Nebraska Supreme Court Online Library
www.nebraska.gov/apps-courts-epub
07/13/2026 12:53 AM CDT

REPORTS OF CASES

DECIDED BETWEEN
APRIL 27, 1945 AND MARCH 15, 1946

IN THE

Supreme Court of Nebraska

SEPTEMBER TERM, 1945
AND JANUARY TERMS, 1945, 1946.

VOLUME CXLVI

WALTER D. JAMES
OFFICIAL REPORTER

CLAFLIN PRINTING COMPANY
LINCOLN, NEBRASKA
1946

Copyright A. D. 1946
By WALTER D. JAMES, REPORTER OF THE SUPREME COURT
For the benefit of the State of Nebraska

SUPREME COURT

DURING THE PERIOD OF THESE REPORTS

ROBERT G. SIMMONS, Chief Justice
BAYARD H. PAINE, Associate Justice
EDWARD F. CARTER, Associate Justice
FREDERICK W. MESSMORE, Associate Justice
JOHN W. YEAGER, Associate Justice
ELLWOOD B. CHAPPELL, Associate Justice
ADOLPH E. WENKE, Associate Justice

WALTER D. JAMES	Reporter
HAZEL N. TWIFORD	Assistant Reporter
GEORGE H. TURNER	Clerk
MAYSEL E. TAYLOR	Deputy Clerk
WALTER R. JOHNSON	Attorney General
CLARENCE S. BECK	Assistant Attorney General
HOMER L. KYLE	Assistant Attorney General
H. EMERSON KOKJER	Assistant Attorney General
ROBERT A. NELSON	Assistant Attorney General
EDWIN VAIL	Assistant Attorney General
CARL H. PETERSON	Assistant Attorney General
ERWIN A. JONES	Assistant Attorney General

JUDICIAL DISTRICTS AND DISTRICT JUDGES

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.	Thomas E. Dunbar	Neb. City
Third	Lancaster.	Jefferson H. Broady	Lincoln
		John L. Polk	Lincoln
		Ralph P. Wilson	Lincoln
		Harry Ankeny	Lincoln
Fourth	Burt, Douglas and Washington.	Charles Leslie[1]	Omaha
		James M. Fitzgerald	Omaha
		Herbert Rhoades	Tekamah
		Francis M. Dineen	Omaha
		Arthur C. Thomsen	Omaha
		Willis G. Sears	Omaha
		William A. Day	Omaha
		Henry J. Beal	Omaha
		James T. English	Omaha
Fifth	Butler, Hamilton, Polk, Saunders, Seward and York.	Lovel S. Hastings	David City
		Harry D. Landis	Seward
Sixth	Boone, Colfax, Dodge, Merrick, Nance and Platte.	Louis Lightner	Columbus
		Frederick L. Spear[2]	Fremont
		Russell A. Robinson[3]	Fremont
Seventh	Fillmore, Nuckolls, Saline and Thayer.	Stanley Bartos	Wilber
Eighth	Cedar, Dakota, Dixon and Thurston.	Sidney T. Frum	South Sioux City
Ninth	Antelope, Cuming, Knox, Madison, Pierce, Stanton and Wayne.	Lyle E. Jackson	Neligh
		Fay H. Pollock	Stanton
Tenth	Adams, Clay, Franklin, Harlan, Kearney, Phelps and Webster.	Frank J. Munday	Red Cloud
		Edmund P. Nuss	Hastings
Eleventh	Blaine, Garfield, Grant, Greeley, Hall, Hooker, Howard, Loup, Thomas, Valley and Wheeler.	Ernest G. Kroger	Grand Island
		William F. Spikes	St. Paul
Twelfth	Buffalo, Custer, Logan and Sherman.	Eldridge G. Reed	Kearney
Thirteenth	Arthur, Banner, Cheyenne, Dawson, Deuel, Keith, Kimball, Lincoln and McPherson.	J. Leonard Tewell	Sidney
		Isaac J. Nisley	North Platte
Fourteenth	Chase, Dundy, Frontier, Furnas, Gosper, Hayes, Hitchcock, Perkins and Red Willow.	Charles E. Eldred[4]	McCook
		Victor Westermark[5]	Benkelman
Fifteenth	Boyd, Brown, Holt, Keya Paha and Rock.	Dayton R. Mounts	Atkinson
Sixteenth	Box Butte, Cherry, Dawes, Sheridan and Sioux.	Earl L. Meyer	Alliance
Seventeenth	Garden, Morrill and Scotts Bluff.	Claibourne G. Perry	Gering
Eighteenth	Gage and Jefferson.	Cloyde B. Ellis	Beatrice

[1] Died December 3, 1945.
[2] Resigned October 31, 1945.
[3] Appointed November 1, 1945.
[4] Died December 19, 1945.
[5] Appointed February 2, 1945.

PRACTICING ATTORNEYS

Admitted since the Publication of Volume 145

HENRY W. DRISCOLL
WILLIAM E. MOONEY
LAWRENCE M. PROBST
JAMES W. R. BROWN
GEORGE E. SVOBODA
ROWAN T. THOMAS
ROBERT F. ELLIOTT

TABLE OF CASES REPORTED

Abrams, State Furniture Co. v. 342
Aiken, Alloway v. 714
Alloway v. Aiken 714
Anderson v. Neb. Defense Corporation 466
Antelope, County of v. State Board of Equalization and Assessment 662
ASCAP, Malec v. 358
ASCAP, WOW Life Ins. Society v. 358

Bauermeister, Glissmann v. 197
Beckmark, Williams v. 814
Bednar v. Bednar 726
Bloomfield, City of, Hassmann v. 608
Born v. Keil 912
Box v. Box 826
Brown v. Brown 908
Burke, Thorin v. 94

C & C Motor Co., Campbell v. 721
Campbell v. C & C Motor Co. 721
Carpenter v. Carpenter 140
Caspers v. Frerichs 740
Central Neb. Public Power & Irrigation District, Robinson v. 534
Cheyenne, County of, Dickenson v. 36
Chicago, B. & Q. R. R. Co., Goodhart v. 290
City of Bloomfield, Hassmann v. 608
City of Harvard, Lee v. 807
City of Kearney v. Consumers Public Power District 29
City of Lincoln v. First Nat. Bank 221
City of Lincoln, Mook v. 779
City of Omaha, Sullivan v. 297
City of Wayne, Wightman v. 944
Coffin v. Maitland 477
Columbus Land, Loan & Bldg. Assn. v. Wolken 684
Consumers Public Power District, City of Kearney v. 29
Consumers Public Power District v. Eldred 926
Conway, Lienhart v. 821
Cooper v. Sanitary District No. 1 412
Cornhusker Hybrid Co., Kennedy v. 230

County of Antelope v. State Board of Equalization and Assessment 662
County of Cheyenne, Dickenson v. 36
County of Dawson v. South Side Irrigation Co. 512
County of Douglas v. Feenan 156
County of Douglas, International Harvester Co. v. 555
County of Nance v. Thomas 640
County of Sarpy, Strawn v. 783
County of Sarpy v. Wright 193
Cox v. Rippe 309
Cronin v. Ehlers 708

Dalton, Watson v. 78
Dawson, County of v. South Side Irrigation Co. 512
Dawson County Irrigation Co., Faught v. 274
De Lair v. De Lair 771
Dickenson v. County of Cheyenne 36
Dodson v. Inda 179
Doerfler, Mead Co. v. 21
Douglas, County of v. Feenan 156
Douglas, County of, International Harvester Co. v. 555
Dreger, Peters v. 670
Duggan v. Olson 248

Ehlers, Cronin v. 708
Eldred, Consumers Public Power District v. 926
Elliott, Mauzy v. 865
Ellis v. Union P. R. R. Co. 397
Emerson-Brantingham Implement Co. v. Hallgren 530
Enquist v. Enquist 708
Evers v. Evers 104
Ewing v. Gilbert 1

Faught v. Dawson County Irrigation Co. 274
Federal Farm Mortgage Corporation v. Ganser 635
Feenan, County of Douglas v. 156
Filley v. Mancuso 493
Filley, Teresi v. 797
Firestine, Herman v. 730
First Nat. Bank, City of Lincoln v. 221
Franks v. Jirdon 585
Frerichs, Caspers v. 740

Ganser, Federal Farm Mortgage Corporation v. 635
Gilbert, Ewing v. 1

Gilmore v. State 647
Glissmann v. Bauermeister 197
Gohlinghorst v. Ruess 470
Goist, In re Estate of 1
Goodhart v. Chicago, B. & Q. R. R. Co. 290
Gordon v. Young 578
Grain Belt Supply Co., Vana v. 132

Hackbarth v. Hackbarth 919
Hadley v. Schow 163
Haller, Hoover v. 697
Hallgren, Emerson-Brantingham Implement Co. v. 530
Hallgren v. Williams 525
Hamilton v. Huebner 320
Harman, Lincoln Drug Co. v. 354
Harvard, City of, Lee v. 807
Hassmann v. City of Bloomfield 608
Hawk v. Olson 875
Hays Lumber Co., Licking v. 240
Hazuka v. Jelinek 452
Hendrickson v. Sullivan 283
Herman v. Firestine 730
Hiatt v. Hiatt 652
Hilyard, Refrigeration & Air Conditioning Institute, Inc. v. 42
Hoover v. Haller 697
Horn v. Stuckey 625
Howard, State ex rel. v. Marsh 750
Huebner, Hamilton v. 320

In re Estate of Goist 1
In re Estate of Inda 179
In re Estate of Jelinek 452
In re Estate of Sexton 618
In re Estate of Sullivan 283
Inda, Dodson v. 179
Inda, In re Estate of 179
International Harvester Co. v. County of Douglas 555

Jackson v. Olson 885
Jelinek, Hazuka v. 452
Jelinek, In re Estate of 452
Jirdon, Franks v. 585
Johnson v. Marsh 257
Johnson v. Radio Station WOW, Inc. 429

Johnson v. Washburn 335
Jump v. State 501

Kearney, City of v. Consumers Public Power District 29
Keil, Born v. 912
Kennedy v. Cornhusker Hybrid Co. 230
Kline v. Metcalfe Construction Co. 389
Knight, Miller v. 207
Kozina v. Watkins Lumber Co. 594
Kucaba v. Kucaba 116

Lamberth v. Omaha & Council Bluffs St. Ry. Co. 213
Lee v. City of Harvard 807
Licking v. Hays Lumber Co. 240
Lienhart v. Conway 821
Lincoln, City of v. First Nat. Bank 221
Lincoln, City of, Mook v. 779
Lincoln Drug Co. v. Harman 354
Linn v. Linn 666
Loudy v. Union P. R. R. Co. 676

Maitland, Coffin v. 477
Malec v. ASCAP 358
Mancuso, Filley v. 493
Marsh, Johnson v. 257
Marsh, State ex rel. Howard v. 750
Mauzy v. Elliott 865
McIntosh v. Union P. R. R. Co. 844
Mead Co. v. Doerfler 21
Meeks, North American Acceptance Corporation v. 546
Mekota v. State Board of Equalization and Assessment 370
Metcalfe Construction Co., Kline v. 389
Metschke v. Metschke 461
Miller v. Knight 207
Mohatt v. Olson 764
Mook v. City of Lincoln 779
Morrow v. State 601
Mullins v. State 521

Nance, County of v. Thomas 640
Neb. Defense Corporation, Anderson v. 466
Neb. Nat. Hotel Co., Shiman Bros. & Co. v. 47
North American Acceptance Corporation v. Meeks 546
Northouse v. Torstenson 187
Nygaard v. Stull 736

Oertle v. Oertle 746
Olson, Duggan v. 248
Olson, Hawk v. 875
Olson, Jackson v. 885
Olson, Mohatt v. 764
Olson, Reetz v. 621
Omaha, City of, Sullivan v. 297
Omaha & Council Bluffs St. Ry. Co., Lamberth v. 213
Omaha Loan & Bldg. Assn. v. Turk 859
Otoe Food Products Co., Surratt v. 854

Paxton-Mitchell Co., Witthauer v. 436
Peters v. Dreger 670
Platte Valley Public Power & Irrigation District, Webb v. 61
Popkay, Sexton v. 618
Prudential Ins. Co. of America, Scheumann v. 173

Radio Station WOW, Inc., Johnson v. 429
Reed, State ex rel. Wolski v. 348
Reetz v. Olson 621
Refrigeration & Air Conditioning Institute, Inc., v. Hilyard 42
Rippe, Cox v. 309
Robinson v. Central Neb. Public Power & Irrigation District 534
Ruess, Gohlinghorst v. 470

Saint Joseph Loan & Trust Co., Unick v. 790
Sanitary District No. 1, Cooper v. 412
Sarpy, County of, Strawn v. 783
Sarpy, County of v. Wright 193
Scheumann v. Prudential Ins. Co. of America 173
Schow, Hadley v. 163
Severin v. State 506
Sexton, In re Estate of 618
Sexton v. Popkay 618
Shiman Bros. & Co. v. Neb. Nat. Hotel Co. 47
South Side Irrigation Co., County of Dawson v. 512
Stanton v. Stanton 71
State, Gilmore v. 647
State, Jump v. 501
State, Morrow v. 601
State, Mullins v. 521
State, Severin v. 506
State v. Tautges, Rerat & Welch 439
State Board of Equalization and Assessment, County of Antelope v. 662

State Board of Equalization and Assessment, Mekota v. 370
State ex rel. Howard v. Marsh 750
State ex rel. Wolski v. Reed 348
State Furniture Co. v. Abrams 342
Strawn v. County of Sarpy 783
Stuckey, Horn v. 625
Stull, Nygaard v. 736
Sullivan v. City of Omaha 297
Sullivan, Hendrickson v. 283
Sullivan, In re Estate of 283
Surratt v. Otoe Food Products Co. 854

Tautges, Rerat & Welch, State v. 439
Teresi v. Filley 797
Thomas, County of Nance v. 640
Thorin v. Burke 94
Torstenson, Northouse v. 187
Turk, Omaha Loan & Bldg. Assn. v. 859
Tuttle v. Wyman 146

Unick v. Saint Joseph Loan & Trust Co. 790
Union P. R. R. Co., Ellis v. 397
Union P. R. R. Co., Loudy v. 676
Union P. R. R. Co., McIntosh v. 844

Vana v. Grain Belt Supply Co. 132
Vocelka v. Vocelka 268

Washburn, Johnson v. 335
Watkins Lumber Co., Kozina v. 594
Watson v. Dalton 78
Wayne, City of, Wightman v. 944
Webb v. Platte Valley Public Power & Irrigation District 61
Wightman v. City of Wayne 944
Williams v. Beckmark 814
Williams, Hallgren v. 525
Williams v. Williams 383
Witthauer v. Paxton-Mitchell Co. 436
Wolken, Columbus Land, Loan & Bldg. Assn. v. 684
Wolski, State ex rel. v. Reed 348
WOW Life Ins. Society v. ASCAP 358
WOW Radio Station, Inc., Johnson v. 429
Wright, County of Sarpy v. 193
Wyman, Tuttle v. 146

Young, Gordon v. 578

CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

JANUARY TERM, 1945

IN RE ESTATE OF ELLA GOIST.
MINNIE R. EWING, APPELLEE, V. MABEL L. GILBERT ET AL., APPELLANTS.

IMPLEADED WITH WEST NEBRASKA METHODIST HOSPITAL, APPELLEE.

18 N. W. 2d 513

FILED APRIL 27, 1945. No. 31871.

1. Wills. The mental capacity of a testator is tested by the state of his mind at the time he executed his will. If a testator knows the extent and character of his property, the natural objects of his bounty and the purposes of his devises and bequests, he is mentally competent to make a will.
2. ———. A testator may dispose of his property as he pleases. The law does not require that he recognize his relatives therein, nor does it put any obstacle in the way of the aged or infirm in making disposition of their property by will; provided, only, that their mentality conforms to the accepted tests at the time of the execution of such testamentary instrument.
3. ———. The elements necessary to be established to warrant the rejection of a will on the ground of undue influence are: (1) That the testator was subject to such influence; (2) that the opportunity to exercise it existed; (3) that there was a disposition to exercise it; and (4) that the result appears to be the effect of such influence.
4. ———. Undue influence, in order to invalidate a will, must be of such character as to destroy the free agency of the testator and substitute another person's will for his own.

5. **Evidence.** A presumption is not evidence and only relates to a rule of law as to which party shall first go forward and produce evidence sustaining a matter in issue. A presumption will serve as and in the place of evidence in favor of one party or the other until *prima facie* evidence has been adduced by the opposite party, but the presumption should never be placed in the scale to be weighed as evidence.
6. **Wills.** While it is a generally accepted view that the mere existence of confidential relations between a testator and a beneficiary under his will does not raise a presumption that the beneficiary has exercised undue influence over the testator, the relationship between the two may be considered with all of the other facts and circumstances in the case in determining undue influence.
7. **Evidence.** If the mental condition of a person becomes a material subject of inquiry, a nonexpert witness may be permitted to state his opinion concerning that condition if he is shown to have had a more or less extended and intimate acquaintance with such person and gives the facts and circumstances upon which the opinion is based. The weight to be given such testimony is a question for the jury, to be considered by them in connection with the credibility and intelligence of the witness, and his opportunities for observation.
8. **Wills.** Where an aged testatrix, by will, leaves the larger part of her estate to a woman companion who lived with and took care of her at her request, in pursuance to an agreement made by the testatrix that if she would do so it would be worth her while, thereby omitting to provide for certain nephews and a niece in her will, the will is not unnatural, when the testatrix had never seen or visited such collateral relatives, and where they did nothing to merit an inheritance or endear themselves to her. Under such circumstances they are not the natural recipients of her bounty.

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

Mothersead & Wright and *J. L. Grimm*, for appellants.

Curtis O. Lyda, W. F. McGriff, F. J. Reed and *Neighbors & Danielson*, for appellees.

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

MESSMORE, J.

This is a will contest tried before a jury in the district

court. The verdict was for the proponents admitting the will of Ella Goist to probate. Contestants appeal.

Ella Goist departed this life September 18, 1943, leaving an estate of the approximate gross value of $250,000. The residue, after the bequests are paid, would be of the gross value of approximately $200,000. The will named Minnie R. Ewing as executrix and residuary devisee and legatee. The issues tried in the district court were: (1) That the testatrix lacked testamentary capacity to make the will; and (2) that the part of the will giving Minnie R. Ewing the residue of the estate was obtained by undue influence. The next of kin and heirs at law are a nephew and nieces residing in Ohio, and the contestants, the children of a deceased brother, residents of Missouri. The Nebraska Children's Home Society and the West Nebraska Methodist Hospital, legatees under the will, appear also as proponents.

The contestants assign as error that the verdict is contrary to the evidence. The provisions of the will, in so far as need be considered, provide in substance that the testatrix, being mindful that the will of her brother, Daniel Wooldridge, contained substantial bequests to relatives, made certain bequests to a favorite sister, nieces and a nephew and to charities which need not be enumerated.

Paragraph No. 6 provides: "I give, devise and bequeath to my very good friend, Minnie R. Ewing of Gering, Nebraska, all the rest, residue and remainder of my estate, real, personal, and mixed, wherever situate, to be hers absolutely. In doing this, I am not unmindful of my many relatives who are not mentioned herein and also of those who may feel the insufficiency of my bounty. Minnie R. Ewing has been my trusted and helpful friend for many years; she has assisted both myself and my deceased brothers, John and Daniel, and is now devoting a very considerable portion of her time to helping me. As further consideration, I am expecting Minnie R. Ewing to take care of me during the remainder of my natural life as she has done in the past and as I may request."

This estate had its origin in the frugality and business

abilities of two bachelor brothers, Daniel and John Wooldridge, who for more than 50 years engaged in ranching, farming, purchasing and holding real estate, and lending money. They worked together and were inseparable in business and companionship. In 1917 Ella Goist, their widowed sister, came to live with them to look after their welfare and keep house for them. In 1925 John Wooldridge died, leaving an estate valued at $73,320.20, $24,000 of which he bequeathed to relatives, the residue to his brother Daniel and sister Ella Goist. In December, 1939, Daniel died, leaving an estate of $175,765.50. He bequeathed to relatives the sum of $20,000, and made certain bequests to charities, in the event his sister Ella predeceased him. Most of the same charities are included in the will of Ella Goist. The wills of the two brothers, especially with reference to bequests to relatives, in great measure, explain the desire of the testatrix to pattern her will after that of her brother Daniel.

During December, 1940, Ella Goist and Minnie Ewing contacted the county judge, and Ella made inquiry about the preparation of a will. The judge was not in position to assist her at this time. However, on January 9, 1941, after the judge had entered the practice of law, the two went to his office where Ella made inquiry about making a will. She accompanied the attorney into another office where the matter was discussed, and Ella informed him she desired to make a will to conform to that of her brother Daniel. It appears she did not have a copy of Daniel's will and the attorney told her he would obtain one later. Thereafter, a copy of Daniel's will was read to her. The attorney wanted to know what property she desired to leave her relatives. She made a complete explanation, to the effect her relatives had received a considerable amount of money from the estates of her brothers and she wanted the will to disclose why she did not give her relatives more. A work sheet was prepared and the charities to receive bequests were enumerated; the amount was $30,000. Later she went alone to the attorney's office and wanted to reduce the residuary

legatee's share by $5,000, believing she was giving such legatee too much. A charity was selected to receive such bequest.

Minnie Ewing and her husband, John, were friends and neighbors of the Wooldridge brothers during their lifetime since 1910, transacted business with them and on occasions were in their home. Minnie Ewing became acquainted with their sister Ella in 1917. For more than 20 years, during emergencies such as illness or death, she would always help by going to their home, staying and working and comforting them. Through this association she became a companion of Ella, helped her, and accompanied her to civic and social functions and on occasions when she transacted business. On about the 16th of March, 1940, Ella Goist asked Minnie Ewing to come and live with her during her lifetime, and if she would do so, she would be remembered in her will, and it would be enough so that she could afford to come. Minnie Ewing discussed the matter fully with her husband, and on March 18, 1940, gave Ella her answer. On June 20, 1940, she moved in permanently and remained until Ella Goist's death.

There were four witnesses to the will, consisting of the president of the bank where the Wooldridge brothers and Ella had transacted their business, the cashier of the same bank, a merchant with whom she had transacted business, and the attorney who drafted the will. All of these witnesses detailed their acquaintance with her, conversations had and business transacted with her, and gave as their opinion that at the time of executing the will she was able to transact business, knew the nature of the act she was performing, and was active for her age of 81 years.

"In Nebraska there is no statutory requirement that a will be read to the testator or to the witnesses thereto prior to its execution. * * * Where a will, written in the presence of the testator according to his dictation, is executed according to the statute, it is valid though not read to or by him. *Hess' Appeal,* 43 Pa. St. 73, 82 Am. Dec. 551." *In re Estate of Bose,* 136 Neb. 156, 175, 285 N. W. 319.

The foregoing constitutes a brief summary of the evidence offered by the proponents on testamentary capacity in making their *prima facie* case.

The contestants' evidence, for the most part, is directed to undue influence, on the part of Minnie Ewing, exerted on the testatrix. We briefly set out the material parts thereof: The record discloses that from July 1, 1938, until the latter part of May, 1940, one Cecil Irvin, now deceased, and his sister Anna Kilgore, lived in the tenant house and were employed on the Wooldridge place. The sister testified that during this period of time Minnie Ewing made frequent visits to the place, and upon occasions would stay nights, and was not desirous of having Anna around at such times; that Ella Goist resented Minnie Ewing's visits and often spoke about them, telling Anna she did not want to be alone with Mrs. Ewing, and Anna should stay with her on such occasions. After these visits, Mrs. Goist would develop swooning spells and believed she conversed with her deceased brother Daniel about what she had done that was wrong, and he would advise with her and admonish her not to loan any more money to the Ewings. She testified that Ella Goist was preparing to make a will, and wrote to some relatives in Missouri for the names of nephews and nieces she wanted to remember; that she desired her relatives to have the property she left, and spoke of giving Anna a house in Gering and $1,000 a year as long as she lived; that Anna and her brother left because Minnie Ewing told them Mrs. Goist had employed a better man, and when Mrs. Goist heard they were leaving she cried and did not want them to go. The witness gave as her opinion that Ella Goist was not able to transact business. Thereafter, for about 60 days, one Elliott worked on the ranch. He was succeeded by Louis Poppert and his wife, Dorothy.

Louis Poppert testified in substance that on or about Christmas time while he was living in Oxford, Nebraska, he received a letter from Dwight Ewing, a son of Minnie Ewing, stating that Ella Goist needed a hired man. He and his wife immediately investigated, but found there was no

employment at that time. Eventually, however, John and Minnie Ewing were instrumental in obtaining such employment for them, and they moved into the tenant house on the ranch, November 9, 1940, and remained there until their employment terminated in March, 1942. During this time Minnie Ewing would come and stay nights, and in the forepart of 1941 moved in with Ella Goist permanently. Part of his duties was to drive for Mrs. Goist on occasions. When Minnie Ewing moved in, she took over the driving and informed him he should not take Ella to town, as she was always getting things mixed up which would have to be straightened out, and if Ella wanted to go to town, that Poppert should call her. He told her that he could not do so because Mrs. Goist did not want him to, and he informed Mrs. Goist of this conversation to which she replied: "It looks to me like we could go without taking all of the neighbors along." Later Mrs. Ewing told him that "she had threatened Mrs. Goist that if she didn't leave the business affairs alone that the people would soon have her in the bug house for making so many mistakes." She also told him that Ella Goist had promised her some of her real estate if she would stay with her, and Minnie Ewing said: "I am seeing to it that I get it. I am going to get it if I have to come over here and live." She further told him that she had about talked Mrs. Goist "in the notion of changing lawyers." Mrs. Ewing gave the orders about the work. He further testified that Mrs. Goist told him she wanted someone to live with her for company and make a home for her, that Minnie Ewing had her own home and should stay in it; further, that Ella Goist was very forgetful and would ask the same thing over, four or five times in an hour's time, would offer to pay him when it was not payday. The ranch consisted of about 1,000 acres, but Mrs. Goist did not know whether it was 200 acres or 160, or how many cattle she owned.

Dorothy Poppert testified Mrs. Goist did her own housework, prepared her own meals, and that in February, 1941, she had attacks which would make her "rather unconscious

and then she would be sick at her stomach." Her further evidence corroborated that of her husband.

A tenant, George Rien, testified he farmed one of the Goist places in 1940 and 1941. At first he saw Mrs. Goist quite frequently, but later when Minnie Ewing moved in with her he had two bosses, and Mrs. Ewing became the manager and if he did not do as she desired, she would get Mrs. Goist to tell him to do as Mrs. Ewing had directed. In the fall of 1940, he complained to Mrs. Goist and she informed him that Mrs. Ewing had no business running her property. During the second year of his tenancy Ella Goist was ill more frequently, and Mrs. Ewing told him that Mrs. Goist was having spells, and if they continued she would lose her mind.

A neighbor, Mrs. Miletus Ouderkirk, who lived in the vicinity all of her life, testified that in 1940 she would see Mrs. Goist about every two weeks, and Mrs. Goist was very forgetful and at times did not know her. In 1939 she called on her for a Red Cross donation, Mrs. Goist was alone and asked who she was, and told her that she was alone, and missed Daniel so much, that " 'he used to be right on the other side of the table from me, or out around the place, * * * .' * * * 'Now, I am just a prisoner in my own home.' * * * 'The folks I have here go early and come back late.' "

William Oberlander, who formerly lived with his parents about a half mile southwest of the Wooldridge ranch, testified he started to drive for Daniel two months before his death, and drove for Ella until the middle of March, 1941, that Poppert drove some, but Mrs. Ewing took over the driving. In February, 1941, he saw Mrs. Goist faint. She remained unconscious 15 or 20 minutes, and he had seen her when she would suddenly get sleepy for a short period and then be awake and become apparently normal. He noticed on several occasions she was forgetful, especially so when he would make purchases for her with his own money and she would repay him, and would want to make settlement again. She did not seem to know where her renters lived and in later years became childish. However, the testimony of this witness does disclose that she transacted business

and that he drove where she directed him. He had made a suggestion that some of her relatives should come and live with her, and in August, 1941, she told him that as long as she was able, she was going to keep the ranch, and when she had finished with it the Sprinkle family, her relatives, could have it.

Thomas E. Wooldridge, a nephew and contestant, testified to two letters written by Ella Goist to his mother, making inquiries about relatives to whom she wanted to leave her property. His wife testified she answered the letters for the mother. The first letter was written in August, 1938, the latter in the fall of 1940. Thereafter there seems to be no correspondence between the parties.

Doctor Gentry testified in rebuttal for proponents. His acquaintance with Ella Goist began in 1919, while employed by her brothers, and he had been in her home on several occasions. In November, 1940, she came to his office, complained of attacks of unconsciousness which subsequently turned out to be a serious heart disease described as Stokes-Adam's syndrome, a disease of the coronary blood vessels of the heart that makes a characteristic trend of symptoms which is mainly the type of unconsciousness with which she was afflicted. The trouble would manifest itself from time to time by a fainting spell, and except for her heart, she was in very good physical condition. After she had had one of these spells she would hardly believe it, and would be mentally alert. He treated her again on February 17, 1941, found her physical condition good, with the exception of her heart; stated that on January 14, 1941, the date of executing the will, she had no mental disease and was able to transact business. In 1940 he talked to her about her relatives. She told him she did not particularly care for her relatives, that Minnie Ewing was the best friend she ever had and took very good care of her, and that she was glad that Mrs. Ewing was willing to stay with her. She also told the doctor that she had made a will and tried to leave her money where she felt it would do the most good, and tried to follow Daniel's will.

In addition to a part of the testimony of Minnie Ewing previously summarized, she, by letters, made answer to inquiries made by a relative of Mrs. Goist. The substance of the letters is to the effect that Ella Goist was peculiar. In explaining this she wrote about having obtained a good Christian couple to work for reasonable wages, but Ella Goist had changed her mind and told her, "Dan says this is the best man we ever had and for me to keep him"; that her attorney could see she was not capable of transacting business. Some mention was made about a rental property for which Mrs. Goist wanted more rent, and the tenants moved. Mrs. Ewing felt that it would be more advisable to keep the property rented. One Sunday Daisy Ewing called Mrs. Goist to go to church. She declined, giving as the reason that she would have to pay her taxes that day. Exhibit 36B appears to be an addition to the letter. It is to the effect that Mrs. Ewing talked to Mrs. Goist over the telephone to find out how she was feeling. She replied that she was all right and "tough as ever." She did not see any change in Mrs. Goist. She then wrote, "I'll keep pretty close tab on things over there and I have your address. Will write you if I see any change or if she gets sick."

Other matters to which Mrs. Ewing testified will be found in a summation as to what the proponents' evidence discloses.

A summation of the contestants' evidence is to the effect that Minnie Ewing, through her acquaintance with the Wooldridge brothers and later their sister Ella Goist, by her frequent visits and her presence during illness and at the time of Daniel's death, by helping and her companionship, ingratiated herself to such an extent that she became indispensable to Ella Goist who is referred to by the contestants as an old, feeble and incompetent person, and as a consequence, Ella Goist asked her to come and live with her, and orally promised and agreed that if she would do so it would be worth her while. After having exerted such influence over Ella Goist, and once moved in permanently, she took full charge of handling the ranch, procured the dis-

charge of Cecil Irvin and thereby getting rid of Anna Kilgore; negotiated the employment of Poppert, sought to control him, directed what he should do with reference to driving for Mrs. Goist; informed him she was promised some real estate and was going to get it if she had to move in; further told him if he would help her she would help him; that throughout the evidence it will be observed that Minnie Ewing controlled the employment of the help on the ranch and dispensed with the services of those who failed to suit her purpose. When there was no hired help she and Ella would do the work on the ranch, and she, well knowing Ella's physical condition, coupled with her age, would not stand the strain of such work. Further, she had borrowed money from Ella Goist, claimed to have repaid it but was unable to show in what manner. She also became a co-owner of war bonds, on one occasion in the amount of $10,500; criticized her in letters written to a relative, saying also she would keep close tab on things; induced her to change attorneys; constantly accompanied her when she was preparing to and making her will, and when she was transacting business with tenants and others, thereby controlling her every act and deed.

Contra, the proponents' evidence summarized, discloses that Ella Goist managed her own business, in fact was insistent upon doing so. She designated Minnie Ewing as executrix of her estate rather than have a businessman, and gave her reasons therefor. Her business was quite extensive, and she managed it without dictation from any one. She made leases between herself and tenants; figured the landlord's share of the rent; made most of her own deposits in the bank, except those made by her attorneys; loaned money, taking notes and demanding security; purchased material to make improvements and repairs on her properties; managed an elevator, required the employee to turn over the canceled checks to her from this business, and made inquiries on those she questioned. She adjusted litigation in a transportation company in which she was interested. She was the executrix of Daniel's estate consist-

ing of more than $175,000 and attended the business incident to her official position with reference to such estate; took an interest in the market, taxes and current events; attended business, civic and social meetings in which she was interested.

Ella Goist often expressed herself that she was not particularly interested in her relatives, they had no interest in her and were of little or no help to her; that Minnie Ewing was her best and trusted friend. It is explained that Minnie Ewing was made co-owner of the war bonds by direction of Mrs. Goist when she was informed that the government required two names on the bonds. In the absence of help on the ranch, Minnie Ewing carried on the work such as fixing fences, watering cattle, taking salt to them, milking the cows and doing considerable riding to count the cattle, and Ella Goist helped as much as she was able.

In a will contest on appeal to the Supreme Court, the issues of fact are determined by the sufficiency of evidence to sustain the verdict. Having this rule in mind, we have searched the record diligently and on the question of mental competency we find that there was sufficient evidence to sustain the verdict.

The mental capacity of a testator is tested by the state of his mind at the time he executed his will. If a testator knows the extent and character of his property, the natural objects of his bounty and the purposes of his devises and bequests, he is mentally competent to make a will. *In re Estate of Laflin,* 108 Neb. 298, 187 N. W. 885. See, also, *In re Estate of Frazier,* 131 Neb. 61, 267 N. W. 181; *In re Estate of Bose,* 136 Neb. 156, 285 N. W. 319.

The evidence of a number of witnesses was offered in rebuttal to the contestants' evidence, consisting of business and professional people of Gering who testified and gave their opinions as to the mental capacity of Ella Goist at the time she executed her will. Among these witnesses were her family physician; an employee of the bank where she transacted business and later employed in the Safeway Store where she traded; a potato broker; an editor; a coun-

ty road employee; a druggist and a clergyman; all in addition to the testimony of the subscribing witnesses of the will heretofore set out. Several tenants who occupied her different properties testified to conversations had with her relative to their tenancy. These witnesses related that she drew leases, purchased material for improvements and repairs for property they occupied, and made rent settlements on crops. An elevator operator employed by her testified that she would go over the canceled checks and call attention to those that were irregular. Old friends, acquaintances and neighbors gave their opinion that she possessed the mental capacity to make her will on January 14, 1941. These were friends of long standing. We deem it unnecessary to detail this evidence, and suffice it is to say all of the conversations, transactions and business had between such witnesses and testatrix, occurred at the time preceding the making of the will, at the time the will was executed and thereafter until her death. It is apparent that Mrs. Goist was able to and did transact business up to almost the day of her death. See *In re Estate of Bayer,* 119 Neb. 191, 227 N. W. 928; *In re Estate of Kerr,* 117 Neb. 630, 222 N. W. 63; *In re Estate of Kubat,* 109 Neb. 671, 192 N. W. 202, citing and following *In re Estate of Laflin, supra.*

A testator may dispose of his property as he pleases. The law does not require that he recognize his relatives therein, nor does it put any obstacle in the way of the aged or infirm in making disposition of their property by will; provided, only, that their mentality conforms to the accepted tests at the time of the execution of such testamentary instrument. In *In re Estate of Bose, supra,* it is said: " 'It is one of the painful consequences of extreme old age that it ceases to excite interest, and is apt to be left solitary and neglected. The control which the law still gives to a man over the disposal of his property, is one of the most efficient means which he has in protracted life to command the attentions due to his infirmities.' "

The contestants, having affirmatively pleaded undue influence, have the burden of proof to prove undue influence by a preponderance of the evidence.

The elements necessary to be established to warrant the rejection of a will on the ground of undue influence are: (1) That the testator was subject to such influence; (2) that the opportunity to exercise it existed; (3) that there was a disposition to exercise it; and (4) that the result appears to be the effect of such influence. *In re Estate of Hagan*, 143 Neb. 459, 9 N. W. 2d 794; *In re Estate of Bowman*, 143 Neb. 440, 9 N. W. 2d 801; *In re Estate of Heineman*, 144 Neb. 442, 13 N. W. 2d 569.

In *Gidley v. Gidley*, 130 Neb. 419, 265 N. W. 245, quoting from 31 C. J. 1183, it is said: "All that can be said, in the way of formulating a general rule on this subject, is, that whatever destroys free agency, and constrains the person whose act is brought in judgment, to do what is against his will and what he would not have done if left to himself, is 'undue influence', no matter by what means the control is exercised, whether the control is exercised by physical force, duress, fraud, threats, importunity, or any other species of mental, moral or physical coercion. The means employed, the extent or degree of the influence, or by whom the influence is exerted, is immaterial, for the test always is, was the influence, whether slight or powerful, sufficient to destroy free agency, so that the act put in judgment was the result of the domination of the mind of another rather than the expression of the will and mind of the actor?" See, also, *In re Estate of Keup*, 145 Neb. 729, 18 N. W. 2d 63.

Having in mind the necessary elements to be proved by the contestants in this case by a preponderance of evidence, and the definition of undue influence, suffice it is to say that the jury had the benefit of all of the evidence, weighed it and resolved the question of undue influence against the contestants. Unless the verdict is clearly wrong, and it is not, it will not be disturbed.

The contestants offered instructions Nos. 3, 10, 11 and 12. Instructions Nos. 3 and 10 are to the effect that a confidential relationship existed between the testatrix and Minnie Ewing; that there was an unnatural distribution of the

property, and the age and physical condition of the testatrix were matters which the jury were at liberty to infer, if they found them to be facts of undue influence. Instructions Nos. 11 and 12 were to the effect that undue influence would rarely be established by direct proof, but was a matter largely of inference and facts surrounding the testatrix.

Error is predicated upon the court's refusal to give the requested instructions. The instructions given by the court substantially cover all matters contained in the requested instructions Nos. 3, 10 and 12. Requested instruction No. 11 contained the language "undue influence can rarely be established by direct proof, and accordingly it may be proved by indirect evidence and by proof of facts by which undue influence may be inferred." While the court did not use such language, there are many matters set out in the instructions given by the court that adequately cover most any reasonable or legitimate inference the jury might desire to draw from the evidence.

The requested instructions do not attempt to shift the burden of proof on undue influence, but adhere to it as required by *In re Estate of Hagan, supra.* However, the contestants cite *In re Estate of Hagan, supra,* as follows: "The propriety of a rule which says that when the evidence of the party having the burden of proof is sufficient to make a *prima facie* case gives rise at that point to a presumption of the existence of a fact, we do not question. Moreover we do not question the propriety of a rule which states that from proof of the existence of certain factual elements the existence of an ultimate or issuable fact may be inferred or presumed."

Assuming a presumption would arise that a confidential relationship did exist as claimed by the contestants, then the following is applicable: " 'A presumption is not evidence of anything and only relates to a rule of law as to which party shall first go forward and produce evidence sustaining a matter in issue. A presumption will serve as and in the place of evidence in favor of one party or the other until *prima facie* evidence has been adduced by the opposite par-

ty, but the presumption should never be placed in the scale to be weighed as evidence.' * * * ." *In re Estate of Kajewski,* 134 Neb. 485, 279 N. W. 185; *Bohmont v. Moore,* 138 Neb. 784, 295 N. W. 419, 133 A. L. R. 270. " 'The better reasoned authorities hold that a presumption is not evidence of a fact, but purely a conclusion, having no probative force, and designed only to sustain the burden of proof until evidence is introduced tending to overcome it. * * * When evidence is introduced rebutting the presumption, the presumption disappears, leaving in evidence the basic facts which are to be weighed.' " *Bohmont v. Moore, supra,* and cases cited therein.

While it is a generally accepted view that the mere existence of confidential relations between a testator and a beneficiary under his will does not raise a presumption that the beneficiary has exercised undue influence over the testator, the relationship between the two may be considered with all of the other facts and circumstances in the case, in determining undue influence. *In re Estate of Bowman, supra.* The court did not commit prejudicial error as contended for by contestants.

Contestants make a point that the will in the instant case provides for an unnatural distribution of the property.

"No right of the citizen is more valued than the power to dispose of his property by will. No right is more solemnly assured to him by the law. Nor does it depend in any sense upon the judicious exercise of that right. It rarely happens that a man bequeaths his estate to the entire satisfaction of either his family or friends. The law wisely secures equality of distribution where a man dies intestate, but the very object of a will is to produce inequality * * * . In this country a man's prejudices form a part of his liberty. He has a right to them. He may be unjust to his children or relatives. He is entitled to the control of his property while living, and by will to direct its use after his death, subject only to such restrictions as are imposed by law. Where a man has sufficient memory and understanding to make a will, and such instrument is not the result of undue influ-

ence, it is not to be set aside without sufficient evidence, nor upon sentimental notions of equality. * * * ." *Isaac v. Halderman*, 76 Neb. 823, 107 N. W. 1016. See *In re Estate of Bose, supra.*

The contestants in the instant case are collateral heirs. The testatrix had never seen them nor talked to them, nor did they ever visit her home, or write or contact her. There is nothing to show that they in any manner endeared themselves to her, in fact, they paid no attention to her and little if any to the letters that were written to their mother by her.

The affection and gratitude which arises in one who is a beneficiary of another's love and attention should not be considered, in absence of definite evidence, the result of wrongful influence simply because the one who serves is not a relative. *Brown v. Jacoby*, 55 Ohio App. 250, 9 N. E. 2d 693; *Estate of Shields*, 49 Cal. App. 2d 293, 121 Pac. 2d 795.

In *Sierkermann v. Knight*, 57 S. D. 420, 233 N. W. 274, the court said: "While it may be more natural to give to relatives, however distant, than to give to strangers, it is not more natural to give to such relatives, where they are not acquainted or associated with testator, than it is to give to close friends and acquaintances, especially if such friends extend aid in time of need." See, also, *In re Estate of Kajewski, supra; In re Estate of Dovey*, 101 Neb. 11, 162 N. W. 134; *Isaac v. Halderman, supra; In re Estate of Bose, supra.*

Under the circumstances of the instant case, the will is not unnatural.

Several non-expert witnesses, which we have noted, testified that the testatrix was of sound mind at the time the will was executed. Contestants predicate error on the admission of this testimony, contending that most, if not all, of the witnesses lacked the necessary qualifications to testify.

In *Clarke v. Irwin*, 63 Neb. 539, 88 N. W. 783, the court said: "It seems to be a well-settled rule that non-expert witnesses who show a personal acquaintance with the person alleged to be insane, extending over a considerable period of

time, and are shown to have a sufficient acquaintance to be able to form an opinion, after detailing to the jury the facts and circumstances upon which such opinion is based, are permitted to testify whether in their opinion such person is sane or insane. The established doctrine is that if the witness has sufficient opportunity for observation to enable him to form an opinion upon the question of the sanity of the person, then he is a competent witness, and may be permitted to testify to such opinion. This rule seems based upon sound reason. In fact, if the rule were otherwise, grievous hardship and injustice might frequently result. Cases might, and frequently do, arise in which medical experts differ as to whether the person in question is sane or otherwise. In such cases, in the absence of a rule permitting non-expert witnesses to testify, the jury might not be able correctly to determine whether the person was or was not insane. The qualification of the witness to give his opinion of the sanity of a person is a question resting very largely in the sound discretion of the trial court."

The above rule was followed in *Kehl v. Omaha Nat. Bank*, 126 Neb. 695, 254 N. W. 397; *Bankers Life Ins. Co. v. Aron*, 133 Neb. 187, 273 N. W. 280; *In re Estate of Steininger*, 139 Neb. 284, 297 N. W. 159; *Torske v. State*, 123 Neb. 161, 242 N. W. 408, citing *In re Estate of Wilson*, 78 Neb. 758, 111 N. W. 788.

From an examination of the testimony of witnesses in the instant case on this subject in connection with the foregoing cases, and in addition reviewing the cases cited below, we hold that the witnesses possessed the necessary qualifications to testify. *In re Estate of Frazier, supra; Seebrock v. Fedawa*, 30 Neb. 424, 46 N. W. 650; *Carter v. Gahagan*, 102 Neb. 404, 167 N. W. 412; *In re Estate of Hieneman, supra; In re Estate of Witte*, 145 Neb. 295, 16 N. W. 2d 203, 17 N. W. 2d 477. In most instances their acquaintance was of long standing or their association close, while in other instances the acquaintanceship was sufficient to enable the witnesses to form an opinion, and the witnesses had sufficient opportunity for observation to enable them to form

such opinions. In some instances there was no objection to this testimony and in one instance no ruling on an objection and no motion to strike the testimony thereafter. While the clergyman's testimony covered a period from a month after the will was executed until two years thereafter, we find no prejudicial error in admitting his testimony.

Contestants complain of instruction No. 7. This instruction is rather long and it would serve no useful purpose to set it out. The court informed the jury in determining the issue of undue influence, " * * * You may, if you find them material to such determination, and find evidence bearing upon the same, may inquire from the evidence into any of the following considerations, to-wit: * * * ." Then the court sets forth a number of matters which the jury might consider. Thereafter the instruction continues: "In addition to the matters above mentioned you may take into consideration any and all facts and circumstances that you may find shown in the evidence. In mentioning the above enumerated matters, the Court has not attempted to outline all of the matters that you shall consider in determining the issue of undue influence, and the Court has not attempted to say that you shall consider any one or more of the matters mentioned. The Court has not attempted to give any more prominence to any one or more of the considerations mentioned than to any matter for consideration that has not been specifically enumerated. These matters have been mentioned merely to aid you in understanding the nature of the determination to be made by you. It may be that you will find subjects of inquiry as important or more important to your determination of this issue than any of those mentioned, and you may find some or all of those mentioned of more or less importance in such determination."

The contestants select the language from the instruction as follows: "In addition to the matters above mentioned you may take into consideration any and all facts and circumstances," contending that this portion of the instruction, in effect, instructed the jury that it was at liberty to disregard a large volume of the competent evidence bearing

upon the issue involved. Reading this portion of the language in the instruction, and the instruction in its entirety, it is apparent that the court was not telling the jury to disregard any competent evidence, but set forth certain facts and circumstances that might assist and aid the jury in considering the issue of undue influence.

The court further told the jury in instruction No. 7 that certain facts standing alone raised no presumption of undue influence. These facts briefly are: That Ella Goist, by her will, gave more to Minnie R. Ewing than a sister of testatrix and her nieces and nephew; that Minnie Ewing was a companion of Ella Goist and looked after her property and exhibited kindness and respect for and towards her. The contestants' contention is that this part of the instruction withdraws from consideration of the jury certain evidence and puts it in the affirmative, which is tantamount to a finding of law; that Minnie Ewing did exhibit certain respect and kindness toward Ella Goist, when there is evidence to the contrary, and that this was a question for the jury to determine from all of the evidence. We are not in accord with the contestants' conception in such respect, when the instruction is read in its entirety. The court told the jury that although the foregoing enumerated facts or circumstances standing alone were not presumptive of undue influence, yet all of them could be considered by the jury, along with any other circumstances shown in the evidence, in determining the issue of undue influence.

The court properly instructed on the burden of proof in instruction No. 6 and properly defined undue influence in instruction No. 8, and gave certain other matters in connection with the definition.

We do not favor the giving of an instruction that purports to seek out certain evidence or to discern what inferences might be drawn therefrom, for the reason that ordinarily to do so places the court in a position of pointing out to the jury evidence which they might consider most important and paramount to other evidence and sometimes leads to over-emphasis on parts of evidence and under-em-

phasis on other parts thereof. In considering instructions Nos. 6 and 8 in connection with instruction No. 7, we find no prejudicial error in the giving of instruction No. 7.

The contestants complain of instruction No. 5. In this instruction the court detailed a number of matters the jury might properly take into consideration in determining the issue of testamentary capacity. We deem it unnecessary to detail these matters. This type of instruction is not favored, especially when the court by a previous instruction has properly instructed on the burden of proof on the subject of testamentary capacity. In this connection, where instructions as a whole clearly present to the jury the issues of fact and law applicable thereto, harmless error in instructions separately criticized on appeal does not require a reversal of judgment. *Whittaker v. Omaha & C. B. Street Ry. Co.*, 137 Neb. 800, 291 N. W. 275; *Interstate Airlines Inc., v. Arnold*, 127 Neb. 665, 256 N. W. 513.

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

AFFIRMED.

THE MEAD COMPANY ET AL., APPELLANTS, V. ZDENKA A. DOERFLER ET AL., APPELLEES.

18 N. W. 2d 524

FILED APRIL 27, 1945. No. 31858.

1. **Executors and Administrators.** The title to the personal estate of an intestate decedent is in the administrator until the charges against the estate have been paid or until sufficient of the estate has been set aside to meet the charges and, as a general rule, until the estate has been closed the administrator is the only proper party plaintiff in an action for recovery of assets for and on behalf of the estate.
2. ———. To this general rule there are recognized exceptions. This court herein recognizes an additional exception to the general rule and sustains the right of a claimant to bring action on his own behalf and all others similarly situated before charges have been paid or without sufficient of the estate having been set

aside to meet charges, and before the estate has been closed, if it appears that the administrator has failed, neglected and refused to prosecute action on behalf of the estate for the benefit of claimants.

3. Judgments. A final order of the county court within its jurisdiction with all proper parties before it and not appealed from is not subject to collateral attack except for fraud.
4. ———. The order of the county court extending the widow's allowance, according to the pleadings herein, was a final order within the jurisdiction of that court with all parties before it and from it no appeal was taken. In the petition no fraud is alleged. The demurrer to the second cause of action was therefore properly sustained.

APPEAL from the district court for Scotts Bluff County: CLAIBOURNE G. PERRY, JUDGE. *Affirmed in part and reversed in part, with directions.*

Neighbors & Danielson, for appellants.

Morrow & Miller, for appellees.

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

YEAGER, J.

This is an action in two causes of action by The Mead Company, a copartnership, and others, against Zdenka A. Doerfler and Douglas Callahan, administrator of the estate of Otto H. Doerfler, deceased. Demurrers were sustained to the separate causes of action. Plaintiffs elected to stand on their petition whereupon judgment of dismissal was entered. From this judgment plaintiffs have appealed.

For their first cause of action plaintiffs pleaded that Otto H. Doerfler died intestate on December 15, 1939; that they filed claims against the estate in the amount of $2,835.75; that the total of the claims filed against the estate amounted to $10,449.85; that in this total was a claim of L. W. Cox & Co., a corporation, for $5,066.37; that L. W. Cox & Co. withdrew a part of its claim amounting to $896.05 thus retaining its claim for $4,170.32; that the entire claim of L. W. Cox & Co. thus retained was evidenced by promissory notes executed by Otto H. Doerfler and the defendant Zdenka A.

Doerfler, except $150.52, although neither the notes nor copies thereof were attached or otherwise made a part of the claim; that the indebtedness represented by the claim, except $150.52, and evidenced by the promissory notes, was the sole obligation of Zdenka A. Doerfler and that Otto H. Doerfler was only an accommodation endorser of the notes; that all claims were allowed in full; that claims in the amount of $364.65 were paid in full; that the estate being insolvent the other claimants including the plaintiffs and L. W. Cox & Co. received in payment 29 per cent of the amounts for which their claims had been allowed; that L. W. Cox & Co. received as its apportionment $1,293.92.

They pleaded further that since Otto H. Doerfler was only an accommodation endorser his administrator was entitled to and there was a duty on his part to institute action and that he had the right to recover back from Zdenka A. Doerfler, the obligor of the promissory notes, the amount which had been paid out of the estate thereon or $1,293.92.

They pleaded that the administrator has failed, refused and neglected to bring action to recover this amount, therefore they are entitled in their own name, for the benefit of all creditors situated as they are, to bring this action.

For their second cause of action plaintiffs pleaded that on July 13, 1940, the county court of Scotts Bluff county, Nebraska, with the consent and acquiescence of the defendant, Douglas Callahan, administrator, notwithstanding the fact that the administration of the estate of Otto H. Doerfler, deceased, had been closed except for the prosecution of an action to recover damages for the wrongful death of the said deceased, authorized the said Callahan to withhold $900 for the purpose of paying an additional six months widow's allowance to the defendant Zdenka A. Doerfler at the rate of $150 per month, which amount was paid.

They pleaded that the county court was without jurisdiction to authorize payment of a widow's allowance after July 13, 1940. The prayer as to the second cause of action is for recovery of this amount for distribution to the general creditors of the estate.

The grounds of demurrer to the two causes of action were: (1) That the court was without jurisdiction of the subject matter, (2) that the plaintiffs had no legal capacity to sue, and (3) that the petition did not state sufficient facts to constitute a cause of action. The ground or grounds on which the demurrers were sustained are not disclosed by the record.

We direct our attention first to the first cause of action. As to this one, by an admission or concession of appellees in their brief, we may properly limit our consideration to the sole question of whether or not the plaintiffs have the right to maintain the action, that is, may a creditor of an estate maintain action for the recovery of assets due the estate when the administrator has failed, refused and neglected to institute action for that purpose. The admission or concession is contained in the following from appellees' brief: " * * * but it was conceded in the lower court and will be conceded in this court that if the facts stated in the first alleged cause of action could be established to the satisfaction of a court or jury, the administrator could recover the item therein specified. The court sustained the demurrers to both causes of action. It is therefore a legitimate assumption that the demurrers were sustained on the ground that the plaintiffs did not have any right to maintain said action."

There is no case directly in point in this state. However the appellants contend that there is an analogy in the decisions the reasoning back of which sustains their right to maintain the action. This analogy came into being as an exception to a general rule that title to the personal estate of an intestate decedent is in the administrator until the charges against the estate have been paid or until sufficient of the estate has been set aside to meet the charges, and until the estate has been closed the administrator is the only proper party plaintiff in an action for recovery of assets for and on behalf of the estate. This general rule was announced in *Cox v. Yeazel*, 49 Neb. 343, 68 N. W. 483. It has been approved as a general rule in *Tecumseh Nat. Bank v.*

McGee, 61 Neb. 709, 85 N. W. 949; *Prusa v. Everett*, 78 Neb. 251, 113 N. W. 571; *Hughes v. Langdon*, 111 Neb. 515, 199 N. W. 832; *Dutch v. Welpton*, 121 Neb. 480, 237 N. W. 579; *Blochowitz v. Blochowitz*, 130 Neb. 789, 266 N. W. 644. However, while these cases recognize the general rule yet they recognize exceptions.

The case of *Cox v. Yeazel, supra*, was one wherein the court was called upon to decide the question of whether or not heirs could maintain action. In the opinion it was stated: "If, then, the title to the personal assets of James Yeazel vested in his administrator, for the purpose of collecting and disposing of the same for the benefit of the creditors and heirs or distributees, it necessarily follows that the administrator, and not the heirs, is the proper party to bring this action to recover the debt in question." Further in the opinion in exclusion of the right of an heir to bring action it was stated: "The following authorities, in addition to those already cited, sustain the doctrine that the heirs cannot maintain this action: * * * ."

The case of *Tecumseh Nat. Bank v. McGee, supra*, was one where an heir was permitted to bring action in her own name for what she claimed was due her as a part of an estate. This court indulged a presumption that the estate had been settled and arrangements had been made for satisfaction of claims and payment of costs of administration but pointed out in the following words that it was of no consequence whether or not this had been done: "But even if this is not the case, the proceedings must be regarded as an exception to the general rule. * * * Thereupon she was given the right to prosecute in her own behalf. This, we think, was proper to be done under the circumstances of the case, and no error was committed in so doing." It will be observed from an examination of the entire opinion that the declared exception to the general rule did not involve an unqualified right of an heir to bring action. It involved only the right after permission so to do was obtained from the county court.

In *Prusa v. Everett, supra*, this court approved action by

an heir instead of an administrator *de bonis non.* The reasoning supporting the exception appears judicious and compelling and for that reason it will be quoted herein. It is the following: "But, where the administrator refuses to bring an action, must the heirs or legatees first cause his removal and the appointment of one who will proceed with the litigation? Perhaps the order of removal would be appealed from, and there would be long and vexatious delay. * * * We think not. Justice should be administered quickly, and, where it is possible for the courts to grant a hearing to one alleging a cause of action, the hearing should be had, though by delay the same relief might be granted in some other way. Again, the administrator may honestly believe that no cause of action exists in favor of the estate which he should prosecute. And upon a hearing before the county judge to remove him, that court may not think there is sufficient ground to justify removal. Should plaintiffs herein be denied a hearing upon their alleged cause of action because of these facts, and perhaps be required to delay the prosecution of the same until an appeal is litigated through the higher courts? Perhaps if another should be appointed he too might refuse to sue. We can plainly see that after preliminary litigation which itself might be protracted, and after long and vexatious delay, the administrator or his successor might be compelled to institute action. * * * But why should there be required this delay? The defendants are not injured. There is no danger of a second suit. The administrator *de bonis non* is made a party defendant to this suit, and will be barred by the judgment herein, if one is obtained."

The case of *Dutch v. Welpton, supra,* seems to indicate that the exception to the general rule is applicable only when the representative of the deceased has refused to bring action. In the opinion the court said: "And where an executor has not refused to compel an accounting by the trustees of the estate of a decedent, which is then in the course of probate proceedings, contingent heirs of such estate cannot maintain such an action."

In *Blochowitz v. Blochowitz, supra,* by quotation from and comment upon the opinion in *Prusa v. Everett, supra,* the right of an heir to maintain an action in the place of an administrator *de bonis non* is recognized when there are no outstanding claims against the estate and the beneficiaries are the only persons interested. In other words the opinion in this case, as well as the other cases cited and quoted from, recognizes the exception first recognized in *Prusa v. Everett, supra,* but we do not think that it was the purpose of this court in any of these cases to state that this was the only cognizable exception to the general rule. We think the reasoning supporting the exception already recognized inevitably points to a pronouncement that this court will recognize an exception where the representative of the deceased has failed, neglected and refused to prosecute action on behalf of the estate for the benefit of interested parties provided that the administrator is made a party to the action.

This appears reasonable and proper. The right of a claimant against an estate is of no less importance than the interest of an heir or distributee and no compelling reason suggests itself why his remedy to enforce a recovery should be more restricted than that of an heir.

The demurrer to the first cause of action was improperly sustained.

The second cause of action is for the recovery back on behalf of the estate for the benefit of creditors of a widow's allowance which appellants contend was improperly allowed and retained out of the estate.

Section 30-103, R. S. 1943, makes the following provision for the husband or wife and children of a deceased during the period of administration of the decedent's estate: " * * * the husband or wife and children constituting the family of the deceased shall have such reasonable allowance out of the personal estate, or out of the income of the real estate, as the county court shall judge necessary for their maintenance during the progress of the settlement of the estate, according to their circumstances, which shall not be longer

than one year after granting administration, nor for any time after the personal estate shall be assigned to the surviving husband or wife; * * * ."

In the petition it is not pleaded that the allowance extended beyond one year from the date of the grant of administration and neither is it pleaded that the administration was closed for all purposes. The sole basis of the contention that the allowance is void is that the personal estate of the decedent had been assigned to the widow at the time the $900 was allowed and that it was improper thereafter to make or extend the allowance for the widow.

The order making the extended allowance is not pleaded but we infer from the petition that the allowance was part and parcel of the proceedings or at least contemporaneous with the assignment of the personal estate to the widow, the order for *pro tanto* payment of claims and the continuance of further proceedings which depended on the action for damages for wrongful death.

It appears clearly that it was made at a time when the court had jurisdiction of the subject matter and of all the parties to the probate proceeding.

The making of a widow's allowance out of a decedent's estate is specifically committed to the county court as is observable from an examination of the provision hereinbefore quoted from section 30-103, R. S. 1943. Also the Constitution (art. V, sec. 16) confers original jurisdiction in all matters of probate and the settlement of estates upon the county court, and by statute (R. S. 1943, sec. 24-503) exclusive jurisdiction is conferred on that court.

The order which furnishes the basis for this second cause of action was a final order within the jurisdiction of the county court and was not appealed from. *In re Estate of Fletcher*, 83 Neb. 156, 119 N. W. 232.

The applicable rule then is that a final order of the county court within its jurisdiction with all proper parties before it and not appealed from is not subject to collateral attack except for fraud. *In re Estate of Creighton*, 91 Neb. 654, 136 N. W. 1001; *Fischer v. Sklenar*, 101 Neb. 553, 163 N. W.

861; *Brownfield v. Edwards*, 132 Neb. 325, 271 N. W. 797; *Starr v. Fidelity & Deposit Co.*, 134 Neb. 240, 278 N. W. 478.

No appeal was taken from the order of the county court. The attack thereon was collateral. No fraud is alleged in the petition. It follows that no cause of action was stated and the demurrer thereto was properly sustained.

The judgment of the district court dismissing the second cause of action is affirmed. The judgment as to the first is reversed and the action remanded with directions to that court to overrule the demurrer thereto and to require the defendants to plead.

AFFIRMED IN PART AND
REVERSED IN PART, WITH DIRECTIONS.

CITY OF KEARNEY, APPELLEE, V. CONSUMERS PUBLIC POWER DISTRICT, APPELLANT.
IMPLEADED WITH JOHN NUVEEN & COMPANY ET AL., APPELLEES.
18 N. W. 2d 437

FILED APRIL 27, 1945. No. 31911.

1. **Eminent Domain.** The right of the city of Kearney to condemnation of the property of the Consumers Public Power District depends upon a new compliance with the provisions of chapter 19, art. 7, R. S. 1943.
2. **Municipal Corporations.** The opinion in *May v. City of Kearney, Consumers Public Power District v. City of Kearney*, 145 Neb. 475, 17 N. W. 2d 448, nullified the proceedings of the city of Kearney theretofore taken to condemn the property of the Consumers Public Power District.
3. ———. The injunctive relief granted in *May v. City of Kearney, Consumers Public Power District v. City of Kearney, supra*, is binding herein and destroys the right of the city of Kearney to claim any rights under its proceeding theretofore instituted and carried on to condemn the property of the Consumers Public Power District.
4. ———. Motion to dismiss proceeding sustained.

APPEAL from the district court for Buffalo County: ELDRIDGE G. REED, JUDGE. *Motion sustained and action dismissed.*

Clarence A. Davis and *Paul E. Boslaugh*, for appellant.

H. L. Blackledge and *Kenneth H. Dryden*, for appellees.

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

YEAGER, J.

The matter presented here at this time is a motion by the appellant, Consumers Public Power District, the purpose of which is to arrest further proceedings on appeal, to reverse the judgment of the district court and to effectually dismiss and dispose of and render for naught all antecedent proceedings in an action by the city of Kearney, Nebraska, to condemn and take over that part of the electric light and power system of the Consumers Public Power District situated in that city.

In order that an understanding may be had of the matter presented it becomes necessary to outline the procedures which by appeal have come to the attention of this court.

On March 2, 1942, the city council of the city of Kearney enacted an ordinance providing for submission to the qualified electors of the question of whether or not the city should acquire the electric light and power system of the Consumers Public Power District in that city under appropriate statutory procedure. The electorate approved the proposal, whereupon the result was duly certified to this court. This court then, pursuant to statute, appointed a court of condemnation. The court of condemnation entered an award fixing the value of the property sought to be condemned at $276,975. From this award the Consumers Public Power District perfected an appeal to the district court. A trial was had in the district court which resulted in a judgment sustaining the award of the court of condemnation. From that judgment the Consumers Public Power District took an appeal to this court. It is to the proceedings leading to

and embraced in this appeal that the present motion is directed.

After the court of condemnation made its award the city council of the city of Kearney enacted an ordinance providing for submission to the electorate of the question of whether or not the city should be empowered to issue and sell revenue bonds for the purpose of raising funds for payment of the cost of acquiring the properties of the Consumers Public Power District. An election was held and the proposition was defeated. Notwithstanding the result of the election the city council enacted an ordinance which provided for the issue and sale of bonds.

Subsequent to the rendition of judgment by the district court, in separate actions, the Consumers Public Power District, on its own behalf, and one Charles E. May, a resident and taxpayer, on his own behalf and all others similarly situated, filed actions to enjoin the city of Kearney from proceeding to condemn the property of the Consumers Public Power District.

The two actions were tried together in the district court and all of the relief prayed by the plaintiffs was denied. Appeals were taken by the plaintiffs therein to this court and here they were presented together and disposed of in a single opinion. The cases are reported as *May v. City of Kearney, Consumers Public Power District v. City of Kearney,* 145 Neb. 475, 17 N. W. 2d 448.

In this court as required by statute (R. S. 1943, sec. 25-1925), the cases being in equity, there was a trial *de novo* which resulted in the reversal of the decree of the district court and a remand to that court for decree in conformity with the opinion.

The basis of the actions to enjoin, to the extent necessary to set it out here, was: (1) That the bonds proposed to be issued and sold were invalid for the reason that they were in violation of section 18-412, R. S. 1943, and (2) that by reason of certain representations, promises and pledges made by the mayor and city council to the electorate during the election upon the question of acquisition of the property,

the city is estopped to issue general obligation bonds under section 19-704, R. S. 1943.

The purport and effect of the former of the two grounds is in nowise in dispute in the motion presented at this time. The parties are in accord as to the purport, effect and finality of this portion of the decision, that is, they are agreed that no such bonds as the city proposed to issue could be issued without a majority vote of the electorate. They are not so in agreement on the second ground.

As to the second, the Consumers Public Power District by its motion says that this court by its opinion in the two injunction cases (*May v. City of Kearney, Consumers Public Power District v. City of Kearney, supra*) declared invalid the election held pursuant to the ordinance under which the question of condemnation was submitted the effect of which was to say that all of the proceedings taken by the city of Kearney to condemn the property of the district were invalid and of no effect, thereby taking from the appeal herein and from all proceedings upon which it depends any justiciable controversy, in other words, that the opinion in those cases removes from this case any determinable issue.

