but which were for the purpose of showing beyond question that defendants' dam did not affect the ground water levels under the plaintiffs' land in the northeast quarter of section 31. The general slope of the alfalfa area is from northwest to southeast, and the water, surface and subsurface, turns in that direction. All of the evidence must be taken into consideration, and we do not believe that defendants' evidence is of such a conclusive nature that it would bar the right of plaintiffs to have the question submitted to the jury. If the water-tables were raised by elevating the stream, plaintiffs would be entitled, under their pleadings, to recover. *Pierce Mill Co. v. Koltermann,* 26 Neb. 722, 42 N. W. 877. An upper riparian owner is not required to bear any burden which a lower proprietor creates by erection of a dam. *Flader v. Central Realty & Investment Co.,* 114 Neb. 161, 266 N. W. 965.

We have set out hereinbefore the construction of defendants' dam and believe such construction is permanent, and that plaintiffs were entitled to have submitted to the jury the permanent damages. Some objection is made on the part of appellants that plaintiffs must be bound by the damages that accrued immediately after the construction of the dam, and not for the period

of years for which they claim damages, namely, 1932, 1933, etc. Several cases are cited in this regard under proposition 4 of appellants' brief.

In *Meister v. Krotter, supra,* the proper measure of damages is stated in syllabus No. 1 as follows: "In assessing recovery for permanent damages to land, the evidence must show with reasonable arithmetical certainty the values before and after the event which gives rise to the action."

Apparently, the above case was reversed because the evidence did not show with reasonable arithmetical certainty the values before and after the event which gave rise to the action. This record discloses the value of plaintiffs' land before and after the erection of the dam, and an examination of the record discloses that the elements of damage were taken into consideration. We believe that the plaintiffs had, without doubt, a right to testify as to the value of their land before and after the erection of the dam. It is well established that the owner of property may testify as to its value. The other witnesses, farmers and landowners in the vicinity, gave their opinions, based on proper questions, as to the respective values of plaintiffs' land, which was a matter for the jury's determination. We see no error in the admission of this testimony.

Certain exceptions were taken to the remarks of the trial judge through the course of the trial. After a careful examination of the record, we are convinced that the court made no statements that affected the substantial rights of the defendants, or such as would constitute reversible error.

Exceptions have been taken to instructions given by the trial court, but under our analysis of the evidence and the measure of damages in this case, the instructions, considered as a whole, properly state the law, and we believe there is no prejudicial error therein, and no prejudice resulted to the substantial rights of the defendants by the giving of such instructions. Other assignments of error are without merit.

The cross-appeal of the plaintiffs is dismissed. The trial judge properly required a remittitur to be filed in the sum of $1,000 when he believed, from all the evidence, that the damages awarded by the jury were excessive. We are of the opinion that a further remittitur in the sum of $600, reducing the judgment to $2,400, would meet the requirements of this case under the evidence.

The order, therefore, will be that, if within 20 days from the releasing of this opinion, plaintiffs will file a further remittitur of $600, the judgment so reduced will be affirmed for $2,400; otherwise, the judgment will stand reversed and a new trial ordered.

AFFIRMED ON CONDITION.

FARMERS ELEVATOR COMPANY, APPELLEE, V. JOE H. PECK ET AL., APPELLANTS.
278 N. W. 499

FILED MARCH 18, 1938. No. 30251.

1. **Fraudulent Conveyances:** BURDEN OF PROOF. "A conveyance from a husband to his wife is presumptively fraudulent as to an existing creditor, and in litigation between the creditor and grantee on that issue, the burden is on the latter to establish the good faith of the transaction by a preponderance of the evidence. *Christensen v. Smith*, 123 Neb. 388, 243 N. W. 118." *Butke v. Nachschoen*, 133 Neb. 366, 275 N. W. 318.
2. ———: INTENT. "The question of fraudulent intent is to be considered as of the time when the conveyance is made, and with reference to the particular conveyance alleged to have been fraudulent as against creditors." *Tanner v. Frink*, 103 Neb. 817, 174 N. W. 417.
3. ———. "'A conveyance is declared to be fraudulent when its object or effect is to defraud another, or the intent with which it is made is to avoid some duty or debt due by or incumbent upon the party making the transfer.' 27 C. J. 415." *Butke v. Nachschoen*, 133 Neb. 366, 275 N. W. 318.
4. ———: INTENT: PROOF. "Fraudulent intent may be established by proof of facts from which such inference may be reasonably drawn." *Peterson v. Wahlquist*, 125 Neb. 247, 249 N. W. 678.

5. **Appeal.** "Where the evidence is conflicting and cannot be reconciled, this court, upon a trial *de novo*, * * * will consider the fact that the district court observed the demeanor of witnesses and gave credence to the testimony of some rather than to the contradictory testimony of others." *Cunningham v. Armour & Co.*, 133 Neb. 598, 276 N. W. 393.
6. **Evidence** examined and *held* to sustain the findings of the trial court.

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

Frank A. Dutton and *Joseph E. Strawn*, for appellants.

E. E. Richards, contra.

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

MESSMORE, J.

This is an action in the nature of a creditors' bill, wherein the plaintiff's petition alleges, in substance, that on March 20, 1933, the defendant Joe H. Peck was the owner of three quarter-sections of land; that he executed and delivered to the plaintiff for a valuable consideration his promissory note in the sum of $540.32, with interest at 10 per cent., due September 20, 1933; that said note was past due and was sued on by plaintiff and judgment rendered thereon October 7, 1935, in the amount of $677.95; that execution was issued on said judgment and returned by the sheriff wholly unsatisfied; that on February 26, 1934, the defendant Joe H. Peck fraudulently, wrongfully, unlawfully and without consideration, for the purpose of hindering, delaying and defrauding creditors, transferred and conveyed to his wife, Melissa Peck, the land in question, which at the time of conveyance was subject to a mortgage to the Federal Land Bank of Omaha, in the sum of $2,500; that subsequent to the conveyance of said real estate some of the buildings thereon were destroyed by fire; that money collected for insurance paid the mortgage debt, and, in addition thereto, Melissa Peck collected $1,300; that said land is of the reasonable value of $6,000.

Plaintiff prays that the conveyance from defendant Joe H. Peck to Melissa, his wife, be set aside.

The defendants filed separate answers, which admit the execution and delivery of the note, the conveyance in question, the history of the mortgage indebtedness, and the borrowing of money by defendant Joe H. Peck from his wife Melissa; allege that defendant Joe H. Peck did owe Melissa $523; that his father, in his last illness, was without property and in need of help, and in consequence thereof defendant Joe H. Peck conveyed to his wife Melissa the real estate in question subject to the 2,500-dollar mortgage; paid his obligation $523, and received a check for $477; that Melissa knew of the indebtedness of defendant Joe H. Peck to the plaintiff. Both answers contain a general denial. The reply is a general denial to the answers.

The trial court found generally for the plaintiff and against the defendants; that the defendant Joe H. Peck was indebted to the plaintiff at the time said conveyance was made, and that Melissa Peck, his wife, had knowledge of such indebtedness; that the deed was made to defraud plaintiff and other creditors, and that plaintiff had exhausted its legal remedy; decreed that the conveyance of February 26, 1934, be set aside, reserving to defendants a homestead interest in the quarter-section of land in question. From such decree, defendants have appealed.

The evidence discloses the execution and delivery of the note, the conveyance of the real estate from defendant Joe H. Peck to Melissa, and the burning of the buildings and collection of the insurance, all as related in the pleadings. The value of the land at the time of the transfer of the real estate, fixed by plaintiff's witnesses, was from $10,000 to $14,000, and after the burning of certain buildings on the land, with about $1,000 of improvements still standing thereon, the land was of the value of $6,000 to $10,000. Its value, as fixed by defendants' witnesses, without the buildings, was $4,250, and the precinct assessor fixed the value at $3,150. Its assessed valuation in 1934 was $3,880.

It is interesting to note the value of the land fixed by defendant Joe H. Peck on or about April 6, 1934, approximately six weeks after the transfer of the land to his wife Melissa. In an application for insurance he stated that he was the sole owner and title-holder of the land and fixed the value of the buildings at $6,500 and the land at $25 an acre, totaling $18,700, and stated that he paid for the land in 1920 the sum of $16,320.

From the evidence on value we have the testimony of defendant Melissa Peck wherein she stated that the land was of the value of $3,500, the amount she paid for it, and that, after the fire which destroyed certain buildings on the land, she received a total of $3,800, and that there was still $1,000 in improvements remaining thereon. The money borrowed by Joe H. Peck from his wife, to be used for burial expenses, erection of a monument, and in the last illness of his father, was borrowed two months before his father passed away. The evidence is rather extensive, but the foregoing synopsis thereof is sufficient for a determination of this case.

The defendants contend that the decree of the trial court is not sustained by and is contrary to the pleadings and the evidence, inequitable and contrary to law, and, in this connection, state that to set aside the conveyance in question would be taking the property and money of Melissa Peck to pay the obligations of her husband; also that plaintiff did not foreclose a chattel mortgage which was taken by it as security for the loan, and has not exhausted its remedy at law.

The evidence discloses that the chattels under the mortgage were of the value of from $70 to $80 at the time of the bringing of this action, and at the time of borrowing the money from plaintiff the value was slightly less than the amount borrowed. The execution on the judgment was returned by the sheriff without finding sufficient property of defendant Joe H. Peck upon which to levy.

"There are two classes of creditors' bills, one to reach the equitable assets or property of the debtor on which an

execution at law cannot be levied; the other in aid of an execution at law, as to set aside an encumbrance or a transfer of property made to defraud creditors. In the first class of cases the creditor must allege and show that he has exhausted his remedy at law, while in the second it is sufficient to show that his claim has been reduced to judgment and docketed in the county where the land lies which he seeks to subject to the payment of his claim. The equity court in such case is merely lending its assistance to the legal tribunal to remove a fraudulent obstruction interposed to the execution of its writ." *State Bank of Ceresco v. Belk,* 68 Neb. 517, 94 N. W. 617; *Riggs v. Hroch,* 133 Neb. 260, 274 N. W. 598. We believe, without question, plaintiff's petition properly predicates an action under either or both of the two classes of creditors' bills.

This court held in *Butke v. Nachschoen,* 133 Neb. 366, 275 N. W. 318: "A conveyance from a husband to his wife is presumptively fraudulent as to an existing creditor, and in litigation between the creditor and grantee on that issue, the burden is on the latter to establish the good faith of the transaction by a preponderance of the evidence. *Christensen v. Smith,* 123 Neb. 388, 243 N. W. 118." With this rule in mind, the burden of proof would be on the grantee to establish by a preponderance of the evidence the *bona fides* of the conveyance or transaction.

In considering the question of fraudulent intent this court has held: "The question of fraudulent intent is to be considered as of the time when the conveyance is made, and with reference to the particular conveyance alleged to have been fraudulent as against creditors." *Tanner v. Frink,* 103 Neb. 817, 174 N. W. 417; *Butke v. Nachschoen, supra.* And, as to the circumstances under which a conveyance is to be declared fraudulent, this court has adopted the following rule: "A conveyance is declared to be fraudulent when its object or effect is to defraud another, or the intent with which it is made is to avoid some duty or debt due by or incumbent upon the party making the transfer." 27 C. J. 415; *Butke v. Nachschoen, supra.* In the same

connection, as respects fraudulent conveyances, "Fraudulent intent may be established by proof of facts from which such inference may be reasonably drawn." *Peterson v. Wahlquist,* 125 Neb. 247, 249 N. W. 678, 89 A. L. R. 747; *Riggs v. Hroch, supra.*

In considering all of the evidence, facts and circumstances in this case, the trial court, after setting aside the homestead rights of the parties in interest, found that such conveyance, made by defendant Joe H. Peck to his wife, Melissa, was fraudulent and did hinder and delay creditors, and especially the creditor plaintiff.

The statutory provision applicable to this class of cases follows: "Every conveyance or assignment, in writing or otherwise, of any estate or interest in lands, or in goods or things in action, or of any rents or profits issuing therefrom, and every charge upon lands, goods or things in action, or upon the rents and profits thereof, made with the intent to hinder, delay or defraud creditors or persons, of their lawful rights, damages, forfeitures, debts or demands, and every bond or other evidence of debt given, suit commenced, or decree or judgment suffered, with the like intent as against the persons so hindered, delayed or defrauded shall be void." Comp. St. 1929, sec. 36-401. And, as stated in the body of the opinion in *Riggs v. Hroch, supra*: "In the application of this provision to transactions between husband and wife, especially where the result thereof is to deny creditors of the husband their just demands, we are committed to the doctrine that conveyances between close relatives are presumptively fraudulent as to an existing creditor, and in litigation between the creditor and the parties to the conveyance over its alleged invalidity, the burden is on them to establish the good faith of the transaction by a preponderance of the evidence. *Lincoln Savings & Loan Ass'n v. Mann,* 129 Neb. 26, 260 N. W. 559; *Waterbury State Bank v. O'Neill,* 129 Neb. 150, 260 N. W. 808; *Gentry v. Burge,* 129 Neb. 493, 261 N. W. 854."

In the case at bar the conveyance was made by the husband to the wife, both of them knowing at the time of the

existence of defendant Joe H. Peck's indebtedness to plaintiff, and, in fact, defendant Joe H. Peck had stated that he was trying "to get the thing settled." The trial court set aside in its decree and provided for the homestead interest of the parties and found, from all the facts and circumstances, that the conveyance should be set aside. It had opportunity to observe the witnesses, their general demeanor and conduct while testifying, and the facts about which they testified, and to test their credibility, and in this connection this court has held: "Where the evidence is conflicting and cannot be reconciled, this court, upon a trial *de novo* * * * will consider the fact that the district court observed the demeanor of witnesses and gave credence to the testimony of some rather than to the contradictory testimony of others." *Cunningham v. Armour & Co.*, 133 Neb. 598, 276 N. W. 393.

A careful examination of the entire record, and in the light of the authorities cited, convinces us that the trial court was correct in its determination of this action. The judgment of the district court is therefore

AFFIRMED.

EDWARD ZIMMER, APPELLANT, V. JAMES H. BRANDON ET AL., APPELLEES.

278 N. W. 502

FILED MARCH 18, 1938. No. 30048.

1. **Negligence.** "Whenever the circumstances attending a situation are such that an ordinarily prudent person could reasonably apprehend that, as the natural and probable consequences of his act, another person, rightfully there, will be in danger of receiving an injury, a duty to exercise ordinary care to prevent such injury arises; and, if such care is not exercised by the party on whom the duty rests and injury to another person results therefrom, liability on the part of the negligent party to the person injured will generally exist, in the absence of any other controlling element or fact, and this, too, without regard to the legal relationship of the parties." *Lisle v. Anderson*, 61 Okla. 68, 159 Pac. 278.

2. **Appeal:** DIRECTION OF VERDICT. "A motion to direct a verdict at the close of plaintiff's evidence is, in effect, a demurrer to the evidence, and where the trial court sustains such motion, and dismisses the action, the appellate court, in reviewing such decision, will assume the existence of every material fact which the evidence on behalf of the plaintiff tends to establish and, in addition, give the plaintiff the benefit of the logical inferences therefrom." *Zielinski v. Dolan*, 127 Neb. 153, 254 N. W. 695.
3. **Negligence:** CONTRIBUTORY NEGLIGENCE: QUESTIONS FOR JURY. "The existence of negligence and contributory negligence in an action for personal injuries is, ordinarily, a question of fact, and where the evidence in relation thereto is such that minds may reasonably reach different conclusions as to their existence, such question should be submitted to the jury." *Sgroi v. Yellow Cab & Baggage Co.*, 124 Neb. 525, 247 N. W. 355.

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

Woods, Aitken & Aitken, for appellant.

Baylor, Tou Velle & Healey, contra.

Heard before GOSS, C. J., ROSE, EBERLY, CARTER and MESSMORE, JJ., and WILLIAM A. DAY, District Judge.

WILLIAM A. DAY, District Judge.

This is an appeal from an order of the district court for Lancaster county, Nebraska, directing the jury to return a verdict for the defendants in an action for personal injuries sustained by the plaintiff on account of the alleged negligence of the defendants.

An examination of the record reveals that this is an action for personal injuries alleged to have been sustained by the plaintiff, which he suffered when a wrought-iron upright pole, approximately 24 feet in height, on which he was working, toppled over, throwing him to the ground. The defendant, the Lincoln Hatchery, the plaintiff's employer (which is made one of the defendants by reason of having paid compensation insurance), had employed the defendants James H. Brandon and Arva V. Hartson to do certain plumbing and pipe-fitting work in connection with the construction of a gasoline filling station. The defend-

ant, the Lincoln Hatchery, also employed the plaintiff to assist in the general construction work of the filling station. During the course of construction, and on the day that the plaintiff was injured, the defendants Brandon and Hartson had been instructed by the Lincoln Hatchery to join together, by means of a coupling, two pieces of three-inch wrought-iron pipe. The shorter piece was about 3 feet in length, and the longer piece was 24 feet in length. The defendants were advised that the pipe, when so joined, was to be erected in an upright position, to which braces and brackets were to be attached, as well as lighting fixtures, and that a baked-enamel sign, weighing some 70 pounds, was to be suspended from the brackets. Braces, brackets and the enamel sign were lying beside the pipe at the time the defendant Brandon and Hartson were directed to work. The defendants were instructed to rethread the longer piece of pipe, the threads of which had been painted. They joined the two pieces of pipe together and then helped the plaintiff and the electrician, who was working about the place, raise the pole so joined to an upright position, and place the end to which the short piece was attached into a hole which had already been prepared in a concrete island in the filling station drive. After the pole had been placed in position, as described, the electrician then placed a ladder against the pole so erected, and spent the remainder of the morning working at the top of the pole, wiring the electrical fixtures attached to the bracket; all of which, together with the braces, had been attached to the pole before it was erected in its upright position. During all the time that the electrician was so working, the defendants were in plain sight of him, as they were working in close proximity to him in completing the installation of the gasoline pumps.

At lunch time, while the electrician and the defendants had gone to lunch, the plaintiff, making use of the electrician's ladder, which had been left erected against the upright pole, prepared to attach the diamond-shaped baked-enamel sign to the bracket. He ascended the pole and at-

tached to the center of the bracket a single block with a rope through it, and returned to the ground and then attached the rope to a corner of the sign and pulled it up into position. He then had his boy hold the rope while he again ascended the ladder and hooked the sign on the hook nearest the pole, then reached out to attach the sign to the hook farthest from the pole, at which time the upright pole fell, hurling him to the ground, and as a result of the fall he sustained certain injuries which are permanent in their nature.

Inspection of the pole after it had fallen to the ground revealed that the long upright pole had separated from the coupling, which was about a foot above the ground, causing the long piece to fall its entire length of 24 feet. Further examination disclosed that neither the pole nor the coupling had been broken; that the coupling had not split or widened; that neither the threads on the long pole nor on the coupling were stripped, and from the brightness of the exposed threads, it was evident that only two or three threads of the long pole and the coupling had been engaged or screwed together. The evidence of expert witnesses on behalf of the plaintiff reveals that the standard practice in joining such pipes, as in this case, required that the pipe threads be screwed or entered into the coupling so that not less than ten full threads were engaged, and that engaging only two or three threads of the pipe into the coupling would be decidedly below all recognized and standard practice; and would not be considered satisfactory or suitable work. Testimony further reveals that had the pole been properly assembled it would have withstood the weight and force directed against it at the time of the plaintiff's fall, and in fact it would have withstood from six to eight times the actual load applied.

The plumbing firm of Brandon and Hartson, in undertaking to assemble this upright pipe by joining the two pieces with a coupling, owed a duty to this plaintiff, and any other person rightfully on the premises, to perform the work in a proper and workmanlike manner, and with-

out negligence on their part. As plumbers they are charged with knowledge of what a proper and workmanlike assembly of the upright pole in question would be, and knowledge of the manner in which the pole was assembled was exclusively theirs, as they did the work. They were told for what purpose the pipe was intended to be used, and they knew or ought to have known, or saw or ought to have seen, the purpose for which the pole was being used, and the manner in which the sign and the electrical attachments thereto were being put in position. The electrician placed a ladder against the pole and climbed up it, within close proximity to where they were working on other work about the premises, and to say that they did not see him using the ladder in this manner, although there is no direct proof that they did see him, would be to draw an unwarranted inference. The testimony reveals that no warning was given to the electrician not to place the ladder against the pole and climb thereon, or that the pole was not properly united and would not sustain his weight and that of the ladder, or that it would be dangerous to climb thereon.

The defendants Brandon and Hartson, by attempting to assemble this upright pole, assumed a duty of assembling it in a good and workmanlike manner, and if a reasonable and prudent person under like circumstances, after having seen the use to which the pole was to be put, could reasonably have anticipated that some person would climb the pole in order to attach the sign thereto by means of a ladder, and put his weight upon the pole, then the defendants are liable for any injury that may have been sustained by any person rightfully upon the premises, as a direct and proximate result of their negligence, and in this case their negligence consisted of the improper and unworkmanlike manner of assembling the two pieces of pipe. Thus, it is to be seen that the rule is: "Whenever the circumstances attending a situation are such that an ordinarily prudent person could reasonably apprehend that, as the natural and probable consequences of his act, an-

other person, rightfully there, will be in danger of receiving an injury, a duty to exercise ordinary care to prevent such injury arises; and, if such care is not exercised by the party on whom the duty rests and injury to another person results therefrom, liability on the part of the negligent party to the person injured will generally exist, in the absence of any other controlling element or fact, and this, too, without regard to the legal relationship of the parties." *Lisle v. Anderson*, 61 Okla. 68, 159 Pac. 278. See *Wiseblood v. Omaha Merchants Express & Transfer Co.*, 98 Neb. 757, 154 N. W. 539; *Oregon-Washington R. & N. Co. v. Branham*, 259 Fed. 555; *Moll v. Bester*, 177 Minn. 420, 225 N. W. 393; *Hall v. Barber Door Co.*, 218 Cal. 412, 23 Pac. (2d) 279; *Garrity v. Newman & Co.*, 202 Ill. App. 194; *Pennsylvania Steel Co. v. Elmore & Hamilton Contracting Co.*, 175 Fed. 176; *Clemens v. Benzinger*, 211 App. Div. 586, 207 N. Y. Supp. 539; *O'Neil v. National Oil Co.*, 231 Mass. 20, 120 N. E. 107; *Kowalsky v. Conreco Co., Inc.*, 237 App. Div. 23, 260 N. Y. Supp. 688; *Connick v. Craig, Inc.*, 107 N. J. Law, 375, 153 Atl. 631; *Howard v. Sacks, Inc.*, 76 S. W. (2d) (Mo. App.) 460; *Mahon v. Spence*, 11 La. App. 604, 123 So. 349; 45 C. J. 883.

"A motion to direct a verdict at the close of plaintiff's evidence is, in effect, a demurrer to the evidence, and where the trial court sustains such motion, and dismisses the action, the appellate court, in reviewing such decision, will assume the existence of every material fact which the evidence on behalf of the plaintiff tends to establish and, in addition, give the plaintiff the benefit of the logical inferences therefrom." *Zielinski v. Dolan*, 127 Neb. 153, 254 N. W. 695. See *Mahon v. Spence, supra; Howard v. Sacks, Inc., supra; Colbert v. Holland Furnace Co.*, 241 Ill. App. 583, Aff. 333 Ill. 78, 164 N. E. 162; *Kowalsky v. Conreco Co., Inc., supra; Tralle v. Hartman Furniture & Carpet Co.*, 116 Neb. 418, 217 N. W. 952.

The plaintiff's evidence in this case clearly establishes that the plumbing firm of Brandon and Hartson negligently

assembled and constructed the wrought-iron pole, and that the said negligence on their part was the sole and proximate cause of the plaintiff's injury. The appellate court, where the trial court directs a verdict against the plaintiff, will assume the existence of every material fact which the evidence of the plaintiff tends to establish, and also give the plaintiff the benefit of the logical inferences therefrom. The record in this case contains such overwhelming proof of the defendants' negligence that it is almost unnecessary to comment upon it. The evidence reveals that the two pipes were scarcely joined together, and in no event were they joined to the extent of more than two or three turns, and the evidence clearly establishes that ten to twelve turns would be the proper and standard method of joining pipes of this kind to be used for the purpose for which these were to be. The testimony reveals that there was no stripping or tearing of the threads, and that neither the threads in the coupling nor those on the end of the long piece of pipe were damaged or stripped in any degree, and that there was no breaking of the pipe or failure of the material. Therefore, the only logical conclusion to be reached from the plaintiff's evidence, giving it the benefit of all proper inferences, is that had the pipe been properly assembled it would have borne the plaintiff's weight without question, and that by reason of the negligent and improper manner of assembling the pipe it fell, causing the plaintiff's injuries.

We are now confronted with the question of whether or not the plaintiff in this case was guilty of contributory negligence sufficient to enable us to say that, as a matter of law, the court was justified in directing a verdict against him. Therefore, we must consider what the plaintiff did in this case. He climbed up the pole on the ladder that was already there, that had been used by the electrician, and attempted to fasten the sign to the pole, at which the pole came apart, causing him to fall and to receive the injuries complained of. Can it be said that, as a matter of law, he was negligent if he did not place the ladder against the

pole in a certain position? The evidence clearly establishes that if the pole had been properly assembled, according to the standard and recognized practice, it would have borne six to eight times his weight. Therefore, we do not believe, as the defendants contend, that it could be said, as a matter of law, that the plaintiff was guilty of such negligence as would defeat recovery by failure to put the ladder in a certain position or use a stepladder or use some means of hanging this sign other than the natural and most obvious way; that is, by placing a ladder against the pole and climbing up the same. The direct and proximate cause of the accident was not the plaintiff's failure to use some other means of hanging the sign than he chose to adopt, but rather the negligent and unworkmanlike manner in which the pole was assembled by the defendants. In any event, the degree of the negligence of the plaintiff in this case is a question of fact, and one wherein reasonable minds might reach different conclusions as to its existence, and should properly have been submitted to the jury. Therefore, the rule in a case of this kind is: "The existence of negligence and contributory negligence in an action for personal injuries is, ordinarily, a question of fact, and where the evidence in relation thereto is such that minds may reasonably reach different conclusions as to their existence, such question should be submitted to the jury." *Sgroi v. Yellow Cab & Baggage Co.*, 124 Neb. 525, 247 N. W. 355. See Comp. St. 1929, sec. 20-1151; *Pinches v. Village of Dickens*, 127 Neb. 239, 254 N. W. 877; *Builders & Manufacturers Mutual Casualty Co. v. Butler Bros. Bldg. Co.*, 192 Minn. 254, 255 N. W. 851; *Mahon v. Spence*, *supra*.

We are not unmindful that the defendants contend, and it is true, that there was no contractual relationship between the plaintiff and the defendants, and that because of the absence of this contractual relationship they owed the plaintiff no duty, and could not, therefore, be liable for any injury sustained by him. However, this case is one sounding in tort and is not based on any contractual

duty. The defendants were obligated to do their work in a proper and workmanlike manner, without negligence, so that any person rightfully upon the premises might not be injured by their negligent conduct.

The defendants also contend that the pole was not being used for the purpose for which it was intended. The purpose of the pole in this case was to support a sign, and how the defendants expected the plaintiff or the defendant, the Lincoln Hatchery, to suspend a sign therefrom and attach electrical fixtures thereto without putting some weight upon the pole is not answered to our satisfaction.

The defendants also put considerable stress upon the exact manner in which the plaintiff attempted to hang the sign, but the evidence clearly establishes that if the pole had been assembled in accordance with recognized standards it would have borne the plaintiff's weight many times over, so we do not believe any weight can be given to the defendants' theory that, had the plaintiff put his weight upon the pole in a different manner, the accident would not have occurred. The plaintiff had the duty of using ordinary care for his own safety, but he undoubtedly had a right to assume that the pole was properly joined.

For the reasons heretofore given, we feel that the district court was in error in directing a verdict for the defendants in this case, and the judgment of this court is that the judgment be reversed and the cause remanded.

REVERSED.

J. T. BAILEY, APPELLEE, V. ALVIN C. LUND ET AL., APPELLANTS.

278 N. W. 506

FILED MARCH 18, 1938. No. 30116.

1. **Appeal.** When a case has been properly submitted, the verdict of a jury will not be set aside unless clearly wrong.
2. **Landlord and Tenant.** A tenancy from year to year may be terminated at any time without notice by agreement.

3. **Appeal.** Instructions by the lower court will not be reviewed unless specifically assigned in motion for new trial.

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

Hamer & Tye, for appellants.

George A. Munro and *E. G. Reed, contra.*

Heard before GOSS, C. J., EBERLY, DAY, PAINE, CARTER and MESSMORE, JJ., and FALLOON, District Judge.

FALLOON, District Judge.

This is an action in forcible entry and detainer brought by the appellee, as plaintiff, in the Buffalo county district court against the defendants, now appellants, seeking restitution of a certain lot and a half, in Keens Park Addition to the city of Kearney. The appellee alleges that the appellants were unlawfully and forcibly retaining said premises. The issue was submitted to a jury which found the appellants guilty, and this case is here for review.

The appellants contend that there were irregularities in the trial, that there was misconduct of the jury, that the verdict was not sustained by sufficient evidence, was contrary to both the evidence and to law, errors occurring at the trial to which they excepted, and that there was error in giving of instruction No. 10 by the court.

Each side produced two witnesses, the appellee, himself, and his wife and the appellant Alvin C. Lund and his sister.

The evidence has all been carefully read and, briefly stated, resolves itself down to this, that the appellant rented the disputed premises from the appellee, so appellant could have a better driveway for his filling station, that the verbal agreement was made about November 28, 1933, at which time a check for $5 was given.

There is a conflict in the evidence as to whether the whole premises were rented or merely a privilege granted. The check introduced in evidence shows a notation thereon for one year's rent, which appellant claims was placed

on check when given, but which appellee flatly denies. The appellant further stated that he paid $10 more for rent on January 16, 1936, which would extend the lease to November 28, 1936. The appellee offered evidence to prove a new agreement was made on January 16, 1936, at which time the wife of appellee gave receipt to appellant, which was offered in evidence and stated that the $10 was for rent from November 28, 1933, to April 1, 1936, on these lots. This new agreement was testified to by the wife of appellee, who was fully authorized to act, but is denied by the appellants. The wife testified that the rent was paid to April 1, 1936, at which time appellant agreed to move. On May 19, 1936, three days' notice was given to vacate the premises, and ten days later action was instituted in the justice court, which was later appealed to the district court and there the issues tried.

The verdict of the jury is fully sustained by the evidence in this case and, as has been so often decreed by this court, such a verdict will not be disturbed unless clearly wrong. See *Lewis v. Darr*, 87 Neb. 624, 127 N. W. 890.

Complaint was made of the instructions of the court and in appellants' brief particular attention is paid to instruction No. 4, although the only assignment of error was as to instruction No. 10. This court has held repeatedly that it will not review instructions unless they have been specifically assigned as error in the lower court. See *Phœnix Ins. Co. v. King*, 52 Neb. 562, 72 N. W. 855. The issues involved in this case, however, were properly submitted by the trial court, and the instructions, taken as a whole, correctly stated the law.

The real issue in this case is whether it was a tenancy from year to year and therefore required a six months' notice before it could be terminated or whether an agreement was made which terminated on April 1, 1936. There is no doubt that such an agreement could be made; the jury found that it was and their finding is conclusive. "A tenancy from year to year may be terminated at any time without notice by an agreement between the parties." 35

C. J. 1109. This finding by the jury obviated any other notice than that of three days as set forth in the bill of exceptions. The evidence amply sustains the judgment. The examination of the record shows no reversible error.

The judgment of the lower court should be and hereby is AFFIRMED.

HILDUR PETERSON, APPELLANT, V. OMAHA & COUNCIL BLUFFS STREET RAILWAY COMPANY ET AL., APPELLEES.
278 N. W. 561

FILED MARCH 25, 1938. No. 30239.

1. **Evidence.** Testimony of a witness on a vital point in a case, materially changed to obviate objections pointed out by this court on a former appeal, without any sufficient explanation given, is discredited as a matter of law, and will be disregarded.
2. **Record** examined and action of the trial court in entering judgment for defendant affirmed.

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

John A. McKenzie, for appellant.

Kennedy, Holland, De Lacy & Svoboda, contra.

Heard before GOSS, C. J., ROSE, DAY, PAINE and MESSMORE, JJ., and FALLOON, District Judge.

GOSS, C. J.

Plaintiff appeals because, after her evidence was submitted to the jury, the court sustained defendants' motion to discharge the jury, dismissed the action, and entered judgment for defendants for costs. Error is assigned on sustaining the motion and on the holding that there was no evidence to show defendants guilty of negligence.

This case was before the court in 1936 to review a former trial in which there had been a judgment for plaintiff. The judgment was reversed. *Peterson v. Omaha &*

C. B. Street R. Co., 131 Neb. 676, 269 N. W. 510. The facts as they there appeared were very concisely stated by Judge Good and give so accurately the general picture of the deplorable accident so grievously suffered by plaintiff that we refer to them for the general statement of the facts in this case; and shall undertake herein to point out wherein the pleadings and testimony were different on the present trial.

On the former trial plaintiff's petition had pleaded that defendant Young negligently and carelessly permitted his automobile to get beyond his control and to descend backward and to proceed in an easterly direction on the north side of Farnam street, and in a northerly direction on the east side of Sixteenth street. The testimony in the former case showed that the automobile described a large arc, going northward on the east side of Sixteenth street before turning and coming back to the west side of that street, where it struck the front end of the south-bound car on the tracks on the west side of that street. To meet the unanswerable argument of the opinion in the former case to the effect that the motorman was not chargeable with negligence in failing to anticipate that the automobile would get far enough west to strike the front of the street car, plaintiff amended her petition so as to allege that the course of the automobile, after turning from Farnam street, was on the *west* side of Sixteenth street. This would bring it in the area of vision of the motorman for a somewhat greater distance. The purpose of the amendment was to bring the case within the last clear chance doctrine, which had in effect been precluded by plaintiff's allegations in the original petition and the testimony as to the direction of the automobile on Sixteenth street. To carry out the theory, the witnesses for plaintiff so changed their testimony as to make it appear that, instead of describing a large arc or curve to the east side of Sixteenth street, the course of the automobile was north on the west side of that street until it struck the street car.