In opposition thereto the city of Kearney contends in effect that nothing was invalidated by the opinion of this court but the procedure upon which it proposed to issue bonds. It contends that the effect of the opinion, properly interpreted, is to sustain the regularity of the election whereat the question of condemnation was submitted and every other step in the condemnation process up to the invalid effort to issue bonds. It contends further that it is not precluded from and has the right to now proceed regularly by election to obtain the consent of the electorate to issue bonds, and, if such consent is obtained, to sell bonds and complete the acquisition of the property of the Consumers Public Power District on the basis of the award of the court of condemnation which award was confirmed by the judgment of the district court, subject of course to the action of this court with regard thereto on appeal.

A determination of this question requires reference to the opinion.

The subject of the proposed bond issue was disposed of by the opinion in the following words: "We find no authority in the statute or other precedent supporting the validity of the bonds proposed to be issued. We can only conclude for the reasons heretofore stated that they are invalid."

Following this pronouncement for 19 paragraphs the opinion deals with the question of the validity of the proceedings antecedent to the proposed bond issue. The subject was introduced by the following: "A declaration of invalidity of the proposed bonds for the reasons above stated, however, does not give plaintiff May all of the relief to which he is equitably entitled or completely determine the issues involved since in any event the city still claims the right to issue general obligation bonds as permitted by section 19-704, R. S. 1943, and will do so unless restrained by the court. In view of this situation we find it necessary to determine whether or not because of certain representations, promises and pledges made by the mayor and city council the city is now estopped from issuing general obligation bonds. In this connection we cannot conclude from the evidence that the representations, promises and pledges were fraudulently made and do not so find but it is undisputed that they were made to the electorate of the city of Kearney as an inducement to a favorable result which was attained in the original election to acquire the property. We do not here intend to pass upon the validity of the election itself to carry out the purposes for which it was represented to be held but confine this part of the opinion to the question of whether the city is now estopped from doing that which its mayor and city council solemnly promised and pledged the electorate they would not do. * * * To preserve self government public officials in charge of, or in obtaining control of, such large public financial and economic operations must be held to strict accountability for promises and pledges made to the electorate who under the law and by their votes confer these powers upon them, in order that the electorate may cast an intelligent ballot and protect their personal and property rights."

It will be noted from this that the court declined to pass upon the validity of the election which was the basis of condemnation but limited itself to a consideration of the question of whether or not the city was estopped to assert any rights thereunder in the light of the solemn promises and pledges of the mayor and city council to induce a favorable result with which promises and pledges there was a failure of compliance.

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

The effect of this conclusion cannot be mistaken when examined with the statutory provisions to which it refers. The conclusion invalidates each and every step of the condemnation process engaged in by the city of Kearney antecedent to the enactment of the ordinance the purpose of which was to cause the issuance and sale of bonds to provide funds to complete the acquisition of the properties of the Consumers Public Power District. It declares that the city may not proceed further "until another election is held and other required steps are taken as provided in chapter 19, art. 7, R. S. 1943."

It was under these provisions that the city proceeded. What it did under these provisions has been nullified. The right of the city of Kearney to condemnation of the property of the Consumers Public Power District must depend upon a new compliance with these provisions.

Neither a motion for rehearing nor one for clarification of the opinion was filed in these cases and mandates have long since been issued. It follows that the opinion as it relates to the subject matter of that action and the parties thereto is binding upon those parties and also on this court.

By reason of the identity of the parties and subject matter of this motion with the parties and subject matter in that case the conclusion of the opinion there is equally binding here.

We conclude therefore that the opinion in *May v. City of Kearney, Consumers Public Power District v. City of Kearney, supra,* has removed from this case any justiciable issue or controversy, and that the relief sought, although but a formality, since proceedings herein have been rendered for naught by the injunctive relief granted in the other cases, ought in some manner to be granted in order that the records of this court and of the district court may be cleared.

The city of Kearney filed no formal response or resistance to the motion of the Consumers Public Power District. They did however present briefs which by filing have become a part of the records of this proceeding. In their briefs they concede that in consequence of the motion the court is required to interpret the opinion in the injunction cases. The statement in the briefs making this concession is the following: "Regardless of the dress in which it may be clothed, the real and only question to be determined on this Motion is the effect that is to be given to the Opinion of this Court in the case of May vs The City of Kearney and Consumers vs The City of Kearney, Nos. 31837 and 31838, filed on January 23, and which will hereinafter be referred to as the 'Injunction Case.'" We conclude that this concession implies consent to the entry of such judgment on that interpretation as is found to be just and proper.

Having arrived at the conclusion that no issue remains to be litigated in this case the motion of Consumers Public Power District to dismiss is sustained and the action is accordingly dismissed.

MOTION SUSTAINED AND ACTION DISMISSED.

MARION DICKENSON, APPELLEE, V. COUNTY OF CHEYENNE, APPELLANT.

18 N. W. 2d 559

FILED MAY 4, 1945. No. 31860.

1. **Highways.** A county cannot be held as an insurer of those who have occasion to use county highways.
2. ———. A county is only required to use such care as is reasonable and ordinary in the maintenance and repair of county highways.
3. ———. Section 39-834, R. S. 1943, provides that a county is liable for the "insufficiency" of its highway, which word "insufficiency" may be defined as being inadequate to the need, use, or purpose of the highway.
4. ———. In the original United States government surveys in the western states, it is provided that on certain range lines running east and west, called correction lines, the section lines coming in from the north must jog over on such east and west road to the nearest section line, continuing on south from this correction line. A county would not be required to erect a warning sign, calling attention to this well-known fact, unless a duty to do so at a particular intersection would be required by reasonable and ordinary care of its highways.
5. **Automobiles.** A motorist who drives his automobile so fast on a highway at night that he cannot stop in time to avoid a collision with an object within the area lighted by his headlights is negligent as a matter of law.
6. **Negligence.** When the plaintiff's negligence is more than slight as compared with that of the defendant, and is clearly the proximate cause of the accident, the court should direct a verdict for the defendant and dismiss the action.

APPEAL from the district court for Cheyenne County: J. LEONARD TEWELL, JUDGE. *Reversed and dismissed.*

R. P. Kepler, for appellant.

P. J. Heaton, for appellee.

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

PAINE, J.

Plaintiff brings action to recover for personal injuries sustained by him in an automobile accident, which he alleges

was caused by a defective condition of a highway maintained by the defendant, the county of Cheyenne. Judgment was entered for $2,812.50, being the amount of the verdict of the jury. The defendant appeals.

The bill of exceptions discloses the following facts: The plaintiff, 21 years of age and married, started about 4:00 a. m. from his home with his brother-in-law, aged 19 years, on November 13, 1941, to go out to a farm to pick corn. Plaintiff drove his 1931 Model A Ford about six miles west on U. S. Highway No. 30 to the town of Sunol, then turned directly south on a county highway, and drove down this section line approximately seven miles to an intersection at a speed of about 30 miles an hour. He drove straight ahead, although it was a dead end road, requiring him to turn either east or west, and crashed into the far side of a borrow pit, which nearly demolished his automobile and caused him such very serious personal injuries that no claim is made by the county that the verdict is excessive.

It is a fact that there was no warning sign erected by the county, and that the north-south section line which the plaintiff was traveling ended in an east-west section line, which is called in the United States government surveys a correction line, and occurs usually every 24 miles, due to the convergence of longitude, and this was also the range line. The main travel southward turned at right angles at this intersection and went nearly half a mile west on this correction line, and then turned to the south again. All of these roads were maintained as graveled county highways, 24 feet wide.

On this particular winter morning, at about 4:30 a. m., it was not only very dark, but in addition there was a rather heavy fog, which wet the headlights and cut down the visibility.

As one approaches the place of this accident from the north, he comes down a gentle slope, which is 30 feet lower at the intersection than it was 1,300 feet back. The contour of the ground continues to decline at this same gentle slope over in the field beyond this dead end. In building this east and west road, the county had made a borrow pit, also used

as a drainage ditch, on the south side of this east-west road, which ditch was about nine feet wide and three feet deep on the farther side. The plaintiff, driving directly ahead down that slope at 30 to 35 miles an hour, did not slacken his speed, and crashed into the south side of this borrow pit, which stopped the car.

The plaintiff claimed he never saw the intersection until he was right on it. His brother-in-law said he noticed it when they were back about 50 to 75 feet, but did not say anything to the driver of the car. Yet the testimony is that plaintiff, either consciously or unconsciously, put on the brakes, for the skid marks showed plainly 60 to 70 feet back of the car.

The defendant county sets out some twelve assignments of error, eight of them relating to alleged errors in the instructions, which need not be discussed in this opinion.

The second assignment charged that the court erred in not sustaining defendant's motion to dismiss plaintiff's action at the close of the plaintiff's evidence. This we will discuss at some length.

A county cannot be held as an insurer of those who have occasion to use county highways. A county is only required to use such care as is reasonable and ordinary in its maintenance of its highways. *Brooks v. Thayer County,* 126 Neb. 610, 254 N. W. 413; *Frickel v. Lancaster County,* 115 Neb. 506, 213 N. W. 826.

The only liability of a county for the care of its highways is that provided in section 39-834, R. S. 1943, reading in part as follows: "If special damage happens to any person, his team, carriage or other property by means of insufficiency or want of repair of a highway or bridge, which the county or counties are liable to keep in repair, the person sustaining the damage may recover in an action against the county, * * * ; *Provided, however,* such action is commenced within thirty days of the time of the injury or damage occurring; * * * ."

There appears to be no question but that the graveled county highways in question were kept in repair by a main-

tainer man going over them twice a week regularly, and more often if necessary.

In addition to the repair of the highways, the only other provision in this statutory limitation placed upon recovery of damages against a county is in the clause providing that if any special damage happens to any person "by means of insufficiency" of the highway. This important word "insufficiency," as used in this section, may be defined as being inadequate to the need, use, or purpose of the highway. The plaintiff charges that it was insufficient by reason of not having some kind of warning signs installed either along the road, before one reached the dead end, or across the dead end itself.

The evidence discloses that, after dark on the night before they were to testify in February, 1944, tests were made by officials at this point with the aid of headlights of an automobile, and the evidence of one witness is that at a point about 650 feet back from the intersection, that is, half way down the hill, one could see the intersection, and that at 400 feet back from the intersection they could see a post. Another testified he could see the fence across the road just back of the borrow pit, 750 feet back from the intersection.

We cannot believe that the failure to put up a sign showing that the road turns, which turn can easily be seen 400 to 750 feet back, is such an omission as would charge the county officers with negligence in their duty in that regard. See *Johnson County v. Carmen,* 71 Neb. 682, 99 N. W. 502.

We will now consider the negligence of the plaintiff.

"As a general rule it is negligence as a matter of law for a motorist to drive an automobile so fast on a highway at night that he cannot stop in time to avoid a collision with an object within the area lighted by his lamps." *Roth v. Blomquist,* 117 Neb. 444, 220 N. W. 572, 58 A. L. R. 1473. See, also, *Fulcher v. Ike,* 142 Neb. 418, 6 N. W. 2d 610; *Anderson v. Robbins Incubator Co.,* 143 Neb. 40, 8 N. W. 2d 446.

"A motorist who drives his automobile so fast on a highway at night that he cannot stop in time to avoid a collision

with an object within the area lighted by his headlights is negligent as a matter of law." *Redwelski v. Omaha & C. B. Street R. Co.*, 137 Neb. 681, 290 N. W. 904. See, also, *Fischer v. Megan*, 138 Neb. 420, 293 N. W. 287.

In the instant case, it was not only very dark at 4:30 this winter morning, but there was a fog which would make it much more difficult to see. This fact imposed an additional reason why the plaintiff should have reduced his speed and exercised care commensurate with the surrounding circumstances, which he failed to do.

In the case of *Morrison v. Scotts Bluff County*, 104 Neb. 254, 177 N. W. 158, it is shown that the doctrine of contributory negligence and comparative negligence applies to counties, and clearly states the rules in regard thereto, as follows: "The true rule is that, if plaintiff is guilty of negligence directly contributing to the injury, he cannot recover, even though defendant was negligent, unless the contributory negligence of plaintiff was slight and the negligence of defendant was gross in comparison therewith. If, in comparing the negligence of the parties, the contributory negligence of the plaintiff is found to exceed in any degree that which under the circumstances amounts to slight negligence, or if the negligence of defendant falls in any degree short of gross negligence under the circumstances, then the contributory negligence of plaintiff, however slight, will defeat a recovery." See R. S. 1943, sec. 25-1151.

Now, the proximate cause of an injury is that which in natural and continuous sequence, without any intervening cause, produces the injury. See *Kudrna v. Sarpy County*, 125 Neb. 83, 249 N. W. 87.

The plaintiff testified that when he came down that road he was keeping a sharp lookout for that corner, but he said he did not know just where it was. So while he was watching for this dead end intersection, which he knew was there for he had traveled over the east and west road before, he did not slacken his speed at all as he came down that hill.

To show the negligence of the plaintiff, there is this additional fact that there was a very large black post, made

out of a railway tie, in the fence just across the ditch and directly in front of one coming down to that intersection. One witness testified he could see, with the aid of headlights of an automobile, that post 750 feet away at night, and another 400 feet back, but the plaintiff did not see it at all, because of the fog, or his poor lights, or lack of care.

"Where the evidence shows beyond reasonable dispute that plaintiff's negligence was more than slight as compared with defendant's negligence, the jury should be instructed to find for the defendant." *Whittaker v. Hanifin*, 138 Neb. 18, 291 N. W. 723. See, also, *Chana v. Mannlein*, 141 Neb. 312, 3 N. W. 2d 572.

"Where the facts show beyond reasonable dispute that the plaintiff's negligence was more than slight, as compared with the negligence of the defendant, it is the province of the court to direct a verdict for the defendant." *Allen v. Omaha & S. I. R. Co.*, 115 Neb. 221, 212 N. W. 428. See, also, *Klement v. Lindell*, 139 Neb. 540, 298 N. W. 137; *Ritter v. Hering*, 135 Neb. 1, 280 N. W. 231.

In several opinions it has been held that, when the proximate cause of the accident is the negligence of plaintiff, it should not be submitted to the jury by the trial court, but should be dismissed. See *Dodds v. Omaha & C. B. Street R. Co.*, 104 Neb. 692, 178 N. W. 258; *Walsh v. Megan*, 139 Neb. 575, 298 N. W. 158.

In our opinion, it was reversible error for the trial court to fail to direct a verdict for the defendant and to dismiss the case. See *Most v. Cedar County*, 126 Neb. 54, 252 N. W. 465.

The judgment is hereby reversed and set aside, and it is directed that the action be dismissed.

REVERSED AND DISMISSED.

REFRIGERATION & AIR CONDITIONING INSTITUTE, INC., APPELLANT, V. HAROLD W. HILYARD, APPELLEE.
18 N. W. 2d 548

FILED MAY 4, 1945. No. 31833.

1. **Corporations.** Where an agent of a foreign corporation comes into this state and solicits a resident thereof, secures a contract, promissory note and down payment, the same to be approved at the domicile of such corporation where the contract and acts of the agent are legal but in violation of the local law where the solicitation is made, and then the foreign corporation comes into this state by the doctrine of comity and institutes suit against such resident to enforce the contract, it owes the reciprocal duty to abide by the local law in effect when the solicitation was made.
2. **Conflict of Laws.** If a foreign corporation solicits, negotiates, or otherwise carries on business in this state contrary to local laws, and a contract growing out of such transaction is subsequently entered into and valid in another state, though invalid here, it will not be enforced in this state as a matter of comity.
3. **Corporations.** A foreign corporation cannot exercise powers or do acts contrary to the laws of the state whose comity it thus enjoys, even though such powers or acts may be authorized by its own charter or by the laws of its own state.

APPEAL from the district court for Lancaster County: RALPH P. WILSON, JUDGE. *Affirmed.*

F. C. Radke and *Littrell & Patz*, for appellant.

O. B. Clark, for appellee.

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

MESSMORE, J.

This is a law action based on a promissory note and contract, given by defendant for a course of instruction in refrigeration and air conditioning, in the amount of $225. Plaintiff sued for the balance due of $165 and interest. Jury was waived, trial had to the court, the court entered judgment for the defendant and dismissed plaintiff's petition. Motion for a new trial was overruled. Plaintiff appeals.

The plaintiff's petition sets forth the contract and note, its compliance with its conditions; in addition, alleges it is

an Illinois corporation and the contract is an Illinois contract. The laws of Illinois do not contain statutes such as sections 62-303, 62-304, 62-305, R. S. 1943. Defendant's answer alleges the contract is void, as provided by sections 62-303, 62-304 and 62-305, R. S. 1943. Briefly, the stipulated facts are as follows:

Plaintiff is an Illinois corporation, was incorporated for the purpose of conducting a trade school, offering courses of study in refrigeration and air conditioning, and is equipped to give such courses by correspondence method in the elementary and theoretical phases thereof, and thereafter to give a practical and laboratory shop course of training in its school and shops in Chicago. As a part of its business, the plaintiff, by its agents, solicited business in other states than Illinois, and on August 24, 1938, one of its agents solicited the defendant in Lincoln, Nebraska, and defendant signed the contract and promissory note and paid $10 on account. The agent then gave the defendant the preliminary educational, proficiency and mechanical inclination test, as provided for in the contract, at his home in Lincoln, and forwarded his conclusion, drawn from the test, with the application and $10 remittance to the plaintiff in Chicago. Upon receipt and examination thereof plaintiff approved the application and enrolled defendant as a student, accepted the $10 payment, notified the defendant he was qualified to pursue the course of instruction offered by the defendant, and his application was approved. The acceptance was stamped upon the contract and note August 26, 1938. Thereafter, as soon as the defendant became enrolled as a student, printed instruction sheets and examination questions were sent through the United States mail, or by express, to the defendant. Defendant accepted such material, pursued the course of study for about six months, made five additional payments on the note of $10 each, refused to proceed further and made no further payments. Plaintiff was at all times ready, willing and able to furnish the instruction according to the contract.

There nowhere appears in the contract or in any other

paper or document relating to the agreement for tuition, prominently, legibly, in bold type or otherwise, across the face of the contract or above the signature thereto, the words "negotiable note given for tuition," or "negotiable contract note given for tuition and scholarship," or any other words or figures, as required by or complying with the provisions of section 62-303, R. S. 1943.

The contract, exhibit A, is in the form of an application for admission as a student in the training program conducted by the plaintiff. It provides that the plaintiff shall have the right to reject the application if the scores on the educational proficiency test and mechanical inclination test, which were taken by the defendant in the presence of plaintiff's agent, did not, in the sole judgment of the plaintiff, meet its requirements for admission, or if, for other reasons, a duly authorized officer of the plaintiff considered the acceptance of the application undesirable. It further provides that the defendant would be notified as soon as possible whether the plaintiff accepted or rejected his application, and in the event of rejection the payment made would be returned to the defendant. The contract then provides that if the application is accepted the defendant would be entitled to receive the complete training.

Plaintiff contends that the court erred in failing to find that the contract note is an Illinois contract, legal and valid in the state of Illinois, and not subject to interpretation and control of sections 62-303, 62-304 and 62-305, R. S. 1943, and that said contract note is enforceable in Nebraska.

Section 62-303, R. S. 1943, provides in part: "It shall be unlawful for any proprietor, officer, agent or representative of any business college, or the business or commercial department of any school doing business within the State of Nebraska, or without the state when operating or soliciting within the state, to contract for or receive for tuition or scholarship a negotiable note or negotiable contract, except the said negotiable note or notes or negotiable contract shall have written or printed prominently and legibly and in bold type across the face thereof, and above the signatures there-

to, the words 'negotiable note given for tuition' if a note, or the words 'negotiable contract note given for tuition and scholarship,' if a contract, and unless a copy of said instrument shall be delivered to the makers thereof at the time of signing the same." Section 62-304, *supra,* provides that the violation of the provisions of the negotiable instrument act constitutes a misdemeanor and fixes the penalty. Section 62-305, *supra,* provides that when such a note fails to comply with the provisions of the act it shall be void.

" * * * the place where the last act is done which is necessary to the validity of the contract is the place where the contract is entered into." *McElroy v. Metropolitan Life Ins. Co.*, 84 Neb. 866, 122 N. W. 27. See, also, *Avondale v. Sovereign Camp, W. O. W.*, 134 Neb. 717, 279 N. W. 355.

Though the contract may be considered an Illinois contract its enforcement in this state is subject to the following: The plaintiff is a foreign corporation not domesticated in this state and not authorized to transact business therein. By comity of the states, corporations of one state may sue in the courts of another state, the same as a domestic corporation, unless prohibited by legislative enactment. *Schmitt & Bro. Co. v. Mahoney,* 60 Neb. 20, 82 N. W. 99. There is no such legislative enactment in this state so under the doctrine of comity the plaintiff may sue in this state.

There is a clear distinction and difference as to what constitutes the transacting of or doing business by a foreign corporation in this state for the purpose of obtaining service of process and transacting or doing business by a foreign corporation with a resident of the state. When the corporation's agent solicits and by doing so procures a contract, promissory note and down payment to be approved in the state of its domicile, where the contract and acts of the agent are legal, but in violation of the local law where the solicitation is made, and then the foreign corporation comes into this state by exercise of the doctrine of comity and institutes suit against such resident to enforce the contract, it owes the reciprocal duty to abide by the local law in effect when the solicitation was made and it accrues to and pos-

sesses no greater rights under such circumstances than a domestic corporation. We hold the plaintiff, a foreign corporation, through its agent, under the circumstances here presented, was transacting business in this state and, this being true, the law is: Where a corporation avails itself of the comity of a foreign state to transact business therein it is subject to the responsibilities and burdens which such state imposes. In entering a foreign state to do business therein, a corporation impliedly agrees to become subject to its laws and is deemed to have notice of those laws. Consequently, it cannot exercise powers or do acts contrary to the laws of the state whose comity it thus enjoys, even though such powers or acts may be authorized by its own charter or by the laws of its own state. 17 Fletcher Cyc. Corporations, sec. 8339, p. 148. See, also, *Interstate Savings & Loan Assn. v. Strine*, 58 Neb. 133, 78 N. W. 377, 59 Neb. 27, 80 N. W. 45; *Building & Loan Assn. of Dakota v. Bilan*, 59 Neb. 458, 81 N. W. 308; *State v. Standard Oil Co.*, 61 Neb. 28, 84 N. W. 413; *Anselme v. American Savings & Loan Assn.*, 66 Neb. 520, 92 N. W. 745; *State v. Fleming*, 70 Neb. 523, 97 N. W. 1063. Foreign jurisdictions, indicating the same legal conception, are too numerous to cite. See, also, 20 C. J. S., sec. 1790, p. 13; Taylor, Private Corporations (5th ed.) sec. 384, p. 368.

It is therefore apparent a corporation has no right to carry on business in a foreign state unless it complies with the domestication statutes of that state, except by comity. If a foreign corporation solicits, negotiates, or otherwise carries on business in this state contrary to local laws, and a contract growing out of such transaction is subsequently entered into and valid in another state, though invalid in this state, it will not be enforced in this state as a matter of comity. Under such circumstances, when the foreign corporation comes into this state to carry on its business as a matter of comity between states, there arises a reciprocal duty on its part to comply with the laws of this state, and, when it fails to do so, it will not be permitted to enforce the contract in the courts of this state. For the reasons

given in this opinion the judgment of the district court is affirmed.

AFFIRMED.

YEAGER, J., concurring in the result.

I concur in the result arrived at in the majority opinion and I agree that under the facts and on the theory of the opinion a correct determination and disposition of the case was made, but in my opinion more than this is called for by the issues presented.

The pleadings put in issue the question of the validity of notes and contracts given for tuition contrary to the provisions of sections 62-303, 62-304 and 62-305, R. S. 1943, and also the question of the right of a foreign person or entity under comity to enforce such a note or contract in the courts of this state. I think these questions should be determined herein.

I am authorized to state that Simmons, C. J., and Chappell, J., concur in the result for the reasons herein stated.

SHIMAN BROTHERS & COMPANY, INC., APPELLANT, V. NEBRASKA NATIONAL HOTEL COMPANY ET AL., APPELLEES.

18 N. W. 2d 551

FILED MAY 4, 1945. No. 31854.

1. **Evidence.** The burden of proof means the duty resting on one party or the other, usually the party having the affirmative, to establish by preponderance of evidence a proposition essential to the maintenance of the action. In this sense the burden of proof never shifts nor changes, but remains from first to last where it is placed by the pleadings or the substantive law of the case.
2. ———. The plaintiff may offer sufficient proof to make a *prima facie* case, or he may be aided by a presumption of law which, if nothing further appeared, would entitle him to a verdict, and when this happens the burden of meeting the *prima facie* case devolves upon the defendant.
3. **Bailments.** A bailment is for hire, although no direct hire is paid for the bailment, where it is a necessary incident of a business in which the bailee makes a profit.

4. ———. When a bailment is reciprocally beneficial to both parties, the law requires ordinary diligence on the part of the bailee and makes him responsible for ordinary negligence.
5. **Innkeepers.** An innkeeper will not be liable for the loss of merchandise or goods bailed to him if the loss was occasioned by the want on the part of the bailor of that ordinary care which a prudent man would be reasonably expected to take under all the circumstances in the case, and whether the bailor has exercised such ordinary care is usually a question of fact for the jury.
6. **Trial.** It is not prejudicial error for the court to fail to instruct on the comparative negligence rule when the evidence discloses the contributory negligence of the plaintiff exceeds slight negligence.
7. **Negligence.** In an action for damages for negligence, an instruction that plaintiff must establish by the greater weight of evidence that the negligence of the defendant caused the damage, is sufficient relative to proximate cause, where there is no question of a remote or intervening cause.
8. **Trial.** An instruction on the measure of damages that properly forms a basis of recovery in behalf of plaintiff, in the event the defendant is liable, is not prejudicially erroneous if not technically correct, especially where the case is terminated on liability and a verdict is returned for the defendant.
9. **Negligence.** When a party alleges and charges negligence, the burden of proving negligence is on such party.
10. **Trial.** Where instructions as a whole correctly state the law applicable to the controverted issues, the verdict of the jury, if supported by sufficient evidence, will not be set aside because particular instructions, considered separately, contain mere informalities or omissions which are not misleading or confusing.

APPEAL from the district court for Douglas County: JAMES M. FITZGERALD, JUDGE. *Affirmed.*

Rosewater, Mecham, Shackelford & Stoehr, for appellant.

Gaines & Shoemaker, for appellees.

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

MESSMORE, J.

This is an action at law for damages in which the plaintiff seeks to recover judgment against the defendant as a bailee for hire. This action is predicated on the negligence

of defendant hotel company, its agents and servants, in caring for plaintiff's trunk containing jewelry of alleged value of $45,809.95 at the time the trunk was stolen. This is the second appearance of this case in this court. In a previous opinion the cause was remanded for a new trial on the question of negligence. See *Shiman Bros. & Co. v. Nebraska National Hotel Co.*, 143 Neb. 404, 9 N. W. 2d 807, hereinafter referred to as our former opinion.

The pleadings establish the following facts without dispute: The defendant is a corporation engaged in the hotel business in Omaha, Nebraska, for the purpose of furnishing food, lodging and services for the public. The plaintiff's salesman, Milton J. Jackson, hereinafter referred to as salesman, registered as a guest in the Hotel Paxton about 9:30 p. m., July 12, 1939, and was assigned to room 1127. On July 13, 1939, about 6 p. m., the salesman called the head porter, informing him he was checking out and that his trunk was to be sent to the Union Station at once. Another porter went to the salesman's room and, after delivering a claim check to him, took the trunk and its contents down to the first floor and put the trunk on a loading dock on the southwest corner of the hotel building.

The plaintiff's petition alleged, in addition to the foregoing admitted facts, the following in substance: That the loss of the trunk and contents was due solely to, and caused by, the carelessness and negligence of the defendant, its agents, servants and employees, in placing the trunk on the open platform in the alley at the rear of the hotel and leaving it wholly unattended and unguarded. The amended answer of the defendant denied negligence on its part, and for further answer alleged that the loss sustained by plaintiff, if any, was due solely and entirely to the negligence and carelessness of plaintiff's salesman. The reply denied the affirmative defense of contributory negligence pleaded in the amended answer.

The case was submitted to a jury and a verdict was returned in favor of the defendant. Plaintiff filed a motion for a new trial, which was argued and submitted. There-

after the court overruled the motion and plaintiff perfected its appeal to this court.

The plaintiff contends that the rule in Nebraska places the burden on a bailee for hire, to show that property entrusted to his care was lost without negligence on his part; that this court, in the former opinion, announced the correct rule to be: "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."

In support of this contention the following Nebraska cases are cited: *Sulpho-Saline Bath Co. v. Allen,* 66 Neb. 295, 92 N. W. 354; *Campbell v. Missouri P. Ry. Co.,* 78 Neb. 479, 111 N. W. 126.

In the case of *Davis v. Taylor & Son,* 92 Neb. 769, 139 N. W. 687, the court said: "The only burden placed upon the bailee is that, when it is established that the property was injured while in his possession, he must overcome this presumption by his proofs." Citing *Sulpho-Saline Bath Co. v. Allen* and *Campbell v. Missouri P. Ry. Co., supra.*

Plaintiff requested instruction No. 6, which placed the burden of proof on the defendant to prove by a preponderance of the evidence that the trunk and contents were not lost by reason of any negligence on the part of the defendant, its servants, agents or employees, and if the defendant hotel company had failed to prove by a preponderance of evidence that the trunk was not lost by reason of the negligence of the hotel company, its servants or employees, their verdict should be for the plaintiff. This requested instruction was refused, and plaintiff predicates error on the court's refusal to so instruct the jury. It will be observed that requested instruction No. 6 would shift the burden of proof to the defendant.

There is much confusion and misunderstanding with reference to the term "burden of proof" as distinguished from the burden of going forward with the evidence. This principle is discussed in *Moore v. Williams,* 111 Neb. 342, 196

N. W. 695, in the following language: " 'Confusion can, to a certain extent, be avoided, and apparent contradictions reconciled, by bearing in mind the distinction between 'burden of proof' and 'burden of evidence' to be hereinafter stated, and also the fact that in the vast majority of cases any such distinction is entirely ignored by the courts. The general rule is that the burden of proof rests upon the party who has the affirmative of the issue, as determined by the pleadings, * * * . This rule is founded upon the obvious purpose of facilitating justice by serving the convenience of the court; and as the rule as to burden of proof is a fixed rule of law, the burden never shifts from the party having the affirmative of the issue. The rule as to the burden of proof is important and indispensable in the administration of justice, and constitutes a substantial right of the party upon whose adversary the burden rests. It should therefore be jealously guarded and rigidly enforced by the courts. The test for determining which party has the affirmative, and therefore the burden of establishing a case, is found in the result of an inquiry as to which party would be successful if no evidence at all were given, the burden being of course on the adverse party.' 22 C. J. 67 *et seq.*" See, also, *Beckman v. Lincoln & N. W. Ry. Co.*, 79 Neb. 89, 112 N. W. 348; *Olson v. Omaha & C. B. Street Ry. Co.*, 137 Neb. 216, 289 N. W. 356; 20 Am. Jur., secs. 131 and 132, p. 134; 22 C. J., sec. 14, p. 68.

The case of *Kohlsaat v. Parkersburg & Marietta Sand Co.*, 4 Cir., 266 Fed. 283, reflects a clear conception of the principle: "There appears to be some confusion of thought and some conflict of authority, particularly in the earlier decisions, because of the double meaning of the phrase 'burden of proof'. Primarily it means the duty resting on one party or the other, usually the party having the affirmative, to establish by preponderance of evidence a proposition essential to the maintenance of the action. In this sense the burden of proof never shifts or changes, but remains from first to last where it is placed by the pleadings or the substantive law of the case. Sometimes, however, the phrase

is used to describe the duty of going forward with the evidence during the progress of the trial. The plaintiff may offer sufficient proof to make a *prima facie* case, or he may be aided by a presumption of law, which, if nothing further appeared, would entitle him to a verdict; and when this happens the burden of meeting the *prima facie* case devolves upon the defendant. Thus, the duty of 'going forward'—that is, the necessity of producing further evidence—may shift back and forth as the trial proceeds. But when all the proofs are in, and the case is ready for submission to the jury, the question of whose duty it was to go forward with the evidence at any turn of the trial practically disappears; and the more important question arises as to which party has the burden of establishing by the greater weight of evidence the proposition in dispute; * * * ." See, also, *Claflin v. Meyer*, 75 N. Y. 260, 31 Am. Rep. 467; *Hunter v. Ricke Bros.*, 127 Ia. 108, 102 N. W. 826; *Bohmont v. Moore*, 138 Neb. 784, 295 N. W. 419, 133 A. L. R. 270.

In *Bohmont v. Moore, supra,* this court quoted from a note in 43 L. R. A. n. s. at page 1172: "The following cases, although containing language which in itself might indicate that the court regarded the bailee as having the burden of proof to establish due care by a preponderance of the evidence, must be construed, in view of other decisions in the same state, simply as authority for the proposition that, in case of injury to or loss of the property, the burden of overcoming a presumption of negligence rests upon the bailee: * * * ." *Sulpho-Saline Bath Co. v. Allen, supra,* is cited therein.

Referring to our former opinion, page 415, the court concluded that the instant suit is predicated on the negligence of the defendant hotel company, its agents and servants, and on page 413 said: "Thus the burden of proving plaintiff's contributory negligence is on the innkeeper," and the case was remanded on the question of negligence.

In this state when a party alleges and charges negligence, the burden of proving negligence on the part of the defendant rests upon the plaintiff and never shifts to the defend-

ant in any stage of the case. *Olson v. Omaha & C. B. Street Ry. Co.*, 137 Neb. 216, 289 N. W. 356; *Mercer v. Omaha & C. B. Street Ry. Co.*, 108 Neb. 532, 188 N. W. 296; *Rapp v. Sarpy County*, 71 Neb. 382, 98 N. W. 1042, 102 N. W. 242; *Vertrees v. Gage County*, 75 Neb. 332, 106 N. W. 331; *Lincoln Traction Co. v. Webb*, 73 Neb. 136, 102 N. W. 258; *Bohmont v. Moore, supra.*

The bailment in the instant case is a bailment for hire, sometimes referred to as a reciprocal bailment, although no direct hire is paid for the bailment where it is a necessary incident of a business in which the bailee makes a profit. *Sulpho-Saline Bath Co. v. Allen, supra;* 6 Am. Jur., sec. 22, p. 150.

" 'When a bailment is reciprocally beneficial to both parties, the law requires ordinary diligence on the part of the bailee, and makes him responsible for negligence.' " *Nagaki v. Stockfleth*, 141 Neb. 676, 4 N. W. 2d 766, quoting from *Mattern v. McCarthy*, 73 Neb. 228, 102 N. W. 468, and citing *Sulpho-Saline Bath Co. v. Allen, Campbell v. Missouri P. Ry. Co.*, and *Davis v. Taylor & Son, supra.*

The court's instructions properly placed the burden of proof on negligence and contributory negligence, and the degree of care required of the defendant, and defined ordinary care. We conclude the court did not err, as contended for by plaintiff.

The plaintiff contends the court erred in not instructing the jury on the comparative negligence rule.

Section 25-1151, R. S. 1943, provides: "In all actions brought to recover damages for injuries to a person or to his property caused by the negligence of another, the fact that the plaintiff may have been guilty of contributory negligence shall not bar a recovery when the contributory negligence of the plaintiff was slight and the negligence of the defendant was gross in comparison, but the contributory negligence of the plaintiff shall be considered by the jury in the mitigation of damages in proportion to the amount of contributory negligence attributable to the plaintiff; and all

questions of negligence and contributory negligence shall be for the jury."

It will be observed, the foregoing statutory provision is for the purpose of requiring the jury to compare negligence of the defendant with that of plaintiff in the mitigation of damages under the circumstances set forth therein.

In the instant case the defendant pleaded the affirmative defense of contributory negligence on the part of plaintiff's salesman. Under the instructions given by the court, before the defendant can avail itself of this defense it must prove by a preponderance of the evidence that the plaintiff's salesman was negligent, as the term is defined by the court's instructions. The definition of negligence given in the court's instructions is, in substance, as follows: "By negligence is meant the doing of some act under the circumstances, which a man of ordinary prudence would not have done, or the failure to do some act or take some precaution which a man of ordinary prudence would have done or taken."

In a case of bailment for hire, the guest's contributory negligence may bar his recovery. This may take place in his not using toward his merchandise, in the instant case jewelry valued at $45,000 contained in a wardrobe trunk, the ordinary care that a prudent man would reasonably be expected to have used. See VanZile, Bailments and Carriers (2d ed.) sec. 205, pp. 179, 180; Lawson on Bailments, riers (2d ed.), sec. 205, pp. 179, 180; Lawson on Bailments, sec. 80, p. 134.

In *Rubenstein v. Cruikshanks*, 54 Mich. 199, 19 N. W. 954, while this case was not one where notification to the bailee was necessary as to the extraordinary value or character of the goods contained in a valise and box, the case recognized that the rule was proper where the record would show the extraordinary value of goods or merchandise bailed, and where the failure to give notice would, or could, amount to contributory negligence on the part of the bailor.

In *Hadley v. Upshaw*, 27 Tex. 547, it is said: "An innkeeper will not be liable for the loss of the goods of his guest, if the loss was occasioned by the want on the part of

the guest of that ordinary care which a prudent man would be reasonably expected to take under all the circumstances of the case; and whether the guest has exercised such ordinary care, is always a question of fact for the jury." This rule was laid down by the Court of Queen's Bench in the case of *Cashill v. Wright,* 37 Eng. Law & Eq. Rep. 175; *Armistead v. White,* 6 Eng. Law & Eq. Rep. 349. See, also, *Fowler v. Dorlon,* 24 Barb. 384.

In *Read v. Amidon,* 41 Vt. 15, it is said: "A guest is not relieved from all responsibility in respect to his goods on entering an inn. He is bound to use reasonable care and prudence in respect to their safety, so as not to expose them to unnecessary danger of loss." See, also, *Stoll v. Judd Co.,* 106 Conn. 551, 138 A. 479, 53 A. L. R. 1042; Beale on Innkeepers and Hotels, sec. 223; 14 R. C. L., p. 534; 32 C. J. p. 546; *Elcox v. Hill,* 98 U. S. Rep. 218; *Purvis v. Coleman & Stetson,* 21 N. Y. 111.

The foregoing texts and cases establish the degree of care required of a bailor in bailing property, and the failure of the bailor to exercise such care may result in contributory negligence on the part of the bailor and bar recovery.

The evidence, in the instant case, of contributory negligence on the part of the plaintiff's salesman which is controverted, was his failure to inform or notify the defendant, its employees or agents, that the ordinary wardrobe trunk which he used in his business contained a valuable collection of jewelry of the extraordinary value of $45,000.

Whether or not a bailor has exercised ordinary care is usually a question for the jury. However, in the instant case contributory negligence constitutes the only affirmative defense, and the only evidence of contributory negligence is the failure of plaintiff's agent to disclose the extraordinary value of the property bailed. This question was submitted to the jury which found, if it was decided on the question of contributory negligence, that such information was not disclosed. The jury having so found, the plaintiff is barred from recovery as a matter of law, because of its own contributory negligence which obviously is more than

slight negligence. Consequently, the trial court did not err prejudicially in failing to give an instruction on comparative negligence.

Plaintiff assigns as error the failure of the court to define proximate cause, in that the court refused an offered instruction on the subject of proximate cause, which was put in issue by the pleadings and the evidence; that under the Nebraska law the only negligence that could be charged to the plaintiff would be negligence which proximately contributed to the loss. The jury was given an instruction on negligence and on contributory negligence, but was not instructed that the contributory negligence of the plaintiff, if any they found, must have proximately contributed to cause the loss. Plaintiff argues: It is vital in this case to have an instruction on proximate cause, in view of the fact that defendant was allowed to offer in evidence facts which occurred over a month before the loss and could not have proximately contributed to cause the loss.

In addition to the offered instruction on proximate cause, plaintiff offered an instruction on the effect of evidence prior to the time of the loss, which was refused. We have reviewed the extended cross-examination of plaintiff's salesman, unobjected to, touching upon his activities throughout the trip. This evidence, in the main, went to the question of his veracity and his memory as to what really and actually occurred on the trip. In any event, the instructions given by the court limited the question of negligence to the handling of the trunk in Omaha. We conclude that the rule announced in *Oliver v. Nelson,* 128 Neb. 160, 258 N. W. 69, disposes of this assignment of error, viz.: "In an action for damages for negligence, an instruction that plaintiff must establish by the greater weight of the evidence that the negligence of the defendant caused the accident and the damage is sufficient relative to proximate cause, where there is no question of a remote or intervening cause."

The above rule was followed in *Triplett v. Lundeen,* 132 Neb. 434, 272 N. W. 307, and cited therein. In the body of the opinion, page 439, it is said: " * * * it is not indispens-

able that the term 'proximate cause' should be used. It is sufficient if it appears that defendants' negligence was the sole cause, or the efficient cause, or was the direct cause. In the instructions we think it clearly appears that the expression, that plaintiff's injury and damage were caused by the negligence of defendants, is equivalent to saying the defendants' negligence was the efficient or direct cause * * * ."

In the instant case there is no question of a remote or intervening cause.

The plaintiff contends that in paragraph 7 of the syllabus of our former opinion this court said: "A statute limiting the common-law liability of an innkeeper as an insurer has no application where the loss occurs after a guest has begun his departure from the hotel and has delivered his baggage to a hotel porter for delivery to a transportation company." From this, it is urged that the common law is in force in this state, that at common law an innkeeper is an insurer of the goods of his guests, and the only rule that can apply with reference to the instant case is that of the common law.

The plaintiff's petition alleged that the loss of the trunk and contents was solely due to and caused by the carelessness and negligence of the defendant. It is apparent that plaintiff bases its cause of action solely upon the negligence of the defendant. In the former opinion this court held: "We conclude therefore that the present suit is predicated on the negligence of the hotel company, its agents and servants, and that the statute modifying the common-law liability of the hotel company as an insurer has no application." The plaintiff's contention is without merit.

The plaintiff contends that the court failed to properly instruct the jury as to the proper basis on which damages are to be estimated, and the jury is entitled to be informed as to the elements of damage which they should take into consideration in arriving at their verdict. On this subject the plaintiff requested instructions defining the term "reasonable market value" and that the measure of damages was the reasonable value of the jewelry lost by the defendant on the market in Omaha on July 13, 1939, when it was

stolen, plus interest at six per cent per annum from July 14, 1939. The offered instructions were technically correct.

The court, in instruction No. 4, used the following language: " * * * then your verdict will be in favor of the plaintiff in whatever sum you may find was the reasonable market value of the merchandise alleged to have been taken from the trunk." The reasonable market value of the merchandise could only be at the place where it was stolen.

While the instruction on this subject given by the court is not as complete as the instructions requested by the plaintiff, it forms a basis of recovery that is proper in the event the defendant is liable. However, the case was terminated on liability, the jury finding for the defendant. The failure to give the requested instructions does not constitute reversible error under the circumstances.

Plaintiff contends the court erred in giving instructions Nos. 1 and 2 by copying the pleadings and where evidence is undisputed or admitted by the defendant, the court should instruct only on issues actually supported by evidence; that such practice has been condemned many times by this court, citing cases. We are not in accord with the plaintiff that the court actually copied the pleadings, and instruction No. 2 sets forth certain facts admitted by the defendant. Obviously the jury were not misled. These instructions merely set forth the contentions of the respective parties, and are not instructions on the law of the case. We find no prejudicial error in such respect.

Our attention is directed to certain language appearing in the last paragraph of instruction No. 2, "in not availing himself of the hotel's provisions for taking care of the trunk," in that such language submits to the jury the defense of the statute limiting liability of the defendant, which the court in the former opinion barred as a defense and defendant's answer contained no such allegation. In considering all the instructions together, especially with reference to the burden of proof on negligence and the degree of care required on behalf of the defendant, we conclude the language used in instruction No. 2, under the circumstances, is not prejudicially erroneous.

"Where instructions as a whole correctly state the law applicable to the controverted issues, the verdict of the jury, if supported by sufficient evidence, will not be set aside because particular instructions considered separately contain mere informalities or omissions which are not misleading or confusing." *Gorman v. Bratka,* 139 Neb. 84, 296 N. W. 456.

The plaintiff predicated error in that the court submitted the issue of contributory negligence to the jury where there is no evidence of contributory negligence on plaintiff's part.

The plaintiff argues the record discloses that the defendant's witness, the porter, took possession of the trunk, giving the salesman a claim check, and was informed that it contained valuable jewelry and to be sure and keep the trunk in a place of safekeeping until such time as the transportation company called for it; that the porter was informed on the previous day that the salesman desired a sample carrier which the porter did obtain for him. However, regardless, the porter placed the trunk unguarded on a loading platform exposed to the alley and the public outside of the hotel. The plaintiff states the porter is the only person who actually knew what happened to the trunk. However, the record further discloses that under the plaintiff's testimony the trunk contained over $45,000 worth of jewelry which remained in possession of the salesman until about 6 o'clock p. m. July 13, 1939, when it was turned over to the porter to be sent out on the 11 o'clock p. m. train. There is no evidence to show that the porter or the defendant hotel company knew, or could have known, that the trunk contained jewelry of the value of $45,000 or more. The evidence is controverted as to whether or not the salesman told the porter the trunk contained valuable jewelry and to keep it in a place of safety until such time as the transportation company called for it. The porter denied he was ever so informed, and another witness who returned some clothes the salesman had left to be cleaned and pressed, was in the room with the salesman and the porter at the time the conversation was alleged to have taken place, and corroborated the porter's testimony.

The trunk was an ordinary wardrobe trunk containing jewelry of the alleged value of $45,000 or more, turned over to a stranger, knowing that the transportation company would not call for the trunk for thirty to forty-five minutes, without disclosing its value. The trunk was at all times checked as baggage by the salesman on the railroad tickets, without his revealing or declaring that it contained a valuable collection of jewelry. Transportation of the trunk between railroad stations and hotels on the entire trip, was by taxicabs or by local baggage carriers, without notice of the value of the contents.

In this connection, 1 Elliott, Evidence, sec. 144, p. 199, it is said, "As a general proposition, therefore, it may be said that any evidence that tends in any reasonable degree to establish the probability or improbability of a fact in issue, no matter how slight its weight may be, is revelant. * * * It is not necessary, however, that it should in itself bear directly upon the point in issue, for if it is but a link in the chain of evidence tending to prove the issue by reasonable inference it may nevertheless be relevant. Indeed, evidence which tends to make the testimony of witnesses probable or improbable may sometimes be competent." See *In re Estate of House,* 145 Neb. 670, 17 N. W. 2d 883.

In VanZile, Bailments and Carriers (2d ed.), sec. 42, p. 35, it is said: " 'What constitutes ordinary diligence,' says Judge Story, 'may always be materially affected by the nature * * * and value of the articles.' " In the same work, p. 36, note 14, the following is quoted from *Erie Bank v. Smith,* 3 Brewster (Pa.) 9: " 'This is very important; a man would not be expected to take the same care * * * of a bale of cotton as of a case of diamonds; * * * .' " See, also, Story on Bailments, sec. 15. The evidence on contributory negligence is such that the court did not err in submitting the defense to the jury.

The plaintiff contends the defendant sought to establish a defense which was invalid by laying a foundation for the introduction of the innkeepers statute to which the plaintiff objected. However, when the exhibit was offered it

was excluded from the jury's consideration. We conclude the court did not err as contended for by plaintiff.

Other assignments of error are found to be without merit.

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

AFFIRMED.

MILTON H. WEBB, APPELLEE, V. PLATTE VALLEY PUBLIC POWER AND IRRIGATION DISTRICT, APPELLANT.
18 N. W. 2d 563

FILED MAY 4, 1945. No. 31891.

1. **Waters and Watercourses.** It is the duty of those who build structures across natural drainways to provide for the natural passage through such obstructions of all waters which may be reasonably anticipated to drain there, and this is a continuing duty.
2. ———. After an easement to drain across the lands of another has been legally acquired it is limited both as to extent and nature to the terms of the original grant.
3. ———. In an action for damages resulting from flooding of premises by a public power and irrigation district if the evidence shows that all the damages were caused by overflow and wrongfully diverted floodwaters, without any commingling of damages by waters from other sources, then it is sufficient to sustain a verdict, and if no error appears in the proceedings a judgment thereon will be affirmed upon appeal.
4. **Trial.** Where instructions are not inconsistent or contradictory but, considered together, correctly state the law, the judgment will not be reversed because one does not state the entire law on the subject, unless it appear that the jury were thereby misled.
5. **Waters and Watercourses.** In order for a flood to come within the term "act of God," it must have been so extraordinary and unprecedented a manifestation of nature as could not have been reasonably anticipated or foreseen.
6. ———. Although a rainfall may be more than ordinary, yet, if it be such as has occasionally occurred at irregular intervals, it is to be foreseen that it may occur again; and a party engaged in a public work, the construction of which involves the change or restraint of the flow of surface waters in a natural drainway, is negligent if he fails to make reasonable provision for the consequences that will result from such extraordinary rainfalls as experience shows are likely to occur.

APPEAL from the district court for Buffalo County: ELDRIDGE G. REED, JUDGE. *Affirmed.*

Beeler, Crosby & Baskins, for appellant.

Dryden & Jensen, for appellee.

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

CHAPPELL, J.

Plaintiff brought this action to recover for damages to growing crops, improvements, and other personal property by surface floodwaters, alleged to have been wrongfully cast upon his land by defendant's irrigation canal. A jury awarded plaintiff a verdict for $1,000 upon which the trial court entered judgment. Motion for new trial was overruled and defendant appealed, contending that the court erred in refusing to sustain defendant's motion for directed verdict at the conclusion of plaintiff's case, in giving and failing to give certain instructions, and in refusing to give defendant's requested instructions. It is also claimed that the verdict is contrary to and not sustained by the law and the evidence. We find that these assignments of error cannot be sustained.

As we view it, the evidence becomes of primary importance to a decision of the case. The record discloses without dispute that plaintiff is a farmer who owns and farms certain land northeast of Odessa in Buffalo County, Nebraska. Defendant is a public power and irrigation district, organized and operating under the statutes of this state (Ch. 70, art. 6, R. S. 1943). As such it operates and maintains an irrigation canal which runs along the south side of plaintiff's land. A natural surface drainway or draw, forked at its upper northern source, crosses plaintiff's land from the north toward the south just east of his improvements. Before construction of the canal this draw carried runoff or excess surface waters from plaintiff's land toward the south to the Platte river. After the canal was constructed the draw emptied such waters into the canal.

Some distance west of plaintiff's land are three other natural surface water drainways or draws located on the lands of others. They come out of the hills northwest thereof and carry runoff or excess surface waters from the lands of others north and west of plaintiff. Before construction of the canal they carried all such waters south and west to the Platte river. After construction of the canal such waters all emptied into the canal and were thus ordinarily carried down past plaintiff's land. However, if the canal was full and these waters could not all get into the canal they of necessity were forced back to the north out of the canal, and if sufficient in volume would come down along the north bank thereof and thence east upon and over plaintiff's land.

There is competent evidence that no dredging or repair work had been done on the canal for many years. Further, three or four feet of sand had washed into the canal from the river, and the banks of the canal were in bad shape, thin in places from sloughing off and caving in, all of which filled in the bottom of the canal and thereby limited its carrying capacity. A concrete wall originally set at the edge of the bank east of plaintiff, then stood eight or ten feet out in the canal. Trees had grown in the sides and in the bottom of the canal, some of which had fallen over or leaned over thereby catching debris, slowing up and diverting the flow of its waters. There had been breaks in the canal, prior to the trouble presently involved, but no steps had been taken to increase its capacity or put in spillways to drain such flood waters out of the canal to the south. There is evidence that this is not a proper method or manner of operating and maintaining the canal.

It also appears in the evidence that on June 13, 1943, at about 4:30 p. m. rain began falling upon plaintiff's premises. Further, just previous to that time the canal was carrying approximately half its capacity of clear river water. It rained for about an hour and a half, not exceedingly hard, and with a measured volume of 1.95 inches. Thereafter the excess surface waters from this rain drained over plaintiff's land into his draw and out into the canal

without any damage by flooding. However, a heavier rain fell to the north and west of plaintiff upon other lands, and about 6:30 or 7:00 p. m. floodwaters began coming from the west along the north bank of and outside the canal down upon plaintiff's land, inundating his improvements and growing crops. These surface waters had piled up from the north and west against the canal which was then filled with water. They backed up from the canal, flooded out to the north, and thence east upon plaintiff's property with such force as to take his fences into his draw toward the east. Floodwaters also flowed clear over the top of the north bank of the canal due south of plaintiff's house. The south bank of the canal eventually broke east of plaintiff and hastened the runoff of the floodwaters toward the south. However, the plaintiff's crops and buildings were flooded for approximately twelve hours and suffered substantial damages therefrom.

The original grant of right of way for the canal which plaintiff concedes is binding upon him, provides, in substance, that defendant has the right to flow water over plaintiff's land by the construction of a canal, without a north bank across the draws and ravines; and with the right to waste surplus water out of the canal into any of such draws, ravines and depressions. That plaintiff and defendant are both bound thereby, and entitled to the benefits and subject to the burdens incident to the exercise of such rights, cannot be questioned.

It is the contention of defendant that by virtue of this grant plaintiff has waived, or is estopped from claiming, damages to his crops or property from the overflow or wastage of waters over and upon his land unless such damages are shown to have been the result of negligence in the operation and maintenance of the canal. In this connection to avoid liability defendant argues that there is no evidence of overflow except in plaintiff's draw, as permitted by the grant, and that there is no evidence that defendant was negligent in the operation and maintenance of its canal, which we find has no support in the record.

The evidence is that excess surface waters from plaintiff's land had already drained out from his draw into the canal of defendant, after the rain upon plaintiff's land had ceased, without any damage to him from flooding. Further, that plaintiff's land never floods by waste waters alone flowing back out of the canal; that it is physically impossible for such waste waters to flow out into the draw from the canal and raise the water high enough to flood plaintiff's other land where the damages occurred. Plaintiff makes no claim that any of his damages accrued in any such manner. The evidence is clear that it did not do so. There is no evidence in this record which could sustain a finding that any of plaintiff's claimed damages proximately resulted from wasting surplus water out of the canal into the draw on plaintiff's land. Rather there is competent evidence that there was an overflow on the north canal bank and that a volume of accumulated and collected surface waters flooded down on plaintiff's land from the west to his damage, which would never have reached his land but for the acts of defendant and the intervention of its canal.

The draws involved are all conceded to be natural drainways. It was held in *Leaders v. Sarpy County,* 134 Neb. 817, 279 N. W. 809, quoting from *Crummel v. Nemaha County,* 118 Neb. 355, 224 N. W. 864: "It is the duty of those who build structures across natural drainways to provide for the natural passage through such obstructions of all waters which may be reasonably anticipated to drain there, and this is a continuing duty." See, also, 27 R. C. L., sec. 77, p. 1148; 67 C. J., sec. 291, p. 868. It was only recently held in *Hengelfelt v. Ehrmann,* 141 Neb. 322, 3 N. W. 2d 576, "A proprietor may not collect surface waters on his estate into a ditch or drain and discharge them in a volume on the lands of his neighbor, nor can he divert them so they go in a direction different from the natural flow."

The original grant of right of way never contemplated that defendant should be relieved from liability if it flooded plaintiff's land, either by negligence or overflow, other than that confined in his draws, ravines, or depressions. The

rule is that, "After an easement to drain across the lands of another has been legally acquired it is limited both as to extent and nature to the terms of the original grant." 27 R. C. L., sec. 84, p. 1162.

We find also no basis either in law or fact for exempting or relieving defendant from liability by reason of any claimed prescriptive rights. As stated in 30 Am. Jur., sec. 57, p. 640, "A party cannot gain a prescriptive right to be negligent; hence, the fact that a ditch company has maintained its ditch in the same negligent manner for several years gives it no right to continue to use it negligently to the injury of another." We conclude, therefore, that the contention made by defendant cannot be sustained.

Defendant's second contention, as stated in the brief, is that, "In an action for damages to crop and other personal property which are alleged to have been sustained as the result of the diversion of surface flood waters, when it is shown that said crop and property were, at the same time, subject to flood waters from other sources, either alone or commingling with surface flood waters so shown to have been wrongfully diverted, it is incumbent upon the plaintiff to allocate the damages arising from each of said sources, and in the absence of competent proof of such allocation, judgment cannot be sustained." In support thereof defendant relies upon several Nebraska cases: *Compton v. Elkhorn Valley Drainage District,* 124 Neb. 299, 246 N. W. 340; *Lincoln Joint Stock Land Bank v. Platte Valley Public Power and Irrigation District,* 140 Neb. 316, 299 N. W. 485; *Siebold v. Whipple,* 143 Neb. 167, 9 N. W. 2d 154; *Robinson v. Dawson County Irrigation Co.,* 142 Neb. 811, 8 N. W. 2d 179.

It is insisted by defendant that plaintiff having failed by his proof to so allocate the damages, the trial court should have sustained defendant's motion to direct a verdict at the conclusion of plaintiff's evidence. Also, that the verdict awarded plaintiff and judgment thereon were the result of speculation and conjecture, not based upon competent evidence, and therefore cannot be sustained. The question here

is simply whether the authorities above cited have application under the facts presented. We find that they do not.

We have heretofore recited the evidence in substance, and are of the opinion it clearly demonstrates that defendant's canal forced surface floodwaters down to the east and upon plaintiff's land, which would never have reached it but for the intervention of defendant's canal, and that plaintiff's damages were caused by such floodwaters overflowing from defendant's canal and transferred upon his land by the canal and from no other source.

There is no evidence that any of plaintiff's damages resulted from excessive rainfall upon his land, or from surface water coming down through his draw, or by wasting surplus water out of the canal into the draw upon his land. In this situation the applicable rule is that, in an action for damages resulting from flooding of premises by a public power and irrigation district if the evidence shows that all the damages were caused by overflow and wrongfully diverted flood waters, without any commingling of damages by waters from other sources, then it is sufficient to sustain a verdict, and if no error appears in the proceedings a judgment thereon will be affirmed upon appeal. *Robinson v. Dawson County Irrigation Co.*, 145 Neb. 32, 15 N. W. 2d 231. We, therefore, decide that this contention cannot be sustained.

Complaint is also made that instruction No. 23 given by the trial court, which deals with the measure of damages, is erroneous, primarily because the jury were not instructed therein as to the necessity of the allocation of damages as between two alleged contributing causes. We have heretofore disposed of this contention by holding that under the evidence the question of allocation of damages was not presented as an issue in the case.

It is also contended that the instruction does not correctly state applicable rules of law as to the measure of damages. An examination discloses that the instruction was taken almost verbatim from *Hopper v. Elkhorn Valley Drainage District*, 108 Neb. 550, 188 N. W. 239, which has never been

overruled by this court. We can see no conflict between that case and *Snyder v. Platte Valley Public Power and Irrigation District,* 140 Neb. 897, 2 N. W. 2d 327; 144 Neb. 308, 13 N. W. 2d 160. See, also, *Gledhill v. State,* 123 Neb. 726, 243 N. W. 909, which is cited and discussed in the latter case. We find that plaintiff's evidence upon the question of damages was clear, certain, definite, and in conformity with every applicable rule of law. The instruction correctly stated the law and therefore could not in any manner have been prejudicial to defendant.

We have also examined instructions numbers 15, 17, 20, and 21, which defendant claims to have been erroneous. In the light of conclusions heretofore reached with regard to defendant's other contentions and the propositions of law discussed in connection therewith, which are all related, we observe no prejudicial error in these instructions and see no necessity of discussing them separately. We have also examined defendant's proffered instructions which the trial court refused. However, we find that they were substantially included in other instructions given by the court, and it cannot be said that they were erroneously refused.

It is also the contention of defendant that instruction No. 18 was erroneously given by the trial court. It stated to the jury substantially, so far as it is relevant to this discussion, that by the statutes of Nebraska a public power and irrigation district is liable for all overflow damage, and if they found from a preponderance of the evidence that plaintiff suffered damages to his crops and property by overflow from the canal, then plaintiff could recover therefor regardless of whether or not defendant negligently operated and maintained its canal, unless they found that such damages were caused by an act of God as defined by the court.

The instruction was undoubtedly based upon section 70-671, R. S. 1943, which is a part of defendant's enabling act. This section of the statute was examined and applied in *Luchsinger v. Loup River Public Power District,* 140 Neb. 179, 299 N. W. 549. See, also, *Applegate v. Platte Valley Public Power and Irrigation District,* 136 Neb. 280, 285 N.

W. 585. However, defendant makes no complaint of the instruction as an abstract proposition of law and we see no need to discuss that phase of it. It is argued, that there is no competent evidence of overflow of the canal upon plaintiff except into plaintiff's draw, and that the instruction assumes that there is such evidence. The instruction itself does not assume that there was such an overflow, but is predicated upon condition that the jury so find from a preponderance of the evidence. There is also competent evidence of overflow from the canal, both over the north bank and out of the drainways west of plaintiff. The evidence as adduced by defendant upon cross-examination is that the waters in the canal came clear over the top of the bank of the canal due south of plaintiff's house. As may be said of most instructions, alone it is not complete or perfect, but in view of the evidence appearing in this record, and all the other instructions given by the trial court, we are unable to find that instruction No. 18 could in any manner be conflicting, misleading, or prejudicial to defendant's rights. We have held that, "Where instructions as a whole correctly state the law applicable to the controverted issues, the verdict of the jury, if supported by sufficient evidence, will not be set aside because particular instructions considered separately contain mere informalities or omissions which are not misleading or confusing." *Gorman v. Bratka,* 139 Neb. 84, 296 N. W. 456. It is also the rule that, "Where instructions are not inconsistent or contradictory but, considered together, correctly state the law, the judgment will not be reversed because one does not state the entire law on the subject, unless it appear that the jury were misled." *Schram v. Lowden,* 144 Neb. 851, 15 N. W. 2d 42. These rules are applicable to the case at bar since there is competent evidence that plaintiff's damages were caused both by overflow and the wrongful diversion of surface waters from natural drainways, both aspects of which were properly presented to the jury by the court's instructions.

It is insisted by defendant that the nature of the flood waters drained from the immediate area upon the plaintiff's

land resulted from an unprecedented rainfall over a short period of time and in a confined area, in such a manner as to constitute an act of God, as a matter of law; and that the trial court erroneously submitted the question to the jury. The evidence is that it was not an unprecedented rain; that many other similar rains had occurred in the vicinity; and that defendant in the maintenance and operation of its canal could reasonably have anticipated that such rains would happen again. It was held in *Clark v. Cedar County*, 118 Neb. 465, 225 N. W. 235, that: "In order for a flood to come within the term 'act of God,' it must have been so extraordinary and unprecedented a manifestation of nature as could not have been reasonably anticipated or foreseen." It was held in *Fairbury Brick Co. v. Chicago, R. I. & P. R. Co.*, 79 Neb. 854, 113 N. W. 535: "Although a rainfall may be more than ordinary, yet, if it be such as has occasionally occurred at irregular intervals, it is to be foreseen that it may occur again; and a party engaged in a public work, the construction of which involves the change or restraint of the flow of water in a natural channel, is guilty of negligence if he fails to make reasonable provision for the consequences that will result from such extraordinary rainfalls as experience shows are likely to occur."

There can be no doubt under the evidence appearing in the case at bar that the question was for the jury to decide, rather than the court. We find that it was properly submitted to the jury, substantially as requested by defendant in its own proffered instructions.

An examination of all the instructions given by the trial court discloses that the issues presented were submitted to the jury in such manner as not to be prejudicial to any of defendant's rights. We find no error in the record and conclude that the verdict and judgment thereon are not only in conformity with the law but are amply supported by the evidence. Therefore, the judgment is affirmed.

AFFIRMED.

ELIZA STANTON, APPELLEE, V. EDWARD C. STANTON ET AL., APPELLANTS.

18 N. W. 2d 654

FILED MAY 11, 1945. No. 31924.

1. **Judgments.** If the court had jurisdiction of all the parties and of the subject matter, a judgment rendered in an action is not subject to collateral attack where the judgment is voidable and not void.
2. ———. The court having jurisdiction, a party cannot, while the action is pending, dispose of the property and avoid the effect of the final judgment in the case.
3. **Lis Pendens.** The rule that a *pendente lite* purchaser took title to property involved in litigation subject to the judgment finally entered was adopted out of considerations of public policy and to inspire confidence in titles based upon the judgment or decree of the court.
4. **Judgments.** Section 25-1515, R. S. 1943, which provides that a judgment shall become dormant in five years and cease to operate as a lien on the estate of the judgment debtor, does not apply to a decree for the sale of specific real property.
5. ———. The purpose of a specific decree is to establish upon some particular property an encumbrance or right arising from a lien which antedated the decree; such a decree and the rights thereunder are not within the operation of the dormancy statute.

APPEAL from the district court for Kearney County: EDMUND P. NUSS, JUDGE. *Affirmed.*

Minor & Minor, for appellants.

B. H. Bracken and *Stiner, Boslaugh & Stiner,* for appellee.

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

PAINE, J.

This is an equity action between contesting claimants over the sum of $1,244.51 held by the clerk of the district court for Kearney county in a partition suit, being a one-eighth part of the proceeds of the sale of certain land. The trial court decreed that this sum should be first applied to discharge the lien of a judgment held by the Kenesaw State Bank and the surplus paid to defendant William P. Stanton,

or the person entitled thereto, and that the petition of intervention of J. J. Gallagher, intervener, should be dismissed, from which the intervener appeals.

The record discloses that Patrick W. Stanton died testate August 17, 1929, a resident of Kearney county. In his last will, made March 6, 1925, he devised a one-eighth interest in 240 acres to each of his children. On April 4, 1930, a petition was filed by Eliza Stanton, a daughter of Patrick W. Stanton, against the other heirs and the Kenesaw State Bank, and prayed for the partition of the land owned by Patrick W. Stanton.

The Kenesaw State Bank filed its answer in the partition suit on May 1, 1930, setting forth that some years before William P. Stanton had owed said bank $1,116 on two promissory notes, bearing interest at 10 per cent, and that suit had been brought and his default was taken, and a judgment in favor of said bank had been entered against him on January 25, 1926, in the sum of $1,125, and that said judgment is in full force and effect, and prays that such judgment be decreed to be a first lien upon the interest of said William P. Stanton in said described real estate, and for such other, further and different relief as may be just and equitable.

On October 13, 1930, the referee reported that said premises could not be partitioned and same should be sold; thereupon the district judge filed a journal entry on October 17, 1930, in which it is ordered that, as there is a contest pending between the other shareholders and the Kenesaw State Bank and other defendants over the share of William P. Stanton in said land, said contest will be determined upon the final hearing and upon the distribution of proceeds if sale is had.

On December 9, 1930, the referee reported the sale of the premises to George H. Porterfield for the sum of $12,000, but on January 2, 1931, this sale was set aside upon the request of the purchaser at said sale, and of all of the defendants and all other parties interested in said action.

However, the district court on September 15, 1936, made

a determination in said partition suit that the lien of the Kenesaw State Bank was a second lien, subject to the lien of the estate, which was, as shown by other records, for the sum of $1,109.11, for two notes given to his father in his lifetime by William P. Stanton, but which the executor had been unable to collect because of the insolvency of said William P. Stanton. The said bank appealed to this court.

In our first opinion, reported in 133 Neb. 563, 276 N. W. 180, we affirmed the trial court. But the second opinion, written on rehearing, found in 134 Neb. 660, 279 N. W. 336, set aside the first opinion, and found that the retainer doctrine did not apply and the executor had no lien on William P. Stanton's distributive share, for the reason that in Nebraska "the doctrine of advancements applies only to intestate estates," and on October 17, 1938, a judgment was entered on the mandate from the supreme court, finding that the lien of the Kenesaw State Bank was superior to the debt due to the estate.

It is shown by the record that William P. Stanton and wife had deeded his interest in his share of his father's real estate to Joseph J. Gallagher on August 20, 1935, and on September 30, 1939, said Gallagher filed petition of intervention in the partition suit, in which he set up that on May 1, 1930, the Kenesaw State Bank in its pleading claimed a lien upon the interest of William P. Stanton in the real estate because of a judgment obtained by said bank on January 25, 1926, and further alleges that no execution was ever issued on said judgment, and the same became dormant on January 26, 1931; that said judgment has never been revived, and said judgment has not been a lien on the interest of William P. Stanton in the real estate devised to him by his father since January 26, 1931, and has never been a lien on the real estate acquired by said Gallagher by the deed executed and delivered to him August 20, 1935, by William P. Stanton and wife.

The Kenesaw State Bank filed its answer to the petition of intervention of Joseph J. Gallagher on November 15, 1939, alleging that on October 17, 1938, judgment was en-

tered on the mandate of the supreme court finding that the lien of the judgment of $1,125 of said bank was superior to any claim or lien of any of the other parties to the action, and that the October, 1938, term of court in and for Kearney county adjourned sine die on January 16, 1939, and that no application has been made to modify, vacate or set aside said judgment, nor any appeal taken from said order and judgment, and that the same is final, complete and conclusive against all of the parties to the partition action, and that the petition of intervention of Joseph J. Gallagher should be dismissed.

Trial was had on October 20, 1941, and the court found generally for the defendant Kenesaw State Bank and against the intervener, Gallagher, and ordered that the petition of intervention of Gallagher be dismissed. The motion for new trial filed by Gallagher, intervener, was duly overruled, and on August 27, 1943, the referee in the partition sale reported that the property had sold for $10,800, and the sale was confirmed and deed ordered, and distribution ordered to all distributees save and except the share of William P. Stanton of $1,244.51, which was to be held pending the decision on this appeal.

The appellant insists that the bank's judgment obtained January 25, 1926, was not a lien after January 25, 1931, as no execution was ever issued thereon, as required by section 25-1515, R. S. 1943, which provides that if execution shall not be sued out within five years of the date of the judgment it shall become dormant and shall cease to operate as a lien on the real estate of the judgment debtor, and therefore on August 20, 1935, when debtor gave a deed to the intervener, Gallagher, the judgment had ceased to be a lien, and Gallagher took the title to the land free of any lien because of the bank's judgment.

The appellant also argues that the only other manner in which the life of a dormant judgment may be prolonged is by a revivor; that section 25-1420, R. S. 1943, provides that such action of revivor must be brought within ten years after such judgment became dormant, which was not done in the instant case.

The appellant insists in his brief that a void judgment is in reality a mere nullity, being supported by no presumption, and can be impeached in any action, either direct or collateral, citing *Radil v. Sawyer,* 85 Neb. 235, 122 N. W. 980. He also cites *Hassett v. Durbin,* 132 Neb. 315, 271 N. W. 867, in which our court said: "A void judgment is in reality no judgment at all. It does not bind the person against whom it is rendered. It may be impeached in any action, direct or collateral."

But, in the case of *Hassett v. Durbin, supra,* the plaintiff failed to get legal service upon the defendant, so the judgment was absolutely void, but in the case at bar the court had jurisdiction of all the parties, and had jurisdiction of the subject matter, and the general rule is that in such a case a judgment is not subject to collateral attack, because the judgment is only voidable, and not void. See 31 Am. Jur., sec. 576, p. 175.

It is also claimed that the sale to J. J. Gallagher relieved the property of the lien of the judgment; but this court has held otherwise, and said that one who purchases property pending a suit in which the title is involved takes the title subject to the judgment or decree that may be entered in such suit against the person from whom he purchases the property, and that "These transfers to these demurring defendants were made by a litigant to a pending suit, in which his title was a matter of controversy, and they must take full notice of all the facts then pending in that case, and actual notice of a pending action is just as effective as would be the filing of a *lis pendens.*" *Johnson v. Olson,* 132 Neb. 778, 273 N. W. 201. See, also, *Martin v. Abbott,* 72 Neb. 89, 100 N. W. 142. The same holding is found in a partition suit in *Clark v. Charles,* 55 Neb. 202, 75 N. W. 563.

"The court having jurisdiction, a party cannot, while the action is pending, dispose of the property and prevent a final judgment in the case." *State v. Neb. Distilling Co.,* 29 Neb. 700, 46 N. W. 155.

"Where a person purchases real estate while an action is pending to subject the property to the payment of a certain

debt, the purchaser is chargeable with notice of the claim, and whatever the form of the decree under the issue made by the pleadings, takes subject to the same." *Nelson v. Bevins*, 19 Neb. 715, 28 N. W. 331.

"When the summons has been served or publication made, the action is pending so as to charge third persons with notice of pendency, and while pending no interest can be acquired by third persons in the subject matter thereof, as against the plaintiff's title; * * * ." R. S. 1943, sec. 25-531.

"The rule that a *pendente lite* purchaser took title to property involved in litigation, subject to the judgment, finally entered, was adopted out of considerations of public policy and to inspire confidence in titles based upon the judgment or decree of court." *Munger v. Beard & Bro.*, 79 Neb. 764, 113 N. W. 214.

After the mandate was returned, the district court entered a judgment for the defendant, the Kenesaw State Bank, in the sum of $1,125, and that the same constitutes and is a first lien upon the interest of William P. Stanton in said real estate. The district court adjourned sine die on January 16, 1939, and the judgment thereupon became final. The court has no authority or power to vacate the judgment except for the reasons stated and within the time limited by section 25-2001, R. S. 1943. See *Feldt v. Wanek*, 134 Neb. 334, 278 N. W. 557; *Cronkleton v. Lane*, 130 Neb. 17, 263 N. W. 388.

There is another rule of law that we believe is determinative of the instant case, rather than the dormancy statute, which the appellant relies upon. It is common knowledge that, during the times of depression, partition cases, foreclosures, and other cases have been frequently held on the dockets for many years awaiting a time when better prices would be received at sales by court officers.

In *Herbage v. Ferree*, 65 Neb. 451, 91 N. W. 408, it was held that section 482 of the Code, which is now section 25-1515, R. S. 1943, which provides when a judgment shall become dormant and cease to operate as a lien on the real estate of the judgment debtor, does not apply to a decree for

the sale of specific real property. Other Nebraska opinions holding to the same effect are *Medland v. Van Etten,* 75 Neb. 794, 106 N. W. 1022, and *Harvey v. Godding,* 77 Neb. 289, 109 N. W. 220.

The supreme court of Ohio in an early case said: "Section 422 of the Code, (which is the dormancy statute) * * * does not apply to a decree for the sale of specific real property." *Beaumont v. Herrick,* 24 Ohio St. 445. See, also, *Moore v. Ogden,* 35 Ohio St. 430.

"The mere money decree or judgment in personam therein * * * may become barred or dormant without affecting that part of the decree which is against specific property. For, as to the judgment in personam or the money decree merely, the lien arises by operation of law, and must be enforced within the time limited by statute. But the very purpose of a specific decree is to establish and permanently fix upon the particular property some incumbrance, burden, interest, estate, or right arising from a lien, contract, obligation, or trust which antedated the decree. This part of the decree and the rights thereunder are not within the operation of the dormancy statute. * * * This is manifest when it is considered that the general object of such a decree is to establish the titles of one party to a particular property. To say that the decree became dormant and his right terminated at the end of seven years would be to make temporary that which had been definitely fixed. The same is true where specific property is charged with the payment of a given debt, as on the foreclosure of a mortgage." *Conway v. Caswell,* 121 Ga. 254, 48 S. E. 956. See, also, *Lindsey v. Porter & Garrett,* 140 Ga. 249, 78 S. E. 847; *Sapp v. Warner,* 105 Fla. 271, 144 So. 481.

In *Crowell v. Kopp,* 26 N. M. 146, 189 Pac. 652, the holding follows the Ohio cases, the Nebraska cases, and Georgia cases. It is said that in Georgia the reason is founded upon the proposition "that the Dormant Judgment Act was designed to do away with stale judgments which created liens upon all of the debtor's property, while a decree of foreclosure of a mortgage created no general lien, and was therefore not intended to be within the terms of the statute."

Our court has quite recently held "that a decree of foreclosure of a mortgage is not a judgment within the meaning of section 20-1515, Comp. St. 1929. *Jenkins Land & Live Stock Co. v. Kimsey,* 99 Neb. 308, 156 N. W. 499. We have also held that such section of the statute does not apply to a decree for the sale of specific real property. *Herbage v. Ferree,* 65 Neb. 451, 91 N. W. 408. An examination of the opinions in those cases reveals that decisions of the supreme court of Ohio under a similar statute were relied on and followed. An examination of the decisions of that state on the point now before us discloses that the rule herein announced is supported by the holdings in *Lemert v. Lemert,* 72 Ohio St. 364, 74 N. E. 194, and *Peeke v. Fitzpatrick,* 74 Ohio St. 396, 78 N. E. 519." *In re Application of Miller,* 139 Neb. 242, 297 N. W. 91.

In the case at bar, the bank's judgment was secured in 1926, and in 1930 the pleadings brought that judgment into a partition case, and in this equity suit it was sought to make it a lien upon a specific piece of land which was to be sold in that partition proceeding.

In our opinion, the procedure followed in this litigation to impress the debt upon a specific piece of real estate and the decree in the partition suit awarding the money from the sale thereof to the payment of the bank's claim were not, under the circumstances here, defeated by the operation of the dormancy statute of Nebraska.

Finding no prejudicial error in the decree of the district court, the same is hereby affirmed.

AFFIRMED.

VICTOR H. WATSON ET AL., APPELLANTS, V. CHARLES S. DALTON ET AL., APPELLEES.
18 N. W. 2d 658

FILED MAY 11, 1945. No. 31832.

1. **Deeds.** Where the owners of an interest in real property convey the same but by agreement contained in the instrument of con-

veyance retain an interest in the premises, such interest will support the imposition of a restriction on alienation where it is reasonably necessary to protect the interest retained.

2. ———. The term "condition subsequent" denotes that part of the language of a conveyance, by virtue of which upon the occurrence of a stated event the conveyor, or his successor in interest, has the power to terminate the interest which has been created subject to the condition subsequent, but which will continue until this power is exercised.

3. ———. While conditions subsequent are not favored in law no particular words are necessary to create them in a deed, although such conditions must be fairly expressed and apt, and sufficient words employed.

4. **Estates.** The intention of the parties must be clearly expressed importing that the estate is to depend upon a contingency provided for but it must be gathered from the entire instrument and the contract must be construed according to its terms especially where there are express words used.

5. ———. A condition, the breach of which is good ground in equity for cancelling the conveyance of which it is a part, will be held to be a condition subsequent unless there is something in the instrument showing a contrary intent.

6. **Deeds.** In an otherwise effective conveyance, the phrase "subject to the conditions above stated" usually indicates an intent to create an estate in fee simple subject to a condition subsequent, even when no express clause providing for termination accompanies it.

7. ———. The nature of the event specified in the limitations, their importance to the grantor in protecting an estate retained, the consideration recited or actually paid, the relation of the parties, and the purposes of the conveyance, are pertinent and significant factors which may also be considered in determining whether a limitation is couched in appropriate words to manifest the intent of the grantor to create a power of termination.

8. **Estates.** Whenever an estate subject to a condition subsequent is created, some person has the power to terminate this estate upon the occurrence of the stipulated event. Such an estate does not end automatically or by expiration. It is divested only if the person having the power chooses to exercise it.

9. ———. The death of the creator of an estate subject to a condition subsequent does not extinguish the power to terminate for condition broken but the right to take advantage of it passes to his heirs because they enforce the condition in the right of the ancestor.

10. ———. An otherwise valid restraint on alienation ceases to ex-

ist in the case of a promissory restraint or a forfeiture restraint in the form of a condition subsequent, upon a union of the power to enforce the restraint and the interest so restrained in the same person.

11. ———. Whenever a restraint in the form of a condition subsequent has been terminated by the happening of events at or prior to the time of an alleged violation thereof, one against whom enforcement is sought has a defense to that enforcement.

APPEAL from the district court for Knox County: FAY H. POLLOCK, JUDGE. *Affirmed.*

McKillip, Barth & Blevens and *W. A. Meserve,* for appellants.

W. Keith Peterson, for appellees.

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

CHAPPELL, J.

This is an action by plaintiffs, appellants, to quiet title to certain lands in Knox County, Nebraska, obtain an accounting for rents thereof, and the partition of such real estate. The petition sets forth plaintiffs' claims as above recited in three separate causes of action. The issues were complete but at the trial evidence was adduced only upon the first cause of action wherein plaintiffs prayed that they each, excepting their respective spouses, be decreed to be the owner of an undivided one-sixteenth interest, and defendant Charles S. Dalton the owner of an undivided one-half interest, in the property. By agreement, trial of the second and third causes of action was deferred pending decision of the first which, if against plaintiffs, would be decisive of the other two.

The trial court, in conformity with its written findings and memorandum opinion filed therein, entered its decree finding generally for defendant Charles S. Dalton. The decree quieted title to all of the property in him, dismissed plaintiffs' first cause of action, and continued their second and third causes of action until further order of the court. The cross-petitions of defendants Rosell A. Watson and

Miles W. Watson, children of a deceased uncle of Fern M. Dalton, deceased, were also dismissed but they did not appeal or cross-appeal. The plaintiffs appealed to this court contending, in effect, that the judgment of the trial court is contrary to law and not sustained by the evidence. We find that these contentions cannot be sustained.

There are only questions of law presented for decision. The facts are not in dispute. One Addie E. Watson, a widow, for a consideration of $1 and other valuable considerations conveyed different parcels of real estate, each of which is particularly described in plaintiffs' petition, to her daughter Fern M. Dalton by two deeds, each dated February 11, 1936, and recorded June 25, 1936. Each of the deeds contained identical restrictive provisions, except the restrictive provision in one was for 5 years and in the other for 12 years. The provision in the former is, "The grantor reserves unto herself the use of said premises during her life time and further as a part of the consideration for the execution of this deed the grantor restricts the grantee for a period of 5 years from this date, from selling or mortgaging said premises or in any manner during said period from placing or causing to place a lien of any kind against said premises. To have and to hold the premises above described, together with all the Tenements, Heriditaments and Appurtenances thereunto belonging unto the said Fern M. Dalton and to her heirs and assigns forever. * * * And the said Addie E. Watson, widow hereby relinquishes all her right, title, and interest in and to the above described premises, subject to the conditions above stated." There were no clauses in the deeds expressly providing for reentry, termination, reverter, or limitation over.

Thereafter, but before the conditions were broken or the restrictions violated, the mother, Addie E. Watson, died, and in short form administration proceedings the county court entered its decree of heirship adjudging that her daughter, Fern M. Dalton, grantee in each of the restrictive deeds, was her sole and only heir at law. From this decree no appeal was taken.

By quitclaim deed dated August 5, 1940, Fern M. Dalton conveyed to her husband, defendant Charles S. Dalton, all of the property previously conveyed to her by her mother. Thereafter on October 2, 1940, Fern M. Dalton died, leaving a will which was duly admitted to probate by the county court, from which no appeal was taken. By the will she devised and bequeathed all her real and personal property to her husband. The probate proceedings in her estate were all complete except for decree of distribution and final decree, which were withheld pending decision of this case. Therein the heirs of Fern M. Dalton were adjudged to be her husband, defendant Charles S. Dalton, and eight aunts and uncles who are the plaintiffs in this case.

The question involved is the legal effect of the two restrictive clauses contained in the deeds from Addie E. Watson to Fern M. Dalton. The answer to this question depends primarily upon the character of the estate conveyed.

As stated in 33 Am. Jur., sec. 10, p. 469: "The rule is well settled in the modern law that if the instrument is not testamentary in character and passes a present interest although enjoyment of the fee is postponed, a grantor may, in a conveyance, either specifically or by language which by construction brings about the same result, reserve to himself a life estate in property in which the fee is granted." Therefore, it must be conceded in the case at bar that there was an effective reservation by the grantor, Addie E. Watson, of a life estate in the premises which in itself did not prevent the passing of the fee to the grantee, Fern M. Dalton, but only postponed the enjoyment thereof.

This court recently held in *Majerus v. Santo,* 143 Neb. 774, 10 N. W. 2d 608: "Where the owners of an interest in real property convey the same but by agreement contained in the instrument of conveyance retain an interest in the premises such interest will support the imposition of a restriction on alienation where it is reasonably necessary to protect the interest retained." A statement of the factors to be considered in determining the reasonableness of restrictions on alienation in such cases will be found in Re-

statement, Property, sec. 406, p. 2406. In the instant case the grantor retained a life estate in the property and imposed a restriction upon the grantee of the fee conveyed which we find under the circumstances presented was reasonably necessary to protect the interest retained. We believe that the record could not sustain any other conclusion.

However, a decision that the restrictions were valid limitations does not solve the matter. That is only an introduction to the problem. The final solution in this case depends upon the character of the estate conveyed and the unusual circumstances presented.

The trial court found that the grantee, Fern M. Dalton, received a fee simple title subject to a condition subsequent. We believe that conclusion to be correct. "The term 'condition subsequent' denotes that part of the language of a conveyance, by virtue of which upon the occurrence of a stated event the conveyor, or his successor in interest, has the power to terminate the interest which has been created subject to the condition subsequent, but which will continue until this power is exercised." Restatement, Property, sec. 24, p. 59. More simply stated, "Conditions subsequent are such as by the failure or nonperformance of which an estate already vested may be defeated," by an exercise of the power of termination. 26 C. J. S., sec. 141, p. 467.

While conditions subsequent are not favored in the law no particular words are necessary to create them in a deed, although such conditions must be fairly expressed and apt, and sufficient words employed. The intention of the parties must be clearly expressed importing that the estate is to depend upon a contingency provided for but it must be gathered from the entire instrument and the contract must be construed according to its terms especially where there are express words used. 26 C. J. S., sec. 141, p. 468. In this connection, it is generally held that a forfeiture clause or a provision for re-entry or termination is not required or necessary for the validity of a condition subsequent. A condition, the breach of which is good ground in equity for cancelling the conveyance of which it is a part, will be held to

be a condition subsequent unless there is something in the instrument showing a contrary intent. 26 C. J. S., sec. 141, p. 471, sec. 142, p. 475.

As stated in Restatement, Property, sec. 45, p. 140: "In an otherwise effective conveyance, the phrase 'upon express condition that' usually indicates an intent to create an estate in fee simple subject to a condition subsequent, even when no express clause for re-entry, termination or reverter accompanies it * * * ." An equivalent phrase, "subject to the conditions above stated," was used in both the deeds here involved. Other pertinent and significant factors which may also be considered in determining whether a limitation is couched in appropriate words to manifest the intent of the grantor to create a power of termination, are the nature of the event specified in the limitations, their importance to the grantor in protecting the estate retained, the consideration recited or actually paid, the relation of the parties, and the purposes of the conveyance. Restatement, Property, sec. 45, pp. 137-143.

In view of all the language employed in the deeds, and other factors presented here, we conclude that the grantor, Addie E. Watson, intended to and did transfer to Fern M. Dalton, grantee, a fee simple title, subject to a condition subsequent, of all the property described in the two original deeds.

In Restatement, Property, sec. 24, p. 59, the statement is made that, "Whenever an estate subject to a condition subsequent is created, some person has the power to terminate this estate upon the occurrence of the stipulated event. Thus such an estate does not end automatically and by expiration * * * . On the contrary, it is cut short, or divested, if, but only if, the person having the power chooses to exercise it. This option to terminate an estate upon breach of a condition subsequent is referred to in this Restatement as a 'power of termination'." See, also, 26 C. J. S., sec. 147, p. 482.

We turn then to the question, who has the power to terminate? Under circumstances similar to the case at bar.

it is the general rule that nonperformance of a condition can be taken advantage of only by the grantor and his heirs, or by the grantor and his legal representatives. The benefit of a condition or breach thereof cannot be availed of by a stranger, by a person who has no present right, legal or equitable, to the part reserved. 26 C. J. S., sec. 148, p. 482, sec. 157, p. 496. Since there were no provisions in the deeds for reversion or limitation over, the conditions were promissory restraints and personal to the grantor to protect her life estate. Therefore, the right of "re-entry for condition broken" or, "the power of termination" is not any estate in land but a mere right or chose in action, merely a right or power to terminate the estate of the grantee if there were a breach of condition. It is the rule that the death of the creator of an estate subject to a condition subsequent does not extinguish the power to terminate for condition broken but the right to take advantage of it passes to his heirs because they enforce the condition in the right of the ancestor. 33 Am. Jur., sec. 208, p. 688, sec. 209, p. 689. Whether such right can be devised is not an issue in this case.

Bearing these rules in mind, we call attention to the fact that plaintiffs are admittedly not the heirs of the grantor, Addie E. Watson, but are the heirs of the grantee, Fern M. Dalton, who was the sole heir of the grantor. Therefore, there could be no termination of title except at the election of the grantor or the grantee, her sole heir. The grantor having died before condition broken, her life estate was extinguished or merged in the title of the grantee. The grantee's enjoyment of the fee was then no longer postponed and as sole heir the power of termination passed to her.

It is affirmatively stated in Restatement, Property, sec. 423, p. 2465: "An otherwise valid restraint or alienation ceases to exist * * * in the case of a promissory restraint or a forfeiture restraint in the form of a condition subsequent, upon a union of the power to enforce the restraint and the interest so restrained in the same person; * * * ." This statement is on all fours with the case at bar, and governs its decision, for the reason that: "Whenever a restraint has

been terminated by the happening of events at or prior to the time of the alleged violation, one against whom enforcement is sought has a defense to that enforcement." Restatement, Property, Introductory Note to Chapter 31, p. 2456.

Other interesting questions of law were ably presented in the briefs of counsel but we do not deem it necessary to discuss them. We conclude that the trial court properly held that plaintiffs could not prevail in this action, and rightly quieted the title of Charles S. Dalton to all the real estate described in plaintiffs' petition.

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

AFFIRMED.

The following opinion on motion for rehearing was filed November 16, 1945. *Former opinion vacated in part; judgment affirmed.*

20 N. W. 2d 610

FILED NOVEMBER 16, 1945.

1. **Estates**: DEEDS. Estates upon condition subsequent, which after having been fully vested may be defeated by a breach of condition, are never favored in law, and no deed will be construed to create an estate upon condition, unless the language to that effect is so clear that no room is left for any other construction.
2. ———. Whenever a person acquires a greater and a lesser estate in the same property, and there is no intervening estate, the lesser does not further exist as a separate estate, but is destroyed by or is considered in law as merged in the greater estate.
3. **Equity**: ESTATES. Equity will permit a merger when to do so will best subserve the purposes of justice and the actual and just intent of the parties.
4. **Estates.** An estate in fee simple is the greatest estate a person can possess in landed property.
5. ———. An estate in fee simple is an estate of inheritance without condition, belonging to the owner, and alienable by him or transmissible to his heirs absolutely and simply.
6. ———. An estate in fee simple is not subject to a special limitation or a condition subsequent, or an executory limitation.
7. **Deeds.** Where a grantor retains a life interest and places restrictions on alienation in the deed that the grantee shall not

have the power to sell, mortgage or otherwise encumber the premises within a specified period of time, and before the period has elapsed the grantor dies and her life estate merges with the title held by the grantee as her sole and only heir, the restrictions on alienation are then unenforceable as being repugnant to and inconsistent with the fee simple title absolute vested in the grantee, and any conveyance by deed or devise by will made by the grantee thereafter is effectual to pass a fee simple title.

8. **Opinion Vacated and Set Aside.** Our former opinion, *ante* p. 78, 18 N. W. 2d 658, holding the restrictions contained in the deeds in issue in this case to be a condition subsequent, to such extent is hereby set aside and vacated as being in conflict with this opinion.

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

MESSMORE, J.

The plaintiffs brought this action in the district court for Knox County to obtain a decree and judgment determining their respective interests to certain lands located therein, and to quiet title thereto in them, and for an accounting of the rents and partition of the land. This appeal involves only the first cause of action, the second and third causes of action being deferred pending decision of the first.

The material facts are not in dispute, and in substance are as follows:

On February 11, 1936 Addie E. Watson, widow, was the owner of certain lands in Knox County, Nebraska, and on said date she conveyed by warranty deeds to Fern M. Dalton, her daughter and sole and only heir at law, such lands. The deeds were duly recorded on June 25, 1936. The first deed set forth in the first cause of action contained the following restrictions: "The grantor reserves unto hereself the use of said premises during her life time and further as a part of the consideration for the execution of this deed the grantor restricts the grantee for a period of 5 years from this date, from selling or mortgaging said premises or in any manner during said period from placing or causing to place a lien of any kind against said premises." The second deed contained like restrictions, with the exception that the

period was for 12 years. On August 5, 1940, Fern M. Dalton and Charles S. Dalton, husband and wife, executed and delivered to Charles S. Dalton a quitclaim deed to all such real estate. This deed was filed of record November 25, 1940. On August 9, 1940, Fern M. Dalton made and executed her last will, and in paragraph 2 thereof, gave, devised and bequeathed to her husband, Charles S. Dalton, all of her property, both real and personal, wherever situated, to be his absolutely, forever.

The heirs of Fern M. Dalton consist of Charles S. Dalton, her husband, and eight uncles and aunts. The uncles and aunts were not heirs of Addie E. Watson, deceased. Addie E. Watson died intestate a resident of Knox County on May 28, 1936, and on January 17, 1941 a short form of administration proceedings was had and decree of heirship rendered, adjudging her daughter, Fern M. Dalton grantee in each of the deeds, as her sole and only heir. Fern M. Dalton died October 2, 1940. No appeal was taken from the final decree entered in the county court of Knox County in the matter of the estate of Addie E. Watson, deceased, and no appeal was taken from the decree of the county court of Knox County admitting the will of Fern M. Dalton to probate. There were no clauses in the deeds expressly providing for re-entry, termination, reverter or limitation over. The habendum clause contained the language, "subject to the conditions above stated."

The trial court dismissed the plaintiffs' petition and dismissed the cross-petition of certain defendants, the children of a deceased uncle of Fern M. Dalton who predeceased her in death. These cross-petitioners did not appeal nor cross-appeal. The court quieted title to the real estate in Charles S. Dalton as against each and all parties thereto. Motion for new trial was filed, submitted and overruled. The plaintiffs appeal.

Plaintiffs will hereafter be referred to as appellants and defendants as appellees.

First, the appellants in their motion for rehearing direct this court's attention to our former opinion *ante* p. 78, 18

N. W. 2d 658, wherein we held that the restrictions on alienation contained in the deeds made and executed by Addie E. Watson to Fern M. Dalton, constituted a condition subsequent.

"The term 'condition subsequent' denotes that part of the language of conveyance, by virtue of which upon the occurrence of a stated event the conveyor, or his successor in interest, has the power to terminate the interest which has been created subject to the condition subsequent, but which will continue until this power is exercised." Restatement of the Law, Property, s. 24, p. 59.

Estates on condition subsequent are defined in 19 Am. Jur., Estates, ss. 62, 63, 65, pp. 522, 523, 526, as follows: "Conditions subsequent are those which in terms operate on an estate conveyed or devised and render it liable to be defeated for breach of condition. The title passes to the grantee, subject to divestiture on failure to perform the condition. * * * While no precise form of words is necessary to create a condition subsequent, still it must be created by express terms or by clear implication so as to leave no doubt of the grantor's or devisor's intention. * * * While the use of technical words appropriate to the creation of a condition or of an express provision for re-entry and forfeiture is not an absolute prerequisite to the creation of a condition subsequent, the failure to use them, or to use other language clearly indicating the creation of such condition subsequent, is an important consideration as indicating the absence of an intention that the estate conveyed shall be restricted by such a condition." See, also, 26 C. J. S., Deeds, s. 141, p. 468.

In *Majerus v. Santo,* 143 Neb. 774, 10 N. W. 2d 608, this court quoted with approval from *Ruggles v. Clare,* 45 Kan. 662, 26 P. 25, the following: "The authorities are uniform, that estates upon condition subsequent, which, after having been fully vested may be defeated by a breach of the condition, are never favored in law, and that no deed will be construed to create an estate upon condition, unless the language to that effect is so clear that no room is left for any other construction."

The grantor, Addie E. Watson, failed to provide for an express provision for re-entry, termination or forfeiture. She apparently did not intend to terminate the estate granted if the restrictions on alienation were violated.

Within the conception of the cited authorities, we deem the language as used therein does not permit the creation of a condition subsequent, and we were in error in so holding. We conclude the language in the deeds in controversy constitutes a restriction on alienation.

The appellants contend that the restrictions on alienation as contained in the deeds of Addie E. Watson to Fern M. Dalton are valid and effective; that the deed and devise by will of Fern M. Dalton to her husband each contravened and violated the restrictions within the limitation of the restrictive period as contained in the deeds, and that each were ineffective to convey title. In this connection, the appellants assert that the restrictions contained in the aforesaid deeds are reasonable and are valid in Nebraska, citing *Peters v. Northwestern Mutual Life Ins. Co.*, 119 Neb. 161, 227 N. W. 917, and *Blochowitz v. Blochowitz*, 130 Neb. 789, 266 N. W. 644, and further state that the rule announced in the cited cases was reaffirmed in *Majerus v. Santo, supra.* The latter case reviewed several of our previous decisions on the subject matter here involved, setting forth that in *Peters v. Northwestern Mutual Life Ins. Co., supra,* the will devised to the son a fee simple title with a restriction against alienation until the devisee became 35 years of age, the restraint was held to be a reasonable restraint and valid; and also that we held in *Hiles v. Benton,* 111 Neb. 557, 196 N. W. 903, *Nebraska National Bank of Minden v. Bayer,* 123 Neb. 391, 243 N. W. 115, and *Drury v. Hickinbotham,* 129 Neb. 499, 262 N. W. 37: " * * * when the estate in fee does not pass, but a lesser estate is created, then provisions against alienation are valid."

The rule announced in *Majerus v. Santo, supra,* is as follows: "Where the owners of an interest in real property convey the same but by agreement contained in the instrument of conveyance retain an interest in the premises, such

interest will support the imposition of a restriction on alienation where it is reasonably necessary to protect the interest retained."

This brings us to the restrictions contained in the deeds made and executed by Addie E. Watson. It is not questioned that in the instruments there was an effective reservation by the grantor of a life estate in the premises. Assuming it was reasonably necessary to protect this life estate by the restrictions and the same were reasonable within the contemplation of the authorities cited by the appellants and the rule announced in *Majerus v. Santo, supra,* we are convinced that from an analysis of the following facts and the law hereinafter set forth and pertinent thereto, it is unimportant whether the restrictions on alienation were reasonable or necessary to protect the life interest.

It will be noted that Addie E. Watson died intestate on May 28, 1936; Fern M. Dalton was her sole and only heir at law; when the original conveyances were made by Addie E. Watson to Fern M. Dalton, Fern M. Dalton became vested with the fee containing restrictions on alienation; the purpose of the restrictions was to protect the interest of the grantor; that interest was a life estate which she retained; upon the death of Addie E. Watson, Fern M. Dalton also became possessed of a lesser estate, the life estate; she became possessed of both estates. There appears no reason why the lesser estate should not merge in the greater estate, and no reason why the two estates should remain separate and distinct. There would be no reason for non-merger, there were no intermediate estates. See *Peterborough Savings Bank v. Pierce,* 54 Neb. 712, 75 N. W. 20.

"The doctrine of merger of estates is that whenever a greater and a less estate meet in the same person without an intermediate estate the less is immediately annihilated." 31 C. J. S., s. 123, p. 141, and Nebraska cases cited under note 74.

"Equity will prevent or permit a merger as will best subserve the purposes of justice and the actual and just intent of the parties * * *." 31 C. J. S., s. 124, p. 144. See, also,

Anderson v. Lincoln Joint Stock Land Bank, 131 Neb. 150, 267 N. W. 355; *American Savings & Loan Assn. v. Barry*, 123 Neb. 523, 243 N. W. 628; *Henry & Coatsworth Co. v. Fisherdick*, 37 Neb. 207, 55 N. W. 643.

We conclude that the life estate, being the lesser title, merged with the greater in the same person, Fern M. Dalton, without an intermediate estate, and that the restrictions on alienation became extinct. This being true, the conveyance made by Fern M. Dalton to her husband on August 5, 1940, and the will made August 9, 1940, effectively convey to the husband a fee simple title in the premises.

The following is likewise pertinent to a determination of this case:

"A fee simple estate is one by which a tenant holds lands, tenements, or hereditaments to himself and his heirs forever. The terms 'fee,' 'fee simple,' and 'fee simple absolute' are substantially synonymous. * * * an estate of inheritance without condition, belonging to the owner, and alienable by him or transmissible to his heirs absolutely and simply; * * *." 31 C. J. S., s. 8, p. 18.

"A fee-simple estate is the greatest estate a person can possess in landed property; * * * . It embraces all of the estates that may be carved therefrom, * * * . It is not subject to a special limitation or a condition subsequent or an executory limitation." 31 C. J. S., s. 8, p. 19. See, also, Restatement of the Law, Property, s. 15, p. 42, and 1 Simes, Law of Future Interests, s. 37, p. 49. The fee simple title descends upon the death of the owner, to both lineal and collateral heirs, according to the statutes of descent in force in the jurisdiction. In this state, under section 30-102, R. S. 1943, the title in fee simple would descend to the sole and only heir, Fern M. Dalton.

We have held that a grant or devise of real estate to a designated person in fee simple with provisions therein that are inconsistent or repugnant thereto, such as a restriction against the power to sell, mortgage or otherwise encumber, such provisions are void.

In *State Bank of Jansen v. Thiessen*, 137 Neb. 426, 289 N.

W. 791, this court held: "A devise of real estate to a designated person 'and his heirs forever,' without power to sell, mortgage or otherwise encumber, vests such designated person with a fee simple title. The restraints against alienation contained therein are repugnant to the estate devised and are therefore void." In the opinion this court said: "It is a fundamental rule when an estate in fee simple is devised that an attempt by the testator to prevent alienation is ineffective and void for the reason that it is repugnant to the estate devised. *Yates v. Yates,* 104 Neb. 678, 178 N. W. 262; *Myers v. Myers,* 109 Neb. 230, 190 N. W. 491." See, also, *Moffitt v. Williams,* 116 Neb. 785, 219 N. W. 138.

In *Grant v. Hover,* 103 Neb. 730, 174 N. W. 317, this court said: "It has been regarded by the courts that it is impossible to convey an absolute title to real estate in fee simple by deed or will, and at the same time in the same instrument convey to the same person a limited right or title in the same land."

We conclude that the restrictions on alienation contained in the deeds of Addie E. Watson to Fern M. Dalton, especially upon the death of Addie E. Watson, were repugnant to and inconsistent with the fee simple title absolute which was then vested in Fern M. Dalton, and that the subsequent conveyance by deed and devise by will by her to her husband, vested in the husband the fee simple title to all the real estate.

Our former opinion reached the same result as we have reached in the case at bar, except that the former opinion was predicated upon a condition subsequent. To this extent our former decision is hereby set aside and vacated, as being in conflict with this opinion.

For the reasons given in this opinion, the judgment of the district court is affirmed.

AFFIRMED.

CHAPPELL, J., concurring.

I concur in the result but not in the primary reason for it. It seems to me that, for all practical purposes, the majority have gently demised conditions subsequent to the age

of past legal history. The law best speaks for itself and I sincerely believe that what it is and ought to be will be found in our former opinion.

THEODORE THORIN ET AL., PLAINTIFFS, V. ALLEN G. BURKE, DEFENDANT.

18 N. W. 2d 664

FILED MAY 11, 1945. No. 31505.

1. **Statutes: TAXATION.** The Legislature may make a reasonable classification of persons, corporations or property for purposes of legislation concerning them, but the classification must rest upon real differences in situations and circumstances surrounding the members of the class relative to the subject of the legislation which render appropriate its enactment and to be valid, the law must operate uniformly and alike upon every member of the class so designated.
2. ———: ———. Under the Nebraska Constitution, art. III, section 18, and art. VIII, section 1, classification of business or property for taxation, whether the tax is a property tax or an excise tax, can be permitted only if the classification is reasonable and the tax operates uniformly upon all members of the class.
3. **Food: STATUTES.** Sections 81-294 to 81-2,110, R. S. 1943, an act relating to revenues, which imposes an excise tax of 15 cents a pound or fractional part thereof on imitation butter, provided any oleomargarine or imitation butter containing more than 50 per cent of animal oils or animal fats produced in the United States and containing no imported oils or fats, for the purposes of the act shall not be included in the term "imitation butter" for tax purposes, is an unreasonable and arbitrary classification of the finished product of oleomargarines for purposes of taxation and does not operate uniformly upon all members of the class and is violative of section 1, art. 8 of the Nebraska Constitution.
4. **Statutes.** If portions of an act are unconstitutional and the remainder is so connected with the invalid portions that it cannot be upheld without doing violence to the legislative intent as a whole, the entire act must fall, in this case, sections 81-294 to and including 81-2,110, R. S. 1943.

Original action under the Uniform Declaratory Judgments Act for a construction of statute imposing a tax upon imitation butter. *Judgment for plaintiff.*

Wear, Boland & Nye and *Paul F. Good,* for plaintiffs.

Walter R. Johnson, Attorney General, Rush C. Clarke and *Edwin Vail,* for defendant.

Leonard A. Flansburg and *Perry, Van Pelt & Marti, amici curiæ.*

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

MESSMORE, J.

This is an original action brought under the Uniform Declaratory Judgments Act approved April 24, 1929, appearing in sections 25-21,149 to 25-21,164, R. S. 1943.

Declaratory judgment proceedings have frequently been employed to determine questions as to the construction or validity of statutes. 16 Am. Jur., sec. 24, p. 296. See *Dill v. Hamilton,* 137 Neb. 723, 291 N. W. 62, 129 A. L. R. 743; *Lynn v. Kearney County,* 121 Neb. 122, 236 N. W. 192.

The action is for a construction of that portion of the regulations adopted as to imitation butter in the year 1931. Laws 1931, ch. 131, secs. 1 to 16, pp. 365 to 370; R. S. 1943, 81-294 to 81-2,110. The following facts are admitted by the pleadings: The plaintiff is a resident of Omaha, engaged in the retail grocery business, and the defendant is director of the Department of Agriculture and Inspection of Nebraska. The case proceeds with the present incumbent official substituted for the original defendant, as provided for by section 25-322, R. S. 1943. The plaintiff's customers have sought to purchase from him oleomargarine, hereinafter called margarine, manufactured principally from vegetable oils, and the same product containing less than 50 per cent animal fats and containing imported oils or fats; that the plaintiff wishes to sell, in the state of Nebraska, margarine the fat or oil of which is derived wholly from domestic vegetable sources, and margarine the fat or oil of which is derived in part from vegetable sources, and in part from animal sources, but in which the animal fats or oils are less than 50 per cent of the total fats and oils, and less than 50

per cent of the total content of such margarine; and margarine made in whole or in part from imported vegetable fat or oil.

Defendant's amended answer denies the plaintiff sold margarine containing imported oils or fats to his customers in this state for many years prior to 1931; denies that he proposes to purchase and to sell to his customers margarine made in whole or in part from imported vegetable oil or fat; denies that large quantities of margarine containing imported oils or fats were sold in Nebraska prior to the enactment of the act or that the sale of such product containing imported oils or fats practically ceased after the enactment of the statute; or that the statutory tax of 15 cents per pound imposed by the act has rendered impossible the sale of margarine containing less than 50 per cent of animal oils or fats produced in the United States and vegetable oil margarine and margarine containing imported oils or fats in competition with the tax-free margarines, which contain more than 50 per cent of animal oils or fats produced in the United States and which contain no imported oils or fats.

The act is designated, "An Act relating to revenue; to impose a tax upon imitation butter, intended for commercial or domestic consumption; * * * ." The act, on its face, is an act for levying taxes, and its primary object must be assumed to be the raising of revenue. Section 1 of the act provides; "There is hereby levied and assessed and shall be collected and paid to the Department of Agriculture of the State of Nebraska, prior to or at the time of the sale and delivery by any retail dealer or any agent or employee thereof, upon all imitation butter, a tax of fifteen cents per pound or fractional part thereof, * * * . For the purpose and within the meaning of this act every edible article, substitute or compound other than that entirely produced from pure milk or cream from the same, made in the semblance of butter, or containing any oil or fat other than the fatty constituent of cows milk intended or designed to be used as a substitute for butter, is hereby declared to be 'imitation butter'; provided, any oleomargarine or imitation butter containing

more than 50% of animal fats or animal oils produced in the United States and containing no imported oils or fats, for the purpose of this Act shall not be included in the term imitation butter for tax purposes. * * * ."

This case does not present the question that the difference between butter and imitation butter, that is, margarine, is or is not sufficient to justify their separate classification for purposes of taxation, nor is there any question but that the state has a right to regulate the sale of imitation butter, and this right has been recognized and upheld in this state. In this connection, in *Beha v. State,* 67 Neb. 27, 93 N. W. 155, the act prohibited the sale or keeping for sale, imitation butter colored so as to resemble butter made from pure milk or the cream thereof. The statute did not undertake to prohibit the manufacture or sale of margarine, on the other hand, the express purpose was to regulate its manufacture and sale. In this connection, the police power of the state is properly exercised in the protection of the people in all matters concerning their health, and that it is within the scope of this power to regulate the manufacture and sale of articles of food even though the right to so manufacture and sell is a natural right guaranteed by the Constitution. The requisite simply is that it shall purport to be what it really is and shall not be so manufactured and put up as to deceive the consumer.

In the case of *Carolene Products Co. v. Banning,* 131 Neb. 429, 268 N. W. 313, section 81-1022, Comp. St. 1929, commonly called the "filled milk" act, was held invalid as being an arbitrary and unreasonable regulation of a lawful occupation in so far as it prohibits the manufacture, sale and distribution of a food product composed of evaporated skim milk and cocoanut oil, both of which are wholesome and nutritious. Paragraph 4 of the syllabus held that the remedy for fraud in the sale of a wholesome and nutritious food product is by legislative regulation and not by a destruction of the business. This case recognized the power of the legislature to regulate imitation or substitute foods, and to so deal with them in such manner as to protect the health

and safety of the public. It is the duty of the legislature to use its judgment in exercising police powers of the state. The presumption is that any such law enacted by it is constitutional and it is only when the courts determine that an enacted law invades personal and property rights protected by the constitution that it will not be sustained.

In this case, the plaintiff's contention is that the act constitutes an arbitrary classification of and a discrimination between margarine without a reasonable basis of distinction, and that is the issue we determine in this opinion. The testimony is by depositions.

Margarine is entirely a product of the laboratory and factory. Oleomargarine, or margarine as it is commonly called, is an edible fat product made by churning or emulsifying into 80 parts of edible food fat, 20 parts of cultured milk. There are usually incorporated table salt, flavor and benzoate of soda, and into the fat portion there are frequently incorporated one or more of the following: Vitamin A, Vitamin D and soya bean lecithin or some other emulsifying agent.

At the time the act was passed, several different kinds of margarine were produced in the industry; margarine, the fat or oil of which is derived wholly from domestic vegetable sources; margarine, the fat or oil of which is derived principally from domestic sources but which contains less than 50 per cent of animal fats or oils; and margarine made in whole or in part from imported animal fats or oils. Under the act, all three of the foregoing are taxable. Margarine, the fat or oil of which is derived in part from domestic vegetable sources and in part from animal sources but in which the animal oils or fats are more than 50 per cent of the total oils and fats, is nontaxable.

In 1930 and early in 1931 imported vegetable oils constituted approximately 70 per cent of all of the oils and fats used in all of the margarine produced in the United States. Domestic vegetable oils constituted approximately 10 per cent of all the oils and fats used in all the margarine produced in the United States. Animal fats and oils consti-

tuted approximately 20 per cent of all the fats and oils used in all the margarines produced in the United States. The manufactured product of margarine, whether made from vegetable oils or fats, or animal oils or fats, contains 3300 calories to the pound, and fat soluble vitamins A, D and E. It is a fatty food consumed primarily for its energy or caloric value. In the manufacturing there are no essential differences between the classes of margarines, and in the finished product there is no difference whatever in the packing or distribution at all stages of the manufacture. The digestibility of margarine does not depend upon whether vegetable or animal fats are used, or whether there is a certain percentage of animal fats present, or whether domestic or foreign fats are used. There is no difference nutritionally between the margarine which is taxable under the act, and that which is not taxable.

The defendant offered evidence that in the manufacture of margarine from vegetable oils the process of hydrogenation is essential to change the oil which occurs in the form of a liquid, to a solid state. Although there is nothing deleterious to the health in the vegetable oils which are used in the manufacture of margarine, the resultant solid may have a melting point above body temperature, and in the process of digestion it may go through the entire alimentary system without particular change and without absorption. It having been admitted by the witness that the fats or oils which are the base of margarine carry certain solubles having a food value, it would seem to be at once apparent that this melting point would be of extreme value in determining the digestibility or the desirability of the use of margarine in the diet. This is based on the testimony of the witness that the difference between animal fats and vegetable oils is that the former is a solid and the latter is a liquid, and therefore in the using of vegetable oil alone, it is necessary to have it go through a process of hydrogenation. This process has the effect on the liquid vegetable oil to change the melting point and raise it until it is solid at ordinary temperature. The witness further explained that with the exception of

one or two of the imported oils, the animal fats are characterized by the amount of fatty acid known as palmitic acid, which occurs in the animal fats usually about 20 to 25 per cent, and with the exception of cottonseed oil and cocoanut oil, does not occur in vegetable oils in anywhere near this amount. Another characteristic fatty acid of animal fats is myristic acid which is present in animal fats usually in the proportion of 5 per cent, and few vegetable oils contain myristic acid.

Digestibility of fats, either animal or vegetable, is related to the melting point, and margarines are all made to melt in the mouth. The fat part of margarine is food at the temperature of the body, and fats in all foods at the temperature of the body are practically completely digested.

All classes of margarines are used for the very same purpose, as spread for bread, in cooking, baking and frying, and by appearance, use, odor or flavor, there is no apparent distinction between the different margarines, and the nutritive values of the different classes are not affected in any way by whether they are one type or another. True, in the original state, before the finished product is manufactured, there is a difference between vegetable oils and fats and animal oils and fats, as heretofore pointed out. In the manufactured product there may be a slight chemical difference which is not detectable, and we are here concerned with the finished product, and the defendant's witness admits this to be true when he testified the color, body, nutritional value and useability of the manufactured products of margarine are the same. The only qualifying statement is that there would still remain the chemical differences in composition in the finished product which were present in the raw materials from which the margarine was made.

Defendant cites *Coy v. Linder*, 183 Ga. 583, 189 S. E. 26, to the effect that it is proper to classify margarines as to their content and to impose a tax for revenue, as a regulation measure, upon one class and not upon another. In this case, an excise tax of 10 cents a pound was imposed on all margarine sold or offered for sale "containing any fat * * *

or oil ingredient other than any of the following fats and * * * oils: oleo oil from cattle, oleo stock from cattle, oleo stearine from cattle, neutral lard from hogs, peanut oil, pecan oils, corn oil, cotton-seed oil, soya bean oil or milk fat." Ga. Laws 1935, p. 81. The classification, for the purpose of imposing the excise tax, was held to be reasonable. However, in the testimony it developed that the elements composing a nontaxable oleomargarine were or could be raised in Georgia, and the development of their production would be beneficial to the state, and the testimony further showed that a substantial difference existed between the margarine of taxed and untaxed varieties in their spreadability, in nutrition, in their response to temperature, in their frying qualities, and their reaction to the taste. There is no such evidence in the instant case offered by the defendant, and the case, under the circumstances, is not authority in support of the classification here under consideration.

The defendant further cites *Carolene Products Co. v. United States,* 323 U. S. 18, 65 S. Ct. 1, 89 L. Ed. 13. This case upheld a federal Filled Milk Act. The defendant's contention is that where it becomes necessary and proper to examine extraneous evidence to determine the reasonableness or unreasonableness of the legislature's classification, the question is then a debatable one, and in such event is for the legislature and not the courts, and the action of the legislature should not be set aside by a finding of the court. The question in the instant case is not debatable in considering the manufactured product of margarines, for the reasons heretofore pointed out. The case is not applicable.

This brings us to an analysis, and the effect of the act here under consideration. A margarine containing 51 per cent of animal fats, and the balance containing domestic cotton-seed oil, is nontaxable. A margarine containing 51 per cent of animal fats and the balance imported cotton-seed oil is taxable. There is no difference between imported cotton-seed oil and domestic cotton-seed oil. They are identical.

A margarine containing 48 per cent of animal fats and the balance domestic vegetable oil, under this act, is taxable, and yet the two finished products are identical.

Under the Nebraska Constitution, art. III, section 18 and art. VIII, section 1, classification of property or business for taxation, whether the tax is a property tax or an excise tax, can be permitted only if the classification is reasonable and the tax operates uniformly upon all members of the class. The principle is announced in *Continental Ins. Co. v. Smrha,* 131 Neb. 791, 270 N. W. 122: "A classification of persons, corporations or property for taxation purposes must be based upon real and substantial differences in situation and circumstances surrounding the members of the class, and, to be valid, the law must operate uniformly upon every member of the class." That part of art. VIII, section 1 of the State Constitution that is material here, provides as follows: "The necessary revenue of the state and its governmental subdivisions shall be raised by taxation in such manner as the Legislature may direct; but taxes shall be levied by valuation uniformly and proportionately upon all tangible property and franchises, and taxes uniform as to class may be levied by valuation upon all other property." That part of art. III, section 18 that is material is as follows: "The Legislature shall not pass local or special laws in any of the following cases, that is to say: * * * Granting to any corporation, association, or individual any special or exclusive privileges, immunity or franchise whatever. * * * ." See, also, *State ex rel. Taylor v. Hall,* 129 Neb. 669, 262 N. W. 835; *Peterson Baking Co. v. City of Fremont,* 119 Neb. 212, 228 N. W. 256; *Speier's Laundry Co. v. City of Wilber,* 131 Neb. 606, 269 N. W. 119; *Moeller, McPherrin & Judd v. Smith,* 127 Neb. 424, 255 N. W. 551; *City of Lincoln v. Lincoln Gas and Electric Light Co.,* 100 Neb. 182, 158 N. W. 962; *State v. Farmers & Merchants Irrigation Co.,* 59 Neb. 1, 80 N. W. 52.

The record conclusively shows that the classification attempted on the basis of benefits received and objects to be accomplished does not rest upon any real differences in sit-

uation and circumstances from others within the class. In the absence of some real and substantial distinction which bears a reasonable, just and proper relation to the objects sought to be accomplished, a tax levied upon a part of those within the same class can not be sustained. The classification and the object to be accomplished must be germane. *Continental Ins. Co. v. Smrha, supra.*

We necessarily conclude that the classification in the instant case does not meet the requirements of uniformity as to class, required by art. VIII, section 1 and art. III, section 18 of the Constitution.

It is obvious that the unconstitutional provision was the principal inducement for the passage of the act, and consequently we will not undertake to sever the constitutional and unconstitutional portions, and the entire act must fall. When sections of a legislative act are unconstitutional, and such sections were an inducement to the passage of an act in its entirety, then the entire act is void, notwithstanding a saving clause therein. *Moeller, McPherrin & Judd v. Smith, supra.*

If portions of an act are unconstitutional, and the remainder is so connected with the invalid portions that it cannot be upheld without doing violence to the legislative intent as a whole, the entire act must fall. See *State ex rel. Taylor v. Hall, supra.*

Other constitutional questions are raised, but in view of our holding, need not be determined.

For the reasons given in this opinion, sections 81-294 to and including 81-2,110, R. S. 1943, are unconstitutional, being in violation of art. III, section 18 and art. VIII, section 1 of the Constitution of the state of Nebraska, and as to this plaintiff is void and to no effect, and judgment is entered accordingly.

JUDGMENT FOR PLAINTIFF.

ALFREA A. EVERS, ALSO KNOWN AS A. E. EVERS, APPELLANT, V. EDWARD H. EVERS ET AL., APPELLEES.
18 N. W. 2d 673

FILED MAY 11, 1945. No. 31895.

1. **Fraudulent Conveyances.** The question of fraudulent intent is a question of fact and not of law, when considered in the matter of the execution and delivery of a real estate mortgage charged to be made to hinder, delay and defraud creditors.
2. ———. Intent to make a mortgage to defraud creditors may be established by proof of facts from which such inferences may reasonably be drawn.
3. ———. Section 36-401, R. S. 1943, pertaining to fraudulent conveyances, considers and includes one having a claim for damages.
4. ———. A claim for damages arising from tort not yet reduced to judgment is within the protection of the statutes against fraudulent conveyances.
5. ———. Where a conveyance is made after the liability accrued, but before suit, the judgment once obtained relates back and becomes a debt as of the time the original cause of action accrued.
6. ———. Accordingly, persons who have been regarded as creditors within the meaning of such statutes include those having a cause of action for damages for wrongful death.
7. **Evidence.** Evidence that the party or parties charged with making a fraudulent disposition of property were engaged at or about the same time in other similar fraudulent transactions is admissible when related to the transaction in question.
8. **Acknowledgment.** The act of an officer in taking an acknowledgment of the grantor to a conveyance of real estate is a ministerial one.
9. ———. A notary's acknowledgment to a real estate mortgage is not conclusive that the instrument was executed and acknowledged on the date the acknowledgment bears. It is *prima facie* correct, but is subject to impeachment.
10. **Fraudulent Conveyances.** A conveyance between relatives which has the effect of hindering or delaying a creditor in the collection of his claim is presumptively fraudulent, and in litigation between the creditor and the parties to the conveyance over its alleged invalidity, the burden is on the parties to the conveyance to establish the good faith of the transaction.

APPEAL from the district court for Kimball County: J. LEONARD TEWELL, JUDGE. *Affirmed.*

Gray & Brumbaugh, for appellant.

Frost & Hammes, Ivan Van Steenberg and *Sam Klaver,* for appellees.

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

MESSMORE, J.

This is a suit to foreclose a real estate mortgage on a half section of Kimball County land. Edward H. Evers and his wife Emma, makers of the note and mortgage, Frances H. Chriss, administratrix of the estate of Edward R. Chriss, deceased, and the tenant in possession, are made defendants.

The plaintiff's petition alleged in substance the execution by defendants Evers of a promissory note dated March 1, 1934, due March 1, 1937, in the amount of $7,000, with interest. To secure the note, defendants Evers executed a mortgage covering land described in the petition. In consideration of all payments made, which included no part of the principal, there was due as principal and interest $9,909.31. The administratrix of the estate of Edward R. Chriss, deceased, had, or claimed to have, some interest in the land, which interest, if any, is subordinate to that of the plaintiff's. The prayer was for decree of foreclosure, order of sale, application of the proceeds thereof to the mortgage indebtedness, and a deficiency judgment if such amount was insufficient to retire the indebtedness.

The administratrix, by answer, alleged, after denying the facts not admitted: that she was the sole owner of the land; that the note and mortgage were fraudulently executed by defendant Evers to their son, the plaintiff, in anticipation of a suit and judgment for the wrongful death of Edward R. Chriss, deceased, her husband; and that the plaintiff was employed by the defendants Evers at the time of the wrongful death of the defendant's decedent and was a party to the fraudulent scheme.

The cross-petition of the administratrix set out certain matters that are covered in the opinion. The prayer was to have the mortgage upon which suit is brought canceled, set

aside, and declared fraudulent as to her, and title to the premises therein described quieted as to the void mortgage, and to recover costs expended.

The defendants Evers' answer to the cross-petition contained a general denial; admitted that Edward H. Evers filed a petition in bankruptcy and after accounting for and surrendering for the benefit of the creditors all assets of which he was owner, that he was discharged in bankruptcy October 23, 1943; specifically denied that the note and mortgage referred to in the petition were executed in anticipation of suit or judgment for wrongful death of administratrix' decedent, but alleged they were executed on the dates they bear and for the considerations set forth therein.

The answer to the cross-petition and reply of plaintiff contained a general denial and also a specific denial that the note and mortgage were not executed in good faith for the consideration named therein; alleged that failure to record the mortgage until June 5, 1934, was the result of plaintiff's inexperience with business matters of that nature, and that lateness in so filing in no way affected any cause of action or remedy of the administratrix or any other person; and renewed the prayer of the petition.

After hearing, the court found generally for the defendant Frances H. Chriss, administratrix, upon her cross-petition and against plaintiff on his petition of foreclosure; canceled the note and mortgage as to the real estate, as far as the same affected the rights of the cross-petitioner; and quieted the title of Frances H. Chriss, administratrix, in and to the real estate as described in the pleadings. From this judgment and order of the court overruling plaintiff's motion for a new trial, plaintiff prosecutes this appeal.

The plaintiff first contends that the decree and judgment entered by the court is erroneous and not sustained by sufficient evidence.

For convenience, we will hereinafter in the opinion refer to Alfrea A. Evers, plaintiff and appellant, also known as A. E. Evers, as the son; to Edward H. Evers, one of the defendants, as the father; to Emma Evers, another defendant,

as the mother; to Frances H. Chriss, administratrix of the estate of Edward R. Chriss, deceased, appellee, as the cross-petitioner.

The record discloses that on February 6, 1934 the father and his partner, Rasmus Nelsen, entered into a lease with Harry Steinberg, leasing the premises described as 802-04-06 North 16th Street, Omaha, Nebraska. The purpose was to open a cabaret, or nightclub, to be named the Showboat. The rent, in the amount of $125 per month, started February 20, 1934, however the place at that time was not prepared for opening. Certain alterations had to be made, the floors sanded, and the walls decorated, the expense of which was to be borne by the lessees. The furnishings consisted of 60 tables with 4 chairs to each table; a lunch counter with 24 stools; 2 bars containing 6 beer taps; an orchestra pit to accommodate 10 musicians and a bandstand for the master of ceremonies and a singer. It is apparent that both the father and his partner had insufficient funds with which to start the project. The father owned the Kimball county land clear, with the exception that he claimed he had borrowed $2,000 from the son to clear it. The financial status of Nelson is not apparent, but it is claimed that he paid his share of the expenses out of his share of the profits from the business. The father, realizing that the funds were insufficient to complete the project, claimed he took the matter up with his son and the lessor who were present in the Showboat on March 1, 1934. The result was that the son agreed to loan the father $5,000. The lessor, being interested in the rent, accompanied the father and son to an attorney's office and introduced them to the attorney who thereafter assisted them in the drawing of certain instruments. At that time the father made out a note for $7,000, which was signed by him and the mother, dated March 1, 1934 and due March 1, 1937. As security therefor, on the same day, the father and mother made and executed a real estate mortgage in favor of the son, in the amount of $7,000. After this transaction the father and mother in their car, and the son in his, drove to Venice, Nebraska, 22 miles west of

Omaha, where the son resided and where his business was located. After arriving at the son's place, the father and son dug up some hidden fruit jars containing currency that had been buried by the son who stated that his reason for burying the money was that he did not have confidence in banks, and his grandfather and a friend had lost money in failed banks and that banks were failing with regularity. The money was counted out in 10 and 20 dollar bills, totaling $5,000 which was given to the father. The son's business which he had operated since 1930 and for which he paid rent not to exceed $150 per year, consisted of cabins, boats and a place where he sold homebrew, soft drinks and served sandwiches and had slot machines from which he received 40 per cent of the amount taken in by the machines. He also operated a dance hall. Through this enterprise, the best season was between March 15 and October 15, when he averaged $300 a week net. For the remainder of the year he averaged $150 per week. However, when beer was legalized his earnings dropped considerably.

The father claims to have used the $5,000 in payment of $800 for plumbing; for a counter, bars and lavatories, $1,500; a cooler for the basement $450, which was not large enough and was subsequently sold for $25; a compressor which cost $775 and a large box installed in the basement, costing $200. The cost of decorating the room was $350; the 60 tables cost $4.75 each; the 24 stools $100; a secondhand steam table $65 to $75; one large-size common ice box $125; 2 electric refrigerators $100 each; 5 secondhand cash registers ranging in price from $75 to $125. Utility deposits required before opening, $150 to $200; beer licenses in the amount of $600; 63 people were employed in the business and the monthly payroll amounted to $4,700.

The Showboat opened about March 15, 1934 and was operated for three or four years, and sold in the last year of the lease. The son was employed as a bartender in the establishment at a salary of $21 per week. He lived with his parents at the time, and at the time of the trial was employed as a taxicab driver.

On May 30, 1934, Edward R. Chriss and a companion visited the Showboat. During his visit some argument arose, and as a consequence he was invited to leave. On the outside of the establishment an altercation occurred between Chriss and one of the officers sent by the Department of Public Welfare of the city of Omaha at the cabaret's expense. As a result Chriss died an hour later.

On March 8, 1935 the cross-petitioner filed a petition for damages against the Showboat, a copartnership, the police officer and others. On March 14, 1936 the cross-petitioner procured a judgment against the father who did not appear at the time of the trial or file pleadings. The trial was had to the court without the intervention of a jury, and a judgment was rendered in favor of the cross-petitioner in the amount of $10,000. A transcript of this judgment was filed in the district court of Kimball county July 16, 1936, and execution was issued thereon August 9, 1943, and the land, as described in the pleadings, owned by the father, was sold to the cross-petitioner at sheriff's sale September 21, 1943. The sale was confirmed by the court November 15, 1943, and sheriff's deed filed of record conveying the title of such real estate to the cross-petitioner November 20, 1943.

On August 31, 1943, the father filed a voluntary petition in bankruptcy in the United States district court. The judgment of the cross-petitioner was listed as unsecured indebtedness in the amount of $15,000, and a disputed amount of $6 to a hospital was listed, the two constituting the total indebtedness of the father. Official form 2, designated "State of Affairs" filed by the father in the bankruptcy proceedings, shows the father's occupation to be that of a truck driver for the Dealers Transport Company, and shows the mortgage indebtedness to be $5,500, and the amount paid the year previous to the bankruptcy proceedings to the son on the mortgage indebtedness, $300.

The son brought this action to foreclose the real estate mortgage on the Kimball county land December 4, 1943. On June 5, 1934, the $7,000 real estate mortgage securing the note was recorded in Kimball county. On June 2, 1934

a chattel mortgage made by the father and his partner to his son, in the amount of $8,400 covering all of the equipment in the Showboat was filed of record in Douglas county. The son claimed to know nothing about this mortgage and it was presumably filed for record by the partner. It is admitted that there was no consideration for the mortgage and that the son had not given his father any such amount. This mortgage was dated May 12, 1934 and released by the son on the margin of the record in the county clerk's office in Douglas county May 5, 1937. The reason for releasing the mortgage was so that the Showboat could be sold.

The attorney who drafted the real estate mortgage also drafted the chattel mortgage and witnessed the chattel mortgage, and the same notary who notarized the real estate mortgage notarized the chattel mortgage. While the father claimed he and his wife and son had never met the attorneys who witnessed and acknowledged the instruments until introduced by Steinberg on March 1, 1934, the lease of February 6, 1934, discloses by the acknowledgment which was taken by the same notary, that the father as lessee, personally appeared before the notary.

The son contends that the evidence is insufficient to sustain the judgment of the court. We have set forth a brief summary of the evidence and will discuss other parts thereof, as occasion requires, in determining this appeal which is tried in this court de novo, as provided for in section 25-1925, R. S. 1943.

The son contends that the undisputed facts establish that his mortgage was acquired prior to the alleged tort of May 30, 1934, and that the cross-petitioner's position is that of a subsequent creditor and not an existing creditor; therefore the burden is upon the cross-petitioner to establish that the mortgage of the plaintiff was the result of a conspiracy on the part of the son and father to hinder, delay and defraud the cross-petitioner in collecting her judgment, and she has failed to establish her case; that the cross-petitioner's theory is that she is an existing creditor and so pleaded and is bound by her pleadings; and that in this connection the rule

cited in *Ayers v. Wolcott*, 66 Neb. 712, 92 N. W. 1036 and cases cited therein, govern. "The rule seems to be well settled that, to set aside a conveyance on the ground that it is fraudulent as to subsequent creditors, such creditors must allege and prove that such conveyance was made with intent to defraud subsequent creditors and in contemplation of such future indebtedness." Whether or not this rule is applicable depends upon the facts and the reasonable and legitimate inferences that may be drawn therefrom.