In the former case, as shown in the opinion, plaintiff

testified that she was carried on the automobile to a point eight or ten feet south of the street car, where she was thrown off or rolled off the automobile onto the pavement and her hand was run over by the front wheels of the street car. Other witnesses testified in the former case that plaintiff was thrown from the automobile as near as two or three feet in front of the street car, but the evidence in that case as well as this shows as a fact that it was 18 feet from the front end of the street car to the back of the front wheels. The former opinion held that if, in the view of the testimony most favorable to plaintiff, the street car moved six or eight feet, she would still be in front of the front wheels. So the opinion held that the verdict did not respond to the physical facts and that she could not have been injured in the manner she claimed. So, to overcome this situation the testimony of plaintiff and some other witnesses was changed in this trial in the manner hereafter depicted.

Whereas, on the former trial, plaintiff testified that she fell off the automobile eight or ten feet south of the street car, on this trial she testified that she fell off about four or five feet south of the street car. She testified that the street car was moving and kept moving, that it ran over her hand and came to a stop after the front wheels had gone over her hand and two feet farther. It is to be noted that the distance from the front of the street car to the back of the front wheels still remains 18 feet. So the street car, by plaintiff's changed testimony, has moved 20 feet plus the four or five feet she was in front of it when she fell off.

Esther Christensen testified that she was sitting in a restaurant booth in the Paxton block on the east side of Sixteenth street and saw the automobile come from along Farnam street about as it turned into Sixteenth street and proceeded on its way. She testified for plaintiff in all three trials of this case. On this trial she testified that, after the automobile and the street car came together, the street car shoved the automobile back "eighteen or twenty

feet." When confronted by, and cross-examined on, what was claimed to be her testimony in the first trial to the effect that the automobile and the street car did not move after they collided, she said she did not remember. When confronted with the testimony she had given on the second trial, she admitted she had testified then that the street car moved ahead "about six or eight feet." It is to be noted that this testimony is evidently what Judge Good had in mind when in the opinion he said "and, in the view most favorable to plaintiff, if it moved six or eight feet thereafter, she would still be in front of the street car wheel and would not have been run over by it as she claims." This was a vital point in the case. It was pointed out in the former opinion. It was necessary to change the situation presented in the former trial to get the case under the last clear chance doctrine. The change in the pleadings by which plaintiff alleged that the automobile ran north on the west side of Sixteenth street instead of the east side, and the change in the testimony of their witness to attempt to prove that the motorman moved the street car so long a distance after the impact, had the effect of producing what it takes to meet what had been tipped off by the former opinion in this case. We do not say that the change in the pleadings alone necessarily comes under any inhibited rule, but when accompanied by this material change in the testimony of the witness, for the sole purpose of making out a case, the changes do not find favor and such conduct cannot blindly bind the court so that it must submit to the jury the credibility of such a witness when to do so merely because of such a general rule would allow the parties to toy with the administration of the law and make a mockery of justice. The motive and purpose were clear. No possible explanation for this change of testimony appears, except that the exigencies of plaintiff's case demanded it.

In *Adams v. New York City Ry. Co.*, 109 N. Y. Supp. 1019, the court said in the syllabus: "Testimony on a vital point in a case, materially changed to obviate objections

pointed out by the appellate division on a former appeal, unless a sufficient and legitimate explanation is given, is discredited testimony." In the opinion the court said (125 App. Div. 551): "It would be a disgrace to the administration of justice if a court charged with the responsibility of reviewing the facts should be held bound by the verdict of a jury when it is apparent that evidence has been deliberately changed or added to meet the exigencies of the case as pointed out upon a former appeal."

This case was tried three times. The last two trials were before the same judge. He evidently concluded that there was not other or different case made out than before when we sent the case back for trial. Other than the testimony of the witness whose testimony we have found discredited, there was no evidence which would allow the case to go to the jury. The trial court anticipated what our action must be in such a situation and reached the same conclusion before we did.

The proximate cause of the injury to plaintiff was the movement of the automobile of defendant Young. Plaintiff has not sustained the burden of proving that the street car company or its motorman concurred in the negligence that produced the injuries.

The judgment of the district court is

AFFIRMED.

LINNIE CHRISMAN ET AL., APPELLEES, V. CYNTHIA DANIEL: FEDERAL LAND BANK OF OMAHA, APPELLANT.
278 N. W. 565

FILED MARCH 25, 1938. No. 30234.

1. **Mortgages:** PLEADING. In a suit to foreclose a lien on land, a plea by plaintiff that a defendant, having a superior lien, claims some interest in the land, which is to plaintiff unknown but which is inferior to the lien of plaintiff, is insufficient as a pleading to require defendant to appear and plead, where the exact nature of his lien and of his claim is fully shown by the public records, and a judgment by default against him as to

priorities is not *res judicata. Cowles v. Kyd,* 91 Neb. 274, 135 N. W. 1010, distinguished.

2. **Subrogation.** "Conventional subrogation arises where one pays the debt of another under an agreement, existing at the time of the payment, with either the debtor or the creditor, that the person paying shall be subrogated to the liens existing as security for the debt." *State v. Holdrege State Bank,* 110 Neb. 814, 195 N. W. 120.

APPEAL from the district court for Madison county: CHARLES H. STEWART, JUDGE. *Affirmed in part and reversed in part.*

William C. Ramsey, Franklin L. Pierce, Philip M. Wellman, William W. Graham, Philip N. Johnston and *Moyer & Moyer,* for appellant.

Greenamyre & Nelson, contra.

Heard before GOSS, C. J., ROSE, DAY, PAINE, CARTER and MESSMORE, JJ., and FALLOON, District Judge.

ROSE, J.

This is a suit in equity by Linnie Chrisman and H. C Chrisman, plaintiffs, to foreclose a contract in which they agreed to convey to Cynthia Daniel, defendant, the southeast quarter of section 21, township 23 north, range 3, Madison county. As consideration for the conveyance the defendant named obligated herself to pay $500 a year to plaintiffs for life or to either of them after the death of the other. There were defaults in payments for four or five years beginning March 1, 1932. Quieting title in plaintiffs and establishing a first lien on the land for the unpaid debt were other forms of relief sought by plaintiffs. The contract was duly executed and acknowledged November 13, 1926, and recorded November 30, 1926. Pursuant to its terms plaintiffs executed and delivered to Cynthia Daniel, defendant, November 29, 1926, a warranty deed to the land described and the deed was recorded November 30, 1926.

The Federal Land Bank of Omaha, also a defendant, pleaded that it had a 20,000-dollar mortgage, executed by

Cynthia Daniel and her husband, J. Edgar Daniel, May 27, 1927, and recorded May 31, 1927, which created a first lien on the land described in the Chrisman contract; that for defaults in payments due on this mortgage it was foreclosed in a suit to which the Chrismans were duly summoned parties who failed to appear or plead; that their default was entered; that their lien was adjudged to be inferior to that of the mortgage; that the suit on the 20,000-dollar mortgage was commenced and determined before the action at bar was instituted; that there was no appeal from the foreclosure, which was *res judicata* as to priority of the liens. The Federal Land Bank pleaded further that the Travelers Insurance Company had on the land in controversy a 7,000-dollar mortgage dated May 19, 1922, and recorded May 26, 1922, which was a lien antedating the Chrisman contract; that the debt secured by the prior mortgage was paid from proceeds of the subsequent 20,000-dollar mortgage, and that the lien of the 7,000-dollar mortgage was satisfied of record June 4, 1927; that the Federal Land Bank was subrogated to the former rights of the Travelers Insurance Company in its satisfied mortgage.

J. Edgar Daniel died January 5, 1933, and the cause was revived in the name of Cynthia Daniel, administratrix of his estate. Linnie Chrisman died pending litigation and the cause was revived in the name of B. L. James, executor of her will.

Under the pleadings in the present case the real issues were *res judicata* and subrogation. Upon a trial of the cause the district court found the issues in favor of plaintiffs, denied subrogation, and foreclosed the Chrisman contract as the first lien, the unpaid annual instalments and interest amounting to $2,915.40. The Federal Land Bank of Omaha appealed.

The Federal Land Bank takes the position that it was adjudicated in its former suit to foreclose its 20,000-dollar mortgage that the lien thereof was superior to the lien of the contract obligating the Daniels to pay the

Chrismans $500 a year for life, and that the district court in the present case erred in the judgment to the contrary.

The pleadings and the evidence herein show conclusively that the Chrismans, plaintiffs, had a lien on the land described in their contract for the annuities, and that when the contract was recorded it was the first lien as disclosed by the public records with the exception of the 7,000-dollar mortgage. In an argument in support of the proposition that the former judgment foreclosing the bank's mortgage as the first lien is binding on and concludes the Chrismans on that issue, the bank relies on *Cowles v. Kyd,* 91 Neb. 274, 135 N. W. 1010. The report of that case shows that Cowles brought a suit to foreclose a tax sale certificate; that defendant pleaded a former adjudication in a suit to which Cowles was a summoned defendant who made default; that it was alleged in the petition therein Cowles claimed to have some lien on or interest in the premises involved, but the exact nature and extent of which the plaintiff does not know, but which is inferior to plaintiff's lien for taxes; that it was adjudicated in the former action plaintiff had the superior lien and that the defense of *res judicata* was established.

On the other side it is contended that the ruling in the later case of *Burns v. Sholl,* 111 Neb. 628, 197 N. W. 393, controls the case under consideration on the issue of *res judicata.* In the *Burns-Sholl* case it was held that allegations in the petition to the effect defendants claim some interest in the premises subject to foreclosure, the exact nature of which is to plaintiff unknown, but which is junior, inferior and subject to the rights of plaintiff, were mere conclusions wholly insufficient as pleadings to require defendants to appear and disclose their interests and claims, where the essential facts were previously given in detail on public records of which plaintiff was chargeable with notice. The opinion in the later of the two cases cited seems to be based on the sounder reasons and the better authorities. In the earlier case the petition was treated as sufficient without discussion. Besides, the surplus arising

from the sale of the premises was ample for the satisfaction of plaintiff's claim.

The record in the case at bar shows that the Chrisman contract for annunities of $500 a year and the deed in consideration thereof were instruments which appeared on the public records of the county when the bank lent $20,000 to Cynthia Daniel. It was bound at its peril to know the contents of the contract and of the deed, notwithstanding the allegation that it did not know the nature of the interests of the Chrismans in the previously encumbered land. By failure to make vain appearances in the former suit and to interpose unnecessary pleas of facts already communicated to the bank by public records, the Chrismans did not, in equity, lose the priority of their lien over that of the bank. The conclusion on this branch of the controversy is that the former adjudication did not displace the priority of the lien for annuities.

Was the bank subrogated to the rights of the Travelers Insurance Company in the latter's 7,000-dollar mortgage? When that was the first lien, Cynthia Daniel applied to the Federal Land Bank of Omaha for a loan of $20,000 on the same and other land. In the application for the loan it was distinctly stated in writing that the debt secured by the 7,000-dollar mortgage was to be paid with proceeds of the new loan and the lender was directed by the borrower to make the payment. The first mortgage was listed in the application as a lien to be discharged from such proceeds. The land was offered as security for the new loan. Pursuant to this understanding the lending bank paid the debt and interest due on the first mortgage, or $7,455, and discharged the lien of record. There was no fraud in the transactions. Under the circumstances the bank was not a volunteer. Subrogation was implied, if not directly expressed by the parties. Rules of equity, based on reason and authority, have been stated as follows:

"Conventional subrogation arises where one pays the debt of another under an agreement, existing at the time of the payment, with either the debtor or the creditor,

that the person paying shall be subrogated to the liens existing as security for the debt. It differs from legal subrogation which exists only in favor of the surety for the payment of the debt, or one who is compelled to pay the debt to protect his own rights. Conventional subrogation arises by reason of either an express or an implied agreement between the third person paying the debt and either the debtor or creditor." *State v. Holdrege State Bank,* 110 Neb. 814, 195 N. W. 120. Followed in *Hoagland & Co. v. Decker,* 118 Neb. 194, 224 N. W. 14. See, also, *Frederick v. Gehling,* 92 Neb. 204, 137 N. W. 998; *Prudential Ins. Co. v. Qualset,* 116 Neb. 706, 218 N. W. 734; *Kellogg v. McDonald,* 122 Neb. 613, 240 N. W. 922.

With the law of subrogation thus previously determined, the Federal Land Bank acquired the interests of the Travelers Insurance Company in its first mortgage for $7,000.

The judgment is affirmed on the issue of *res judicata* and reversed on the issue of subrogation and the cause remanded to the district court, with directions to correct the error on the record as it stands.

AFFIRMED IN PART AND REVERSED IN PART.

EMMA I. BUCHANAN, APPELLEE, V. TABETHA K. RAHMEYER ET AL., APPELLANTS.

278 N. W. 558

FILED MARCH 25, 1938. No. 30199.

1. **Mortgages:** FORECLOSURE: SALE: CONFIRMATION. "Mere inadequacy of price will not preclude confirmation of a foreclosure sale unless it is so inadequate as to shock the conscience of the court or amount to evidence of fraud." *Keller v. Boehmer,* 130 Neb. 763, 266 N. W. 577.
2. ———: MORATORIUM. Defendant in a foreclosure action is not entitled to the benefit of a moratory stay where the mortgage lien exceeds the actual value of the mortgaged premises.

APPEAL from the district court for Lincoln county: ISAAC J. NISLEY, JUDGE. *Affirmed.*

Hoagland, Carr & Hoagland, for appellants.

Beatty, Maupin, Murphy & Davis, contra.

Heard before GOSS, C. J., ROSE, DAY, PAINE and MESSMORE, JJ., and FALLOON, District Judge.

PAINE, J.

Appeal from judgment overruling objections to confirmation of sale on mortgage foreclosure, denying moratorium stay, and confirming the sale.

Plaintiff brought foreclosure, and a decree was entered on August 2, 1932, for $9,897.40, with 7 per cent. interest, and the same decreed to be a first lien upon the west half of section 32, township 13, range 30 west, Lincoln county, Nebraska, on which date a ten months' stay was granted by agreement of the parties.

On August 24, 1933, a moratorium was granted until March 1, 1935, upon condition that $100 be paid annually for the pasture land, together with two-fifths of all corn and grain raised thereon, and directing how the rentals should be applied.

On September 1, 1933, a further hearing was had therein, and the court found that George A. Rahmeyer does not personally farm said land, but has rented out the same, and therefore the order entered on August 24, 1933, was set aside, and all further proceedings were stayed until December 1, 1933, and defendant George A. Rahmeyer directed to pay plaintiff two-fifths of the corn on said place and $100 for the pasture.

On January 22, 1937, the court found that a portion of 110 acres of the mortgaged premises has been condemned by the Platte Valley Public Power and Irrigation District, and the sum of $4,959 paid in upon said condemnation proceedings for the value of the land actually taken, as well as the damage done to the remainder of the farm, has been paid to the plaintiff, leaving a sum still remaining due upon said decree in the sum of $8,008.13, with 7 per cent. interest from January 11, 1937.

The court further found that the balance of this land would not sell for enough to satisfy the amount due, and that there was no equity in the land for the defendants. The application for a further moratorium stay was denied, and it was directed that an order of sale issue thereon.

On March 4, 1937, the sheriff's return to the order of sale was filed, showing sale had been made to Emma I. Buchanan, plaintiff, for $8,153.49. Thereafter, on March 9, 1937, defendants made another application for a moratory stay until March 1, 1939. On the same day defendants also filed objections to confirmation of the sale. On March 11, 1937, plaintiff filed objections to granting moratorium on the ground that legislative bill No. 4, 1937 legislature (Comp. St. Supp. 1937, sec. 20-21,159) is unconstitutional and void.

On March 11, 1937, a hearing was had, and a decree of confirmation was duly entered, in which it was found that all the proceedings were regular, legal, and valid; that the real estate sold for its full value, and that a subsequent sale would not bring a greater amount; that there was no equity whatsoever in said real estate over and above the amount of the mortgage debt and taxes, and further set out that the court was personally acquainted and familiar with said real estate. Objections to sale overruled, application for a moratorium denied, sheriff directed to issue deed, and writ of assistance awarded. Supersedeas bond fixed in the sum of $800.

Two controlling questions are presented in this appeal: First, did the court err in overruling the application for a moratorium? And, second, was the court correct in finding there was no equity in the property?

Considering the value first, we find the land was sold for $41.31 an acre in this foreclosure. The evidence of the plaintiff's witnesses averaged around $35 an acre, but no witness knew of any one who would buy the land at any price. A large tract of land with much better improvements lying near this land has found no buyers at the offered price of $26 an acre.

The evidence disclosed that this land in the case at bar was not in the valley, but was table-land; that it was at least 160 feet to water, and the fences and buildings were badly run down, none of the buildings having been painted in years.

Fraud in this sale is not shown or implied. No shocking discrepancy appears between the value and the sale price. There is an entire lack of evidence to show that upon a resale any higher bid could be expected. The trial court was right in finding there was no equity in the property.

In considering the refusal to grant a further moratorium, the evidence is clear that, although retaining the land under the first moratorium granted, defendant George A. Rahmeyer did not pay in anything to the clerk of the court, as directed, from either his barley or his corn. We are convinced that the defendant had no valuable interest to protect, and, as the mortgage liens clearly exceed the value of the real estate, the trial court was right in refusing the moratorium. *Luikart v. Graf*, 130 Neb. 736, 266 N. W. 641; *First Trust Co. v. Stenger*, 130 Neb. 750, 266 N. W. 642; *Clark v. Hass*, 129 Neb. 112, 260 N. W. 792; *Security Mutual Life Ins. Co. v. Herpolsheimer Bldg. Co.*, 132 Neb. 149, 271 N. W. 343.

The entire record examined *de novo*. No error has been found in the proceedings, and the judgment of the district court is

AFFIRMED.

ELMER H. FELDT, APPELLANT, V. GEORGE WANEK, APPELLEE.
278 N. W. 557

FILED MARCH 25, 1938. No. 30247.

Judgment: VACATION. "After the final adjournment of the term of court at which a judgment has been rendered, the court has no authority or power to vacate the judgment except for the reasons stated and within the time limited in chapter 20, art. 20, Comp. St. 1929." *Lyman v. Dunn*, 125 Neb. 770, 252 N. W. 197.

APPEAL from the district court for Hamilton county: LOVEL S. HASTINGS, JUDGE. *Affirmed.*

John Adams, Jr., and *Ralph W. Adams,* for appellant.

J. H. Grosvenor and *J. H. Grosvenor, Jr., contra.*

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

CARTER, J.

This is an appeal from an order of the district court for Hamilton county refusing to vacate a judgment of dismissal and to reinstate the cause of action.

The record discloses that the case had been pending for some time and had been regularly set for trial on November 19, 1936, when the events of which plaintiff complains occurred. On November 17, 1936, the plaintiff and his attorney at Lincoln signed and forwarded a telegram to M. F. Stanley, plaintiff's attorney at Aurora, directing him to dismiss the case without prejudice. The trial court thereupon dismissed the action at the request of Mr. Stanley. On January 8, 1937, plaintiff filed an application to set aside the judgment of dismissal and for a reinstatement of the action. This application was called up for hearing on April 5, 1937, the same being within a subsequent term of court, and on April 24, 1937, the court denied the application. The correctness of this ruling is before this court for decision.

The rule is established in this state that the court is without authority to vacate or modify its own judgments after the final adjournment of the term of court at which it was rendered except for the reasons stated and within the time limited in chapter 20, art. 20, Comp. St. 1929.

In *Lyman v. Dunn,* 125 Neb. 770, 252 N. W. 197, we said:

"In civil cases, a court of general jurisdiction has inherent power to vacate or modify its own judgments at any time during the term at which they are rendered.

"After the final adjournment of the term of court at

which a judgment has been rendered, the court has no authority or power to vacate the judgment except for the reasons stated and within the time limited in chapter 20, art. 20, Comp. St. 1929."

Other cases to the same effect are *Cronkleton v. Lane*, 130 Neb. 17, 263 N. W. 388, and *Elvidge v. Brant*, 131 Neb. 1, 267 N. W. 169.

There is no evidence in the record that brings the case within the provisions of chapter 20, art. 20, Comp. St. 1929. We necessarily conclude that it is governed by the authorities herein set out and that the trial court correctly denied plaintiff's application.

AFFIRMED.

DEPARTMENT OF BANKING, RECEIVER OF CLARKSON STATE BANK, ET AL., APPELLEES, V. AUGUST MODROW, APPELLANT.
278 N. W. 559

FILED MARCH 25, 1938. No. 30272.

1. **Judicial Sales:** CONFIRMATION. Mere inadequacy of price will not preclude a confirmation of a judicial sale unless it is so inadequate as to shock the conscience of the court or amount to evidence of fraud.
2. **Execution:** MORATORIUM. One whose lands are sold upon execution based upon a judgment is not entitled to a moratory stay under the provisions of section 20-21,159, Comp. St. Supp. 1937, in the absence of evidence that the judgment was obtained on a note or contract secured by real estate.

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

George B. Clark and *N. H. Cornell*, for appellant.

Lloyd L. Pospishil, Robert H. Downing and *L. F. Otradovsky, contra.*

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

CARTER, J.

This is an appeal from an order of the district court for

Colfax county denying defendant's application for the vacation of an order of confirmation of a sale of real estate and denying his application for a moratory stay.

It appears from the record that a certain tract of land in the village of Clarkson belonging to the defendant was sold upon execution and the sale confirmed, the property having been sold for $670, subject to taxes in the amount of $195. The defendant contends in his motion to set aside the confirmation that the sale price was inadequate and that the court erred in confirming the sale.

The question as to the adequacy of the sale price was tried on affidavits. Plaintiff offered in evidence the affidavits of Adolph Dudek and Julius E. Haase to the effect that the property did not exceed $670 in value, exclusive of the unpaid taxes against it. The defendant produced the affidavits of Karl Marinec, E. J. Pokarny, Henry C. Nagel, John M. Zrust, and J. J. Karnik, who fixed its value at $1,500, $2,000, $1,800, $1,450, and $1,500, respectively. Upon this conflicting evidence the trial court properly refused to vacate the order confirming the sale. The evidence is sufficient to bring the case within the rule that mere inadequacy of price will not preclude a confirmation of a judicial sale unless it is so inadequate as to shock the conscience of the court or amount to evidence of fraud. *Srajhans v. Mares,* 130 Neb. 924, 267 N. W. 82; *Keller v. Boehmer,* 130 Neb. 763, 266 N. W. 577; *Erickson v. Hansen,* 129 Neb. 806, 263 N. W. 132. Necessarily, if the evidence as to adequacy of price is sufficient to sustain a confirmation of the sale, it is sufficient to sustain an order denying the vacation of the sale upon the same grounds.

Defendant complains of the refusal of the trial court to vacate the confirmation of sale in order to consider an application for a moratory stay. While our holding that there was no error in refusing to vacate the confirmation of sale disposes of this contention, the defendant was not entitled to a moratory stay in any event for the reason that a sale of lands upon an execution based upon a judgment is not within the provisions of the moratory law unless it

affirmatively appears that the judgment was obtained on a note or contract secured by real estate. Comp. St. Supp. 1937, sec. 20-21,159.

The judgment of the trial court is affirmed with leave granted to redeem at any time before the issuance of the mandate of this court.

AFFIRMED.

DEPARTMENT OF BANKING, RECEIVER OF FIRST STATE BANK OF BURWELL, APPELLANT, V. CORA MCMULLEN, EXECUTRIX, ET AL., APPELLEES.

278 N. W. 551

FILED MARCH 25, 1938. No. 30072.

1. **Statutes.** A statute may be remedial in one part and penal in another. *Globe Publishing Co. v. State Bank of Nebraska*, 41 Neb. 175, 59 N. W. 683.
2. **Banks and Banking.** That part of section 8-150, Comp. St. 1929, which provides that every director of a bank who participates in, or knowingly assents to, an excessive loan shall be held liable in his personal and individual capacity for all damages which the bank, its shareholders, or any other person shall have sustained in consequence of such violation, is remedial in character.
3. **Limitation of Actions:** BANKS AND BANKING. A cause of action against a director participating in or assenting to an excessive loan as provided in section 8-150, Comp. St. 1929, is complete the moment the loan is made, and then is entire.
4. ———: ———. The statute of limitations begins to run against a cause of action thereon as of the date of the making of such excessive loan, and is barred after four years in the absence of fraud or concealment.
5. ———. Petition examined, and *held* to show on its face that any and all causes of action, if any, asserted by plaintiff were barred by the statute of limitations, and the demurrer thereto was properly sustained.

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

Clarence G. Miles, F. C. Radke, Robert H. Downing and *Glenn E. Runyan,* for appellant.

Prince & Prince, Guy Laverty and *B. A. Rose, contra.*

Heard before GOSS, C. J., ROSE, EBERLY, PAINE, CARTER and MESSMORE, JJ., and CHAPPELL, District Judge.

CHAPPELL, District Judge.

The department of banking of the state of Nebraska, appellant, as receiver and liquidating agent of the First State Bank of Burwell, Nebraska, filed a petition in the district court for Garfield county, for and in behalf of creditors, against all of the directors of the First State Bank of Burwell, Nebraska, seeking a judgment for $8,-215.88 as damages because of alleged making of excessive loans by them in violation of section 8-150, Comp. St. 1929. It is admitted that, at the time of the filing of the petition on March 27, 1936, two years, two months and fifteen days after plaintiff took over the bank for liquidation, two of the directors were unable to be served with summons because no one knew their whereabouts; two directors were deceased and the representatives of their estates were made parties but not served with summons; and the two other directors, William L. McMullen, Sr., and Harry J. Coffin, were served with process, but before this appeal was taken the defendant William L. McMullen, Sr., died and the proceeding was revived against the representative of his estate, Cora McMullen, executrix. Therefore, the defendants, appellees herein, are Cora McMullen, executrix, and Harry J. Coffin. Defendants McMullen and Coffin demurred to plaintiff's petition for the reasons, generally, that the petition did not state facts sufficient to constitute a cause of action in favor of the plaintiff and against the defendants, or either of them, and especially because the petition shows on its face that any and all claims asserted by plaintiff were barred by the statute of limitations. Their demurrer was sustained and, plaintiff having elected to stand upon its petition, the action was dismissed at plaintiff's costs. Motion for new trial was overruled and appeal taken to this court.

The petition alleges in substance the corporate organization of the bank, issuance of its charter and general conduct of a banking business from March 1, 1920, until January 12, 1934, at which time it became financially embarrassed and involved to such an extent that the department of banking of the state of Nebraska took it over for liquidation; that, as liquidating agent and receiver, the department of banking proceeded to collect and dispose of its property and liquidate the bank, among the assets of which was this alleged cause of action; that the paid-up capital stock was $50,000 and the surplus $10,000, a total of $60,000, 20 per cent. of which was $12,000; that William L. McMullen, Sr., and Harry J. Coffin, together with the other defendants, continuously constituted the board of directors of the bank charged with the management and control thereof as required by law; that, while defendants were officers and directors, the bank made excessive loans of its funds to one F. J. Grunkemeyer, a single individual, for his use and benefit. The petition sets out separately some 42 loans on separate dates beginning on October 9, 1928, and continuing down to and including April 11, 1931, the total sum thereof being $48,567.19; that each of said loans going to make up this aggregate sum was an excessive loan, and each loan at the time it was made, added to the amount already owing to the bank, increased the amount of his loans from the bank to exceed 20 per cent. of the paid-up capital stock and surplus of the bank; that defendants each and all participated in, knowingly assented to, and negligently permitted the making of such excessive loans upon which there has been paid and credited the sum of $40,351.31, the amount still due and unpaid being $8,215.88, by reason of which the bank has been damaged in that sum, for which plaintiff prays judgment.

We have given careful study to the allegations of the petition but have been unable to determine from pleaded facts that there ever was an excessive loan. The allegation that each of the loans going to make up the aggregate sum was an excessive loan cannot be true because the greatest

single loan was $9,000, and it must have been more than $12,000 before the loan could be excessive. The statement that each of the loans at the time it was made, when added to the amount already owing to the bank, increased the amount to exceed the sum of 20 per cent. of the capital and surplus could be true only as to the first two loans, one made on October 9, 1928, and the other October 16, 1928, either one or both of which we must assume were paid when due in the absence of pleaded facts as to the time of payment. From the statement that there has been paid and credited upon such excess loans the sum of $40,-351.31, with no date or designation of the time of payment, we are unable to come to any other conclusion except that the borrower made these payments on the first owing indebtedness. To make an overloan out of the last amounts borrowed, we must return to December 3, 1929. From this pleading we must assume, in the absence of pleaded facts, that he paid a part of the $40,351.31 at a time after excessive loans were made. This court cannot assume facts not pleaded to establish such a basis of recovery. In other words, this court cannot take the sum of $40,351.31 paid upon the loan without knowing the date of payment and, by any procedure, apply it either up or down upon the scale of the account and thereby make an excessive loan upon any date.

We find no allegation that any excessive loan caused the insolvency of the bank or that any creditor for whom this action was brought was a creditor at the time of making any excessive loan or that they were damaged as a consequence thereof. We do not find any allegation in the petition, outside of the general statement that the bank has been damaged, which shows that the Grunkemeyer loans are not now perfectly good and may still be collected. To hold the directors of a bank liable under this statute, facts pleaded by plaintiff must show that an excessive loan was, in fact, made; that the directors participated in or knowingly assented thereto, and that the person or persons for whom the action is brought were

creditors or otherwise interested at the time and sustained damages in consequence of such violation.

We find plaintiff's petition shows upon its face that any and all claims asserted by plaintiff in this action were, at the time of the filing of the petition, March 27, 1936, barred by the statute of limitations. In the case of *Wood v. Carpenter,* 101 U. S. 135, Justice Swayne said: "Statutes of limitation are vital to the welfare of society and are favored in the law. They are found and approved in all systems of enlightened jurisprudence. They promote repose by giving security and stability to human affairs. An important public policy lies at their foundation. They stimulate to activity and punish negligence. While time is constantly destroying the evidence of rights, they supply its place by a presumption which renders proof unnecessary. Mere delay, extending to the limit prescribed, is itself a conclusive bar. The bane and antidote go together." We approved this statement in *Branham v. Ayers,* 126 Neb. 688, 254 N. W. 259.

Counsel for the parties have, at great length and very ably, discussed the question of whether section 8-150, Comp. St. 1929, is remedial or penal in character, having in mind sections 20-206 and 20-208, Comp. St. 1929, which, in effect, provide that, if remedial, the action must be brought within four years, and, if penal, within one year. Section 8-150, Comp. St. 1929, provides, in so far as it relates to this case: "No corporation transacting a banking business in this state shall directly or indirectly loan to any single * * * individual * * * for the use and benefit of such * * * individual, more than twenty per cent. of the paid-up capital and surplus of such bank. * * * Any officer or employee of any corporation transacting a banking business under the laws of this state who shall violate or knowingly permit a violation of the provisions of this section, upon conviction thereof shall be punished by a fine not exceeding five hundred dollars. * * * If the directors of any state bank shall knowingly violate, or knowingly permit any of the officers, agents or servants

of the bank to violate any of the provisions of this section, all rights, privileges and franchises of the bank shall be thereby forfeited. * * * In case of such violation, every director who participated in, or knowingly assented to the same, shall be held liable in his personal and individual capacity for *all damages which the bank, its shareholders, or any other person shall have sustained in consequence of such violation.*" (Italics ours.)

The petition discloses upon its face that more than four years elapsed from the time the last loan of any kind was ever made to Grunkemeyer by the bank, and that more than two years elapsed from the time the bank was taken over by the department before this action was brought. It is conceded by the parties that, if the statute is penal in character, it is barred by the statute of limitations. Plaintiff concedes that more than four years have elapsed since any excessive loan was made, but contends, however, that the statute is remedial and the statute of limitations cannot apply for the reasons, first, that the cause of action did not accrue until damages were suffered as far as the creditors are concerned on whose behalf this action was brought; second, that the directors were in full possession and control of the bank at all times and are estopped in equity to claim the benefit of the statute of limitations; and, third, that the directors were trustees of an express trust and cannot claim the benefit of the statute of limitations.

We conclude that the statute is penal in part and remedial in part. In so far as the forfeiture of the bank's charter and the imposition of a fine for a violation of the statute are concerned, it is penal. See *Bank of College View v. Nelson,* 106 Neb. 129, 183 N. W. 100. As to that part of the statute in controversy, it is remedial. We said in *Globe Publishing Co. v. State Bank of Nebraska,* 41 Neb. 175, 59 N. W. 683: "A penal statute is an act by which a forfeiture is imposed for transgressing the provisions of the act. It may also be remedial in one part and penal in another." There is an abundance of other authority for

this proposition which we deem it unnecessary to cite. In *Kleckner v. Turk*, 45 Neb. 176, 63 N. W. 469, and *Bourne v. Baer*, 107 Neb. 255, 185 N. W. 408, we said that a statute was penal because it imposed a liability, "*the extent of which is not measured or limited by the damage caused by the act or omission.*" (Italics ours.) That part of the statute in controversy which provides a liability for all damages which the bank, its shareholders or any other person shall have sustained in consequence of the violation is, by analogy, remedial.