The question of fraudulent intent is a question of fact and not of law, when considered in the matter of the execution and delivery of a real estate mortgage charged to be made to hinder, delay and defraud creditors. See, *Hilton v. Clements*, 137 Neb. 791, 291 N. W. 483; *Luikart v. Detweiler*, 133 Neb. 614, 276 N. W. 395.

Intent to make a mortgage to defraud creditors may be established by proof of facts from which such inferences may reasonably be drawn. *Luikart v. Detweiler, supra; Farmers State Bank of Ewing v. Dierks*, 137 Neb. 442, 289 N. W. 860.

The trial court found that the note and mortgage set forth in the plaintiff's petition were executed by the father and mother to the son subsequent to the date of May 30, 1934, and on or about June 2, 1934, and was caused to be pre-dated back to March 1, 1934. The son predicates error on the finding that it is erroneous and not sustained by sufficient evidence. If this finding is true, the cross-petitioner would then be an existing creditor and not a subsequent creditor as contended for by the son. The cross-petitioner became a creditor of the father from the date of the tort resulting in the wrongful death of her decedent, which was May 30, 1934, and comes within the protection of section 36-401, R. S. 1943, pertaining to fraudulent conveyances. The statute provides in part as follows: "Every conveyance * * *, in writing * * *, of any estate or interest in lands, * * * and every charge upon lands, * * * made with the intent to hinder, delay or defraud creditors or persons, of their lawful rights, damages, * * * shall be void." It will

be observed the statute considers one having a claim for damages within its contemplation.

" * * * the well-nigh universal rule is that claims for damages arising from torts and not yet reduced to judgment are within the protection of the statutes against fraudulent conveyances, on the theory that where a conveyance is made after the liability accrued, but before suit, the judgment, once obtained, relates back and becomes a debt as of the time when the original cause of action accrued. Accordingly, persons who have been regarded as creditors within the meaning of such statutes include those having a cause of action for * * * death by wrongful act, * * * ." 37 C. J. S., sec. 75, pp. 915, 916.

At the time the cross-petitioner became a creditor, the son was living with his parents and employed in the Showboat as a bartender. On the day Edward R. Chriss lost his life both the father and son knew about the altercation, and knew the next day what had happened. At that time the Kimball county land, for all intents and purposes in so far as notice was concerned, was free and clear of encumbrances. The Showboat was clear of the $8,400 chattel mortgage and the only reason the father could give for executing it, as he testified: "Because I wanted to protect my interest", and his reason for recording the chattel mortgage was, as he testified: " * * * if anything would go wrong, I would be the total loser."

It is significant to note the close proximity of the time of the recording of the $8,400 chattel mortgage and the $7,000 real estate mortgage. The latter was sent by the son's attorney to Kimball county to be recorded. It reached it destination six days after the altercation and resulting death of Edward R. Chriss. The chattel mortgage was recorded three days after Chriss' death. The real estate mortgage and chattel mortgage discloses a total indebtedness owing from the father to the son the amount of $15,400. The only logical inference to be drawn from this evidence is that the father and son anticipated a lawsuit and judgment thereon for the wrongful death of the cross-petitioner's decedent.

It is proper in this connection to consider when it becomes material to show the motive or intent which inspired an act, or the knowledge under which one has acted, it is relevant for such purpose, under certain limitations, to prove other similar acts which explain such motive or bring home to the party the knowledge sought to be proved. Jones, Evidence (2d ed.) sec. 142. See *Masonic Bldg. Corporation v. Carlsen,* 128 Neb. 108, 258 N. W. 44.

"Evidence that the party or parties charged with making a fraudulent disposition of property were engaged at or about the same time in other similar fraudulent transactions is admissible to show fraudulent intent in making the transfer in controversy." 27 C. J. 807. See *Shepard v. Hamaker,* 120 Neb. 166, 231 N. W. 761.

At the time the father claimed to have borrowed $5,000 from the son, March 1, 1934, which brought about the execution of the $7,000 real estate mortgage, the record shows other indebtedness by the father with reference to the Showboat cabaret; a chattel mortgage for $500 on restaurant equipment filed March 5, 1934; a chattel mortgage for $500 on bar fixtures filed March 27, 1934; a chattel mortgage for $70 to purchase three cash registers.

It is significant to note the son, approximately two months before he claimed to have loaned his father the $5,000, gave a chattel mortgage for $126 on a secondhand automobile, January 5, 1934, payable at $21 per month.

The only witnesses who testified were the father and son. The counsel that drafted the instruments, witnessed and acknowledged them, the lessor and the partner, did not testify. "Where the testimony relied upon to show good faith is given by interested relatives only, the reasonableness or unreasonableness of their evidence has considerable weight in arriving at a just conclusion." *Hilton v. Clements, supra.*

The son relies upon the notary's acknowledgment and cites *Council Bluffs Savings Bank v. Smith,* 59 Neb. 90, 80 N. W. 270. "When the party executing a deed or mortgage knows that he is before an officer having authority to take acknowledgments, and intends to do whatever is necessary

to make the instrument effective, the acknowledging officer's official certificate will be, in the absence of fraud, conclusive in favor of those who in good faith rely on it." A notary's acknowledgment to a real estate mortgage is not conclusive that the instrument was executed and acknowledged on the date the acknowledgment bears. It is *prima facie* correct and cannot be impeached except for fraud, collusion or imposition. *Pereau v. Frederick*, 17 Neb. 117, 22 N. W. 235. "In this state the act of an officer in taking an acknowledgment of the grantor to a conveyance of real estate is a ministerial one." *Horbach v. Tyrrell*, 48 Neb. 514, 67 N. W. 485. See *Burbank v. Ellis*, 7 Neb. 156.

We conclude that the certificates of acknowledgment, under the facts, and the inferences reasonably and legitimately drawn therefrom, and the circumstances surrounding the real estate mortgage and the chattel mortgage, have been impeached. We can draw no other conclusion than did the trial court, that the real estate mortgage executed by the father to the son was subsequent to May 30, 1934, and that the legal status of the cross-petitioner is that of an existing creditor.

A conveyance between relatives which has the effect of hindering or delaying a creditor in the collection of his claim is presumptively fraudulent, and in litigation between the creditor and the parties to the conveyance over its alleged invalidity, the burden is on the parties to the conveyance to establish the good faith of the transaction. *McBride v. Helmricks*, 140 Neb. 843, 2 N. W. 2d 118; *Buckner v. McHugh*, 123 Neb. 396, 243 N. W. 119; *Hilton v. Clements, supra; Farmers State Bank of Ewing v. Dierks, supra.* The son has failed to meet the foregoing rule of law in his proof.

The trial court found that the note and mortgage were executed by the father and mother without consideration, and for the purpose and with the intent to hinder, delay and defraud the creditors of the father, and that the note and mortgage are void as to such creditors. The son predicates error on this finding, that it is erroneous and not sustained by sufficient evidence.

From the business in which the son was engaged at Venice, Nebraska, from and after 1930 and until he took up his employment as a bartender in the Showboat at a wage of $21 per week, it would indicate that he would have made out of his business, until the advent of legalized beer, approximately $12,500 per year. When the Showboat opened he was living with his parents. He had never filed a United States income return from 1930 to 1936 inclusive. He filed personal property tax schedules with the assessor of Douglas county April 18, 1934. The property listed, subject to taxation, was a secondhand automobile on which he had borrowed $126, and a $20 radio. Personal property returns for the years 1931, 1932 and 1933, also shown in evidence, listed a secondhand automobile; some household goods, exempt; a radio, and poultry valued at $10. None of these personal property returns show or include cash in any amount. In 1935 the son executed a chattel mortgage to his mother for $500 on his car, which chattel mortgage was admittedly without consideration, and was filed of record June 14, 1935. The purpose of executing this chattel mortgage was to cover his car in such manner as to keep his wife from interfering with it. At that time he was having trouble with her, due to a divorce action which he had filed. On August 3, 1935 a decree of divorce in favor of the wife as defendant and cross-petitioner was entered and is in evidence, showing a property settlement to the wife in the amount of $20 cash, and in addition her husband was to cancel a chattel mortgage of $100 and pay attorney fees amounting to $35. He testified he did not tell his wife that he had loaned his father $7,000. There is nothing in the record to show that the father ever deposited $5,000 in any bank. The record is void of books of accounts showing expenditures made by him after receipt of this amount. The only witness attempting to corroborate him is his son. The son made no deposits of interest collected on this indebtedness from his father, and kept no books of account with reference to his business.

In considering all of the evidence, the legitimate and rea-

sonable inferences to be drawn therefrom, and the circumstances surrounding this transaction, it is inconceivable to believe that the son ever loaned his father such an amount of money as $7,000. We agree with the court's findings heretofore set out in this respect, and for the reasons given in this opinion, the decree and judgment of the district court is affirmed.

AFFIRMED.

ANTON KUCABA, JR. ET AL., APPELLANTS, V. EDWARD KUCABA ET AL., APPELLEES.
18 N. W. 2d 645

FILED MAY 11, 1945. No. 31897.

1. **Trial.** Evidence which is admitted generally is in the case for any legal purpose for which it is admissible, although the evidence, when introduced, was intended for a particular purpose.
2. ———. While evidence admitted generally is in the case for any legitimate purpose, evidence which is offered and admitted for a limited purpose cannot be used for another and totally different purpose. Where, by express ruling, it is limited to one purpose, without exception, it cannot be used for another purpose.
3. **Evidence.** The weight or value of opinion testimony as to handwriting depends largely upon the character of the witness and the opportunity he had of acquiring a knowledge of the handwriting in question, together with the cogency of the reasons for his opinion.
4. **Acknowledgment.** Public policy forbids that deeds and mortgages of real estate, duly authenticated in the mode pointed out by statute, should be set aside except upon clear and convincing proof that the certificate of acknowledgment is false. The presumption is in favor of the certificate, and the burden is upon the party alleging such a defense to prove it.
5. **Deeds.** Where it is sought to cancel a deed for the want of mental capacity of the grantor to make the instrument, the burden of proof is on the one who alleges the mental incapacity.
6. ———. To set aside a deed on the ground of want of mental capacity on the part of the grantor, it must be clearly established that the mind of the grantor was so weak or unbalanced at the

time of the execution of the deed that he would not understand and comprehend the purport and effect of what he was then doing.

7. **Evidence.** The fundamental principle is that the burden of proof in any cause rests upon the party who, as determined by the pleadings or the nature of the case, asserts the affirmative of an issue and remains there until the termination of the action.

8. ———. The burden of proof means the duty resting on one party or the other to establish by a preponderance of the evidence an issue essential to his recovery. In this sense the burden of proof never shifts nor changes but remains from the first to the last where it is placed by the pleadings or the substantive law of the case.

9. ———. The plaintiff may offer sufficient proof to make a *prima facie* case, or he may be aided by a presumption of law which, if nothing further appeared, would entitle him to a judgment, and when this happens the burden of evidence to meet this *prima facie* case devolves upon the adverse party.

10. **Cases Clarified.** The cases of *Gibson v. Hammang*, 63 Neb. 349, 88 N. W. 500, and *Chamberlain v. Frank*, 103 Neb. 442, 172 N. W. 354, are clarified and corrected.

11. **Deeds.** The one attacking an instrument on the ground that its execution was procured by undue influence has the burden resting on him to establish that fact. However, the circumstances under which it was made, the condition of the grantor at the time and the injustice to him and his heirs, if it is upheld, may be such as to cast upon the grantee the burden of evidence to show that it is not tainted with undue influence but is the deliberate and *bona fide* act of the grantor.

12. ———. In determining whether or not the plaintiffs have established sufficient facts and circumstances, considering the relationship of the parties, to raise a presumption of undue influence, and, if so, whether the defendants have rebutted it, the court will examine the transaction with care and closely scrutinize everything done by the donees to secure the deed in question.

APPEAL from the district court for Saline County: STANLEY BARTOS, JUDGE. *Affirmed.*

Thomas J. Dredla and *T. R. P. Stocker*, for appellants.

Joseph Ach, for appellees.

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

WENKE, J.

Anton Kucaba, Jr., Barbara Meyers, Jennie McDonald, Josephine Koranek, Julia Swartz, Rose Baumruker, and the Cicero State Bank, conservator of the estate of Joseph W. Kucaba, incompetent, as plaintiffs, commenced this action in the district court for Saline county against Edward Kucaba, Frances Kucaba, his wife, Cecilia Topel, Alfred Topel, her husband, and Marie Werth, a widow, as defendants.

The purpose of the action is to vacate and set aside a deed from Anton Kucaba, Sr., and Josefa Kucaba, his wife, conveying 160 acres of land located in Saline county to the defendants, Edward Kucaba and Frances Kucaba. The grounds therefor are that the deed was obtained by undue influence, that both grantors were mentally incompetent at the time of their executing the deed and that the signatures attached to the deed are forgeries.

From a judgment for the defendants, Edward Kucaba and Frances Kucaba, sustaining the deed and dismissing the plaintiffs' action, the plaintiffs have appealed.

For the purpose of this appeal the appellants will be collectively referred to as plaintiffs; the appellees, Edward Kucaba and Frances Kucaba, as defendants; Anton Kucaba, also known as Anton Kucaba, Sr., and Josefa Kucaba individually as father or mother and collectively as the parents; otherwise, the parties will be referred to by their respective individual names.

The defendants, Marie Werth and Cecilia Topel, together with the latter's husband, Alfred Topel, were made parties defendant because they refused to join as parties plaintiff. They have no interest in the deed itself. Their only interest is through the estate of the father in case the deed in suit is set aside.

This being an appeal in an equity action the statute requires this court, in determining questions of fact, to reach an independent conclusion without reference to the findings of the district court. However, if there is an irreconcilable conflict therein on a material issue this court will, in determining the weight of the evidence of witnesses who ap-

peared in court to testify, consider the fact that the trial court observed them and their manner of testifying.

The facts in cases of this kind are never completely the same. While many of the cases cited are helpful in determining the issues, because of their similarity, however, the ultimate decision in this case must necessarily be based on the facts thereof.

The parties to this action are all the children of Anton Kucaba and Josefa Kucaba. Seven are plaintiffs and three are defendants. All are competent, except a son, Joseph W., who has been declared an incompetent and appears by his conservator or guardian. Anton, Jr., is the oldest and Edward, who was born in 1902, is next to the youngest.

The parents were of Bohemian extraction. They lived most of their lives either in Chicago or Cicero, Illinois. The father was engaged in many different businesses, among them being that of a contractor, a coal yard operator and a dealer in real estate.

In the spring of 1917 the father sold his coal business and the family moved to Tobias, Nebraska, and lived there until the spring of 1920. They then moved back to Chicago and two years later to Cicero where the parents lived the remainder of their lives. The mother died on May 15, 1934, and the father on June 25, 1939.

Edward lived with his parents until December of 1925. At that time he married and left home. He was gone for about four and one-half years. He returned in 1930. At that time he was a divorcé. He then continued to live there until 1938. On June 11, 1932, he married the defendant, Frances Kucaba, and, at the parents' request, she came into the home very shortly thereafter. At this time the mother was failing in health, due to diabetes, and Frances took care of the home. She also took care of the mother until she died and the father until he was taken to the home of a daughter sometime in 1938.

On August 29, 1933, the parents, by means of the deed in question, purported to convey to Edward and Frances Kucaba the southwest quarter of section 32, township 6 north,

range 1, east of the 6th P. M., in Saline county except for the right of way of the K. C. and Q. R. R. This deed was recorded in the records of Saline county on September 1, 1933. At the time the deed was executed the father was 75 and the mother 73 years of age.

On December 30, 1936, the probate court of Cook county, Illinois, adjudged the father to be incompetent and appointed a conservator or guardian of his estate. Anton, Jr., and Edward were appointed conservators. Subsequently, on May 27, 1937, the Chicago Trust Company of Chicago was appointed their successor and acted in that capacity until the father died. This change was made after Edward prepared an inventory in which he did not list the property here involved and which, because thereof, Anton, Jr., refused to sign.

The first issue necessary for our decision is the question of whether or not the signatures on the deed are forgeries.

On this issue the parties agreed that certain exhibits carried the genuine signatures of the parents. These exhibits were received for the limited purpose of providing a standard for comparison in determining whether or not the signatures on the deed in question are genuine. In this connection the plaintiffs complain that the trial court considered these exhibits for purposes other than that for which they were received.

As stated in *Baxter v. National Mtg. Loan Co.*, 128 Neb. 537, 259 N. W. 630: " 'Evidence which is admitted generally is in the case for any legal purpose for which it is admissible, although the evidence, when introduced, was intended for a particular purpose.' 64 C. J. 137." However, the continuation of this same principle is: "While evidence admitted generally is in the case for any legitimate purpose, evidence cannot be used for another and totally different purpose by the party offering it which is offered and admitted for a limited purpose. Where, by express ruling, it is limited to one purpose, without exception, it cannot be used for another purpose." 64 C. J., sec. 159, p. 137.

The trial court, if the offer is expressly restricted or, by

ruling of the court, is limited in the purpose for which received, should only consider it for that purpose. However, the action of the trial court in considering this evidence becomes immaterial as the case is here *de novo* and we will consider only the evidence that is properly before us, subject to such restrictions and limitations as were properly imposed thereon.

In support of their contention that the signatures are forgeries, the plaintiffs offered the testimony of George W. Schwartz, a handwriting expert from Chicago, Illinois, with 51 years of experience. He analyzed the admitted signatures of the parents and those on the deed in question. He pointed out the distinctions and differences as he saw them and then gave the reasons why, in his opinion, the signatures on the deed here involved are not genuine but forgeries. Edward A. Becker, vice-president of the Continental National Bank of Lincoln, Nebraska, testified that by reason of the fact that his work in the bank required him to identify signatures, he had, over a period of 30 years work, become an expert in handwriting; that he had made a careful examination of the admitted signatures of the parents and those on the deed in question. He analyzed the characteristics and formulation of the letters in the various signatures and then testified that in his opinion the signatures on the deed in question were not genuine but forgeries. Anton Kucaba, Jr., a son and one of the plaintiffs, testified he was familiar with his parents' signatures and that the signatures on the deed were forgeries.

The defendants called Wallace O. Shane of Omaha, Nebraska, a handwriting expert with 40 years of experience. He testified that after an examination and analysis of admitted signatures with those on the questioned deed he was of the opinion the signatures on the deed were genuine and gave the reasons for his opinion. Louis E. Harris of Lincoln, Nebraska, is an expert in the examination and comparison of handwriting with 11 years of experience. He testified that he had carefully examined the admitted signatures and those on the questioned document and in his

opinion the signatures were genuine and then gave his reasons therefor. Cecilia Topel, a daughter, identified the signatures to the deed in question as those of her parents.

While the signature of the mother is not necessary to the validity of the deed, however, since evidence was offered in reference to both, and if the mother's signature was forged it would be a very strong circumstance in connection with the execution thereof, we will consider and discuss them together.

The weight or value of opinion testimony as to handwriting depends largely upon the character of the witness and the opportunity he had of acquiring a knowledge of the handwriting in question together with the cogency of the reasons for his opinion. See 20 Am. Jur., sec. 1210, p. 1062.

Bearing this rule in mind we have carefully considered the testimony of the several witnesses for both sides and have examined the admitted and questioned signatures in the manner suggested by the plaintiffs. In consideration thereof, together with all the facts and circumstances relating thereto as disclosed by the record, we have come to the conclusion that the signatures on the deed in question are the genuine signatures of the parents.

In addition thereto we have the testimony and the certificate of the notary before whom the deed was signed and acknowledged. "Public policy forbids that deeds and mortgages of real estate, duly authenticated in the mode pointed out by statute, should be set aside except upon clear and convincing proof that the certificate of acknowledgment is false. The presumption is in favor of the certificate, and the burden is upon the party alleging such a defense to prove it." *Phillips v. Bishop*, 35 Neb. 487, 53 N. W. 375. See, also, *Thams v. Sharp*, 49 Neb. 237, 68 N. W. 474; *Coe v. Talcott*, 130 Neb. 32, 263 N. W. 596. The testimony of the notary shows that he failed to remember details in connection with the acknowledgment and that he contradicted himself on some matters. However, as a whole, it shows the fact that the deed was signed and acknowledged by the grantors in his presence. The evidence fails entirely to

show by clear, convincing and satisfactory proof that the certificate was false.

The next issue is the question of mental capacity. On this issue the burden of proof is on the plaintiffs, they having so charged, to sustain the lack of mental capacity to make the deed. As stated in *Little v. Curson,* 114 Neb. 752, 209 N. W. 737: " 'Where it is sought to cancel a deed for the want of mental capacity of the grantor to make the instrument, the burden of proof is on the one who alleges the mental incapacity.' *Brugman v. Brugman,* 93 Neb. 408; *Borgmann v. Borgmann,* 110 Neb. 318; *Hitchcock v. Guilliams, ante,* p. 522. (114 Neb. 522, 208 N. W. 630)."

"It is not every weakness of mind arising from old age or sickness, or other causes, that will avoid a deed. There must be a total want of reason or understanding. * * * Mere mental weakness will not authorize a court of equity to set aside an executed contract. * * * In order to vacate a deed on the ground of mental incapacity of the grantor, it is necessary to show such a degree of mental weakness as renders the maker of the deed incapable of understanding and protecting his own interest. The mere circumstance that the mental powers have been somewhat impaired by age or disease is not sufficient, if the maker of the deed still retains a full comprehension of the meaning, design and effect of his act, * * * ." *Brugman v. Brugman,* 93 Neb. 408, 140 N. W. 781.

Both sides offered many witnesses on this issue. They include friends of the parties, friends of the family, relatives, doctors who had attended the parents during the time here involved, neighbors and some of the parties themselves. All of the plaintiffs' witnesses came to the conclusion that the father was not mentally competent to transact business on the day the deed was executed, whereas, all of the defendants' witnesses were of a contrary opinion. Some of the witnesses also testified as to the mother's mental condition on that date.

To set forth the names of all these witnesses and detail their testimony would unreasonably lengthen this opinion

and serve no useful purpose. We have examined their testimony and in determining its value have considered the witnesses' relationship, if any, to the parties; the length of their acquaintance with the parents; the closeness thereof; their interests, if any, in the outcome of the litigation; the purpose, nature and frequency of their visits; their opportunity for observation; the nature and subject matter of their conversations; the failure of the father to recognize them; together with all other facts and circumstances which they gave as a basis for their opinion.

The record also shows that in 1932 the father made a loan to his son, Anton, Jr., one of the plaintiffs, of $1,000. This loan the son paid back in 1935. At the same time the father made a loan to his son he made one to his daughter, Jennie McDonald, a plaintiff in this action, of $1,000. Up until 1934 the father carried an account in the Cicero State Bank in which he made deposits and on which he drew checks. A conservator or guardian was not appointed until December 30, 1936.

Our conclusion upon this phase of the case is that the evidence falls far short of adequate proof of lack of mental capacity to make the deed. "The rule of law is well settled that, to set aside a deed on the ground of want of mental capacity on the part of the grantor, it must be clearly established that the mind of the grantor was so weak or unbalanced at the time of the execution of the deed that he would not understand and comprehend the purport and effect of what he was then doing. *Clark v. Holmes,* 109 Neb. 213; *Schley v. Horan,* 82 Neb. 704; *West v. West,* 84 Neb. 169." *Blochowitz v. Blochowitz,* 122 Neb. 385, 240 N. W. 586.

The evidence discloses that the father and mother were strong individuals, both in body and mind. Although they were getting older in years and the mother was physically afflicted with diabetes, nevertheless, the court is fully satisfied that both had their mental faculties intact on August 29, 1933.

The next issue is the question of undue influence. Under

this issue the parties have discussed the question of who had the burden of proof. It can generally be said that undue influence is never presumed but that the one attacking an instrument on the ground that its execution was so procured has the burden resting on him to prove that fact.

"The fundamental principle is that the burden of proof in any cause rests upon the party who, as determined by the pleadings or the nature of the case, asserts the affirmative of an issue and remains there until the termination of the action." 20 Am. Jur., sec. 135, p. 138.

"The burden of proof in its proper sense rests, throughout the case, as to each issue, on the party originally having the burden as to such issue." *In re Estate of Hagan*, 143 Neb. 459, 9 N. W. 2d 794.

"The test for determining which party has the affirmative, and therefore the burden of establishing a case, is found in the result of an inquiry as to which party would be successful if no evidence at all were given, the burden being, of course, on the adverse party." 31 C. J. S., sec. 104, p. 711.

"In equity, as at law, the party who has the affirmative of an issue has the burden of proof as to such issue, and a plaintiff in equity has the burden of proving all allegations of his bill not admitted by the answer." 31 C. J. S., sec. 107, p. 717.

"It is a fundamental rule of pleading and evidence that a party pleading a material fact assumes the burden of proving it. *Allen v. Chicago, B. & Q. R. Co.*, 82 Neb. 726; *Pierce v. Miller*, 107 Neb. 851." *Gutzmer v. Nelsen*, 121 Neb. 214, 236 N. W. 614.

As stated in *Moore v. Williams*, 111 Neb. 342, 196 N. W. 695: " 'Confusion can, to a certain extent, be avoided, and apparent contradictions reconciled, by bearing in mind the distinction between "burden of proof" and "burden of evidence" * * * and also the fact that in the vast majority of cases any such distinction is entirely ignored by the courts. The general rule is that the burden of proof rests upon the party who has the affirmative of the issue, as determined by

the pleadings, * * * and as the rule as to burden of proof is a fixed rule of law, the burden never shifts from the party having the affirmative of the issue. * * * The test for determining which party has the affirmative, and therefore the burden of establishing a case, is found in the result of an inquiry as to which party would be successful if no evidence at all were given, the burden being of course on the adverse party.' 22 C. J. 67 *et seq.*"

"The ambiguity lies in the indiscriminate use of the phrase 'burden of proof,' as meaning either the necessity of establishing the existence of a certain fact or set of facts by evidence which preponderates to a legally required extent, or the necessity which rests on a party at any particular time during a trial to create a prima facie case in his own favor or to overthrow one when created against him." 31 C. J. S., sec. 103, p. 709.

However, we have held in cases to set aside deeds because of undue influence that when a presumption thereof arises by reason of the facts and circumstances of the particular transaction, that it places on the grantee the burden of proof to establish that no undue influence was exerted by him upon the grantor. See *Gibson v. Hammang*, 63 Neb. 349, 88 N. W. 500; *Chamberlain v. Frank*, 103 Neb. 442, 172 N. W. 354. In so far as these cases shift the burden of proof, we think they misconceive the effect of the presumption.

As stated in 20 Am. Jur., sec. 158, p. 161: " * * * a presumption may be defined as a rule of law that attaches definite probative value to specific facts or draws a particular inference as to the existence of one fact, not actually known, arising from its usual connection with other particular facts which are known or proved. It is the conclusion of law which the court draws of the existence of one fact from others already proved." "Presumptions form an important part of the law of evidence generally. During the trial of an action, the party who has the burden of proof upon an issue may be aided in establishing his claim or defense by the operation of a presumption, or, expressed differently, by

the probative value which the law attaches to a specific state of facts. A presumption may operate to relieve a party of the duty of presenting evidence until his adversary has introduced proof to rebut the presumption." 20 Am. Jur., sec. 157, p. 161.

"While it is often loosely said that a presumption shifts the burden of proof, cases distinguishing between the concepts of burden of proof, properly so called, and burden of evidence, or using the phrases in their precise meanings, hold that the position of the burden of proof, properly so called, is not affected by a presumption, but that a presumption shifts the burden of evidence." 31 C. J. S., sec. 111, p. 720.

" * * * at the beginning of every trial the burden of proof and the burden of evidence as to any particular issue are generally on the same party. This burden of evidence is so continued until the party having the burden of proof establishes a *prima facie* case; nothing less will shift the burden of evidence. When such a *prima facie* case is established, the burden of evidence is shifted to the adverse party; the adverse party may, by the production of evidence destroying the *prima facie* case against him, satisfy the burden and restore it to the original party." 31 C. J. S., sec. 110, p. 718.

"The burden of evidence at any particular time rests on the party who would be defeated if no further evidence were introduced; when a *prima facie* case is established, the burden of evidence is shifted to the adverse party, and the burden may shift from side to side during the course of the trial." 31 C. J. S., sec. 110, p. 718.

The burden of proof means the duty resting on one party or the other to establish by a preponderance of the evidence an issue essential to his recovery. In this sense the burden of proof never shifts nor changes but remains from the first to the last where it is placed by the pleadings or the substantive law of the case.

The plaintiff may offer sufficient proof to make a *prima facie* case, or he may be aided by a presumption of law which, if nothing further appeared, would entitle him to a

judgment, and when this happens the burden of evidence to meet this *prima facie* case devolves upon the adverse party.

By this distinction of the proper relation between "burden of proof" and "burden of evidence" we in no way limit or restrict the presumption of undue influence that arises when sufficient facts and circumstances are established from which it flows. See *Bennett v. Bennett*, 65 Neb. 432, 91 N. W. 409; *Gibson v. Hammang, supra; Chamberlain v. Frank, supra; Scott v. Swank*, 132 Neb. 720, 273 N. W. 25; *Wixson v. Nebraska Conference Ass'n.*, 122 Neb. 771, 241 N. W. 532. As stated in *Gidley v. Gidley*, 130 Neb. 419, 265 N. W. 245: "Generally, the one attacking an instrument on the ground that its execution was procured by undue influence has the burden resting on him to establish that fact, but the circumstances under which a conveyance is made, the condition of the grantor at the time, and the injustice to him and his heirs, if it is upheld, may be such as to cast upon the grantee the burden of (evidence) showing that it is untainted with undue influence, imposition or fraud, but is the intelligent and deliberate act of the grantor."

Therefore, when a party seeking to set aside a conveyance because of undue influence establishes facts which show the relationship of the parties and their dealings to be such that a presumption of undue influence arises therefrom, the burden then shifts to the party seeking to sustain such conveyance to introduce evidence to overcome such presumption and in the absence thereof a decree should be entered against him.

It is impossible to lay down any hard and fast rule in cases of this kind as to when a presumption of undue influence arises. The rule must of necessity be applied according to the particular facts and circumstances of each case in which the question arises. It may generally be stated that if the facts and circumstances of a case show such a confidential, fiduciary or trust relation that it would be inequitable to sustain the deed in question then such presumption arises and the burden of going forward with the

evidence rests upon the grantee to show the bona fides thereof.

In determining whether or not the plaintiffs have established sufficient facts and circumstances, considering the relationship of the parties, to raise a presumption of undue influence, and, if so, whether the defendants have rebutted it, the court will examine the transaction with care and closely scrutinize everything done by the donees to secure the deed in question. See *Bennett v. Bennett, supra; Scott v. Swank, supra; Broeker v. Day*, 124 Neb. 316, 246 N. W. 490; *Winslow v. Winslow*, 89 Neb. 189, 130 N. W. 1042.

In considering the facts we should bear these legal principles in mind:

"The undue influence which will avoid a deed is an unlawful or fraudulent influence which controls the will of the grantor." *Gidley v. Gidley, supra.*

"In case of a gift or voluntary conveyance from parent to child, no presumption of fraud or undue influence arises, as between the parties thereto, from the mere fact of the relation. * * * ." *Broeker v. Day, supra.*

" 'The affection, confidence and gratitude of a parent to a child which inspires the gift is a natural and lawful influence, and will not render it voidable, unless this influence has been so used as to confuse the judgment and control the will of the donor.' *Hacker v. Hoover*, 89 Neb. 317." *Little v. Curson, supra.*

"Although mental weakness may fall short of entire incompetency to transact business, if it is taken advantage of to procure a conveyance by inequitable means, the conveyance may be set aside." *Bennett v. Bennett, supra.*

While some of the evidence is in conflict, we find it discloses: That after the Kucaba, Sr., family moved from Tobias back to Chicago and then to Cicero, they lived in Cicero until both parents passed away. After their return the father did not engage in any business but up until 1927 did buy and sell some real estate. Judging from the extent of his property the father was apparently a successful business man and, although he raised a large family, was able to

save considerable. As the family grew up they married and left home, Edward doing so in 1925. However, in 1930 he returned a divorcé and continued to live at home. The daughter, Mrs. Koranek, was living with the parents at this time and continued to remain until the fall of 1931. After she left the three, the mother, father and Edward, lived there by themselves until in June of 1932 when Edward and Frances were married. At the parents' request she came into the home. The mother was afflicted with a diabetic condition and was unable to take care of her home, being up and down as her physical condition permitted.

Frances took complete charge of the household duties and the care of the parents, particularly the mother who needed considerable individual attention. Although the father assisted her in a small way she did everything necessary and seemed to completely satisfy the parents. While she could not talk Bohemian she could understand it and was able to get along with the parents very well. At the mother's direction she learned to cook Bohemian dishes. She continued to take care of the household and the mother until the latter passed away. She then continued to keep the home for the father until he went to live with one of his daughters in 1938. About six months after he went to live with his daughter the father returned to Edward's home at 5045 25th Place for a period of six or seven weeks. He was then taken to a hospital for about ten days when Edward brought him back to his home where he stayed until he passed away.

When Edward came back to the family home in 1930, they lived at 5009 25th Street in Cicero, and he remained in their home until he moved to 5045 25th Place in 1938. At the time he came back to the parents' home in 1930 he was employed in a "bookie" establishment and continued in that capacity until 1936 when he started working for the city of Cicero. Incidentally, it appears that the father was a great fan of horse racing. He liked to bet on the races and continued to do so long after 1933.

The deed in question was prepared on or about August

29, 1933. Although the evidence does not disclose who drew the deed, presumably Edward either prepared it or had it prepared. Edward called Anton Maciejewski, a notary, who was a personal friend of his and of the parents, to witness and acknowledge its execution. This notary had purchased the father's coal business in 1917 and at the time of the taking of his deposition he was a United States congressman from the sixth Illinois district. He came to the home and the deed was there signed by the parents. He witnessed and acknowledged it. It was then recorded in Saline county on September 1, 1933. In May of 1934, just after their mother's death, Edward had a conversation about the deed with Anton, Jr., in front of the latter's office. Again, in the latter part of July or the forepart of August, 1936, in the office of Anton, Jr., in the presence of Anton, Jr., Mrs. Werth, Mrs. Topel, Mrs. Meyers, Mrs. Koranek, Mrs. McDonald and Mrs. Baumruker and while they were discussing their father's affairs, Edward told them the parents had deeded him the farm in Nebraska. At the time of taking a deposition in 1941, the deed in question was produced. It is apparent that no effort was made to conceal the conveyance from the children or, during their lifetime, from the parents, nor to destroy it.

Dr. Arnold C. Blattspieler of Tobias, Nebraska, who had become a friend of the Anton Kucaba, Sr., family, including Edward, when they lived at Tobias, visited in the parents' home in February of 1934. At that time the mother was in bed as a result of her diabetic condition but she was mentally all right. While they were having a conversation in which they were discussing her condition and then their property holdings at Tobias, she told him they had given Edward the farm which the deed conveys.

At the time the farm in question was conveyed to Edward and Frances the father owned in addition thereto another quarter section of land in Saline county; a quarter section in Thayer county; 80 acres near Black River Falls, Wisconsin; a two-flat brick building at 5009 West 25th Street, Cicero, Illinois, in which they lived; five and one-half va-

cant lots adjoining the flat; and $12,600 in notes and mortgages.

From all the evidence we conclude that the deed was a gift from the parents to their son and daughter-in-law of a part of their property; that in view of their relationship it was a natural act of the parents; that they had their mental faculties fully intact; that it was their voluntary act done with full knowledge and something which they had full right and privilege to do. Therefore, the judgment of the lower court is affirmed.

AFFIRMED.

JOHN C. VANA, JR., APPELLANT, V. THE GRAIN BELT SUPPLY COMPANY ET AL., APPELLEES.
18 N. W. 2d 669

FILED MAY 18, 1945. No. 31903.

1. **Pleading.** A motion for judgment on the pleadings requires a consideration of what may be found in all the pleadings as the ultimate facts.
2. **Nuisances.** Whether a party injured has only one or several rights of action for the maintenance of a nuisance, whether public or private, depends upon whether the nuisance is a permanent, or what is called a continuing, one. If the nuisance be permanent in its nature, there is but one cause of action, and when that has been determined, the rights of the party claiming to be injured by the nuisance are settled once and for all. If, however, the nuisance is of a continuing nature, successive actions may be maintained for the damages occurring from time to time.
3. **Torts.** In order to charge one as a continuing wrongdoer, he must have a legal right and be under a legal duty to terminate the cause of injury.

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

Fischer, Fischer & Fischer, for appellant.

G. M. Tunison, for appellees.

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

SIMMONS, C. J.

In this action plaintiff seeks to recover damages for permanent injuries to his health, resulting from the pollution of a stream. Defendants plead as a defense a settlement, the dismissal with prejudice of certain litigation, and favorable decisions in other litigation. Plaintiff by reply admitted the correctness of the court proceedings and the settlement agreement. The defendants moved for judgment on the pleadings. The trial court sustained the motion and dismissed the plaintiff's cause. Plaintiff appeals. We affirm the judgment of the trial court.

In this action, the defendants are the Grain Belt Supply Company, a corporation, hereinafter called the corporation; Robert W. Young, who appears to be the president of the corporation; Reuben B. Miller, who appears to be or to have been an employee of the corporation; and "Mrs. Miller", identified in the answer as Louise Miller.

This court has adopted the rule that "A motion for judgment on the pleadings requires a consideration of what may be found in all the pleadings as the ultimate facts." *McMillan v. Chadron State Bank*, 115 Neb. 767, 214 N. W. 931. See, also, *Hamaker v. Patrick*, 123 Neb. 809, 244 N. W. 420.

For an understanding of the overall factual situation, the property involved and the general controversy between the plaintiff and the corporation, reference is made, out of chronological order, to the decision in *Vana v. Grain Belt Supply Co.*, 143 Neb. 118, 8 N. W. 2d 837, and 143 Neb. 125, 10 N. W. 2d 474.

Plaintiff's amended petition herein was filed on October 27, 1943. In it he alleged ownership of and residence upon the same land as was involved in the litigation in the cited case. He alleged that defendants had operated and maintained a rendering works on their land until January 30, 1941; and that before and since September 11, 1940, they had maintained thereon a hog feeding lot. Plaintiff further

alleged that a fresh water stream ran through defendants' premises and then upon and through the land of the plaintiff; that in the operation of the rendering plant from 1935 "to the present time", defendants had caused large amounts of decaying animal matter and various kinds of refuse to be dumped, washed and drained into the stream; that this matter was teeming with actively motile bacteria and protozoan parasites; that defendants thereby had rendered the stream unwholesome, impure, and unfit for human or animal consumption, and had caused the stream to be contaminated, its banks filled with bacteria communicable to human beings directly and through animals, and dangerous to the health of human beings and animals.

Plaintiff further alleged that he was employed as a clerk in a packing company; that prior to the times mentioned in his petition, he had enjoyed robust health; that since 1935, when he moved upon his present premises, he has become increasingly ill from the effects of the organisms transmitted to him through livestock in milk and meat, as a direct result of which and due to his becoming infiltrated with bacteria of all kinds received from the pollution of the stream, he has been unable to pursue his occupation efficiently and to enjoy his former good health; that on June 9, 1941, he had a tonsillectomy and lost time from his work due to infection caused by said organisms; that on July 7, 1941, he had an appendectomy and as a result lost time from his work due to disease from the same sources; that as a further result of these infections, he has lost weight, and much of the use of his right arm, his eyesight has been impaired and he is generally debilitated; that he has been informed and believes that his system has carried an excessive amount of harmful bacteria consisting of streptococcus and bacillus colon, which cause great pain and suffering, inconvenience and weakness; and that as a direct result of such pollution of the stream and infections resulting therefrom, his life has been endangered, he will be permanently injured and his health will be permanently impaired, all to his damage in the amount of $50,000, for which he prays judgment.

The only allegations of the answer of defendants which need be set out here are those having to do with the prior litigation and settlement. Plaintiff, by reply, admitted the correctness of the pleadings and judgments set out in the answer. These matters accordingly are recited in their chronological order.

On April 25, 1940, the county attorney of Sarpy county filed a petition in the name of the state in the district court for Sarpy county. The defendants named therein included the corporation, Young and Mr. Miller. In that action an injunction was sought against the operation of the rendering works on the ground that it was making the stream and air unwholesome and impure, and constituted a nuisance. Issues were made, trial had, and on September 11, 1940, decree was entered enjoining the defendants from operating the rendering plant in its then condition, and the injunction was to continue until the nuisance was abated. Defendants prosecuted an appeal to this court.

On October 5, 1940, the plaintiff filed an action in the district court for Douglas county against the corporation, Young and Miller. In this action there was a second plaintiff, Rose M. Vana, identified in the record as the wife of plaintiff. Plaintiffs alleged the operation and maintenance of the rendering plant and hog feeding lot, the offensive odors injurious to their health and property, the pollution of the stream for many years, the accumulation of refuse filled with maggots and bacteria to such an extent that the contamination would continue for some time, even though the nuisance be abated, permanent damage to their property, and illness of plaintiffs and their family because of the odors. They prayed for the recovery of damages.

Thereafter on November 30, 1940, a written agreement was entered into between the two Vanas as parties of the first part, and the corporation, Young and Miller as parties of the second part. This agreement recited the ownership of the two tracts of land, the operation of the rendering works and hog feeding lot by the corporation, the pendency of the damage action, and the desire of the corporation to

secure its dismissal with prejudice, and the desire of the parties to settle all matters of controversy, including the damage action. It further stated that the Vanas had no objection to the operation of the feed lot on the premises, but desired the discontinuance of the operation of the rendering works. It was agreed that the second parties within 60 days would cease and discontinue the operation of the rendering works, and thereafter would not operate and maintain any rendering works on the premises; that upon the discontinuance of the rendering works, the Vanas would dismiss the damage action with prejudice; that the second parties reserved the right to continue the operation of the hog feeding lot and lot for feeding other cattle; and that " * * * first parties agree to save second parties harmless from any and all claims for damages or rights and causes of action on the part of them, the first parties, of whatsoever kind and nature arising from or out of the operation of said premises, by second parties, as a feeding lot to date hereof." And "It is the intention and agreement of the parties that upon the second parties discontinuing and ceasing to operate the rendering works above-mentioned on said premises first parties acknowledge full receipt, discharge and satisfaction of all damages for all matters and things alleged in said petition, or other claims by them, against second parties, on account of the operation of said rendering works and hog feeding lot up to the date hereof and consent that said premises may continue to be operated as a feeding lot in the future."

Thereafter, by stipulation the damage action was dismissed with prejudice on January 24, 1941, the appeal in the injunction action was dismissed in this court, and that cause dismissed in the district court.

On April 8, 1941, plaintiffs filed a petition in the district court to set aside the dismissal of the damage action. A demurrer to this petition was sustained and the cause dismissed.

On September 5, 1941, the Vanas filed a petition in the district court for Sarpy county against the corporation,

Young and Miller. In this action they alleged the existence of offensive odors which were injurious and dangerous to the plaintiffs' health, and the pollution of the stream resulting from the feeding of hogs thereon since November 30, 1940, which, if not restrained, would continue to pollute the stream. They further alleged that the present operation of the hog feeding lot was a nuisance and health menace; and that by reason of the pollution of the stream and the odors, the value of plaintiffs' property had been depreciated and its use restricted. Plaintiffs prayed for a permanent injunction and for judgment in the amount of $5,000. Issues were made and trial had, resulting on May 18, 1942, in a judgment of dismissal of plaintiffs' petition. On appeal the judgment was affirmed by this court in *Vana v. Grain Belt Supply Co., supra*, on July 13, 1943.

On July 7, 1942, plaintiff and Rose M. Vana filed another suit in the district court for Sarpy county against the corporation, Young and Miller, alleging the digging of ditches by defendants from the hog lots to the creek, the existence of the refuse matter, its dumping into the stream, and the violation of the statutes. An injunction was sought. Issues were made and trial had, resulting in a dismissal of plaintiffs' petition.

On July 24, 1941, Rose Vana filed a complaint against Miller charging him with putting animal substance in the creek in violation of statute. Trial was had resulting in a verdict of not guilty.

In this action the trial court sustained defendants' motion for judgment on the pleadings and dismissed the plaintiff's petition. The question here is whether or not that decision was correct.

Plaintiff advances the propositions that the feeding lot is a continuing nuisance, constantly creating new causes of action; that in order to constitute a bar by a former adjudication, it must be in an action between the same parties and upon the same subject matter; and that a judgment of dismissal in a criminal action cannot be given in evidence in a purely civil action to establish the truth of the facts upon which it is rendered.

Defendants advance the propositions that there was an estoppel by deed, referring to the agreement of November 30, 1940; that the issue here presented has been adjudicated in the former actions; and that a motion for judgment on the pleadings is a proper procedure.

Plaintiff on November 30, 1940, had a damage action pending against the corporation, Young and Miller. He then entered into the contract hereinbefore set out.

What was the effect of this contract? Defendants agreed to discontinue the operation of the rendering works. Plaintiff pleads in this action that they did so. Plaintiff consented that the defendants could continue the operation of the feed lot. That consent of necessity was that the defendants could continue the operation of the feed lot as it was then carried on with its pollution of the stream and its noxious and offensive odors. Plaintiff could not thereafter require that it be abated, if operated as it was then being operated. The nuisance, if the feeding lot be one, was to continue, and become a permanent one so far as these parties were concerned. Plaintiff acknowledged satisfaction of all claims for damage then existing. Can he thereafter claim additional damages arising as a result of the doing of the things to which he consented? We do not think so.

The applicable rule has been clearly stated by the Supreme Court of Arizona in the recent case of *City of Phoenix v. Johnson*, 51 Ariz. 115, 75 Pac. 2d 30, as follows: "Whether a party injured has only one or several rights of action for the maintenance of a nuisance, whether public or private, depends upon whether the nuisance is a permanent, or what is called a continuing one. If the nuisance be permanent in its nature, there is but one cause of action, and when that has been determined, the rights of the party claiming to be injured by the nuisance are settled once and for all. If however, the nuisance is of a continuing nature, successive actions may be maintained for the damages occurring from time to time."

The rule is stated in 1 Sedgwick, Damages (9th ed.), sec. 95, p. 159, as follows: "If the injury is caused by erecting

a structure or making a use of land which the defendant has a right to continue, the injury is regarded as committed once for all, and action must be brought to recover the entire damages, past and future."

See, also, *Omaha & R. V. R. R. Co. v. Standen,* 22 Neb. 343, 35 N. W. 183; *Omaha & R. V. R. Co. v. Moschel,* 38 Neb. 281, 56 N. W. 875; *Beatrice Gas Co. v. Thomas,* 41 Neb. 662, 59 N. W. 925; *Webb v. Virginia-Carolina Chemical Co.,* 170 N. C. 662, 87 S. E. 633; *Worley v. Mathieson Alkali Works,* 119 Va. 862, 89 S. E. 880; *Risher v. Acken Coal Co.,* 147 Ia. 459, 124 N. W. 764; *Irvine v. City of Oelwein,* 170 Ia. 653, 150 N. W. 674; 46 C. J., secs. 443, 444, 446, pp. 802, 803, 804, 805; 27 A. L. R. 61.

The rule is stated by the Supreme Court of Kansas in *Kansas Pacific Railway v. Mihlman,* 17 Kan. 224. "But the principle upon which one is charged as a continuing wrongdoer is, that he has a legal right, and is under a legal duty, to terminate the cause of the injury." Or, as stated in *City of Kansas City v. Frohwerk,* 10 Kan. App. 120, 62 Pac. 432: " * * * in order to charge one as a continuing wrongdoer he must have a legal right and be under a legal duty to terminate the cause of injury." The rule is discussed in *Bartlett v. Grasselli Chemical Co.,* 92 W. Va. 445, 115 S. E. 451, 27 A. L. R. 54, wherein it is pointed out that repeated recovery of damages is a means of coercion to abatement by the wrongdoer himself. This rule is also discussed in L. R. A. 1916E 1032 to 1040.

Here, so far as this plaintiff is concerned, the defendants are under no legal duty to terminate the cause of the injury, on the contrary, they have a contractual right to continue the operation of the feeding lot. We conclude that when the plaintiff settled all claims for damages to the date of the contract and agreed that the nuisance, if any, which existed in the operation of the feed lot might continue indefinitely, by that agreement and settlement he also settled once and for all any claim for future damages arising from the operation of the feed lot in its then state.

This conclusion makes unnecessary the determination of the plea of *res adjudicata*.

The judgment of the trial court is affirmed.

AFFIRMED.

HARRY V. CARPENTER, APPELLEE, V. MARIE G. CARPENTER, APPELLANT.

18 N. W. 2d 737

FILED MAY 18, 1945. No. 31907.

1. **Divorce.** Under the provisions of section 42-340, R. S. 1943, the right of a prevailing spouse to have a divorce decree set aside is not an absolute but a qualified right.
2. ———. The control of the decree is within the sound judicial discretion of the trial court.
3. ———. The application to set aside a decree must be made within six months following rendition of the decree. It is not to be granted *ex parte*. Notice and a reasonable opportunity must be given to the other party to be heard.
4. ———. Good reason for setting aside the decree must be shown. Legal collusion must be absent. The setting aside of the decree must not produce an unconscionable result. Where property rights have been affected by the decree, there should be the greatest possible restoration of the parties to the status quo existing at the time of the decree. If these conditions are met, then the trial court has the power to and should grant the application.
5. ———. *Dudgeon v. Dudgeon*, 142 Neb. 82, 5 N. W. 2d 133, clarified.

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

Grenville P. North, for appellant.

Leon, White & Lipp, for appellee.

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

SIMMONS, C. J.

Here, the defendant, as the prevailing spouse in a divorce action, sought to have a decree of divorce set aside and her

cross-petition for divorce dismissed on the ground that she had an absolute right to such an order. The trial court denied her motion. She appeals. We affirm the judgment of the trial court.

Plaintiff in March, 1942, brought suit against defendant, his wife, in which he prayed for an absolute divorce. Thereafter an order for temporary alimony and suit money was entered. A year later defendant answered and prayed for a dismissal of plaintiff's petition. Some months thereafter defendant filed an amended answer and cross-petition praying for separate maintenance. Plaintiff filed a reply. On September 15, 1943, defendant filed an amended answer and amended cross-petition, in which she prayed for an absolute divorce. On September 17 a decree was filed in which the court found generally for the defendant and against the plaintiff and granted the defendant an absolute divorce. It appears from the decree that on September 16 the parties entered into a written property settlement agreement, which recited that it was subject to the approval of the trial court, and that if an absolute divorce was not granted to defendant, it was null and void. The trial court in the decree approved the property settlement agreement.

Plaintiff, by the terms of the agreement, was to pay defendant substantial alimony over a period of 121 months. Defendant was to receive the household furnishings, automobile, diamonds, life insurance and other property. Plaintiff was to pay certain accounts of the defendant, attorney fees and court costs. Also, by the terms of the agreement, the defendant was to receive the residence real estate, subject to a mortgage, and was to execute a note and mortgage for $3,000 to the plaintiff, to run without interest for ten years and to be then payable unless the house and lot were sold or the alimony paid. If the residence was sold before all alimony was paid, then the $3,000 was to be held in escrow to secure the alimony payments.

On March 15, 1944, defendant filed a petition to set aside the decree, to dismiss her amended cross-petition and to

secure the $3,000 escrow money. On the same day, defendant filed a motion to set aside the decree, for sundry reasons, and dismiss her answer and cross-petition. Plaintiff answered the petition and the motion. Defendant then withdrew parts of her motion and submitted it upon a claim of absolute right to have the decree set aside without any cause whatever being shown, except her election not to be divorced. Thereafter a hearing was had in which defendant testified that she did not desire a divorce, but instead desired to have the decree set aside and her cross-petition dismissed. Some evidence was taken as to the property settlement and disposition.

On July 13, 1944, the trial court granted defendant's application to set aside the decree and dismiss her cross-petition on the condition that she, within 30 days, restore to the plaintiff all she had received from him under the property settlement, and that if that be done, the case was to be for hearing on plaintiff's petition, and if not done, the application was to be denied.

Defendant then filed a motion to clarify and modify the order, and an offer to do equity. She prayed for a modification to permit her to tender into court the property "now in her hands" and for an order as to what property she should restore, and she tendered "all of the property that she has left." Plaintiff resisted the motion. A hearing was had.

At the hearing it was shown that defendant, beginning soon after the decree was entered, entertained the idea that she wanted the decree set aside and intended to move that that be done before the expiration of a period of six months. Nevertheless she thereafter listed the home for sale, sold it, closed the transaction and received the net of the sale money just prior to the filing of the petition and motion to set aside the decree. When the house and lot were sold, the $3,000 was placed in escrow as provided by the property settlement agreement. She also sold a part of the furniture and received the proceeds. Apparently from funds so received, the defendant paid current bills, purchased sundry articles for an apartment, bought clothing, a new car, some

war bonds, and had money in the bank. Defendant further testified that she felt the $3,000 which was in escrow was hers, and that she should receive it. It appears that demand was made for it and refused before the petition and motion to set aside the decree were filed.

The trial court overruled defendant's motion for dismissal as a matter of right, and also overruled the defendant's motion for a clarification of the previous order.

Defendant appeals, assigning error to the trial court in not finding and holding that she had the absolute right to set aside the divorce decree and dismiss her cross-petition within the six-month period following the decree.

The statute is: "A decree of divorce shall not become final or operative until six months after trial and decision, except for the purpose of review by appeal, and for such purpose only the decree shall be treated as a final order as soon as rendered; Provided, if appeal shall have been instituted within three months, such decree shall not become final until such proceedings are finally determined. If no such proceedings have been instituted, the district court may, at any time within said six months, vacate or modify its decree, but if such decree shall not have been vacated or modified, unless proceedings are then pending with that end in view, the original decree shall at the expiration of six months become final without any further action of the court." R. S. 1943, sec. 42-340.

Defendant's position is that the innocent party to whom a divorce has been granted has the absolute right within the six-month period to have the decree set aside and the absolute right to dismiss her cross-petition without any evidence or showing, other than a desire that that be done. This appeal presents the correctness of that contention for decision. This contention is that the prevailing spouse, and not the court, controls the decree. The first question is: Does the defendant have an absolute right to have the decree set aside?

The statute provides that the trial court may, at any time within the six months, vacate or modify the decree. It

places the control of the decree within the sound judicial discretion of the trial court. Of necessity the decree of a court cannot be controlled by the whim, or changing mind or desire of a litigant. The judgment of a court is not a plaything of the litigant. It is the solemn adjudication of the rights of parties. The decree represents the judgment of the court and not necessarily the desire of the litigant. Whether or not it is to stand, be vacated or modified, is to be determined by the court. The maintenance of our judicial system and the administration of justice by courts so require. To hold as defendant contends would be to reduce the judicial act to a mere ministerial function to be performed at the direction of the litigant.

Speaking with reference to a decree in divorce proceedings, this court has said: " * * * the trial court has power over it similar to that which trial courts have always exercised over their judgments during the term; that it is not a final order in any sense except for the purposes of appeal, but more in the nature of an interlocutory order which the court can, at any time, for good reason, vacate or modify." *Everson v. Everson,* 101 Neb. 705, 164 N. W. 717. This appears to be the general rule. See 27 C. J. S., sec. 168, p. 806; 17 Am. Jur., sec. 450, p. 370. In *Dudgeon v. Dudgeon,* 142 Neb. 82, 5 N. W. 2d 133, this court discussed a contention that the prevailing party had no right in any event to have a decree set aside and there stated certain principles which are applicable in cases of this character. The prevailing spouse may have a decree of divorce in his or her favor vacated and set aside as a matter of right. It, however, is not an absolute but a qualified right. The application therefor must be made within six months after rendition of the decree. It is not to be granted ex parte. Notice and a reasonable opportunity must be given to the other party to be heard. Good reason must be shown. Legal collusion must be absent. The setting aside of the decree must not produce an unconscionable result. Where property rights have been affected by the decree and as an incident to the nullification of that part of the decree, there should

be the greatest possible restoration of the parties to the status quo existing at the time of the decree. If these conditions are met, then the trial court has the power to and should grant the application.

Just what constitutes a good reason for setting aside a decree, or an unconscionable result should a divorce decree be set aside, depends upon the facts and circumstances of each case. Here, the defendant, as prevailing party, accepted the full benefits of the property settlement to which she was a party, which was made on condition that an absolute divorce be granted and which the court approved. She accepted and continued to accept the monthly alimony payments up to the time of the hearing. She accepted the real and personal property and converted most of it into money, and spent and invested it as she desired—all this subsequent to her determination to seek the vacation of the decree and, in part at least, after she had made application to have that done. She expresses neither desire nor hope for, nor expectation of a reconciliation. She sought to secure at once the $3,000 fund belonging to the plaintiff, and held in escrow to secure the alimony payments. To set aside a decree under these circumstances as a matter of absolute right would be to permit the prevailing spouse to use the decree as an instrument to secure money and other property from the other spouse, and having secured it, then to have the decree set aside and be in a position to seek additional awards if further support were not voluntarily given. If defendant's theory be correct, that process might be continued indefinitely. Such a result would be an abuse and a misuse of the judicial process which is not required by the interests of society nor the parties in the proper protection of the marriage relationship.

We conclude that the defendant does not have the absolute right to have the decree set aside.

The judgment of the trial court is affirmed.

AFFIRMED.

EDNA TUTTLE, APPELLANT, V. BERT A. WYMAN ET AL., APPELLEES.
18 N. W. 2d 744

FILED MAY 18, 1945. No. 31917.

1. **Trusts.** Where legal title to real estate is obtained by fraud, actual or constructive, in which another has ownership as a devisee under a will, a court of equity will impress a constructive trust upon the property for the benefit of the estate.
2. **Limitations of Actions.** The statute of limitations begins to run in favor of a trustee *ex maleficio* of a constructive trust from the time of the discovery of the wrong or fraud, for the prevention of which the trust is imposed.
3. **Evidence.** The admissions and declarations of a party against his own interest upon a material matter and with reference to and pertinent to the issues being tried, are admissible in evidence against such party.
4. **Costs.** Within the contemplation of section 25-1708, R. S. 1943, where a judgment is obtained for the recovery of specific real property the costs follow the judgment.

APPEAL from the district court for Dawson County: I. J. NISLEY, JUDGE. *Affirmed in part and in part reversed and remanded.*

Frank M. Johnson, for appellant.

M. O. Bates, for appellees.

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

MESSMORE, J.

This is an action in equity to obtain a decree that the defendants are holding title to certain real estate in trust for the benefit of the estate of Isaac Large, deceased. The plaintiff, in her petition, charges the defendants with fraud in obtaining title to all of the real estate formerly owned by her father, Isaac Large; and prays that the defendants be declared trustees, holding title to the land for the benefit of the estate of Isaac Large. The defendants' answer denied generally the allegations of the petition; pleaded the statute of limitations; further alleged that Isaac Large had a num-

ber of creditors and conveyed his real estate with the intention to cheat and defraud his creditors; and prayed for a dismissal of the plaintiff's action. Plaintiff's reply is in effect a general denial of defendants' answer. The court decreed that no act of fraud was practiced by the defendants at the time of the execution of the deeds conveying to the defendants certain real estate formerly owned by Isaac Large; that the defendants are the owners of the fee simple title as joint tenants with right of survivorship of certain real estate formerly owned by Isaac Large, and that such real estate is not held in trust by the defendants for the benefit of his estate; and that defendants are holding title to one quarter section of land in trust for the benefit of the estate of Isaac Large. Plaintiff appeals, contending the court erred in not creating a trust as prayed in her petition. The defendants cross-appeal from that part of the decree awarding one quarter section of land, the title held by the defendants, to the estate of Isaac Large.

The record discloses that on June 13, 1932, Isaac Large, then 71 years of age, made and executed his last will, wherein he devised and bequeathed all of his property to his two daughters, share and share alike, with the exception of a bequest of one dollar to a son. He died June 17, 1939. Also, on June 13, 1932, Isaac Large conveyed to Carl E. Faught three quarter sections of land in Keith county, the consideration named in the deed was $15,000. Nothing was paid by the grantee for the title. On the same day Large deeded one quarter section of land to Lester H. Stedman. The consideration named in the deed was $4,000. The grantee paid nothing for the conveyance. He also, on the same day, deeded a quarter section of land to Jesse L. Hendrix, a brother-in-law of Bert Wyman, defendant. The consideration set forth in the deed was $6,400, subject to a mortgage of $2,500. The grantee paid no consideration for the conveyance. He made and executed, on June 13, 1932, a power of attorney, designating the defendant Bert Wyman, as his attorney in fact to lease, convey, mortgage, collect the rents and attend to all business with reference to

the land deeded to Faught. Shortly thereafter Large moved to California.

On July 26, 1932, Large made and executed a second power of attorney to Bert Wyman, covering, in addition to the lands deeded to Faught, the lands deeded to Stedman and Hendrix. Bert Wyman collected all the rents from the real estate conveyed to Faught, Stedman and Hendrix, and paid the expenditures incident to the lands.

On August 3, 1932, Faught deeded the same land to the defendants, the consideration named in the deed was one dollar. This deed was recorded May 7, 1935. August 13, 1932, Hendrix conveyed the land deeded to him by Large, to the defendants. The consideration named in the deed was $4,000, subject to a $2,500 mortgage. Defendants paid no consideration to Hendrix for this conveyance. This deed was recorded May 22, 1935. January 17, 1935, Stedman deeded the land conveyed to him by Large to the defendants. The named consideration was one dollar. This deed was recorded May 7, 1935.

The plaintiff, Edna Tuttle, is a sister of the defendant Della Wyman, and sister-in-law of the defendant Bert Wyman, and a daughter of Isaac Large, deceased.

On May 31, 1932, Large entered into a contract to sell three quarter sections of land in Keith county to a real estate dealer for $15,000. He acknowledged receipt of a $5,000 payment, but never obtained the money. This contract was to be completed August 1, 1932, when the balance of $10,000 was due. Previous to entering into the contract Large lost an amount of money, believed to be $10,000 on a fake horse race.

The three quarter sections of land evidenced by the contract of May 31, 1932, is the land that Large deeded to Faught on June 13, 1932. In the fore part of June, 1932, Bert Wyman contacted Faught and wanted him to help his father-in-law out of some difficulties, explaining that the father-in-law had made an improvident contract of sale with respect to three quarter sections of Keith county land, and Bert Wyman wanted Faught to take title to the land,

handle it as his own, and sell it. A short time thereafter Faught had a conversation with Large wherein Large told him about the contract of May 31, 1932, and said he was sorry he had entered into such a contract, and wanted Faught to take the title and sell the land. Faught agreed to do this and attempt to sell the land for $18,000, and if successful he would retain one-third of the amount over and above $15,000 as his commission. On August 1, 1932, the date of the expiration of the contract entered into May 31, 1932, the purchaser failed to comply with the terms of the agreement. Thereafter Faught instituted a suit to quiet title in him, and obtain a decree to that effect. He was successful and his explanation was that he believed the contract of May 31, 1932 constituted a cloud on the title, and by having it removed the land would be more salable. Faught testified that he took title to the three quarter sections of land as an accommodation to Large, and for the purpose of sale, believing he could make some money, but he never considered himself at any time the true owner. At the time he took title, he was not aware that Large had several creditors. It developed that on November 28, 1930, Large obtained a decree of divorce in Iowa, from his wife, and on June 10, 1931, she brought an action to set aside the decree. She obtained a settlement wherein Large was to pay off a mortgage, in the amount of $2,300, on certain land owned by her. This he failed to do, so suit was brought against Large in Keith county and judgment was obtained in the amount of $2,530.10. Faught mortgaged the land for $2,600, turning the money over to Bert Wyman who satisfied the judgment. The attorneys who represented Large in the divorce proceedings in Iowa, brought suit against him in Keith county, and procured a judgment in the amount of $276.25. Bert Wyman satisfied this judgment July 10, 1935. Suit was brought on a promissory note in favor of W. E. Burton, dated July 29, 1930, for $1,000 due July 29, 1932. Judgment was entered against Large on the note October 12, 1933, and satisfied May 21, 1935. Another judgment appears in the record, in favor of a bank on a

note of $4,000. Judgment was entered against Large on January 18, 1932 for such amount, and he satisfied the judgment February 2, 1932. The record does not show any other creditors.

Faught testified he did not know the plaintiff, and thought Della Wyman was the only daughter, and had he known about the plaintiff, he would have required a written contract with respect to the conveyances made to him and by him.

The conveyance to Stedman was taken by him as an accommodation to Large, when Large told him he was making a property settlement with his wife, and the lawyers wanted $1,100. Stedman conveyed to the defendants at Bert Wyman's suggestion.

In 1933 and 1934 Stedman visited Large in California. At both times Large was receiving subsistence from the county. On the first visit Large told Stedman he had received a letter from his daughter, Edna Tuttle, inquiring about his finances, and said she did not need to worry, he had everything fixed. Stedman attempted to contact Large in 1935, but he had moved to the county poor farm.

The conveyance to Hendrix developed in the same manner as that which was made to Stedman. Hendrix testified he knew that the conveyance made by Large to him, and the conveyance by him to the defendants, bore false and untrue considerations.

The record shows that Large was an inmate of the county poor farm in California from May 4, 1935 to June 30, 1936, and received subsistence from December, 1934, through March, 1938, in the amount of $382.45.

On June 13, 1932, when the conveyances were made by Large to Faught, Stedman and Hendrix, and when the will was made and executed, and the first power of attorney was made and executed to Bert Wyman, the attorney consulted in these matters testified that Large said Bert Wyman was handling the conveyances, and the attorney suggested it would be well to have a trust agreement drawn, unless the deeds of conveyance contained a recitation of trust. Large

said he was deeding to friends of Bert, in whom he had confidence, and Bert would protect him, and in any event, he did not believe it would be necessary. On cross-examination the attorney testified that Large never made a request that he deed his property in order to avoid his creditors.

The plaintiff testified that her father never told her he had conveyed real estate he owned in Keith and Dawson counties. She learned for the first time of the conveyances to Faught, Stedman and Hendrix in October or November, 1942, from Stedman, who wrote her about them, and that her father had made a will. She later discussed this matter with Stedman when she was in Long Beach, California in July, 1943. She was present at her father's funeral in Lexington, and no mention was made about the defendants owning title to all of the father's real estate. In 1941 she wrote to her sister, Della Wyman, defendant, inquiring about the progress of her father's estate. She received no answer to this letter. In August, 1942, she wrote again to her sister, to the effect that she needed $200 for hospital purposes, due to an operation to be performed upon her daughter. This amount was sent to her. The first she knew that the defendants claimed the property as their own was in July, 1943.

There seems to be a dispute with reference to the date of a letter sent by the plaintiff to Della Wyman, as to whether the plaintiff knew about the different conveyances in 1939 or 1940, and was acquainted with the facts and circumstances. From a reading of the exhibit, it appears the plaintiff knew something about the conveyances, but not all of them. There is nothing to show that she knew the purposes for which they were made, or that she knew Faught, Stedman and Hendrix had conveyed to the defendants. She testified that her father wrote her he was deeding land in trust to Stedman for the benefit of his estate.

The testimony in behalf of defendants was to the effect that Large was being pressed by his creditors, and inquired from a friend, and from an attorney, as to how he should proceed. He was advised if he made the conveyances and

there were no judgments against him, there could be no harm in so doing, and it was nobody's business.

It is apparent Isaac Large realized that he had been wasteful of his money and had made mistakes in transacting business. He lost confidence in his ability to attend to his business and felt he was unable to continue doing so. He desired to go to Caliifornia and live, and to leave his business affairs in the charge and care of a person in whom he had confidence. That person was his son-in-law, the defendant Bert Wyman. Mr. Wyman had considerable to do with the conveyances to Faught, Stedman and Hendrix, in fact, he engineered these conveyances. It was he that had Faught, Stedman and Hendrix convey to him and his wife without consideration passing in any of the conveyances. The powers of attorney of June 13, 1932 and July 26, 1932, explain Large's confidence in Bert Wyman. He gave Mr. Wyman full and complete charge of his business. There was no intention nor desire on the part of Large to defraud or cheat his creditors. Bert Wyman knew this, and from the rents collected and by a mortgage on a part of the land, all of the creditors of Isaac Large were paid. Large felt that when he deeded the three quarter sections of Keith county land to Faught, that Faught would sell the land and there would be ample money to pay all his creditors and he would have thousands of dollars in addition, besides the land which he had deeded to Stedman and Hendrix.

We conclude the conveyances were not fraudulent, but were made to conserve and protect the estate of Isaac Large. If Isaac Large intended to cheat and defraud his creditors, or if he intended that the defendants would eventually own all of his real estate, obviously he would not have made a will on the same day the conveyances were made. Recognizing the right of this plaintiff to share and share alike in his property with her sister, the defendant Della Wyman, he nominated Della Wyman executrix of his estate. He felt that she would make the division of the property in accordance with his desires, as evidenced by his will.

We conclude the evidence shows a fraudulent scheme and

devise on the part of the defendants to cheat and defraud this plaintiff, and to unjustly enrich themselves. It is clear that they did nothing to merit the ownership of all of Isaac Large's land. It was not intended by Large that they should own all of his land. It was his intention that the land be held in trust for the benefit of his estate. We believe, from analysis of the record, a constructive trust comes into existence.

In *Pollard v. McKenney*, 69 Neb. 742, 96 N. W. 679, a case similar to the instant case in that the agreement to reconvey was entirely parol, the court held such an agreement would not fall within the statute of frauds. "Where a person obtains the legal title of real estate belonging to another by means of fraud, actual or constructive, a court of equity will fasten a constructive trust upon the property, and convert the grantee or those claiming under him, by descent, into trustees of the legal title, and enforce the trust for the benefit of the grantor or those claiming under him."

" 'A constructive trust is a relationship with respect to property subjecting the person by whom the title to the property is held to an equitable duty to convey it to another on the ground that his acquisition or retention of the property is wrongful and that he would be unjustly enriched if he were permitted to retain the property.' Restatement, Trusts, sec. 1e." *Fisher v. Keeler*, 142 Neb. 728, 7 N. W. 2d 659. See, also, *Wilcox v. Wilcox*, 138 Neb. 510, 293 N. W. 378.

" * * * a constructive trust will arise whenever the circumstances under which property was acquired make it inequitable that it should be retained by him who holds the legal title, as against another, provided some confidential relation exists between the two, and provided the raising of a trust is necessary to prevent a failure of justice." 65 C. J., sec. 215, p. 456.

"A constructive trust is the formula through which the conscience of equity finds expression, and when property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the bene-

ficial interest, equity converts him into a trustee." *Beatty v. Guggenheim Exploration Co.*, 225 N. Y. 380, 122 N. E. 378.

We hold, under the circumstances, a constructive trust is established, and the defendants are declared to be trustees and to hold title to the lands in question for the benefit of the estate of Isaac Large, deceased.

The next question presented is whether or not the statute of limitations has run against the plaintiff's claim. The defendants, in their answer, allege that more than four years have elapsed since the conveyances were made and before the death of Isaac Large; and more than four years have elapsed since the death of Isaac Large; that if a cause of action existed in favor of Isaac Large, it was barred by the statute of limitations before his death, and if a cause of action accrued to the plaintiff upon the death of Isaac Large, it is now barred by the statute of limitations.

The plaintiff did not discover the true facts with reference to the conveyances made to Faught, Stedman and Hendrix until October or November, 1942, and she first discovered that the defendants claimed to own all of the real estate which formerly was owned by her father and to which they held title, in July, 1943. In none of the correspondence between the defendant, Della Wyman, and the plaintiff, was it ever revealed to the plaintiff, or even indicated, that the defendants claimed to own all of such land, or that they even held title to any part of it; nor was it ever mentioned by the defendants; nor did she have knowledge of her father's will. As far as the defendants were concerned, they concealed knowledge of facts from this plaintiff respecting the conveyances, especially the conveyances from Faught, Stedman and Hendrix to them, and of the will.

The statute of limitations does not run in a case such as the instant case, during the time when the obligor fraudulently conceals the existence of the cause of action. " 'The statute of limitations begins to run in favor of a trustee *ex maleficio* of a constructive trust from the time of the discovery of the wrong or fraud, for the prevention of which

the trust is imposed.' *Hanson v. Hanson,* 78 Neb. 584." *Abbott v. Wagner,* 108 Neb. 359, 188 N. W. 113. See, also, *Wiseman v. Guernsey,* 107 Neb. 647, 187 N. W. 55.

The plaintiff offered exhibits 26 and 27, depositions of the defendants, in evidence. The offer was made for the purpose of showing a variance between the defense pleaded in the defendants' answer that Isaac Large made the conveyances of his real estate to cheat and defraud his creditors, and the testimony given in the depositions. The defendants objected to the depositions, on the ground that the defendants were residents of the county and their testimony was available, and in fact, the defendant Bert Wyman was in attendance during the trial. The objections were sustained, and in the depositions we find relevant and material evidence not objected to, which discloses statements in the nature of admissions against interest which are pertinent to the issues being tried. The defendants testified that they were the owners of all of the land formerly owned by Isaac Large and to which they held title, for the reason that they had supported him and sent him approximately $100 per month during the last 7 years of his life, and this was the agreement.

"It is a well-settled rule that admissions of a party against interest made in court or out of court, with reference to and pertinent to the issues being tried, are admissible in evidence against such party." *Gentry v. Burge,* 129 Neb. 493, 261 N. W. 854. See, also, *Young v. Kinney,* 79 Neb. 421, 112 N. W. 558; *McDaniel v. Farlow,* 132 Neb. 273, 271 N. W. 905.

"A statement made by a party to an action as to any fact in issue unfavorable to the conclusion contended for by such party is relevant, and may be introduced in evidence as an admission against interest." *Falkinburg v. Inter-State Business Men's Accident Co.,* 132 Neb. 670, 272 N. W. 924.

The court should have admitted the depositions, for the purpose here stated.

The court divided the costs, requiring each party to pay their own costs. We hold that within the contemplation of

section 25-1708, R. S. 1943, "Where it is not otherwise provided by this and other statutes, costs shall be allowed of course to the plaintiff, upon a judgment in his favor, in actions * * * for the recovery of specific real * * * property", the court did declare a trust existed in so far as the quarter section of land held by Stedman and conveyed by him to the defendants was concerned. The defendants did not concede that any part of this land that originally belonged to Isaac Large was held by them in trust. The court's decree constituted a recovery for specific real property in which the plaintiff would be entitled to an undivided half interest. The court erred in dividing the costs under the circumstances.

The accounting requested by the plaintiff is not before the court, and need not be determined. We hold that all the land formerly owned by Isaac Large, to which the defendants now hold title, be declared to be held in trust by the defendants for the benefit of the estate of Isaac Large, deceased, and judgment be entered accordingly. Defendants' cross-appeal is dismissed.

AFFIRMED IN PART AND REVERSED IN PART.

COUNTY OF DOUGLAS, APPELLANT, V. EMMA FEENAN ET AL., APPELLEES.

18 N. W. 2d 740

FILED MAY 18, 1945. No. 31920.

1. **Process.** In certain kinds of actions subsection six of section 25-517, R. S. 1943, provides for service by publication upon a resident of the state when, after diligent investigation and inquiry, the whereabouts, if in this state, or residence of such person cannot be ascertained and is not known.
2. **Judgments.** When a sufficient affidavit therefor has been filed and, as provided by subsection six of section 25-517, R. S. 1943, an order of the court entered finding that sufficient investigation has been made and ordering service by publication, such order is conclusive and binding upon the parties until modified, vacated

or set aside either on appeal or in an equitable or statutory proceeding instituted for that purpose and is not subject to collateral attack.

3. ———. When, pursuant to such authorization, a sufficient notice is published in the manner provided by statute and a judgment or decree is entered thereon, such judgment or decree is not void because of lack of jurisdiction of the parties so served. It is final and binding on the parties until modified, vacated or set aside either on appeal or in an equitable or statutory proceeding instituted for that purpose and is not subject to collateral attack.

APPEAL from the district court for Douglas County: FRANK M. DINEEN, JUDGE. *Reversed and remanded with directions.*

Kelso Morgan and *August Ross*, for appellant.

Ziegler, Dunn & Becker, for appellees.

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

WENKE, J.

From an order of the district court for Douglas County sustaining the special appearance of Lorena Katz, quashing the service by publication had upon her and holding that all proceedings had pursuant thereto be set aside and held for naught, the County of Douglas appeals.

For a better understanding of the case the following history is set forth: The action is a tax foreclosure. It was commenced on April 14, 1942, by the County of Douglas pursuant to and by authority of a resolution of the Board of County Commissioners, as provided by section 77-2039, Comp. St. 1929. The third cause of action relates to lot 2, block 195, original city of Omaha, and is the cause of action here involved.

On the same day the county attorney filed his affidavit therein, the pertinent part of which is as follows: "Affiants further say that the whereabouts, if in this State, the residence of, or places of abode of the following named defendants, to-wit: Lorena Katz, * * * are unknown to the affiants and after diligent investigation and inquiry affiants are un-

able to ascertain, and do not know the whereabouts if in this State, residences or places of abode of such defendants. * * * Affiants further say that personal service cannot be had upon the defendants named herein, and prays that constructive service by publication, in the manner and form as provided for by law may be had upon said defendants and each of them."

Thereafter, and on the same day, the court authorized service by publication. The pertinent parts of the order are as follows: " * * * the Court being fully advised and being satisfied that sufficient inquiry has been made by the plaintiff's attorneys and that they have been unable to ascertain and do not know the names or whereabouts, if in this State, or the residences of the following named defendants, * * * and that the residences of each and all said defendants is unknown to plaintiff's attorneys, and that personal service of summons cannot be had upon the said defendants within the state of Nebraska, said defendants being particularly described as follows: Lorena Katz * * * that the plaintiff be and it is hereby authorized to obtain service upon the above named defendants by publication * * * ."

Service by publication was made pursuant thereto, both upon Lorena Katz and the property. A decree of foreclosure was entered on June 2, 1942, based upon this service. Order of sale was issued on June 24, 1942. Notice was published, sale had of the property on July 29, 1942, and the property sold.

On October 24, 1944, Lorena Katz filed her special appearance and asked the court to quash the service by publication had upon her for the reason that at all times during the year 1942, and prior thereto for over 50 years she has been a resident of and domiciled in the state of Nebraska and that the constructive service upon her was null and void.

This special appearance was sustained on November 22, 1944. The court found that Lorena Katz was, at the time of the commencement of the action and at the time of the

taking of the decree, a resident of the state of Nebraska; that service of summons could have been had upon her within the state; and that no sufficient investigation had been made at the time of the filing of the affidavit for obtaining service.

The showing made at the hearing upon the special appearance establishes that Lorena Katz was, at the time the action was filed and at all times subsequent thereto, a resident of the state of Nebraska. It also establishes that the investigation and inquiry made as to her whereabouts, if in the state, or her residence was very limited.

This proceeding, which is in the form of a special appearance, was instituted after the term in which the decree was entered and after the time for appeal had passed. No question is raised as to the sufficiency of the affidavit or the order of the court authorizing service by publication. It is neither an equitable nor a statutory proceeding to modify, vacate or set aside an order after the term at which it was made, nor is it a direct appeal from the entry of the decree itself. Although filed in the original action, it is in effect a collateral attack.

"Where a judgment is attacked in other ways than by proceedings in the original action to have it vacated or reversed or modified or by a proceeding in equity to prevent its enforcement, the attack is a 'collateral attack.'" Restatement, Judgments, sec. 11a, p. 65. As stated in *Butler v. McKey*, 138 Fed. 2d 373: "A motion, made after expiration of time for direct appeal from default judgment, to quash service of summons by publication under California statute, must be considered under principles applicable to 'collateral attack' on judgment, though such motion is 'direct attack' on judgment. Code Civ. Proc. Cal. sec. 412; Federal Rules of Civil Procedure, rules 4 (d) (7), 86, 28 U. S. C. A. following section 723c." See *Davis v. Vinson Land Co.*, 76 Kan. 27, 90 Pac. 766.

Being in the form of a collateral attack, the only question before us is whether or not the decree entered is void. Restatement, Judgments, sec. 11, p. 65.

Cases such as *German Nat. Bank v. Kautter*, 55 Neb. 103, 75 N. W. 566; *Eayrs v. Nason*, 54 Neb. 143, 74 N. W. 408; *Welch v. Ayres*, 43 Neb. 326, 61 N. W. 635; *Hayes County v. Wileman*, 82 Neb. 669, 118 N. W. 478; and *Hassett v. Durbin*, 132 Neb. 315, 271 N. W. 867, are not in point. They were either determined prior to the addition of subsection six in 1909 to what is now section 25-517, R. S. 1943, or based solely on provisions thereof as to nonresidence. In either event no order of the court was necessary to authorize service. It could be had upon the affidavit alone. *West Nebraska Land Co. v. Eslick*, 102 Neb. 761, 169 N. W. 729. Some of these decisions contain statements as to a resident that support the appellee's contention, however, while applicable to those cases, they are not applicable here.

In the case of *Hassett v. Durbin, supra*, the court, in referring to the case of *Hayes County v. Wileman, supra*, said: " * * * that a judgment rendered on service by publication against a resident of this state on whom personal service might have been had was absolutely void; * * * ." Under the statute as it existed at the time of the opinion in *Hayes County v. Wileman, supra*, it was undoubtedly correct. Under the facts of the case of *Hassett v. Durbin, supra*, where service was obtained on the sole basis of nonresidence, it was also applicable. However, as a general statement of law, it is not applicable to the provisions of our present statute under which appellant proceeded.

Subsection six was added to what is now section 25-517, R. S. 1943, in 1909. As amended in 1921, this subsection provides: "Service may be made by publication * * * (6) in all actions wherein the subject matter is as described in subdivisions (1) or (4) of this section, whether the defendant be *a resident or nonresident* of this state, wherein it is alleged in the petition or other pleading that the plaintiff or person in whose behalf such allegations are made, *after diligent investigation and inquiry*, is unable to ascertain and does not know the whereabouts if in this state or the residence of persons named or designated as defendants to such action, and when the court in which such action is

docketed, or a judge thereof, *being satisfied that sufficient investigation has been made,* shall make an order in such action directing that service be had upon such defendant or defendants by publication." (Italics ours.)

The provisions of this statute expressly provide that service may be had upon a resident. The court can acquire jurisdiction of a person in the manner therein provided. Therefore, the sole fact that Lorena Katz was a resident of Nebraska and might have been served therein is not, by reason of the provision of the statute under which the appellant proceeded, sufficient to make the decree void.

However, in actions of this nature the statute provides, with regard to obtaining service by publication upon a resident, that the petition or other pleading must allege "that the plaintiff or person in whose behalf such allegations are made, after diligent investigation and inquiry, is unable to ascertain and does not know the whereabouts if in this state or the residence of persons named or designated as defendants * * * ." The statute does not require that it set forth the facts with reference to what investigation and inquiry was made but merely that it was made. Then the statute provides: " * * * when the court * * * , or a judge thereof, being satisfied that sufficient investigation has been made, shall make an order in such action directing that service be had upon such defendant or defendants by publication." At the time the application for order for service by publication is made, it is the court, or judge thereof, and not the parties, that is to determine the sufficiency of the investigation made and, if satisfied, to order such service.

That a party may, at the proper time, challenge the truth of the allegations in the affidavit in the proceedings itself has been determined in *Jackman v. Miller,* 119 Neb. 463, 229 N. W. 778, wherein we stated as follows: " * * * When, either before or after the entry of an order for service by publication, and before default is entered or judgment rendered, an objection is filed by an interested party impugning as untrue the facts alleged in plaintiff's affidavit, as in this case, then it becomes necessary for the court or judge

to set the matter for hearing, and determine whether or not the challenged allegations are true. *Welch v. Ayres*, 43 Neb. 326."

While the court may have erred in determining that the investigation and inquiry made by appellant was sufficient, however, after default and entry of decree the findings are final and conclusive unless vacated or set aside on appeal or by proper equitable or statutory proceedings.

That the sufficiency of the facts set forth in the affidavit, in jurisdictions where the statutes so require, or presented in support thereof, under statutes such as ours, for the purpose of obtaining an order of the court for service by publication cannot be questioned in a collateral attack thereon, has been held by other jurisdictions. In *Evans v. Weinstein*, 108 N. Y. Supp. 753, the court said: "Code Civ. Proc. sec. 439, authorizes an order for service by publication where it appears by affidavit that the plaintiff has been or will be unable with due diligence to make personal service of the summons. What is required is, not that the affiant, but the judge, shall be satisfied that the defendant is a nonresident, and that personal service cannot be made, even with due diligence. In *Belmont v. Cornen*, 82 N. Y. 256, the court said: 'If the affidavit, presented to a judge to whom application was made for such an order, contained allegations tending to show that efforts had been made to find the defendant within the state and that he was not there, the judge was by the section before referred to vested with jurisdiction to pass upon the question of the sufficiency of the proof of these facts; and, if the proof satisfied him, neither his order nor the judgment based thereon could be impeached collaterally.' " "A judgment rendered on constructive service of process, the requirements of the statute having been complied with, is as much protected against collateral impeachment as any other, and it cannot be shown collaterally that defendant was not in fact a nonresident as alleged, * * * ." 34 C. J., sec. 836, p. 535. "But we do not think that the judgment can ever be attacked in a collateral proceeding, simply because the affidavit for publication may

have been untrue. It would be against public policy, and the peace and good order of society, that such a thing should be done. * * * If so, then titles, resting upon judicial proceedings, where service has been made by publication only, is of but little value, and it must no longer be supposed that judicial proceedings import absolute verity." *Ogden v. Walters*, 12 Kan. 282. As stated in *Davis v. Vinson Land Co., supra*: "But whenever done, the finding amounts to an adjudication that all the steps required by law to bring the defendant into court have been taken. This determination establishes *prima facie* the jurisdiction of the court, and its subsequent judgments cannot be overthrown except for the causes and within the limitations prescribed by law. The question whether the facts stated in the affidavit are true or not is immaterial until challenged in some recognized legal proceeding for the vacation of valid judgments. (*Ogden v. Walters*, 12 Kan. 282; *Larimer v. Knoyle*, 43 Kan. 338, 22 Pac. 487; *Hammond v. Davenport et al*, 16 Ohio St. 177.)" See, also, *Butler v. McKey, supra; Winemiller v. Laughlin*, 51 Ohio St. 421, 38 N. E. 111; *Stevens v. Reynolds*, 143 Ind. 467, 41 N. E. 931.

In accordance with this opinion the cause is reversed with directions to overrule the special appearance.

REVERSED, WITH DIRECTIONS.

EMMA HADLEY, APPELLEE, V. WILLIAM JENS SCHOW ET AL., APPELLANTS, ELBA R. HADLEY, APPELLEE.
18 N. W. 2d 923

FILED MAY 25, 1945. No. 31890.

1. **Mortgages.** Entering satisfaction of a mortgage and taking a new one, when designed by the parties to be merely a continuation of the first mortgage, and when the two acts are practically simultaneous or parts of the same transaction, is not an extinguishment of the mortgage, but a renewal thereof, and does not give priority to an intervening lien, especially where it is done in good faith and without any intention to release the lien of the mortgage.

2. ———. Record examined, and from an analysis thereof, held that plaintiff became the title owner of the premises here involved by virtue of foreclosure proceedings instituted February 3, 1939.

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

Lloyd E. Chapman, for appellants.

R. P. Kepler and *Beatty & Clarke,* for appellee.

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

MESSMORE, J.

This case, as finally presented, developed as a suit to quiet title in the plaintiff to certain land, against any claim the defendants might have, or claim to have, in the land by virtue of a mortgage dated June 7, 1926, executed by the defendant Elba R. Hadley and wife to Louis J. Peterson, then guardian of the defendants Schou, sometimes referred to as Schow, and for the purposes of this opinion will hereinafter be referred to as defendants Schow.

The court decreed the title to the land to be in the plaintiff, held the Schow defendants had no right, title, lien or interest in the real estate, and quieted title against any claims of the Schow defendants under the $11,600 and $3,500 mortgages. These mortgages will be discussed in the opinion. Schow defendants appeal.

The plaintiff's petition alleged in substance: That on February 3, 1939, she was the owner of a first real estate mortgage against certain real estate which is described, and legal holder of a promissory note in the amount of $7,000 which was secured by such mortgage. The note and mortgage were executed by Elba R. Hadley and his wife, Helene R. Hadley. Plaintiff further alleged that on February 3, 1939, she filed a petition in the district court for Cheyenne county to foreclose the mortgage. A decree of foreclosure was rendered November 7, 1939, establishing her mortgage as a first lien. The indebtedness due the plaintiff was $8,-

821.65, with interest. An order of sale was issued, notice given, sale had, and the real estate purchased by the plaintiff for $8,984.90. The sale was confirmed January 19, 1940. During all of said time the defendants were the owners of a second mortgage on the same real estate, in the amount of $3,500, dated June 7, 1926, executed by Elba R. Hadley and his wife, filed for record June 24, 1926; that through inadvertence, the defendants herein, and each of them, were not barred and foreclosed in the action brought by the plaintiff of any and all their right, title, interest, lien or equity of redemption in and to the real estate; and prayed that an accounting be had on her first mortgage and the court enter a decree of strict foreclosure and the defendants be required to pay the plaintiff the amount found due, within a short time fixed by the court for that purpose, and that in default thereof, the defendants, and each of them, be forever barred and foreclosed of any right, title, interest, lien or equity of redemption in the real estate.

The petition was amended to conform to the proof. That part of the petition referring to the second mortgage of $3,500 owned by defendants Schow, was amended, (and so far as need be considered here), to read in substance as follows: That each and all of the defendants were made parties to the action filed by the plaintiff, February 3, 1939, and duly served with process, and the court had jurisdiction of all of the defendants and the subject matter; that the defendants were in said action barred and foreclosed from any and all rights, title, lien or interest in and to the real estate, but defendants claim they have some interest in the real estate which claim is unfounded and untrue; that the claims of the defendants cast a cloud upon the plaintiff's title to the real estate.

The prayer was amended as follows: That a decree be entered forever confirming and quieting title to the real estate in the plaintiff and determining that the defendants, and each of them, have no right, title, lien or interest in and to the real estate by virtue of the $3,500 mortgage, or otherwise, and that defendants be forever enjoined from setting

up claims or asserting any right, title, lien or interest in and to the real estate.

The following facts are not in dispute, as shown by the pleadings: That the Schow defendants are the children of Soren P. Schow who died April 5, 1921 in Johnson county, Wyoming, and whose will and codicil were admitted to probate bequeathing all of his property to his children; that Soren P. Schow obtained the land here involved by deed February 28, 1917, and on May 28, 1919 sold and conveyed the same real estate to Elba R. Hadley who, with his wife, made and executed to Soren P. Schow four promissory notes, one for $2,500 payable October 1, 1920, one for $2,500 payable October 1, 1922, one for $2,500 payable October 1, 1923 and one for $4,100 payable October 1, 1924. To secure the notes, Elba R. Hadley and his wife made and executed a second mortgage in the amount of $11,600 to Soren P. Schow, recorded June 3, 1919.

The defendants' cross-petition and answer to the original petition of the plaintiff contain a general denial, and further alleged in substance as follows: That on May 5, 1924 the owner and holder of a first mortgage on the real estate here involved, released and discharged such mortgage because of payment; that thereupon the $11,600 mortgage owned by the Schow heirs, by operation of law, became a first mortgage lien upon the real estate described in the plaintiff's petition, and continued to be a first lien for a period of over two years, or until June 30, 1926, when it was fraudulently released and discharged without any order of the county court permitting the same, by one Louis J. Peterson, guardian of the Schow children who were then minors, and without payment of the full amount of $11,600 and interest. The cross-petition further alleged that by such an unlawful and fraudulent release and discharge of the $11,600 mortgage then owned by the Schow heirs, the $7,000 mortgage, which this immediate action was instituted to foreclose, became a first lien on the real estate, instead of a second and inferior lien, and prayed dismissal of the plaintiff's petition and judgment on the cross-petition, canceling

and annulling the release of $11,600 mortgage, and reinstating the unpaid portion of such mortgage as a first and subsisting mortgage lien on the real estate involved, and grant the Schow defendants a foreclosure thereof.

The reply of the plaintiff interpleaded with the defendant, Elba R. Hadley, made certain admissions which are heretofore covered, and denied that the second mortgage of $11,600, by operation of law, became a first lien on the real estate here involved; further alleged that on May 28, 1919, Elba R. Hadley was the fee simple title owner of the real estate here involved, and that the mortgage of $7,000 owned by the plaintiff constitutes a first lien on the real estate, and that the $11,600 mortgage was subject to such first lien. The prayer was substantially as appears in the amended prayer of the petition.

The record discloses that Niels P. Rasmussen, the fee title owner of the land here involved, sold and conveyed the same to R. A. Babcock October 4, 1916. The deed was recorded October 7, 1916. On October 4, 1916 R. A. Babcock and wife executed a first mortgage on the land, in the amount of $7,000 to Rasmussen, securing a promissory note for the same amount. On February 28, 1917, Babcock conveyed the same land to Soren P. Schow, and on May 28, 1919, Soren P. Schow conveyed the land to the defendant Elba R. Hadley. This deed was recorded June 6, 1919. In part payment of the purchase price, Elba R. Hadley and wife executed a mortgage to Soren P. Schow in the amount of $11,600, subject to a first mortgage of $7,000, dated March 1, 1916, payable March 1, 1925. Elba R. Hadley was unable to carry the burden, with reference to the $7,000 first mortgage and, as a consequence, wrote to his brother, C. O. Hadley of Boone, Iowa. As a result of this correspondence C. O. Hadley purchased the $7,000 first mortgage made and executed by Babcock and his wife to Rasmussen. The check evidencing the purchase was sent to Elba Hadley who turned it over to Rasmussen, and in return, Rasmussen gave him the $7,000 mortgage, the note endorsed by Rasmussen and a release of such mortgage, dated May 5, 1924,

to be sent to C. O. Hadley. This release was filed of record June 24, 1926.

With reference to the $11,600 second mortgage, Elba Hadley defaulted in the payment of interest. Thereafter Louis J. Peterson, the testamentary guardian appointed in the will of Soren P. Schow, deceased, and by the will authorized to dispose of the testator's property as his judgment dictated and to manage the Schow heirs estate, commenced proceedings in the county court of Nance county, Nebraska on September 25, 1924, to be appointed guardian of the Schow minors. Letters of guardianship were issued to him on the same day. On March 30, 1926 the guardian made application to the county court for leave to proceed to foreclose the $11,600 mortgage in the district court of Cheyenne county, to obtain a decree of foreclosure. On May 5, 1926 the guardian instituted suit in the district court of Cheyenne county to foreclose the $11,600 mortgage which secured the notes of $9,100 and interest due thereon. A thorough investigation had been made previously by the guardian and his counsel, as to the value of the land, and it was found to be of no more value than the $7,000 first mortgage. Thereafter a settlement was made between Elba Hadley and the guardian of the Schow heirs, wherein Elba Hadley paid $5,000 in cash, made and executed on June 7, 1926, a mortgage in the amount of $3,500 subject to a prior mortgage in the sum of $7,000 running to C. O. Hadley due June 7, 1932, with interest at 5 per cent per annum, to Louis J. Peterson, as guardian. This mortgage was recorded June 24, 1926. The settlement of the foreclosure suit involving the $11,600 mortgage was reported to the county court. The report shows that the $11,600 mortgage was subject to a first mortgage of $7,000, and the settlement, which consisted of taking $5,000 cash, securing a $3,500 second mortgage and releasing the $11,600 second mortgage, was for the best interests of the wards estate. This report was approved on the same day. The release of the $11,600 mortgage was made on June 7, 1926, and filed of record June 30, 1926. The attorneys representing the

guardian testified they understood that at the time of settlement of the foreclosure suit involving the $11,600 mortgage, that such mortgage was a second mortgage subject to an original mortgage of $7,000 which was renewed on June 7, 1926, the same date as the settlement of the foreclosure case involving the $11,600 mortgage. Certain correspondence appearing in the record is definitely to the effect that the $7,000 renewal mortgage dated June 7, 1926 filed of record June 24, 1926, was considered a first and paramount lien to the $11,600 mortgage.

The plaintiff became the owner of the renewal mortgage prior to the death of her husband, which occurred June 19, 1934. There is testimony of an interest payment on the $7,000 mortgage made November 8, 1927 by Elba Hadley, in the amount of $759, and some interest payments were made by him on the $3,500 mortgage.

On August 6, 1930, Mildred M. Schow, Nona M. Schow, Evelyn B. Schow, minors over the age of 14 years, together with the defendants William J. Schow and Myrtle E. Schow over 21 years of age, made application to the county court of Nance county for a successor guardian to Louis J. Peterson. John H. Schow was appointed guardian.

It is the contention of the defendants Schow, that the $11,600 mortgage as heretofore set out, became a first mortgage on the real estate here involved upon the execution of the release of the $7,000 mortgage which had been a first mortgage May 5, 1924, and which was released of record June 24, 1926.

From an analysis of the facts and circumstances, we deem *Peoples Bank v. Trowbridge,* 123 Neb. 312, 242 N. W. 647, applicable and controlling. In the body of the opinion we said: "This elementary rule has been stated by a recognized authority: 'Entering satisfaction of a mortgage and taking a new one, when designed by the parties to be merely a continuation of the first mortgage, and when the two acts are practically simultaneous or parts of the same transaction, is not an extinguishment of the mortgage, but a renewal thereof, and does not give priority to an intervening judg-

ment or mortgage creditor of the mortgagor, especially where it is done in good faith, in ignorance of the existence of the intervening lien, and without any intention to release the lien of the mortgage.' 27 Cyc. 1222." After quoting from 2 Jones, Mortgages, (7th ed.) sec. 873, we further said: "In *Edney v. Jensen,* 116 Neb. 242, * * * , we held: 'Ordinarily, it is presumed that one must have intended to keep alive his mortgage title, where it was essential to his security against an intervening title; and this presumption applies although the party through ignorance of such intervening title may have actually discharged the mortgage and canceled the notes and really intended to extinguish them.' " See, also, *Prudential Ins. Co. v. Nuernberger,* 135 Neb. 743, 284 N. W. 266.

In 33 A. L. R. 149, the general rule is stated as follows: "It is a general rule that the cancelation of a mortgage on the record is not conclusive as to its discharge, or as to the payment of the indebtedness secured thereby. And where the holder of a senior mortgage discharges it of record, and contemporaneously therewith takes a new mortgage, he will not, in the absence of paramount equities, be held to have subordinated his security to an intervening lien unless the circumstances of the transaction indicate this to have been his intention, or such intention upon his part is shown by extrinsic evidence." See, also, 98 A. L. R. 843.

As stated in *Farmers & First Natl. Bk. v. Citizens State Bank,* 211 Ind. 389, 5 N. E. 2d 506: "As a general rule the acceptance of a second note and mortgage in renewal of a prior note and mortgage is not an extinguishment of the lien unless the parties so intend; that where the release of the old mortgage and the execution of a new one appear to be part of one transaction, and the new mortgage is taken and recorded simultaneously with the release of the old mortgage, the recording of the new and the cancellation of the old mortgage constitute a contemporaneous act. A court of equity will look to the circumstances of such transaction, and will not permit the release of the old mortgage and the execution and recording of the new to destroy the

lien of the original mortgage, when not so intended, or rights of third parties have not intervened, or positions changed. Equity keeps the lien of the first mortgage alive for the benefit of the mortgagee under such circumstances."

Thus, it is clearly to be seen that the $7,000 mortgage executed by Babcock to Rasmussen on October 4, 1916, sold by Rasmussen to C. O. Hadley May 5, 1924, by C. O. Hadley renewed with the express agreement with everyone interested on June 7, 1926 that it was to continue a first lien on the land, remained a first lien at all times.

As set out in the plaintiff's petition in the instant case, the plaintiff, on February 3, 1939, filed a petition in the district court of Cheyenne county which was amended August 12, 1939, to foreclose a $7,000 mortgage running to C. O. Hadley, her husband, and sold by him to the plaintiff October 9, 1929. The Schow heirs were all of age prior to the time of the filing of the petition, and were made parties defendant. Proper service of process was had upon each and all of the Schow defendants. Each and all of said defendants defaulted and their default was entered.

It was alleged in the petition that the Schow defendants have, or claim to have, some right, title or interest in and to, or a lien upon, the real estate described in the petition by reason of a certain mortgage of record, but that the right, title, interest or lien of the said defendants is junior, inferior, and subject to the lien of the plaintiff.

Plaintiff prayed for an accounting and that she be decreed to have a first lien upon the land described in the petition, and that the Schow defendants be forever barred and foreclosed of all their right, title, interest or equity of redemption in or to said premises.

It will be observed that the allegations of the petition filed February 3, 1939, did not properly describe the mortgage indebtedness owned by the Schow defendants. It was not set up in the petition that the $11,600 mortgage constituted the mortgage indebtedness owned by defendants Schow, or whether the $3,500 mortgage taken in lieu thereof in the settlement constituted such mortgage indebted-

ness. The plaintiff's petition in the instant case discloses by inadvertance the $3,500 second mortgage owned by the Schow defendants was not set forth in such manner in the petition filed February 3, 1939. On November 7, 1939, the court entered a decree of foreclosure in favor of the plaintiff in conformity with the prayer of the petition, the real estate was ordered sold, the sale was had January 6, 1940, and the premises purchased by the plaintiff for the sum of $8,984.90, the amount of her mortgage indebtedness. The sale was confirmed January 19, 1940 and the plaintiff became the title owner.

The instant case arose by virtue of negotiations on the part of Elba R. Hadley with the plaintiff, to purchase from her the real estate here involved. To do this, Elba R. Hadley was to obtain a loan of $5,000 on the land and to pay therefrom $1,750 delinquent taxes and expenses, and to turn over to the plaintiff the balance of the $5,000 and give her in addition thereto, his note for $1,500. He executed the $5,000 note and mortgage to the Kloke Investment Company. The Investment Company raised the question as to whether or not the Schow defendants had been effectively cut off from any right, title or interest they might have in the land by virtue of the plaintiff's foreclosure proceedings on the $7,000 note, commenced on February 3, 1939. The instant action was brought by the plaintiff to quiet her title to the real estate against the Schow defendants.

It is clear that at the time the plaintiff's petition to foreclose the $7,000 mortgage was filed, February 3, 1939, the $11,600 mortgage owned by the Schow defendants and for which settlement was made taking in lieu thereof the $3,500 mortgage, and the $3,500 mortgage were second liens, subject to the plaintiff's first mortgage of $7,000, and never at any time became a first lien on the premises here involved. This being true, it is obvious from the decree of foreclosure, sale and confirmation of the premises as heretofore related, that the plaintiff became the title owner of the premises and the defendants Schow, in no event, had any right, title or interest in the real estate after the sale was confirmed in the

plaintiff, and under such circumstances any right, title or interest in such defendants was effectively cut off, as far as the plaintiff was concerned, in the foreclosure action of February 3, 1939.

In view of our holding, other matters raised by the parties need not be determined.

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

AFFIRMED.

C. H. SCHEUMANN ET AL., APPELLEES, V. THE PRUDENTIAL INSURANCE COMPANY OF AMERICA ET AL., APPELLANTS.
19 N. W. 2d 48

FILED MAY 25, 1945. No. 31915.

1. **Pleading.** As a general rule a default is an admission of such facts only as are properly alleged.
2. ———. A recognized exception to the general rule is that where in a foreclosure or other kindred proceeding a defendant who is called upon to disclose his supposed but unknown interest in the subject of the action makes default, he will be held thereby to have admitted that his interest therein is subordinate to that of the plaintiff.
3. **Mortgages: PLEADING.** An allegation in a petition to foreclose a first mortgage on real estate with reference to a junior mortgage stating that whatever interest in, right or title to or lien upon the real estate the junior mortgagee has is subject, junior and inferior to the lien of plaintiff's first mortgage is sufficient upon which to base a decree foreclosing and barring the second mortgage in case of default by the junior mortgagee.
4. **Cases Distinguished.** *Lincoln Nat. Bank v. Virgin*, 36 Neb. 735, 55 N. W. 218, distinguished.
5. **Case Overruled.** *Gibson v. Sexon*, 82 Neb. 475, 118 N. W. 77, overruled.

APPEAL from the district court for Seward County: HARRY E. LANDIS, JUDGE. *Reversed and remanded with directions to dismiss.*

Stanley A. Matzke, Joseph H. Sauer, Votava & McGroarty, for appellants.

McKillip, Barth & Blevens, for appellees.

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

YEAGER, J.

This is an appeal from a decree of the district court for Seward county, Nebraska, in an action wherein C. H. Scheumann and P. H. Wiegardt were plaintiffs and The Prudential Insurance Company of America was a defendant.

The action was for foreclosure of a real estate mortgage held by plaintiffs which was subject to a prior and superior mortgage held by defendant which had been previously foreclosed, and for an accounting. Decree was entered granting the prayer of the petition. From this decree the defendant has appealed.

The facts which are not in dispute are as follows: The Prudential Insurance Company held a first mortgage on certain land in Seward county, Nebraska. The Farmers State Bank of Staplehurst, Nebraska, held a second mortgage on the same land. The Prudential mortgage was in default on December 20, 1933. Foreclosure action was commenced and the Farmers State Bank of Staplehurst was made a party defendant therein. The petition contained the following allegation which was applicable to the Farmers State Bank: "That defendant, Farmers State Bank of Staplehurst, Nebraska, appears or claims to have some interest in, right or title to said real estate by reason of a mortgage thereon. * * * ; that whatever interest in, right or title to or lien upon said real estate said defendants or any of them may have the same is subject, junior and inferior to the lien of plaintiff's mortgage."

The prayer of the petition was the following: "WHEREFORE, plaintiff prays that the amounts due plaintiff under its said note and mortgage be ascertained by the Court, and that said sums be declared a first lien upon the above de-

scribed real estate, and upon the failure of the defendants or any of them to pay said sums within a period of twenty days from the entry of the decree, said real estate be sold as provided by law for the satisfaction thereof; that upon said sale and confirmation thereof, the defendants and each of them be barred and foreclosed of all their right, title, interest and equity of redemption in and to said real estate."

The pertinent portion of the decree is the following: " * * * that upon the failure of the defendants or one of them to pay the aforesaid sums within twenty days from date hereof said real estate be sold as provided by law for the satisfaction thereof; that the proceeds of said sale be applied, first, to the payment of plaintiff's costs herein, second to the satisfaction of plaintiff's lien and third, to the satisfaction of the lien of said defendant and cross petitioner, and the balance, if any, as the court may direct; that the defendants and each of them be and hereby are foreclosed of all their right, title, interest and equity of redemption in and to said real estate."

There having been no redemption the land was sold pursuant to the terms of the decree to plaintiff therein, defendant here. Sale was duly confirmed and deed issued.

In that action process was duly served on the Farmers State Bank of Staplehurst, Nebraska. It made no appearance in the action and default was entered. After the foreclosure the bank assigned its mortgage to the plaintiffs herein.

The theory of plaintiffs' cause of action here is that the petition in that foreclosure action insufficiently described the right of the Farmers State Bank of Staplehurst, Nebraska, to permit of a valid foreclosure of a junior mortgage and that by reason of that fact they as assignees now have the right of foreclosure thereof subject however to the rights that the defendant herein has under the mortgage which it invalidly and insufficiently foreclosed.

The district court, as disclosed by a formal memorandum made a part of the record, entered a decree sustaining this theory of the plaintiffs and granting foreclosure of the sec-

ond mortgage as prayed subject to the rights of defendant under its mortgage. It is from this decree that the defendant has appealed.

The defendant on the other hand contends that the former foreclosure proceeding effectually foreclosed all rights of the Farmers State Bank of Staplehurst, Nebraska, and the plaintiffs herein and that the proceedings therein are res judicata as to any and all rights sought to be asserted by them in this action.

To sustain their theory the plaintiffs rely on a statement of a legal principle announced in *Lincoln Nat. Bank v. Virgin,* 36 Neb. 735, 55 N. W. 218, and which they claim has been pursued through *Gibson v. Sexson,* 82 Neb. 475, 118 N. W. 77, *Burns v. Sholl,* 111 Neb. 628, 197 N. W. 393, and *Chrisman v. Daniel,* 134 Neb. 326, 278 N. W. 565, as follows: "The general rule is that a default is an admission of such facts only as are properly alleged in the petition or complaint."

On authority of this pronouncement the plaintiffs contend that the allegation of the petition in foreclosure, "That defendant, Farmers State Bank of Staplehurst, Nebraska, appears or claims to have some interest in, right or title to said real estate by reason of a mortgage thereon. * * * ; that whatever interest in, right or title to or lien upon said real estate said defendants or any of them may have the same is subject, junior and inferior to the lien of plaintiff's mortgage." was an insufficient allegation of fact to make effective the decree in that action as against the second mortgage of the Farmers State Bank of Staplehurst, Nebraska.

Careful examination discloses that the opinion in that case does not support this contention of plaintiffs. No comparable controversy was before the court. The actual decision which gave rise to the foregoing pronouncement was upon the question of whether or not as between defendants in that action, one of whom defaulted, affirmative relief could be granted without a pleading setting forth the facts entitling the one defendant to relief against the other.

While, as has been stated, no controversy comparable to the one presented here was before the court in that case the court in an *obiter* statement came to a conclusion directly opposite to the one contended for by the plaintiffs, in the following words: "A recognized exception, however, is that where, in a foreclosure or other kindred proceeding, a defendant who is called upon to disclose his supposed but unknown interest in the subject of the action makes default, he will be held thereby to have admitted that his interest therein is subordinate to that of the plaintiff."

In *Gibson v. Sexson, supra,* quoting from the syllabus but mistaking the purport and effect of the opinion and decision in *Lincoln Nat. Bank v. Virgin, supra,* the court arrived at conclusions which are consistent with the contentions of the plaintiffs herein.

The opinion in *Burns v. Sholl, supra,* contains no reference to *Lincoln Nat. Bank v. Virgin, supra,* and neither does it sustain the contention of plaintiffs. Its purport and effect is that in a foreclosure of a mechanic's lien and a challenge to a *prior* recorded, unmatured mortgage the facts constituting the invalidity must be alleged.

The opinion in *Chrisman v. Daniel, supra,* contains no reference to *Lincoln Nat. Bank v. Virgin, supra.* Like *Burns v. Sholl, supra,* it is authority for the proposition that in the foreclosure of a lien on land and a challenge to the validity of a *superior* lien the facts constituting the invalidity of the *superior* lien must be alleged.

It therefore becomes apparent that the only support for plaintiffs' contention is the mistaken interpretation and application of the opinion in *Lincoln Nat. Bank v. Virgin, supra,* found in *Gibson v. Sexson, supra.*

On the other side of this proposition are the dicta of *Lincoln Nat. Bank v. Virgin, supra, Wyman v. Embree,* 78 Neb. 84, 110 N. W. 537, *Munger v. Beard & Bro.,* 87 Neb. 527, 127 N. W. 872, and *Cowles v. Kyd,* 91 Neb. 274, 135 N. W. 1010.

The sufficiency of the allegations of a petition regarding a junior lienor was brought into controversy in *Wyman v*

Embree, supra, as here, and in that connection it was said in the opinion: "He further alleged that he was the holder and legal owner of the note and mortgage, and that the interests of the defendants, the mortgagee and its receiver, were junior and inferior to his lien; that said debt has not been paid, except the interest coupons maturing prior to the first day of November, 1895, which are the coupons in controversy herein. By their default the defendants admitted these facts, which we hold were sufficiently alleged."

The case of *Cowles v. Kyd, supra,* was a case wherein it was contended that a decree on a petition in a tax foreclosure action containing substantially the same allegations as those brought into question herein were insufficient to bar a subsequent action for foreclosure by a junior tax lienor, where such junior lienor had defaulted in the former action. In the opinion with reference to the failure of the junior lienor to appear and set up his lien it was said: "Failing so to do, his right to subsequently assert it against the judgment entered in that suit, or against those claiming as purchasers under said judgment, is forever barred and foreclosed."

Reason supports the rule for which the defendant herein contends. Parties to foreclosure actions, having had due and proper service of process, should not be permitted to sit idly and permit their right, if any they have, to be barred by solemn judgments and decrees and thereafter at their whim and caprice be allowed to attack collaterally such decrees and judgments. If this is to be permitted a heavy burden will be cast upon the title examiner and a heavy hazard on the purchaser of real estate in those cases where there has been foreclosure of encumbering liens. No title in any such case could be held merchantable without examination of petitions for foreclosure and satisfaction that the rights and interests of junior lienors were therein fully described.

We conclude therefore that the rights and interests of the Farmers State Bank of Staplehurst, Nebraska, and its assignees, the plaintiffs herein, were forever barred and fore-

closed by the decree, sale and confirmation in the foreclosure action wherein the defendant herein was plaintiff and the Farmers State Bank of Staplehurst, Nebraska, was a defendant.

The principle announced in *Gibson v. Sexson, supra,* in conflict with this opinion is overruled.

The decree of the district court is reversed and the cause remanded with directions to dismiss plaintiffs' petition.

REVERSED, WITH DIRECTIONS.

IN RE ESTATE OF MARGARET INDA.
JEANNE V. INDA DODSON ET AL., APPELLANTS, V. LOUIS J. INDA ET AL., APPELLEES.
19 N. W. 2d 37

FILED MAY 25, 1945. No. 31773.

1. **Trial.** Alleged misconduct of counsel in argument to jury cannot be properly shown by affidavit, and to preserve such error the statements must be taken by the official court reporter at the trial, together with the objections made thereto and the court's ruling thereon.
2. ———. One may not complain of the misconduct of counsel, if, with knowledge of such misconduct, he does not ask for a mistrial, but consents to take the chances of a favorable verdict.
3. ———. It is the duty of the trial court to instruct the jury upon the issues presented by the pleadings and the evidence, whether requested so to do or not.
4. **Wills.** The elements necessary to be established to warrant the rejection of a will on the ground of undue influence are (1) that the testator was subject to such influence; (2) that the opportunity to exercise it existed; (3) that there was a disposition to exercise it; and (4) that the result appears to be the effect of such influence.
5. ———. The burden of proving that a will resulted from undue influence is on the contestants. Undue influence cannot be inferred alone from motive or opportunity, and mere suspicion of undue influence on the testator is insufficient to require submission of the question to the jury.
6. ———. A person who understands (1) the nature of his acts, (2) the extent of his property, (3) the proposed disposition of it,

and (4) the natural objects of his bounty, is competent to make a will.

7. ———. The question of testamentary capacity relates exclusively to the time when the will was made, and although competent evidence of testator's condition of mind long before, closely approaching, and shortly after the time of its execution is admissable, it is received only to assist in revealing his state of mind at that time and the jury should be so instructed.

8. Witnesses. A nonexpert witness who is shown to have had a more or less extended intimate acquaintance with a person may be permitted to state his opinion as to the mental condition of that person, if said condition becomes a material subject of inquiry, by giving the facts and circumstances upon which the opinion is based.

9. Wills. It must appear, however, that a witness, lay or expert, in giving his opinion as to mental capacity of a testator to make a will had in mind the quality of mental capacity essential to the making of a valid will.

10. ———. The burden is on the proponent of a will to prove the execution of the will and the testamentary capacity of the testator. However, if the proponent makes a prima facie case as to testamentary capacity it then devolves upon the contestant to overcome the presumption arising therefrom after which the burden of going ahead and proving testamentary capacity by preponderance of the evidence devolves upon the proponent.

11. ———. In order that a will may be rejected on the ground of incompetency of the testator the evidence of the objector must be sufficient to sustain a reasonable inference that the testator was incompetent to make a will.

12. ———. It is the duty of trial courts to determine the issues upon which there is competent evidence and submit them, and them only, to the jury. In a will contest on the ground of mental incompetency and undue influence, if the evidence is insufficient to sustain a verdict upon either of such issues in favor of the contestants, then the trial court should withdraw both issues from the jury and direct a verdict.

APPEAL from the district court for Douglas County: CHARLES LESLIE, JUDGE. *Reversed and remanded.*

Paul J. Garrotto and *Oscar T. Doerr,* for appellants.

Grenville P. North, for appellees.

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

CHAPPELL, J.

Petition for probate of the will of Margaret Inda, deceased, was filed in the county court of Douglas county. Louis J. Inda, a son, and Helen M. Shattuck, a daughter of the deceased, filed objections that the testatrix did not possess testamentary capacity to make a will, and that its execution was obtained by undue influence. The will which devised the small estate of deceased to two sons, George S. Inda and Frank A. Inda, was admitted to probate in the county court. Contestants appealed to the district court. There, by stipulation, the case was tried to a jury upon the same pleadings as filed in the county court. However, the trial court appointed a guardian ad litem, for a daughter who was admittedly incompetent and he answered in her behalf.

The jury returned a verdict finding for contestants, upon which the trial court entered its judgment that the will was not the last will and testament of deceased. Motion for new trial was overruled. Proponents, beneficiaries under the will, and the executrix designated in the will, appealed to this court, assigning as error, substantially: (1) That inflammatory remarks were made to the jury by counsel for contestants which were prejudicial; (2) that the trial court erred in the admissions of evidence; and (3) erred in its instructions to the jury. We find that the first contention is without merit, but that the two latter should be sustained.

With reference to the first assignment, we find that the alleged inflammatory statements made by counsel for contestants were not taken by the court reporter and no objections were made thereto upon which the court could make a ruling. Further, no request was made for a mistrial. Counsel for proponents in support of motion for new trial did file an affidavit that certain remarks alleged to be inflammatory were made to the jury in the opening statement by counsel for contestants. This court has only recently held: "Alleged misconduct of counsel in argument to jury cannot be properly shown by affidavit, and to preserve such error the statements must be taken by the official court

reporter at the trial, together with the objections made thereto and the court's ruling thereon.

"One may not complain of the misconduct of counsel if, with knowledge of such misconduct, he does not ask for a mistrial, but consents to take the chances of a favorable verdict." *In re Estate of House,* 145 Neb. 670, 17 N. W. 2d 883. That case is directly in point here and disposes of the first assignment of error.

Complaint is made that instruction No. 2 given by the trial court was incomplete and prejudicial to proponents' rights. It is conceded that the instruction properly placed the burden of proof upon the proponents with reference to testamentary capacity. However, it is contended that the instruction being in the negative created a wrongful inference that proponents were also required to show by a preponderance of the evidence that the testator was not unduly influenced to make the will. With this we agree. It appears from the record that no instruction whatever was given by the court affirmatively placing the burden of proof upon contestants to prove the alleged undue influence. That the burden on this issue affirmatively rested upon them cannot be questioned. *In re Estate of Hagan,* 143 Neb. 459, 9 N. W. 2d 794; *In re Estate of Heineman,* 144 Neb. 442, 13 N. W. 2d 569. The rule in this jurisdiction is that, "It is the duty of the court to instruct the jury upon the issues presented by the pleadings and the evidence, whether requested so to do or not." *In re Estate of Keup,* 145 Neb. 729, 18 N. W. 2d 63. We find that the instruction did not properly and fully present the issues to the jury and under the circumstances was erroneous and prejudicial to proponents' rights, which requires a reversal of the judgment.

Although the case must be reversed for the reason just given, there are other matters which require discussion. True, the proponents did not formally assign as error in the brief that the verdict and judgment are not sustained by, or are contrary to, the law and the evidence. These contentions do, however, appear in their motion for new trial and are argued at length in brief of counsel. In the situa-

tion presented we deem it necessary to take cognizance of errors fatal to a just and lawful conclusion of the case, and do so in conformity with section 25-1919, R. S. 1943, and amended rules of this court on preparation of brief, Rule 14, a 2 (4). See, also, *Hamaker v. Patrick*, 123 Neb. 809, 244 N. W. 420; *American State Bank of Springfield v. Phelps*, 120 Neb. 370, 232 N. W. 612.

Therefore, we refer again to the issues of undue influence and testamentary capacity which we have recently discussed at length in similar cases. In those cases we held: "Undue influence, in order to invalidate a will, must be of such character as to destroy the free agency of the testator and substitute another person's will for his own." *In re Estate of Bowman*, 143 Neb. 440, 9 N. W. 2d 801. "The elements necessary to be established to warrant the rejection of a will on the ground of undue influence are (1) that the testator was subject to such influence; (2) that the opportunity to exercise it existed; (3) that there was a disposition to exercise it; (4) that the result appears to be the effect of such influence." *In re Estate of Keup, supra.* See, also, *In re Estate of Witte*, 145 Neb. 295, 16 N. W. 2d 203. "Undue influence cannot be inferred alone from motive or opportunity. There must be some evidence, direct or circumstantial, to show that undue influence not only existed, but that it was exercised at the very time the will was executed." *In re Estate of Heineman, supra.* "The burden of proving that the will resulted from undue influence is on the contestants, and the mere suspicion of undue influence on testatrix is insufficient to require submission of the question to the jury." *In re Estate of Alton*, 128 Neb. 411, 258 N. W. 871. See, also, *In re Estate of Kajewski*, 134 Neb. 485, 279 N. W. 185.

Bearing these rules in mind, we have examined the record and find that it discloses no competent evidence whatever supporting contestants' allegations that the execution of the will was procured by undue influence. We conclude that the trial court should not have submitted that issue to the jury but should have directed a verdict for proponents thereon.

In connection with the question of testamentary capacity, it is the rule that, "A person who understands the nature of his acts, the extent of his property, the proposed disposition of it, and the natural objects of his bounty, is competent to make a will." *In re Estate of Witte, supra.* "It is not medical soundness of mind that governs, but testamentary capacity as defined in law. A high degree of mentality is not required to make a valid will, in case it is found to be free from undue influence." *In re Estate of Frazier,* 131 Neb. 61, 267 N. W. 181. The question of testamentary capacity relates exclusively to the time when the will was made, and although competent evidence of the testator's condition of mind long before, closely approaching, and shortly after the time of its execution is admissible, it is received only to assist in revealing his state of mind at that time. *In re Estate of Winch,* 84 Neb. 251, 121 N. W. 116. In this connection the instructions to the jury "should confine the consideration of mental capacity to the testator's condition at the time of the execution of the will, and require the disregarding of capacity at other times, except so far as it bears on capacity at the time of the execution of the will." 68 C. J., sec. 932, p. 1112.

It is the settled rule of law in this state that, "A non-expert witness who is shown to have had a more or less intimate acquaintance with a person may be permitted to state his opinion as to the mental condition of that person, if said condition becomes a material subject of inquiry, by giving the facts and circumstances upon which the opinion is based." *In re Estate of Witte, supra.* However, it must follow that the facts and circumstances testified to by the witness shall be sufficient as a foundation upon which to base an opinion. It was said in the opinion last cited, " * * * it must appear that the witness in giving his or her opinion as to mental capacity must have in mind the quality of mental capacity essential to the making of a valid will, that is whether or not the testator understood the nature of the acts, knew the extent of the property, understood the proposed disposition, and knew the objects of the bounty."

The burden is on the proponent of a will, both in the county court and in the district court on appeal, to prove the execution of the will, and the testamentary capacity of the testator. However, if the proponent makes a *prima facie* case as to testamentary capacity it then devolves upon the contestant to overcome the presumption arising therefrom after which the burden of going ahead and proving testamentary capacity by a preponderance of the evidence devolves upon the proponent. See *In re Estate of Keup, supra;* and *In re Estate of Witte, supra.*

We have held: "In order that a will may be rejected on the ground of incompetency of the testator the evidence of the objector must be sufficient to sustain a reasonable inference that the testator was incompetent to make a will." *In re Estate of Witte, supra.* Courts must give effect to the rule that the mental capacity of a testator is tested by the state of his mind at the time he executed the will. Therefore, "In the contest of a will on the ground of incompetency, it does not necessarily follow as a matter of law from proof of temporary mental infirmities before and after the testamentary date that the jury should be permitted to pass on the state of testator's mind at that time, in absence of proof that there was then a mental disturbance." *In re Estate of Laflin,* 108 Neb. 298, 187 N. W. 885. See, also, *In re Estate of Slattery,* 125 Neb. 194, 249 N. W. 597.

In the case at bar proponents made a prima facie case with four witnesses. One of them was a lawyer, a friend of the family for 20 years, who drew the will, signed as a witness, and attended to the preparation and execution of the instrument at the request of the deceased. The others were: A daughter-in-law, who saw the deceased on the day, the very hour, the will was executed, and almost daily for two years prior thereto; a next-door neighbor who saw and visited with deceased almost every day including the day, the very hour, that the will was executed; and the attending physician, who had treated deceased for chronic asthma for some time and was present in her home when the will was executed. He was also a witness to the will. These wit-

nesses clearly established a prima facie case of execution of the will and testamentary capacity in conformity with all rules of law relating thereto.

The contestants then adduced their evidence, most of which had no relation whatever to the issues of testamentary capacity or undue influence. A great part of their evidence was remote, immaterial, irrelevant, and highly prejudicial. In view of the fact that other disposition is made of the case we do not deem it necessary to discuss such matters at length. To repeat the details thereof in this opinion would serve no good purpose. An observance of rules set forth herein will remedy such matters if there is another trial of this case.

There is no medical evidence in the record supporting testamentary incapacity. Contestants offered none that was admissible. Only two witnesses, the contestants, who were a daughter and a son of deceased, offered any evidence touching testamentary incapacity. Their evidence was not sufficient to sustain any reasonable inference that the testator was incompetent at the time she made the will. It does not appear that either of them in giving their opinions had in mind the quality of mental capacity essential to the making of a will. They adduced no competent evidence which negatived any one or more of the four requirements for mental capacity to make a will.

Nevertheless, after contestants had rested the proponents adduced further evidence by three other witnesses: A physician, who at intervals had treated the testatrix for chronic asthma over many years prior to July 25, 1941, testified that deceased was mentally competent in every respect up until the last time he saw her on that date. A married daughter of deceased, the executrix designated in the will, who lived in the home with the testatrix, testified that the mother was ill from asthma but mentally alert and competent at all times until forty-eight hours before her death on October 9, 1942. A son, Dr. Frank Inda, who is a physician and teacher of pathology at the Medical College, University of Nebraska, testified that he saw his mother often

from July, 1942, until her death, and that she was ill from chronic asthma but mentally alert and competent during all that period. From an examination of the record and applicable law we conclude that the trial court should not have submitted the issue of testamentary capacity to the jury but should have directed a verdict for proponents thereon.

The applicable rule upon both issues presented in this case is that, "If in a case contesting a will on the ground of mental incompetency and undue influence, the evidence is insufficient to sustain a verdict upon either of these issues in favor of the contestants, the trial court should withdraw these issues from the jury and direct a verdict." *In re Estate of Slattery, supra.* This is the rule because "It is the duty of trial courts to determine the issues upon which there is competent evidence and submit them, and them only, to the jury. The submission of issues upon which the evidence is insufficient to sustain an affirmative finding is generally very prejudicial and invariably results in a second trial." *Johnson v. Anoka-Butte Lumber Co.*, 141 Neb. 851, 5 N. W. 2d 114. See, also, *In re Estate of Witte, supra.*

For the reasons stated herein the judgment is reversed and the cause remanded for further proceedings.

REVERSED, FOR FURTHER PROCEEDINGS.

GEORGE NORTHOUSE ET AL., APPELLANTS, V. GULUF TORSTENSON, APPELLEE.

19 N. W. 2d 34

FILED JUNE 1, 1945. No. 31944.

1. **Process.** When an affidavit for constructive service in a quiet-title action contains no venue, and does not show whether the notary public was a resident of, or commissioned for, the county, such affidavit is fatally defective.
2. **Vendor and Purchaser.** A merchantable title is a title which a man of reasonable prudence, familiar with the facts and the questions of law involved, would accept as a title which could be sold to a reasonable purchaser.

3. ———. The term "marketable title" is difficult of definition, but, accepting the prevailing rule that a good title is a marketable title, a "clear title," "merchantable title," or "marketable title" generally means a title which consists of both the legal and equitable title, and is free from reasonable doubt in law or in fact; not merely a title valid in fact, but one which can be readily sold to a reasonably prudent purchaser, or mortgaged to a person of reasonable prudence as a security for the loan of money.

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

Moyer & Moyer and *M. S. McDuffee,* for appellants.

Frederick M. Duetsch, for appellee.

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

PAINE, J.

This is an action in equity to compel the specific performance of a contract for the sale of real estate. The trial court found for the defendant and dismissed the plaintiffs' petition, from which the plaintiffs appealed.

The plaintiffs and appellants assign as errors that the judgment is not sustained by sufficient evidence and is contrary to law, for errors of law occurring at the trial and duly excepted to by the plaintiffs, and for the error in overruling plaintiffs' motion for a new trial.

The evidence discloses that David A. Ommerman, the grandfather of the plaintiff George Northouse, died seized of real and personal property of the value of $175,000, and that the 80-acre tract in litigation in the instant case was but a portion of the land bequeathed to the said plaintiff under a provision in the 13th paragraph of his will, reading, so far as affects this case, as follows:

"I hereby devise, give, and bequeath, unto my grandson, George Northouse, the use of the following real estate, for and during his natural life, to-wit: The West one-half (W½) of the Northwest Quarter (NW¼) of Section Fourteen (14), * * * in Township Twenty-four (24) North, Range Two (2) West * * * Madison County, Nebraska,

* * *, I hereby give and bequeath to the wife and children of the said George Northouse who may survive him, for and during the natural life of the wife of the said George Northouse, should she survive him, share and share alike, and upon the death of the wife of the said George Northouse, the remainder in and to said real estate, I hereby give and bequeath, absolutely and forever to the children of the said George Northouse, share and share alike, who may survive him, provided however, that should the said George Northouse die leaving no wife him surviving, then in that event the remainder in said real estate described in this paragraph is vested absolutely and forever in the children of the said George Northouse and provided further that should the said George Northouse die leaving no wife or children him surviving then in that event the remainder in and to said real estate to be vested absolutely and forever in Victor Northouse and Lynis Northouse, share and share alike."

The evidence further discloses that the plaintiff George Northouse was born August 31, 1912, was 19 years of age when his grandfather died, was married September 7, 1940, and up to the time of trial he had never had any children by such marriage.

The plaintiffs and defendant entered into articles of agreement May 29, 1944, in which the defendant agreed to purchase from the plaintiffs the farm above described for the sum of $5,200, and that he paid down $2,000 in cash. The defendant further agreed to pay the balance of $3,200 "when the purchaser has approved the title which shall be within 60 days from this date." The plaintiffs agreed "to convey to the purchaser by good and sufficient warranty deed as clear fee simple title to said real property free from incumbrance. * * * In the event the seller cannot by June 30, 1944, make title satisfactory to the purchaser the seller will return to the purchaser said $2000.00 with interest thereon at five per cent from this date and this contract shall thereupon be cancelled."

The petition of plaintiffs alleges that they delivered an abstract of title showing a good and marketable title of rec-

ord in George Northouse, and tender said abstract into court and pray that the defendant be required to accept said title and pay the balance due of $3,200.

The defendant in his answer and cross-petition says he is ready, able and willing to complete said contract. He recites that a quiet-title action was brought by said George Northouse, claiming title to such land by adverse possession, and making no reference to the will of his grandfather or to any interest which an unborn child of his might have, if and when born. It is also charged by defendant in his brief that the affidavit for constructive service contains no venue, and does not otherwise show where it was sworn to, or whether the notary public was a resident of, or commissioned for, the county, and that in *Albers v. Kozeluh,* 68 Neb. 522, 97 N. W. 646, it was held that when an affidavit contains no venue it is fatally defective. See, also, 15 Neb. Law Bulletin, 349.