The cause of action, however, accrued when the loan was made. In *Corsicana Nat. Bank v. Johnson*, 251 U. S. 68, 87, 40 Sup. Ct. Rep. 82, the supreme court of the United States said: "The cause of action against a director knowingly participating in or assenting to such excessive loan would be complete at that moment, and entire." Plaintiff concedes in its brief that the cause of action accrued in favor of the bank when the loans were made. We can give no merit to the contention that creditors for whom this action was brought stand in any different position than the bank so far as determining when the cause of action accrues. There is no allegation in the petition that any excessive loans made the bank insolvent or that any creditor was such at the time of making any excessive loan, or that they were damaged thereby. We said in *Bourne v. Baer, supra*: "The petition in the case at bar does not allege any facts tending to show that any creditors of the corporation were induced to extend credit to it or damaged by the failure of the corporation to publish notice of its indebtedness. The liability upon which appellant herein bases his cause of action comes, therefore, within definition of a penalty set forth in *Kleckner v. Turk, supra.*" See, also, *Graham v. Railroad Co.*, 102 U. S. 148; *Crowley v. Brower*, 201 Ia. 257, 207 N. W. 230; *Sheppard v. Thomas*, 24 Kan. 780.

If the statute provided a director's liability for the amount of the excessive loan, or the balance due thereon, instead of all damages actually suffered, plaintiff's con-

tention might have merit, except that the statute would then be penal in character. The recovery under this statute is not limited to the amount of the excess loan or the balance still due thereon. There is no limitation except all damages actually suffered by the unlawful act. The statute gives to any person damaged—this includes a creditor—a right to a cause of action, and any such person, if damaged, had an immediate right to begin suit. The accrual of a cause of action means the right to maintain and institute a suit, and whenever one person may sue another, a cause of action has accrued and the statute begins to run, but not until that time. So whether at law or in equity, the cause of action arises when, and only when, the aggrieved party has a right to apply to the proper tribunal for relief. When the cause of action accrues is a judicial question, and to determine it in any particular case is to settle a general rule of law for a class of cases which must be founded upon reason and justice. See 37 C. J. 810. We concede that there must be a wrong and damages as a consequence thereof, but the law cannot concede that no cause of action would arise until the damages could be exactly determined. The amount of damages recoverable may depend upon the damages incurred, but that does not toll the statute to await the accumulation thereof. In 37 C. J. 815, we find the statement: "Under the rule that an action for a breach of contract may be begun before substantial damage has been sustained, a right of action accrues and the statute begins to run at the time the contract is broken, not at the time when actual damage results or is ascertained; nor does the subsequent accrual of additional damages resulting from the same breach afford a new cause of action so as to create a new period of limitation. Where the action is based on the breach of an implied undertaking to use care and skill in the performance of services, the form of the action, whether case or assumpsit, does not vary the foregoing rule."

"The running of the statute is not delayed until plaintiff can get sufficient evidence to maintain his action."

37 C. J. 809. See *Aachen & Munich Fire Ins. Co. v. Morton,* 156 Fed. 654, 15 L. R. A. n. s. 156, and note. Whether this liability attempted to be enforced be *ex delicto* or *ex contractu* in its nature, the same rule of law governs.

Plaintiff concedes that the cause of action accrued in favor of the bank when the loans were made, but contends that the bank in this case, being in complete control of the directors, was powerless to act. Thus, plaintiff attempts to impose equitable estoppel in bar of the plea of the statute of limitations. No facts are pleaded in plaintiff's petition showing an equitable estoppel except that the directors acted continuously throughout the period of the loaning. No inducement, fraud or concealment is charged to the directors, and no want of knowledge or notice thereof is alleged on the part of this plaintiff or any creditor. We said in *Furstenberg v. Omaha & C. B. Street R. Co.,* 132 Neb. 562, 272 N. W. 756: "Estoppel must be *reciprocal and mutual.* * * * See 21 C. J. 1107 and 1139. Estoppel does not itself give a cause of action, its purpose being to preserve rights already acquired and not to create new ones. *State v. Missouri Utilities Co.,* 331 Mo. 337, 53 S. W. (2d) 394." (Italics ours.)

The case of *Mobley v. Faircloth,* 174 Ga. 808, 164 S. E. 195, 83 A. L. R. 1201, is patently in point. In that case the court said: "Where directors of a bank of this state make excessive loans in violation of the provisions of section 13 of article 19 of the banking act, * * * as a result of which the bank sustained loss and was rendered insolvent, and where the superintendent of banks of this state, after having taken possession of the particular bank as an insolvent institution, brought a suit against such directors to recover damages solely for their breach of duty in making such excessive loans, the suit was subject to demurrer upon the ground that it appeared that the cause of action was barred by the statute of limitations, where the allegations of the petition affirmatively disclosed that the loans were made more than four years before the suit was filed, but that the failure of the bank and its sur-

render to the superintendent of banks occurred less than four years before the commencement of the action, and that the directors served in that capacity and were in control of the bank continuously from the time of the making of such loans until the failure of the bank and its seizure by the superintendent of banks for the purpose of liquidation. * * * Under the facts stated above, the period of limitation is to be calculated from the date of the making of such excessive loan. The statute is not tolled or suspended because of the fact that the directors making such loan remain continuously in control of the bank's affairs until liquidation. * * * Under the banking law of this state, the affairs of all state banks must be rigidly examined by representatives appointed by the state superintendent of banks, and holding office especially for that purpose. The general assembly adopted this method of bringing irregularities and violations of the law to the notice of the interested parties and to the department of banking. It is likewise the duty of the superintendent of banks, on receiving notice of such matters, to require an immediate rectification, adopting such means as are deemed appropriate in each particular instance. The general assembly deemed this sufficient and appropriate protection to all persons interested in or dealing with banks chartered by this state." See, also, *Council v. Brown,* 151 Ga. 564, 107 S. E. 867. If plaintiff's theory is correct as to the time when excessive loans were made, there still remained one year, two months and twenty-nine days after the bank was taken over by plaintiff for liquidation before the statute of limitations would be a bar to this action. However, plaintiff waited two years, two months and fifteen days thereafter before this action was brought, at which time it was barred by the statute of limitations. This same statute under which plaintiff seeks recovery for creditors directed it to have full knowledge of any overloan at once and to give notice to interested parties. This statute gave plaintiff effective instruments of discovery, and directed plaintiff to forthwith take such steps

as were necessary to forfeit the bank's charter, prosecute the guilty and compensate the innocent who suffered damages. Surfeited with this dereliction, the court cannot supply a remedy. The natural arm of the law was never powerless to act and this court cannot now furnish an artificial substitute. Full justice, however, demands that we exonerate the present serving department of banking from this dereliction of duty.

The Nebraska cases cited by plaintiff in support of its contention that directors of a bank are trustees of an express trust are not in point here. We said in *Mayberry v. Willoughby*, 5 Neb. 368: "If the creditor, by his own fault and laches, permits the statute so to attach, whatever may be the nature or character of his claim, he cannot complain of the operation of the law, since it is by his own negligence that it can be brought to bear against him." Courts generally concede a fiduciary relationship; that is, that directors of a corporation hold the property thereof for the benefit of creditors, but only under a trust which is implied or constructive in nature and not such as to bar the statute of limitations. See *Baxter v. Moses*, 77 Me. 465, 1 Atl. 350, 52 Am. Rep. 783; *Boyd v. Mutual Fire Ass'n*, 116 Wis. 155, 94 N. W. 171; *Wallace v. Lincoln Savings Bank*, 89 Tenn. 630, 24 Am. St. Rep. 625; *Hollins v. Brierfield Coal & Iron Co.*, 150 U. S. 371. The case of *Hayden v. Thompson*, 71 Fed. 60, was a case arising under the statutes of the state of Nebraska. The court had under consideration in that case the question of whether or not there was an express trust between a bank and a depositor or creditor of the bank under the statutes of Nebraska, and whether or not the statute of limitations runs as against recovery of payment of an unauthorized dividend by the bank. Therein Judge Sanborn said: "Express trusts are not within the statute of limitations because the possession of the trustee is presumed to be the possession of the *cestui que trust*. * * * But lapse of time is as complete a bar to a constructive or implied trust in equity as at law, unless there has been a fraudulent concealment

of the cause of action." See, also, 17 R. C. L. 794, sec. 162; 37 C. J. 909.

The general rule seems to be that the statute of limitations is ordinarily available as a defense unless the action is one which will stand the triple test, to wit: First, it must be a direct or express trust; second, it must be of a kind belonging exclusively to the jurisdiction of a court of equity; and, third, the question must arise between the trustee and the *cestui que trust.* This is not an action cognizable exclusively in equity by a *cestui que trust* against a resisting trustee. In *Bodie v. Robertson,* 113 Neb. 408, 203 N. W. 590, this court said: "So far as the appellants are concerned, this is not an action to enforce a trust against a resisting trustee. If it were, many of the authorities they cite would be in point." This is not an action to preserve assets or martial the same for creditors or to restore or account for trust assets as such. This is an action for creditors upon a liability created by statute remedial in character to recover damages which must be actually suffered by some person or persons as a consequence of a violation of the statute. It is a law action now barred by section 20-206, Comp. St. 1929, which provides that an action upon a liability created by statute must be brought within four years.

The judgment of the trial court sustaining defendants' demurrer and dismissing plaintiff's petition at plaintiff's costs was right, and it is hereby

AFFIRMED.

FRANCES KULHANEK, APPELLEE, V. JAMES KULHANEK, JR., APPELLANT.

278 N. W. 563

FILED MARCH 25, 1938. No. 30162.

1. Appeal: CONTINUANCE. Motion for continuance is addressed to the sound discretion of the trial judge and unless abused will not be disturbed.

2. ———: NEW TRIAL. The question of the mental capacity of defendant raised for the first time in second motion for a new trial, filed after term in which judgment was rendered, and some 80 days after first motion for new trial, is too late and will not be considered.

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

James E. Bednar and *Leigh & Krajicek*, for appellant.

Rudolph Tesar, contra.

Heard before GOSS, C. J., ROSE, DAY, PAINE, CARTER and MESSMORE, JJ., and FALLOON, District Judge.

FALLOON, District Judge.

Frances Kulhanek brought this action, consisting of two causes, for damages against her stepson, James Kulhanek, Jr. The defendant was not present but was represented by counsel at the trial. The jury on January 20, 1937, awarded the plaintiff $1,000 for assault and battery and $2,000 for alienation of her husband's affections. Motion for new trial was filed January 22, 1937, and overruled February 6, 1937. Subsequently to this overruling of the motion, guardianship proceedings were instituted in the county court, guardian appointed, and the said guardian filed a second motion for new trial on April 14, 1937, which was after the term the verdict was rendered, which second motion was likewise overruled by the trial court.

The plaintiff in this case, a woman 86 years of age, and her divorced husband, Vaclav Kulhanek were married in Czechoslovakia some 46 years ago. There was no issue resulting from this marriage, though by a previous marriage, the plaintiff had five girls and the divorced husband had two sons, both of whom made their home with this couple. One son died and the other, being the appellant, never married and at all times lived with the plaintiff and his father until the divorce proceedings. The appellant is about 46 years of age and his father about 75 years old. The record indicates that the plaintiff and her children,

who appeared as witnesses, have never acquired a very good command of the English language.

The case was set for trial for January 11, 1937, continued till the next day, then continued until the 13th, at which time the court on its own motion continued the case to January 18. Motion for further continuance was filed by attorneys for defendant, and the court, after taking oral testimony and receiving affidavits, overruled request for continuance and proceeded to trial, which trial lasted two days, and on the third the jury returned its verdict.

The testimony of one of the defense attorneys was to the effect that smoke was coming out of defendant's house on either the 14th or 15th, that he knocked and was convinced that either the father or defendant, or both, were in the house, though he could not get them to answer. It was further stated that the defendant knew two weeks before January 1 that the case would be reached for trial soon. A neighbor, Ernest Stern, testified that he saw a light in the Kulhanek home on January 17. The deputy sheriff who served the subpœnas for the defendant and his father on January 11 stated he was there three times, the first time he left subpœnas stuck in the door, the second time subpœnas were still there, and the third time they were moved, and, also, that the next day in the evening he saw a light in the house, and when he rapped the light went out. The defense attorneys in their motion for continuance stated that they were unable to find their client, though they had diligently tried to do so, though no suggestions were made as to this evidence, and, of course, under the trial court's ruling, the trial began and was concluded without the presence of the defendant.

The first proposition to be determined is whether the trial court abused its discretion in overruling the motion for continuance. There is nothing in the record but what discloses that the defendant absented himself voluntarily or through his own negligence. Courts cannot permit parties to thus disregard the prompt administration of trials. To hold otherwise would let any litigant determine for himself

when he wishes to have his case tried. The defendant knew his case was to be tried at this term of court, every effort was made to reach him, the record discloses that some one was at his home when these efforts were made, and he cannot complain of his own neglect. Parties have a right to be present when their cases are tried, but this right may be waived, and it should be so held when the absence is voluntary and due to his own negligence. The record discloses that the court below exercised its sound discretion in overruling motion for continuance, and its ruling should not be disturbed. Any other ruling would allow trial of cases to depend on the convenience of litigants. The defendant was ably represented by counsel, testimony was taken in his behalf, and the record does not disclose other than a fair trial was accorded the defendant.

The verdict in this case was returned on January 20, 1937, and two days later motion for new trial was filed and later overruled. Subsequently, by different counsel, a second motion for new trial was filed on April 14, 1937, in which the mental condition of defendant was raised for the first time. There is no showing that the defendant was not in control of his faculties either before or at the time of the trial and this second motion under the record is clearly out of time. It is nearly three months late and at a different term. See *Heeter v. Nisi, ante,* p. 209, 278 N. W. 271. A motion for a new trial must be filed within three days after the decision is rendered and at the term except for newly discovered evidence and, if not, should be disregarded.

The defendant contends that the evidence will not sustain the findings of the jury as to either cause of action. The testimony offered has therefore been carefully checked. The plaintiff testified that she was 86 years old, that the defendant beat her so her mouth was bashed and bled, that she was in bed as result of her injuries for about two weeks or more. The daughters corroborated her testimony, and also did her granddaughters. A neighbor corroborated the influence of the defendant in seeking to get rid of the

plaintiff, and this gradual lessening of the affections of her husband was also shown by the testimony of one of the granddaughters. Two neighbors who testified for the defense never noticed anything wrong nor did they notice any bruises or difference in the condition of the plaintiff's health.

While the testimony, because some of the witnesses did not speak well the English language, is rather hard to follow, still there was enough testimony to go to the jury and they could, if they believed the testimony offered by the plaintiff, find for her. The testimony shows that the plaintiff was beaten by the defendant, as a result of which she spent a short time in bed with some pain. Throughout the record it appears that this stepson whom plaintiff reared from babyhood was making every effort to get his father to abandon the plaintiff, and while the testimony is somewhat unsatisfactory it is sufficient to sustain a finding by the jury for the plaintiff.

The most serious question that this court has to pass upon, however, is the amount of the award. Reviewing courts are very reluctant to reduce a recovery when the jury who have seen the witnesses and heard the evidence give their decision. But when the appellate court believes the verdict excessive, then it should take such steps that substantial justice is done both litigants.

The plaintiff, a woman 86 years of age, had an expectancy of less than four years. No physician attended her at the time of the assault, and the only physician called, according to stipulation entered in the record, attended her a year previously for some other ailment. The testimony indicates that the injuries were not permanent or extremely serious.

Justice will be more fully served by reducing the judgment from $3,000 to $1,800. The order will therefore be that, if within 20 days from the filing of this opinion, the plaintiff file in this court a remittitur of $1,200, the judgment so reduced will be affirmed; otherwise, the case will stand reversed and a new trial directed.

AFFIRMED ON CONDITION.

CAMILLA BELL SHELBY ET AL., APPELLANTS, V. PLATTE VALLEY PUBLIC POWER AND IRRIGATION DISTRICT, APPELLEE.
278 N. W. 568

FILED MARCH 25, 1938. No. 30007.

1. **Estoppel.** In order to create an estoppel *in pais*, the party pleading it must have been misled to his injury; that is, he must have suffered a loss of a substantial character or been induced to alter his position for the worse in some material respect.
2. **Record** examined and ratification pleaded found not sustained by proof.
3. **Equity** will not aid one whose conduct connected with the controversy has been unconscientious or unfair.

APPEAL from the district court for Lincoln county: J. LEONARD TEWELL, JUDGE. *Reversed, with directions.*

Halligan, Beatty & Halligan and *Lowell C. Davis*, for appellants.

E. H. Evans and *Beeler, Crosby & Baskins, contra.*

Heard before ROSE, EBERLY, DAY and CARTER, JJ., and HASTINGS and RINE, District Judges.

RINE, District Judge.

The appellants, Camilla Bell Shelby and A. M. Shelby, brought a suit in the district court for Lincoln county, Nebraska, against the appellee, Platte Valley Public Power and Irrigation District, which will be hereinafter referred to as the District. The District at all times involved in this suit was and is now a corporation duly organized as a public power and irrigation district. It was organized under the laws of this state for the purpose of diverting water from the North Platte river, conveying this water by canals to reservoirs located in Lincoln county, Nebraska, then conveying it to and through a powerhouse located south of North Platte, Nebraska, for the operation of this powerhouse for generating electrical energy for sale, and for the sale of the water so diverted and stored, to water users elsewhere. The District was and is clothed

with the power of eminent domain to acquire land necessary for the improvement for which it was organized.

At all times involved in this suit prior to March 26, 1935, the Shelbys were the owners as tenants in common of a tract of land lying immediately north of the property upon which the powerhouse of the District is located. This tract of land which was owned by the Shelbys is three-quarters of a mile in width from east to west and one mile in length from north to south. The Shelbys still claim to be the owners of this land. Diagonally across this Shelby land a large canal was constructed by the District. This canal is referred to in the record as a tailrace and we will so refer to it herein. The District entered upon the Shelby land and commenced the construction of this tailrace on March 26, 1935. This tailrace was a necessary part of the improvement for which the District was organized, and it was necessary in making this improvement to cross this land, although it was not essential to the improvement that it should be located at the exact place where it was constructed.

The Shelbys in their amended petition allege that at the time the District went upon their land and constructed this tailrace it had neither purchased nor condemned the land over which the tailrace was constructed, and has not done so since that time; that in constructing this tailrace the District committed an unlawful trespass to their great damage; that the District possesses the power of eminent domain, under which this land can be acquired by the District for the construction and use of this tailrace; that by reason of an arrangement with the United States government, which has been financing this improvement, the property of the District, including its future income, has been encumbered to such an extent that there are no available assets of the District out of which a judgment could be satisfied should one be obtained by them against the District; that unless the District is restrained from entering upon their property the District will go thereon and cause irreparable damage thereto and refuse to pay

them the damages caused thereby; that they have no adequate remedy except injunction, for which reason they are entitled to an injunction enjoining defendants from going upon their said property until the District has either purchased the land in question or has condemned it for the District's use under the laws of the state of Nebraska. In their amended petition the Shelbys pray for an injunction against the District enjoining it from entering upon any part of their land until the District shall have purchased or condemned the land used by the District for its tailrace.

The District filed an amended answer, wherein it alleges that it went upon the Shelby land and has completed the tailrace by virtue of a contract with the Shelbys whereby it was authorized to enter upon this land and construct this tailrace for the agreed sum of $7,400 to be paid by the District to the Shelbys; that the District has offered to pay the Shelbys said agreed sum of $7,400, which sum they have refused to accept; that the Shelbys had full knowledge of the fact that the District had entered upon their land and was constructing the tailrace thereon for some time prior to the institution of this suit, and with such knowledge they made and executed a deed of conveyance to the District of the right of way in question, sent the same by mail to their authorized agent at North Platte, Nebraska, with instructions to deliver the same to the District, and thereby ratified and affirmed the contract and the authority of the District to go upon their land and construct a tailrace across the same; that the District has expended large sums of money in the construction of said tailrace, and that the Shelbys by such acts of ratification and acquiescence are estopped from changing their position to the great detriment and injury of the District, and are estopped from asserting that they had not consented to the District going upon their land and constructing the tailrace across the same, and are estopped from denying that Coufal & Shaw, who in their name executed the contract in question, had no authority

to enter into said contract for and in their behalf, and are thereby estopped from asking that an injunction issue restraining the District from remaining upon said land and using said tailrace it has constructed over the same, which, if issued, would be a great injury to the District; that the District has a right to go upon the premises in question to construct its works and carry on its work, and any interference by the Shelbys by whatever means or by an injunction issued in this suit would prevent the District from using this tailrace as an outlet for its waters and would prevent the District from using all of its constructed works for the purpose of manufacturing, selling and disposing of electric power and to irrigate lands situated below the outlet of the tailrace, and would work irreparable injury to the District and the persons with whom the District has entered into contracts to furnish water and power. The District denies the allegation of the Shelbys that it has no assets available to satisfy a judgment that might be secured against it, and alleges that ample funds will be available to pay any judgment that the Shelbys may secure in the matter. The District further alleges that it at no time wilfully or maliciously trespassed upon the Shelby land or continued to trespass thereon, but at all times depended in good faith upon the provisions of said contract in entering upon and constructing said tailrace, and that at all times it has been ready, willing and able to pay said sum of $7,400, agreed upon to the Shelbys, and has tendered to them said sum of money as a consideration for entering upon their land and constructing said tailrace, and is still ready, willing and able to pay said sum so fixed as a consideration for entering upon their land and constructing said tailrace, and has deposited with the trial court by placing in the hands of its clerk the sum of $7,400 for the use and benefit of the Shelbys, and offers same to the Shelbys in payment of the contract price. In its amended answer the District prays that relief asked for by the Shelbys in their amended petition be denied and that their amended petition be dismissed.

The District filed a separate cross-petition asking for affirmative relief against the Shelbys, wherein it alleges and states that on February 27, 1935, the Shelbys, being then the joint owners of the land in controversy, which land is described by metes and bounds, on that date sold said land to the District to use the same for the construction of this tailrace, and that the Shelbys and the District entered into an agreement in writing in relation thereto, a copy of which is set out in the cross-petition. This alleged agreement is a contract between the Shelbys on the one part and the District on the other, in which it is stated that, in consideration of the payment of $7,400 by the District to the Shelbys and the conditions contained in the agreement to be kept and performed by the District, the Shelbys agree to sell and convey to the District by warranty deed the land therein described. This agreement bears date of February 27, 1935. It purports to be executed on behalf of the District by "W. E. Frank, its duly authorized agent," and on behalf of the Shelbys by "Coufal & Shaw, their attys." It is further alleged and stated by the District in said cross-petition that shortly after March 7, 1935, and at various times since, the District tendered to the Shelbys said sum of $7,400 and requested them to convey to the District the premises described in the agreement, and that they made and executed such a conveyance as provided for in said agreement and transmitted the same by mail to their agent at North Platte, Nebraska, with instructions to deliver the same to the District and receive the sum of $7,400 for and on their behalf, but that said agent refused to comply with these instructions and failed to deliver said deed of conveyance and did not take the payment provided for in said contract, and since that time the Shelbys have refused and still refuse to deliver such conveyance; that the District has deposited with the court the sum of $7,400 for the use and benefit of the Shelbys, and that it now offers said sum to the Shelbys in payment of the contract price; that the District has duly performed all conditions of this agreement on its

part to be performed, and stands ready, willing and able to pay said sum of money to the Shelbys whenever they comply with their part of the agreement; that the Shelbys through and by their duly authorized agents had full knowledge of the fact that the District had entered upon their land and was engaged in constructing its works over and across the same, and with such knowledge made and executed a good and sufficient deed of conveyance to the District of the right of way over and across said land, and sent the same by mail to their duly authorized agent with instructions to deliver the same to the District, and thereby ratified and affirmed said agreement and the authority of the District to go upon said land and construct its works over and across the same and expend large sums of money for said works, and that the Shelbys by such acts of ratification and acquiescence are now estopped from changing their position to the great detriment and injury of the District, and estopped from asserting that they have not consented to the District going upon said land and constructing said works over and across the same, and are estopped from asserting that Coufal & Shaw had no authority, as their agents, to enter into said agreement, and are estopped by their ratification of the execution of said contract from asking that injunction issue restraining the District from remaining upon the land and using the tailrace it has constructed over and across the same, which injunction, if granted, would be of great and irreparable injury to the District. The District in its cross-petition prays that the Shelbys be required to receive said sum of $7,400 so tendered and either deliver the conveyance already executed by them or make, execute and deliver to the District another deed of said premises, and for such other and further relief as justice and equity may require.

The Shelbys in a single pleading filed a reply to the District's answer, and an answer to the District's cross-petition. In this pleading they deny that they ever entered into a contract of sale for any part of their land, and allege and say that Coufal & Shaw were attorneys

employed by them for the purpose of investigating and reporting to them the nature and extent of the property desired by the District; that M. A. Shaw of that firm had no authority, express or implied, to enter into any contract with the District for the sale of any of their land; that the agreement set forth in the District's cross-petition was signed by Coufal & Shaw without authority from them, and that said contracts were forwarded to them and that they forthwith repudiated the action of said Coufal & Shaw and refused to execute said contracts or affirm the same, and have at all times since disapproved the action of said attorneys and have never ratified said action. They further allege that the provisions of said agreement purporting to be signed by said attorneys were unknown to them, and such provisions were never ratified by them and have at all times been repudiated by them, and that the action of said firm of attorneys in signing said contract has at all times been repudiated by them, and that said agreement executed by Coufal & Shaw was void and unenforceable by virtue of the statute of frauds of the state of Nebraska. In this pleading the Shelbys pray for an injunction against the District and for damages as prayed for in the amended petition, and for further equitable relief.

The trial court denied the injunction prayed for, set aside and vacated a temporary injunction granted to the Shelbys on June 29, 1935, but which had never been in effect because the requisite bond had never been furnished, dismissed plaintiff's petition, and on the District's cross-petition decreed specific performance of the contract of purchase entered into between the Shelbys through Coufal & Shaw and the District. From that decree this is an appeal. The Shelbys also appeal from the order of the trial court overruling their motion for a new trial.

The facts and circumstances out of which this suit arose, so far as important here, are as follows:

Early in January, 1935, the improvement being made by the District had about reached the tailrace below the

powerhouse and it became necessary for the District to acquire a right of way across the Shelby land to construct this tailrace.

For many years prior to this time O. H. Thoelecke of North Platte, Nebraska, had represented the Shelbys in managing and renting their land; the Shelbys being residents of California. About this time the District employed Mr. Thoelecke as one of its land appraisers. Upon being so employed Mr. Thoelecke and the Shelbys professedly selected an employee of Mr. Thoelecke, one L. E. Mehlmann, to act as the Shelbys' agent at North Platte, Nebraska; however, the record shows that, while this was apparently the situation, the fact was that all of the correspondence in reference to this matter between the Shelbys and their represntatives in North Platte was placed in a drawer in Mr. Thoelecke's office, to which he had access, that part of this correspondence was personally conducted by Mr. Thoelecke, that he was in touch with the Shelbys during all of the time that he was an appraiser for the District, that while he was an appraiser for the District he disclosed to the Shelbys confidential information which he acquired as such appraiser relative to the tentative appraisement the District had made of the Shelby land sought to be acquired for the tailrace, of which information the Shelbys availed themselves, and that after he was dismissed by the District he again took full charge of the Shelby interests at North Platte.

About the time that the District determined to take action to secure this right of way over the Shelby land, Mr. Thoelecke and Mr. Mehlmann took up that matter by correspondence with the Shelbys, and thereafter numerous letters, telegrams and telephone conversations passed between them and the Shelbys about the sale of land for this right of way to the District and as to other matters incident to the construction of the tail race. This, as well as correspondence dealing with this matter had by the Shelbys with their representatives located elsewhere in Nebraska, was carried on from California on behalf of the

Shelbys either by Mr. Shelby, Mrs. Shelby, or by Jesse Bell, a brother of Mrs. Shelby, with full knowledge had by all three of these parties of what was being done by each one.

At this time the Shelbys decided to employ attorneys who were not located at North Platte, and about the middle of January, 1935, they employed the law firm of Coufal & Shaw of David City, Nebraska, to negotiate with the District relative to the District acquiring the right of way over their land. Shortly after this employment the firm sent Mr. Shaw of the firm to North Platte to investigate the situation. Mr. Shaw made a thorough investigation and by letter of date January 29, 1935, reported fully upon what he had found. In this letter he gave the exact description of the land proposed to be taken; this is the land which is the subject of this controversy. From this time on the Shelbys were aware of the exact land the District was seeking to secure for this tailrace. This firm of attorneys for a considerable period of time negotiated with the officers of the District about this matter. In these negotiations numerous questions were raised and considered, including what amount of money the Shelbys should be paid for land taken or damaged in the construction of this tailrace, the way the land should be left when the improvement had been completed, the question of fencing this land after the improvement had been made, siphoning the slough under the tailrace which ran across the Shelby land, and as to whether or not a bridge should be constructed by the District over the tailrace. The result of these negotiations and the position taken by the District were reported by these attorneys to the Shelbys from time to time as they occurred.

About February 16, 1935, the Shelbys were advised by their attorneys that it was extremely important to the District that it should have possession of this land at an early date, and that unless a settlement was made at once the District would proceed to condemn this land. The need for immediate possession arose because of the fact that

it was necessary to dig at least a part of the tailrace to dispose of the water that had accumulated above the tailrace before the District could proceed with the construction of the improvement.

Prior to this time, on January 24, 1935, the District had entered into a contract with its contractor to construct this tailrace under plans and specifications which had theretofore been adopted by the District. This contract contained a time limit within which the contract was to be completed and subjected the contractor to penalties for failure to complete the contract within the time specified. This was a further reason why the District wanted early possession of the land.

On February 23, 1935, Coufal & Shaw wired the Shelbys that the District would settle for $7,200, conditions same. What those conditions were are set out in the letter of confirmation written by the attorneys to the Shelbys as follows: "The contracts are conditioned they will furnish and maintain the fence, and they will not interfere with the natural flow of Fremont slough but will take care of the same by syphon."

On February 24, 1935, the Shelbys sent a telegram to their attorneys authorizing them to settle upon the basis indicated. This telegram is as follows: "Will accept seventy-two hundred if absolutely necessary but get your fee above this amount if possible." This telegram was signed by Mr. Bell, but it was directed to be sent by Mrs. Shelby and the action taken was known to Mr. Shelby. Upon receiving this authority to settle, these attorneys, on February 25, 1935, by telegram, advised the District that they could close this matter for $7,200 plus their attorney fees. A few days later Mr. Frank, who was the officer of the District having charge of securing the right of way for the District, called up Mr. Shaw by telephone, and after negotiating about the matter, Mr. Frank on behalf of the District and Mr. Shaw on behalf of the Shelbys arrived at the agreement embodied in the contract of sale. Whereupon the attorneys for the Shelbys prepared duplicate

copies of this contract of sale, executed the same on behalf of the Shelbys, and forwarded them to the District on February 28, 1935. On the same day these attorneys wrote a letter to the Shelbys advising them that they had entered into a contract with the District for $7,400, in line with the authority they had received, and that they would forward deed for signature within the next few days. Shortly thereafter these contracts were returned to the attorney duly executed by the District.

On March 8, 1935, these attorneys forwarded to the Shelbys duplicate executed copies of this contract of sale and a warranty deed conveying the land in controversy to the District, and requested the Shelbys to execute the warranty deed, acknowledge the execution of the contracts and to return the deed and one copy of this contract to them. On March 9, 1935, these attorneys wrote the auditor of the District advising him that pursuant to his request they forwarded the deed and duplicate copies of the contract to the Shelbys for execution and acknowledgment, and on the same day they advised the attorney for the District to the same effect. The contract in question provides that, in consideration of the payment of $7,400 by the District to the Shelbys and the conditions contained in the contract to be kept and performed by the District, the Shelbys agreed to sell and convey to the District by warranty deed the land involved in this suit. These duplicate copies of the contract and the warranty deed transmitted to the Shelbys contained all the conditions insisted upon by the Shelbys up to the time they authorized their attorneys to sell the land involved for $7,400.

Some time after the contract and deed had been forwarded to the Shelbys they wrote to their attorneys complaining that the contract did not protect them from damages they might sustain because of seepage, although at no time prior thereto had they insisted upon such a provision as a condition of settlement. In this letter they returned the two copies of the contract unsigned but retained the warranty deed that had been forwarded to them.

On March 25, 1935, the Shelbys again wired their attorneys stating that the contract should contain a clause covering any future damages that might arise due to seepage, and then stated in this telegram "but rather than have further litigation will settle for $7,400.00." Finally, when on May 27, 1935, Coufal & Shaw sent the Shelbys a telegram advising that the District was willing to include in the contract and in the deed a provision that they should not be barred from collecting future damages from seepage, they forthwith discharged them from further service and advised them that they were not interested in having such a provision inserted in the deed and contract.

In the circumstances we have outlined the District went upon the land and constructed this tailrace without condemning the land over which it runs and which is essential to its operation, and began piling some dirt upon the south end of the land early in March, 1935, and on March 26, 1935, it entered the north end of this land, placed a drag-line thereon and proceeded to construct this tailrace which was completed at the time of the trial of this case. The record shows that the District did all things necessary to be done to carry out its contract of purchase, that the price agreed upon to be paid was available on and after March 8, 1935, and that that sum was thereafter tendered to the Shelbys, which tender has been kept good at all times since.

The warranty deed conveying the land in controversy to the District which had been sent to the Shelbys by their attorneys was executed by the Shelbys in due form on the 1st day of May, 1935, and on the following day transmitted to Mr. Mehlmann with directions to check the descriptions therein contained and to deliver the deed to the District or to the attorneys at Bellwood. This was not done by Mr. Mehlmann, who gives as a reason for not doing so that he did not know the attorneys at Bellwood. He retained possession of the deed until this suit was brought when he turned it over to the present attorney of the Shelbys. Unfortunately the letter whereby the Shelbys

transmitted this deed to Mr. Mehlmann has not been produced—neither the original nor the copy, both seem to have been lost—and the court must reply upon Mr. Mehlmann's memory as to what instructions it contained.