It is the contention of the defendant that the will of the grandfather created a simple life estate in George Northouse in the real estate in question, and that his two brothers had a conditional estate in the property, and that in the quiet-title action such brothers were not, in fact, representatives of a child born to the plaintiffs, but their interests were adverse to the interests of such a child yet to be born. It was also suggested that no guardian ad litem was appointed to defend the interests of the unborn child, although some courts have done so, even in the absence of statutory authority. See *Gunnell v. Palmer,* 370 Ill. 206, 18 N. E. 2d 202, 120 A. L. R. 871, which case cites the case of *McArthur v. Scott,* 113 U. S. 340, 28 L. Ed. 1015, 5 S. Ct. 652, as supporting this view. The Nebraska statute, section 38-114, R. S. 1943, seems to make no provision for appointing a guardian ad litem for children unborn.

With this question as to a possible interest of an unborn child of the plaintiff having an interest in the property, which interest was not cut off by the quiet-title action, the question arises, Is the title to this land, as inherited by the plaintiff under the will of his grandfather, a title which the defendant must accept as a merchantable title?

The bill of exceptions discloses the evidence of R. J. Shurtleff, an attorney of many years standing at Norfolk, Nebraska, who testified that he had examined more than 100 abstracts of title for the Aetna Life Insurance Company, and more than 200 abstracts of title for the Union Central Life Insurance Company, and since 1918 had been attorney for the Elkhorn Building & Savings Association at Norfolk and had examined abstracts of title on all of the loans made by that concern, and conducted all foreclosures necessary in its business. He further testified that he had examined the abstract of title in the instant case, which abstract of title included a synopsis of the proceedings in the matter of the probate of the estate of David A. Ommerman, deceased, also a synopsis of the proceedings in the quiet-title action brought in the district court by plaintiff George Northouse against his brothers Lynis Northouse and Victor Northouse and their wives and against the land, and alleging his adverse possession for more than ten years, and praying that the title be quieted in him, and the evidence of the witness was to the effect that the abstract of title does not reflect a merchantable title which a reasonable and prudent man engaged in the buying of land would accept as a merchantable title. In his cross-examination by plaintiffs' attorney he admitted that he had checked no authorities nor read any law in connection with his examination of the abstract in this case.

The bill of exceptions discloses that other competent attorneys, experienced in handling real estate titles, also rejected the title offered to the defendant.

The bill of exceptions discloses that plaintiff secured a decree quieting title in himself by adverse possession against his brothers and their wives, yet in such quiet-title action no attempt whatever was made to cut off the right of his surviving children to inherit his interest, and in said action the affidavit for service by publication was fatally defective, so we will not further discuss the quiet-title action.

Now, should the defendant be compelled to accept the title shown by the abstract? This court has said that a

merchantable title need not be free from every technical defect. See *Campagna v. Home Owners Loan Corporation,* 141 Neb. 429, 3 N. W. 2d 750. And further we have said that it is not necessary that such a title be shown to be bad, if there be doubt or uncertainty about it sufficient to form the basis of litigation. See *Shonsey v. Clayton,* 107 Neb. 695, 187 N. W. 113.

A merchantable title is a title which a man of reasonable prudence, familiar with the facts and the questions of law involved, would accept as a title which could be sold to a reasonable purchaser. See *Bliss v. Schlund,* 123 Neb. 253, 242 N. W. 436.

"The term 'marketable title' is difficult of definition, but, accepting the prevailing rule that a good title is a marketable title, a 'clear title,' 'merchantable' or 'marketable title' generally means a title which consists of both the legal and equitable title, and is free from reasonable doubt in law or in fact; not merely a title valid in fact, but one which can be readily sold to a reasonably prudent purchaser, or mortgaged to a person of reasonable prudence as a security for the loan of money; a title which a reasonable purchaser, well informed as to the facts and their legal bearings, willing and anxious to perform his contract, would, in the exercise of that prudence which business men ordinarily bring to bear on such transactions, be willing and ought to accept; * * * ." 66 C.J., sec. 534, p. 862. See, also, *Robinson v. Bressler,* 122 Neb. 461, 240 N. W. 564.

The trial court expressly found that the plaintiffs had not tendered an abstract of title reflecting a merchantable title in them or either of them, and dismissed plaintiffs' petition and entered judgment for defendant for the $2,000 paid down on the contract, with interest.

It appears to this court that no other judgment is possible under the law and the facts, for a purchaser cannot be made to buy a lawsuit in such a case, even if he might win in the end. A title to real estate, to be good, satisfactory or marketable, should be free from reasonable doubt, either in

law or in fact. The judgment of the district court is affirmed.

AFFIRMED.

COUNTY OF SARPY, APPELLEE, V. EDWARD C. WRIGHT ET AL., APPELLEES, EMIL A. FRICKE, APPELLANT.
19 N. W. 2d 146

FILED JUNE 1, 1945. No. 31910.

1. **Judicial Sales.** A purchaser at a judicial sale, by reason of his purchase alone, becomes a party to the proceedings and is concluded by the orders of the court entered therein.
2. **Taxation.** A redemption by the owner of real estate being foreclosed under section 77-2040, Comp. St. 1929, is required to be made in accordance with section 20-1530, Comp. St. 1929, which requires that the person entitled to redeem shall pay the amount of the decree, interest and costs, and, if sold to a person not a party to the suit, the person redeeming must pay in addition thereto interest at 12 per cent per annum on the amount of the purchase price from the date of sale to the date of redemption.
3. **Judicial Sales: TAXATION.** When an owner of real property sold at judicial sale for the payment of delinquent taxes purports to redeem the same by paying an amount less than that called for by the decree and the purchaser accepts the return and retains the amount of his bid from the redemption fund, such purchaser is estopped to deny the validity of the redemption so made.
4. **Abatement and Revival.** The refusal of the trial court to revive a cause of action in the name of the heirs of a deceased person is not prejudicially erroneous where it appears as a matter of law that the moving party has no rights which he can enforce against them.

APPEAL from the district court for Sarpy County: RALPH P. WILSON, JUDGE. *Affirmed.*

J. E. Strawn, for appellant.

Guy E. Tate, for appellee.

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

CARTER, J.

This is an appeal from an order denying the motion of Emil A. Fricke, appellant, for a revivor of the action against the heirs of Emil Schauland, deceased.

This controversy arose out of a tax foreclosure suit brought by Sarpy county to enforce collection of delinquent taxes levied against the property here involved and other properties similarly situated. The record shows that Emil Schauland was the owner of Lots 7 and 8, Block 8, South Papillion, against which the sum of $1,645.82 of delinquent taxes and court costs had accumulated. On June 12, 1941, the lots were sold under a decree of foreclosure entered by the district court for Sarpy county to Emil A. Fricke for $600. Fricke also purchased Lots 5 and 6, Block 8, South Papillion, for $15 each, making a total of $630 bid for the four lots. Pursuant to the requirements of the sheriff in conducting this sale, Fricke deposited his check for $315, 50 per cent of the amount bid, with the sheriff. On June 13, 1941, the day following the sale, Emil Schauland, the owner of the property, paid $600.40 to the clerk of the district court for the purpose of redeeming Lots 7 and 8. On June 18, 1941, the county, through its attorney, moved to confirm the sales of all properties sold, except Lots 7 and 8, and the sales of all except the two lots thus excluded were confirmed. It is evident that Lots 7 and 8 were excluded on the theory that a redemption as to them had been made.

On July 20, 1943, more than two years later, Fricke delivered his check for $600.40 to the sheriff of Sarpy county and filed an application for a confirmation of the sale of the property to him, and for a deed thereto, on the theory that a proper redemption of the property had not been had in that Schauland had paid in only the amount of the bid with interest and costs instead of the full amount of the taxes found to be due in the decree of foreclosure. Notice of this application was served on Schauland on August 12, 1943. On August 30, 1943, the death of Emil Schauland was suggested. On October 29, 1943, Fricke moved to revive the action and caused a conditional order of revivor to be is-

sued. Objections were filed to the application for a revivor. Upon a trial, the court denied a revivor of the action in the name of the heirs, and Fricke appeals.

We have repeatedly held that a purchaser at a judicial sale becomes a party to the action and is concluded by the orders of the court entered therein. The purchaser, Emil A. Fricke, therefore, became a party to the proceedings when he became the successful bidder at the sale. *Travelers Ins. Co. v. Thompson,* 140 Neb. 109, 299 N. W. 329; *Madison County v. Crippen,* 143 Neb. 474, 10 N. W. 2d 260.

A redemption by the owner of real estate being foreclosed under section 77-2040, Comp. St. 1929, is required to be made in accordance with section 20-1530, Comp. St. 1929, which requires that the person entitled to redeem shall pay the amount of the decree, interest and costs, and, if sold to a person not a party to the suit, the person redeeming must pay in addition thereto interest at 12 per cent per annum on the amount of the purchase price from the date of sale to the date of redemption. *Knox County v. Perry,* 142 Neb. 678, 7 N. W. 2d 475; *Madison County v. Crippen, supra.* It is urged that this holding relates to a matter of practice and can have no application to a case arising previous to the announcement of the rule. There is no merit in this argument. The interpretation of the statutes announced in the foregoing cases is the meaning contained in them from their inception and must be so considered in the determination of all matters affected by them. It is evident, therefore, that the purported redemption made by Schauland was not in conformity with the applicable sections of the statute under which this tax foreclosure was had.

The record shows, however, that Schauland paid in the amount of Fricke's bid for the purpose of redeeming the property from the tax foreclosure proceedings on the day following the sale. No objection was ever filed by Fricke to the application of Schauland to redeem. Fricke, by placing the highest bid, became a party to the suit and is concluded by any orders made. His payment of $300 on Lots 7 and 8 was returned to him on July 22, 1941, on which date he

made full payment on his purchase of Lots 5 and 6. He retained the check and acquiesced in the purported redemption of which he was charged with notice. For two years he made no effort to assert any rights he may have had because of the purported redemption. By receiving back the amount he paid as the successful bidder, and retaining it for more than a reasonable period of time, Fricke will be deemed to have voluntarily accepted the redemption money paid in by the owner and to have recognized the redemption as valid irrespective of whether it was in fact proper. Under such circumstances, the bidder is estopped to assert the invalidity of the redemption, or to claim any rights based on his bid at the foreclosure sale. Consequently, the motion of Fricke to have the sale confirmed and a deed issued to him shows on the face of the proceedings that he is entitled to no relief at the hands of a court of equity.

The question then arises whether the trial court erred in not reviving the action in the name of the heirs of Emil Schauland, deceased. Ordinarily, the proper procedure, under the circumstances such as we have here, is to grant the revivor without regard to the merits of the action. In view of the conclusion we have reached that the appellant is shown to have no rights which he can enforce in this proceeding, the failure of the trial court to revive this action is not prejudicially erroneous. Nothing could be gained by reversing the judgment and ordering the trial court to revive the action when the record shows as a matter of law that appellant is entitled to no relief.

For the reasons stated, the judgment of the district court is affirmed.

AFFIRMED.

HAROLD W. GLISSMANN, APPELLEE, V. F. H. BAUERMEISTER ET AL., APPELLEES, SERENA E. GRABOW ET AL., APPELLANTS.
19 N. W. 2d 43

FILED JUNE 1, 1945. No. 31885.

1. **Bailments.** A pledge is a bailment of personal property as a security for some debt or engagement, the property being redeemable on specified terms.
2. **Pledges.** In the case of a pledge the rights of the parties with respect to the property involved remain within the control of the original owner or pledgeor to the extent that he may terminate the pledgee's lien and right of possession by payment of the secured obligation.
3. **Appeal and Error.** Where a mandate of the supreme court makes the opinion of the court a part thereof by reference, the opinion should be examined in conjunction with the mandate to determine the nature and terms of the judgment to be entered or the action to be taken thereon.
4. **Trial.** Where the action to be taken as provided for in the preceding syllabus necessitates the taking of additional evidence to ascertain the status of the amounts due from an estate to parties who have pledged their interest therein, the lower court may proceed, if desirable, to appoint a master to take evidence, make findings therefrom, from which the court may enter a proper judgment to conform to the original opinion attached to and made a part of the mandate by reference.

APPEAL from the district court for Douglas County: FRANK M. DINEEN, JUDGE. *Reversed and remanded.*

Gray & Brumbaugh, for appellants.

S. L. Winters and *Oscar Doerr*, for appellee.

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

MESSMORE, J.

Appellant, Serena E. Grabow, filed a motion for judgment on the mandate of this court entered on October 6, 1941. The district court did not enter judgment on the mandate in conformity with the motion. Instead, it permitted the filing of further pleadings for and in behalf of the parties at interest, appointed a master commissioner

who held a hearing, took further testimony, and made findings from which it entered a judgment different than the judgment directed by this court as set forth in the mandate. Hence this appeal.

To determine this appeal, a brief summary of the history of this protracted litigation is necessary. The facts are adequately set forth in the companion cases of *Glissmann v. Orchard,* 139 Neb. 344, 297 N. W. 612, and the case of *Glissmann v. Bauermeister,* 139 Neb. 354, 297 N. W. 617 and 299 N. W. 225. A brief summary of the pertinent facts set forth in the foregoing opinions discloses in substance, the following: That Henry C. Glissmann owned the Valley View Golf Course property which had been foreclosed and the property was being sold. Through negotiations with his sister, Serena E. Grabow, arrangements were made for her to bid in the property which she did, bidding therefor $23,725 which was a higher bid than the bid of Edmond H. Orchard. Henry C. Glissmann was unable to furnish the money to cover the bid made by his sister. Through further negotiations between Serena E. Grabow and Edmond H. Orchard, the bid of Serena E. Grabow was assigned to Edmond H. Orchard, and the sale of the property was confirmed in him.

Exhibit 33, appearing throughout the record and as set forth in *Glissmann v. Orchard, supra,* substantially in the following language, is a contract between Serena E. Grabow and her brother, Henry C. Glissmann, and provides: " * * * where as it is to the mutual advantage of the contracting parties hereto, that the first party, pledge her share in the estate of the late Hans C. Glissmann (her father), as security in connection with other securities offered so that the parties hereto can procure and complete, a certain deal in which E. H. Orchard, of Omaha, Neb., is to take a deed to the 70 acres included in what is known as the Valley View Golf Links, and to lease the same back to Serena E. Grabow, and give a five year option to buy same, at a price mentioned in contract entered into with Edmond H. Orchard, the option to be assigned to Tena E. Glissmann,

wife of Henry C. Glissmann, now therefore:" that in consideration of Serena E. Grabow pledging her share in her father's estate, Henry C. Glissmann would sell, assign and set over to her and her heirs all right, title and interest of Henry C. Glissmann in his father's estate and grant her and her heirs the right to receive, receipt for, and acknowledge all papers in connection with the share of Henry C. Glissmann in the estate of his father, and in consideration of his assignment to her of all of his interest in the estate of his father she agrees to execute any instruments necessary to pledge her share in the estate of her father.

It developed that Serena E. Grabow pledged $5,500 of her share of her father's estate to Edmond H. Orchard, and in order to obtain the option, as provided for in the contract, an additional pledge was made by Tena E. Glissmann, wife of Henry C. Glissmann, of five acres, for the purpose of the pledge, valued at $1,500. The option agreement entered into between Edmond H. Orchard and his wife and Serena E. Grabow and her husband March 28, 1929, provided for a lease of the property to Serena E. Grabow for five years commencing January 1, 1929, and terminating December 31, 1933, and Serena E. Grabow was to pay an annual rent of $1,650, and all taxes and assessments levied or assessed against the property, and have the right to redeem the property as provided for in the contract for $26,000. The option agreement having been assigned to Tena E. Glissmann, she then had the right to redeem under the terms of the contract. See *Glissmann v. Orchard, supra.*

Part of the estate of Hans Glissmann consisted of a contract wherein he had sold certain real estate to what is known as the Happy Hollow Club, Inc., the amounts evidencing the purchase to be paid in to his estate in installments. These installments constituted interests of his daughter, Serena E. Grabow, and his son, Henry C. Glissmann in the estate. Henry C. Glissmann assigned his interest in his father's estate to his wife, Tena E. Glissmann, on October 15, 1928, and she assigned this interest, November 3, 1930, to their son, Harold W. Glissmann. See *Glissmann v. Bauermeister, supra.*

Harold W. Glissmann brought an action in equity against Serena E. Grabow and several other defendants to obtain certain money held by the Happy Hollow Club and trustees thereof. Serena E. Grabow interpleaded and asked that she be awarded the funds and credits claimed by the plaintiff, and other funds and credits claimed to be due her from the defendants Orchard. This court held that Harold W. Glissmann was not entitled to the payments due on his father's share which the father had pledged to his sister; that in the case of *Glissmann v. Orchard, supra,* Tena E. Glissmann was entitled to redeem the homestead property by complying with the terms of the contract. See *Glissmann v. Bauermeister, supra.* The case of *Glissmann v. Bauermeister, supra,* was reversed and dismissed.

On motion to clarify the original opinion, a supplemental opinion was filed by this court July 3, 1941. The supplemental opinion recites in part: "Therefore, in addition to the entry of the judgment heretofore rendered, and supplemental thereto, judgment is hereby entered in favor of Serena E. Grabow on her counterclaim and cross-petition against the plaintiff and defendants Henry C. Glissmann and Tena E. Glissmann for all moneys due from defendant Happy Hollow Club, Inc., * * * " and the trustees, the Happy Hollow Club and others are named that might have money in their possession representing the one-eighth interest of Henry C. Glissmann in the estate of Hans C. Glissmann, "and the district court is further directed to enter judgment in favor of Serena E. Grabow and against defendants Henry C. Glissmann and Tena E. Glissmann for such sums as that court finds have been received by Henry C. Glissmann, Tena E. Glissmann and Harold W. Glissmann from and after March 28, 1929, together with interest thereon from date so received, and which said sums represent payments on the aforesaid share of Henry C. Glissmann in the estate of Hans C. Glissmann."

The mandate of this court dated October 6, 1941, contained the judgment as heretofore set out in the supplemental opinion, and directed the district court to proceed in

conformity with the judgment of this court. The mandate had attached to it a certified copy of the opinion of this court and incorporates the same therein by reference.

On October 13, 1942, Serena E. Grabow filed a motion for an order fixing and determining the amount of money and interest thereon received by Harold W. Glissmann, Henry C. Glissmann and Tena E. Glissmann from and after March 28, 1929, and forming a part of the share of Henry C. Glissmann in the estate of Hans C. Glissmann, and prayed judgment in conformity with the mandate with interest at 6 per cent per annum. To this motion Harold W. Glissmann and defendants Henry C. Glissmann and Tena E. Glissmann filed an answer, counterclaim and prayer for equitable relief, praying the district court to determine the status of the accounts of the parties and render judgment for any excess above one full share of her father's estate received by Serena E. Grabow. Thereafter there were numerous motions and other pleadings filed which need not be set out. We set forth only that part of the subsequent proceedings to the filing of the motion for judgment on the mandate as may be pertinent to a determination of this appeal.

The testimony before the master discloses: That from and after March 28, 1939, Henry C. Glissmann, Tena E. Glissmann and Harold W. Glissmann have received the following payments from the estate of Hans Glissmann, deceased: Principal, $3,508.76 and that the interest amounts to $2,617.24, or a total of $6,126; that on April 4, 1938, Harold W. Glissmann received a payment of $138.50 and the interest on this amount from April 4, 1938 to June 10, 1943 amounting to $43.08; that the appellant received through the trustee Bauermeister, from her own share in the estate of Hans Glissmann, $3,508.76, and the further sum of $1,801.15, and from March 24, 1936 to October 13, 1942, $1,713.82, and that one Moeller, as trustee, had on hand for the appellant, in the Federal Savings and Loan Association, $803.15 from which should be deducted $76.77 interest which was earned while deposited in the Savings and Loan account, leaving a net balance of $726.48, held by Moeller

for the appellant, but subject to her assignment to Edmond H. Orchard, and on April 4, 1938 the appellant received $138.50 to apply on her share in her father's estate; that on June 2, 1942 the clerk of the district court of Douglas county paid unto the appellant the sum of $3,282.90; that this money was held by the clerk for Henry C. Glissmann and received as part of his share in his father's estate; that Edmond H. Orchard, from and between August 24, 1933 and April 12, 1938, authorized Bauermeister and Moeller, as trustees, to release unto the appellant $2,700 of the $5,500 interest assigned by her to Orchard as collateral for the lease of the Valley View Golf Course; that at the time of the hearing, $800 of the balance of $2,800 was held by Moeller, and that the balance of $2,000 had not been collected by the trustee, Moeller. All of the rent, taxes and insurance to Orchard on the golf club lease were paid by Henry C. Glissmann, he being in possession of the premises up to the spring of 1940. Henry C. Glissmann vacated the premises about March 1, 1942. Therefore, Serena E. Grabow had a contingent liability for the rent, taxes and insurance for the years 1940 and 1941 on the Valley View Golf Course.

The recapitulation shows that the amount received by the Glissmanns from the share of Henry C. Glissmann in the estate of Hans Glissmann, with interest, amounted to $6,307.58, and the amount received by the appellant, Serena E. Grabow, from her share in the estate of Hans Glissmann was $7,162.23, and the additional amount of $3,282.90 paid to her by the clerk of the district court out of Henry C. Glissmann's share in his father's estate. The appellant was content to accept the figures as to the amounts received by Harold W. and Tena E. Glissmann as assignees of Henry C. Glissmann of his share in his father's estate, and prays for a judgment for such amount under the theory of the judgment pronounced in the supplemental opinion of *Glissmann v. Bauermeister, supra.* The amounts received by Serena E. Grabow do not seem to be seriously questioned by her.

The court approved the report of the master and entered a judgment thereon for Henry C. Glissmann against Serena

E. Grabow, the appellant, for the sum of $3,282.90, without interest until termination of the liability of the appellant under the golf course lease for 1940, 1941 and up to March 1, 1942, and that no execution issue until after termination of such liability of Serena E. Grabow; that Henry C. Glissmann recover the balance, if any, paid for the share of Henry C. Glissmann in the estate of his father, after deducting therefrom any payments required to be made by Serena E. Grabow personally to satisfy any liability due to Edmond H. Orchard on account of the golf course lease, without interest until after termination of the lease liability, and that no execution shall issue until after said time; that if Henry C. Glissmann terminates or causes to be terminated the liability of Serena E. Grabow on the golf course lease with Edmond H. Orchard, without any deduction from the collateral now in the hands of Edmond H. Orchard and without any payment by her personally, that then and in that event, or after Henry C. Glissmann has reimbursed her, or she has reimbursed herself for any rental or other liability under said lease out of the $3,282.90 now in her hands, and any balance payable for the share of Henry C. Glissman in said estate, then Serena E. Grabow shall reassign to Henry C. Glissmann all of his interest in the estate of his father which she held as collateral. The costs of the action, the fees of the master and counsel of Serena E. Grabow were ordered to be paid by Henry C. Glissmann.

There are certain offsets and interest charges appearing in the court's decree which we will not here set forth, but which, from an analysis of the evidence in the instant case, seem to be an equitable and proper adjustment of such matters.

The district court found that in this court's opinion, *Glissmann v. Bauermeister, supra,* on page 361 this court held that by exhibit 33, the contract heretofore set out in the opinion, entered into by the two parties, Serena E. Grabow and Henry C. Glissmann, he *pledged* to her all of his rights and share in the estate of his father if she would enter into the contract with Edmond H. Orchard.

There is a clear distinction between a pledge and an assignment and passing title of an interest in an estate. "A pledge * * * is a bailment of personal property as a security for some debt or engagement, the property being redeemable on specified terms, and subject to sale in the event of default." 41 Am. Jur., p. 582, sec. 2. " * * * in the case of a pledge, the rights of the parties with respect to the property involved remain within the control of the original owner or pledgeor to the extent that he may terminate the pledgee's lien and right of possession by payment of the secured obligation." 41 Am. Jur., p. 583, sec. 3.

The debt or liability secured by Henry C. Glissmann's pledge is the liability of Serena E. Grabow to Edmond H. Orchard on a lease option agreement, and when the extent of that liability has been determined in dollars and cents and Serena E. Grabow has been restored her security pledged to Edmond H. Orchard intact or with any diminution made good by Henry C. Glissmann and his assigns, Henry C. Glissmann or his assigns are entitled to a return of such of the remaining part constituting his interest in his father's estate held in accordance with his pledge.

This court, in *Glissmann v. Bauermeister, supra,* said in its opinion that Serena E. Grabow was entitled to the possession of the money paid on the share of Henry C. Glissmann to the extent of the obligation of Serena E. Grabow to Edmond H. Orchard. In connection with the foregoing, it becomes necessary to determine the effect of the judgment pronounced by this court in the supplemental opinion of *Glissmann v. Bauermeister, supra,* as it appears in the mandate and in connection with the original opinion of this court.

In *State ex rel. Johnson v. Hash,* 145 Neb. 405, 16 N. W. 2d 734, this court held: "Where a mandate of the Supreme Court makes the opinion of the court a part thereof by reference, the opinion should be examined in conjunction with the mandate to determine the nature and terms of the judgment to be entered or the action to be taken thereon."

In the opinion in *State ex rel. Johnson v. Hash, supra,* it

is said: "It will be noted that the mandate makes the opinion of the court a part thereof by reference. Under such circumstances, the opinion of the court can properly be examined in determining the nature and terms of the judgment to be entered or action to be taken. This seems to be the rule when the opinion is made a part of the mandate * * * ." See cases cited therein.

It is apparent from the original opinion of *Glissmann v. Bauermeister, supra,* that this court did not find that Serena E. Grabow should receive both shares, but that each party had pledged his or her share in their father's estate. "Where the mandate is ambiguous or uncertain the lower court may apply the usual rules of interpretation in its construction and may examine the opinion of the appellate court to ascertain the true intent and purpose of the mandate." 5 C. J. S., sec. 1963, p. 1494. In applying this rule and reading the original opinion in *Glissmann v. Bauermeister* in the light of what was necessarily involved and under consideration, and without giving its language a strained construction, it is obvious that the judgment pronounced in the supplemental opinion is ambiguous when the original opinion is properly considered.

Under the circumstances the district court, to determine the judgment that should be entered, took into consideration the original opinion in *Glissmann v. Bauermeister, supra.* Further to determine the status with reference to the pledge of Serena E. Grabow and Henry C. Glissmann, the court appointed a master to take testimony and make findings therefrom and from which, as shown by the master's report, determine the amount paid in by the trustees and others from the estate of Hans Glissmann and for the benefit of Serena E. Grabow and Henry C. Glissmann and his assigns.

There is some contention made by the appellees that the five acre tract, wherein Tena E. Glissmann's equity was fixed at $1,500 which she pledged to Serena E. Grabow who in turn pledged the same to Edmond H. Orchard so that the lease option agreement could be consummated, be returned

to Tena E. Glissmann or, in the alternative, she be given a lien thereon, subject to an amount paid by Edmond H. Orchard to complete the purchase of the five acres, and interest be determined on the amount for 16 years and be awarded to Tena E. Glissmann.

The lease option agreement provides for a deed to Edmond H. Orchard for the 70 acres, and likewise provides for the terms by which the 70 acres may be redeemed. Tena E. Glissmann, having the right to redeem, failed to comply with the lease option agreement. The record discloses that Henry C. and Tena E. Glissmann retained possession of the premises under the lease option agreement for five years, and under the moratorium law for at least an additional seven years. Under the circumstances there is no obligation on the part of Serena E. Grabow or Edmond H. Orchard to account to Tena E. Glissmann for such pledge.

We conclude that any money up to the amount that Serena E. Grabow is entitled to receive as her share of her father's estate and now in her hands should be credited to her; that any remaining liability chargeable to Serena E. Grabow by Edmond H. Orchard by reason of the lease option agreement be finally determined, and such amount as the court may find be paid from the share of Henry C. Glissmann and his assigns that they have in the estate of Hans Glissmann, and the remaining pledged property, if any, under the control of Edmond H. Orchard be released by him; that Henry C. Glissmann and his assigns pay all costs in the district court and in the supreme court, including the fees awarded the master and the attorney for Serena E. Grabow in the district court. Any moneys thereafter remaining in the hands and under the control of Serena E. Grabow, the trustees, or the court, constituting the share of Henry C. Glissmann and his assigns in the Hans Glissmann estate, should be paid to Henry C. Glissmann or his assigns as the court may order. The report of the master is approved and the cause remanded for further proceedings in accordance with this opinion.

REMANDED FOR FURTHER PROCEEDINGS.

CHAPPELL, J., dissents.

KINGSTON H. MILLER, APPELLANT, V. HARVEY H. KNIGHT ET AL., APPELLEES.

19 N. W. 2d 153

FILED JUNE 8, 1945. No. 31934.

1. **Appeal and Error: EQUITY.** While this court is obliged, in an equity action, to try the issues of fact *de novo* upon the evidence and reach an independent conclusion without reference to the findings of the district court, yet when the testimony of witnesses upon the material issues involved is in irreconcilable conflict, this court will consider the fact that the trial court observed the witnesses and their manner of testifying and must have accepted one version of the facts rather than the other.
2. **Quieting Title.** When the allegations of a pleading, praying that the title to the real estate involved be quieted in the pleader, allege that the pleader is in possession of the premises, and the court finds from the evidence that such allegation is true, a court of equity has jurisdiction of the subject-matter and may properly quiet the title as to all parties to the action.
3. **Equity.** A prayer for general equitable relief is as broad as the pleadings and the equitable powers of the court.

APPEAL from the district court for Keith County: J. LEONARD TEWELL, JUDGE. *Affirmed.*

Beatty & Clarke, for appellant.

L. A. DeVoe, Beeler, Crosby & Baskins, for appellees.

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

CARTER, J.

This is an injunction suit, commenced by Kingston H. Miller, to restrain alleged trespasses by Harvey H. Knight and others acting through him, upon lands claimed by Miller as owner. The answer of Knight, who will hereafter be referred to as the defendant, denied plaintiff's right to possession and alleged the ownership of the land in himself. The plaintiff by cross-petition then claimed that he purchased the land and that the title thereto was taken in the name of the defendant as security for amounts loaned to plaintiff by the defendant in making the purchase. Plain-

tiff alleged that he had repaid all of said monies advanced by the defendant, and that defendant now held the title of the property in trust for him. The trial court found for the defendant Knight on all of the issues in controversy, and plaintiff appeals.

The land primarily involved in this suit will be referred to as section 35. Prior to 1927 it was owned by one Cady. In November, 1927, plaintiff took an option to purchase the land from Cady for $3,200, $100 to be paid in cash, $966.67 on March 1, 1928, and the balance to be evidenced by a mortgage for $2,133.33 for five years at 5 per cent per annum. The evidence is in conflict as to whether plaintiff or defendant furnished the $100 cash payment. The parties agree, however, that on March 1, 1928, plaintiff could not raise the $966.67 due on that date and that defendant paid Cady the amount. Defendant thereupon took title to the property by deed from Cady and executed the note and mortgage to Cady for the $2,133.33 remaining due. It is the contention of defendant that he bought the land and arranged with the plaintiff that if plaintiff would pay him the principal and interest advanced and pay off the note and mortgage he would deed the land to him. Plaintiff claims that defendant loaned him the money and took the deed in defendant's name as security therefor. When the mortgage came due in 1933, plaintiff was unable to pay it off, and defendant caused it to be extended three years, at the end of which period of time defendant paid off the mortgage. It is admitted that defendant made all interest payments during the life of the mortgage and paid the taxes which fell due on the land.

Plaintiff contends that he repaid all amounts of interest to the defendant and made annual payments which reduced the principal to approximately $380, although he claims to have agreed with defendant that the amount remaining due was $460. Plaintiff claims to have paid varying amounts of principal and interest during the life of the mortgage, which he attempted to establish by a record book alleged to have been kept by him during the years involved. The rec-

ord book is in evidence and has the appearance of having been made at one time for the purposes of the trial. In explaining the source of the funds and how they were paid to the defendant, the evidence was so unsatisfactory as to be of little weight. We think the trial court was correct in finding that the record book was not kept currently throughout the happening of the events which it purports to represent, and that it has little or no weight as evidence. We are also of the opinion that the trial court was correct in holding that the evidence will not sustain a finding that the interest payments were fully paid to the defendant, although there is evidence that a part of some of them *were* paid. In this respect, plaintiff claims to have made annual payments in amounts varying from $50 to $600. No checks were given for any of these amounts, plaintiff contending that he sold cattle, hogs and farm produce to raise the money and carried the cash on his person until he paid it over to the defendant. All this the defendant denies. We think the trial court was justified in finding that plaintiff did not sustain the burden of proving the payments which he claims he made.

It is evident throughout the record that the affairs of plaintiff and those of his parents, Fred M. C. Miller and Anna Miller, were confused by the mutual interests of each in the affairs of the others. The defendant dealt with the Millers and made loans and signed notes for them for many years. It appears that in May, 1944, Anna Miller sold three quarters of land in section 2 to the defendant for $4,141. It is the contention of plaintiff that the balance of the indebtedness owing by him on section 35 was withheld by defendant from the purchase price of the three quarters in section 2, and from that time on that he was the sole owner of the land and entitled to a deed from the defendant. A brief review of the contentions of the parties with reference to the settlement in 1944 seems necessary.

It appears that, at the time of the purchase of the three quarters of land in section 2, Anna Miller had borrowed $900 from the defendant. There remained due on this note

at the time of the purported settlement the sum of $381.99. Plaintiff contends that defendant, with the assistance of his banker, determined that there was $460 remaining due the defendant on the monies advanced by him on the transaction involving section 35. This, with two checks totaling $3,300 appearing in the record, makes the full payment of $4,141 for the three quarters in section 2, the 99 cents being "knocked off," according to the plaintiff, to make it even.

The defendant contends that in 1936, when the mortgage became due after the extension of three years had elapsed, the agreement was cancelled, the interests of plaintiff terminated, and the land leased to plaintiff for a rental of $100 per year. It is defendant's contention that he purchased the three quarters in section 2 for $3,300 and the cancellation of all indebtedness owed by the Millers. This indebtedness, according to the defendant, consisted of $250 for lease rentals on section 35, $50 on a school lease, and the balance being the amount due on notes held by defendant which appear in the record. It is true that defendant's evidence is not very satisfactory as to how the sum of $841 was fixed. On the other hand, it was not material to the issue if he purchased the three quarters in section 2 for $3,300 and the cancellation of all existing indebtedness between the parties, as he testified. Defendant's evidence is that the calculation of the interest and the determination of the amount remaining due was made by D. D. Cole, the banker at Keystone. The figures of Cole are not in the record, and how he arrived at the amount shown as the consideration in the deed is not explained. It is not possible to verify with exactness the contentions of either of the parties on this phase of the controversy by the record. The evidence is in direct conflict in so far as the material issues are concerned. All during the time that plaintiff was making the payments of interest and principal claimed to have been made by him, he was borrowing money for his own use. He has no records and cannot show with any degree of satisfaction that the payments were made as claimed. The trial court observed the witnesses, their demeanor and

conduct while testifying, and evidently came to the conclusion that the evidence, considered as a whole, supported the version testified to by the defendant. While we are obliged in an equity action to try the issues of fact *de novo* upon the evidence in the bill of exceptions and reach an independent conclusion without reference to the findings of the district court, it is a rule often announced that, where evidence of persons appearing in court as witnesses on material issues is in irreconcilable conflict, this court will consider the fact that the trial court observed their conduct and demeanor and gave credence to the testimony of some rather than to the contradictory testimony of others. *Otto v. L. L. Coryell & Son,* 141 Neb. 498, 3 N. W. 2d 915; *Chitwood Packing Co. v. Warner,* 138 Neb. 800, 295 N. W. 882. After giving effect to the foregoing rule, we conclude that the evidence supports the contentions of the defendant.

The defendant testifies that plaintiff agreed to and did surrender possession of the lands in sections 2 and 35 by the agreement made in May, 1944. The defendant says, and plaintiff does not deny it, that they drove over these lands and agreed upon the property, personal in character, which was to go with the land. On May 24, 1944, defendant leased some of the farm lands to one Ray Miller, who in turn employed one McClain to list it to corn. Defendant went upon the land thereafter and did some fencing after the contract was allegedly made. These facts are consistent with defendant's story that he not only was the owner of the property but that immediate possession had been given him by the agreement made in May, 1944. We think the evidence as a whole, when considered with the rules hereinbefore announced relative to the consideration given the findings of the trial court on evidence which is in irreconcilable conflict, sustains the defendant's version. This in turn disposes of plaintiff's contention that the court lacked the jurisdiction to enter the decree it did for the reason that the evidence showed the defendant to be out of possession, a fact, if true, that would ordinarily limit defendant to an action at law in ejectment. But when the evidence shows

as here, that defendant was in possession, the jurisdiction of the court to quiet the title is established.

Both parties invoked the powers of a court of equity. In *Frank v. Smith,* 138 Neb. 382, 293 N. W. 329, we said: "Each party in the case at bar is seeking equitable relief and each invoking the aid of a court of equity. The court properly denied a trial by jury." In the present case, no demand for a jury was made. Both parties sought equitable relief. The parties proceeded to trial on the theory that the suit was an equitable one. While we think the action was one in equity, the plaintiff is in no position to claim error prejudicial to his rights, even if it was not.

There is no rule more axiomatic than that, where a suit in equity is properly brought and the court has jurisdiction of the subject-matter and all parties to the action, it is the duty of the court to adjudicate all questions and rights presented by the pleadings in order to do full justice to all the parties to it. *Rakow v. Tate,* 93 Neb. 198, 140 N. W. 162; *First Trust Co. v. Airedale Ranch & Cattle Co.,* 136 Neb. 521, 286 N. W. 766.

Plaintiff urges also that the judgment is not supported by the pleadings. We think it is. Plaintiff's petition alleges his ownership of the land and that defendant was a trespasser thereon. He sought an injunction restraining defendant from entering upon the lands or otherwise interfering with his ownership and possession of them. Defendant answered and filed a cross-petition. He admitted plaintiff's possession as vendee in possession and lessee from March 1, 1928, to May 10, 1944. He alleges an agreement by which all differences were adjusted, possession surrendered, and all previous agreements cancelled as of May 10, 1944. We are of the opinion that this allegation is sufficient to support a finding from the evidence that defendant was in possession of section 35 when this action was commenced. In *School District v. Wood,* 144 Neb. 241, 13 N. W. 2d 153, we said: "A prayer for general relief in an equity action is as broad as the pleadings and the equitable powers of the court." See, also, *Johnson v. Radio Station WOW,* 144 Neb.

432, 14 N. W. 2d 666. It is a notable fact that both plaintiff and defendant prayed "for such other and further relief as may be just and equitable."

For the reasons stated, we conclude that the judgment of the trial court is correct, and it is affirmed.

AFFIRMED.

WILLIAM LAMBERTH, APPELLANT, V. OMAHA AND COUNCIL BLUFFS STREET RAILWAY COMPANY, APPELLEE.
19 N. W. 2d 164

FILED JUNE 8, 1945. No. 31888.

1. **Trial.** An instruction which sets out a state of facts, and authorizes a verdict for one of the parties upon a finding of such facts, is erroneous, unless it includes every controverted fact necessary to sustain a verdict in favor of such party.
2. ———. Where such instruction is complete in itself, the error therein is not cured by the giving of other instructions which correctly state the law or the facts essential to a recovery by such party.

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

Henry F. Pedersen, for appellant.

Kennedy, Holland, DeLacy & Svoboda, for appellee.

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

CHAPPELL, J.

This action was filed in the district court for Douglas county to recover damages for personal injuries alleged to have been sustained by plaintiff in a collision between plaintiff's truck and defendant's street car. Trial to a jury resulted in a verdict for defendant upon which the trial court entered judgment. Motion for new trial was overruled and plaintiff appealed, assigning as error that instructions given by the trial court numbered 1 to and including 7, respec-

tively, were erroneous, and that the verdict and judgment entered thereon are not sustained by the evidence. We find that instruction number 6 was erroneous and prejudicial to plaintiff's rights but that all of plaintiff's other assignments of error are without merit.

The plaintiff adduced competent evidence in his behalf substantially in conformity with and supporting the material allegations of his petition. It is in substance that on December 19, 1942, at about 11:20 p. m., plaintiff was driving his lighted one and one-half ton truck north on North Twenty-fourth street in Omaha, Nebraska. It was cold, snowing at intervals, and the streets were icy and slippery. He was driving north astride defendant's northbound track at approximately 15 miles an hour. A car parked at the east curb suddenly pulled out to the left, eight or ten feet in front of him. Plaintiff blew his horn and swerved his truck left to avoid striking the car. To avoid going too far to the left he then put on his brakes and stopped, headed north and to the east on defendant's southbound track. At that time the evidence is that defendant's lighted street car traveling south was more than a block away from him. Plaintiff then started to pull his truck off the southbound track but because of the icy condition of the street the wheels slipped, his truck was stalled and would not move off the track. By that time defendant's street car was approximately 100 to 125 feet away coming toward him without slackened speed at approximately 20 miles per hour. Plaintiff's wheels on the truck continued to spin and the back end of it slid around to the east until the truck stood in a north and westerly direction. The street car gong was sounded and although the street car could have been stopped within 40 or 50 feet it came on without slackened speed and the left front of it crashed into the plaintiff's truck with great force and violence shoving it back 18 or 20 feet to the southeast and against a parked car. There was evidence adduced by and in behalf of plaintiff that he suffered painful, serious and permanent injuries and damages in the collision.

Defendant then adduced competent evidence substantial-

ly in conformity with and supporting the material allegations of its answer. Its witnesses admit that it was cold, blustery and snowing at times. Its evidence is in substance that the southbound track is slightly down grade to the point of collision. A block or a block and a half away the motorman driving defendant's street car south, 15 or 20 miles an hour, saw the lights of plaintiff's truck driving north astride the northbound track on its own side of the street at a rate of speed estimated to be 15 miles an hour. The motorman was watching and suddenly plaintiff's headlights were shining into the motorman's eyes and plaintiff's truck was headed northwest over on the southbound track almost directly into the street car, 40, 50 or 75 feet away. The motorman sounded the gong, put on his brakes, slowed down to 10 or 12 miles an hour and the impact came, throwing plaintiff's truck into a parked car to the southeast. The motorman testified that plaintiff did not stop or slow down and was in motion at the time of the impact. He never saw the car of plaintiff stopped with its wheels spinning 100 or 125 feet away. Other witnesses who were passengers on the street car testified that plaintiff's truck was in motion at the time of the impact but were unable to estimate his speed. The motorman testified that at 15 to 20 miles an hour it was possible to stop the street car within 40 or 50 feet by the use of the instruments at his disposal. There was evidence adduced by defendant that the injuries and damages suffered by plaintiff in the collision were not as serious or extensive as claimed by him.

Bearing all this evidence in mind, together with the issues presented by the pleadings, we have examined the instructions about which plaintiff complains. In doing so we are unable to find that instructions numbered 1, 2, 3, 4, 5 or 7 given by the trial court were prejudicially erroneous to any rights of plaintiff requiring reversal. In view of the disposition of the case hereafter made we do not consider it necessary to discuss them separately.

However, instruction number 6 about which plaintiff complains is a more serious matter. In that instruction,

which is complete in and of itself, the trial court told the jury: "If you find that the plaintiff ran into the street car of the defendant, in that event plaintiff's negligence would bar his recovery and your verdict would have to be for the defendant."

In conformity with rules which are well established in this jurisdiction we have only recently held that: "An instruction which sets out a state of facts, and authorizes a verdict for one of the parties upon a finding of such facts, is erroneous, unless it includes every fact necessary to sustain a verdict in favor of such party, unless the omitted facts are conclusively established." "Where such instruction is complete in itself, the error therein is not cured by the giving of other instructions which correctly state the law or the facts essential to a recovery by such party." *In re Estate of House,* 145 Neb. 670, 17 N. W. 2d 883. See, also, *Sanders v. Chicago, B. & Q. R. Co.,* 138 Neb. 67, 292 N. W. 35.

A mere reading of instruction number 6 demonstrates that it does not include every fact necessary to sustain a verdict in favor of the defendant and an examination of the record discloses that the omitted facts were controverted and not conclusively established.

In *Kor v. American Eagle Fire Ins. Co.,* 104 Neb. 610, 178 N. W. 182, this court held: "An instruction which ignores the principal issues in the case, and authorizes the jury to base their verdict upon their finding as to a single controverted fact not decisive of those issues, is erroneous." See, also, *Knapp v. Chicago, K. & N. R. Co.,* 57 Neb. 195, 77 N. W. 656. The issues for decision by the jury were the alleged negligence of the parties as respectively charged in plaintiff's petition and defendant's answer. The mere fact alone that plaintiff's truck may have been moving forward at the time of the impact or collision with defendant's street car would not in and of itself under the circumstances presented be negligence *per se* and prevent plaintiff's recovery or require the jury to return a verdict for defendant. By instruction number 6 the trial court in effect told the jury that it did.

We find that the instruction as given by the trial court comes squarely within the rules above quoted. Clearly it was erroneous and prejudicial to plaintiff's rights. Therefore the judgment is reversed and the cause is remanded for a new trial.

REVERSED.

The following opinion on motion for rehearing was filed January 18, 1946. *Former opinion modified; former judgment vacated and set aside and judgment affirmed.*

1. **Trial.** It is proper for a trial court to instruct a jury as to the legal effect of facts in proof and where, under the theory upon which this case was tried by the parties, the determination of a single fact requires a verdict for or against one of the parties, it is proper for the court to so instruct.
2. **Opinion Modified.** Former opinion, *ante* p. 213, 19 N. W. 2d 164, modified to the extent shown in this opinion.

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

CARTER, J.

This is an action to recover for personal injuries sustained by plaintiff in a collision between plaintiff's truck and defendant's street car. In a previous opinion *ante*, p. 213, 19 N. W. 2d 164, we reversed a judgment for the defendant and remanded the case for a new trial because of error in the giving of instruction number six. After a further consideration of the case we are of the opinion that we were in error in holding that the instruction was erroneous under the record we have before us.

The facts stated in our previous opinion correctly reflect the record and they will not again be detailed here except so far as is necessary to a proper determination of the case.

The theory upon which plaintiff seeks to recover is that he turned out to pass a car pulling out from the curb and, after proceeding 18 to 20 feet beyond the car, came to a complete stop on defendant's streetcar track. He says that in attempting to get off the track his wheels spun around on the snow and ice and that he was unable to move because

of a lack of traction. Plaintiff contends that the streetcar did not slacken its speed and crashed into his truck, when by stopping the streetcar, which the operator had ample time to do, the accident could have been avoided.

The theory of the defendant is that the plaintiff suddenly turned out to pass the car pulling out from the curb, turned to the left side of the street onto the southbound streetcar track without slackening his speed and ran into the streetcar.

It seems to us that the two theories upon which the case was tried conflict in such a manner that the controlling question is whether the truck was traveling up the car track as alleged by the defendant or stalled on the track as alleged by the plaintiff. The trial court simplified the issues by stating in effect that if the truck was traveling north on the streetcar track and ran into the streetcar, the defendant should recover, but if the car was stalled on the track and the streetcar ran into it, plaintiff should recover. The language of the instructions by which the court sought to submit this issue to the jury is contained in instructions six and seven as follows:

"If you find that the plaintiff ran into the street car of the defendant, in that event plaintiff's negligence would bar his recovery and your verdict would have to be for the defendant."

"If you find from a preponderance of the evidence that the plaintiff's truck was stalled upon the track in front of the southbound street car, but that its position of danger could not in the exercise of ordinary care have been discovered by the motorman in time to have averted a collision by the appliances on hand, the plaintiff would not be entitled to recover; or that the truck appeared in its stalled condition in such close proximity to the street car that the motorman was confronted with a sudden emergency not due to his own negligence and had insufficient time to determine with certainty the best appliances to be used to stop the car, but pursued a course of action to avoid the accident such as a person of ordinary prudence placed in like position might

choose, the motorman would not be guilty of negligence even though he did not adopt the wisest choice, and if under those conditions you find that the motorman used ordinary care there would be no liability on the part of the defendant. If on the other hand, the plaintiff's situation on the track could in the exercise of ordinary care have been discovered by the motorman in time to have averted the accident, and the plaintiff has established all the propositions set out in Instruction No. 3, the defendant would be liable and your verdict would be for the plaintiff."

It seems clear to us that the evidence adduced in support of the issues upon which the case was tried resolved itself into one simple question: Was the truck traveling up the street or was it stalled on the streetcar track at the time of the collision? If the jury found the former to be the fact it is clear that plaintiff was guilty of contributory negligence sufficient to defeat his claim, as the court stated in its instruction number six. If the jury found the latter to be the fact then instruction number seven should be applied. This method of simplifying an issue when the evidence justifies is to be commended, not only because of its brevity but also because it makes plain to the jury the point before it for determination. The trial court is charged with the duty of informing the jury of the legal effect of facts which they find to be true from the evidence. This duty is no less the function of the court when the controlling facts are simple than when they are complicated and it in no way conflicts with the rule announced in *Kor v. American Eagle Fire Ins. Co.*, 104 Neb. 610, 178 N. W. 182. The jury found that the truck was traveling north on the streetcar track and ran into the streetcar. The court properly informed the jury by instruction number six that if they found such fact to be true their verdict as a matter of law should be for the defendant. The jury heard the evidence, they knew what the conflicting contentions of the parties were, and the court's instructions six and seven were so plain that the jury could not have been misled.

We now hold that instruction number six was not erro-

neous under the evidence appearing in the record before us. All other errors assigned are correctly disposed of in our former opinion. We hereby vacate our former order reversing the judgment of affirmance and remanding the cause, and enter a judgment of affirmance in its stead.

AFFIRMED.

CHAPPELL, J., dissenting.

I do not agree with the majority and briefly state the reasons. As recently as *In re Estate of House,* 145 Neb. 670, 17 N. W. 2d 883 (in conformity with *Sanders v. Chicago, B. & Q. R. Co.,* 138 Neb. 67, 292 N. W. 35; *Bauer & Johnson Co. v. National Roofing Co.,* 107 Neb. 831, 187 N. W. 59; *Standard Distilling & Distributing Co. v. Harris,* 75 Neb. 480, 106 N. W. 582; *Knight v. Denman,* 64 Neb. 814, 90 N. W. 863; and *Knapp v. Chicago, K. & N. R. Co.,* 57 Neb. 195, 77 N. W. 656), this court held: "An instruction which sets out a state of facts, and authorizes a verdict for one of the parties upon a finding of such facts, is erroneous, unless it includes every fact necessary to sustain a verdict in favor of such party, unless the omitted facts are conclusively established." It was also held: "Where such instruction is complete in itself, the error therein is not cured by the giving of other instructions which correctly state the law or the facts essential to a recovery by such party."

In connection with the latter rule it is aptly stated in *Knight v. Denman, supra*: "Other instructions may supply details or amplify and explain. But where an instruction, as in this case, covers the whole field explicitly, and purports to tell all that is required to bar the plaintiff's action, the further instructions are simply in conflict with it and can only produce confusion and misunderstanding."

Instruction No. 6 given by the trial court in the case at bar reads in toto: "If you find that the plaintiff ran into the street car of the defendant, in that event plaintiff's negligence would bar his recovery and your verdict would have to be for the defendant."

Clearly, standing alone, it is an instruction complete within itself and I am of the opinion that it does not state even

a single controverted fact necessary to sustain or correctly expound a proposition of law which could sustain a verdict and judgment for defendant, although it erroneously purports to do so. In such a situation the instruction is prejudicially erroneous by virtue of the above well-established authorities and cases cited therein which also hold that even if other instructions given correctly state the law or the facts essential to a recovery the error is not remedied thereby.

It appears to me that the majority opinion has arrived at a contrary conclusion in the case at bar without in any manner distinguishing, modifying, or overruling the former opinions of this court which uniformity of procedure and justice should demand. As a matter of course such cases usually have two theories and it is the duty of the trial court to fully and correctly instruct the jury upon both of them.

For the reasons heretofore stated, I believe that the cause should have been reversed and remanded for a new trial.

YEAGER, J., concurs in the dissent.

CITY OF LINCOLN, NEBRASKA, APPELLANT, V. FIRST NATIONAL BANK OF LINCOLN, APPELLEE.

19 N. W. 2d 156

FILED JUNE 8, 1945. No. 31918.

1. **Statutes.** Resort to contemporaneous construction of a statute by administrative bodies is neither necessary nor proper where the language used is clear, or its meaning can be ascertained by the use of intrinsic aids alone.
2. ———. When the court of last resort has judicially construed a statute, the rule permitting recourse to contemporaneous construction of the statute by administrative or executive officials charged with the enforcement of such statute is inapplicable.
3. **Municipal Corporations.** Each deposit of city funds in a bank is a contract express or implied between the city and the bank.
4. ———. Such a contract is void by virtue of section 3, art. VII,

home rule charter, City of Lincoln, 1917, and section 15-603, R. S. 1943, while a member of the city council or officer of the city is a stockholder, director or officer of such bank.

APPEAL from the district court for Lancaster County: JOHN L. POLK, JEFFERSON H. BROADY, and RALPH P. WILSON, JUDGES. *Reversed and remanded with directions.*

Max Kier, A. A. Whitworth, and *Jack Devoe,* for appellant.

Cline, Williams & Wright, for appellee.

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

CHAPPELL, J.

The city of Lincoln sought a declaratory judgment in the district court for Lancaster county to determine whether it was legal to continue the deposit of its funds in the defendant First National Bank of Lincoln, Nebraska, while a member of the city council was a stockholder, director or officer of the bank. The question arose by reason of identical provisions contained in section 3, art. VII, home rule charter, City of Lincoln, 1917, and section 15-603, R. S. 1943, applicable to cities of that class. The charter and the statute each provide in part: "No officer of the city shall be interested directly or indirectly in any contract to which the city, or anyone for its benefit, is a party; and such interest in any contract shall avoid the obligation thereof on the part of the city. * * * Nor shall any officer receive any pay or perquisite from the city other than his salary * * * ."

The district court by its decree found that the deposits of city funds in defendant bank were not prohibited by either of such provisions, notwithstanding that a member of the council was a stockholder, director and officer of the bank. Motion for new trial was overruled and the city appealed, contending that the decree is not sustained by the evidence and is contrary to law. We sustain these contentions.

The matters presented for decision involve only questions of law. There is no dispute concerning the facts. On Au-

gust 8, 1938, the city council by resolution authorized and empowered the city treasurer, their appointee, to deposit city funds in any one bank within the city of Lincoln in an amount up to the paid-up capital and surplus of the bank, not to exceed ninety per cent of the value of securities to be pledged to secure such deposits. The resolution also designated classes of securities permitted to be used by the bank. On May 15, 1939, the council adopted a resolution designating certain banks, including defendant, as sole and only depositories for city funds.

By arrangement with the city treasurer since 1938, division as to time and amount of deposits has been upon a basis of 15 months in proportion to capital and surplus, four months of which were allotted to the Continental National Bank, four to the National Bank of Commerce and seven to defendant bank. At the time of trial defendant bank was being used for a depository and would continue to be so used for approximately seven months. Deposits are made daily, recorded in a regular bank book and withdrawn by check. Suburban banks have water and light department moneys on deposit but do not have active checking accounts.

Stanley Maly, a stockholder, director and vice-president of defendant bank, was elected and qualified as a member of the city council on May 12, 1941, for a four year term. Subsequently the city treasurer has deposited city funds in defendant bank and it has accepted them claiming it was legally entitled to do so. At the time of the trial there was on deposit with defendant approximately $1,250,000 of city funds and deposits will continue to be made in the future if legal to do so. To secure the city funds defendant has placed in escrow with the Federal Reserve Bank of Kansas City, Missouri, $1,000,000 in United States Treasury bonds at 2¾ per cent, due December 15, 1965.

The evidence offered by defendant consists of a stipulation received subject to the objection that it was immaterial and irrelevant. This evidence is that from 1911 to 1913, from 1917 to 1921 and from 1929 to 1931 certain mayors of the city were stockholders and directors of banks, including

defendant, in which city funds were deposited during that period. In this connection the position of defendant is that this evidence discloses an administrative interpretation of the statute involved contrary to the city's contentions both before and after the adoption of the home rule charter which should be considered by the court in giving the provisions involved their true construction.

At the outset it should be said that the resolutions authorizing the city treasurer to deposit city funds in any one bank upon certain conditions of security and the later designation of defendant bank as one of the sole depositories for city funds were passed by the city council long before Stanley Maly became a councilman. The sole question presented here is whether the First National Bank, of which Stanley Maly is admittedly a stockholder, director and officer, is prohibited from receiving deposits of city funds because he is now a member of the city council.

It must be conceded that the pleadings present a justiciable controversy under the declaratory judgment act. We have held that the term "person" used in the declaratory judgment act is broad enough to include the state or any subdivision thereof. *State ex rel. Smrha v. General American Life Ins. Co.*, 132 Neb. 520, 272 N. W. 555. In both *Dill v. Hamilton*, 137 Neb. 723, 291 N. W. 62, and *Lynn v. Kearney County*, 121 Neb. 122, 236 N. W. 192, this court approved the views expressed in *State v. Grove*, 109 Kan. 619, 201 Pac. 82, wherein it was said: "It is hardly conceivable that any fundamental principal of our government, beyond legislative control, prevents two disputants, each of whom sincerely believes in the rightfulness of his own claim, but each of whom wishes to abide by the law whatever it may be determined to be, from obtaining an adjudication of their controversy in the courts without one or the other first doing something that is illegal * * * if he is mistaken in his view of the law."

We turn then to decision of the important question, whether a bank deposit constitutes a contract within the prohibitions of the charter and statute. It seems clear un-

der the circumstances that if a deposit in a bank is a contract and an officer of the city has an interest therein that such a contract comes squarely within the charter and statute. If a deposit is a contract it is one made by volition of the parties as distinguished from one that is ministerial, and it is not one of common benefit or privilege open to all citizens upon the same terms or standard rates such as water or electricity furnished by the city. The electors and Legislature had a right to include the provisions here involved in the charter and statutes which should not and cannot be voided in a proper case by judicial construction.

We find that the question presented must be answered affirmatively. It is said in 7 Am. Jur., sec. 405, p. 286: "The term 'deposit,' when used in connection with a banking transaction, denotes a contractual relationship ensuing from the delivery, by one known as the 'depositor,' of moneys, funds, or things into the possession of the bank, which receives the same upon the agreement to pay, repay, or return, upon the order or demand of the depositor, the moneys, funds, or equivalent amount, or things, received; this agreement on the part of the bank is usually a tacit one and implied * * * ." Also in 9 C. J. S., sec. 267b, p. 545: "The relation of banker and depositor is created by contract." This court has held that the relation of banker and depositor can only be created by contract express or implied. *State v. Citizens State Bank,* 117 Neb. 358, 220 N. W. 593. See, also, *Citizens State Bank v. Worden,* 95 Neb. 53, 144 N. W. 1064, wherein there appears an affirmance of the contractual nature of a deposit in a bank.

The resolution of the council giving the city treasurer authority to deposit and the designation by the council of defendant bank and others as the sole and only depositories are only resolutions of the council. Such a resolution standing alone is not a contract. The former was simply a grant of authority to the treasurer, and the latter a limitation of his authority naming and designating certain banks of which defendant was only one. The actual deposit of city funds as authorized in a designated bank creates the con-

tractual relationship between the city and the particular bank in which the deposits are made. In this connection each daily deposit gives rise to a new and continuous contractual relationship between the city and the bank until the undertaking of the bank to pay upon proper demand by check according to general usage in such cases or according to special stipulation with the city is fully performed. See *Citizens State Bank v. Worden, supra.*

Manifestly the defendant is deriving a benefit or profit from the deposits of the city funds. The defendant in its answer so admitted. As a business institution it could not ordinarily be expected to receive and disburse so large an account without prospect of profit commensurate with the service required. Naturally, any person who was a stockholder, director or officer thereof would be both directly and indirectly financially interested in any contractual arrangement which returned a profit to his corporation. However, we call attention to the fact that if the contract is of a kind prohibited by law it is immaterial whether the officer of the city actually profited from the contract or whether he was actually influenced by his interest. The question is whether there was any contract to which the city or any one for its benefit is a party in which the officer of the city was interested directly or indirectly by virtue of an opportunity to benefit or profit therefrom.

In *Schenectady Illuminating Co. v. Board of Supervisors of Schenectady County,* 151 N. Y. Supp. 830, which was affirmed in 151 N. Y. Supp. 1012, 166 App. Div. 758, it was said: "The contract is unenforceable, not because a public officer has failed in his duty, but because he has some interest in conflict with his duty. The interest referred to is not necessarily a money interest, nor is it an interest sufficiently large to induce a man generally honest to disregard his duty. It may be indirect. It is such an interest as is covered by the moral rule: No man can serve two masters whose interests conflict. *Smith v. City of Albany, supra.* Too great refinement of reasoning must not be indulged to uphold a contract against this provision of the law on the ground that the interest is so little or so indirect."

In *Neisius v. Henry,* 142 Neb. 29, 5 N. W. 2d 291, we had occasion to examine a statutory provision which uses language almost identical with the city charter and statute involved. That statute, now sec. 17-611, R. S. 1943, provides in part: "No officer of any city or village shall be interested, directly or indirectly, in any contract to which the corporation, or any one for its benefit, is a party; and any such interest in any such contract shall avoid the obligation thereof on the part of such corporation, nor shall any officer receive any pay or perquisites from the city other than his salary * * * ." In the opinion last above cited it was said: "It is argued by defendants that this statute does not by its terms, or by implication, render the contract void, but that on the contrary it is carefully worded so as to make it voidable only. If the contract be voidable only under this statute, some affirmative act on the part of a city would be required to terminate liability. We think the statute clearly expresses a contrary meaning. The use of the words 'and any such interest in any such contract shall avoid the obligation thereof on the part of such corporation' does not import any affirmative action on the part of the city to avoid the obligation of the contract. The interest of the officer in the contract avoids *ipso facto* the obligation thereof on the part of the city." We therein also quoted from and followed the construction placed upon the same statute in *Village of Bellevue v. Sterba,* 140 Neb. 744, 1 N. W. 2d 820, wherein it was said: "Where a statute prohibits an officer of a village from having an interest in any contract with the village, and avoids the obligation of any such contract so made, it is void for all purposes, and any funds paid out because of such purported contract may be recovered back at the suit of the village or of a taxpayer suing in its behalf." In *Neisius v. Henry, supra,* we also disapproved the reasoning in *Call Publishing Co. v. City of Lincoln,* 29 Neb. 149, 45 N. W. 245, in the following language: "The reasoning indulged in fails to give effect to the words 'and any such interest in any such contract shall avoid the obligation thereof on the part of such corporation'. To 'avoid the obliga-

tion' is plain language and clearly implies relief from all liability, not only as to unperformed portions of the contract, but from the whole transaction from its very inception."

In *Hobbs, Wall & Co. v. Moran,* 109 Cal. App. 316, 293 Pac. 145, it is said: "Such transactions are held to be void whether they arise from the relationship of an agency which is public, quasi public or private in its nature. The theory of the law is that a councilman or other officer of a city sustains the same fiduciary relationship toward the citizens of his community that a trustee bears to his cestui que trust * * * ."

The statement is made in 44 C. J., sec. 2176, p. 93: "Cases are numerous wherein a municipality was brought into contractual relation with firms or companies, of which a councilman or other city officer was a member, stockholder or employee, and the courts have usually applied the general doctrines to the undoing of such contracts, just as though the officers were individually interested." As stated in 37 Am. Jur., sec. 274, p. 897, "A charter or statutory provision which prohibits a municipal officer from being directly or indirectly interested in a contract with the municipality has been held to extend to contracts between the municipality and a corporation of which a municipal officer is a stockholder or stockholder and officer. Such a contract is void and incapable of ratification even though the municipal officer has no official connection with the contract and no knowledge of its existence." See, also, *Ferle v. City of Lansing,* 189 Mich. 501, 155 N. W. 591, L. R. A. 1917C 1096 and annotation L. R. A. 1917C 1099.

As said in *Hardy v. City of Gainesville,* 121 Ga. 327, 48 S. E. 921: "A stockholder in a private corporation clearly has an interest in its contracts; and if the city can not make a contract with the officer himself, it can not make it with a corporation in which such officer is a stockholder." In 2 Dillon, Municipal Corporations (5th ed.), sec. 773, p. 1143, it is stated in somewhat different language, "At common law and generally under statutory enactments, it is now es-

tablished beyond question that a contract made by an officer of a municipality with himself, or in which he is interested, is contrary to public policy and tainted with illegality; and this rule applies whether such officer acts alone on behalf of the municipality, or as a member of the board of council. * * * The fact that the interest of the offending officer in the invalid contract is indirect and is very small is immaterial." See, also, *James v. City of Hamburg*, 174 Ia. 301, 156 N. W. 394.

We can only conclude that the deposits of the City of Lincoln in defendant bank are prohibited by virtue of section 3, art. VII of the home rule charter and section 15-603, R. S. 1943, while a member of the city council or officer of the city is a stockholder, director or officer of the bank. In arriving at this conclusion we have not overlooked the former executive or administrative construction of the charter and statute presented by defendant. We find that it is immaterial and of no effect under the circumstances presented. In *Miller v. Iowa-Nebraska Light & Power Co.*, 129 Neb. 757, 262 N. W. 855, it was held by this court that: "Resort to contemporaneous construction of a statute by administrative bodies is neither necessary nor proper where the language used is clear, or its meaning can be ascertained by the use of intrinsic aids alone." Also, it was held in *Ehlers v. Farmers Mutual Ins. Co.*, 130 Neb. 368, 264 N. W. 894: "When the court of last resort has judicially construed a statute, the rule permitting recourse to contemporaneous construction of the statute by administrative or executive officials, charged with the enforcement of such statute, is inapplicable." See, also, 59 C. J., sec. 607, p. 1022; sec. 613, p. 1036.

We find that the language of the charter and statute is clear and unambiguous. Further both in *Village of Bellevue v. Sterba, supra*, and *Neisius v. Henry, supra*, this court has held under a statute, almost identical therewith, that a contract of a city in which an officer thereof has an interest is illegal and void for all purposes. The plain import of such provisions already unequivocally adjudicated cannot

be changed or avoided by an erroneous administrative construction.

For the reasons heretofore stated the judgment of the district court is reversed and remanded with directions that the trial court enter a judgment finding and adjudging that the deposit of city funds in defendant bank is illegal and void while an officer of the city is either a stockholder, officer or director of defendant bank. An injunction will not be granted since deposits by the city may be discontinued at any time and we assume, as a matter of course, that both the city and the bank will abide by the final decision of the court.

REVERSED, WITH DIRECTIONS.

WILLIAM J. KENNEDY, APPELLEE, V. CORNHUSKER HYBRID COMPANY, APPELLANT.
19 N. W. 2d 51

FILED JUNE 8, 1945. No. 31926.

1. **Sales.** The seller's refusal to warrant is not repugnant to, nor avoided by, the provisions of the Uniform Sales Act relative to implication of warranty.
2. ———. When the seller has expressly refused to warrant the property in certain particulars, there can be no implied warranty of a character covering those particulars.
3. ———. A disclaimer of warranty may be operative when used in or upon containers in which the subject matter of the sale is sold or invoices for the price of the goods.
4. ———. The buyer's lack of notice or knowledge of a disclaimer of warranty does not avoid its effect in the absence of express representations, bad faith, fraud or concealment, if the disclaimer is so expressed that the buyer ought to be aware of it.

APPEAL from the district court for Buffalo County: E. G. REED, JUDGE. *Reversed and dismissed.*

Baird & Baird and *Blackledge & Sidner,* for appellant.

Dryden & Jensen, for appellee.

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

CHAPPELL, J.

Plaintiff brought this action in the district court for Buffalo County, Nebraska, alleging substantially in his petition that on or about May 8, 1943, he purchased from defendant a bushel of hybrid seed corn, No. 5892, 20 flat, relying upon defendant's newspaper and radio advertisements, and the representations of defendant's agent that the seed would be hybrid seed corn of that grade and if planted would return a much increased yield over ordinary seed corn. He alleged that relying on such representations, he planted the seed but it did not germinate or yield a crop in conformity with the representations made, because it was in fact inbred seed, not hybrid seed of the quality purchased, as a result of which he suffered damages.

Defendant for answer admitted that plaintiff purchased from defendant one bushel of hybrid seed corn, No. 5892, 20 flat, on or about May 8, 1943; denied generally all other allegations of plaintiff's petition, and alleged in substance that the seed was purchased by plaintiff from defendant upon express terms and conditions that defendant did not give any warranty, express or implied, as to the productiveness, yield, or quality of the crop produced therefrom. Defendant alleged that at the time of the sale and delivery of the seed, there was delivered to and accepted by plaintiff a dated written instrument describing the seed, together with the price, and that plainly printed on the face thereof were the following terms and conditions: "NOTICE: We give no warranty, express or implied, as to the productiveness of the seed used to supply this order and we assume no responsibility for the yield or quality of the crop produced by use thereof." Defendant alleged also that there was attached to the bag containing the seed a tag upon which was plainly printed: "NOTICE, NON-WARRANTY—We give no warranty, express or implied, as to the productiveness of any seeds or corn we sell and we will not be in any way responsible for the crop."

Plaintiff for reply denied generally the allegations of defendant's answer and denied specifically that at the time of the sale and delivery of the seed to plaintiff there was delivered to and accepted by him a written instrument, or that there was any tag attached to the bag, as alleged in defendant's answer.

Upon trial to a jury, each of the parties moved for a directed verdict at the conclusion of all the evidence. Thereupon the trial court found that plaintiff was entitled to recover from defendant, and by its instructions submitted to the jury only the question of the amount of damages recoverable. The jury returned a verdict for plaintiff in the amount of $360, upon which judgment was entered. Motion for new trial was overruled and defendant appealed, assigning as sole error the finding of the trial court that the disclaimer of warranty was not a sufficient and complete defense. We find that the assignment should be sustained.

There is no dispute in the evidence upon the salient facts. We first call attention to the fact that there is no evidence whatever in the record that defendant's agent made any representations as alleged by plaintiff at the time of the purchase of the seed, or at any other time. Likewise, there is no competent evidence that any express representations were ever made by defendant or its agents in the newspapers or over the radio. With reference to the alleged representations made by defendant's agent, plaintiff testified: "Well, he didn't say anything. I just paid him and took it." Further plaintiff testified: " * * * I never have had much to do with hybrid corn, so I just took this neighbor's word that he had been raising this corn and it was so good, and I thought I would just try a bushel of it." Referring to defendant's alleged radio advertising, plaintiff testified: "They guaranteed it to be fine corn and everything,—and they do yet." And as to newspaper advertisements, plaintiff testified: "Well, it was all supposed to be fancy, good corn." It will be observed at once that this is a case wherein no express representations as to productiveness or yield of crop were made upon which plaintiff could predicate a cause of action.

The other material evidence is in substance that the plates on plaintiff's corn lister were worn, and for that reason he needed large kernel seed corn, or his lister would plant the crop too thick. One of his good farmer friends told him about this seed and gave him the number, 5892, 20 flat. The number 20 flat represents the size of the seed. The plaintiff went to defendant's seed store about 10:00 p. m. on Saturday night and asked the agent if he had it in stock. The agent said that he did. At plaintiff's request the agent then opened the bag and plaintiff saw that it was nice looking, large, flat kernel corn. He thereupon purchased it and gave his check for it.

Plaintiff testified that the agent showed him the bag; and that he did not pay any attention to whether the bag had a tag on it, but he supposed it did. The agent did not specifically call his attention to the tag. The agent, however, testified that the tag was sewed on the bag; and that he had to look at the tag to get the number of the seed purchased by plaintiff. After paying for the seed, the agent asked plaintiff to sign a sales slip to show the company that he had sold the seed to plaintiff. The agent did not read the instrument to him. However, plaintiff says that he signed without reading it because he did not have his glasses with him. The agent testified that he gave a copy of the instrument to plaintiff, but plaintiff cannot remember whether he did or not.

It is interesting to note that the disclaimer of warranty appeared on this instrument immediately above the signature of plaintiff, preceding which were the printed words, "Accepted By" in comparatively large type. The word "NOTICE" appeared at the head of the disclaimer in capital type. The rest of the disclaimer was printed in smaller but plainly visible and readable type. Sewed upon the bag was an attractive red, yellow and green tag, size three by six inches, upon one side of which there was printed in capital type the words, "NOTICE-NON-WARRANTY." The second disclaimer immediately followed in smaller but plainly visible and readable type.

Plaintiff took the bag of seed home and put it in his garage until planting time. Thereafter he opened the bag and planted the seed in a separate tract beside other segregated kinds of hybrid seed corn purchased elsewhere, all of which plaintiff testified produced abundantly while the seed purchased from defendant, although planted upon soil of like fertility and given the same care, did not produce a comparable yield.

Plaintiff first contends that the disclaimer of warranty has no application because his action is for breach of contract for failure to deliver the variety of seed purchased, and not for breach of warranty. This is not based upon the premise that he did not get the specific number which he asked for at the time of purchase, but that he purchased hybrid seed corn and was delivered inbred seed corn. This contention cannot be sustained because the fundamental difference between the hybrid seed corn purchased and the inbred seed corn delivered was the quality of its productiveness and not in kind or variety. Plaintiff received the kind and variety purchased by him. He purchased seed of a certain number and he was delivered seed of that number. He purchased what he thought would be highly productive seed of a certain kind and variety, which was in fact not highly productive but was of the kind and variety purchased by him.

Plaintiff's case is not comparable with those where a party purchased timothy and was delivered millet, or purchased alfalfa and was delivered sweet clover, or, as stated by plaintiff, purchased a cow and was delivered a horse. Cases cited by plaintiff in support of his contention are obviously distinguishable and have no application to the case at bar. The distinction is clearly demonstrated by a statement which appears in one of the cases relied upon by plaintiff. In *Rocky Mountain Seed Co. v. Knorr*, 92 Colo. 320, 20 Pac. 2d 304, it was said: "It will be observed that defendant's (buyer's) contention is not that the delivery was short in quantity, or was lacking in productiveness, or was an inferior kind of alfalfa, or that the crop failed, but rather

that on a purchase of alfalfa seed plaintiff made delivery of sweet clover seed. * * * And that is the distinction which the authorities recognize."

The Nebraska Uniform Sales Act, by chapter 69, article 4, R. S. 1943, clearly recognizes the almost uniform rule that one who sells personal property may effectually disclaim as to any warranty in connection with the sale. Section 69-471, R. S. 1943, provides: "Where any right, duty or liability would arise under a contract to sell or a sale by implication of law, it may be negatived or varied by express agreement or by the course of dealing between the parties, or by custom, if the custom be such as to bind both parties to the contract or the sale." It is stated in 55 C. J., sec. 707, p. 730: "The seller's refusal to warrant is not repugnant to, nor avoided by, the provisions of the Uniform Sales Act relative to implication of warranty." And, "When the seller has expressly refused to warrant the property in certain particulars, there can be no implied warranty of a character covering those particulars; * * * ."

The statement is made in 55 C. J., sec. 698, p. 710: "The seller of property may, by disclaimer of warranty, refuse to warrant the property sold, unless a disclaimer of warranty is contrary to statutory provisions; * * * ." And, "Any disclaimer of warranty so expressed that its existence and nature is understood by the parties to the sale as constituting a term of the bargain operates thus, as, for instance, where the buyer is given to understand that he must take the property, if at all, on his own judgment, and a provision of nonwarranty may be operative when used in letter heads, or containers in which the subject matter of the sale is sold, on bills for the price of the goods, in notes for the purchase price, or in catalogues."

Nevertheless, plaintiff argues that a disclaimer is of no avail to the seller where it does not appear that the same was brought to the attention of the buyer and that he purchased in view thereof. There is not entire unanimity in the decisions upon that question. A minority of the courts seem to hold that actual notice or knowledge of a disclaimer

is necessary. The majority, however, logically hold that the buyer's lack of actual notice or knowledge of a disclaimer of warranty does not avoid the disclaimer if under the circumstances the buyer ought to be aware of it, and there is no competent evidence of express representations, bad faith, fraud, or concealment, as in the case at bar.

Such a rule is comparable to the general rule which applies to other writings, such as notes or contracts. In this connection this court, in a case involving an insurance contract, recently placed its approval upon statements appearing in *Metropolitan Life Ins. Co. v. Alterovitz*, 214 Ind. 186, 14 N. E. 2d 570, which were adopted from *Sun Fire Office v. Wich*, 6 Colo. App. 103, 39 Pac. 587, to the effect that "There is no reason, in contracts of insurance, that a party should be, by law, relieved from the duty of exercising the same ordinary care and prudence that is required in every other business transaction. It is the duty of every man to read what he signs. His failure to do so will or should not relieve him, or allow him to avoid the contract." In adopting the rule this court said: "After a careful consideration of the authorities we conclude that there is no sufficient reason in contracts of insurance why a party should be relieved from the duty of exercising the ordinary care and prudence that would be exacted in relation to other contracts." *Gillan v. Equitable Life Assurance Society*, 143 Neb. 647, 10 N. W. 2d 693, 148 A. L. R. 496.

It seems only logical and consistent that the same rules should apply with equal force respecting written disclaimer of warranty which is a part of the purchaser's contract. To hold otherwise would place a weapon of injustice in the hands of the purchaser and destroy the effect of such disclaimers generally, since the purchaser could as well avoid it by simply denying all notice or knowledge whether actually given or not and regardless of the circumstances presented.

There is ample authority supporting that view. In discussing the matter of notice or knowledge of disclaimer, it is said in 55 C. J., sec. 698, p. 712: "The buyer's actual ig-

norance of the disclaimer does not avoid its effect if it is so expressed that he ought to be aware of it." It is discussed in broader language in 16 A. L. R., note b, p. 882: "It has been held that, in order for a disclaimer of warranty clause to have the effect of precluding any warranty, it is not essential that the buyer should have actual knowledge of it, it being sufficient in this regard if the clause was printed upon the package containing the articles, or upon the invoice, or in the catalogue, so that it might have come to his attention."

In *Ross v. Northrup, King & Co.*, 156 Wis. 327, 144 N. W. 1124, a case similar in many respects to the one at bar, the court said: "The defendant having the right to sell without warranty, it seems clear that it did all that could in reason be required of it to advise the purchaser of the condition upon which the seed was sold. Of course it is easy to imagine other things which it might have done which would be better calculated to give notice, but if those things had been done and had proved inefficacious, still other things might be suggested which would surely acquaint Morton with the conditions of sale. The business was transacted by mail. Where the book from which the order was given, the shipping tag, and the invoice, all stated these conditions, it would seem to be unreasonable to hold that any blame attached to the defendant if Morton failed to observe all of these things. * * *

"Mr. Morton could not close his eyes to the information that was literally staring him in the face and then hold the defendant liable because he did so. In matters of contract one must observe what he has reasonable means of knowing. The law for the protection of persons even against fraud will not be extended to those who 'having the means in their own hands neglect to protect themselves. * * * The law requires men, in their dealings with each other, to exercise proper vigilance, and apply their attention to those particulars which may be supposed to be within reach of their observation and judgment and not close their eyes to the means of information which are accessible to them.'

Mamlock v. Fairbanks, 46 Wis. 415, 417, 418, 1 N. W. 167; *Bostwick v. Mut. L. Ins. Co.*, 116 Wis. 392, 400, 89 N. W. 538, 92 N. W. 246.

"And where a purchaser is put upon inquiry as to the quality of the thing offered for sale, he is bound to know what is discoverable in regard thereto by the exercise of ordinary care, and he cannot 'close his eyes to defects which are before him or to information which is at hand.' *Warner v. Benjamin*, 89 Wis. 290, 62 N. W. 179.

"In the absence of fraud 'a man cannot relieve himself from the obligation of a written agreement by saying he did not read it when he signed it, or did not know what it contained.' *Deering v. Hoeft*, 111 Wis. 339 (87 N. W. 298), and cases cited on page 343; *Steffen v. Supreme Assembly*, 130 Wis. 485, 487, 110 N. W. 401."

We believe that the authorities cited herein reflect the more logical and just rules of law. They are clearly applicable to the situation presented here. We find, therefore, under the circumstances that defendant's disclaimers of warranty were valid and binding upon the plaintiff. We find also, since plaintiff's complaint goes entirely to the matter of lack of productiveness, and his damages consisted in failure to get the yield of crop expected, or as many bushels of corn as the purchase should ordinarily have produced, it comes within the scope of defendant's disclaimers.

In this connection there is an interesting case similar in many respects to the one at bar. The case is squarely in point upon the question of the scope of a disclaimer of warranty as to productiveness and responsibility for the yield or quality of the crop produced therefrom. In *Lumbrazo v. Woodruff*, 256 N. Y. 92, 175 N. E. 525, 75 A. L. R. 1017, it was said in the opinion: "In raising Japanese onion sets the result is not always certain, and the examination of the bulbs will not disclose their inherent vitality. The business is more or less an undertaking to bargain with nature; the elements are not always the same. Therefore, the defendants were unwilling to assume the risk of the implied warranty connected with the sale of Japanese onion sets, * * *

and insisted that if the plaintiff purchased three hundred bushels of these sets, he must take the risk of the crop, provided, of course, that the defendants had resorted to no fraud, unfair dealing or negligence amounting to undue enrichment. This clause was, therefore, made a part of the contract: 'We give no warranty, express or implied, as to description, quality, productiveness, or any other matter, of any seeds sent out, and will be in no way responsible for the crop.' The words cover the facts of this case. The defendants did not warrant that the seeds or sets were Japanese onion sets; *neither did they warrant their productiveness.* (Italics ours.) As stated above, the principal quality of Japanese onion sets is their ability to multiply, or their productiveness. There was to be no guarantee of these qualities. The plaintiff's only damage consisted in the failure to get the crop he expected or as many bushels of onions as the purchase should have produced.

"Neither party was obliged to enter into this contract, and there is no public policy which prevents adult persons of sound mind making such agreements as they please, not prohibited by statute, or contrary to natural justice and good morals. This court and other courts have recognized the validity of agreements limiting or excluding implied warranties." Thereafter followed reversal of recovery by the buyer plaintiff and dismissal of his complaint.

For the reasons heretofore stated, we conclude that the trial court should have sustained defendant's motion for directed verdict at the conclusion of all the evidence and entered a judgment for defendant. Therefore, the judgment of the trial court is reversed and the case is dismissed.

REVERSED AND DISMISSED.

CLYDE L. LICKING, APPELLEE, V. HAYS LUMBER COMPANY, APPELLEES, STATE OF NEBRASKA, APPELLANT.
19 N. W. 2d 148

FILED JUNE 8, 1945. No. 31938.

1. **Taxation: CORPORATIONS.** All occupation fees assessed against domestic corporations for profit under the provisions of section 24-1703, Comp. St. 1929, were, by reason of the provisions of section 24-1712, Comp. St. 1929, prior to the 1943 amendment thereto, a lien upon all the property of the corporation from and after the time they were determined and assessed in the Secretary of State's office.
2. ———: ———. When so determined and assessed in the Secretary of State's office it constituted notice to all parties having or claiming any rights in or to such property.
3. **Judicial Sales.** A foreclosure sale of lands and tenements, unless the decree otherwise provides, transfers to the purchaser every right and interest in the property of all the parties to the action.

APPEAL from the district court for Thomas County: WILLIAM F. SPIKES, JUDGE. *Affirmed as modified.*

Walter R. Johnson, Attorney General and *Robert A. Nelson,* for appellant.

Johnson & Johnson, for appellee.

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

WENKE, J.

This action was commenced in the district court for Thomas county by Clyde L. Licking, as plaintiff. The purpose of the action is to quiet plaintiff's title in and to certain lands located therein. Among the defendants was the state of Nebraska, which has appealed from a general finding in favor of the plaintiff.

For the purpose of this opinion the appellant will be referred to as the state and appellee as the plaintiff.

Since the provisions of the Compiled Statutes of 1929 are applicable to the facts of this case they will be referred to rather than the Revised Statutes of 1943, except when it is necessary to refer to subsequent amendments.

The Hays Lumber Company, a corporation organized for profit, was incorporated under the laws of this state on January 15, 1916. On February 16, 1925, it became the owner of the lands here involved. General taxes for the state and its political subdivisions were assessed against these lands for the years of 1925 and 1926. They remained unpaid and were sold to J. B. Gibson on November 7, 1927. He was issued a tax sale certificate. This certificate he assigned to D. P. Wetzel. The holder of this certificate paid the 1927 and 1928 taxes assessed against these premises after the same became delinquent.

In each of the years of 1926 and 1927, pursuant to the provisions of section 24-1703, Comp. St. 1929, the Secretary of State assessed against the Hays Lumber Company, a corporation, an occupation fee of $70 based on its paid-up capital stock. On August 1 of each of said years there was, pursuant to the provisions of section 24-1713, Comp. St. 1929, added thereto, because of the corporation's failure to pay such occupation fee, the sum of 15 per cent or $10.50, making a total for each of said years in the sum of $80.50. Pursuant to the provisions of section 24-1722, Comp. St. 1929, the Secretary of State did, on December 23, 1927, send by registered letter to the company at its last named address a notice of the occupation tax which was due and advised that if the delinquent occupation tax was not paid within 90 days the corporation would be dissolved. The corporation failed to pay the occupation fee and accordingly on March 23, 1928, the Secretary of State dissolved the corporation.

On September 9, 1932, D. P. Wetzel commenced a foreclosure of these lands on the basis of the tax sale certificate which has heretofore been referred to. In this action he did not make the state of Nebraska a party. Pursuant to decree entered on March 13, 1933, a sale was had on January 20, 1934, and the property sold to D. P. Wetzel. This sale was confirmed on March 12, 1934, and a sheriff's deed executed to the purchaser on August 17, 1935.

The property was on September 5, 1935, conveyed by the

purchaser to Margaret L. Corkin and she conveyed it to the plaintiff on November 8, 1943.

In 1943 the legislature, by Legislative Bill 368 which appears as chapter 54, Laws 1943, at page 217, amended section 24-1722, Comp. St. 1929. This law is now section 21-323, R. S. 1943, and the amendment is as follows: "*Provided,* however, occupation taxes existing and delinquent on August 28, 1943, shall cease to be a lien as against any mortgagee, pledgee, purchaser or judgment creditor unless a notice of the lien is filed by the Secretary of State, within one year after the taking effect of this act, with the county clerk of the county wherein the personal property sought to be charged with such lien is situated, and with the county clerk or register of deeds of the county wherein the real estate sought to be charged with such lien is situated." Pursuant thereto the Secretary of State filed its notice of lien in the office of the county clerk of Thomas county on May 29, 1944.

Was the occupation fee assessed against the Hays Lumber Company by the Secretary of State a lien on the lands in question of which a purchaser had notice?

Section 24-1712, Comp. St. 1929, provided in part as follows: "The fees, taxes and penalties required to be paid by this article, shall be the first and best lien on all property of the corporation, * * * ."

Section 24-1722, Comp. St. 1929, provided in part as follows: "Upon the failure of any domestic corporation to pay its occupation tax within ninety days after the mailing of the registered letter correctly addressed to the last known address of the corporation, all delinquent occupation taxes of the corporation shall be a lien upon the assets of the corporation, subsequent only to state, county and municipal taxes."

To support the state's contention that these statutory provisions create a lien of which all parties had notice, it cites the case of *Nebraska Central Bldg. & Loan Ass'n v. Yellowstone, Inc.*, 140 Neb. 422, 299 N. W. 474, also reported on rehearing in 141 Neb. 679, 4 N. W. 2d 762. It is true

that the opinion holds the occupation fee to be a lien but that question was never raised by the parties. It was agreed that whatever years were owing constituted a lien. It can hardly be said, from an examination of these two opinions, that we have passed on the question here presented.

"A tax imposed as an annual charge upon the right to continued corporate existence is not a property tax but is an excise, although computed on the basis of the amount of capital stock." 2 Cooley, Taxation (4th ed.), sec. 840, p. 1706. "A tax graduated by the amount of the capital stock of a corporation, the paid-up or outstanding capital stock, the authorized capital stock, * * * is usually regarded as a franchise tax imposed on the privilege of existing as a corporation or the privilege of doing business as a corporation in the state, rather than as a property tax." 51 Am. Jur., sec. 811, p. 728. "An excise tax, using the term in its broad meaning as opposed to a property tax, includes taxes sometimes designated by statute or referred to as privilege taxes, license taxes, occupation taxes, and business taxes." 1 Cooley, Taxation (4th ed.), sec. 45, p. 129.

Our Constitution provides that such taxes may be authorized by law. Section 1, art. VIII of the Constitution of Nebraska provides in part: "The necessary revenue of the state and its governmental subdivisions shall be raised by taxation in such manner as the Legislature may direct; * * * . Taxes, other than property taxes, may be authorized by law."

"Tax liens, their duration, extent, and priority, are creatures of the local constitutions and statutes; * * * ." 51 Am. Jur., sec. 1010, p. 881. And as stated in 51 Am. Jur., sec. 1016, p. 887: "It is doubtless competent for the legislature not only to make taxes a lien upon all the property of the owner of the property taxed, but to make such liens a first lien upon the property of the taxpayer, giving them priority over a mortgage or any other lien existing against the property, whether created before or after the assessment of the tax; * * * ." "An excise tax may be made a lien on the property in connection with which the act, priv-

ilege, or occupation taxed is performed, enjoyed, or carried on, and such lien may be given priority over other liens existing against such property." 51 Am. Jur., sec. 1012, p. 883.

We find nothing in our Constitution or statutes that prohibits the legislature from making this statutory occupation fee a charge on the corporation's property, both real and personal. As stated in *Blackrock Copper Min. & Mill. Co. v. Tingey*, 34 Utah 369, 98 Pac. 180: "Nor is there any merit in the contention that both the tax and penalty constitute a lien upon the tangible property of the corporation. This is the method that the Legislature has adopted to enforce payment of the tax, and, * * * is a matter entirely within the legislative discretion."

As stated in *State v. J. Bodenger Realty Co.*, 195 La. 1014, 197 So. 741: "The state's lien under statute imposing a franchise tax on corporations doing business within the state, and providing that the state shall have a first lien on the property of the corporation for unpaid taxes, is superior in rank to a pre-existing vendor's lien and mortgage."

We have examined, in so far as possible, the decisions of all other state and federal jurisdictions on this question and find none to the contrary. For similar holdings see *Moran v. Leccony Smokeless Coal Co.*, 122 W. Va. 405, 10 S. E. 2d 578, 136 A. L. R. 1007; *New York Terminal Co. v. Gaus*, 204 N. Y. 512, 98 N. E. 11; *In re Century Steel Co. of America*, 17 F. 2d 78; *Seaboard Nat. Bank v. Rogers Milk Products Co.*, 21 F. 2d 414; *Engelhart v. Alvino Realty Co.*, 248 N. Y. 374, 162 N. E. 287; *Atlanta Trust Co. v. Atlanta Realty Corporation*, 177 Ga. 581, 170 S. E. 791; *Carey v. Keith, Inc.*, 250 N. Y. 216, 164 N. E. 912; *North River Coal & Wharf Co. v. McWilliams Bros.*, 32 F. 2d 355; *Smith v. Meader Pen Corporation*, 8 N. Y. S. 2d 39.

It is undoubtedly desirable that the legislature provide that notice of such tax be filed in some office of the county wherein such property is located, as was provided by the 1943 legislature in its amendment to section 24-1712, Comp. St. 1929, which section is now 21-312, R. S. 1943. This

amendment is as follows: "*Provided,* that the Secretary of State may, in his discretion, file notice of such lien in the office of the county clerk of the county wherein the personal property sought to be charged with such lien is situated, and with the county clerk or register of deeds of the county wherein the real estate sought to be charged with such lien is situated; and the lien provided for in this section shall be invalid as to any mortgagee or pledgee whose lien is filed, or as against any judgment lien which attached, or as against any purchaser whose rights accrued, prior to the filing of such notice."

However, we find no constitutional provision requiring it to do so. Prior to this amendment all that was necessary, in order to establish the lien, was for the state to assess the tax in the Secretary of State's office. All parties who, after the tax was assessed, dealt with the property of the corporation against which the tax was a lien must, for their protection, consult the records of the Secretary of State's office at Lincoln.

The case of *Commonwealth v. Central Realty Co.*, 338 Pa. St. 172, 12 Atl. 2d 312, was a case in which the reverse of this case existed. The legislature had repealed the provisions of the act requiring a notice of the lien to be filed in the county where the property was located. The court, in discussing this phase of the case, said: "That rule is that the necessity for filing the lien in the county where the taxable's real estate is located, which we held was essential to prevail under the Act of 1827, *supra,* against other lien creditors, became no longer necessary. It was thenceforth sufficient, in order to establish the lien, for the Commonwealth to settle the tax in the auditor-general's office in Harrisburg. The judgment creditor of or *bona fide* purchaser from the party against whom the taxes were assessed was thereafter required, for his own protection, to consult the auditor-general's records or indices in the State Capitol, * * * . The judgment indices in the county could not be exclusively relied upon. * * * 'As stated before, the Act of 1911 did away with the requirement of the Act of

1827 which compelled the Commonwealth to transmit a certified copy to the prothonotary of the county to be entered in his office and in lieu thereof it provided that the auditor-general should, upon the payment of a fee of twenty-five cents, give to any one interested a certificate showing the amount of all tax liens against any corporation. In other words, the manner and place of getting information as to State taxes was changed. This was a mere change of procedure and affected no rights. No one has any vested right in a particular remedy. If the records of a certain office are notice to every one as to matters therein appearing, the legislature may, in its wisdom, unless prevented by some constitutional restriction, at any time provide that thereafter such records shall be kept in some other office. Certainly no one would think that such an act changing the place where one must go for such information in regard to liens of a certain character deprived him of any right.' " See *Lewis & Wyalusing Light, Heat & Power Co.*, 62 Pa. Super. 282.

The state perfected a continuation of its lien within the time provided therefor by the 1943 legislature's amendment to section 24-1722, Comp. St. 1929, which now appears as section 21-323, R. S. 1943, by filing notice of its lien on May 29, 1944. Prior to this amendment it was not necessary to file a notice of lien in the county where the property of a corporation was located in order to establish a lien thereon for occupation fees assessed by the state. It was sufficient that it be assessed in the office of the Secretary of State.

The plaintiff's contention that the limitation imposed on a lien for occupation fees by the 1943 amendment to what is now section 21-312, R. S. 1943, applies to the state's lien here involved is not well taken. This limitation was not in force and effect at the time the state's lien became effective nor is the amendment retroactive. The 1943 legislature, by its amendment to what is now section 21-323, R. S. 1943, provided a method by which the state could keep alive whatever lien it had. This the state did by filing its notice within the time therein provided.

Nor do we see how the recording act, section 76-238, R. S. 1943, applies. It in no manner either refers or applies to taxes.

The record shows that the state was not made a party to the tax foreclosure action.

"'A foreclosure sale of lands and tenements, unless the decree otherwise provides, transfers to the purchaser every right and interest in the property of all the parties to the action.' *Hart v. Beardsley,* 67 Neb. 145, 93 N. W. 423; *Arterburn v. Beard,* 86 Neb. 733, 126 N. W. 379. The same principle is announced in *Young v. Brand,* 15 Neb. 601, 19 N. W. 494; *Milligan v. Gallen,* 64 Neb. 561, 90 N. W. 541; *Criswell v. McKnight,* 120 Neb. 317, 232 N. W. 586, and in the annotation appearing in 73 A. L. R. 630, and *Bristol Lumber Co. v. Dery,* 114 Conn. 88, 157 Atl. 640." *Clements v. Doak,* 140 Neb. 265, 299 N. W. 505. "'The purchaser of real estate at judicial sale under the foreclosure of a mortgage buys at his peril, * * * .' *Bannard v. Duncan,* 79 Neb. 189, 112 N. W. 353." *Clements v. Doak, supra.* The same rule applies to purchasers of property at tax sales. *Pennock v. Douglas County,* 39 Neb. 293, 58 N. W. 117; *Adams v. Osgood,* 42 Neb. 450, 60 N. W. 869; *Martin v. Kearney County,* 62 Neb. 538, 87 N. W. 351.

"The sale of real estate by a county treasurer for delinquent taxes due thereon for one year does not discharge either state, county, or city taxes assessed against such real estate for prior years, which taxes were not included in such sale." *Adams v. Osgood, supra.* See 135 A. L. R. 1468, note. "A sale of land for taxes due for one year does not discharge those levied and delinquent for previous years." *Medland v. Connell,* 57 Neb. 10, 77 N. W. 437.

The tax sale certificate which J. B. Gibson purchased and assigned to D. P. Wetzel did not include the state's lien for occupation tax nor did either party subsequently pay it. When D. P. Wetzel foreclosed these lands he only foreclosed for the general taxes for the years 1925, 1926, 1927 and 1928. He failed to make the state a party to the foreclosure proceeding. The state, at that time, had a lien on these

lands for the occupation fees and penalties assessed against the Hays Lumber Company who owned the property. These occupation fees have never been paid and continue to be a lien thereon. D. P. Wetzel, who purchased the property at the sale arising out of his foreclosure, purchased the property at his peril. He took the title subject to the unforeclosed lien of the state and its rights thereunder. His successors in title are in no better position.

We have therefore come to the conclusion that the decree quieting title was erroneous in so far as the state is concerned and should be modified so as to grant the state the relief prayed for.

It is therefore ordered that the decree be modified so as to allow the state a lien in the amount of its unpaid occupation fees together with costs. That if the amount be not paid within 30 days the premises, or so much thereof as is necessary, be sold to satisfy such lien. As modified the decree is affirmed.

AFFIRMED AS MODIFIED.

PAT DUGGAN, APPELLANT, V. NEIL OLSON, WARDEN OF THE NEBRASKA STATE PENITENTIARY, APPELLEE.
19 N. W. 2d 353

FILED JUNE 22, 1945. No. 31960.

1. **Criminal Law: JUDGES.** A judge of the district court, sitting at chambers within his judicial district, may, upon a written request by the accused charged with a felony, receive a plea of guilty and pass sentence thereon.
2. **Constitutional Law: CRIMINAL LAW.** The power of the legislature to provide by appropriate enactment for the trial of criminal cases in the district court upon informations filed by the county attorney, instead of indictments, cannot be successfully questioned in view of section 10, article I of the state Constitution.
3. ———: ———. A law of Nebraska permitting the prosecution by information is not in violation of the Constitution of the United States.

4. **Indictments and Informations.** The right of a defendant under section 29-1802, R. S. 1943, not to be required, without his assent, to answer an information until one day shall have elapsed, after receiving a copy thereof, may be waived, and this is especially true where the defendant, in writing, requests the right to plead to the information.
5. **Criminal Law.** A defendant, by pleading guilty, waives all defenses other than that the information charges no offense.
6. ———. A valid plea of guilty dispenses with the necessity of a jury and even of a trial at all.
7. ———. The constitutional right of the accused to have the assistance of counsel may be waived.
8. **Habeas Corpus.** In an application for a writ of habeas corpus if the applicant or petitioner sets forth facts which, if true, would make out a case which would entitle him to his discharge, then the writ is a matter of right and the petitioner should be produced and a hearing held thereon to determine the question of fact presented. But if he shows by the facts which he sets forth in his application for the writ that he is not entitled to relief, then the writ should be denied.

APPEAL from the district court for Lancaster County: JOHN L. POLK, JUDGE. *Affirmed.*

Pat Duggan, pro se.

Walter R. Johnson, Attorney General, H. Emerson Kokjer and *Carl H. Peterson,* for appellee.

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

MESSMORE, J.

This is a habeas corpus proceeding instituted in the district court for Lancaster county by relator Pat Duggan, against the warden of the state penitentiary as respondent, to obtain the petitioner's release. From an order denying the writ, the petitioner has appealed to this court.

At the outset, we disregard the gratuitous uncomplimentary remarks contained in the petition and in the relator's brief, and proceed to the subject matter raised in the proceedings.

On October 16, 1935, the relator, then 37 years of age, was informed against by the county attorney of Perkins

County in an information duly filed in such county, with the crime of incest, alleged to have been committed on or about April 10, 1935. He was served with a true and certified copy of the information at 11:30 o'clock a. m. the same day. On October 17, 1935, the following proceedings were had before Charles E. Eldred, judge of the district court of the fourteenth judicial district of Nebraska, sitting in chambers at McCook, Red Willow County, Nebraska, as shown by the journal entry contained in the petition, and hereinafter, in substance set out: The state of Nebraska being represented by W. C. Conover, county attorney of Perkins County, and the defendant being present in the custody of the sheriff, the defendant having requested in writing filed therein that he be permitted to plead to the information filed against him in Perkins county, at McCook, Red Willow County, Nebraska, and the court advising the defendant of the nature of the charge made against him, and of the law, and the penalty, on inquiry of the court whether he wished to proceed with the hearing on the information at this time and place, or wait until the court convened in Perkins County, the defendant stated that he desired to plead to the information and to proceed with this matter at this time and place. The defendant was advised that he was entitled to consult and have the benefit of counsel if he wished to do so, and defendant stated that he did not desire to consult an attorney. The defendant was thereupon arraigned, information read, and defendant entered a plea of guilty as charged, which plea was by the court endorsed upon the information. The court thereupon advised the defendant of the nature of the charge and the nature and effect of his plea of guilty, and inquired of the defendant whether he had any reason to offer why the sentence of the court should not be pronounced against him upon his plea of guilty. The defendant answered that he had not. Thereafter the court imposed sentence and commitment issued.

The relator alleges in his petition that his trial, conviction and commitment by the district court for Red Willow County was unconstitutional and void, being in violation of

the fourteenth amendment to the Constitution of the United States, which provides that no person shall be deprived of his liberty without due process of law.

The violations of the due process clause of the Constitution of the United States claimed by the relator in paragraph three of the petition are: No change of venue was requested by the petitioner or granted by the judge while sitting in the district court for Perkins County, Nebraska, transferring the case to place of trial at McCook, Red Willow County, Nebraska; no accusation nor indictment was ever filed in the office of the clerk of the trial court at McCook, Red Willow County, Nebraska, therefore the judgment and conviction is based upon information rather than an indictment by the grand jury; the relator was deprived of having 24 hours within which to examine the charge and prepare a defense; the relator was denied trial by jury; and the relator was deprived of having the assistance of counsel. The alleged violations of the due process clause of the Constitution of the United States will be taken up in the order in which they appear.

The journal entry appearing in the relator's petition, which is heretofore set out in part, contains a complete recital of what transpired at the time of his arraignment and sentence. The record, which he himself pleads, discloses that upon the filing of the information against him in the district court for Perkins County, and at his express request in writing, he entered a plea of guilty upon which judgment was entered, and he was sentenced in chambers at McCook in Red Willow County and within the judicial district of which Perkins County was and is a part, presided over by the same judge. It is therefore obvious that this charge rests upon a misconstruction of the record in his prosecution. There was, in fact, no transfer of his prosecution to the district court for Red Willow County. The case remained at all times in the district court for Perkins County.

The procedure pursued is in keeping with the law of this state. Section 24-317, R. S. 1943, provides in part: "A judge of the district court may sit at chambers anywhere

within his district, and * * * shall have power to * * * receive a plea of 'guilty' from any person charged with a felony, and pass sentence thereon, * * * ."

In *McCarty v. Hopkins*, 61 Neb. 550, 85 N. W. 540, this court held: "A judge of the district court, sitting at chambers within his judicial district, may, upon reasonable notice to the prosecuting attorney, receive a plea of guilty from a person charged with a felony and pass sentence upon him." In the opinion, what was then section 23, article VI of the Constitution of Nebraska was cited, wherein it was provided: "The several judges of the courts of record shall have such jurisdiction at chambers as may be provided by law." This constitutional provision remains the same today. See Const., art. V, sec. 23.

Under the authority of this constitutional provision the legislature enacted, in 1881, what is known as section 57, chapter 19, Comp. St. 1899, the fifth provision thereof which is like provision 10 of section 24-317, R. S. 1943, with the exception that in the earlier statute reasonable notice to the prosecuting attorney was provided, while in the later statute, ten days' notice to the prosecuting attorney is provided. The notice contained in the statute is immaterial here because the relator made an express request in writing to be permitted to plead to the information at McCook, Red Willow County.

"Whether the district judges in Nebraska may accept pleas of guilty in counties in their respective circuits other than the counties where the accusations are pending is a question of state procedure within the knowledge of the state courts." See *Duggan v. O'Grady*, 8th Cir., 114 Fed. 2d 561.

As a matter of law, the relator's contention must be denied.

In connection with the second contention raised in the petition, section 10, art. I of the Constitution of Nebraska reads in part: " * * * ; *Provided*, That the Legislature may by law provide for holding persons to answer for criminal offenses on information of a public prosecutor; and may by

law, abolish, limit, change, amend, or otherwise regulate the grand jury system."

Pursuant to the constitutional provision, the legislature provided in what is now section 29-1601, R. S. 1943, as follows: "The several courts of this state shall possess and may exercise the same power and jurisdiction to hear, try and determine prosecutions upon information, for crimes, misdemeanors and offenses, to issue writs and process, and do all other acts therein, as they possess and may exercise in cases of the like prosecutions upon indictments."

Section 29-1602, R. S. 1943: "All informations shall be filed in the court having jurisdiction of the offense specified therein, by the prosecuting attorney of the proper county as informant."

In *Bolln v. State,* 51 Neb. 581, 71 N. W. 444, this court said: "The power of the legislature to provide by appropriate enactment for the trial of criminal cases in the district court upon informations filed by the public prosecutor, or county attorney, instead of indictments, * * * could not be successfully questioned, in view of section 10, article I of the state constitution, * * * ." See, also, *Dinsmore v. State,* 61 Neb. 418, 85 N. W. 445.

In *Bolln v. Nebraska,* 176 U. S. 83, 20 S. Ct. 287, it is said that a law of Nebraska permitting the prosecution by information is not in violation of the Constitution of the United States and does not conflict with the Fourteenth Amendment to the Constitution of the United States. On page 88, in the body of the opinion, the court said: "As we have repeatedly held, the Fourteenth Amendment was not intended to curtail the powers of the States to so amend their laws as to make them conform to the wishes of their citizens, to changed views of administration, or to exigencies of their social life." See, also, *Hurtado v. California,* 110 U. S. 516, 4 S. Ct. 292; *In re Kemmler,* 136 U. S. 436, 10 S. Ct. 930; *Dent v. West Virginia,* 129 U. S. 114, 9 S. Ct. 231; *Caldwell v. Texas,* 137 U. S. 692, 11 S. Ct. 224.

It will thus be seen, the several states of the Union are at liberty to define offenses under their laws and to provide

the legal procedure for punishment. Where such procedure, as in Nebraska, is not in violation of the Fourteenth Amendment to the Constitution of the United States, error cannot be predicated upon the failure to prosecute by indictment.

Analyzing the third contention raised in the petition, the relator's petition discloses he was formally served with a true and certified copy of the information by delivery by the sheriff to him at 11:30 o'clock a. m., on October 16, 1935. He entered his plea on the next day, October 17, 1935, at what hour of the day is not shown. It is impossible to tell from the record whether the 24 hours had elapsed or not.

The specific right to the lapse of one day after the receipt of an information or indictment before a defendant may be arraigned or called upon to answer, is created by section 29-1802, R. S. 1943, which provides in part: "No one shall be, without his assent, arraigned or called on to answer to any indictment until one day shall have elapsed, after receiving in person or by counsel, or having an opportunity to receive a copy of such indictment as aforesaid." The defendant's right under the statute may be waived. *Kopp v. State*, 124 Neb. 363, 246 N. W. 718: "The right of a defendant, under section 29-1802, Comp. St. 1929, (now section 29-1802, R. S. 1943) not to be required, without his assent, to answer an indictment, until one day shall have elapsed after receiving a copy thereof, may be waived. The failure of the record to show that he made any objection raises the presumption that he waived the right." See, also, *Barker v. State*, 54 Neb. 53, 74 N. W. 427.

The case of *Zink v. State*, 34 Neb. 37, 51 N. W. 294, is not in point, as there was no plea of guilty in that case. In the instant case there was a plea of guilty.

"A defendant, by pleading guilty, waives all defenses other than that the indictment (information) charges no offense." 14 Am. Jur., sec. 272, p. 953. "A plea of guilty, accepted and entered by the court, is a conviction or the equivalent of a conviction of the highest order, the effect of which is to authorize the imposition of the sentence pre-

scribed by law on a verdict of guilty of the crime sufficiently charged in the * * * information." 14 Am. Jur., sec. 272, p. 952.

In the case at bar, the record shows affirmatively that the defendant had pleaded guilty, this absolutely waived this and all other preliminary steps in connection therewith. The contention has no merit.

The relator pleads that he was deprived of a trial by jury. Section 11, art. I of the Constitution of Nebraska states: "In all criminal prosecutions the accused shall have the right * * * to * * * a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed." This right may be waived. See *McCarty v. Hopkins, supra.* It need only be remarked in considering this contention, that a valid plea of guilty dispenses with the necessity of a jury, and even of a trial at all. Law to this effect is so well established that citation of authority, both state and federal, is deemed unnecessary. There is no merit to the relator's contention in such respect.

The relator pleads that he has been deprived of his liberty in violation of the Fourteenth Amendment to the Constitution without due process of law, for the reason that he was without the assistance of counsel, and through ignorance entered a plea of guilty. Not repeating the journal entry heretofore set out and appearing in the relator's petition, we deem it necessary to call attention to the following admitted facts included therein: The defendant, relator here, requested in writing that he be permitted to plead to the information. The court advised the defendant (relator) of the nature of the charge made against him and of the law and the penalty. The court further inquired whether he wished to proceed with the hearing on the information at this time and place, or wait until the court convened in Perkins county. The relator desired to proceed and plead. The court advised the relator that he was entitled to consult and to have the benefit of counsel if he wished to do so, and relator stated to the court he did not desire to consult an attorney. In other words, he freely and voluntarily

waived the right to have the offered assistance of counsel. The waiver was within his competency. In *McCarty v. Hopkins, supra,* it was held that, "A person charged with crime may, by a judicial confession of guilt, waive all the rights secured to him by section 11, article I of the Constitution." This includes the right to be represented by counsel. See, also, *Marino v. State,* 111 Neb. 623, 197 N. W. 396; *Miller v. State,* 116 Neb. 702, 218 N. W. 743.

" 'The constitutional right of the accused to have the assistance of counsel may be waived, and a waiver will be implied where the accused, being without counsel, fails to demand that counsel be assigned him.' 16 C. J. 821." *Alexander v. O'Grady,* 137 Neb. 645, 290 N. W. 718. See, also, *Davis v. O'Grady,* 137 Neb. 708, 291 N. W. 82; 23 C. J. S., sec. 979, p. 314; *Logan v. Johnston,* 28 F. Supp. 98; *Cundiff v. Nicholson,* 107 F. 2d 162; *In re Application of Carper,* 144 Neb. 623, 14 N. W. 2d 225.

There is no doubt but that the relator freely and voluntarily waived his right to be represented by counsel, and that it was within his competency to do so. He obviously knew, being a father and a mature man, whether or not he violated the body of his daughter. An offense of this character is one where it would be presumed that a defendant of ordinary intelligence would readily understand exactly what he was charged with, as respects acceptance of his plea of guilty. See *Loucks v. State,* 213 Ind. 108, 11 N. E. 694.

"Where an accused, without counsel, admits his guilt, and does not ask for or desire a trial, but wishes to submit himself to the trial court's mercy, his conduct is a competent and intelligent waiver of his constitutional right to assistance of counsel." *Erwin v. Sanford,* 27 F. Supp. 892. See, also, *Betts v. Brady,* 316 U. S. 455, 62 S. Ct. 1252.

The relator was not denied his constitutional right to have the assistance of counsel under the circumstances here presented.

All the questions raised in the relator's petition are questions of law, determined by the trial court and this court.

In an application for a writ of habeas corpus, if the appellant or petitioner sets forth facts which, if true, would make out a case which would entitle him to a discharge, then the writ is a matter of right, and the petitioner should be produced and a hearing held thereon, to determine the question of fact presented, but if he shows by the facts which he sets forth in his application for the writ, that he is not entitled to relief, then the writ will be denied.

For the reasons given in this opinion, we hold that the trial court properly determined the questions of law raised in the relator's petition, and the petition for writ of habeas corpus was properly denied.

AFFIRMED.

WALTER C. JOHNSON ET AL., APPELLANTS, V. BERT M. MARSH ET AL., APPELLEES.
19 N. W. 2d 366

FILED JUNE 22, 1945. No. 31930.

1. **Pleading.** A general demurrer admits all allegations of fact in the pleading to which it is addressed, which are issuable, relevant, material, and well pleaded; but does not admit the conclusions of the pleader, except when supported by, and necessarily result from, the facts pleaded. It does not admit inferences of the pleader from the facts alleged, nor mere expressions of opinion, nor theories of the pleader, nor allegations of the pleader as to what will happen in the future, nor arguments, nor allegations contrary to the facts of which judicial notice is taken or which are contrary to law.
2. **Evidence.** Where cases are interwoven and interdependent and the controversy involved has already been considered and determined by the court in former proceedings involving one of the parties now before it, the court has the right to examine its own records and take judicial notice of its own proceedings and judgments in the former action.
3. **Husband and Wife.** Postnuptial contracts entered into by husband and wife while complete marriage relation exists settling their property rights, including their respective rights of inheritance in property of the other, are invalid.

4. **Descent and Distribution.** A proceeding in the probate court to settle the estate of a decedent is a proceeding in rem, and every one interested in such settlement is a party in the probate court with constructive notice thereof whether he is named or not, and this is particularly true as to the distribution of an estate under a will.
5. **Equity.** Equity will not afford relief if the complainant has a remedy by statutory proceeding in the original action, and to be entitled to equitable relief against the enforcement of a judgment procured by fraud the party must not have neglected to avail himself of a statutory remedy.
6. ———. Independently of any limitation for the guidance of courts of law, equity may, in the exercise of its own inherent powers, refuse relief where it is sought after undue and unexplained delay, and when injustice would be done in the particular case by granting the relief asked.

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

O. B. Clark, for appellants.

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

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

CHAPPELL, J.

The plaintiffs in this action are the surviving nephews and nieces and successors in interest of surviving nephews and nieces of Ellen C. Marsh, deceased, without issue. Defendants, Melvin Johnson, Edith Johnson Unger, Charlotte Johnson Hintz and Luella Johnson Gardner, are also surviving nephews and nieces of decedent who refused to join with plaintiffs and have been named as defendants. Ellen C. Marsh, deceased, was the wife of DeWitt C. Marsh, deceased. Defendants, Bert M. Marsh, Harry Marsh and Retta McGee Dunning, are his nephews and niece. Defendant, Massachusetts Bonding and Insurance Company, was surety upon the bond of defendant, Arnold C. Blattspieler, special administrator of the estate of DeWitt C. Marsh, and

defendant, United States Fidelity and Guaranty Company, was surety upon the bond of defendants, Bert M. Marsh and Fred H. Bruning, the executors of his estate.

The action was filed in the district court for Saline county on August 8, 1942, to obtain an accounting against all defendants, except defendant nephews and nieces who refused to join as plaintiffs, for property alleged to have constituted the estate of Ellen C. Marsh, deceased. An amended petition was filed on October 22, 1943. To plaintiffs' amended petition defendants filed demurrers which were sustained by the trial court. The plaintiffs elected to stand upon their amended petition and declined to plead further. Thereupon the trial court entered a judgment dismissing the action. Plaintiffs appealed to this court contending that the trial court erred in sustaining the demurrers and entering judgment of dismissal. We find that these contentions cannot be sustained.

Plaintiffs allege in substance that at the time of the marriage of DeWitt C. Marsh and Ellen C. Johnson in 1866 the husband had no property. Thereafter the wife acquired a separate estate of $7,500 which they both used in their business transactions. On July 1, 1891, they entered into a written postnuptial property agreement. They then had an estate of approximately $50,000. Plaintiffs do not have a copy of the agreement but its substance is alleged in the petition. It provided that they should thereafter each own an undivided one-half interest in all their property, including accumulations, and upon the death of either the survivor would take a life interest in the undivided one-half interest of the estate of the first deceased, at the expiration of which the estate of the first deceased would go to his or her heirs. They each waived and renounced all rights of inheritance and agreed to make distribution of his or her estate to the heirs at law of the first deceased.

It is claimed that this contract continued in full force and effect until the death of Ellen C. Marsh intestate and without issue on May 22, 1929, at which time they had accumulated property valued at approximately $562,000. DeWitt

C. Marsh, her husband, died without wife or issue April 15, 1932. They had resided in Nebraska as husband and wife a great many years and both were residents of Saline county at the time of their death. Ellen C. Marsh left surviving as her sole heirs at law, the plaintiffs, their predecessors in interest, her four nephews and nieces made defendants and her husband who after her death retained possession of her undivided one-half interest in the estate, as provided in the agreement, holding it in trust for her heirs at law, including plaintiffs. Claim is made that after the death of his wife, DeWitt C. Marsh executed a valid will devising her estate as provided in the postnuptial agreement which was never revoked and was in full force and effect at the time of his death. Plaintiffs do not have a copy of the will and its provisions are not recited.

Plaintiffs allege that in the latter months of his life DeWitt C. Marsh was mentally incompetent to make a will. Thereupon defendants, Fred H. Bruning and Arnold C. Blattspieler, who sustained a confidential relationship with him, together with defendants, Bert M. Marsh, Harry Marsh and Retta McGee Dunning, entered into a conspiracy to defraud Ellen C. Marsh's heirs and secure her estate for themselves and others with full knowledge of the postnuptial agreement and the valid will both of which were secreted or destroyed.

They also allege that on March 28, 1932, the conspirators, with knowledge of his incompetency to make a will, caused to be prepared and published a purported valid will of DeWitt C. Marsh and after his death caused it to be filed in the county court of Saline county for probate, together with the appointment of defendants, Bert M. Marsh and Fred H. Bruning as executors named in the will. William E. Lyon contested its probate but the conspirators by false testimony and suppression of facts procured an order of probate whereupon contestant appealed to the district court. Arnold C. Blattspieler was then appointed special administrator. He qualified, gave approved bond and took possession of all the personal property in the possession of DeWitt C.

Marsh at the time of his death, together with all the real estate, the title to which was in DeWitt C. Marsh.

It is alleged that thereafter the special administrator unlawfully paid $20,000 to William E. Lyon and others and by extrinsic fraud secured dismissal of the appeal in the district court and secured issue of letters testamentary in the county court to Bert M. Marsh and Fred H. Bruning as executors who qualified, gave approved bond and took possession of all the property then in the hands of the special administrator. Thereafter, defendants by extrinsic fraud procured a final decree of the county court distributing all the property to themselves and other persons, as provided in the will, to which they now hold the apparent title and right to possession, failing and refusing to account therefor to plaintiffs although holding all of the same in trust for them.

Plaintiffs assert that the conspirators violated their legal duty and did not fully disclose to the county court and the district court all the true facts and circumstances. That they suppressed all communications between plaintiffs and DeWitt C. Marsh after the death of Ellen C. Marsh. That they fraudulently concealed from and did not notify plaintiffs, who were nonresidents, of the death of DeWitt C. Marsh, the existence of the postnuptial agreement and prior valid will or the legal proceedings in the county and district courts. By reason thereof plaintiffs did not learn of facts and circumstances which would put them as reasonable persons upon inquiry until the spring of 1940 and thereafter plaintiffs acted diligently and with dispatch in making inquiry as to the facts. They made application for administration of Ellen C. Marsh's estate June 15, 1940, and obtained decree of heirship February 27, 1942.

Plaintiffs pray for an accounting of all money and property coming into the possession of defendants, or any of them, belonging to Ellen C. Marsh or DeWitt C. Marsh during the lifetime of either of them or belonging to the estate of either of them after death whether the same was a part of the estate of Ellen C. Marsh, as claimed in the petition, or a part of the estate of DeWitt C. Marsh, and whether de-

fendants came into possession of the property by reason of the admission to probate of the will of DeWitt C. Marsh, or otherwise. They pray that all such property belonging to the estate of Ellen C. Marsh be declared to belong to plaintiffs in their proportionate share or that in lieu thereof they be awarded a personal judgment with a lien upon the real estate therefor, together with attorney's fees, costs and equitable relief.

Preliminary to discussion of the merits, we call attention to the rule announced in *Richter v. City of Lincoln,* 136 Neb. 289, 285 N. W. 593, to the effect that: "A general demurrer admits all allegations of fact in the pleading to which it is addressed, which are issuable, relevant, and material, and well pleaded; but does not admit the conclusions of the pleader, except when supported by, and necessarily result from, the facts pleaded. It does not admit inferences of the pleader from the facts alleged, nor mere expressions of opinion, nor theories of the pleader, nor allegations of the pleader as to what will happen in the future, nor arguments, nor allegations contrary to the facts of which judicial notice is taken, or which are contrary to law."

In this connection this court has held:

"The general rule is that, while a court will take judicial notice of its own records, it will not in one case take judicial notice of the record in another case.

"However, where cases are interwoven and interdependent and the controversy involved has already been considered and determined by the court in former proceedings involving one of the parties now before it, the court has the right to examine its own records and take judicial notice of its own proceedings and judgments in the former action." *Witzenburg v. State,* 140 Neb. 171, 299 N. W. 533. The latter rule was recently approved and reaffirmed by this court in *In re Estate of McCleneghan,* 145 Neb. 707, 17 N. W. 2d 923. In that opinion, referring to *Witzenburg v. State, supra,* it was said: "We think that case and the cases cited in support of the rule indicate that it has no application to the rule herein announced. The rule in those cases indicates

that this court will take judicial notice of final orders of this court made in the same case on a former appeal or in other cases which are so interdependent as to warrant the application of the rule. These are exceptions to the general rule warranted from the necessity of giving effect to former holdings which finally decide questions of fact and law."

Bearing these rules in mind we find that *In re Estate of Marsh,* 145 Neb. 559, 17 N. W. 2d 471, and *Bend v. Marsh,* 145 Neb. 780, 18 N. W. 2d 107, are interwoven and interdependent cases which come within the exception to the general rule, above set forth, and govern decision in the case at bar.

One of the plaintiffs here, Blanche Allen Bend, a niece of Ellen C. Marsh, deceased, was sole plaintiff in *Bend v. Marsh, supra.* The principal defendants are the same in all three cases. They all involve primarily a collateral attack upon the validity of the will executed by DeWitt C. Marsh on March 28, 1932, its probate on May 20, 1932, by the county court of Saline county, and its subsequent final decree of May 12, 1933, distributing the assets of his estate. In each case there appear very similar allegations of lack of testamentary capacity, undue influence, confidential relationship, concealment, fraud and conspiracy in connection with the will and some part or all of the estate thus devised and distributed. In each of the cases demurrers of defendants were sustained by the trial court and the actions dismissed. We affirmed the action of the trial court in the two above cited cases as we must the one at bar. To find otherwise would give no effect to the valid orders and decrees of the district court for and the county court of Saline county entered a decade or more before plaintiffs filed this action and twice heretofore approved by this court.

Only recently this court has held: "Postnuptial contracts entered into by husband and wife while complete marriage relation exists settling their property rights, including their respective rights of inheritance in property of the other, are invalid." *Focht v. Wakefield,* 145 Neb. 568, 17 N. W.

2d 627. See *Smith v. Johnson*, 144 Neb. 769, 14 N. W. 2d 424.

Clearly the alleged agreement between Ellen C. Marsh and DeWitt C. Marsh, her husband, by virtue of which it is claimed that DeWitt C. Marsh held the property involved in trust for plaintiffs was, if it existed, a postnuptial agreement and invalid. Since plaintiffs can claim nothing under the invalid postnuptial agreement they are relegated to the claim that Ellen C. Marsh had a separate estate at the time of her death, one-half of which was fraudulently distributed as assets of DeWitt C. Marsh's estate, or that there was a prior valid will of DeWitt C. Marsh wherein he devised one-half of his property, which then stood in his name and possession, to the heirs of Ellen C. Marsh, among whom are the plaintiffs, and that his subsequent will was invalid and its probate, together with final decree of distribution thereunder, was fraudulently procured. If that be true, then the time and place to have asserted such claim was when the subsequent purported will was offered for probate in the county court of Saline county on April 19, 1932, and while proceedings were pending therein or subsequently by statutory proceedings within the time fixed by statute. This the plaintiffs failed to do.

It is apparent at once then that the alleged invalidity of the subsequent will of DeWitt C. Marsh, its probate in the county court and the final decree distributing the estate, now claimed by plaintiffs, is the keystone of the arch supporting plaintiff's case. If that be true, this action is a collateral attack upon those proceedings which under the circumstances is not now available to them and their action is barred by every applicable statute of limitations and their own laches.

In *In re Estate of Marsh, supra*, we decided that the order of the district court entered August 8, 1932, dismissing the appeal of William E. Lyon from the judgment of the county court of Saline county, entered May 20, 1932, finding that the will of DeWitt C. Marsh dated March 28, 1932, was his last will and testament and admitting it to probate was

valid, not subject to collateral attack and operated as an affirmance of the judgment of the county court. With reference to allegations made by plaintiffs therein concerning lack of testamentary capacity, undue influence, confidential relations with deceased, conspiracy and fraud it was found that all such matters could have been raised by plaintiffs in the *in rem* proceeding instituted in the county court of Saline county on April 19, 1932, for the probate of the will, as objections thereto or subsequently by statutory proceedings within the time fixed by statute, which they had failed to do. It was found that since plaintiffs' action had not been filed until May 7, 1943, the time within which such proceeding could be brought had long since passed. We then applied the rule announced in *Brandeen v. Beale,* 117 Neb. 291, 220 N. W. 298, and other cases cited, which provides: "The rule obtains in this and some other jurisdictions that equity will not afford relief if the complainant has a remedy by statutory proceeding in the original action, and that to be entitled to equitable relief against the enforcement of a judgment procured by fraud the party must not have neglected to avail himself of a statutory remedy."

The petition in *Bend v. Marsh, supra,* was filed in the district court for Saline county, Nebraska, August 14, 1942, just six days after the original petition was filed in the present case. We found in the opinion that Blanche Allen Bend who is one of the plaintiffs in the case at bar had actual knowledge of the death of DeWitt C. Marsh within a month after it occurred. The property claimed by her in that case is part of the same real estate in which all these plaintiffs now claim an interest. She also asked for a money judgment. She claimed that her action did not arise out of or through the estate of DeWitt C. Marsh but by reason of an agreement with Ellen C. Marsh and DeWitt C. Marsh during their lifetime and that upon the theory of constructive trust she could recover the property then in the hands of third persons, defendants here who were alleged to have fraudulently taken and distributed the property with knowledge of the agreement. Plaintiff assumes a similar position in the case at bar.

In the opinion it was said: "Plaintiff alleges, contends and bases many of her propositions on the theory that the order of the district court for Saline county entered on August 8, 1932, in the matter of the Estate of DeWitt C. Marsh, Deceased, dismissing the appeal of William E. Lyon, contestant, is void and consequently the will of deceased dated March 28, 1932, has never been allowed and admitted to probate and that there has never been a legal administration of the estate. This has been decided to the contrary in *In re Estate of Marsh,* 145 Neb. 559, 17 N. W. 2d 471. Consequently, all of plaintiff's allegations with reference to the execution of the will, the lack of testamentary capacity, the exercise of undue influence and fraud practiced upon both the county court and the district court are without merit for all of these matters could have been raised either directly in the proceeding in the county court of Saline county, instituted on April 19, 1932, for the allowance and admission of the will as objections thereto or subsequently by statutory proceedings within the time fixed by statute. The time within which such proceedings could be brought has long passed." We then again applied the rule announced by this court in *Brandeen v. Beale, supra.*

With reference to the contention that her action did not arise out of or through the estate of DeWitt C. Marsh but by reason of a constructive trust, it was found: "Where, as here, the plaintiff knew of the death and had constructive notice of the probate of his will (*Miller v. Estate of Miller,* 69 Neb. 441, 95 N. W. 1010) and by reasonable diligence could have ascertained that the property was being handled as part of the estate and being distributed as such under the provisions of the will, we think the statute applies and has run. There was no concealment of how the property involved was being considered and handled. It was listed as part of the assets of the estate and distributed as such. For more than the statutory period the plaintiff has had her right to sue but failed to bring an action. She is barred as to all the defendants under every applicable statute of limitations."

It was also found that her action was barred by laches. The rule decisive of that question, as quoted in *Bend v. Marsh, supra,* is: "Independently of any limitation for the guidance of courts of law, equity may, in the exercise of its own inherent powers, refuse relief where it is sought after undue and unexplained delay, and when injustice would be done in the particular case by granting the relief asked." In applying that rule it was said in the opinion: "The neglect of the plaintiff in waiting more than ten years from the time she knew, or ought to have known from the circumstances of which she had notice or by reasonable diligence could have ascertained, that the deceased had failed to carry out the terms of the agreement before commencing her action to recover the property she claims by reason thereof, and permitting it to be included in his estate and distributed under his will as such and received by part of the residuary devisees and legatees who received the same as part of their share of the estate, is such laches as will bar the granting of the relief for which she here prays."

In the case at bar plaintiffs do not plead ignorance of the death of Ellen C. Marsh on May 22, 1929, which occurred more than eleven years before any attempt was made to administer her estate and more than thirteen years before this action was filed. At least one of these plaintiffs had actual knowledge of the death of DeWitt C. Marsh more than ten years before this action was filed. All of the plaintiffs had constructive notice of the probate of his will more than ten years and the distribution of his estate under the will more than nine years before this action was filed. See *Miller v. Estate of Miller, supra; In re Estate of Sieker,* 89 Neb. 216, 131 N. W. 204; *In re Estate of Kelly,* 103 Neb. 513, 172 N. W. 758. It was held in *In re Estate of Sweeney,* 94 Neb. 834, 144 N. W. 902, that "A proceeding in the probate court to settle the estate of a decedent is a proceeding *in rem,* and every one interested in such settlement is a party in the probate court whether he is named or not, and this is particularly true as to the distribution of an estate under a will."

We are of the opinion that the conclusions reached and the propositions of law stated in *In re Estate of Marsh, supra,* and *Bend v. Marsh, supra,* are applicable to and decisive of the case at bar. Other interesting questions of law are ably presented in brief of counsel but we do not deem it necessary to discuss them. For the reasons heretofore stated we conclude that the judgment of the trial court was correct and it is affirmed.

AFFIRMED.

FRANCES VOCELKA, APPELLANT, V. JAMES VOCELKA APPELLEE.

19 N. W. 2d 363

FILED JUNE 22, 1945. No. 31943.

Divorce. In deciding the question of alimony or division of property as between the parties the court, in exercising its sound discretion, will consider the respective ages of the parties, their earning ability, the duration of and the conduct of each during the marriage, their station in life, the circumstances and necessities of each, their health and physical condition, whether the property was accumulated before or after the marriage, and any and all other circumstances bearing upon the question and from all of such elements determine the rights of the respective parties.

APPEAL from the district court for Douglas County: JAMES M. FITZGERALD, JUDGE. *Affirmed as modified; appellant allowed $150 attorney fee for services in this court.*

J. V. Benesch, Crofoot, Fraser, Connolly & Stryker, for appellant.

B. J. Boyle, for appellee.

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

WENKE, J.

The plaintiff, Frances Vocelka, commenced this divorce action in the district court for Douglas county against the

defendant, James Vocelka, on August 11, 1944. From a decree granting her a divorce upon the grounds of extreme cruelty, awarding her the custody of their son, Edward J. Vocelka, aged four years, allowing $25 per month for the child's support and maintenance, granting her certain personal property fully set out in the decree, and awarding her the properties located at 2706, 2708 and 2807 Ed Creighton avenue, Omaha, Douglas County, Nebraska, the plaintiff appeals.