The trial court found, and the record sustains its finding, that the employment of Coufal & Shaw, by the Shelbys, did not contemplate power in Coufal & Shaw, or either of them, to execute the contract of sale on behalf of the Shelbys and that Coufal & Shaw were without proper written authority from the Shelbys to execute the contract of sale herein involved, and that at the time of the execution thereof the same was not binding upon the Shelbys; that the Shelbys became aware of the execution of this contract of sale as entered into by Coufal & Shaw and were, on or about February 28, 1935, fully apprised of the contents thereof, and received from Coufal & Shaw the duplicate originals of said contract of sale, receiving same on or before March 10, 1935, and thereby became advised and informed as to all the provisions contained therein; that one L. E. Mehlmann gave to the Shelbys in the early part of April, 1935, actual knowledge of the fact that the District had entered into possession of said land and was constructing its ditch thereon.

In its decree the trial court ordered specific performance of the contract of sale. Among other things the trial court found that, under all of the circumstances as disclosed from the evidence, the Shelbys are estopped to deny that they had ratified the acts of Coufal & Shaw in the execution and signing of said contract of sale, and that the acts and omissions of the Shelbys, under all of the circumstances, as shown in this case, works an estoppel *in pais* as against the Shelbys in such manner as to effect and to cause the execution of said instrument and agreement of sale to be ratified by operation of law, and to cause such instrument to express a contract binding upon the Shelbys and upon the District and that the District is entitled to a decree for specific performance of said contract of sale. The trial court also found "that between the dates of

March 10, 1935, and May 27, 1935, the defendant District constructed a large ditch upon and across the lands described in said agreement of sale at great expense to said District and did and perform such work that would subject the defendant District to large damages in the event that it had no right upon said lands." There is no evidence in the record to justify this last finding. Unless there is such evidence or other evidence to sustain a finding that the District has suffered substantial injury because of the conduct of the Shelbys then this decree of specific performance cannot be sustained upon the ground of estoppel. It is a well-established principle of law that before a party can avail himself of estoppel because of the wrongful conduct of another it must clearly appear that he has suffered substantial injury or damage because of such conduct. *Haschenberger v. Dennis,* 118 Neb. 411, 225 N. W. 25; *Commercial Investment Corporation v. Farmers State Bank,* 118 Neb. 678, 225 N. W. 758; *Rea v. Pierson,* 114 Neb. 173, 206 N. W. 760; *First Nat. Bank v. First Nat. Bank,* 111 Neb. 441, 196 N. W. 691. The contract for the construction of this tailrace was entered into and the location of this tailrace was fixed and determined before any negotiations took place between the Shelbys and the District. It is idle to say that the District suffered substantial injury by the conduct of the Shelbys because of being deprived of the privilege of changing the course of this tailrace and locating it upon some other land. There is not a particle of evidence in the record to show that this tailrace could have been constructed more cheaply elsewhere, and it affirmatively appears from the record that to construct this tailrace at any other place would have caused the District greater expense. Furthermore, the District could have instituted condemnation proceedings to acquire the land under the power of eminent domain. That is what the Shelbys asked for. The trial court in this case entered a temporary injunction enjoining and restraining the District from going upon that land until it instituted proper and regular condemnation pro-

ceedings in the county court of Lincoln county, Nebraska, to secure title to such part of the Shelby premises as is necessary for the construction of the works of the District, and that, upon the institution of such condemnation proceedings, the injunction be suspended and the District permitted to proceed with the construction of the tailrace so long as such condemnation proceedings were diligently prosecuted and carried out and the condemnation money awarded paid the Shelbys or deposited with the county court of Lincoln county, Nebraska, as provided by law. However, the District objected to proceeding by condemnation which was thus made available to it and secured the dissolution of the temporary injunction. Had it proceeded along this line at that time, the District could in no way have suffered any substantial injury because of the conduct of the Shelbys. In such circumstances the District cannot now be heard to say that it is entitled to the specific performance of the contract of sale made by Coufal & Shaw upon the ground of estoppel.

The District also urges that it is entitled to a decree for specific performance on the ground that this contract of sale was ratified and approved by the Shelbys. This claimed ratification is based upon the following grounds: (1) Through the chain of correspondence to which the name of the Shelbys, or one of them, was subscribed; (2) by execution and delivery of the deed; (3) that ratification may be construed to have been had from the silence and acquiescence of the Shelbys under the circumstances; (4) that such ratification be determined as a matter of law to have been effected by reason of the estoppel of the Shelbys to deny such. The trial court was clearly right in refusing to grant specific performance upon any ground of ratification. The first contention made is not borne out by the record; no correspondence found in the record justifies this claim. Contentions 3 and 4 are without merit for the reason that no substantial injuries were shown to have been suffered by the District because of the conduct of the Shelbys. We have already touched upon that phase

of the law. Contention number 2 is based upon the claim that ratification took place by the execution and delivery of the deed. This deed was delivered to the agent of the Shelbys at North Platte and it could be recalled at any time before it was delivered to the District. This was done, and when the deed was returned to the Shelbys it became a nullity for all purposes of this case. See *Jobse v. United States Nat. Bank,* 142 Or. 692, 21 Pac. (2d) 221, wherein it was said: "Delivery is an indispensable requisite to the validity of a deed. So long as the grantor retains the legal control of an instrument, title under it cannot pass any more than if he had not signed it. To pass the title the grantor must give up dominion and control of the deed. He must part not only with the possession of the deed, but also with the right to recall it or to alter any of its provisions."

Under the record in this case the Shelbys are not entitled to any relief in a court of equity. The trial court was right in dismissing their petition. 1 Pomeroy, Equity Jurisprudence (3d ed.) sec. 404, lays down the law applicable here: "It is not alone fraud or illegality which will prevent a suitor from entering a court of equity; any really unconscientious conduct, connected with the controversy to which he is a party, will repel him from the forum whose very foundation is good conscience." This court in *Blondel v. Bolander,* 80 Neb. 531, 114 N. W. 574, approved the following rule of law laid down in 1 Pomeroy, Equity Jurisprudence (3d ed.) sec. 397: "Whenever a party, who, as actor, seeks to set the judicial machinery in motion and obtain some remedy, has violated conscience, or good faith, or other equitable principle, in his prior conduct, then the doors of the court will be shut against him *in limine;* the court will refuse to interfere on his behalf, to acknowledge his right, or to award him any remedy." In *Deweese v. Reinhard,* 165 U. S. 386, the rule is announced as follows: "A court of equity acts only when and as conscience commands, and if the conduct of the plaintiff be offensive to the dictates of natural justice,

then, whatever may be the rights he possesses and whatever use he may make of them in a court of law, he will be held remediless in a court of equity." The Missouri court dealing with the same question held in *Creamer v. Bivert*, 214 Mo. 473, 113 S. W. 1118: "The maxim that he who comes into equity must come with clean hands is a cardinal one. It touches to the quick the dignity of a court of conscience itself. Hence, its application does not depend upon the averments of the pleadings, or the wish of counsel, but it may be invoked and applied, *ex mero motu*, by the court."

The Shelbys petition a court of equity to compel the District to acquire the land it needs for its tailrace, through the exercise of the power of eminent domain. The District resisted this action, claiming to have acquired this land through purchase, and prayed for and secured from the trial court a decree for the specific performance of the contract of sale. This contract has now been held unenforceable, and unless some provision is made by this court, the District may find itself deprived of the right to acquire this property through condemnation proceedings and at the same time be confronted with an action for damages for a large sum of money, the effect of which would be that the Shelbys, by the action of this court, would benefit through their own misconduct. To prevent injustice, and to prevent this happening, and to the end that equity and justice be done, the district court for Lincoln county, Nebraska, is directed to enter an order, if application is made therefor by the District, which is the appellee herein, within 10 days of the time the mandate of this court is filed with the clerk of said district court, to enjoin Camilla Bell Shelby and A. M. Shelby, the appellants herein, from instituting an action for damages, such injunction to be conditioned that the District proceeds at once to institute proper and regular condemnation proceedings in the county court of Lincoln county, Nebraska, to secure the title to such of plaintiffs' land as is necessary for the construction and operation of the works of appellee, and such injunction

to remain in force so long and only so long as such condemnation proceedings are diligently prosecuted and carried out, and the condemnation money awarded the plaintiff deposited with the clerk of the county court of Lincoln county, Nebraska, as provided by law.

For the reasons stated in this opinion, the judgment of the district court is reversed, with directions that judgment be entered by the trial court in conformity with this opinion.

REVERSED.

IN RE ESTATE OF JAMES A. DESOE.
GEORGE R. DESOE, APPELLEE, V. SEWARD R. BENTON, ADMINISTRATOR, ET AL., APPELLANTS.
278 N. W. 852

FILED APRIL 1, 1938. No. 30248.

1. **Adoption.** A child may be adopted in Missouri by residents of Nebraska by deed of adoption duly executed.
2. **Evidence.** There being no provision of Nebraska laws for the recording of a deed of adoption, if it cannot be found its contents may be proved by secondary evidence.
3. **Adoption.** Where adoptive parents substantially comply with adoption proceedings, take a child into their home and treat it for many years as an adopted child, they and their heirs may not deny that the child was adopted, and the child inherits its share of the estate of the parents as if he was born their child.

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

Cleary, Suhr & Davis, for appellants.

W. P. Mullen and *Prince & Prince, contra.*

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

GOSS, C. J.

The administrator of the estate and the widow and three children of James A. DeSoe, deceased, appeal from

a judgment that George R. DeSoe was duly adopted by and is a lawful heir of James A. DeSoe.

The case arose in the county court on objections of George R. DeSoe to the final report of the administrator. Plaintiff alleged that he was an adopted son and entitled to a decree of heirship in common with the widow and three daughters of James A. DeSoe, deceased, stating the facts upon which he alleged his adoption and asking a finding awarding him an undivided share in the estate. The county court sustained a demurrer to this pleading, a decree of distribution was rendered, apportioning the estate to the widow and daughters, and George R. DeSoe appealed to the district court.

In the district court it was stipulated that the objections should stand as appellee's pleading. The appellants filed an answer and the appellee filed a reply in the district court.

Appellee pleaded that, as Richard Coffee, he was left some time prior to January 18, 1910, at a Kansas City, Missouri, hospital by his mother, with the instruction to the superintendent to find a home for him; that on the 18th day of January, 1910, James A. DeSoe and his then wife, Maude B. DeSoe, applied to the juvenile court of Jackson county for the child, on the next day the child was placed with the said applicants, and on January 31, 1910, the court found that the child was a neglected child, and on March 21, 1910, said court committed plaintiff to the care and custody of James A. DeSoe. Plaintiff further alleged that about said time James A. DeSoe and Maude B. DeSoe executed and acknowledged a deed of adoption, adopting said child, Richard Coffee, as their own, under the name of George R. DeSoe, and took said child, which was then less than one year old, to their home in Cairo, Nebraska; that the deed of adoption has been lost; that the DeSoes both treated him as a son, told their friends and neighbors that they had adopted him; that until the death of Maude B. DeSoe both of them treated him as a lawfully adopted child, and after her death James A. DeSoe

and later Theresa M. DeSoe, whom James A. DeSoe married, treated him as an adopted son; that after the death of Maude B. DeSoe, James A. DeSoe placed a marker on her grave inscribed "Mother," and she was never the mother of any child save George A. DeSoe, who was then about five years of age; that C. H. DeSoe, the father of James A. DeSoe, died about 1901, leaving a last will devising a life estate in a farm to his son, then to his children if he had any, and, if not, to the testator's heirs; that James A. DeSoe had been advised that his wife, Maude B. DeSoe, would be unable to bear children and, in order to protect his wife from loss of the farm, it was planned to adopt a child and they did adopt plaintiff; and that by reason of all the facts hereinbefore set forth defendants are estopped to claim that the said George R. DeSoe is not the adopted son of James A. DeSoe.

For answer defendants allege that Richard Coffee was duly found by the juvenile court of Jackson county, Missouri, to be a neglected child and his custody and control was awarded to James A. DeSoe and thereafter he lived at the home of James A. DeSoe under said commitment and not otherwise; the answer makes certain other allegations that are not necessary to recite, and contains a general denial and demurrer and prays that he be excluded from participation as a distributee of the estate of James A. DeSoe.

Appellee replied realleging the execution of the decree of adoption.

The court ordered the issues tried to the jury and at the conclusion of the evidence confined the issues to be submitted to the single question whether James A. and Maude B. DeSoe had executed and acknowledged a deed of adoption, as provided by the laws of Missouri, with the intention thereby to adopt the appellee. The jury answered in the affirmative and judgment was entered for appellee.

The main question is whether appellee was legally adopted by the DeSoes under the laws of Missouri. Chapter 20, art. I, Rev. St. Mo. 1909, says:

"Sec. 1671. Adoption of children shall be by deed.—If any person in this state shall desire to adopt any child or children as his or her heir, it shall be lawful for such person to do the same by deed, which deed shall be executed and acknowledged by the person adopting such child or children and recorded in the county of the residence of the person executing the same, as in the case of conveyance of real estate.

"Sec. 1672. Married woman may join in deed.—A married woman, by joining in the deed of adoption with her husband, shall, with her husband, be capable of adopting any child or children."

Appellants argue that the right to adopt a child was a privilege accorded by the statute to residents of Missouri. But the statute does not so expressly state. It says "If any person in this state," etc. It does not say they must be residents of the state. The DeSoes were in the state and they desired to adopt the little boy, whose custody they first procured from the juvenile court of Jackson county, Missouri. It is shown by the evidence that they made at least two trips to Missouri. That the statute provided the deed of adoption should be recorded in the county of the residence of the parties to it was designed to preserve the record of the deed for the benefit of parties who would be affected by it and might as well apply to parties residing in Nebraska as Missouri. The statute says "as in the case of conveyance of real estate." Real estate conveyances are not required to be recorded to be effective. There is no provision of the Nebraska statutes requiring or providing for deeds of adoption to be recorded.

This particular deed of adoption was not produced in court. Secondary evidence of its contents and purport was given sufficient to warrant the jury finding as a fact that it was executed and acknowledged. Irvin C. Schultz, a boyhood friend of James A. DeSoe, testified that some time after the DeSoes brought the boy home DeSoe showed him the deed, which he testified was executed by James A. DeSoe and Maude B. DeSoe. The deed was also testified

to by Charles E. Taylor, a lifetime friend of DeSoe. He had told Taylor that it was impossible for his wife to have a child and expressed the idea that they would adopt one. Taylor took the school census about 1915. James A. DeSoe then told the witness that George was his adopted son and produced the deed of adoption signed by James A. and Maude B., which the witness sufficiently described to take this case to the jury.

Other witnesses who were neighbors and friends of the DeSoes testified that both of them freely stated that George was their adopted son.

In the will of Hannah L. DeSoe, stepmother of James A. DeSoe, she made a devise "unto my stepson, James A. DeSoe, and his adopted son, George R. DeSoe." Both devisees were present when the will was admitted to probate and when it was discussed by the county judge in its relation to an inheritance tax. The county judge stated that, if George was an adopted son, there would be no inheritance tax on his share. James A. DeSoe stated that George R. DeSoe was his adopted son and no inheritance tax was levied.

As long as they lived, James A. DeSoe and his wife thought they had adopted this boy and treated him as an adopted son in the highest and best sense of that term. Now that he is 28 years old, his right to that status under the deed of adoption and under the acceptance of the relation for so many years is attacked collaterally.

A similar principle was involved in *In re Estate of Zehner*, 130 Neb. 375, 264 N. W. 891, and it was decided:

"The probate court acts judicially in an adoption proceeding. If there is a substantial compliance with the statutes, the decree is conclusive. * * *

"Where adoptive parents seek and obtain a decree of adoption, and take the child into their home as their own, they and their heirs are estopped from attacking said decree collaterally."

To the same effect is the case of *In re Reichel*, 148 Minn. 433, 182 N. W. 517.

Appellants assign numerous errors, many of which are not argued. The foregoing disposes of all of them which we think are relied on and possess debatable merit.

The judgment of the district court is

AFFIRMED.

MARGARET J. WESTCOATT, APPELLEE, V. EDWIN LILLEY, APPELLANT.

278 N. W. 854

FILED APRIL 1, 1938. No. 30315.

1. **Workmen's Compensation:** EMPLOYEE. Under the workmen's compensation law, an employee, fatally injured in a collision between motor trucks, while driving his own truck on his way to the gravel pit of his employer for a load of gravel, and at the same time, under the employer's orders, transporting a tank of gas to the pit, *held* to be an employee whose widow is entitled to compensation.
2. ———: PURPOSE OF LAW. "An outstanding purpose of the workmen's compensation law is to shift from the employee to modern industry the burden of economic waste or loss 'arising out of and in the course of his employment' as a result of his injury or death." *Tralle v. Hartman Furniture & Carpet Co.*, 116 Neb. 418, 217 N. W. 952.
3. ———: ———. The relief authorized by the workmen's compensation law includes a purpose to prevent an employee's dependents from becoming a public charge.

APPEAL from the district court for Hall county: EDWIN P. CLEMENTS, JUDGE. *Affirmed.*

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

B. J. Cunningham and *W. P. Lauritsen, contra.*

Heard before GOSS, C. J., ROSE, EBERLY, DAY and MESSMORE, JJ., and FALLOON, District Judge.

ROSE, J.

This is a proceeding to recover compensation under the workmen's compensation law.

Edwin Lilley, defendant, owned and operated a sand and gravel pit about a mile southeast of Wood River and was

engaged as a contractor in sand, gravel and concrete work. For him Vere G. Westcoatt, a resident of Wood River, was engaged in hauling by motor truck sand and gravel from defendant's pit to the village of Alda. About a mile from Wood River on the way from there to the pit, a truck owned and operated by him on the highway collided with another truck October 23, 1935, and he was fatally injured, dying the same day.

The widow, Margaret J. Westcoatt, plaintiff, mother of two small children of decedent, presented to the compensation court a claim for compensation, based on allegations that her husband had been an employee of defendant, engaged in the performance of his duties as such, and that the fatal accident arose out of and in the course of his employment. Defendant resisted the claim on the grounds that the truck driver was an independent contractor and not an employee entitled to compensation and that he was on his way to work and not in performance of any duty of his employment when injured.

The cause was tried before a judge of the compensation court with the result that plaintiff was awarded compensation of $15 a week for 325 weeks and other benefits authorized by statute.

Upon appeal by defendant to the district court, plaintiff recovered a judgment for $15 a week for 325 weeks; expenses of burial, $150; services of physicians and hospital expenses, $105.15; fees of attorneys for plaintiff, $200. From the district court defendant appealed to the supreme court.

In view of the rulings in *Showers v. Lund,* 123 Neb. 56, 242 N. W. 258, the defense that the truck driver was an independent contractor within the meaning of the compensation law was unproved.

It is clearly established by the record that he was an employee of defendant at the time of the accident.

Was the husband of plaintiff engaged in the performance of a duty of his employment when injured? That is the question for determination. Defendant did not produce

any witness in his own behalf, but relied for proof of a defense on the cross-examination of plaintiff's witnesses. Employer and employee did not enter into any contract of employment in writing. Their understanding of the terms of their agreement extended over a period of years. Defendant operated his gravel pit and conducted his business as a contractor for more than six years. During all that time the employee hauled gravel for him in the working season which generally lasted each year from some time in April until freezing weather in October. The employee owned and operated his motor truck and paid for his gas and oil. His haul was from pit to dump where the materials were to be used. His compensation was four cents a mile per cubic yard of materials hauled. Two other truck drivers also hauled gravel for defendant on the same terms. All had the privilege of using gas from a supply kept by defendant at the pit, where it cost defendant's truckers less than at regular filling stations. The charges for gas thus furnished to plaintiff's husband were deducted from his compensation. A truck driver was permitted to get gas at a filling station in town and have it charged to himself or defendant. At the time of the accident defendant was performing a contract to deliver gravel to the village of Alda. This employee had authority to accept for defendant orders from the village marshal of Alda for truck loads of gravel for the use of the village. The haul of employee at the time was from the pit to Alda. Gravel was delivered at times pursuant to such orders. The foregoing facts were conclusively proved at the trial. There is direct and positive testimony that, at the pit, on the evening before the employee lost his life, he was furnished a 15-gallon gas tank or drum belonging to defendant and told to bring it back filled with gas. This was a direct order from employer to employee. This same drum, filled with gas, was found at the scene of the accident the next morning, where the employee was fatally injured on his way to the pit for a load of gravel.

On cross-examination of defendant who had been called

as a witness for plaintiff, defendant attempted to show that the employee borrowed the gas drum for his own purpose and was transporting gas therein on his way to work for his sole use in his own truck on the morning of the accident, but these are not necessary inferences from the cross-examination. On further cross-examination defendant said also that he told the truck driver in effect that the supply of gas at the pit was running low and that there might not be enough for the next day. There was an admission of testimony at a former trial to the same effect, but this did not affirmatively prove that the gas on hand would be insufficient for the work of the next day or that the gas en route would not be accepted by defendant if delivered. The direct order from employer to employee to procure and transport to the pit in defendant's tank 15 gallons of gas was not destroyed by the cross-examination, when the methods of mutual transactions over a long period of time are considered. The better views of the entire record are that plaintiff's husband was engaged in the performance of a duty of his employment when fatally injured and that the accident arose out of and in the course of his employment, the claim being within the relief contemplated by the legislature, as indicated by the following interpretation of the law:

"An outstanding purpose of the workmen's compensation law is to shift from the employee to modern industry the burden of economic waste or loss 'arising out of and in the course of his employment' as a result of his injury or death." *Tralle v. Hartman Furniture & Carpet Co.*, 116 Neb. 418, 217 N. W. 952. This aim includes a purpose to prevent an employee's dependents from becoming a public charge. *Parson v. Murphy*, 101 Neb. 542, 163 N. W. 847.

The findings and judgment of the judge of the compensation court who heard the cause and of the district court where there was a trial on appeal are in harmony with the conclusion herein stated. Error in the record has not been found. A fee of $100 for the services of counsel for plaintiff in the supreme court is allowed as costs.

AFFIRMED.

HENRY S. COLLINS, APPELLEE, V. HUGHES & RIDDLE ET AL., APPELLANTS.

278 N. W. 888

FILED APRIL 1, 1938. No. 30132.

1. **Contracts.** A "caret" is a definite character of the English language clearly defined and established by immemorial usage.
2. **Alteration of Instruments.** "Where a written instrument shows upon its face a material and obvious alteration, the presumption of law is that such alteration was made before the instrument was finally executed and delivered." *Dorsey v. Conrad*, 49 Neb. 443, 68 N. W. 645.
3. ———. "Such an instrument may go in evidence in the first instance, leaving the parties to such explanation of the alteration as they may choose to offer." *Dorsey v. Conrad, supra.*
4. **Trial.** "The value of testimony where the witness refuses to testify positively to the facts, is for the jury to determine, and will vary with the surrounding circumstances and the manner and appearance of the witness." 14 Encyclopedia of Evidence, 142.
5. **Alteration of Instruments.** In the instant case, as there was presented evidence of the facts surrounding and attending the actual execution of the release in controversy, the presumption that the alterations appearing on the instrument were made before its execution was removed, and the question as to how, or when, or with what motive the alterations were made and the five typewritten words inserted was for the triers of fact to determine under all of the evidence.
6. **Release:** FRAUD. "When the amount received in settlement is grossly inadequate to compensate for the injuries sustained, that fact may be considered, with other evidence, as tending to show unfair practice, that the party has been overreached, and that the minds of the parties never met in the consummation of a valid contract." *Perry v. Omaha Electric Light & Power Co.*, 99 Neb. 730, 157 N. W. 921.
7. ———: MISTAKE. Where parties fairly and honestly intend to and do settle their controversy for known injuries received, but there are injuries wholly unknown to the parties, of a serious character, which are not taken into consideration, a release given in settlement of the injuries, although purporting to be a release of all damages that may thereafter accrue, will be set aside, on the ground of mutual mistake, as inequitable, unjust, and not complying with the intention of the parties.
8. **Compromise and Settlement:** RETURN OF CONSIDERATION: EXCEPTIONS. "An exception to the rule requiring the restoration of the consideration as a condition precedent to rescission exists

in those cases in which the party rescinding would be entitled to retain the money or property received, even though the compromise be set aside, or where the payment was a gratuity or related to a part of the cause of action. An offer to return is also unnecessary if the judgment asked for will accomplish that result, or where plaintiff is not suing to rescind the new agreement, but his action is on his original demand." 12 C. J. 356.

9. New Trial: EXCESSIVE VERDICT. A verdict so clearly excessive as to induce the belief on the part of the reviewing court that it must have been found through passion, prejudice, mistake, or some means not apparent in the record, will be set aside and a new trial awarded.

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

Gaines, McLaughlin & Gaines and *Harold A. Palmer,* for appellants.

McGan & Burbridge, contra.

Heard before GOSS, C. J., ROSE, EBERLY, PAINE, CARTER and MESSMORE, JJ., and ELDRED, District Judge.

EBERLY, J.

This is an action at law to recover damages for personal injuries received by plaintiff on November 28, 1934. On that day plaintiff was riding as a passenger in a Chevrolet coupé, proceeding west on Maple street in Douglas county on the paved highway, about 2 o'clock p. m. on a bright, clear day, when the defendants, driving a large refrigerator truck proceeding west, overtook and negligently struck the automobile in which plaintiff was riding in its rear and knocked the same a considerable distance. In his original petition plaintiff alleges that as a result of the collision he suffered a severe sprain of the sacroiliac joint, a severe concussion of the brain, and a severe sprain of the right shoulder and of the neck. Later plaintiff amended his petition by stating that as a result of this accident plaintiff also suffered a compression fracture of the third lumbar vertebra and a subluxation of the fourth lumbar vertebra, commonly called a broken back, and alleged further the results of the injuries so received.

Defendants, in their answer, put in issue the claims of the plaintiff, and denied the negligence by him alleged. They further set forth that, "on December 10, 1934, negotiations were entered into between plaintiff and defendant for a compromise and a settlement and as a result thereof a compromise and settlement was made of all claims of whatsoever character the plaintiff may have had against this defendant and the alleged partnership for the sum of $15, which said sum by way of settlement and compromise was paid to plaintiff."

To this answer, plaintiff's reply, in addition to a general denial, in substance, alleged that the settlement actually made embraced only an adequate compensation for his damaged pipe, his injured watch, and the payment of his doctor bill, and that, as to the release pleaded by defendants, the same was the result of mutual mistake of all parties, and fraud exercised by defendants in the procurement thereof.

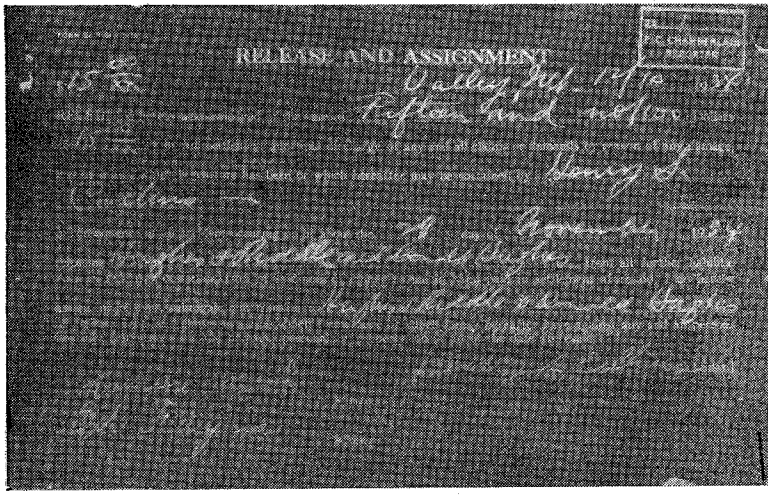
There was a trial to a jury, and a verdict was returned for plaintiff for $15,000. The trial court directed a remittitur of $10,000 by plaintiff. This order being complied with, the motions of defendants for a new trial and for judgment *non obstante veredicto* were each denied, and judgment was entered for the sum of $5,000 against defendants, from which they prosecute this appeal. Plaintiff Collins prosecutes a cross-appeal.

It may be said that the occurrence of the accident on November 28, 1934, and the infliction of severe injuries on plaintiff are amply sustained by the evidence. Plaintiff was taken home from the scene of the collision, treated by a physician, and remained in bed some three days. About the last of December following he went to see a physician. At this time he had a lump on his back that had never been there before. His evidence is that after this accident he could not do any lifting or heavy work; that he was restless, and had pains in his back and legs all of the time. The attending physician at the time testifies that the condition of Collins' back in December, 1934, was

different than when he had seen him in the spring of 1934; that there was now a lump on his back about the third vertebra; that Collins, who was on relief, did not have any money to pay for X-rays and none were taken until March 30, 1936, which were introduced in evidence. Plaintiff's experts testify that these photographs disclose that the third lumbar vertebra had been crushed, and the fourth partly dislocated, which is called subluxation; that the vertebra which was crushed is about one-third of its normal width; that it is a permanent injury; that the fracture had been present less than two years because the healing was not complete when the picture was taken. Indeed, this crushed condition of the third vertebra does not appear to be a matter of dispute. The evidence in the record, notwithstanding its conflicting nature, considered as an entirety, if believed by the jury, forms ample support for a verdict in favor of plaintiff.

The defendants contend that the execution of a release and assignment by the plaintiff on December 10, 1934, and the acceptance by him of the sum of $15, operated as a complete settlement and discharge of all liability on their part.

The following is a photostatic copy thereof:


RELEASE AND ASSIGNMENT

It will be noted that we have here an ordinary printed blank which has been completed with pen and ink, but that between the third and fourth lines appear in typewriting the words "known and unknown," and likewise between the tenth and eleventh lines the typewritten words "injuries, known & unknown."

The record fails to disclose the presence of a typewriter, portable or otherwise, at the scene where this instrument was made out and the signatures thereto affixed. The evidence is also uncontradicted that Ed Fagen, shown as a witness on the above instrument, was wholly absent from the entire transaction, and that he affixed his signature at a place some miles distant from where the negotiations of settlement were had.

In their brief appellants treat the inserted typewritten words as regularly interlined and regularly connected with the printed portion of the instrument by "carets."

The "caret," it may be said, is a definite character of the English language, clearly defined and established by immemorial usage. While, at some time not now definitely appearing, the typewritten words "known and unknown" and "injuries, known & unknown" were typed on the face of this instrument, it would seem that no proper "carets" indicate where the same should be inserted, or incorporate these words in the body of the instrument.

The following constitute the definitions of the term "caret" as given by the leading lexiocographers, viz.:

Oxford Dictionary: "Caret. (L. caret (there) is wanting, f. carere to be in want of.) A mark (∧) placed in writing below the line, to indicate that something (written above or in the margin) has been omitted in that place. * * * Lowell Study Wind. (1886) 301 Like the carets on a proof-sheet."

New Standard Dictionary: "A sign (∧) placed below a line, indicating where omitted words, letters, etc., should be inserted: sometimes inverted (∨) and above the line (L., there is wanting, 3d per. sing. pres. ind. of careo, want)."

Century Dictionary and Cyclopedia: "Caret. (< L. caret, there is wanting, 3d pers. sing. pres. ind. of carere, want, lack; see carency.) A mark (Λ) used in writing, in correcting printers' proofs, etc., to indicate the proper place of something that is interlined or written in the margin."

Webster's New International Dictionary (2d ed.): "L. caret there is wanting, fr. carere to want.) A mark (Λ) used by writers and proofreaders to indicate that something interlined above or inserted in the margin belongs in the place marked."

As thus properly presented, courts will take judicial notice of the "caret" and the function it performs, and conform thereto. Thus, in *Rex v. Davis,* 32 E. C. L. Rep. 634, where there was an attack on an indictment which was interlined, as follows:

of the price of one pound, and one

"One ewe Λ sheep of the value of one pound," the court held: "If an indictment have an interlineation, and have a caret at the proper place where the interlined words are to come in, the court will take notice of the caret and read the indictment correctly." See, also, 9 C. J. 1292. But, we find no authority to extend such judicial recognition to the characters employed in the document now before us. However, assuming that the five typewritten words are, so far as form is concerned, to be deemed regularly interlined, the situation in this jurisdiction, in view of the challenge to the authenticity of this document, invokes the application of these rules:

"Where a written instrument shows upon its face a material and obvious alteration, the presumption of law is that such alteration was made before the instrument was finally executed and delivered." *Dorsey v. Conrad,* 49 Neb. 443, 68 N. W. 645. See, also, *Nathan v. Jensen,* 110 Neb. 283, 193 N. W. 715.

"Such an instrument may go in evidence in the first instance, leaving the parties to such explanation of the alteration as they may choose to offer." *Dorsey v. Conrad, supra.* See, also, *Nathan v. Jensen, supra.*

On the subject of the condition of the release in suit at the time it was signed by plaintiff Collins, Maurine Moad, whose name appears thereon as an attesting witness, says: "Q. Did you observe the release at the time that you signed it? A. I just looked over it, I did not read it. Q. Do you know whether or not the fine print was in there, 'or any known or unknown,' at that time? A. No; I don't think that was there at all. Q. It is in here now; you would not say for sure whether it was there or not? A. No; but I don't think it was."

"The value of testimony where the witness refuses to testify positively to the facts, is for the jury to determine, and will vary with the surrounding circumstances and the manner and appearance of the witness." 14 Encyclopedia of Evidence, 142.

In the application of this rule, the supreme court of New Hampshire, in *Hoitt v. Moulton*, 21 N. H. 586, said:

"In another deposition there was the following interrogatory and answer: 'What did you learn from the plaintiff and your sister after this interview?' Answer: 'I think she said he was at liberty to go where he pleased.' This was objected to, but admitted; and, we think, rightly so. Witnesses are not required to give their testimony with absolute positiveness. Were such the case, many of the most truthful and reliable men would be wholly excluded from testifying in a court of justice. They are frequently timid lest they may overstep the bounds of truth, and in narrating their evidence almost always do it with much caution. Witnesses are not required to speak with such confidence as to exclude all doubt in their minds. If the fact is impressed on the memory, but the recollection does not rise to positive assurance, it is still admissible to be weighed by the jury. And on any subject to which a witness may testify, if he has any recollection at all of the fact, he may express it as it lies in his memory, of which the jury will judge. 1 Greenl. Ev. sec. 440. In *Snell v. Moses*, 1 Johns. 99, 103, a witness being called to prove a conversation with a party, said he could not recollect the

expressions used, but would give his impressions as to the substance of the conversation. This mode of giving the conversation was objected to, but held admissible.

"The qualifying words, 'I think,' used by this witness, are of frequent occurrence in the trial of cases. Sometimes, when uttered by an honest, careful man, they detract nothing from the weight of his testimony; while, at others, they are thrown in by dishonest witnesses as a kind of supposed antidote to their perjury. But a witness is as liable to an indictment and conviction for perjury by using these words in connection with his statements, as though he gave his testimony directly and positively. So, also, if he express his belief or understanding of a matter. *Maxwell v. Warner,* 11 N. H. Rep. 568; *Eaton v. Rice,* 8 N. H. Rep. 378; *Pedley's Case,* 1 Leach Cr. Cases, 325; *Miller's Case,* 3 Wils. 427; *Riggs v. Tayloe,* 9 Wheat. 486. It is always desirable that witnesses speak with as much distinctness, directness, and positiveness, as the truth will permit; but absolute assurance is by no means necessary in order to make the evidence admissible."

The oral evidence as to what occurred when this "release" was obtained is without substantial dispute. It is, epitomizing substantially, that one Gustafson came to plaintiff's house; told plaintiff that he had been to see Dr. Parsons, who treated plaintiff the day the injuries were received; that Dr. Parsons had said that plaintiff was not seriously hurt; that he, Gustafson, would pay plaintiff for his damaged pipe, his injured watch, and his doctor's bill, allowing him $15 therefor, but would not pay him for any bodily injuries; that they did not pay damages to his person. Plaintiff's testimony is that he relied on the statements of Dr. Parsons communicated to him by Gustafson; that he did not then know of anything wrong with himself except superficial injuries, and signed the instrument as then prepared by Gustafson, without reading it or having the same read to him. There is also evidence that plaintiff was sitting up in bed at the time the release was executed; that he was then suffering pain, and was then in

a weakened condition. One of the issues of fact, as to which this evidence is pertinent, is whether in this case there is or was a contract in writing embodying a contract of settlement, and whether the instrument under which defendants claim actually constituted such contract of settlement. Under the circumstances of this case, it would have been erroneous to have excluded parol evidence bearing on that issue, on the assumption that in this case such a writing exists and is evidenced by the release already set forth herein.

In addition, the evidence in the record fairly establishes that plaintiff's injuries, at the time this release was obtained by Gustafson, were of a permanent nature, and so serious in character, and so disproportionate to the amount actually paid as a claim for compensation therefor, as to clearly support, as a matter of fact, an inference of mutual mistake or fraud.

Therefore, in the instant case, as there were presented in the record all the facts surrounding and attending the actual execution of the release in controversy, this removes the presumption that the alterations appearing on the instrument were made before its execution, and the question as to how, or when, or with what motive the alterations were made and the five typewritten words inserted was for the triers of fact to determine under all of the evidence. *Nathan v. Jensen,* 110 Neb. 283, 193 N. W. 715.

Viewing the facts detailed in the present record in the light most favorable to defendants, still the circumstances involved invoke this rule, viz.: "When the amount received in settlement is grossly inadequate to compensate for the injuries sustained, that fact may be considered, with other evidence, as tending to show unfair practice, that the party has been overreached, and that the minds of the parties never met in the consummation of a valid contract." *Perry v. Omaha Electric Light & Power Co.,* 99 Neb. 730, 157 N. W. 921.

At the same time, evidence is presented, which, though controverted in part, would, if believed, require the appli-

cation of the following principle: Where parties fairly and honestly intend to and do settle their controversy for known injuries received, but there are injuries wholly unknown to the parties, of a serious character, which are not taken into consideration, a release given in settlement of the injuries, although purporting to be a release of all damages that may thereafter accrue, will be set aside, on the ground of mutual mistake, as inequitable, unjust, and not complying with the intention of the parties. *Simpson v. Omaha & C. B. Street R. Co.*, 107 Neb. 779, 186 N. W. 1001; *Baumann v. Hutchinson*, 124 Neb. 188, 245 N. W. 596; 53 C. J. 1268; *Nygard v. Minneapolis Street Ry. Co.*, 147 Minn. 109, 179 N. W. 642; *McIsaac v. McMurray*, 77 N. H. 466, 93 Atl. 115, L. R. A. 1916B, 769; *Reddington v. Blue & Raftery*, 168 Ia. 34, 149 N. W. 933; *Ostegaard v. Adams & Kelly Co.*, 113 Neb. 393, 203 N. W. 564; *Richardson v. Chicago, M. & St. P. Ry. Co.*, 157 Minn. 474, 196 N. W. 643.

Nor can defendants' contention in this case that plaintiff may not sustain his action until he has tendered back the $15 he received be conceded. It appears that "An exception to the rule requiring the restoration of the consideration as a condition precedent to rescission exists in those cases in which the party rescinding would be entitled to retain the money or property received, even though the compromise be set aside, or where the payment was a gratuity or related to a part of the cause of action. An offer to return is also unnecessary if the judgment asked for will accomplish that result, or where plaintiff is not suing to rescind the new agreement, but his action is on his original demand." 12 C. J. 356.

In addition, Restatement, Contracts, sec. 480, states the controlling rule, as follows:

"(1) The power of any party * * * to avoid a transaction for fraud or misrepresentation is conditional on an offer * * * to return the amount of any money * * * received by him, except as stated in subsection (2). * * *

"(2) A failure to return * * * performance received in

accordance with the rule stated in subsection (1) does not preclude avoidance if the performance * * * (c) is merely money paid, the amount of which can be credited in partial cancelation of the injured party's claim, or * * * (e) constitutes a comparatively small part of the whole consideration," etc.

It thus appears that in all material respects the procedure followed by the trial court, at least until the receipt of the jury's verdict, merits our approval. As returned by the jury this verdict awarded the plaintiff a recovery of $15,000 for the damages in suit. This the defendants in their motions for new trial attack as being excessive in such a degree as to sustain the conclusion that it was the result of prejudice and passion. To set forth the evidence in the record pertaining to this subject would not only unduly lengthen this opinion, but would serve no purpose. However, a careful consideration of plaintiff's history, his age, his general health, his physical condition, his capacity to work and earn, both before and after the accident, and keeping in mind the suffering occasioned thereby, as reflected in the record of this case as submitted, clearly establishes that in arriving at the amount of their verdict the trial jury failed to respond truly to the real merits of the controversy submitted to them, and manifestly erred. The amount of $15,000 awarded by this verdict is clearly excessive in such a degree as to necessarily induce the belief that it must have been found and determined through and because of passion, prejudice, or mistake, or some means not apparent in the record. The district court, therefore, erred in overruling defendants' motions for a new trial based on this fact, in requiring a remittitur of $10,000, and in the entry of a judgment for $5,000 upon such verdict.

Our Bill of Rights (Const. art. I, sec. 6) prescribes: "The right of trial by jury shall remain inviolate." In the matter of fixing the amount of damages inflicted by them the defendants have not been accorded a fair trial by jury. This error was not cured by the order of the trial

court requiring a remittitur of 66 2/3 per cent. of the amount of the verdict returned. "A verdict so clearly wrong as to induce the belief on the part of the reviewing court that it must have been found through passion, prejudice, mistake, or some means not apparent in the record, will be set aside and a new trial awarded." *Garfield v. Hodges & Baldwin,* 90 Neb. 122, 132 N. W. 923. See, also, *Trute v. Holden,* 118 Neb. 449, 225 N. W. 238; *Schafer v. Missouri Valley Pipe Line Co.,* 123 Neb. 669, 243 N. W. 889; *Watson v. Miller,* 131 Neb. 74, 267 N. W. 230.

Solely because of the excessive verdict returned, and the inferences established thereby, the judgment of the district court is reversed and the cause remanded for further proceedings in harmony with this opinion.

REVERSED.

OLIVER ERICSON, APPELLANT, V. NEBRASKA-IOWA FARM INVESTMENT COMPANY ET AL., APPELLEES.
278 N. W. 841

FILED APRIL 1, 1938. No. 30154.

1. **Appeal.** In the determination of appeals in equity, this court will "reach an independent conclusion as to what finding or findings are required under the pleadings and all the evidence, without reference to the conclusion reached in the district court or the fact that there may be some evidence in support thereof." Comp. St. 1929, sec. 20-1925.
2. **Contracts:** CONSTRUCTION. "Where there is a question as to the meaning of a contract, it is to be construed most strongly against the party preparing it." *Greenough v. Willcox,* 213 N. W. 175 (238 Mich. 52).
3. ———: ———. "Language used in a contract prepared by one of the parties thereto, which is susceptible to more than one construction, should receive such a construction as the party preparing the same at the time supposed the other party would give to it, or such a construction as the other party would be fairly justified in giving to it." *Flory v. Supreme Tribe of Ben Hur,* 98 Neb. 160, 152 N. W. 295.
4. ———: ———. "Where a contract is ambiguous it will be construed most strongly against the party preparing it or em-

ploying the words concerning which doubt arises, the reason for the rule being that a man is responsible for ambiguities in his own expressions and has no right to induce another to contract with him on the supposition that his words mean one thing, while he hopes the court will adopt a construction by which they would mean another thing more to his advantage." 13 C. J. 545.

5. **Sales:** AGENCY. "Although particular contracts may be difficult to classify, the distinction in principle is clear and if the other party is merely empowered to bind the owner of the property by making on his behalf a contract to sell the same to another, and no interest in the property is given to him, the contract is merely one of agency." 66 C. J. 480.
6. **Principal and Agent.** The contract here in suit construed, and *held* to create and establish between the parties thereto the relation of principal and agent.
7. **Trusts.** An agent or other fiduciary who deals with the subject-matter of the agency so as to make a profit for himself will be held to account in equity as trustee for all profits and advantages acquired by him in such dealings.
8. **Principal and Agent.** An agent who fails to disclose to his principal every material fact in the transaction which is the subject-matter of the agency is guilty of fraud and bad faith, and may not retain anything acquired by him either in the performance or violation of his agency.
9. **Trusts.** All persons who knowingly aid or participate in committing a breach of trust will be held responsible for the resulting loss, and will be held accountable by personal judgment for the value of the property so converted.

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

Ginsburg & Ginsburg, for appellant.

Votava, McGroarty & Sklenicka, contra.

Heard before GOSS, C. J., EBERLY, DAY, PAINE, CARTER and MESSMORE, JJ., and MUNDAY, District Judge.

EBERLY, J.

This is a suit in equity for the rescission of a contract in writing, dated January 24, 1935, between Oliver Ericson of Oakland, Nebraska, and the Nebraska-Iowa Farm Investment Company; for an accounting for certain specific property owned by plaintiff and delivered to and received

by defendants named, pursuant to the terms of the above contract, in trust and as agents of plaintiff; and also to recover certain secret and concealed profits made by defendants in handling plaintiff's property as his agents and trustees.

Without attempting to detail the niceties of the defendants' technical pleadings by which each material allegation of plaintiff's petition was controverted, it may be said that defendants assume the position that by the transactions in suit the property here in litigation was sold by plaintiff to defendants in consideration of the agreed delivery to him (by defendants) of 245 shares of the capital stock of the Western Union Life Insurance Company of Lincoln, Nebraska. While the execution of the contract in writing of January 24, 1935, by the Nebraska-Iowa Farm Investment Company and the receipt of plaintiff's property therein described are admitted, defendants expressly deny that by virtue thereof any fiduciary relation was thereby constituted between plaintiff and any of the defendants, and further by their pleading insist that, if said contract appears to provide for a fiduciary relationship, the same is a mutual mistake of fact, and "should be so construed, corrected and reformed as intended by the parties as a final, conclusive and binding contract of sale between these parties."

Plaintiff joined issue with defendants' pleading by a reply denying generally the allegations thereof.

A trial in the district court resulted in a judgment and decree for defendants. From the order of the trial court overruling his motion for a new trial, plaintiff appeals.

This case comes to this tribunal as an "appeal in equity," and involves a trial *de novo* in this court. Upon this record, we are, by statute, required to "reach an independent conclusion as to what finding or findings are required under the pleadings and all the evidence, without reference to the conclusion reached in the district court *or the fact that there may be some evidence in support thereof.*" (Italics supplied.) Comp. St. 1929, sec. 20-1925.

The transaction forming the basis of this litigation, at least at its inception, was an attempt to secure an exchange of certain real estate mortgages for common stock of the Western Union Life Insurance Company of Lincoln, Nebraska. It clearly was not a sale. The parties to this deal were Oliver Ericson, a tenant farmer living at Oakland, Nebraska, who owned the mortgages, and the Nebraska-Iowa Farm Investment Company, a corporation, of which Vivian L. Maynes, wife of J. V. Maynes, was president and J. V. Maynes was manager, and as to which the latter testified: "Q. You testified that the Nebraska-Iowa Farm Investment Company is a Nebraska corporation? A. Yes, sir. Q. And you are the general manager? A. Yes, sir. Q. And what is this, a real estate concern? A. Yes, sir. Q. Consisting of yourself and your wife? A. I think there are two outside, or three outside stockholders. Q. Mostly nominal stockholders? A. Yes; there is one $1,500 stockholder outside. Q. Is it a trade-name for the real estate business? A. Possibly."

The Western Union Life Insurance Company, of Lincoln, Nebraska, some five years prior to this transaction, had been organized with the par value of its common stock at $10 a share, but by resolution of its board of directors the sale value was then fixed at $22.50; but it never succeeded in selling any of this stock at the selling price so fixed. About "the 12th, 13th or 14th of February," 1935, the board of directors reduced the selling price to $11.50 a share. No dividends had ever been paid by this insurance company, and none of its stock had ever been sold for as high as $30 a share; and its book value, as computed by its own officers, was $11.58 a share. It had no established market value.

This insurance company had had an agreement with the Nebraska-Iowa Farm Investment Company as early as 1934, whereby the investment company should have a commission on all of the common stock of the insurance company sold by it. As to this agreement, the testimony in the record is that the insurance company had no objection

to Maynes buying stock for himself outright and paying for it, and the insurance company would, in that event, sell it on the same terms and allow him the same commission. J. V. Maynes testifies, in part, viz.: "I had always been told by Mr. Herbert (secretary of the insurance company) that if any deal came up that we could work out on some stock, not to pay too much attention to the quoted price; to get a proposition and come down to see him."

The plaintiff Ericson, prior to the transaction in suit, was the owner and in possession of the following real estate mortgages, viz.: The Vogt mortgage of $1,000; the Kreider mortgage of $1,000; the Benedict mortgage of $2,300; and a 5/8 interest in a decree of foreclosure, then pending on moratory stay, of a mortgage executed by G. G. Griffin on an 80-acre tract situated some two miles from Pender, Nebraska. For these mortgages and the obligations secured thereby, he had paid par. But there had been defaults in certain interest payments accrued thereon, and certain taxes thereon and on the premises mortgaged had not been paid.

It appears without question that on or about January 24, 1935, the plaintiff was brought to the office of the Nebraska-Iowa Farm Investment Company by one Frank Hoagland, and introduced to J. V. Maynes, the manager thereof. Hoagland is an associate with Maynes in the deal now under consideration, and was by the latter paid $150 for his services therein. Epitomizing the discussion that followed, J. V. Maynes was represented to plaintiff as the man engaged in selling the stock of the Western Union Life Insurance Company. Ericson's testimony is that Maynes stated to him that this stock was then worth $30 a share, and that dividends thereon were being paid; that Maynes told him that his real estate mortgage interests could be revamped and reformed and traded to the insurance company at a valuation of $7,350, which would secure him 245 shares of stock; that Maynes would revamp these securities without charge to Ericson as he would get his compensation by the sale of the stock. Ericson

further testifies: "He (Maynes) told me that if the company refused to make the deal—if they would not allow me as much as 245 shares of stock for my securities—I would get my securities back and there would be no deal; and he also stated that, if the company would allow more than that, he had estimated that that would be mine and I would get all that there was for my securities, and all the company would allow me for my securities; that I would get it all."

At the conclusion of this discussion, J. V. Maynes dictated a contract to his stenographer. Though this occurred when Ericson was present, he did not participate. The contract thus prepared purports to be between the plaintiff, as party of the first part, and the Nebraska-Iowa Farm Investment Company, as party of the second part. It was not signed when the typing was completed, but some hours later the signatures were affixed thereto at the home of J. V. Maynes. Summarizing the provisions of this instrument, omitting strictly formal parts, it recites the ownership by first party of certain securities which first party desires to exchange for capital stock of the Western Union Life Insurance Company, but which were not then in proper form for legal investment of the insurance company.

This contract further recites: "Whereas, it is the purpose of this agreement that first party shall offer said securities to second party for said capital stock in order that second party may have an opportunity to try and rearrange the legal status of said securities into legal investments for life insurance companies, after which second party will offer said securities to Western Union Life Insurance Company for capital stock which will be delivered to said first party. * * *

"Therefore, it is hereby agreed that first party shall and does hereby offer the following securities for 245 shares of capital stock in the Western Union Life Insurance Company:" (then follows a complete description of the securities embraced in the contract).

In addition, the following provisions were embraced in this contract:

"As evidence of good faith in the above proposition, first party hereby deposits $200 cash with second party to be held in escrow by them pending the final approval and acceptance by the Western Union Life Insurance Company of the above described securities and upon the acceptance by said company and delivery of said securities, said first party hereby agrees to pay said $200 to second party and if the offer is not accepted by said Western Union Life Insurance Company, second party agrees to refund said $200 to first party.

"Said second party hereby agrees that upon the execution of this contract they will immediately take steps to contact the owners of the property that is security for the above described securities and endeavor to reform and revamp said securities into legal investments for life insurance companies and that as soon as said securities can be reformed into legal investments that they will tender said offer to the Western Union Life Insurance Company, for 245 shares of capital stock which have a par value of $10 per share.

"First party further agrees to furnish abstracts brought down to date showing the above described securities to be a good and valid first lien on said property except unpaid taxes which may show on the records and convey said securities by good and sufficient assignments.

"Should said Western Union Life Insurance Company refuse to accept the above offer, said $200 will be refunded to first party and this contract shall be null and void and of no effect whatsoever. If said Western Union Life Insurance Company accept said offer, the parties hereto hereby agree to faithfully perform all the terms and conditions contained herein to be performed by them."

In substance, defendants contend that the terms of the foregoing contract constitute it a contract of sale or exchange, and confers upon them the rights of a vendee or assignee, wholly relieved of any fiduciary obligations; and

that such contract does not create or establish the relation of principal and agent between the plaintiff and the defendant investment company.

This court is not in accord with these contentions. "Where there is a question as to the meaning of a contract, it is to be construed most strongly against the party preparing it." *Greenough v. Willcox,* 213 N. W. 175 (238 Mich. 52).

The following is a form of this rule which this court has approved, viz.: "Language used in a contract prepared by one of the parties thereto, which is susceptible to more than one construction, should receive such a construction as the party preparing the same at the time supposed the other party would give to it, or such a construction as the other party would be fairly justified in giving to it." *Flory v. Supreme Tribe of Ben Hur,* 98 Neb. 160, 152 N. W. 295.

An approved statement of the basic reason on which the rule rests is: "Where a contract is ambiguous it will be construed most strongly against the party preparing it or employing the words concerning which doubt arises, the reason for the rule being that a man is responsible for ambiguities in his own expressions and has no right to induce another to contract with him on the supposition that his words mean one thing, while he hopes the court will adopt a construction by which they would mean another thing more to his advantage." 13 C. J. 545.

See, also, *People's State Bank v. Smith,* 120 Neb. 29, 231 N. W. 141; *Kortright v. Mutual Life Ins. Co.,* 123 Neb. 746, 243 N. W. 904; *Lyman-Richey Sand & Gravel Co. v. State,* 123 Neb. 674, 243 N. W. 891.

The written contract here presented, read in the light of the foregoing principles, and in view of the surrounding circumstances established by the proof, clearly discloses that the contractual intent was to obtain an exchange of Ericson's securities for the insurance company stock. This exchange was to be by and between Ericson and the insurance company, and in the event terms satisfactory to the insurance company were not agreed upon nothing would

result and Ericson would retain his securities. Each act and duty which the terms of the written contract in suit enjoined upon the second party thereto was intended to, and did, serve no purpose other than to facilitate and secure the making by plaintiff of the primary contract of exchange with the Western Union Life Insurance Company.

"In determining whether a contract is one of sale or of agency, the essential test is its real purpose and object. * * * Although particular contracts may be difficult to classify, the distinction in principle is clear and if the other party is merely empowered to bind the owner of the property by making on his behalf a contract to sell the same to another, and no interest in the property is given to him, the contract is merely one of agency." 66 C. J. 480.

It follows that the contract in the instant case created and established between the parties thereto the relation of principal and agent. *Gesselman v. Phillips,* 110 Neb. 416, 193 N. W. 750; *Pearlman v. Snitzer,* 112 Neb. 135, 198 N. W. 879; *Nebraska Power Co. v. Koenig,* 93 Neb. 68, 139 N. W. 839; *Greenough v. Willcox,* 238 Mich. 52, 213 N. W. 175.

On this basis the facts disclosed in the instant case invoke the application of these well established principles, viz.:

An agent or other fiduciary who deals with subject-matter of the agency so as to make a profit for himself will be held to account in equity as trustee for all profits and advantages acquired by him in such dealings. 2 C. J. 694, 697, 700, 888; 2 Am. Jur. 202-229; *Gesselman v. Phillips,* 110 Neb. 416, 193 N. W. 750; *Pearlman v. Snitzer,* 112 Neb. 135, 198 N. W. 879; *Rockford Watch Co. v. Manifold,* 36 Neb. 801, 55 N. W. 236; *Jansen v. Williams,* 36 Neb. 869, 55 N. W. 279.

An agent who fails to disclose to his principal every material fact in the transaction which is the subject-matter of the agency is guilty of fraud and bad faith, and may not retain anything acquired by him either in the performance or violation of his agency. *Pearlman v. Snitzer, supra*; *Barber v. Martin,* 67 Neb. 445, 93 N. W. 722; *State v. State Journal Co.,* 77 Neb. 752, 110 N. W. 763; *Missouri*

Valley Trust Co. v. Nelson, 104 Neb. 499, 177 N. W. 835; *Maul v. Cole,* 94 Neb. 714, 144 N. W. 247; *Stettnische v. Lamb,* 18 Neb. 619, 26 N. W. 374.

All persons who knowingly aid or participate in committing a breach of trust will be held responsible for the resulting loss, and will be held accountable by personal judgment for the value of the property so converted. *Masonic Bldg. Corporation v. Carlsen,* 128 Neb. 108, 258 N. W. 44; *Federal Trust Co. v. Baxter,* 128 Neb. 1, 257 N. W. 368; *Ashby v. Peters,* 128 Neb. 338, 258 N. W. 639.

The evidence in the record clearly discloses that in reliance upon the terms of the contract of agency in suit, and upon the false representations of fact made by defendants, the plaintiff duly assigned to the Nebraska-Iowa Farm Investment Company all of his real estate mortgage securities hereinbefore enumerated and they were by defendants duly accepted and received. The Vogt and Kreider mortgages were revamped and renewed by the investment company. The Kreider mortgage, which when revamped and reformed amounted to $1,100, together with $659.50 in cash, and together with a credit of 10 per cent. allowed J. V. Maynes amounting to $195.50, was delivered to and accepted by the Western Union Life Insurance Company at par, and certificate of stock No. 382 A, bearing date of, March 11, 1935, for 170 shares of common stock, each of the par value of $10 was issued therefor. This certificate defendants caused to be transmitted to plaintiff. The Vogt mortgage was revamped and renewed in the sum of $1,700, and is acceptable to the insurance company, but, together with the Benedict mortgage, still remains in possession of defendants and under their control. The 5/8 interest in the $8,000 Griffin mortgage was by the investment company sold for cash, of which amount, after allowing all just credits, there still remains in the possession of the investment company the sum of $2,608.26, which is equitably the property of plaintiff and as such constitutes a trust fund.

The signature of plaintiff to the contract in suit was

secured upon the express and false representation that the actual value of the common stock was $30 a share, and the contract was entered into by the parties thereto on that basis. The defendant investment company wholly failed to disclose to plaintiff the true facts with reference thereto, and also, in violation of duty, failed to disclose that the actual selling price of the 170 shares of stock, when purchased, was $11.50 a share and no more. *The Distilled Spirits,* 11 Wall. (U. S.) 356; *Norris v. Tayloe,* 49 Ill. 17; *Fairfield Savings Bank v. Chase,* 72 Me. 226.

The defendants are now unlawfully claiming the right to purchase for, and supply to, plaintiff 75 shares of common stock at a cost to them of $11.50 a share, less 10 per cent., in full satisfaction of the terms of the contract in suit, and to retain two mortgages, hereinbefore described, and the balance of the proceeds of the sale of the Griffin decree as additional compensation. This claim transgresses the principles announced by this court in *Morrison v. Hunter,* 74 Neb. 559, 105 N. W. 88.

This court, therefore, finds that these claims of defendants are unlawfully made and not sustained by the evidence; that immediately upon the discovery of the actual situation and the frauds of the defendant investment company and J. V. Maynes, its manager, the plaintiff on May 9, 1935, elected to rescind the contract of agency and the transaction evidenced thereby, and tendered to defendants the certificate of stock, No. 382 A, and demanded the return of the securities then held and controlled by defendants, and also the amount of trust funds then in their possession. This court further finds that the plaintiff is entitled to rescind said contract of agency, to have a return of all of his property in the possession of defendants on the date of rescission, which includes the Vogt mortgage, the Benedict mortgage, and the sum of $2,608.26 with interest thereon, as provided by law, from May 9, 1935.

Therefore, the findings, general and special, as made and entered by the district court for Douglas county in this cause, are each set aside and annulled, and its decree and

judgment entered in favor of defendants is wholly reversed, and the cause is remanded, with directions to enter judgment in favor of the plaintiff and against the Nebraska-Iowa Farm Investment Company and J. V. Maynes for the return to plaintiff of the two real estate mortgages referred to herein, and, in addition, a judgment for the sum of $2,608.26 with interest, all to be in harmony with this opinion.

REVERSED.

HARRIET L. BERNHARD, APPELLEE, V. PRUDENTIAL INSURANCE COMPANY OF AMERICA, APPELLANT.

278 N. W. 846

FILED APRIL 1, 1938. No. 30227.

1. Insurance: DEATH: ACCIDENT. Insured's death may be held accidental if it results from something unusual, which took place without the foresight or expectation of the insured, and could not have been reasonably anticipated by him.
2. ———: ———. When an insured makes an attack upon an officer, and while advancing to continue such attack is shot and killed by such officer, the insured did not meet his death through accidental means.

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

Young & Williams, for appellant.

Gray & Brumbaugh, contra.

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

PAINE, J.

The plaintiff sues to recover upon the provisions for double payment for accidental death contained in seven policies of life insurance upon the life of her husband, Otto H. Bernhard. The answer admitted the issuance of the policies, and that they were in force at the time of the death, but denied that any accidental death benefit is due, alleging that death was brought about by Bernhard's own

wrongful act. At the close of the evidence, each party moved for a directed verdict, and the court discharged the jury and entered judgment on each cause of action for a total amount of $2,800.92, and allowed an attorney fee of $300.

The facts in the case may be briefly stated as follows: Otto H. Bernhard was 52 years old, weighed 185 pounds. He left his home in Omaha at 6 a. m., on May 29, 1934; between 1 and 2 o'clock that afternoon he stopped his car in front of a restaurant at Rosalie, Thurston county, Nebraska, and went in and had a steak dinner, visiting with the proprietor. In this restaurant, the front room is 24 by 28 feet, and at the rear there is a 16-foot counter, with some ice cream tables on one side of the room, and on the other side a cigar stand and card tables.

The village marshal, Forest Brown, testified that he had never met Bernhard prior to this occasion, but had previously seen him drive through town and stop at different places, and had decided to search his car the first time he got a chance. Marshal Brown had been checking water meters, and in going past the café saw this car and waited outside for the owner. He testified that he was wearing a regular officer's star, which was pretty well exposed, and told the deceased he was an officer as soon as he came out to go to his car.

In the conversation that ensued, marshal Brown testifies he told him: "I understand you are hauling liquor, and I believe I will look your car and case over, and see if you are." Bernhard asked, "What are you going to do?" and the marshal said, "I am going to arrest you if you are hauling liquor." Bernhard took a large sample-case out of the car and walked into the café with it, saying that it had candy in it, and placed it on the counter at the rear of the room. The marshal said to open it up and let him look at it, and reached over and knocked the case a little, and said, "It sounds like liquid in here of some kind, don't it? I guess I will take the case." Bernhard started to go out of the restaurant, leaving the case on the rear counter,

and the marshal stepped in front of him, and thereupon he whirled and struck the marshal a violent blow in the eye, and continued striking him. The marshal pulled his gun and told him he would shoot, and Bernhard said, "Shoot, God damn you, you haven't got the guts." The marshal shot, and the bullet struck the edge of a watch in the left shirt pocket and was deflected into Bernhard's body, from the effects of which he died within a minute or two.

Marshal Brown said Bernhard was turned sidewise toward him, and that "it seemed to me he was coming around with a gun or was going to unloosen another left hook, or something, and I pointed this gun at his upper left shoulder or forearm. I didn't really intend to seriously injure him, as far as that is concerned."

Marshal Brown called a doctor and the sheriff, and went out and examined the insured's car and found it contained four gallons of alcohol in tin containers and three jugs of whisky, all of it being moonshine. There was no candy in the car, but there was an extra set of license plates in it, Kansas license plates. The examining doctor testified that the bullet wound was just below the left nipple, which is where the heart is normally located.

In this case it was stipulated that the premiums were all paid, and that all of the policies were in force on the date of the insured's death, and upon proper proof of death being made the defendant insurance company immediately paid to plaintiff the full life insurance benefits due on each of the seven policies, but the company denied liability upon the provision for double liability in case death results solely through external, violent, and accidental means.

The defendant sets out nine errors relied upon for reversal, which cover every phase of the case. The plaintiff insists that there is no provision in any of these policies which renders them void in case the insured is violating the law at the time of his death, nor is there any provision which involves the question whether the insured came to his death during the commission of an offense. 6 Couch,

Cyclopedia of Insurance Law, sec. 1236; *Piotrowski v. Prudential Ins. Co.*, 141 Misc. Rep. 172, 252 N. Y. Supp. 313.

The plaintiff also calls to our attention that the deceased was wearing bifocal glasses; that the officer had his gun at about his waistline, and that the deceased may not have seen the gun at all, and, as some evidence indicates, that the marshal's badge may have been under the bib of his overalls, from which plaintiff argues that the deceased may not have known that the marshal was an officer of the law, but the evidence does not support this contention on the part of the plaintiff.

The plaintiff contends that an event which takes place without the foresight or expectation of the person acted upon must be considered accidental, citing *Railway Officials & Employees Accident Ass'n v. Drummond,* 56 Neb. 235, 76 N. W. 562. The facts in this case show a wanton killing of a young man by a pair of hold-ups, although the young man had stopped his bicycle immediately upon their command and did no act to provoke them in any way.

We are cited to many similar cases. In *DeMello v. John Hancock Mutual Life Ins. Co.,* 281 Mass. 190, 183 N. E. 255, the deceased was a fisherman, and was shot by a bullet from a rapid-firing gun of United States coast guards for violating the National Prohibition Act. He carried a policy providing for double accidental death benefits. The coast guard did not intend to kill or wound any one, but fired low at the hull of the boat to disable it. The court is of the opinion that the death was not incurred by accidental means. He was shot and killed while engaged in the transportation of liquor in violation of the federal statute, and it is held to be contrary to public policy to permit a recovery in such case.

It is said that, in suits on accident policies insuring against the risk of death from external violence and accidental causes, mere proof of death will not suffice, but plaintiff must also prove that the death was accidental. The true rule is that, where plaintiff's proof shows a vio-

lent death, and does not show it to have been self-inflicted, his case is *prima facie* made out, because suicide will not be presumed. This statement is taken from *Boggan v. Provident Life & Accident Ins. Co.*, 79 Fed. (2d) 721. If, however, the evidence shows not merely a death by shooting, but that death occurred as the result of an encounter, then it is incumbent upon the plaintiff to take the initiative again and show by other evidence that the death was accidental, citing *Mutual Life Ins. Co. v. Sargent*, 51 Fed. (2d) 4; *Scales v. Home Life Ins. Co.*, 89 Fed. (2d) 580; *Metropolitan Life Ins. Co. v. Roma*, 97 Colo. 493, 50 Pac. (2d) 1142 (involving the death of a bootlegger).

Let us now examine a leading case where a homicide is held to be an accident. Such is the case of *Employers Indemnity Corporation v. Grant*, 271 Fed. 136, 20 A. L. R. 1118, in which a passenger conductor endeavored, as his rules required him to do, to get a passenger out of the toilet room when the train was approaching a terminal junction. The passenger refused to unlock the door and refused to come out. The conductor went into the express car and got a revolver to scare the passenger. He climbed up on the arm of the car seat and tapped lightly on the glass top of the toilet, and ordered the passenger to come out. As soon as the conductor's head could be seen through this glass, the passenger shot the conductor dead. The conductor did not know that the passenger had a revolver. In this case death was held to be accidental, for the conductor did not have any reason to anticipate that he would be killed.

It is well established by cases herein cited that, when an insured did not make an assault, nor was his death in any way due to his own misconduct, such death may be held to be accidental if it resulted from something unusual, which took place without the foresight or expectation of the insured, and could not have been reasonably anticipated by him.

But, on the other hand, when the insured was the aggressor, and made such an attack on another as would

naturally invite a deadly encounter, and if the aggressor is killed as the probable consequence of such assault, his death cannot be regarded as accidental, since he voluntarily put his life at stake, and deliberately took the chances of getting killed. *O'Bar v. Southern Life & Health Ins. Co.*, 232 Ala. 459, 168 So. 580.

An unusual case was that in which a husband was electrocuted for murdering his wife, and suit was brought on the ground that his death was accidental. The court held in *Diamond v. New York Life Ins. Co.*, 42 Fed. (2d) 910, that he could reasonably have anticipated that his death would ensue as the result of such act, and that his death was not a remote probability.

The cases appear to be clear on the following propositions: Did the insured have any reason to believe that the slayer had a dangerous weapon, which he intended to use? If he did not, the death might be held to be accidental. Did the insured make a vicious and unprovoked assault upon an officer who was attempting to arrest him? If he did, it has been held in many cases that the killing by the person assaulted is not an accident, although the assailant did not know that his victim was armed. *Meister v. General Accident Corporation*, 92 Or. 96, 179 Pac. 913, 4 A. L. R. 718, and annotation following; *Taliaferro v. Travelers Protective Ass'n*, 25 C. C. A. 494, 80 Fed. 368; *Erb v. Connecticut Mutual Accident Co.*, 232 Pa. St. 215, 81 Atl. 207; *Price v. Accidental Life Ins. Co.*, 169 Cal. 800, 147 Pac. 1175; *Mid-Continent Life Ins. Co. v. Dunnington*, 177 Okla. 484, 60 Pac. (2d) 1047; *Mutual Benefit Health & Accident Ass'n v. Ryder*, 166 Va. 446, 185 S. E. 894.

The shooting in the case at bar does not appear to the court to come within any of the very liberal definitions of the word "accident," as found in our decisions.

It appears that the insured not only commenced the assault, but provoked and invited violence, and was advancing in a threatening manner upon an officer of the law at the time he was shot. He should have anticipated and expected the reasonable consequences of his acts.

In our opinion, the court erred in overruling the defendant's motion for a directed verdict.

REVERSED.

LINNA T. APFEL, APPELLEE, V. GENERAL AMERICAN LIFE INSURANCE COMPANY, APPELLANT.

278 N. W. 884

FILED APRIL 1, 1938. No. 30252.

1. Insurance. Beneficiary entitled to recover upon a paid-up policy of life insurance where the defense was that policy had lapsed by reason of sending a notice demanding payment of $2.48 of interest.
2. ———: ATTORNEY'S FEES. An attorney's fee in actions on insurance policies must always be reasonable in amount, and cannot be based solely on the amount of the judgment, but should only be fixed after examining the type of questions involved, and the length of time, diligence and skill necessarily devoted to the preparation and presentation thereof.

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

Loren H. Laughlin, Allen May and *J. R. Burcham,* for appellant.

Baylor, Tou Velle & Healey, contra.

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

PAINE, J.

This is an action to recover death benefits upon a paid-up policy of life insurance. Defendant claimed the policy had lapsed. Plaintiff moved for judgment upon the pleadings. The court after arguments entered judgment for $1,325.59, with interest from September 19, 1936, and costs, including an attorney's fee of $250.

It is understood that the motion for judgment on the pleadings admitted the truth of all well-pleaded facts in the answer, together with all fair inferences to be drawn

therefrom, and the court, in passing upon such motion, assumed the truth of the allegations in both pleadings.

The defendant, in assigning errors, insists that the judgment is not supported by the pleadings, is contrary to law, and fails to give full faith and credit to the decree of the circuit court of the city of St. Louis approving the purchase agreement of the assets of the Missouri State Life Insurance Company by the General American Life Insurance Company, entered September 7, 1933; also insists that the court erred in taxing attorney's fees of $250 as grossly excessive, being about 18 per cent. of the amount involved, and involving but a half-day in court, and insists that the motion to retax attorney's fees should have been sustained by the court.

This policy was issued by the Missouri State Life Insurance Company on July 29, 1932, for $2,000, and it was originally issued as a paid-up policy, no additional premiums to be charged thereon at any time. The insured obtained a policy loan thereon in the sum of $600. In August, 1933, the Missouri State Life Insurance Company became insolvent, and the superintendent of insurance found that the assets would not warrant the company in continuing business, and the court authorized him to sell and dispose of all the assets of said company.

An entirely new company, the General American Life Insurance Company, purchased all of the assets, and issued its certificate of assumption under date of September 7, 1933, by which it assumed and agreed, among other things, to carry out the obligations of the policy therein described. If a policyholder did not care to continue his policy in the new organization, he could go into the court before which the matter was pending, surrender his policy, and receive a certain amount in cash. If he desired to continue his policy in force, the decree of the court provided for a lien to be set up against each of the old policies issued by the former company. As the parties do not agree on the effect of this lien, we are required to examine it with some care. Plaintiff's deceased was notified that there was

a lien outstanding against his policy as against all others. This lien was computed at 50 per cent. of the reserve of the policy as of September 1, 1933. It is stated in section 19 of exhibit D that this lien can never be increased above the initial amount, "nor above any amount to which it may have been reduced by any distribution," and section 17 states that the lien bears interest at the rate of 5 per cent., payable at the end of the policy year. After the fifteenth year, if all liens have not been discharged, the rate will be reduced to 4 per cent. In section 18 it is stated that every dollar of interest paid on the liens goes to the old policyholder's account, and increases the earnings used for his benefit. It is further stated in section 30 that it is expected that the liens may be entirely eliminated within the period of 15 years, the same being extinguished out of recovery in values and earnings on the business.

We have gone into detail in regard to this rather elusive "lien" arbitrarily taxed up against outstanding policies, which it was hoped would be wiped out by the earnings of the company within 15 years, for the reason that this lien offers the difficulty of arriving at a decision of the case. The defendant insists that this policy had outstanding against it on July 5, 1936, a loan of $600, with interest to that date of $35.78; that it had the lien charged up against this policy of $541.30, and that the interest on this lien at 5 per cent. to July 5, 1936, amounted to $25.29, making a total indebtedness charged against the policy on that day of $1,202.37, and that at the same moment the cash surrender value of this paid-up policy was $1,202.42, leaving a credit of five cents due to the policyholder, and thereupon on said date a notice was sent out to the policyholder, stating that he owed interest of $2.48, and who he should pay it to, and it stated on the back of said notice that, inasmuch as the indebtedness of the policy equals the available cash value, the policy has lapsed, and will be void in accordance with its terms, unless the interest thereon is paid within the period stated in the preceding paragraph.

The plaintiff insists that the only debt against this policy was $600, with the interest thereon; that the lien which the company arbitrarily charged against the policy was not an indebtedness in any sense against the policy; that by its very terms the interest upon this lien was not due until July 29, 1936, the anniversary date of the policy, and no part of that interest could be demanded or collected on July 5; and it was further provided that if the insured died before September 1, 1948, the lien charged up against the policy was not to be deducted, but should be waived in the payment of the death claim, and the insured died in 1936, and, therefore, the lien itself could not be deducted from his policy.

This lien seems to occur first in the purchase agreement, a photostatic copy of which is attached to the petition as exhibit B, and it is set out in section (c), art. II thereof, that the appraised value of the assets purchased is less than the required legal reserves. Therefore, a lien equal to 50 per cent. of the terminal reserve on each policy has been established in the accounts of the old company, and such lien and its accumulation shall be carried as an asset by the new company,—a rather unique arrangement.

In article VII appear the provisions covering the reduction and repayment of such liens. It provides that the new company will apply the net earnings of the old company to the reduction and repayment of such liens against all the policies; that such accounting shall take place on various fixed dates, and that the new company shall continue to apply all such net earnings to the gradual reduction and repayment of such liens until such time as the sum so applied shall be equal to and cancel the entire amount of the original lien.

The defendant cites the case of *Kittles v. General American Life Ins. Co.*, 182 S. Car. 162, 188 S. E. 784, which states that the arrangement in reference to these policy liens was definite and clear.

Now, with all due respect to that South Carolina decision, we have reached a different conclusion.

The assets of the old company were arbitrarily charged down, or off, to leave a deficit of 50 per cent. of the reserve on each policy, according to the books of the old company, which had ceased to function otherwise. However, each policy was entitled to its share of the earnings, which were constantly being recovered by skilful handling of these assets.

This lien was not a definite sum, but was an amount which would fluctuate with earnings secured from the assets of the old company. There was not a definite actual liability to pay a certain definite sum of money on July 5, 1936, or any other date except on accounting dates, and this paid-up policy could not in law or equity be arbitrarily canceled as of that date for failure to pay $2.48 interest, which date in any event was not the correct interest payment date.

On May 4, 1937, the trial court entered judgment on the pleadings in the sum of $1,325.59, with interest at 6 per cent. and attorney's fee in the sum of $250. Objections to the amount of this fee are set out at length in the brief, and it is insisted this court has held that 10 per cent. of the judgment recovered is a fair fee. *Rathbun v. Globe Indemnity Co.*, 107 Neb. 18, 184 N. W. 903. The plaintiff cites two cases in support thereof: *Hemmer v. Metropolitan Life Ins. Co.*, 133 Neb. 470, 276 N. W. 153; *Prince v. Pathfinder Life Ins. Co.*, 133 Neb. 705, 276 N. W. 661.

The transcript shows that some 46 pages are taken up with the petition and answer, and, in addition, a large number of printed exhibits are attached, the proceedings in the circuit court of St. Louis alone being a booklet of some 54 pages. Doubtless the trial court is as good a judge of the reasonableness of the fees for the services rendered in its court as any one, and he saw fit to fix the fees at more than the usual fee of 10 per cent.

An attorney's fee in actions on insurance policies must always be reasonable in amount. In many cases it cannot be based solely on the amount of the judgment, but should only be fixed after examining the type of questions in-

volved, the length of time, diligence, and skill necessarily devoted to the preparation and presentation of the matters involved.

After an examination of the entire record in this case, we have found no reversible error, and affirm the judgment entered by the lower court, and tax an additional attorney's fee of $50 in this court.

AFFIRMED.

UTILITIES INSURANCE COMPANY, APPELLEE, V. CHARLES STUART ET AL., APPELLANTS.
278 N. W. 827

FILED APRIL 1, 1938. No. 30149.

1. **Contracts:** ASSENT. In the absence of some statutory requirement or specific agreement that a contract is not to become effective until signed, assent thereto may be shown in other ways, as by accepting or delivering the contract and acting under it.
2. ———: EXECUTION. As a general rule, a party who signs and delivers a contract is bound by the obligations it contains, although it is not executed by all the parties for whose signatures it was prepared, where there is no testimony on his part of intention not to be bound thereby until it is signed by others, and no express agreement shown to such effect, brought home to the obligee therein.
3. ———: RESCISSION. A rescission of a contract by subsequent agreement as much requires the meeting of the minds of all parties thereto as does the making of the contract; and where there are three parties to a contract, two of such parties alone may not rescind or supersede such contract so as to affect the rights and liabilities between either of them and the third party thereto.
4. **Pleading.** A defendant answering plaintiff's petition as a special defense pleads that the contract sued on by plaintiff was superseded by a contract made at a later date. *Held*, that the answer was in the nature of a confession and avoidance and admitted the consummation of the original contract in seeking to avoid its legal effect, though the answer also contained a general denial.
5. **Assignments:** RATIFICATION. A party may assent to or ratify

an assignment of an executory contract, though for personal services, or may by his acts and conduct be estopped to set up nonconsent thereto.

6. ———: ESTOPPEL. When a contract for personal services in procuring of insurance risks is assigned by the party for whom the services are to be performed, and the other party with knowledge of the assignment acts for the assignee, writing insurance on policies of assignee and collecting premiums therefor, *held*, that by such conduct the other party to the contract, when sued for the premiums claimed to be owing under the assigned contract, was estopped from contending that assignee could not enforce contract.

7. ———. An instrument purporting to assign "all of the accounts receivable for premiums in the course of collection now on their books in the amount of $117,955.82, together with all right, title and interest, both legal and equitable, and to all contracts relating to the same," construed, and *held*, that it was the intention by such instrument to transfer to assignee all such accounts then owing the assignors, and that proof thereof should not be confined to the assignors' books, but could be shown by any competent evidence.

8. **Evidence.** In a suit against two individual defendants who were jointly general agents of an insurance company, entries on the books of said general agency kept in the regular course of business of such agency under the supervision of one of its members are admissible in evidence on behalf of the adverse party, when in the nature of admissions, as against both defendants.

9. **Trial.** While it is proper practice for the trial court to furnish to the jury forms of verdict for their convenience when they retire for deliberation; yet, only such forms of verdict should be so furnished as might, under the issues and evidence, be properly returned by the jury.

10. ———. Disputed questions of fact, as well as the credibility of witnesses, are for the determination of the jury; and a verdict will not be disturbed on the ground that it is not supported by the evidence, where there is sufficient competent evidence to sustain it.

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

Beghtol, Foe & Rankin, for appellants.

Good, Good & Kirkpatrick, Lester L. Dunn and *Ralph W. Ford, contra.*

Heard before GOSS, C. J., ROSE, EBERLY, PAINE, CARTER and MESSMORE, JJ., and ELDRED, District Judge.

ELDRED, District Judge.

This is an action brought by Utilities Insurance Company, plaintiff, against Charles Stuart and Richard L. Kimball, defendants, upon a written contract executed under date of August 1, 1930, purporting to have been made by and between Lynton T. Block & Company, first party, alleged to be engaged in the insurance business and to operate Utilities Indemnity Exchange, as attorney in fact for the subscribers thereat, A. R. Talbot Underwriters, Inc., general agent, party of the second part, alleged to be attorney in fact for and to operate Highways Motor Underwriters, an insurance exchange insuring automobile risks, and Richard L. Kimball and Charles Stuart, third parties. The contract provides: "The third parties are now actively connected with A. R. Talbot Underwriters, Inc., and it is understood and agreed that in the event the said A. R. Talbot Underwriters, Inc., cease to be actively engaged in business * * * then the third parties * * * shall be substituted herein as the general agent with like effect as if this contract were made with them in the first instance." It is alleged that A. R. Talbot Underwriters, Inc., ceased to be actively engaged in business January 1, 1931; that while Richard L. Kimball did not sign the contract, his failure to do so was an oversight; that it was his intention to be bound by it; that he assented to and adopted the terms of the contract; and that Richard L. Kimball and Charles Stuart, on January 1, 1931, became substituted for A. R. Talbot Underwriters, Inc. The petition alleges the reinsurance by plaintiff of the liabilities of Utilities Indemnity Exchange and claims to have succeeded by assignment to the right of the subscribers of Utilities Indemnity Exchange and Lynton T. Block & Company. Plaintiff prays for recovery of amounts claimed due from defendants for insurance premiums for which, it is claimed, they became responsible as general agents.

Defendant Stuart, answering plaintiff's petition, (1) denies all allegations therein contained; (2) alleges that the contract sued on by plaintiff never became a binding contract as to him, because it was not executed by Richard L. Kimball; and (3) that on October 30, 1930, Lynton T. Block & Company and A. R. Talbot Underwriters, Inc., entered into an agreement superseding the contract sued on in this action; and that from and after said date the contract sued on had no binding force upon any of the parties thereto. The reply of plaintiff is a general denial. The answer of defendant Kimball is a general denial.

On trial, there was a verdict and judgment for plaintiff against both defendants, and from an order of the court overruling separate motions for new trial, defendants have appealed. In this opinion the plaintiff in the lower court, appellee herein, is referred to as plaintiff, and the defendants in the lower court, appellants, are referred to as defendants.

It appears that defendants, Kimball and Stuart, and A. R. Talbot Underwriters, Inc., were interested in Highways Motor Underwriters, a reciprocal exchange, insuring automobile risks; A. R. Talbot Underwriters, Inc., was its attorney in fact; Utilities Indemnity Exchange was a reciprocal exchange, and Lynton T. Block & Company was its attorney in fact. A reciprocal exchange is defined in the testimony as: "An unincorporated association of firms, corporations and individuals who agree by written instrument called power of attorney to choose an attorney in fact to act for them in the exchange of indemnity. The attorney in fact is empowered under a reciprocal contract,—reciprocal power of attorney to handle premiums, settle losses, and in short, to carry out the business of insurance for those who join in such an association." The contract which is the foundation of this suit contains the following clause:

"Fifteenth: The third parties are now actively connected with A. R. Talbot Underwriters, Inc., and it is understood and agreed that in the event that A. R. Talbot

Underwriters, Inc. cease to be actively engaged in business or in the event that the third parties shall form a partnership or corporation and engage actively in business by way of taking over all or any substantial part of the business of A. R. Talbot Underwriters, Inc., then said third parties or the partnership or corporation to be so formed by them shall be substituted herein as the general agent with like effect as if this contract were made with them in the first instance."

The contract is signed by Lynton T. Block & Company, and by "A. R. Talbot Underwriters, Inc., by Charles Stuart, President. Attest: Richard L. Kimball, Secretary." It is also signed by Charles Stuart individually, but is not signed by Richard L. Kimball individually.

It is first urged that the defendant Stuart is not bound by the contract sued on because not signed by defendant Kimball. In brief of defendant Stuart, it is said: "Where a contract in writing is obviously drawn as a mutual agreement between several parties to be signed by all of them, it must be executed by all of such parties or it will not bind any of them." In support of this proposition defendant quotes at length from *Welsh v. Premack*, 61 S. Dak. 326, 249 N. W. 1. But, a modification to the rule presented is recognized in that case; that is, that the contract must be executed, by all parties signing it, "or otherwise acceding to its terms." To like effect is *Hess v. Lackey*, 191 Ind. 107, 132 N. E. 257, also cited by defendant. These cases are in harmony with the view of the law adopted by the trial court in this case as expressed by instruction No. 6, of which defendant Kimball complains. In *Wilcox v. Saunders*, 4 Neb. 569, cited by defendant, the question as to a party being bound on a contract by having acceded to its terms in some manner other than by signing it was not involved or considered. The same is true of *Middleboro Nat. Bank v. Richards*, 55 Neb. 682, 76 N. W. 528, and *Morton v. Harvey*, 57 Neb. 304, 77 N. W. 808, also cited by defendant. Further, in the last two cases the bond involved was signed by part of the sureties, on the condition

that it was not to be considered complete or delivered until signed by all the sureties named, which presented a different question than here involved.

While the defendant Kimball was named as party to the contract and it was prepared for his signature, there was no testimony or contention made that it was signed by Stuart on condition that it was not to become a binding obligation as to him or delivered until signed by Kimball. As to delivery, the defendant Stuart testified that when he signed the contract he "turned it over to Kimball." When asked: "Q. Did you have any understanding or agreement with him at that time that he would sign the instrument?" He answered, "No." Kimball testified as to the same matter: "Q. Did Mr. Stuart say anything to you concerning not delivering this contract to any one until you had signed it? By the Court: Shouldn't that be confined to the time? Q. Yes. I mean at the time you got the contract, exhibit 6, from him signed by him. * * * A. No, there was nothing said." Consequently, the defendant Stuart, having executed and delivered the contract, or permitted it to be delivered, is bound by the obligation therein assumed, although the contract was never signed by Kimball. *Farmers State Bank of York v. Brock,* 120 Neb. 551, 234 N. W. 92; *Kansas City Terra-Cotta Lumber Co. v. Murphy,* 49 Neb. 674, 68 N. W. 1030; *Naylor v. Stene,* 96 Minn. 57, 104 N. W. 685.

Defendant Kimball urges error in holding the contract sued on binding as to him, and challenges the rule of law stated by the court in instruction No. 6, wherein the court advised the jury:

"In order that a party may be bound by written contract it is not essential that he must attach his signature thereto. His assent may be evidenced in other ways such as by accepting the contract and acting thereunder." And applying this rule to the issues and evidence in this case, the instruction further states: "If you find from the evidence that the defendant Kimball did in fact act under the contract, whether by the name of A. R. Talbot Underwriters,

Inc., Highways Motor Underwriters, his own personal name or any other name, and received benefits from said contract, and so agreed to the same as a matter of fact, you are at liberty to find that he became bound by said contract notwithstanding the fact that he did not attach his signature individually thereto."

This instruction by the trial court is in harmony with a well-established rule of law that, in the absence of some statutory requirement or specific agreement that a contract is not to be effective until signed, assent thereto may be shown in other ways as by delivering the contract and acting under it. This rule is recognized in *Welsh v. Premack, supra,* and *Hess v. Lackey, supra,* cited by defendant. In *Ramsay Realty Co. v. Ramsay,* 135 Ia. 612, 113 N. W. 468, the facts were closely analogous to those in the case at bar, and the court there applied the rule followed by the trial court herein. In the instant case, defendant Kimball signed the contract, exhibit 6, as secretary of the A. R. Talbot Underwriters, Inc., but, although named as a third party thereto along with defendant Stuart, he did not sign it in his individual capacity, yet, after the contract had been signed as above indicated, Kimball delivered the contract to Lynton T. Block & Company. The contract provided that Highways Motor Underwriters should be liquidated. He then knew that the Highways Motor Underwriters and A. R. Talbot Underwriters, Inc., were in process of liquidation. He testified: "We were in the process of liquidation, if you want to call it that, of the Highway Motors Exchange and the A. R. Talbot Underwriters, Incorporated, at the time this contract was drawn. * * * It was known at that time that the Highways Motor Underwriters and the A. R. Talbot Underwriters would pass out of the picture as soon as this reinsurance of their business had been effected. * * * It is evidently drawn with that in mind." Defendant must be held to have known that under the terms of the contract, as soon as the liquidation of said underwriters was completed, the only parties remaining to said contract would be the parties designated

as the "first party" and the "third parties," Stuart and Kimball. Kimball having delivered the contract, under the circumstances then existing, must be held to have effectively approved it. In the case of *Ramsay Realty Co. v. Ramsay, supra,* the party seeking to avoid the contract, as in this case, signed only as an officer of a company that was a party thereto, and did not sign personally. The court in the opinion states: "True he did not sign the agreement except in a representative capacity; but he did accept the benefits of the contract, and cannot now be heard to say that he will not be bound by its burdens. It is as binding upon him as if he had personally signed it. Unless a contract is required by statute or arbitrary rule to be in writing, it need not be signed by the party to be charged, provided it be accepted and acted on by him. This doctrine is so fundamental as not to need the citation of authorities." See *Henderson v. Henderson,* 136 Ia. 564, 114 N. W. 178; *Albright v. Stegeman Motor Car Co.,* 168 Wis. 557, 170 N. W. 951, 19 A. L. R. 463; *Monarch Portland Cement Co. v. Creedon & Sons,* 94 Neb. 185, 142 N. W. 906.

Defendant Kimball in his brief urges that he never acted under the contract or received any benefits therefrom. It appears that he continued the insurance business after the charter of A. R. Talbot Underwriters, Inc., was forfeited, and being asked as to such business with reference to the time of such forfeiture: "Q. And continuing after that time, you continued to handle business,—that is, Highways Motor Underwriters continued to handle business of the Lynton T. Block & Company and Utilities Indemnity Exchange, did it not? A. I continued to handle the business that came in from these subagencies, myself. This business kept coming in and I kept sending it on to the Utilities Indemnity Company." He also made to the plaintiff company daily reports showing typewritten portions of the policies and the premiums and indorsements, policies used being the policies of the plaintiff company. However, defendant claims that none of such insurance was written under the contract, exhibit No. 6, but contends that it was

written under an oral arrangement, the exact terms of which not being shown. Much of defendant's testimony on the question here considered is largely self-serving statements, and in view of other facts and circumstances shown by the evidence, it is not convincing. The conversation sought to be proved, through which defendant was attempting to establish an oral arrangement for the writing of insurance, appears to have been had prior to the execution and delivery of the contract, exhibit No. 6, and the objections thereto were properly sustained.

There were some additional allowances made defendants for commissions over the 25 per cent. specified in the contract; that is, 2½ per cent. on account of prevention expense, and 5 per cent. on account of adjustment expense. Also allowance of $110 a month for writing of policies written in the defendant Kimball's office, formerly written at the office of Lynton T. Block & Company. This allowance appears to have been made under date of October 4, 1930. However, there is nothing inconsistent with the contract in allowing to the defendant an additional compensation for additional services. We conclude that the evidence was such as to justify the court in giving instruction No. 6, submitting that issue to the jury.

Defendant Stuart in his answer pleads (3) that on October 30, 1930, Lynton T. Block & Company and A. R. Talbot Underwriters, Inc., entered into an agreement superseding the contract sued on in this action; that from and after the 30th day of October, 1930, the contract sued on was ineffective and had no binding force upon any of the parties hereto. The court by its instruction No. 4 charged the jury:

"Where there are three parties to a contract it cannot be changed, modified, rescinded or superseded by the action of only two of such parties so as to affect rights between either or both of them and the third party. And if you find from the evidence that the defendant Stuart or the defendant Kimball or both of them became bound by the contract of August 1, 1930, you are instructed that

the contract entered into on October 30, 1930, between Lynton T. Block & Company and A. R. Talbot Underwriters, Inc. could have no effect upon said contract of August 1, 1930, so far as concerns rights and liabilities between Lynton T. Block & Company and the defendants Kimball and Stuart or either of them."

Both defendants assigned this as error. There were three parties to the contract sued on, exhibit No. 6, the third parties being the defendants. The contract of October 30, 1930, exhibit No. 10, purports to have been between Lynton T. Block & Company, first party, and A. R. Talbot Underwriters, Inc., second party. It is signed: "Lynton T. Block & Co., A. R. Talbot Underwriters, Inc., per Richard L. Kimball, W. B. Walker." It appears that W. B. Walker was superintendent of agencies for Lynton T. Block & Company. Stuart and Kimball were not parties to the contract of October 30, 1930, exhibit 10. Further, the contracts are not confined to the same subject-matter. Exhibit 6 appears to be confined to "automobile insurance with a commission of twenty-five per cent." There is an indorsement affixed to said contract, however, extending it to include the writing of "residence burglary, personal holdup, and the miscellaneous types of public liability and property damage insurance;" but neither exhibit No. 6 nor the indorsement thereon includes "workmen's compensation insurance or fleet automobile insurance;" while exhibit No. 10 covers only "workmen's compensation insurance," with a commission of 15 per cent. and "all forms of fleet automobile insurance," with a commission of 27½ per cent.

Further, the superseding or rescission of a contract would require the assent of all parties to it. "If one party to a contract furnishes a legal ground for rescission, his assent to a rescission declared by the other is unnecessary, but in the absence of such ground all the parties to the contract must assent to its rescission and there must be a meeting of their minds." 13 C. J. 601. The rescission of a contract by the parties as much requires the meeting

of the minds as does the making of the contract. *White Pine Lumber Co. v. Manufacturers Lumber Co.*, 191 Mich. 390, 158 N. W. 124. A tripartite contract cannot be rescinded or modified without the consent of all parties thereto. *Ehrman v. Rosenthal*, 117 Cal. 491, 49 Pac. 460; *Currier v. Kretzinger*, 162 Ill. 511, 44 N. E. 882. But it is urged by defendant Stuart that, until the contingency occurred making defendants general agents under the contract, he was not interested in any particular; that he was not yet a party to it, and had no rights under it; and, therefore, reasons that it was not at time of making of contract, exhibit No. 10, a tripartite contract. We cannot subscribe to such contention. Here was a contract which we must conclude from the evidence both defendants considered of value; they were interested in the Highways Motor Underwriters and also A. R. Talbot Underwriters, Inc., and knew at the time contract was drawn that not only both the Highways Motor Underwriters and A. R. Talbot Underwriters, Inc., were in process of liquidation, and that both of those organizations would "pass out of the picture soon;" but the contract was evidently drawn with that in mind. It would thus appear that they had a vital interest in the contract sued on at that time. Under such existing conditions defendant Kimball, as representative of A. R. Talbot Underwriters, Inc., entered into the contract of October 30, 1930, not, we conclude, to supersede the contract, exhibit No. 6, but to permit the handling of a line of insurance through Lynton T. Block & Company not covered by the contract of August 1, 1930. We conclude that, under the facts in this case, the giving of instruction No. 4 to the jury was not error.

On the part of the plaintiff it is contended that the defendant Stuart, by part three of his answer, pleading that the contract sued upon was superseded by the contract of October 30, 1930, pleaded a confession and avoidance, and consequently that the contract sued on stands admitted by defendant; and plaintiff cites *Manley State Bank v. Spangler*, 130 Neb. 196, 264 N. W. 459, in which it is held: "Facts

alleged in a petition to which the defendant in his answer pleads a waiver, an estoppel, or matter to avoid, will be treated as admitted, though the answer also contains a general denial." The appellee's contention appears well founded. The defendant Stuart admitted the consummation of the original contract, exhibit 6, by seeking to avoid its legal effect on the theory that it had been superseded.

It is urged by both defendants that the contract sued on was for personal services and not assignable, and error is assigned in the holding of the court that the contract had been assigned to the plaintiff. *Rice v. Gibbs*, 40 Neb. 264, 58 N. W. 724, and *Corson v. Lewis*, 77 Neb. 446, 109 N. W. 735, are cited in support of such contention. The first case involved a contract for the sale of land where payment of a portion of the purchase price was deferred. The court held the contract could not be assigned so as to permit the assignee to enforce it and compel the vendor to substitute the obligation of any other person for the obligation of the one with whom the contract was made. In the latter case, the holding was that a contract for legal services is personal in its nature; and that the client could not be required to accept the services of another attorney for the one employed. Neither of those cases is controlling under the facts involved in the instant case. The contract sued on is dated August 1, 1930, to become effective September 1, 1930; the assignment is dated February 11, 1932. A part of the account sued on was for money claimed to have been owing by defendants to Lynton T. Block & Company, attorneys in fact for Utilities Insurance Exchange, at the time of making of the reinsurance contract and the assignment. As to such part of the account, the transaction amounted simply to a transfer of a past-due account for insurance premiums. That such an account may be assigned so as to permit the assignee to recover thereon, subject to then existing defenses as between the original parties, is irrefutable. The remainder of the account sued on was for premiums claimed to be owing on insurance written by defendants after the assignment was made.

As to such items, it was an executed contract on the part of the plaintiff, Utilities Insurance Company, with nothing left to be performed but payment by defendants of the premiums received, or for which they became responsible. The defendants had been conducting business in name of Highways Motor Underwriters. Witness Nangle, vice-president of plaintiff, Utilities Insurance Company, and also of Lynton T. Block & Company testified: "Mr. Kimball said he wanted to promote and continue retaining the name of Highways Motor Underwriters, and we agreed that the policies as written would have on the face of the policy 'Highways Motor Underwriters, Division of Utilities Insurance Company' in order to cause the name to be predominant;" and it was further stated by that witness that after the Utilities Insurance Company was organized the Highways Motor Underwriters continued to write the policies on blanks furnished by the Utilities Insurance Company. Witness Briscoe testified as to conversation between witness and defendant Kimball: "Q. Mr. Briscoe, was anything said at that time between you and Mr. Kimball about the Utilities Insurance Company? A. Yes. Q. Would you state what was said between the two of you on that subject? A. Well, Mr. Kimball asked me just when we would be able to get the stock,—the new stock company licensed in Nebraska,—he was anxious to use it." Defendant Stuart was connected with the Stuart Investment Company and as a witness testified that he kept pretty close touch with the business affairs of the company; wrote insurance during 1930, 1931, and 1932; did business through Highways Motor Underwriters, and on policies of insurance issued by Utilities Insurance Company to customers of Stuart Investment Company, the Stuart Investment Company collected the premiums. The action of the defendants in using the policies of Utilities Insurance Company, plaintiff, would necessarily indicate knowledge on their part that the contract had been transferred to such company, and by so doing they recognized that company as the principal for whom they were doing business

as general agent, thereby ratifying the assignment. 5 C. J. 884; 6 C. J. S. 1133. While defendants might have refused to do any further business with Lynton T. Block & Company as attorney in fact, after the assignment of the contract to the Utilities Insurance Company, yet, if defendants, through Highways Motor Underwriters, under such circumstances wrote business as agents on policies of the plaintiff, Utilities Insurance Company, and collected the premiums, they are now estopped to deny liability therefor.

Defendant Stuart further urges that the assignment was only for "all of the accounts receivable for premiums in the course of collection now on their books in the amount of $117,955.82;" and that for plaintiff to show title to some account against Stuart "it must be shown by evidence that there was an account receivable for premiums in the course of collection on Block's books on February 11, 1932;" and it is contended there was no such evidence; but the quotation from the contract above made, to which defendant refers, is followed by the words: "Together with all right, title and interest, both legal and equitable, and to all contracts relating to the same." It is evident from the language used, taken together, that it was the intention of such instrument to transfer to the Utilities Insurance Company all accounts receivable for insurance premiums then owing by defendants to the Utilities Insurance Exchange and Lynton T. Block & Company. Proof thereof should not be confined to Block's books, but could be shown by any competent evidence. To hold otherwise would tend to carry refinement of language to excess.

Error is assigned in failure of the court to submit to the jury a form of verdict finding for the defendant Stuart, alone, without necessarily finding for the defendant Kimball. As has been stated, the answers of both defendants contained a general denial, though admittedly defendant Stuart signed the contract. But Stuart's answer also contained the two special defenses, (a) that Stuart was not bound because Kimball did not sign the contract

sued on; and (b) that the contract sued on was superseded by the contract of October 30, 1930. The two issues thus presented raise the only defenses by Stuart not equally available to Kimball under his answer. The defendant Stuart having signed the contract sued on while the defendant Kimball did not do so, a liability might have existed as to Stuart, though none was established as against Kimball; but we fail to conceive how, under the issues and the evidence in this case, a finding could logically have been made against Kimball without a finding against Stuart also. Under the first special defense, (a) if there was proof of Kimball's liability, such defense on the part of Stuart would fail; and under the second special defense, (b) proof that the contract had been superseded or rescinded would have relieved both defendants from liability. A trial court should only submit to the jury with its instructions such forms of verdict as under the issues and the evidence might properly be returned by the jury. We conclude that the trial court was right in not submitting to the jury a form of verdict finding in favor of Stuart alone and against Kimball.

Finally, it is urged by both defendants that the evidence is not sufficient to sustain the verdict. Defendants do not dispute any particular items of the account, but challenge the method by which the plaintiff sought to establish its entire claim. The argument on behalf of defendant Stuart is largely founded on the proposition that the books of account kept by defendant Kimball were not admissible as against Stuart. At the outset, the proof of the plaintiff's case as against Stuart was less involved than the proof required as against Kimball, as Stuart personally signed the contract in his individual capacity, while Kimball did not do so. Under the terms of the contract, no partnership or corporation being formed by them, on A. R. Talbot Underwriters ceasing to be actively engaged in business, the defendants became jointly the general agents of the plaintiff company. By the contract, the general agents were obligated to procure proposals for automobile insur-

ance and collect the premiums therefor for the account of the company, all moneys received to be held and chargeable to such general agents as a fiduciary trust; all credit given by general agent should be at its own risk, it being responsible for premiums on all policies and all renewals written by it or its subagents; and at the end of each month to make full statement to company of business written and to make a full settlement with the company within sixty days thereafter. There was no occasion to prove some act on the part of Stuart tending to show an adoption of the contract by him in order that he might be bound thereby, as in the case of Kimball. Pursuant to the obligation of the contract, both defendants appear to have procured proposals for automobile insurance. Defendant Kimball operated under name of Kimball General Agency. He testified: "Q. Now this Kimball General Agency was merely yourself doing business under that name, is it not? A. Yes. Q. And what you mean to say is that you may have collected personally that money in the name of or doing business as the Kimball General Agency, but not have reported it to the business which you were operating as the Highway Motor Underwriters, is that correct? A. I may have collected it in the local agency and not paid it over to the general agency, yes. Q. And that general agency is the agency which was known as the Highway Motors Underwriters? A. Yes." Stuart operated a separate business through Stuart Investment Company; both defendants operating through the Highways Motor Underwriters general agency. While Stuart testified he did not know through what company the Stuart Investment Company wrote insurance, witness Nangle testified as to a conversation with Stuart about the time the contract was entered into: "Q. Would you state what you said about it and what he said about it? A. At that time I told him we wanted him to sign the contract. Q. You recall whether the contract had been signed by him or not at that time? A. I don't recall. Q. Do you remember what he said about it? A. He said he was interested in getting his $50,000

out of the deposit in the state of Missouri on account of this Highways Motor Underwriters. Q. And did he say anything about the General Agency? A. Yes; and he hoped that the working out of the General Agency might recoup for him some of the losses he had suffered in this undertaking." That Stuart did, in fact, do business through Highways Motor Underwriters using the policies of the Utilities Insurance Company, plaintiff, is apparent from his own testimony: "Q. And that Stuart Investment Company did do business, did it not, with the plaintiff, the Utilities, that is, did do business using the policies of the plaintiff, the Utilities Insurance Company, did it not? A. I think so. Q. And it did business through the Highways Motor Underwriters, did it not? A. Well, I think so. Q. And on the policies that the Utilities Insurance Company issued to customers of the Stuart Investment Company, the Stuart Investment Company collected the premium, did it not? A. Yes, sir. Q. And where were those premiums paid? A. Well, whoever we had the contract with. Q. Were they paid to Highways Motor Underwriters? A. I imagine so if they had the contract,—wherever the contract existed." Included in the account involved herein are two items for risks on policies in the plaintiff company written through Highways Motor Underwriters covering automobiles of the defendant Stuart.

To prove the account sued on, witness Greiner qualified as an accountant and testified to an examination made by him of the books, records and accounts of the Highways Motor Underwriters, which were kept by or under the direction of the defendant Kimball. Witness produced and identified work sheets showing the detailed account as ascertained by him on such examination; this was analyzed and summarized on a further statement produced and identified, which itemized the account as made by him in detail for each month, and further itemized by months, insurance written for which premiums were unpaid, showing premiums unpaid for each month, and total amount due. That the Highways Motor Underwriters was the

agency through which the defendants, as general agents, were jointly acting is quite apparent. Though the Highways Motor Underwriters was under the immediate management of the defendant Kimball, that does not release Stuart from liability. The contract made Kimball and Stuart jointly general agents and created a joint relationship. Under the facts in this case, the books and records from which the accounting was made being a record of the transactions of both defendants, they were admissible in evidence as against both defendants. *German Nat. Bank of Hastings v. Leonard,* 40 Neb. 676, 59 N. W. 107; *Globe Savings Bank v. National Bank of Commerce,* 64 Neb. 413, 89 N. W. 1030.

Further, no error was assigned in briefs of either defendant on account of the admission of the testimony of the accountant, or on account of the exhibits prepared by him being received in evidence. The weight of evidence, as well as the credibility of witnesses, were questions for the jury; and there being evidence sufficient to support the verdict returned, it will not be disturbed on appeal. Finding no prejudicial error, the judgment of the trial court is

AFFIRMED.

JAMES EVERETT FONDA ET AL., APPELLANTS, V. NORTHWESTERN PUBLIC SERVICE COMPANY ET AL., APPELLEES.
278 N. W. 836

FILED APRIL 1, 1938. No. 30166.

1. Gas: NEGLIGENCE: LIABILITY. When a gas company engages in the distribution of natural gas and the installation and inspection of its equipment, it is incumbent on such company to exercise the high degree of care and diligence required in the handling of a dangerous commodity, and, if negligent, it is liable therefor.
2. ———: ———: ———: NOTICE. Liability for injuries caused by escaping gas does not depend on notice of defect, where defect is due to improper or careless installation and inspection.

3. **Master and Servant.** An employee who, after installation and inspection of gas equipment, by the exercise of ordinary care should have known it was improper or defective is liable with his employer for injuries occasioned thereby.
4. **Trial.** When defendant moves for a directed verdict, he admits as true evidence of plaintiff, who is entitled to benefit of every reasonable inference deductible therefrom. *Martin v. Sanford*, 129 Neb. 212, 261 N. W. 136.
5. ———. When the evidence is such that reasonable minds might differ as to the cause of injuries for which damages are sought, the question is for the determination of the jury.

APPEAL from the district court for Lincoln county: J. LEONARD TEWELL, JUDGE. *Reversed.*

R. H. Beatty and *Shuman & Overcash*, for appellants.

Hoagland, Carr & Hoagland and *William Suhr, contra.*

Heard before GOSS, C. J., ROSE, DAY, PAINE and MESSMORE, JJ., and FALLOON, District Judge.

FALLOON, District Judge.

This is an action for damages brought by Nellie L. Fonda against the defendant gas company and its superintendent, Elmer H. Smith. The plaintiff claimed injuries from asphyxiation caused by the negligence of the defendants in the installation, inspection and maintenance of a gas conversion burner in the heating plant of the plaintiff's home. The defendants admitted the purchase and installation, but claimed it was safe and proper, and that any injuries were caused by plaintiff's negligence. Plaintiff later died and the case was revived in name of her executors, and tried in the lower court. At conclusion of plaintiff's testimony, the trial court sustained motion to discharge jury and dismissed action at plaintiff's costs. Plaintiff appealed, and since one of defendants has died, action has been revived against his administratrix.

The evidence discloses that the defendant corporation was engaged in the installation and servicing of gas and heating equipment, and also in the selling, delivering and furnishing of natural gas therefor in North Platte, and

that the other defendant was its superintendent and foreman in charge. The plaintiff, Nellie L. Fonda, and her husband, James H. Fonda, occupied their dwelling-house in North Platte and had lived there for many years. They were both past 70 years of age and in usual health for their age. Their home had been heated with a coal or other solid fuel furnace in August, 1932, and prior thereto. This furnace had a direct flue connection from the rear of combustion chamber running to the chimney, and below this connection another flue pipe connecting therewith, but which was only about half the length, and at the end of which a clean-out plug was placed, which before the furnace had been connected for gas usage was removable so the accumulated soot could be cleaned out when necessary.

During August, 1932, estimates were made by said defendants for the proper conversion of this Green Colonial furnace to natural gas, and after some conversation agreement was reached about September 10, 1932, and a Sonner Heat machine was installed and everything checked by the defendants and approved by the foreman defendant, Smith, on September 26, 1932. There is no doubt but the defendants installed and claimed that the equipment was proper and safe, and that the same was accepted by James H. Fonda, the owner of the home and the husband of the plaintiff, and a few days later was being operated. Nothing out of the ordinary happened until on Sunday, the 17th of December, 1933, when the servant maid, Edna Hall, occupied the home while the Fonda occupants were on a visit to Omaha, and she testified that in the nighttime she heard a noise or puff, as though something dropped on the basement floor. She called for Clarence Molley, a service employee of the defendant company; he came and she went with him to see what was the matter with the furnace. He opened the furnace front door, relit the pilot-light and left. She further testified that the house warmed up, but she later had a headache, pressing on her lungs, pictures on the wall seemed to dance around, felt she was

going to faint, became sick to her stomach and nauseated. She further testified, when her father came to take her home, she was worse, delirious and hardly knew her father, and that she stayed in bed a day or so, had never had such sickness before, and that she only ate breakfast which usually consisted of coffee.

The testimony further reveals that the plaintiff, Nellie L. Fonda, and her husband returned from Omaha late Tuesday, December 19, 1933, and that a neighbor, Mrs. Elmer Koons, saw Mrs. Fonda when they returned. One of the keys to the Fonda house was left with the Koonses. Elmer Koons took the key over and gave it to Mr. Fonda, talked with him a few minutes and he seemed all right. The next day about dark, because of the receiver being off the telephone at the Fonda home, the telephone company called the Koons home and asked that they investigate. Mrs. Koons went over, could not get in, saw Mrs. Fonda staggering around, so went back and got Mr. Koons, and they unlocked the screen and went into the Fonda home. They found the Fondas in bad shape, clothes disheveled and scattered about, evidence of bowel movements, and neither able to give coherent accounts of themselves. A doctor was called, also the daughter, Mrs. Blanche Tarkington, and Mrs. Koons helped get things in order. Mrs. Koons further stated she was all right when she went over, but she got a headache, though she thought at the time it was the excitement. The daughter and her husband came that night and the Koonses returned to their own home. The daughter later became violently sick, vomited, went to bed, and her husband also had a terrible headache.

A nurse, Janice Ryan, who was called on the case about 10 o'clock the night of the 20th, became dizzy, had headache and was so nauseated that she was relieved by another nurse, and Miss Ryan remained in bed for a few days as a result of her experience.

A neighbor, Mrs. Fred Waltemath, having heard of the illness next door, called the next morning between 10 and 11 o'clock, found both Mr. and Mrs. Fonda groaning and

gasping for breath, and also Mrs. Blanche Tarkington very sick, and also noticed the air in the house offensive. She was there later for a minute or two in the afternoon, then the air was not so bad, as windows and doors were open, but when she returned to her own home she called the gas company and told them she thought the trouble at the Fonda home must be gas, and she thought they should investigate, and that she later saw some of the gas people come almost immediately.

The record conclusively shows that all parties who occupied or visited this home about this time were more or less similarly affected. What the trouble was, or whether any one was negligent, it is necessary to look further for determination.

The plaintiff charged negligence to the defendants in the installation, and particularly in leaving the clean-out plug as it was. Let us see what the record discloses in this regard.

The defendant Elmer H. Smith testified that he was the gas distribution superintendent of the company, that he had examined the Fonda home as to proper installation of a gas conversion burner, later installed it, personally did some of the work, that the job was completed, that gas was turned on, that the company later inspected it at intervals, that the clean-out plug was not needed, that they did not fasten it, that it was pushed in a crimp joint, could be removed by hand with a little pressure and really had no purpose with gas installation, but it need not be fastened, just so it was in place tight. He also testified as to some changes being made as to checking the draft less than 30 days before the eventful night. He also testified as to the danger of the gases formed by the combustion of natural gas. There was also testimony as to certain features of the furnace that were of but little or no value.

The testimony of Clarence Molley, an employee of the defendant company, was to the effect that he went to the Fonda home the morning of December 17, found pilot-light out, doors closed, relit pilot-light, electric controls all

functioning, did not go behind furnace at all or look at clean-out plug as he was only there 20 or 30 minutes.

Dewey Tarkington testified that Charles Gerkin, an employee of the company, Thursday, went into the furnace room, manipulated the valves on the pipe-line, and looked around the back of the furnace, picked up the plug off the floor and replaced it, that when he put the plug in, it went in freely, and that Gerkin then said he thought that was the trouble and that it should be fastened in, and that after that no one else took sick.

Charles Gerkin identified exhibit 12, dated December 21, 1933, which was a work ticket of the defendant company and had the notations thereon of "See if there is a gas leak" and "Vent-pipe off at furnace fixed."

Blanche Fonda Tarkington testified that she talked on Friday, the time of her parents' sickness, to Howard Hopkins, manager of the defendant company, in basement of the home, and he told her "they had found the difficulty and the plug was put back in and we would have no more trouble." He said "it was all fixed," and that after this there was never any trouble with gas appliances or anybody getting headaches or nausea.

The record also shows that on January 9, 1934, about three weeks after the accident, flue connection was changed and cemented up by Charles Gerkin for the defendant company, and according to the architect who made a drawing of the equipment, the clean-out plug "is riveted now."

August A. Luebs, a professor in the University of Nebraska and an expert on installation of gas heating, testified that it was entirely improper, and contrary to accepted practices, to install this gas-conversion burner without strapping or fastening this clean-out plug, so it could not be displaced by a puff or explosion in the furnace, and that if the clean-out plug was displaced, poisonous gases would increase, escape and permeate the house.

One of the doctors testified that the symptoms of one who inhaled gases, particularly carbon dioxide and carbon monoxide, in a closed room, would be severe headache,

throbbing in the temple region, followed by nausea and vomiting. This would also be followed by a complete muscular relaxation of the bladder and lower bowels, and would be depressing on the lungs and heart. This same doctor, in response to a hypothetical question covering the testimony as brought out, stated that in his opinion the immediate sickness caused plaintiff was carbon monoxide poisoning.

That the plaintiff and her husband were in good health for their ages is not disputed, nor is the fact that they both suffered, the husband, James H. Fonda, until he died on January 11, 1934, and the plaintiff, Nellie L. Fonda, who passed away on August 17, 1934.

The testimony clearly shows that the plaintiff was injured, that it was probably occasioned by poisonous gases which escaped from the furnace, and there was sufficient evidence to warrant a jury determining whether the defendants were negligent.

There can be no doubt that a gas company must exercise a high degree of care in dealing in a dangerous commodity, and a failure to do so may render it liable. There is no absolute standard of duty, but it should take every reasonable precaution. The ordinary householder depends upon the experience that the gas company possesses and it is its duty, when selling the commodity and equipment in which it is used, to see that the appliances are not only fit and proper, but also are in proper working order. Inspections otherwise would be useless.

The testimony clearly shows that the defendants made the installation according to their own plans, and that after the installation it was turned over to the Fondas as proper and in working order. The evidence introduced also shows that the clean-out plug may not have been properly installed and it likewise points to this as the source of the asphyxiation. There can be no dispute that the plaintiff was asphyxiated.

In the case of *Mischnick v. Iowa-Nebraska Light & Power Co.*, 125 Neb. 598, 251 N. W. 258, this court said: "It is

possible that the fire may have been caused by a leak in the gas pipe, or by spontaneous combustion in the box of rubbish, or there might have occurred a slight explosion in the furnace, which threw out a flame which ignited some combustible substance, or it might have occurred in some entirely different manner. Proof is entirely lacking as to its exact cause." The fire in that case had destroyed the opportunity to form definite conclusions, but in this case there was no fire and the evidence points to the clean-out plug as being the trouble. This clean-out plug under the evidence came out on the night of December 17 and remained out until the 21st. During the night, people were all afflicted alike, and it is proper that the construction most favorable to the plaintiff, when motion for directed verdict was made, should have been placed thereon, and, if so, it should have been submitted to the jury. The record conclusively shows that after the clean-out plug was replaced no one in the household became sick. There is nothing in the record that shows any other means of gas escape than the clean-out plug. The evidence introduced is not a mere possibility as it was in the *Mischnick* record.

The gas company defendant installed and supervised the equipment and furnished the gas for fuel, and it was incumbent upon it to see that the installation was proper and safe, and, moreover, the company owed a further duty to make reasonable and necessary inspection as will enable it in the exercise of ordinary care to prevent injury or death to the patrons of its service, and for failure thereof the company would be liable.

In the case of *Taylor v. Kings County Lighting Co.*, 286 N. Y. Supp. 36 (247 App. Div. 799), we quote the syllabus: "Gas companies held liable for injuries sustained from partial asphyxiation by occupants of home wherein companies installed gas heater and left, in pipe furnishing a chimney draft to carry off gases, a damper which became easily closed by vibration or otherwise, and interfered with outlet of carbon monoxide which permeated home."

The supreme court of Wyoming in the case of *Miller v.*

New York Oil Co., 34 Wyo. 272, 243 Pac. 118, said: "We must concede, as defendant contends, that it assumed no duty to inspect or maintain the heater, and that it was not liable as an insurer. Its duty was to exercise ordinary or due care in installing the heater, and the plaintiff was required to prove that the duty had not been performed. * * * The defendant, in installing the heater, was required to take all reasonable precautions to guard against known danger that would arise from ordinary use. It knew that the heater should be provided with proper and sufficient means for escape of fumes. By the testimony of its own witnesses it is shown that the installation was defective if the vent pipe of the heater was connected with a clogged chimney."

The gas company's trouble-shooter was called by the maid to look after the furnace trouble of December 17. The inspection should then have been thorough and, if it had been, perhaps no further trouble would have occurred.

Having undertaken this inspection, it was the duty of the appellees to exercise ordinary care in making such inspection and to make any necessary repairs or advise the tenants or owner of the defects and afford an opportunity for them to make such repairs. 28 C. J. 594. The company is not required to keep up a constant inspection, but when its attention is called to the trouble and it undertakes to remedy it, then this inspection, where there may be great danger, should be thorough and efficient. Its liability in that case attaches the moment it assumes that the trouble has been remedied. But whether a company has been negligent or not depends upon the facts, which should be determined by the jury.

Whether the equipment in the first instance was improperly installed or whether the inspection later made about December 17 was careless and incomplete, each of which was alleged as negligence on the part of the defendant company, and whether either was the proximate cause of the injury were questions that should have been left

to the jury for determination under proper instructions, and upon their findings would depend whether the company or its superintendent was liable.

The proximate cause of an injury is a question of fact, which may be proved by circumstantial evidence and inferences properly drawn therefrom, and the plaintiff in seeking to establish the connection between the defendants' negligence and the injuries need not negative all other possibilities. All the plaintiff was required to do was to establish by a reasonable probability, the allegations of her petition, and if it could be logically inferred therefrom, the facts she sought to establish, then it was a case for the jury and it was error not to so submit it.

"Where facts and circumstances are established from which the manner of sustaining injuries can be logically inferred, an issue is presented for the jury." *Markussen v. Mengedoht,* 132 Neb. 472, 272 N. W. 241.

The defendant Smith testified that he laid out the plans and helped to install the gas equipment. If the clean-out plug was improperly installed, there can be no question of his liability. A foreman of a corporation whose negligence causes injuries is jointly and severally liable with the corporation in an action for damages caused by such injuries. This is the law in this state and has been so held in *Allen v. Trester,* 112 Neb. 515, 199 N. W. 841.

The courts have made a distinction where the employee was not in charge nor actually did the work. In this case, the defendant Smith did both. The principle has been very well stated by the supreme court of Illinois in *Baird v. Shipman,* 132 Ill. 16, 23 N. E. 384, where it stated: "It is not the agent's contract with his principal which exposes him to or protects him from liability to third persons, but his common-law obligation to so use that which he controls as not to injure another. That obligation is neither increased nor diminished by his entrance upon the duties of agency, nor can its breach be excused by the plea that his principal is chargeable." The court goes on to state: "All this is not doing, but it is not the not doing of that

which is imposed upon the agent merely by virtue of his relation, but of that which is imposed upon him by law as a responsible individual, in common with all other members of society."

If the installation and inspection, when gas was first used in the Fonda home, were careless and improper, and the company or its superintendent should have known, then it was not necessary that they be further informed. The company was paid for this equipment and installing service. A company engaged in the maintenance of such a dangerous fuel commodity must have employees efficient in their line, and it is bound to anticipate injuries resulting therefrom. The Fondas had a right to trust its workmanship and service and to rely exclusively on its knowledge and skill. Whether the company was negligent is a question for the jury, and the law does not require direct and positive evidence, but it may be inferred from circumstances, if sufficient to satisfy reasonable men.

The trial court struck out certain portions of plaintiffs' amended petition, but we can find no error therein and its ruling should stand.

Under the law and the evidence, the case should have gone to the jury for determination. The judgment will therefore be reversed and the cause remanded.

REVERSED.

H. D. HAMAKER, APPELLANT, V. FRANK MIDDAUGH, APPELLEE.

278 N. W. 849

FILED APRIL 1, 1938. No. 30233.

1. **Exchange of Property:** FRAUD. The fact that a party might have discovered the truth by investigation is immaterial, when he is fraudulently induced by the other party to forego such investigation.
2. ———: ———. A contracting party has a right to rely not only upon the express statement of an existing fact, the truth of which is known to him, as a basis of a mutual agree-

ment, but also upon the representation of a fact in the future, which has been acted upon and turns out to be false.

3. ———: ———. A contract will be set aside when fraudulent representations are made, and the party making them had reason to believe the other party relied upon them at the time they both entered into the transaction.

4. Contracts: RESCISSION. The right to rescind a contract for fraud must be promptly exercised, but the question of promptness depends solely upon the circumstances and facts.

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

Battelle, Strehlow & Morearty, for appellant.

E. L. Mahlin, contra.

Heard before GOSS, C. J., ROSE, EBERLY, PAINE, CARTER and MESSMORE, JJ., and FALLOON, District Judge.

FALLOON, District Judge.

This is an action at law brought by the plaintiff, who is the appellant here, to recover upon two promissory notes given by the defendant, appellee, as part payment of the purchase price of land. The defendant in his answer and cross-petition admitted the execution of the two notes, denied any consideration therefor, alleged fraud and misrepresentation, prayed for a rescission of the sale contract, judgment for the cash payment, reconveyance of the Colorado land from plaintiff taken on exchange, or accounting therefor, cancelation of the notes, and damages. The case was transferred to the equity docket and there tried by the court below.

The court below set aside the sale agreement, canceled and ordered returned to plaintiff the deed to the Iowa land given to wife of defendant, and also canceled the two notes sued on, decreed that the deed to the Colorado land, which had not been recorded, be surrendered back and held for naught. Further, the lower court held, if any liens had been filed against the Colorado land, that they be removed, and further gave judgment to defendant for $303.97 with interest at 6 per cent. from date of decree,

this sum, being the difference between the down payment of $1,000 and the rent taken from the Iowa land. These findings form the basis of appellant's appeal.

The sale contract in this case dated December 11, 1934, provided for the sale of 160 acres of land in Harrison county, Iowa, to defendant. The defendant was to pay and did pay the $1,000 cash; he also gave two notes dated the next day, one for $1,000 due on or before January 20, 1935, and the other for $772.05 due on or before March 1, 1935. The defendant was also to cause to be deeded the quarter-section of Colorado land to plaintiff. The Colorado land was to be clear and by warranty deed. The Iowa land, conveyed by quitclaim, was to be subject to foreclosure for the amount of $10,160.60 and also accepted subject to the unpaid last half of 1933 taxes in sum of $67.35 and all subsequent taxes. The plaintiff was also to assign or cause to be assigned the Stansberry lease for 1935 crop, which is on basis of one-half of entire crop, delivered in the bin or elevator. Both parties were to furnish abstract showing merchantable title.

The Iowa land was conveyed to the wife of the defendant and the Colorado land was conveyed by the defendant's wife, who was the owner. The purchaser took possession of the Iowa land. This suit was not commenced until February 14, 1936, on the promissory notes and the answer and cross-petition was filed about two months later.

The evidence discloses that two real estate agents about two months before the contract was entered into prevailed upon the defendant and his wife to inspect the Iowa farm. The next day, the defendant at the request of these agents submitted an offer to purchase this land to an Omaha attorney who was a creditor and representative of the plaintiff, but the offer was rejected. Nothing more was done until the day the contract was entered into, then one of these same agents telephoned the defendant to meet the owner of the Iowa land at the Castle Hotel in Omaha. The defendant and his wife went to the plaintiff's room,

where the plaintiff, a land trader, and the same two agents and another real estate agent were present, and for several hours the proposition was discussed. Later they walked to the Conant Hotel where the contract was drawn, and about dark the defendant left with his wife. Before the contract was signed, the testimony of the plaintiff was to the effect the encumbrance on the Iowa land either had to be renewed or refinanced or he would not make the deal. The defendant also wished to investigate certain statements that had been made by the plaintiff relative to the figures on mortgage or for refinancing obtained from the Lougee office who handled the insurance company mortgage, but he was assured he would find all representations exactly as stated.

The plaintiff several times emphasized the fact that both he and the defendant checked up on the figures that same day. The testimony of the defendant just as emphatically conflicted. If the plaintiff's side of the case is true, then this case should be reversed. If not, then the statements of the plaintiff were fraudulent, because the true facts were concealed and the defendant had every reason to rely thereon. It is difficult to reconcile the testimony in this case, but the testimony of E. H. Lougee convinced this court, just as it convinced the trial judge, that the testimony of the plaintiff was false, and when part of his testimony has been proved false, it is very difficult to credit the remainder, and even, likewise, the contradicted testimony of the real estate fraternity of the plaintiff.

The rapid-talking real estate agents in this case moved too fast. The defendant had a right to rely on the express statements of the plaintiff, which the plaintiff knew were untrue, and defendant, having been induced to forego any such investigation, had a right, when he discovers the fraud, to rescind the contract and seek to have substantial justice done in the matter.

The right to rescind a contract for fraud must generally be done promptly when the discovery is made or when

the truth could be easily ascertained. But, in this case, the fact that the defendant might have discovered the truth by investigation is immaterial where he was fraudulently induced to forego making such investigation and when the representations were such as to disarm his vigilance and induce him to refrain from making such inquiries. 12 R. C. L. 375, sec. 127. He had a right to rely on the express statements of the plaintiff, the truth of which was known to the plaintiff and unknown to him, and also upon representations as to facts in the future. Having acted upon these future facts, if they turn out to be false, will entitle the injured party to the same remedy as fraudulent representations of existing facts.

"A person is justified in relying on a representation made to him in all cases where the representation is a positive statement of fact, and where an investigation would be required to discover the truth." *Foley v. Holtry*, 43 Neb. 133, 61 N. W. 120. The defendant had a right to rely on the express statements of the plaintiff, the truth of which was known to him and unknown to the defendant, as a basis of their mutual understanding. The evidence clearly shows this state of facts and moreover that the plaintiff did not wish any inquiries to be made. A contract for exchange of property will be set aside if fraudulent statements are made and acted upon, and the party making them, knowing they were false, had reason to believe the other party would rely upon them without any investigation. See *Rhodes v. Uhl*, 189 Ia. 408, 178 N. W. 394.

There is nothing in the evidence to indicate that the defendant ever approved the acts of fraud which procured his signature to the contract and notes.

The decree of the district court is the only decree that should have been entered, and it is by this court

AFFIRMED.

GUSTAV KRAEMER, APPELLANT, V. NEW YORK LIFE INSURANCE COMPANY, APPELLEE.
278 N. W. 886

FILED APRIL 8, 1938. No. 30268.

1. Appeal. In a law action, a verdict of a jury based on conflicting evidence will not be disturbed unless clearly wrong. *Tidd v. Stull*, 128 Neb. 506, 259 N. W. 369.
2. ———. "Ordinarily the credibility of a witness is a question for the determination of the jury, and it is within their province to credit the whole of his testimony or any part of it which appears to them to be convincing, and reject so much of it as in their judgment is unworthy of credit." *Baker v. Racine-Sattley Co.*, 86 Neb. 227, 125 N. W. 587.

APPEAL from the district court for Dixon county: MARK J. RYAN, JUDGE. *Affirmed.*

Edward F. O'Brien, W. V. Steuteville and *W. G. Jepson*, for appellant.

Brown, Fitch & West, contra.

Heard before GOSS, C. J., EBERLY, PAINE, CARTER and MESSMORE, JJ., and LIGHTNER and SPEAR, District Judges.

GOSS, C. J.

Action on an insurance policy to recover for disability. The jury returned a verdict for defendant. From a judgment thereon plaintiff appealed.

July 9, 1929, plaintiff purchased a policy of insurance from defendant. The policy was for $2,500 or for $5,000 (double indemnity) if death resulted from accident. The company agreed to pay the insured a monthly income of $25 and to waive payment of premium falling due during continuous total disability. The consideration was the payment of $102.33 premium paid in advance and a like sum each calendar year, payable July 9. The premium included $3.13 for the double indemnity benefits and $13.80 for the disability benefits. Premium could be paid annually, semiannually or quarterly in advance. Plaintiff alleged and the answer admitted that premiums were paid only to January 9, 1933. The suit was begun July 31, 1936.

Plaintiff alleged that on or about December 10, 1932, while carrying a half hog on his right shoulder, a ladder stationed in an upright position on his hog-house fell and struck the half hog, and plaintiff thereby sustained a severe injury to his spinal cord between the shoulder blades, and as a result thereof plaintiff has been continually and totally disabled; that said injury so affected plaintiff's mental and physical condition that he was unable to carry out the ordinary business duties incidental to his occupation and his condition grew gradually worse, and due to this condition plaintiff failed to pay the premium on his policy due in January, 1933; plaintiff pleads that the policy contained this provision among other things: "In event of default in payment of premium after the insured has become totally disabled as above defined, the policy will be restored and the benefits shall be the same as if said default had not occurred, provided due proof that the insured is and has been continuously from date of default so totally disabled and that such disability will continue for life or has continued for a period of not less than three consecutive months, is received by the company not later than six months after said default." Plaintiff alleges that, by reason of plaintiff's aforementioned impaired mental faculties due to the spinal injury, he did not notify defendant of his injury within the time stipulated in the policy and had forgotten and could not reasonably have remembered the existence of his policy of insurance; that as a proximate and direct result of said spinal injury plaintiff, on or about August 24, 1933, contracted sleeping sickness from which he regained consciousness about October 15, 1933; that the degenerative process left plaintiff with a total lack of business aptitude, and he did not become aware of the existence of the policy of insurance until he had reached a more normal state of mind, to wit, June, 1935, and notice was promptly thereafter given to defendant within the time stipulated in the policy, to wit, on or about July 1, 1935.

The answer of defendant denied each and every allega-

tion not admitted to be true; admitted that the policy was issued, and alleged the default of premium occurred on January 9, 1933, and still exists; pleads provisions of the policy as to proofs of disability to be furnished the company not later than six months after default, and alleges that plaintiff failed to furnish proofs of alleged disability within six months after the default, and denies that plaintiff suffered total and permanent disability as set forth in the contract.

The case was tried before a jury and both sides tendered evidence which was received and made a case upon which the jury could have found either for plaintiff or defendant. No fault is found with the instructions of the court. The vital assignment of error is that the verdict is not sustained by the evidence and is contrary to the evidence.

It may be said that in their testimony plaintiff and his witnesses described the manner in which he was injured and the effect upon him. There was an attempt to excuse the failure of plaintiff to make any claim for disability until long after the time fixed in the policy for such notice because of mental impairment to such an extent that plaintiff forgot that he had such a policy. Over against this there was evidence before the jury to the effect that in the spring of 1933 he remembered that he had a safety deposit box in the bank with his papers in it, remembered at that time, when he got a notice from the receiver of the bank, that Mr. Johnson was the receiver, that the receiver was at the bank at stated periods, and that he had a matter of business on which he wished to consult Mr. Johnson and remembered to see Mr. Johnson and to have conversation with him, remembered to get the papers out of the box and to take the envelope home with him. The insurance policy involved was in that envelope. All of this was within time to have given notice of disability under the policy. The failed bank from which he got the papers was in his market town a few miles from his home, where he went every week or two after his injury.

The fifth instruction given to the jury by the court con-

tained five propositions submitted to the jury in the form of questions for their deliberation. The fourth proposition was: "And was the plaintiff so disabled by reason of the injury as to prevent or excuse him from giving notice to the defendant company as to the disability caused by the injury?" Under the evidence before the jury they were justified in finding that his memory was not affected so as to excuse him from giving notice within the time provided by the policy.

In a law action, a verdict of a jury based on conflicting evidence will not be disturbed unless clearly wrong. *Tidd v. Stull,* 128 Neb. 506, 259 N. W. 369; *Harrell v. People's City Mission Home,* 131 Neb. 138, 267 N. W. 344.

It is true that defendant did not by direct testimony expressly contradict much of the testimony of plaintiff and some of his corroborating witnesses. It left the credibility of their testimony to the jury for consideration on its merits including the effect of cross-examination. In *Baker v. Racine-Sattley Co.,* 86 Neb. 227, 125 N. W. 587, the rule was stated as follows: "Ordinarily the credibility of a witness is a question for the determination of the jury, and it is within their province to credit the whole of his testimony or any part of it which appears to them to be convincing, and reject so much of it as in their judgment is unworthy of credit."

No error has been shown. For the reasons stated in the opinion, the judgment of the district court is

AFFIRMED.

JOSEPH C. WHEELER, APPELLEE, V. DIETZ HILL DEVELOPMENT COMPANY, APPELLANT.

279 N. W. 157

FILED APRIL 8, 1938. No. 30243.

1. **Sales.** Where parties to a contract for the sale and purchase of a commodity provide for inspection without designating the place to make it, the general rule is that the place of delivery is the place of inspection.

2. ———. Buyer of a commodity accepting and using quantities of it at different times without inspection, though having opportunities for inspections pursuant to contract, *held* liable for the contract price.

APPEAL from the district court for Cass county: WILMER W. WILSON, JUDGE. *Affirmed.*

Dwyer & Dwyer and *G. W. Duvall,* for appellant.

W. A. Robertson and *Lloyd E. Peterson, contra.*

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

ROSE, J.

This is an action to recover an alleged unpaid debt of $1,450 due plaintiff from defendant under a written contract executed by them September 11, 1934. The writing designated plaintiff, J. C. Wheeler, "party of the first part," and defendant, Dietz Hill Development Company, "party of the second part." The contract permitted defendant to enter upon a 50-acre tract of plaintiff's land in Cass county and quarry and remove rock therefrom upon the following terms and conditions:

"Party of the second part will enter said premises and build all buildings necessary for the quarrying of rock, having the right to remove same upon completion of the work, to excavate the rock, to fill rip-rap contracts which party of the second part may procure from contractors doing government work upon the Missouri river, said rock to be of dimensions not less than 3 inches thick nor weighing less than 30 pounds and to stand inspection of the United States engineers and to be paid for by party of the second part at the rate of 10—ten cents per cubic yard as measured by the United States engineers and paid for at that rate at the time the United States government's estimates are paid to the contractor. * * *

"It is further agreed that the second party has the right of ingress and egress to and from the public road at such point or points as will be most convenient to them for the

operation of said quarry and to remove fencing surrounding said property for such purpose.

"All dirt and refuse from said quarry shall be thrown in the place from which the rock is taken, or on the ground adjacent thereto, and second party is to bear the expense of building its own road and to pay the first party, or his tenants, a reasonable sum for all crops damaged or destroyed, said amount to be agreed upon between the parties at or before the destruction of said fields."

In an answer to the petition defendant admitted execution of the contract, and that it entered upon the premises of plaintiff and removed rock after September 11, 1934, but alleged it paid therefor according to the measurements made by the United States engineers pursuant to contract. Unadmitted allegations of the petition were denied. The reply to the answer contained a general denial.

Upon a trial of the cause the jury rendered a verdict in favor of plaintiff for $1,200. From a judgment therefor, defendant appealed.

It is argued as a ground of reversal that plaintiff did not prove any unpaid debt due under the contract. This proposition is based on defendant's interpretation of the contract and on its understanding of the evidence. It is contended that 7,139.25 cubic yards only were measured by the United States engineers, and that of this quantity 20 per cent., or 1,427.85 cubic yards, were rejected, leaving 5,711.40 cubic yards for which defendant agreed to pay at the price stipulated; that plaintiff received $625 and was overpaid.

This view disregards the place of inspection and eliminates rock taken by defendant from the premises but not used "to fill rip-rap contracts" which defendant procured "from contractors doing government work upon the Missouri river." The contract does not specifically designate a place of inspection. In view of such an omission, inspection is at the place of delivery, according to the general rule. 55 C. J. 423. There is evidence it was so understood by defendant. Inspection was a privilege which de-

fendant could waive. There is evidence that quantities of rock were quarried, removed and used by defendant without inspection of government engineers at the quarry, though opportunity therefor was given at that place. Liability for the contract price was therefore created. *Roman v. Bressler*, 32 Neb. 240, 49 N. W. 368; *Hazen v. Wilhelmie*, 68 Neb. 79, 93 N. W. 920. There is no issue of *quantum meruit*.

The dimensions of the excavated area were open for measurements and calculations. There is evidence that defendant received in the neighborhood of 22,000 cubic yards and that about 20 per cent. of the rock was objectionable. Deducting objectionable rock and crediting defendant with $625 which it paid, the verdict for $1,200 is sustained by the evidence. Having reached these conclusions on the controlling questions of law and fact, rulings of the district court on evidence and in giving and refusing instructions are found to be without error prejudicial to defendant.

AFFIRMED.

STATE, EX REL. RICHARD C. HUNTER, ATTORNEY GENERAL, PLAINTIFF, V. W. H. HATTEROTH, DEFENDANT.
279 N. W. 153

FILED APRIL 8, 1938. No. 30297.

1. **Attorney and Client.** An attorney is bound by oath, when admitted to the bar, "to maintain the respect due to the courts of justice" and "to abstain from all offensive practices." Comp. St. 1929, sec. 7-105.
2. ———: DISBARMENT. "Misappropriation by an attorney of money belonging to his client is such a disregard of duty as to warrant disbarment." *State v. Priest*, 123 Neb. 241, 242 N. W. 433.

Original proceeding by the state, on the relation of the attorney general, to disbar the defendant. *Judgment of disbarment.*

Richard C. Hunter, Attorney General, Barlow Nye and *Paul P. Massey,* for plaintiff.

W. H. Hatteroth, pro se.

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

ROSE, J.

This is a prosecution by the state of Nebraska on the relation of the attorney general to disbar the defendant who had been regularly admitted by the supreme court to practice law.

The complaint against defendant charges, in substance, that he was retained December 13, 1935, to perform professional services for Raymond H. Reed and Ora Reed and to represent them as his clients in a pending suit in the district court for Douglas county to foreclose a mortgage on their home in favor of the Occidental Building & Loan Association; that while a decree of foreclosure was temporarily stayed July 27, 1936, defendant advised his clients that payment of $320.26 would satisfy the judgment of foreclosure against them; that, to discharge their debt and to satisfy the decree, they paid to defendant $320.26, for which he receipted in writing July 27, 1936; that defendant did not discharge the judgment against them or return their money to them but converted it to his own use; that the mortgaged home of the clients was sold at foreclosure sale December 29, 1936, after expiration of the stay, and purchased by mortgagee; that the sale has not been confirmed, owing to a moratorium requiring the clients to pay the purchaser a monthly rental to retain possession of their home.

To the complaint defendant filed an answer October 27, 1937, one paragraph of which reads as follows:

"Admits that on July 27, 1936, this defendant received from Ora Reed and Raymond H. Reed the sum of $320.26, and that he gave to them a receipt, as set forth in the complaint herein. Alleges that thereupon defendant arranged with the Rivett Lumber Company, one of the de-

fendants in said foreclosure action, to release its mechanic's lien on the premises, which lien was released of record on September 11, 1936; and defendant also on several occasions conferred with Mr. Ellery H. Westerfield, attorney for plaintiff in the foreclosure action, as to settlement of the case, and defendant fully intended to satisfy the judgment, interest and costs, but inasmuch as the nine months' stay did not expire until October 14, 1936, defendant used some of his clients' money—fully expecting to be able to replace the same and satisfy the decree, but defendant regrets to state that he was not able to replace it, due to disappointment in business affairs; that defendant is making diligent efforts to obtain the money so as to satisfy the judgment, interest and costs in the foreclosure case, and to make restitution to the satisfaction of Mr. and Mrs. Reed, as he has always wanted to do and expects to be able to do in the very near future."

Relator demurred to the answer on the ground that it did not state facts sufficient to constitute a defense and moved for judgment on the pleadings.

The demurrer and the motion were presented in open court March 9, 1938. It is plain on the face of the pleadings that defendant had not then performed his duty to apply the money which he received from his clients to the satisfaction of the decree foreclosing the mortgage on their home. Subsequent performance has not been shown. His relation to his clients was not that of an ordinary debtor. *State v. Goldman,* 127 Neb. 340, 255 N. W. 32. His relation was one of trust and confidence involving professional honor of a lawyer in a court of justice. He was a trustee with the money of his clients in his hands for a specific purpose. Solemn and impressive as this relation is, the complaint of the attorney general includes more than violation of duties of lawyer to client. Attorneys must also conform at their peril to established standards of conduct in their relations to courts, to the legal profession and to the public in general. *State v. Ireland,* 125 Neb. 570, 251 N. W. 119. The bar is part of an institution

of government for the administration of justice. Judges of courts are selected from its membership. If the source from which memberships in judicial tribunals are chosen is untainted, respect for courts themselves will be correspondingly increased. Reproach on the bar may reflect on the bench. The armor of courts is purity of purpose and excellence in performance of duty. It is a mission of lawyers to aid them in the administration of justice as well as to serve their clients. They are educated by the public for those purposes. The state provides schools for their training and maintains libraries furnishing the sources of knowledge essential to the practice of the law. The responsibilities of attorneys are commensurate with their duties to their clients, the public, the courts and the legal profession. For them in their professional capacity there is no moratorium on breach of trust, on violation of confidence, on misappropriation of trust funds or on other reprehensible misconduct. The legislature imposed on attorneys the duties "to maintain the respect due to the courts of justice" and "to abstain from all offensive practices." Comp. St. 1929, sec. 7-105. These duties are contemplated in the oath taken when a student in the law is admitted to the bar. A standard of discipline was stated in a former opinion as follows:

"Misappropriation by an attorney of money belonging to his client is such a disregard of duty as to warrant disbarment." *State v. Priest,* 123 Neb. 241, 242 N. W. 433.

Where a long and honorable career at the bar calls eventually for discipline, as it does in the present instance, the natural promptings of sympathy and mercy are not absent from the bench, but sentiment cannot be permitted to prevent disbarment for the professional misconduct charged by relator and confessed by defendant.

The demurrer to the answer and the motion for judgment on the pleadings are sustained. Defendant is disbarred from the practice of the law in Nebraska, his license canceled and his name stricken from the roll of attorneys and counselors at law.

JUDGMENT OF DISBARMENT.

GRACE BROWN, APPELLANT, V. DAVENPORT HOLDING COMPANY, APPELLEE.
279 N. W. 161

FILED APRIL 8, 1938. No. 30285.

1. **Negligence.** An owner has the duty of exercising ordinary care for the safety of an invitee.
2. ———. In the absence of unusual circumstances and conditions, the maintenance of polished hardwood floors and the use of small rugs in an apartment is not negligence for which the owner is liable to a prospective tenant invited to inspect the premises.

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

Lower & Sheehan, for appellant.

Kennedy, Holland, De Lacy & Svoboda, contra.

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

DAY, J.

This is an action for damages for personal injuries brought against the owner and operator of an apartment building by one who visited the premises in response to an advertisement for the purpose of leasing an apartment. Mrs. Brown, the appellant, stepped upon a small rug, slipped, and fell to the floor while inspecting the apartment. At the conclusion of the plaintiff's evidence, the court directed a verdict for the defendant.

Mrs. Brown, in answer to the advertisement, visited the apartment building with her husband and daughter for the purpose of inspection, and with a view of leasing an apartment for the use of her daughter. They looked at the living-room and the kitchen, and then walked into the bedroom. Mrs. Brown then started to walk across to the window, and as she passed the foot of the bed she stepped upon a small rug, slipped, and fell at the foot of the bed. The party was shown the apartment by an agent of the owner, and the only question presented to this court is

the liability of the owner for the condition of the floor as maintained by him. There is no dispute as to the furnishings of the room, nor as to the manner of the fall. There was a small rug at the foot of the bed and Mrs. Brown stepped upon it and fell. The floor was waxed hardwood such as the appellant was accustomed to in her own home. The evidence indicates that the floor was highly polished, and that the rug would slip. In fact, the husband of the injured woman put his foot on the rug and found it would move easily. He also turned the rug over and found that "it looked like it had been waxed, or it was just shellac underneath, now." The daughter did not make an inspection of the floor and rug, and this is the only evidence upon which to predicate liability.

Of course, an owner is bound to exercise ordinary or reasonable care for the safety of an invitee, which Mrs. Brown was in this case. 45 C. J. 823; *Tucker v. Draper*, 62 Neb. 66, 86 N. W. 917; *Broadston v. Beddeo Clothing Co.*, 104 Neb. 604, 178 N. W. 190. The owner owed the invitee ordinary care to protect her from hidden and unusual dangers, and the question arises as to whether or not there was an unusual danger in this case. The evidence does not establish that the floor was waxed except in the ordinary manner. True, it is described by the witnesses as "slippery" and "highly polished," but at the same time they declare that it was a highly polished hardwood floor. The rug was at the foot of the bed. Only one witness examined the rug, and his testimony with respect to it has heretofore been set out. While this evidence states that the bottom of the rug was waxed or shellacked, it does not establish that this rug was different in any way from other ordinary rugs and because of such difference unusually dangerous. The ordinary condition of an apartment or a home confronted the appellant. It is not comparable to a defect such as a hole in the floor, or a sloping aisle in a store. The common use of waxed and polished floors, covered with small rugs, in homes and apartments is a matter of common knowledge. In the instant case

the evidence establishes that the appellant knew of such use. They are not inherently dangerous to invitees. In the absence of unusual circumstances and conditions, the maintenance of polished hardwood floors and the use of small rugs in an apartment is not negligence for which the owner is liable to a prospective tenant invited to inspect the premises. *Nelson v. Smeltzer,* 221 Ia. 972, 265 N. W. 924. Another court held that a prospective tenant having been invited to inspect a tenement, the owner was charged to maintain it in a reasonably safe condition. *Sleeper v. Park,* 232 Mass. 292, 122 N. E. 315. Though a polished floor is slippery and light rugs are apt to slide, since such rugs are in common use their use is not negligence unless there is something unusual about them. There was nothing unusual about the floor or the rug in this case, and the verdict was properly directed.

AFFIRMED.

LODENA MAE DOWNS, APPELLANT, V. FRED DOWNS, APPELLEE.

279 N. W. 151

FILED APRIL 8, 1938. No. 30303.

1. **Appeal.** Without a bill of exceptions, the only question to be considered by this court is the sufficiency of the pleadings to support the judgment of the trial court.
2. ———. In the absence of a bill of exceptions, it is presumed that an issue of fact raised by the pleadings received support from the evidence, and that such evidence was correctly determined.
3. **Divorce:** CUSTODY OF CHILD. A decree awarding care and custody of a minor child to the mother in a divorce suit will not be modified unless the mother is unfit or the best interests of the child require such action.

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

Jackson B. Chase and *Bryce Crawford, Jr.,* for appellant.

Shotwell & Vance, Benjamin S. Baker and *Edward Shafton, contra.*

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

DAY, J.

This is a proceeding upon an application of a mother of a child against the divorced father for additional money for the support of the child. The father filed an answer and a cross-petition, asking that the care and custody of the child be awarded to him. The trial court, at the close of a three and a half day hearing, did not award the child to either the father or the mother, but to the chief juvenile probation officer of the district court for Douglas county, Nebraska, with certain orders as to the disposition of the money which was ordered paid by the father. The mother appeals from the order.

A brief review of the history of the case will perhaps help us to a better understanding of the issues. Differences arose between the father and mother of the infant child, Jean Lou Downs, in 1931, and a decree of divorce was entered as a consequence on the 29th day of March, 1932. At the time the minor child was about three years of age, and the decree awarded the care, custody and education of the child to the mother, who has had it since that time. The decree provided that the father should pay the mother for the support and maintenance of said child the sum of $30 a month, which sum has always been paid. In April, 1935, the mother made an application to increase the allowance. The application states that another application had been made, and a hearing held therein, but the record does not show this. The father filed an answer to that application, alleging the decree of March, 1932, and asking that the plaintiff's petition be dismissed. He also filed a cross-petition in which he asked that he be given the care and custody of the minor child. Since there is no bill of exceptions in this case, the cross-petition becomes important, because, without a bill of exceptions,

the only question to be considered by this court is the sufficiency of the pleadings to support the judgment of the trial court. If the pleadings are sufficient to support the judgment that was rendered by the trial court, it will be affirmed. *Towle v. Richardson County,* 130 Neb. 467, 264 N. W. 335; *Plantz v. Peony Park,* 129 Neb. 338, 261 N. W. 826; *State v. Barney,* 133 Neb. 676, 276 N. W. 676. In the absence of a bill of exceptions, it is presumed that an issue of fact raised by the pleadings received support from the evidence, and that such evidence was correctly determined. *State v. Barney, supra.*

If the cross-petition here is insufficient to support the judgment of the court, said judgment must be reversed. In this case, the care and custody of a nine-year old girl was taken from the mother after she had enjoyed it for over five years under a decree of divorce entered in March, 1932. The material part of the cross-petition is here set out: "The defendant alleges that the plaintiff is an improper person to have the care and custody of said minor child. * * * The plaintiff has no permanent place of abode, but shifts from place to place, and the child has no place of living, and has not been under the parental care of the plaintiff and has no means to take proper care and support of the said minor child."

These are the only allegations upon which the court could change the care and custody of the minor child. The first allegation is that the mother is an improper person to have the care and custody of the minor child. In its decree the trial court found generally against the father in his cross-petition. Nowhere in the decree is there a specific finding that the mother is an improper person to have the care and custody of her own nine-year old daughter. So far as the record is concerned, there is no finding of the trial court that the mother is an improper person to be awarded the care and custody of said child.

The other allegations in the cross-petition, stating that the plaintiff has no means with which to support herself

or to take care of the minor child, or that she has no permanent place of abode, are not sufficient allegations to deprive a mother of the care and custody of a minor daughter. This merely confirms the allegations of the plaintiff that the amount awarded is insufficient. There is no finding of the trial court that these are even true. The presumption that the facts supported the findings of the trial court on the allegations does not help to sustain the judgment under these findings, and the judgment cannot stand.

A decree of divorce was entered in the suit of the mother against the father of this child in March, 1932. That decree awarded the care and custody of the child to the mother. The decree, in so far as the minor child is concerned, is never final in the sense that it cannot be changed. Section 42-312, Comp. St. 1929, states: "If the circumstances of the parents shall change, or it shall be to the best interests of the children, the court may afterwards, from time to time, on its own motion, or on the petition of either parent, revise or alter to any extent, the decree so far as it concerns the care, custody and maintenance of the children or any of them."

Where, as here, there is a decree awarding care and custody of a minor child to the mother in a divorce suit, it will not be modified unless the mother is unfit, or the best interests of the child require such action. *Gross v. Gross*, 122 Neb. 25, 239 N. W. 201; *Chambers v. Chambers*, 75 Neb. 850, 106 N. W. 993. The court does not find that the mother is unfit, and it is not alleged in the cross-petition or found by the court in the decree that the best interests of the child require that the decree be modified.

In view of the foregoing conclusions, it becomes imperative that the judgment of the trial court be reversed, and the petition and cross-petition be dismissed in the case, without, of course, prejudice to a further application with reference to the custody and support of the child. While perhaps the judicial processes of the court are inadequate to properly attend the needs of a child of divorced parents,

nevertheless the ordinary rules of pleading and evidence are applicable when resort is had to the courts. One of the safeguards thrown about such a child is that the decree is subject to modification to meet changing circumstances. But the record here does not establish the necessity or authority for a modification.

REVERSED.

ANDREA ALESIO, APPELLEE, V. ANTHONY LOCOCO, JR., APPELLANT.

279 N. W. 154

FILED APRIL 8, 1938. No. 30242.

1. **Automobiles:** INJURY TO GUEST: LAW GOVERNING. In an automobile accident occurring in the state of Texas, the liability of the driver to his guest is determinable by the laws of that state, when pleaded.
2. ———: ———: GROSS NEGLIGENCE. Under the Texas guest statute, gross negligence is such negligence as evidences reckless disregard of human life, or such conscious indifference to the rights of others as amounts to an intentional violation of them.

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

L. R. Doyle, for appellant.

Jack W. Cohen and *R. M. Anderson*, *contra.*

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

PAINE, J.

This is a suit by a guest for personal injuries sustained in a head-on collision with another automobile. The jury returned a verdict for $1,500, for which judgment was entered, and defendant appeals.

The defendant admits that the collision occurred, but denies he was guilty of gross negligence, and charges plaintiff with contributory negligence; alleges that plain-

tiff was acquainted with ability of defendant as a driver, and assumed the risk of travel in defendant's automobile.

The evidence discloses that the defendant was a football fan, who had driven to the Rose Bowl game in 1934, and planned to make the trip again in December, 1935. The plaintiff asked to be taken along, as he had two daughters living in California. Defendant said the car was full, but if anybody dropped out the plaintiff could ride with them, and just before starting one person decided not to go, and the plaintiff made the trip as a gratuitous guest, riding at all times in the back seat with the father of the defendant. Leaving Lincoln December 26, 1935, they made Dallas the first day, El Paso the second, Yuma, Arizona, the third, and Los Angeles the fourth day. On the return trip they left Los Angeles Thursday morning, January 9, 1936, and made Phoenix, Arizona, the first night. Leaving Phoenix the next morning on U. S. Highway No. 80, they reached a point between 15 and 17 miles west of Pecos, Texas, by about 8:00 p. m. that night. It was after dark, and all cars were using their headlights, when a head-on collision occurred.

Plaintiff claims this collision occurred as follows: One Carl Proctor was driving a Buick slowly westward, with proper care and caution, on the north and right-hand side of U. S. Highway No. 80, having just come out of a filling station located on the north side of the road. The defendant was coming around a curve, driving eastward at a high rate of speed in excess of 65 miles an hour, and in gross negligence, with a wanton and reckless disregard of human life and a conscious indifference to the consequences to others, ran his car on the wrong side of the highway, and, failing to see the said Buick, drove his automobile directly into it with great force and violence, so that the plaintiff suffered serious, painful, and permanent injuries, which first confined him to the Camp & Camp Hospital in Pecos, Texas, and thereafter in his home in Lincoln, Nebraska. The plaintiff testified that a short time before the crash he objected to the father of the de-

fendant, who was sitting in the rear seat with him, and said the son was driving too fast; that the father spoke to the son, who answered, "What is the matter, you scared?"

The defendant testified that he was 32 years of age, lived in Lincoln all his life, and assisted his father in the grocery business; that he had known the plaintiff for 15 years, and that they reside in the same block, almost across the alley from each other, and that the plaintiff is in the fruit business in Lincoln. The defendant drove the car on the entire trip, and testified that at the point of collision there was a curve or bend where the accident occurred; that he did not see the Buick car until he was within 75 yards; that he thought the Buick was coming clear over on the wrong side of the road, and therefore, in order to avoid a collision, he turned to the left-hand side in order to go around it on the north side, and instead he hit it head-on. The defendant testified that the accident happened very fast, but he had applied his brakes and decreased the speed, and that before the accident he had been running less than 45 miles an hour.

The defendant sets out many errors relied upon for reversal. They include the failure of the court to direct a verdict for defendant or to dismiss the suit, and a failure to enter judgment for the defendant.

The plaintiff introduced in evidence several sections of Texas law covering the laws of the road, and also the Texas guest law, being section 1, ch. 225, Laws of Texas 1931, which provides as follows: "No person transported over the public highways of this state by the owner or operator of a motor vehicle as his guest without payment for such transportation, shall have a cause of action for damages against such owner or operator for injuries, death or loss, in case of accident, unless such accident shall have been intentional on the part of said owner or operator, or caused by his heedlessness *or* his reckless disregard of the rights of others."

The defendant insists that the court erred in not in-

structing the jury that, in the statute just quoted, the word "or" means "and," and that the court should have instructed the jury that this law meant "caused by his heedlessness *and* his reckless disregard of the rights of others." The trial judge covered this question in his seventh and eighth instructions to the jury, the latter reading as follows:

"You are instructed that under the Texas law involved in this case gross negligence is such negligence for which defendant may be liable in damages if you find from the evidence he was guilty of gross negligence in the operation of the said Lococo automobile, is such negligence as evidences reckless disregard of human life or bodily injuries, or such conscious indifference to rights of others as amounts to an intentional violation of them; is such that is evidenced by acts indicating a wanton and reckless disregard for the life or safety of the plaintiff or others in the said automobile; and is that entire want of care which would raise a presumption of conscious indifference to consequences."

In the late case of *Scott v. Gardner*, 106 S. W. (2d) (Tex. Civ. App.) 1109, the Texas court suggests that a sufficient definition of heedless and reckless is the following: "Such an entire want of care (not including, but excluding, ordinary care) sufficient to raise the belief or presumption that the act or omission complained of was the result of conscious indifference to the rights, welfare, or safety of the person or persons to be affected by it;" and this definition suggested by the Texas court was substantially followed by Judge Broady. See, also, *Hamilton v. Perry*, 85 S. W. (2d) (Tex. Civ. App.) 846; *Meyer v. Hart*, 110 Conn. 244, 147 Atl. 678.

The law of Texas required plaintiff to drive at not to exceed 45 miles an hour, and required him to keep on the right-hand side of the highway, and not to pass another automobile at such a speed as to endanger the life or limb of any person.

The testimony of Sam Oakley was that defendant's car

was going 60 miles an hour at the time of the collision, while the Buick was not exceeding 12 miles an hour at that time. Mrs. Carl Proctor, also in the Buick, testified the defendant was running 65 to 70 miles an hour at the time of the collision. Mrs. Proctor gave this answer: "Well, I just walked up there and I said, 'Man, what in the world is the matter with you? Are you drunk, crazy, or what?' He said, 'Lady, I can't tell you whether I went to sleep or whether I'm "loco."' That's what he said. 'I don't know what happened.' "

The jury heard all of the evidence and found against the defendant on the questions of fact; the rulings and instructions of the trial court do not disclose any prejudicial error, and while we have examined all of the errors set out, we will not discuss them all in this opinion, but hereby affirm the judgment of the lower court.

AFFIRMED.

JAMES J. CHALUPNIK, APPELLANT, V. IRVIN S. BRANT, APPELLEE.

279 N. W. 159

FILED APRIL 8, 1938. No. 30296.

1. **Evidence.** When the consideration of a contract is promissory or contractual in its nature, it cannot be varied by parol evidence.
2. **Contracts:** CONSIDERATION. Reciprocal promises as a basis of a valid agreement must be equally obligatory upon the parties; otherwise such agreement is *nudum pactum.*
3. ———: ———. Contracts entered into or promises made on the basis of relations of friendship and good-will, unsupported by pecuniary benefit, create at most moral obligations, and a breach thereof presents no cause for redress by the courts.

APPEAL from the district court for Madison county: CHARLES H. STEWART, JUDGE. *Affirmed.*

James P. Marron and *Frederick M. Deutsch,* for appellant.

Webb Rice, contra.

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

PAINE, J.

The trial court sustained a demurrer to the original petition for damages for breach of a contract, and then sustained a motion to strike out a large part of an amended petition, and, after sustaining another demurrer, dismissed the amended petition. Plaintiff appeals.

This lawsuit is based upon a written contract between the plaintiff and defendant, dated December 15, 1933, which provided, among other things, that as Chalupnik, the plaintiff herein, and second party in said contract, was operating a creamery at Verdigre, and was well acquainted with the creamery business in north Nebraska, "his good-will and advice is of value to the new organization to be made by first party, and first party desires to compensate second party for such advice and good-will."

This contract further provided that, when the new corporation to be formed at Norfolk was organized, "10% of which stock is to be assigned and transferred to second party for the considerations hereinbefore stated." It was provided that such 10 per cent. of the stock should be issued to second party "without any consideration other than that hereinbefore stated."

The plaintiff brought suit, based on this contract, exhibit A, attached to the petition, and set up that the defendant has wholly failed and refused to issue the stock as provided in the contract, and plaintiff prayed for damages in the sum of $10,000. Demurrer being filed was argued and sustained, but plaintiff was given permission to file an amended petition, which was duly filed.

The defendant filed a motion to strike out 14 paragraphs of plaintiff's amended petition, which set up an alleged oral contract, which it was alleged attempted to vary and contradict the written contract, exhibit A, attached thereto. The district court sustained this motion and a de-

murrer to such amended petition. Plaintiff electing to stand upon said demurrer, and not to plead further, the said petition was dismissed. The sustaining of the motion to strike and the sustaining of the demurrer are set out as errors of the court.

The appellant presents as his first proposition of law that "the recitals of a written instrument as to consideration are not conclusive, and it is always competent to inquire into the consideration and show by parol or other evidence what the real consideration was." We are cited to *Hartman v. Lipovsky,* 122 Neb. 823, 241 N. W. 563, as his authority, in which case it was held that, when the contract contained the words "$4,000 in cash, the receipt whereof is hereby acknowledged," it is a recitation of fact, and not a contractual part of the contract, and that such an acknowledgment of the receipt of consideration may be explained or contradicted by parol evidence. 4 Neb. Law Bulletin, 132, sec. 10, discusses this point, and sets out that, when the consideration is promissory or contractual in its nature, it cannot be varied by parol, citing many Nebraska cases.

It may be admitted that, if the contract in the case at bar was ambiguous, parol evidence might be admissible, but in this case the court can easily determine its full meaning when construed as a whole, and the intention of the parties stands out very clearly.

The oral contract, set out in the amended petition, which was stricken out by the trial judge on motion, set out an entirely different agreement than is disclosed in the written contract which is attached to the amended petition.

This court has adhered rather closely to the parol evidence rule, as discussed in *Theno v. National Assurance Corporation,* 133 Neb. 618, 276 N. W. 375, and in our opinion the trial court was right in sustaining the motion to strike out many paragraphs of the amended petition setting out oral agreements between the parties.

After all such paragraphs of the petition as referred

to an oral agreement were stricken out, it left the written contract, which states near the end that it contains a correct statement of facts, and this can hardly be doubted. In another of the closing paragraphs it states that the 10 per cent. of all the stock of the corporation is to be transferred and conveyed without any consideration other than that hereinbefore stated, which was the advice and good-will of Mr. Chalupnik, but the next paragraph limits the advice and good-will to that which does not conflict with his own interest, and thus limited he agrees to do all he reasonably can to assist in the success of the creamery company. The stock that was to be given him in the sixth paragraph of the contract (although it is not so numbered in the original) was some 30 shares of stock, of the par value of $10 each, and on the failure to give such stock suit is brought for damages of $10,000.

The demurrer was sustained by the trial court on the ground that the contract lacked mutuality, in that it did not obligate Mr. Chalupnik to furnish other than his good-will and advice, and it has been held many times that good-will is not a sufficient consideration for an executory contract.

"Reciprocal promises as the basis of a valid agreement must be equally obligatory upon the parties, so that each may have an action thereon; otherwise such agreement is *nudum pactum.*" *State v. Holcomb,* 46 Neb. 612, 65 N. W. 873.

"Contracts entered into or promises made on the basis of relations of friendship and good-will, unsupported by pecuniary or material benefit, create at most bare moral obligations, binding only on the conscience, and a breach thereof presents no cause for redress by the courts." *Rask v. Norman,* 141 Minn. 198, 169 N. W. 704, 17 A. L. R. 1296.

If the defendant and appellee was suing the plaintiff and appellant on his promises as set out in the written contract, could he recover damages for failure to per-

form? We do not believe he could. He asserts that his part of it was performed before the writing was drawn up, and that the only obligation was to transfer the stock to him. If so, it was *nudum pactum.* The district court dismissed the action on the theory that nothing had been done under the contract which legally entitled him to the $300 worth of stock, or to damages because the stock was not delivered. This court had before it a case involving the same Norfolk creamery, entitled *Elvidge v. Brant,* 131 Neb. 1, 267 N. W. 169.

We have examined the record in this case, and find that no prejudicial error was committed by the trial court, and the judgment of dismissal is

AFFIRMED.

IDA BALSTER, ADMINISTRATRIX, APPELLANT, V. OTTO C. KELLER ET AL., APPELLEES.
279 N. W. 156

FILED APRIL 8, 1938. No. 30284.

1. Mortgages: MORATORIUM. A moratory stay under the provisions of section 20-21,159, Comp. St. Supp. 1937, should be denied when it appears that the amount of the liens exceeds the value of the real estate involved.
2. ———: ———. Evidence examined and found to establish that the amount of liens exceeds the value of the real estate.

APPEAL from the district court for Cuming county: CHARLES H. STEWART, JUDGE. *Reversed.*

Zacek & Nicholson, for appellant.

John J. Gross, contra.

Heard before GOSS, C. J., ROSE, DAY, CARTER and MESSMORE, JJ., and LIGHTNER and SPEAR, District Judges.

SPEAR, District Judge.

Appeal by plaintiff from an order of the district court for Cuming county wherein that court granted a mora-

tory stay to defendants Keller, under the provisions of section 20-21,159, Comp. St. Supp. 1937.

Defendant Otto C. Keller is the owner of 200 acres of land situated about 5½ miles northeast of Wisner, which was mortgaged to Fred Balster, deceased. Ida Balster, administratrix with the will annexed, brought this action to foreclose the mortgage. Decree of foreclosure was entered on October 30, 1933, in the sum of $23,675, with interest from the date of the decree at the rate of 5¼ per cent. per annum on $21,225, and at 10 per cent. per annum on $2,450. At the time of the granting of the moratory stay on June 10, 1937, this judgment amounted to over $28,000. In addition there was at that time a second judgment lien amounting to over $6,500, making a total of over $170 an acre.

Plaintiff objected to the granting of the moratory stay upon several grounds, among which are that the liens exceeded the value of the premises, and that the act of the legislature authorizing the granting of moratory stays is unconstitutional.

Plaintiff does not contend that the law is unconstitutional for any of the reasons by which this court held the law unconstitutional in the case of *First Trust Co. v. Smith, ante,* p. 84, 277 N. W. 762, and did not cite any authorities upon her propositions in her brief nor argue the same. Therefore, the constitutional objections raised by plaintiff will not be considered.

This brings us to the question of value. A number of witnesses testified, but it will not be necessary to go over this somewhat conflicting testimony in detail. We are of the opinion that the amount of the liens upon these premises far exceeds the value of the land, and that the district court erred in granting the moratory stay. *Clark v. Hass,* 129 Neb. 112, 260 N. W. 792; *Equitable Trust Co. v. Groves,* 133 Neb. 177, 274 N. W. 457.

REVERSED AND REMANDED.