This decree awarded the defendant certain personal property and fixtures fully described in the decree, lots 6, 7 and 8, block 12, Kountze addition, Omaha, Douglas County, and the south half of lot 13 in Dee's addition to South Omaha, Sarpy county, all in Nebraska.

Appellant complains of the court's division of the property and its refusal to award her alimony.

The parties were married on January 10, 1939, and to this union a son, Edward J. Vocelka, was born. This is not the first marriage of either party. Appellant had two previous marriages. To her first marriage two children were born, Frank and Marie, who, at the time of the trial, were 17 and 11 years of age. At the time of the marriage they lived with their mother. The first husband was accidentally killed in 1934. She remarried in 1936 and this marriage lasted only about 10 months and ended in a divorce. No children were born to this union. The appellee, who was 56 years of age at the time of trial, was also previously twice married. His first wife died leaving him with six children. His second marriage ended in divorce. No children were born as a result of this union. At the time of this marriage four of his children were living with him.

At the time of the marriage both parties were possessed of property. Appellant owned two houses located at 2706 and 2708 Ed Creighton avenue, which were free of debt, and a property located at Thirteenth and William streets and referred to as the Golden Goose. This latter property was quite heavily encumbered. She also had $360 on deposit in the bank. Appellee owned the property described

as lots 6, 7 and 8, block 12, Kountze addition, Omaha, located at 1730-1732 South Thirteenth street and the Sarpy county place. He also owned properties located at 4115 South Thirteenth street and 1605 Elm street in Omaha. The latter of these two properties was encumbered for $1,000. He owned the fixtures in the tavern located at 1730 South Thirteenth street, which he operated in his son's name, together with the stock necessary to conduct the business. Also, the household furniture upstairs where his family lived. This property at 1730-1732 South Thirteenth street appears to be a two-story building with double front in which a tavern was being operated at 1730 and a grocery at 1732. It will herein be referred to as the tavern property. Upstairs were rooms in part of which the family lived and part of which were rented to others.

Although a carpenter by trade, the appellee was engaged in operating a tavern. Prior to and at the time of the marriage he was operating it by securing a liquor license in his son's name. This was necessary for the reason that he was not a citizen and therefore ineligible. After their marriage, when the license expired on May 1, 1939, they took out a new license in appellant's name and continued to do so for four years. They operated this business, which included a restaurant, together. He did the managing and both worked in the tavern. She cooked, cleaned, waited on customers and did whatever was necessary besides taking care of their home, which was upstairs. They remodeled the building by putting a dance floor in the space formerly occupied by the grocery and included it in their business. The proceeds of the business were used to operate it, to repair and improve the tavern property, to add fixtures in the tavern, and for family expenses.

In 1943 the Nebraska Liquor Control Commission refused appellant a license and one was taken out in the name of McLaughlin. However, it appears that appellee was a secret partner in this setup. McLaughlin had his license revoked about two and one-half months later. It appears appellant advanced some $400 for McLaughlin to purchase liquor stock but she was never able to get this back.

In addition the appellant, prior to the marriage, loaned $100 to the appellee to enable him to buy stock for the tavern. Later, at the time of renewing the license in 1941, she advanced $505 for that purpose. In May of 1941 she advanced him $300 to pay off a mortgage on his car.

However, she did not sell McLaughlin the stock of liquors which they had on hand when a license was refused her. Later, when a Mrs. Whitcomb obtained a license on May 1, 1944, and operated the tavern, she sold it to her and received $992 therefrom. This sum she retained and invested in bonds for her children.

Appellant retained her two residences on Ed Creighton avenue. The same were kept in good repair, and the taxes assessed thereon paid. She collected the rents therefrom. She testified she used considerable of these rents to buy clothes for herself and her children. In 1940 she sold the property at Thirteenth and William, referred to as the Golden Goose, and received for her equity $3,000. She invested $1,600 of this in a property located at 2807 Ed Creighton avenue, which is awarded her in the decree; used $300 to buy some furniture, which is awarded her in the decree; and used some $400 to fix up the place where they lived in the tavern property. What was done with the balance is not clear. However, her account book with the Union Building and Loan Association shows she had on deposit there as late as March 17, 1944, the sum of $1,611.82. She withdrew on that date $1,602.58.

Appellee sold two of his properties after the marriage. These were the properties located at 4115 South Thirteenth street and 1605 Elm street. What he received for them is not shown and just what he did with the proceeds is not too clear, except that he used some of it to repair and improve the tavern property, particularly when they remodeled it and put in a place to dance. This remodeling cost somewhere between $1,400 and $1,600. Other improvements and betterments were made to this property and the cost thereof was either paid from the proceeds of the sale of these properties or taken out of the income of

the business. It appears that all the properties of the parties were kept in fairly good condition.

The record is none too complete as to the value of the real property and the income therefrom. Appellant testifies the two houses at 2706 and 2708 Ed Creighton avenue are worth $4,400. They rent for $45 per month. She purchased the property at 2807 Ed Creighton avenue for $4,000. Its rental value is not shown. The only testimony as to the value of the tavern property is appellant's following answer: "Well, I don't know. Maybe he can sell it for $15,000.00." Mrs. Whitcomb pays $125 per month rent for the first floor of the tavern property. There are some rooms upstairs, in addition to those occupied by the appellee as a home. These have, from time to time, been rented but are apparently not very desirable. The rental income or value is not shown for the Sarpy county property.

The appellee also has two music boxes from which he receives some income. Appellant testifies this amounts to $60 per month.

In addition to the property herein set forth it appears appellee, at the time of the trial, had $155 in cash, a $100 bond, the fixtures in the tavern and his household furniture.

While the evidence shows the appellee to be a carpenter by trade, he had not, as far as the record shows, engaged therein except to make repairs to the several properties of the parties. He is about 57 years of age and whether or not he is capable of again engaging therein is not apparent from the record.

We stated the rule applicable to the questions here involved in *Martin v. Martin*, 145 Neb. 655, 17 N. W. 2d 625, as follows: " * * * we apply the rule as stated in *Hild v. Hild*, 135 Neb. 896, 284 N. W. 730: 'In determining the question of alimony or division of property as between the parties, the court, in exercising its sound discretion, will consider the respective ages of the parties to the marriage, their earning ability, the duration of, and the conduct of each during, the marriage, their station in life, the circumstances and necessities of each, as well as their health and

physical condition, and whether the property was accumulated before or after the marriage, and from all of such elements the court, in allowing or refusing to allow permanent alimony, will determine the rights of the respective parties and all other matters pertaining to the case.' " And to the same effect in somewhat different language in *Lippincott v. Lippincott,* 144 Neb. 486, 13 N. W. 2d 721, as follows: "In fixing the amount of permanent alimony the court will take into consideration the estate of each party at the time of the marriage, their respective contributions since, the duration of the marriage, the wife's loss of her interest in the husband's property by virtue of the divorce, the social standing, comforts and luxuries of life which the wife would probably have enjoyed except for the enforced separation, the conduct of the parties leading up to the divorce and to which party the divorce is granted, their age and condition of health, and all other facts and circumstances, and award an amount in alimony which appears to be fair and equitable between the parties."

Applying these rules to the parties and their rights, particularly in view of the trial court's finding " * * * that the plaintiff (appellant here), Frances Vocelka, is a suitable and proper person to be awarded the care, custody and control of said minor child * * * ," we think the decree should be modified as follows: That in addition to the property division, as made by the trial court, the appellant be allowed the sum of $1,500 alimony, same to be payable at the rate of $25 per month, beginning with the date of the decree, December 18, 1944, until fully paid. That appellant be allowed an attorney's fee in the sum of $150 for services in this court.

AFFIRMED AS MODIFIED.

CARL E. FAUGHT, APPELLEE, V. DAWSON COUNTY IRRIGATION COMPANY, APPELLANT.
19 N. W. 2d 358

FILED JUNE 29, 1945. No. 31937.

1. **Appeal and Error.** In a law action findings of fact made by the court have the same force and effect as the verdict of a jury, and if there is competent evidence to support them, such findings will not be disturbed on appeal.
2. **Waters: DRAINS.** It is the duty of those who build structures across natural drainways to provide for the natural passage through such obstruction of all waters which may be reasonably anticipated to drain there. This is a continuing duty.
3. **Damages.** The rule as to allocation of damages is applicable where damage is caused by the several and independent negligent acts of two or more parties, so that it may be found that the act of each resulted in some injury and the consequences of their acts are separable.
4. **Crops: DAMAGES.** The question of whether damages based on the result of an unmatured crop are speculative must be decided by whether there is sufficient data to determine with reasonable certainty the probable value it would have had if matured.
5. ———: ———. In case of the destruction of a permanent or perennial crop, such as alfalfa, the measure of damages is the difference between the value of the land before and after the destruction of the crop.
6. **Waters: DAMAGES.** The application of the rule of allocation of damages last announced in *Seibold v. Whipple*, 143 Neb. 167, 9 N. W. 2d 154, is clarified.

APPEAL from the district court for Dawson County: I. J. NISLEY, JUDGE. *Affirmed.*

Beeler, Crosby & Baskins, for appellant.

Frank M. Johnson, for appellee.

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

SIMMONS, C. J.

In this action plaintiff seeks to recover damages for loss of crops as a result of flooding. Trial to a jury was waived and had to the court. The trial court found for the plain-

tiff. Defendant appeals. We affirm the judgment of the trial court.

We state the evidence in conformity with the rule that in a law action findings of fact made by the court have the same force and effect as the verdict of a jury, and if there is competent evidence to support them, such findings will not be disturbed on appeal. *Linch v. Thorpe,* 140 Neb. 478, 300 N. W. 383.

Plaintiff is the owner of a piece of irrigated land of about 70 acres, generally rectangular in shape, and contiguous lengthwise to and above the main canal of defendant.

Defendant is the owner of an irrigation canal and works, its main canal running generally east and west in Dawson county.

Plaintiff's petition here states two causes of action.

The first cause is based upon the destruction of .7 acres of beets as the result of two floodings occurring in May of 1940. These were caused by the overflow of defendant's canal. The trial court found that plaintiff was damaged in the sum of $10.31.

The second cause of action is based upon damage to and destruction of beets and the killing of a perennial crop of alfalfa on another part of the same farm by flooding which occurred beginning on June 7, 1940. The trial court found for plaintiff and awarded damages in the sum of $101.65 for the beets and $500 for the alfalfa.

Plaintiff's land is bisected by a draw or creek running generally north and south through about the center of his land. This in the lower area is referred to as Spring creek. This creek forms the outlet of a drainage basin several miles to the north and extending generally north and south, and empties into the Platte river. The creek is described as a swale or dry creek, except in times of heavy rainfall. Its meanderings are defined but without distinct banks until it reaches within a short distance of plaintiff's land. There it has distinct banks. At a point about 100 feet north of defendant's canal the west bank is lower than above that point.

In 1925 defendant constructed a concrete box underdrain two feet by six feet, and a 24-inch diameter pipe underdrain at the point where the bed of the creek intersects its canal. At a higher elevation they had provided two structures, six feet wide, in the upper bank of their canal, capable of being opened to allow excess flood waters to enter their canal.

To the east of Spring creek, there originally appears to have been a swale called Stump ditch or creek, which in part at least drained naturally to the east of Spring creek. About 1891 or 1892 an irrigation ditch was built along the east side of this swale, so that waters no longer passed down it, but were diverted onto the lands to the west and excess waters reached Spring creek. Thereafter, the lands below that ditch were tilled and leveled, and the ditch no longer existed in fact. About 1935 Stump creek was tapped with a drain ditch about two miles north of plaintiff's land and carried into Spring creek a half a mile or so north of plaintiff's land. This prevented flood damage to the intermediate lands.

The Cozad Irrigation Ditch runs generally east and west across this drainage area a few miles to the north of defendant's canal. Still a few miles further to the north the Gothenburg Irrigation Ditch runs generally east and west across this drainage area.

During the night of June 6, 1940, over two inches of rain fell at Cozad and apparently a heavier fall occurred in the drainage area to the north.

At that time the defendant's canal was carrying a considerable quantity of water diverted from the river. The next morning its wasteway to the east of the point in question was opened, and during the early forenoon its intake gates were closed. At that time the water had backed up and flooded plaintiff's land west of the creek, although the underdrains were functioning. The canal being filled with water, the spillway gates into it were not then opened. At about noon the water was coming down from the north, and, so far as plaintiff's land is concerned, within the banks of the creek until it reached a point about 100 feet from de-

fendant's canal. There it overflowed the bank and had flooded plaintiff's land to a depth up to three feet, or more. The underdrains were clogged with weeds and other debris. The defendant's canal was then empty. The gates of the spillway were opened as much as possible, permitting the accumulated water to enter the canal. The obstructions in the underdrains were removed, and after some time the height of the water receded. Plaintiff's land remained under water for two or three days. The evidence is that the rainfall on plaintiff's land would not have caused the flooding and would have drained off without damage to his crops. The evidence also is that had defendant's structure not been placed across this creek, the flood waters would have passed on without damage to plaintiff.

Also, during the day of June 7, the drain ditch was emptying water into Spring creek above plaintiff's land. On the morning of that day, the Gothenburg canal was carrying a small head of diverted water sufficient to prime the ditch and keep down the growth of weeds. Its intake gates were closed early that morning. Floodwaters from the north came down to the Gothenburg canal and overflowed its banks, and ran into the canal. Shortly after noon of that day, the south bank of this canal gave way and the waters were released to flow south and eventually into Spring creek. At the same time, floodwaters overflowed the banks of the Cozad canal and came on down into Spring creek. All these waters, however, remained within the banks of Spring creek until they reached a point about 100 feet from defendant's canal, where they banked up against the canal and flowed out upon defendant's land.

The above statement of facts is consistent with the evidence and the findings of the trial court.

Plaintiff alleges that defendant was negligent in the construction of its outlet or underdrain in that it was inadequate to permit floodwaters to pass through in sufficient quantity and to prevent the accumulation of waters that flooded plaintiff's land; and that it was negligent in permitting the underdrains to become clogged. The trial court

found generally and specifically for the plaintiff on these allegations of negligence.

Defendant argues that for 20 years prior to the time in question these structures had proved adequate, and that negligent construction and operation were not proved.

We have repeatedly held that it is the duty of those who build structures across natural drainways to provide for the natural passage through such obstruction of all waters which may be reasonably anticipated to drain there. This is a continuing duty. *Crummel v. Nemaha County*, 118 Neb. 355, 224 N. W. 864; *Leaders v. Sarpy County*, 134 Neb. 817, 279 N. W. 809; *Webb v. Platte Valley Public Power and Irrigation District ante* p. 61, 18 N. W. 2d 563.

It appears quite obvious that the underdrains were not adequate to permit the passage of all waters which the defendant should have anticipated might drain there. In fact, this evidence shows that defendant did anticipate that the underdrains would not be sufficient, for it provided an outlet into its canal for excess waters not passing through the drains. This outlet was closed when the crest of the flood reached plaintiff's land. We think the evidence is ample to sustain the finding of the trial court of inadequate and negligent construction and operation.

Defendant next contends that there was other water commingled with the impounded floodwaters, which contributed to the damage plaintiff suffered, and that it was incumbent upon the plaintiff to allocate the damages arising from each of said sources, and no competent proof of such allocation being shown, the judgment cannot be sustained. Defendant cites *Lincoln Joint Stock Land Bank v. Platte Valley Public Power and Irrigation District*, 140 Neb. 316, 299 N. W. 485; *Snyder v. Platte Valley Public Power and Irrigation District*, 140 Neb. 897, 2 N. W. 2d 327; *Robinson v. Dawson County Irrigation Co.*, 142 Neb. 811, 8 N. W. 2d 179; *Seibold v. Whipple*, 143 Neb. 167, 9 N. W. 2d 154; *Murphy v. Chicago, B. & Q. R. Co.*, 101 Neb. 73, 161 N. W. 1048; *Compton v. Elkhorn Valley Drainage District*, 124 Neb. 299, 246 N. W. 340; *Harris v. Lincoln & N. W. R. Co.*,

91 Neb. 755, 137 N. W. 865; *Republican Valley R. Co. v. Fink*, 18 Neb. 89, 24 N. W. 691; *McAdams v. Chicago, R. I. & P. Ry. Co.*, 200 Ia. 732, 205 N. W. 310.

The rule as to allocation of damages is applicable where damage is caused by the several and independent negligent acts of two or more parties, so that it may be found that the act of each resulted in some injury and the consequences of their acts are separable. Each tort-feasor is then held liable only for so much of the injury as was caused by his act. 1 Cooley, Torts (4th ed.), sec. 86, p. 279; Gould, Waters (3d ed.), sec. 222, p. 439; 4 Sutherland, Damages (4th ed.), sec. 1059, p. 3938; 3 Kinney, Irrigation and Water Rights (2d ed.), sec. 1685, p. 3105; Annotations, 9 A. L. R. 942, 35 A. L. R. 412, 91 A. L. R. 763; 62 C. J., sec. 45, p. 1131; *Chipman v. Palmer*, 77 N. Y. 51; *Miller v. Highland Ditch Co.*, 87 Cal. 430, 25 Pac. 550; *Sellick v. Hall*, 47 Conn. 260; *Blaisdell v. Stephens*, 14 Nev. 17. The rule requires that plaintiff establish that a negligent act of the defendant was the proximate cause of the damage which he suffered. Where a substantial amount of water from another source or sources has been added to the water for which defendant is liable, and the combined waters have caused the damage, then it is incumbent upon the plaintiff to establish either that his damages would have occurred from the waters for which defendant is liable, or to establish the amount of his damage that had been caused by the waters for which defendant is liable. To apply the rule otherwise would make it an instrument by which damage liability would be avoided. So to apply it is to require the tort-feasor to pay that for which he is liable.

Defendant contends that there are three sources of such other waters shown by the evidence.

First, there is evidence of waters that came upon plaintiff's lands, and into the accumulated water on the damaged area, from the land immediately to the west. This evidence is controverted. The amount of this water is not shown. It appears to have been in the drainage area of Spring creek, and although it did not come down the creek

from the north, it reached the point where it, along with other waters, was impounded by defendant's canal. It clearly comes within the waters which defendant should have anticipated would drain down and off through Spring creek.

Next, there is evidence that there was some diverted water flowing in the Gothenburg canal on the morning of June 7. The intake had been closed some hours before the break in that canal. There is no evidence showing the amount of that water, nor the amount, if any, which entered the floodwaters which were impounded by defendant's canal. For aught that appears from this record, that water could have passed the point of the break long before it occurred. The evidence would not sustain a finding that any material amount of the damage-causing water came from that source. There also is evidence that the Cozad canal was running to "capacity" without a showing as to what the capacity was or the source of the water, whether diverted or flood. The evidence also is positive that there was no washout in the banks of the Cozad canal. The floodwaters came down, ran over the upper bank, filled the canal, and ran over the lower bank. This evidence would not sustain a finding that there was any material amount of foreign water reaching the floodwaters. In fact, it would indicate that the Cozad ditch and the Gothenburg ditch also carried away a part of the floodwaters. There is evidence that both the Gothenburg and Cozad canals retarded the normal flow of floodwaters down the natural drainage course and prevented those waters reaching the impounded waters and increasing the flood level at its crest.

The third source of waters was from the Stump ditch or drainage area. The evidence is clear that for almost fifty years prior to 1940, floodwaters from that source had spread out across the lands and drained into Spring creek on or above plaintiff's land. For that period of time, the land and Spring creek carried that drainage burden. That water also falls within the waters which defendant should have anticipated would drain down Spring creek.

We see nothing in this evidence which required the plaintiff to allocate damages, or which required the court to deny the award for damages sustained because of such waters.

As to the damages resulting from the May, 1940, flooding involved in plaintiff's first cause of action, he proved that he received as rent a share of the beet crop, the area drowned out, the production on the balance of the tract, and the price of beets, and on that basis arrived at his damages. There is a dispute in the evidence as to whether or not the beets had at that time been actually planted. That dispute the trial court resolved in favor of the plaintiff. There is no dispute that because of the flooded condition beets or other crops could not thereafter be planted on the land so flooded.

As to the damages caused by the flooding on June 7, plaintiff proved that as landlord he received as rent a share of the beet crop; he proved the area drowned out upon which no beets or other crops were raised that year, the area damaged by the floodwaters, the production on land under conditions similar to his own in the same area, the production that he actually had on the flooded lands, and the price received for the beets produced. By that process, he arrived at the damages which he sustained. As to the damage to his alfalfa land caused by the June 7 flooding, plaintiff proved that alfalfa was a perennial crop; that 20 acres of it were killed by the waters standing on it for a period of days; that the fair market value of the land immediately before the flooding was $100 per acre and immediately thereafter was $75 per acre.

There was no other evidence of the amount of damages. That the crops were destroyed and damaged as a result of the flooding is shown. The trial court found in accord with this testimony.

The defendant contends that this evidence was not competent nor sufficient to prove damages. This same contention was advanced in *Gledhill v. State*, 123 Neb. 726, 243 N. W. 909. We there reviewed the authorities. We find the language there used is applicable here. "The trial court assessed the damages for the loss of the use of the land for

that year. Much of this land involved was rented to tenants who gave the owner a share of the crop as rental. The trial court determined the value of the use of the land from evidence tending to prove the value of the crop which would have been raised on the land but for the damage caused by the flood. ' * * * The question of whether damages based on the result of an unmatured crop are speculative must be determined by whether there is sufficient data to determine with reasonable certainty the probable value it would have had if matured.' * * * The determination of the value of the loss of the use of this land can be made almost certain in this case if based upon the evidence of the value of the crop which could have been raised upon this land but for the flood. * * * No better way could be devised to determine the rental value of this land than to determine the value of the crop they could and would have produced except for the flooding. The evidence in this case shows that the cultivation of similar crops on portions of the same or adjoining lands under similar conditions furnishes sufficient data to remove the uncertainty as to damage of the unmatured crops. When there is evidence of the actual value of other matured crops of a like kind grown during the same period, in portions of the same or adjoining land under similar conditions, there is sufficient data to determine with reasonable certainty the probable value of an unmatured crop if it had matured. * * *

"In this case, there was nothing left to conjecture or speculation as to the probability of the crop or the extent of it dependent upon the rainfall or unfavorable conditions. Every element surrounding the production of a crop was then known and was applicable alike to the land that was flooded and that which was not."

The rule as to the damages to the alfalfa land long followed by this court is: "In case of the destruction of a permanent or perennial crop, such as alfalfa, the measure of damages is the difference between the value of the land before and after the destruction of the crop." *McKee v. Chicago, B. & Q. R. Co.*, 93 Neb. 294, 140 N. W. 145.

Finally, defendant contends that this rainfall was unprecedented and amounted in law to an act of God relieving defendant from liability, citing *Matousek v. Galligan*, 104 Neb. 731, 178 N. W. 510. We recently reviewed a similar contention in *Webb v. Platte Valley Public Power and Irrigation District, supra.* We find no merit in this contention.

The judgment of the district court is affirmed.

AFFIRMED.

IN RE ESTATE OF PHILLIP SULLIVAN.
C. H. HENDRICKSON, APPELLANT, V. ESTATE OF PHILLIP SULLIVAN ET AL., APPELLEES.
19 N. W. 2d 372

FILED JUNE 29, 1945. No. 31963.

Trusts. An allowance may not be made out of a trust estate, being administered by the courts, for the services of an attorney not employed by the trustee or trustees, unless the services redounded to the interest of all persons interested in the estate and were beneficial to the estate.

APPEAL from the district court for Wayne County: LYLE E. JACKSON, JUDGE. *Affirmed.*

C. H. Hendrickson, pro se, Mark J. Ryan, for appellant.

Fred S. Berry, for appellees.

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

SIMMONS, C. J.

This action involves two claims for attorney's fees filed against the trust estate of Phillip Sullivan, deceased. The county court and the district court denied the claims. Claimant, herein called the plaintiff, appeals. We affirm the judgment of the trial court.

Mr. Sullivan died testate October 5, 1919, possessed of a

considerable estate, including large holdings of farm land. His will, admitted to probate in November, 1919, provided that H. F. Wilson and H. S. Ringland should be his executors, and later trustees, of his estate to handle the same, reduce it to cash and distribute to named beneficiaries. The executors as such were discharged in 1921 and the property assigned to them as trustees. Thereafter, the two trustees administered the trust, and early in the trust period were paid substantial fees as trustees. In 1924 Mr. Wilson died, and Mr. Ringland continued as sole trustee until his death November 9, 1932.

A. R. Davis represented the trustees as their attorney. He died in March, 1929. He was associated with plaintiff in the practice of the law.

Plaintiff's first claim, in the order in which they arise, is for the sum of $1,000 for representing said estate for the years 1930, 1931 and 1932. The second claim is in the sum of $200 for services in representing the estate and legatees in preparing objections to the final report of the trustee made by his estate, and in filing a claim against the Ringland estate in behalf of the trust estate.

The evidence presented to sustain the claims consists of the testimony of the plaintiff, exhibits of various court proceedings, and originals and copies of letters from plaintiff's files concerning this estate and plaintiff's connection therewith. From this file of correspondence, the court proceedings and plaintiff's testimony, the picture can be developed.

We consider the claims in the above order.

Plaintiff testified that during the years mentioned, he represented the trustee in estate matters. He testified that he prepared three reports of the trustee covering the period from June 13, 1929, to February 3, 1932. These reports consist of a tabulation of receipts and disbursements, and show balances on hand. They were prepared from data furnished by the trustee. Plaintiff also testified that during this period of time, he went with the trustee to visit the lands, inspect fences and wells, care for property, and to collect rents—sometimes a difficult task. He corresponded

with two bonding companies and secured a bond for the trustee. Those in general were his services, except as to the matters now to be mentioned. It appears that in February, 1932, one of the beneficiaries of the trust named Whitlatch undertook to secure a distribution and a payment of her share of the trust estate. Some litigation followed about the appointment of a second trustee. An attempt also was made to set aside specific property to this beneficiary. Considerable correspondence was had and papers were prepared for filing an action to secure the above result. These papers were not filed because of the death of the trustee.

A member of the bar of Illinois, William M. Walker, represented the principal beneficiary of this trust. Plaintiff's correspondence file begins with a letter from Mr. Walker to A. R. Davis, dated February 17, 1932, concerning the Whitlatch attempt to secure distribution. This letter was turned over to plaintiff by the trustee, and thereafter plaintiff rendered services to the trustee in that matter. The trustee also answered that letter of Mr. Walker and advised him of the death of Mr. Davis three years earlier, and that " * * * *as nothing has come up until this time,* this is perhaps the reason that his death has not been brought to your attention." (Emphasis supplied.) It then appears that the trustee did not consider that he had employed an attorney prior to that time. It also appears that prior correspondence concerning the trust estate was in Mr. Davis' files, and apparently covered matters handled by him. This written record, made at the time, rather definitely fixes the date of the beginning of plaintiff's services as in February, 1932.

Under date of March 29, 1932, plaintiff advised Mr. Walker that he would appear for "all defendants" in the actions brought by Whitlatch. It further appears from a letter dated April 21, 1932, that the trustee did not file objections in the Whitlatch action in county court.

Mr. Walker's client was concerned about expenses of administration. Under date of October 1, 1932, he wrote the plaintiff asking for "a statement of all existing expense of

administration against the estate" and "the amount of expense occasioned by the activities of the Whitlatch interests, also the expense, if any, that may exist otherwise and also an estimate of the probable expense to finally close this estate." Plaintiff replied to this letter on October 4, 1932, and stated:

"You already have reports showing fully all statements of expenses in connection with this estate, and there should be no further expenses except the usual run of affairs, which no doubt will be small.

"The expenses of litigation that the Whitlatches brought about to the estate are as follows:

"Court costs paid to date by defendants 50¢

In addition I will charge an attorney fee of $200.00.

"The future expenses of this estate no one can determine in advance, but they ought not to be great, depending, of course, on what is being done, but in all events they could not be large."

Mr. Walker acknowledged this letter on October 5, stating it was the information wanted as he "thought there might be in existance at the present time charges and expenses that had never been paid or statement made * * *." Thereafter, the final report of Mr. Ringland was made by his administrator. It shows that on October 28, 1932, the trustee paid plaintiff for services in county and district courts in re Whitlatch v. Sullivan, per statement October 24, 1932, $200.02. Plaintiff admits the receipt of this payment, but testifies that it was limited to services performed in the two court cases. Thereafter, the trustee's report was allowed in 1933 and his bond released.

In April, 1944, plaintiff filed his claim in county court for $1,000 attorney's fees. The trustees objected to the allowance of this claim and required strict proof. They pleaded payment of the claim; that it was not a valid claim against the trust property; and that the claim was barred by the statute of limitations and by estoppel and laches.

It seems to us from this record, and in particular from the plaintiff's letter of October 4, 1932, that he contemplated

a charge against the estate of $200, which would constitute the charge for all services rendered, and that there would be no further charges except "future expenses" which "ought not to be great." Accordingly, we find that the plea of payment of this claim is sustained.

The second claim arises out of events following the death of the trustee. The filing date does not show in the transcript, but the parties treat it as having been filed in July of 1933.

Again, we go to the correspondence and the court proceedings for information as to what took place. It appears that the trustee had for some time held substantial balances of cash on hand. The principal beneficiary had, prior to the death of the trustee, raised the question of the estate being entitled to interest on this fund. Plaintiff had taken the position that no interest was payable. After the trustee's death, Mr. Walker again raised that question with the plaintiff. He also raised a question regarding the fees already paid to the trustees, taking the position that the fees paid were to cover the entire cost of administration; that the estate of the trustee should pay all subsequent costs of administering the estate; that Mr. Ringland, as sole trustee, was negligent in not filing a claim in the estate of trustee Wilson for fees paid and not earned; that the estate of trustee Ringland should pay interest on the trust funds held by him.

New trustees were appointed in January, 1933. They did not qualify for reasons hereinafter mentioned. No one represented the estate. There was correspondence between plaintiff and Mr. Walker about the appointment of trustees.

Plaintiff advised Mr. Walker that he did not represent any one after Mr. Ringland's death. On December 1, 1932, Mr. Walker wrote plaintiff about filing a claim against the Ringland estate, and asked if he (plaintiff) would be in a position "to handle such a claim on a contingent fee basis?" On December 3, 1932, plaintiff wrote Mr. Walker that he saw no reason why he could not represent a claim against the Ringland estate and would "be glad to work with you in any way that we can." On January 17, 1933, Mr. Walker

wrote a general letter to the heirs, in which he suggested that a claim be filed against the Ringland estate and also objections be filed to the final report of the trustee. The letter concludes with a request for information as to whether other beneficiaries were willing to join with the principal beneficiary in so proceeding, and in employing an attorney at Wayne and "to allow him up to fifty percent of the amount that could be recovered for his compensation?" Under date of February 27, 1933, Mr. Walker wrote plaintiff that he had not "received instructions from all of the Sullivan legatees agreeing to your employment" and asked for a letter advising as to the terms under which plaintiff was handling the matter as his (Walker's) client desired to have the "arrangement made in formal shape." We find no answer to that letter in the files.

Plaintiff testified that he filed the claim hereafter mentioned against the Ringland estate under an arrangement with Mr. Walker.

The administrator for the trustee had filed a final report on January 9, 1933, in which he asked, among other things, for the allowance of additional fees.

Plaintiff and Mr. Walker discussed this matter by correspondence. Plaintiff wrote Mr. Walker on November 25, 1932, about filing a claim against the Ringland estate for costs, expenses, or a rebate of fees and expressed the thought that "nothing much could be accomplished by it * * * ." Plaintiff and Mr. Walker, for the principal legatee and some of the others, prepared and, on January 27, 1933, filed objections to the allowance of the final report of the trustee. This was based generally upon the grounds above enumerated as to the claim against the Ringland estate, and included objections to the allowance of any further sums to the trustee. Thereafter, on April 4, 1933, a claim was filed on behalf of certain of the legatees against the estate of Ringland, covering the matters herein mentioned, for the total sum of $25,000. Plaintiff on February 6, 1933, wrote Mr. Walker expressing the view that the county court would hold against them but that they should appeal "because they

will not want it tied up that long, and we will get a substantial settlement out of them."

The matter then took its course. The final report of the trustee was approved and no further allowance for service or expense made. On July 17, 1933, the claim against the Ringland estate was disallowed. It appears that this disposition of the two was according to an agreement reached by the various parties. Thereafter the new trustees qualified and administered the trust.

In the meantime there were no trustees of the estate. Plaintiff testified that while those objections were standing on the record, the new trustees could not give a bond and could not qualify, and the objections were withdrawn so that the new trustees could give a bond and qualify.

He further testified that the benefit to the trust estate by the filing of these objections was that no further allowance was made to Mr. Ringland's estate from the trust funds. His claim here is based on securing that benefit to the estate.

In the exhibits there is a letter written to the plaintiff on July 19, 1933, by the attorney for the Ringland estate, with reference to the disallowance of that claim. From the recital therein it appears that an attorney representing certain of the heirs had expressed the opinion that it was not proper to allow plaintiff a fee from the trust estate; that no final determination was reached; and that the court's impression seemed to be that the estate had not been benefited by what was done. Thereafter this claim for fees was filed.

From this record furnished by the plaintiff, it appears that he undertook the work of representing certain beneficiaries relying upon a contingent fee based upon the amount recovered for the estate. No recovery was had. It also appears that no additional fee was allowed the trustee. But there is no showing here that one would have been allowed had the objections not been made, nor is there a showing of the amount that was claimed for the trustee. At one point in the negotiations a small fee was suggested. Hence, any effort to calculate possible benefits would be purely speculative. There is another matter to be consid-

ered. From January to July, 1933, this large estate was without a trustee to manage it. The evidence shows that the landlord's share of crops was being neglected, new leases needed to be made and were not, tenants were in doubt as to what to do, collections were not being made, and the trust estate was not being cared for properly. According to the plaintiff's testimony, the pendency of these objections prevented the new trustees from qualifying. The loss to the estate, if any, as a result of this delay is not shown. The spring and summer of 1933 were trying times in Nebraska, as throughout the United States. If we were permitted to speculate, it might well be the conclusion that these objections could have caused far more damage to the estate than the claimed benefits. But we will speculate neither as to the benefits nor detriments caused by these claims.

In *In re Estate of Love*, 136 Neb. 458, 286 N.W. 381, we stated the following rule: "An allowance may not be made out of the estate of a deceased person for the services of an attorney not employed by the personal representative of the estate unless the services redounded to the interest of all persons interested in the estate and were beneficial to the estate." The principle there is applicable here, and requires a denial of the fee claimed.

The judgment of the district court is affirmed.

AFFIRMED.

LEO B. GOODHART, APPELLANT, V. CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, APPELLEE.

19 N. W. 2d 549

FILED JUNE 29, 1945. No. 31919.

1. Waters: RAILROADS. In an action for damages to land and growing crops by floodwaters of a stream, subject to overflow from natural causes, and which it is alleged were thrown upon the plaintiff's land by the negligent and improper construction of a railroad near by and adjacent thereto, the burden of proof is on

the plaintiff to show that the construction complained of either caused such overflow or increased the same, or in some manner contributed thereto, together with the nature and extent of the increased overflow, if any, and the amount of damages caused thereby.

2. **Trial.** Where the evidence was insufficient to sustain a judgment in favor of the plaintiff, it was the duty of the trial court to sustain a motion directing a verdict for defendant at the close of plaintiff's evidence.

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

Archibald J. Weaver and *F. A. Hebenstreit,* for appellant.

Jean B. Cain, J. W. Weingarten and *W. P. Loomis,* for appellee.

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

PAINE, J.

This is an action against the Chicago, Burlington & Quincy Railroad Company for damages for the destruction of growing crops by floodwaters which were caused to back up on the plaintiff's land because of the alleged improper construction of a culvert under the railroad track. At the close of all of the evidence, the trial court instructed the jury to return a verdict for the defendant. Plaintiff appeals.

Plaintiff is the owner of a tract of bottom land in Richardson county, on the south line of which there is a county highway running east and west, and a quarter of a mile south of this highway, and across the land of another, is the right of way of the defendant railroad company. Just to the south of such right of way, and parallel therewith, is the drainage canal of Drainage District No. 2, Richardson county. Part of plaintiff's land is drained by a small watercourse which rises not far from the northwest corner of plaintiff's farm and angles in a southeasterly direction across such farm, going under the county road and then continuing on for about a quarter of a mile across the inter-

vening land to the defendant's right of way and across that right of way in a concrete culvert.

This little watercourse originally ran under an open trestle under the railroad track, and by natural processes it had eroded until it had a considerable depth under the open trestle, which had to be replaced, for it impaired the safety of the tracks. In the year 1916 the defendant company constructed the present culvert of concrete with reinforced steel bars, which provides a waterway 12 feet wide, 10 feet high, and 61 feet long. The highest part of the floor of this culvert is at the north edge, from which point it slopes downward over three feet to the south side of the culvert. The north edge, which is the highest part of the culvert, is over six feet lower than the south edge of the plaintiff's land and ten feet lower than the upper reaches of the watercourse. This entire drainage course is about 4,500 feet in length to where it empties into another waterway.

One of the charges of the plaintiff is that this filling up of this eroded watercourse made an obstruction therein, which prevented the water running off in its natural course and caused it to back up on the plaintiff's land, causing the loss of his crop in the year 1940, for which this action was brought. The plaintiff charges that the defendant does not have the right to raise the eroded level of that watercourse, but that the plaintiff has the right to the natural erosion and deepening of such watercourse back toward his land, and that this culvert deprives him of rights which he possessed.

The defendant answers that the plaintiff is precluded from a recovery for the reason that the level of the water which damaged his crop was about ten feet higher than the floor of the concrete culvert under the right of way, which culvert was at least a quarter of a mile away from any of the plaintiff's land, and that obstructions in that quarter of a mile, which held the water from running down to the culvert, were not under the control of the Burlington railroad, but were under the control of the county authorities, which

built and maintained the county highway on the south side of the plaintiff's land, and that the ditch in which this small watercourse ran could not carry half as much water as could have gone under the culvert on the right of way; that the bridge across the watercourse at the county road had only 25 per cent of the capacity of the railroad culvert, and there was a hump about one foot high in the flow line, over which the water must go in crossing the intervening land, which could not be controlled by the defendant railroad in any way, as it was not responsible for the construction of this ditch. All witnesses agreed that the railroad culvert did allow all the water to pass which came to it.

The defendant claims that under section 31-359, R. S. 1943, which section has been in force since 1905, Mr. Linn, the previous owner of both tracts, could have proceeded under this statute for the construction of a deeper ditch, but instead in about 1914 he elected to improve the surface drainage of what is now the plaintiff's land by laying a line of 12-inch outlet tile in the drainage course across what is now the Bruun land, and laid lines of lateral tile every 80 feet to this outlet tile, and in 1930 refused to permit the drainage course to be deepened to disturb his main tile line. In 1916 Mr. Linn withdrew any objection to the construction of defendant's new culvert when he learned there was a fall of 15½ inches from the end of his outlet tile to the end of the culvert.

Exhibit No. 9 is a release, filed for record May 12, 1910, in which it describes the payment of $10,890.27 by the Chicago, Burlington & Quincy Railroad Company on account of Drainage District No. 2, which runs parallel with the Burlington right of way and immediately south thereof, and this release is signed by the chairman and by C. M. Linn, secretary for Drainage District No. 2, together with the signatures of many landowners, all signed before a notary public, and which agreed that for the payment of said sum of money it would be accepted in full satisfaction of all claims for damages to crops growing upon said lands, whether caused by the railroad grades or embankments, and

from all liability or damages on account of water, and they each bound themselves, their tenants, their assigns and grantees, so long as the present capacity of the waterways is not decreased by repair or reconstruction and the right of way is not changed so as to increase the present obstruction to the natural flow of water. This release was signed by Linn and his wife individually to cover the land now owned by the plaintiff and the intervening land now owned by Bruun.

The evidence of the engineers of the defendant company shows that the present concrete culvert under the railroad track is in strict accordance with the terms of the release mentioned. It is also shown that said Linn, now deceased, was still the owner of both tracts of land in 1916, when the old trestle bridge was replaced by the new concrete culvert, and that said Linn acquiesced in and consented to the construction of said culvert in the year 1916.

In the motion of defendant for a directed verdict it was claimed that the evidence was insufficient to sustain a verdict in the plaintiff's favor; that there was no substantial evidence that any act of the defendant contributed to the crop damage which the plaintiff sustained in 1940, which was doubtless caused by the inefficiency of the ditch beginning on plaintiff's own land, and over which defendant had no control.

The evidence shows that the concrete culvert was adequate and sufficient to pass all water that came to it; that the release executed by C. M. Linn, releasing the defendant from liability for damages to crop, is binding upon the plaintiff as a successor in the chain of title; that the construction of the defendant's culvert was designed to and did prevent the erosion of the defendant's right of way, but invaded no right of the plaintiff or his predecessors, as plaintiff had no right to require defendant's right of way to be eroded under the roadbed.

The trial court, in instructing the jury to return a verdict for the defendant, stated that the evidence was insufficient to sustain a recovery; that the floor of the culvert was rea-

sonably lower than the plaintiff's land, and it was not an obstruction, for the opening was left large enough to take off all the water which came to it; and the jury were instructed to return a verdict for the defendant.

The decision of this court in *Johnk v. Union P. R. Co.*, 99 Neb. 763, 157 N. W. 918, sustains the right of the defendant railroad company to protect its own land in the matter of guarding against dangerous erosion under the old trestle bridge.

"In an action for damages to land and growing crops by floodwaters of a stream, subject to overflow from natural causes, and which it is alleged were thrown upon the plaintiffs' land by the negligent and improper construction of a railroad nearby and adjacent thereto, the burden of proof is on the plaintiffs to show that the construction complained of either caused such overflow or increased the same, or in some manner contributed thereto, together with the nature and extent of the increased overflow, if any, and the amount of damages caused thereby." *Harris v. Lincoln & N. W. R. Co.*, 91 Neb. 755, 137 N. W. 865. See, also, *Alt v. Chicago, B. & Q. R. Co.*, 96 Neb. 714, 148 N. W. 900.

The evidence is undisputed that the waters which stood on plaintiff's land and caused his serious damages were not in any way backed up by the railroad culvert, for the floodwaters standing on plaintiff's land were approximately at a level ten feet above the north edge of the culvert.

The undisputed evidence shows that the obstructions to the free flowage of the water which were on intervening land between plaintiff's south line and the north line of the defendant's right of way were caused by others, and for which defendant could not be held responsible.

This court has said in a recent case: "It is the duty of those who build structures across natural drainways to provide for the natural passage through such obstructions of all waters which may be reasonably anticipated to drain there, and this is a continuing duty." *Webb v. Platte Valley Public Power and Irrigation District, ante*, p. 61, 18 N. W. 2d 563.

We believe that this obligation and duty was met by the defendant in the construction of the present concrete culvert.

It is true, as plaintiff insists, that "In reviewing an instruction to the jury to return a verdict for defendant at the close of all the evidence, the appellate court will assume the existence of all material facts which competent evidence on behalf of the plaintiff establishes or tends to prove, and also give him all proper and logical inferences from such facts." *Franks v. Jirdon*, 144 Neb. 693, 14 N. W. 2d 372.

"In a jury case where different minds may draw different conclusions or inferences from the adduced evidence, or if there is a conflict in the evidence, the matter at issue must be submitted to the jury, but where the evidence is undisputed, or but one reasonable inference or conclusion can be drawn from the evidence, the question is of law for the court. *Craig v. Chicago, St. P., M. & O. R. Co.*, 97 Neb. 426, 150 N. W. 374; *Hickey v. Omaha & C. B. Street R. Co.*, 140 Neb. 665, 1 N. W. (2d) 304." *Fulcher v. Ike*, 142 Neb. 418, 6 N. W. 2d 610.

"Where the evidence was insufficient to sustain a judgment in favor of the plaintiff, who was injured in a collision while driving his automobile, it was the duty of the trial court to sustain a motion directing a verdict for defendant at the close of plaintiff's evidence." *Redwelski v. Omaha & C. B. Street R. Co.*, 137 Neb. 681, 290 N. W. 904. See, also, *Smith v. Epstein Realty Co.*, 133 Neb. 842, 277 N. W. 427.

In our opinion, there was no prejudicial error made by the trial court in instructing the jury to return a verdict for the defendant, and the judgment is hereby affirmed.

AFFIRMED.

FRANK J. SULLIVAN ET AL., APPELLEES, V. CITY OF OMAHA, APPELLANT.

19 N. W. 2d 510

FILED JUNE 29, 1945. No. 31929.

1. **Municipal Corporations.** Where the legislature enacts a law affecting municipal affairs which are of state-wide concern, the law takes precedence over any municipal action taken under its home rule charter and amendments thereto. Metropolitan cities are not excluded from the operation of this rule.
2. **Statutes.** An amendatory act whose title indicates the nature of the changes and additions by it made meets the requirements of section 14, art. III of the Constitution requiring that no bill shall contain more than one subject and the same shall be clearly expressed in the title.
3. ———. When such requirements have been met it is immaterial whether or not the provisions of the title to the amendatory act contain other provisions which are contained in the title of the act amended or supplemented.
4. ———. The simultaneous repeal and reenactment of a statute in terms or in substance is a mere affirmance of the original act and not a repeal in the strict or constitutional sense.
5. ———. Where it appears from the scope and purpose of an amendatory act that there was no legislative intent to in any manner change the effect of the amended statute in the respects in which it was not modified or supplemented, the portion of the statute so retained will be given the same effect as it had before the amendatory statute was enacted.
6. ———. The amendatory act before us (Laws 1943, ch. 92, appearing as ch. 35, art. 2, R. S. 1943) does not have the effect of occupying the field relating to firemen's pensions in metropolitan cities. It retains and affirms the identical position and effect that it had before the amendatory statute was enacted.
7. **Municipal Corporations.** The home rule charter amendment of the city of Omaha, effective June 30, 1942, is valid and constitutional as to all questions raised by this appeal for the reasons stated in *Lickert v. City of Omaha*, 144 Neb. 75, 12 N. W. 2d 644, the opinion of which is adhered to and reaffirmed.
8. **Pensions: MUNICIPAL CORPORATIONS.** The pension rights of firemen in the city of Omaha are declared to be presently determinable from the home rule charter of the city and amendments thereto.

APPEAL from the district court for Douglas County:

FRANK M. DINEEN, JUDGE. *Reversed and remanded with directions.*

Harold C. Linahan, G. H. Seig, Edward F. Fogarty, and *Edward Sklenicka,* for appellant.

Rosewater, Mecham, Shackelford & Stoehr, for appellees.

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

CARTER, J.

This is an action instituted by 17 members of the Omaha fire department against the city of Omaha, seeking a declaratory judgment as to the rights of the parties under an amendment to the home rule charter of the city and a statute enacted by the legislature of the state subsequent thereto. From an adverse judgment the city appeals.

The city of Omaha is admittedly a city of the metropolitan class. On July 18, 1922, it adopted its home rule charter pursuant to section 5, art. XI, Nebraska Constitution. The home rule charter contained provisions relative to pensions for firemen, identical in form and substance with existing state statutes on that subject. In a discussion of this situation this court said that as to the city of Omaha, the legislative act of 1921 "lost its qualities as a statutory charter or law imposed by the sovereign power of the state, and in lieu thereof, by virtue of an explicit constitutional grant, its terms then existing became a home rule charter created and to be thereafter continued in force at the will of the grantee municipality lawfully expressed, every section of which was expressly made subject to its own lawful amendments." *Munch v. Tusa,* 140 Neb. 457, 300 N. W. 385. The foregoing case further held that "To construe the terms of the Omaha home rule charter as precluding amendment because of its existence in statutory form is to invalidate the constitutional amendment so providing." The effect of this decision is that amendments to the Omaha home rule charter are valid, even though they may conflict with the state statute in existence and incorporated into the home rule

charter at the time of its adoption. In other words, even though a subsequent amendment to the home rule charter may involve a matter of state-wide concern, the field will not be deemed to have been occupied by legislative act unless such act came into existence after the adoption of the home rule charter.

This was the situation existing when the electors of the city of Omaha amended their home rule charter with reference to firemen's pensions at an election held on May 12, 1942, it becoming effective on June 30, 1942. In a case involving members of the police force and the city of Omaha, growing out of the adoption of an amendment to the home rule charter of the city of Omaha at the same time and in the same form as the amendment presently being considered, we said: "For the reasons stated herein it is held that the pension rights of these plaintiffs are to be determined by the charter provisions of the defendant city which became effective at midnight June 30, 1942." *Lickert v. City of Omaha*, 144 Neb. 75, 12 N. W. 2d 644. We think that the same holding applies in the present case in the absence of further applicable legislative action. The state legislature, however, adopted an act relative to firemen's pensions, generally referred to as L. B. 327 (Laws 1943, ch. 92, appearing as ch. 35, art. 2, R. S. 1943), which became effective on May 28, 1943. The question to be here determined is whether the subsequent statute, if valid, occupies the field and takes precedence over the Omaha home rule charter or any amendment thereto. If L. B. 327 changes the pension rights of firemen in cities of the metropolitan class and occupies the field of firemen's pensions in metropolitan cities, it is clear that it takes precedence over the Omaha home rule charter or any amendment thereto. This conclusion is required under the previous holdings of this court. In *Axberg v. City of Lincoln*, 141 Neb. 55, 2 N. W. 2d 613, we said: "We conclude that pensions for superannuated and disabled firemen are matters of state-wide concern and that a statute providing for their payment applies to cities governed by home rule charters the same as other cities in the

designated class." In the discussion of this question in the opinion in that case we also said: "The purpose of the home rule charter provision of the Constitution was to render the cities adopting such charter provisions as nearly independent of state legislation as was possible. Under it a city may provide for the exercise of every power connected with the proper and efficient government of the municipality where the legislature has not entered the field. Where the legislature has enacted a law affecting municipal affairs, but which is also of state concern, the law takes precedence over any municipal action taken under the home rule charter." The reasoning of this holding is just as applicable to cities of the metropolitan class as those of the first class. Consequently, if the legislative act, L. B. 327, effective May 28, 1943, is a valid enactment occupying the field formerly occupied by the home rule charter and its amendments, it would take precedence over conflicting provisions of the home rule charter and its amendments where, as here, a matter of state-wide concern is involved.

The city of Omaha contends that the legislative act, L. B. 327, is violative of section 14, art. III of the Nebraska Constitution providing: "No bill shall contain more than one subject, and the same shall be clearly expressed in the title." The title to the act in question is as follows: "AN ACT relating to pensions for firemen; authorizing every city of the first class which has adopted, or which may hereafter adopt, a charter for its own government, as provided by Article XI of the Constitution of Nebraska, to provide by charter and establish pensions or a retirement system or systems for its municipal employees, subject to statutory minimum standards as to firemen and other provisions and conditions relating thereto; to amend sections 35-201, 35-202, and 35-203, Compiled Statutes of Nebraska, 1929; to repeal the original sections; and to declare an emergency." Laws 1943, ch. 92, p. 313.

The body of the act is in part as follows: "All metropolitan cities and cities of the first class having a paid fire department, except any city of the first class that has hereto-

fore adopted or may hereafter adopt a charter for its own government * * * shall pension all firemen of the paid fire department, * * * ." The act which it purported to amend contained the following language: "All metropolitan cities, and cities of the first class having a paid fire department, * * * shall pension all firemen of the paid fire department * * * ." Comp. St. 1929, sec. 35-201. It will be observed that L. B. 327 is amendatory of the former act. No change is made in the amended act in so far as metropolitan cities are concerned. The amendatory act merely provides that the law as to firemen's pensions shall remain the same as it was in so far as metropolitan cities and cities of the first class having a paid fire department are concerned except those cities of the first class which have adopted a home rule charter. The amendatory act then proceeds by including new sections to provide for firemen's pensions in cities of the first class having a paid fire department which has or may hereafter adopt a home rule charter. It is evident that the amendatory statute affects certain designated cities of the first class only and that the position of a metropolitan city was in no way changed by its enactment. In this respect it will be noted that the title to L. B. 327 is broad enough to cover the matter of firemen's pensions in cities of the first class which have adopted, or which may hereafter adopt, a charter for its own government. This meets all constitutional requirements.

In *Nebraska Central Bldg. & Loan Assn. v. Yellowstone, Inc.*, 141 Neb. 679, 4 N. W. 2d 762, we said: "The title to a legislative act is a part thereof. *Wayne County v. Steele*, 121 Neb. 438, 237 N. W. 288. And where the title to the amendatory act sufficiently indicates the nature of the legislation in it contained or the nature of the changes or additions by it made, it is immaterial whether or not the provisions of the act are covered by the title of the act amended."

In *Miller v. Iowa-Nebraska Light & Power Co.*, 129 Neb. 757, 262 N. W. 855, we said: "In determining whether an act amending a previous act of the legislature is broader

than its title, the court will consider the titles to both the amending and the amended acts." In the body of the opinion we quoted the following from 59 C. J., sec. 400, p. 819, with approval: " * * * where the title of an amendatory or supplemental act sufficiently indicates the nature of the legislation in it contained, or the nature of the changes or additions by it made, it is immaterial whether or not the provisions of the act are covered by the title of the act amended or supplemented."

We conclude, therefore, that L. B. 327, being an amendatory act whose title indicates the nature of the changes and additions by it made, meets the requirements of section 14, art. III of the Constitution, and that it is immaterial whether or not the provisions of the title to the amendatory act contain other provisions which are covered by the title of the act amended or supplemented.

It is then urged that as L. B. 327 is in all respects constitutional, it has the effect of occupying the field as to firemen's pensions in metropolitan cities and therefore supersedes the provisions of the home rule charter and its amendments relating to firemen's pensions. We do not think that the act has any such effect in the present case. It must be borne in mind that L. B. 327 was an amendatory act which did not purport to deal with, change or supplement the provisions of the former act relating to firemen's pensions in metropolitan cities. Consequently, L. B. 327 had the effect of simultaneously repealing and reenacting that part of the statute relating to firemen's pensions in metropolitan cities. Under such circumstances we have many times held that such an act has the effect of continuing the uninterrupted operation of the statute amended.

In *Gooch Milling & Elevator Co. v. Chicago, B. & Q. R. Co.*, 109 Neb. 693, 192 N. W. 231, we said: "It has been frequently held by this court that the simultaneous repeal and reenactment of a law has the effect of continuing the uninterrupted operation of the statute."

In *Schneider v. Davis*, 109 Neb. 638, 192 N. W. 230, we said: "The act of 1919 added the following words to the

statute: 'And in the event an appeal be taken and the plaintiff shall succeed, such plaintiff shall be entitled to recover an additional attorney fee to be fixed by such court or courts.' This was the only change made. The simultaneous repeal and reenactment of all the other provisions of the law had the effect to continue the uninterrupted operation of the statute."

In *Bauer v. State*, 99 Neb. 747, 157 N. W. 968, we said: "The rule seems to be that the simultaneous repeal and reenactment of the statute in terms, or in substance, is a mere affirmance of the original act, and not a repeal in the strict or constitutional sense of the term." See, also, *Stenberg v. State*, 50 Neb. 127, 69 N. W. 849; *State ex rel. Churchill v. Bemis*, 45 Neb. 724, 64 N. W. 348.

It will be noted that there is no conflict or inconsistency with the original act contained in L. B. 327. It clearly appears from the scope and purpose of the amendatory statute that there was no legislative intent to in any manner change the effect of the amended statute as it applied to firemen's pensions in metropolitan cities. Where a new act is in the very words of the statute which it repeals, and it is clear that the repeal and reenactment were intended to continue in force the uninterrupted operation of the old statute in the respects in which it was not modified or supplemented, the effect of the acts will be so construed and the amended act will be given the same effect as it had before with respect to the parts of the old statute that were retained in the new one.

In giving effect to this view we arrive at the conclusion that L. B. 327 indicates no intent on the part of the legislature to occupy the field of firemen's pensions in metropolitan cities, but rather to affirm and retain the identical position and effect that it had before L. B. 327 was enacted.

The firemen urge that the home rule charter amendment effective June 30, 1942, is unconstitutional for the following reasons: (1) Because it violates section 18, art. III of the Nebraska Constitution in that it is not uniform as to class in that it deducts unequal percentages of the wages of firemen of the city of Omaha from the second, third and pro-

bationary classes and the officers as compared with firemen of the first class; (2) because it violates sections 1 and 6, art. VIII of the Constitution of Nebraska, providing for uniformity of levy of taxes and exactions in a class; (3) because it deprived the firemen of property without due process of law contrary to section 3, art. I, Constitution of Nebraska; and (4) because the Omaha home rule charter amendment conflicts with state statutes enacted prior to the adoption of the Omaha home rule charter and with a legislative enactment effective subsequent to the adoption of the home rule charter amendment effective June 30, 1942.

The first three points above set forth are fully and completely answered in the case of *Lickert v. City of Omaha, supra.* We adhere to the conclusions reached in that opinion and conclude that constitutional objections Nos. 1, 2 and 3 are without merit on the authority of that decision. Objection No. 4 is without merit for the reasons heretofore determined in this opinion.

We conclude that L. B. 327, effective May 28, 1943, (Laws 1943, ch. 92, p. 313; R. S. 1943, secs. 35-201 to 35-214, inclusive) is constitutional on all issues presented by this appeal; that, under the rule applicable to the simultaneous repeal and enactment of statutes, it does not in any respect change the act amended as it relates to firemen's pensions in metropolitan cities; nor does it have the effect of occupying such field so as to supersede the effect of the home rule charter and its amendments relating thereto. The home rule charter amendment involved in this suit is held constitutional as to all questions raised by this appeal and as a result the rights of plaintiff firemen are determinable from such charter amendment until it is repealed, or until such time as the legislature may by legislative enactment, evidencing an intent to so do, occupy the field of firemen's pensions in metropolitan cities.

The judgment of the district court is reversed and remanded with directions to enter a judgment in accordance with this opinion.

REVERSED, WITH DIRECTIONS.

Yeager, J., participating on briefs.

The following opinion on motion for rehearing was filed January 25, 1946. *Rehearing denied.*

CARTER, J.

The motion for a rehearing filed after the adoption of our previous opinion in this case, *ante* p. 297, 19 N. W. 2d 510, raises questions which warrant a supplemental opinion. We will consider them in the order in which they are raised in the brief in support of the motion.

It is first contended that the rule of simultaneous repeal and reenactment which was applied in the former opinion has no application to the case for the reason that we had previously held in *Munch v. Tusa,* 140 Neb. 457, 300 N. W. 385, that "All provisions previously existing, including all of article III, ch. 23, Rev. St. 1913, so far as applicable to cities of the metropolitan class, were by it superseded and in effect repealed." Appellees assume from this language that the statute then existing was repealed. The adoption of the home rule charter by the city of Omaha could not operate as a repeal of a state statute. This appears axiomatic to us. We said in *Munch v. Tusa, supra,* and correctly we think, that the adoption of the home rule charter superseded and in effect repealed the existing statute. By the adoption of the home rule charter by the city of Omaha the existing statute no longer controlled, but it was not repealed. It remained applicable to any other metropolitan city within the class and, in addition thereto, to the city of Omaha in the event its relative charter provisions were repealed. We reiterate, therefore, that the action taken by the legislature in repealing sections 35-201, 35-202, and 35-203, Comp. St. 1929, and the enactment of L. B. 327, (Laws 1943, ch. 92) constituted the repeal of a valid and effective legislative act and the reenactment in identical terms of the constitutional portions of the act applicable hereto as stated in our former opinion.

It is further urged that sections 35-201, 35-202, and 35-203, Comp. St. 1929, were unconstitutional by virtue of our holding in *Axberg v. City of Lincoln,* 141 Neb. 55, 2 N. W.

2d 613. This is correct, but appellees overlook the fact that the invalidation of sections 35-201, 35-202, and 35-203, Comp. St. 1929, left in effect sections 2439, 2440, and 2441, Comp. St. 1922, which was reenacted in terms and substance in L. B. 327. The rule of simultaneous repeal and reenactment is therefore no less operative because of our holding in the Axberg case and the use of sections 35-201, 35-202, and 35-203, Comp. St. 1929, rather than sections 2439, 2440, and 2441, Comp. St. 1922, in the repealing clause. This view is sustained by the previous holdings of this court. In *State v. City of Kearney,* 49 Neb. 325, 68 N. W. 533, we said: "It has been held by this court that where the amendment to a statute is plain, and the intention of the legislature is so distinctly pointed out that there is no difficulty in ascertaining to what law it was intended to apply, it will not be held invalid merely because the section number of the original law and the amendment are apparently somewhat confusing." A very similar situation arose to which identical objections were advanced as here in *Cass County v. Sarpy County,* 63 Neb. 813, 89 N. W. 291, wherein the court said: "In 1881 the legislature passed and the governor approved a measure entitled 'A bill for an act to amend section 88, of an act to amend chapter 47, of the Revised Statutes of 1866, entitled "Roads," approved March 1st, 1879.' This measure did not include a clause expressly repealing the section mentioned, and was therefore void, but in the first and subsequent editions of the Compiled Statutes, until that of 1899, the section, in the form attempted to be given to it by the supposed act of 1881, was substituted for the valid section 88 of chapter 78. In 1899, an act was passed entitled 'An act to amend section 88, chapter 78, Compiled Statutes of Nebraska of 1897, and to repeal said original section.' It is argued by counsel for defendant in error that this last act is an attempt to amend the void measure of 1881, and that it is therefore itself void. For the reason already given, this contention can not be upheld. The supposed act of 1881 and the above-mentioned error in the publication of the Compiled Statutes were each and

both wholly ineffectual for any purpose, and the act of 1899, having an appropriate title and being otherwise in due form, is the first and only amendment of section 88 of the act of 1879. It can not be inferred that the legislature were ignorant of the invalidity of the attempted amendment of 1881, and supposed that they were amending a measure to which they made no reference, rather than the 'original section,' which they accurately described." When L. B. 327 was enacted for the purpose of amending sections 35-201 to 35-203, inclusive, Comp. St. 1929, followed by the repeal of the old sections amended, the amending statute simply designated the place where the existing and constitutionally effective language might be found which it specifically attempted to amend. Consequently, L. B. 327 did not simultaneously repeal and reenact an unconstitutional statute, although it had the apparent appearance of having done so.

Appellees urge that we were in error in assuming that the constitutional questions raised were answered in the case of *Lickert v. City of Omaha*, 144 Neb. 75, 12 N. W. 2d 644. We concede at the outset that the Lickert case did not decide constitutional questions. It did determine the nature of the deductions from base pay authorized by the 1942 charter amendment in such a way as to destroy the basis for appellees' constitutional objections. It is contended that the charter amendment violates constitutional provisions requiring uniformity as to class; requiring uniformity of levies, taxes, and exactions in respect to persons and property; in that it denies equal rights; and in that it violates the due process clause. It is also urged that the charter amendment violates the Fourteenth Amendment to the Constitution of the United States because it abridges the privileges and immunities of plaintiffs and the due process and equal protection provisions of that amendment.

In the Lickert case we held that the deduction of one dollar a month from the base pay of all policemen for the creation of a pension fund under a similar statute constituted a determination of the net amount of compensation to be paid monthly. The right to a pension was held to be a part of the

compensation paid and did not constitute a gratuity. Consequently, it is not a tax or exaction within the meaning of the constitutional prohibition. We know of no case holding that equal contributions to a pension fund, irrespective of differences in base pay, are violative of cited constitutional provisions. Appellees cite cases in support of their contention that are not in point. *Templar v. State Board of Examiners of Barbers,* 131 Mich. 254, 90 N. W. 1058, holds that a barber's license law which denies a license to any alien violates the equal protection clause. In *State v. Montgomery,* 94 Me. 192, 47 A. 165, it was held that a statute authorizing a peddler's license to be issued to any citizen of the United States who is of good moral character is violative of the equal protection clause in that it discriminates against aliens. *State of Oregon v. Standard Oil Co.,* 61 Ore. 438, 123 P. 40, was a case involving alleged statutory discrimination between resident and nonresident corporations dealing in petroleum products. The statute was held not violative of the equal protection provision of the Fourteenth Amendment. *Santa Clara County v. Southern Pacific R. Co.,* 118 U. S. 394, 18 L. Ed. 1132, 30 S. Ct. 118, was a case in which the plaintiff sought judgment for the entire tax upon an assessment of different kinds of property as a unit, including property not legally assessable and not separable from the other part. The defendant was held not liable partly on the theory that it was entitled to the equal protection of the laws under the Fourteenth Amendment to the Constitution of the United States. We fail to find any reasoning in the foregoing cases which supports the contentions of the appellees in the present case. We think that appellees as firemen in a metropolitan city constitute a reasonable classification of persons for purposes of legislation concerning them. The fact that their contribution to the pension fund set up for their benefit is placed on a fixed basis rather than on a percentage of earnings is not of itself violative of either state or federal constitutional prohibitions. We think the rule announced in *State ex rel. Taylor v. Hall,* 129 Neb. 669, 262 N. W. 835, cited by appellees, does not

conflict with our holding in the present case. The effect of that decision is that members of a class cannot be discriminated against. We hold that firemen in a metropolitan city constitute a class. Contributing a fixed amount each month to a pension fund set up for their benefit, which is held to constitute deferred compensation, does not of itself constitute want of due process, equal protection, or lack of uniformity. The charter amendment meets all constitutional requirements and is, therefore, valid.

We are convinced of the correctness of the conclusion reached in our former opinion. The former opinion as supplemented herein is adhered to and the motion for a rehearing is overruled.

REHEARING DENIED.

ARMAND V. COX, APPELLEE, CROSS-APPELLANT, V. RALPH E. RIPPE, APPELLANT, CROSS-APPELLEE.

19 N. W. 2d 514

FILED JUNE 29, 1945. No. 31954.

1. **Contracts.** When a contract is partly written and partly oral, and the written portion thereof is clear, certain and definite, and where such written terms used have an apparent intent, then the evidence of parol statements or recollections of one of the parties contrary thereto and inconsistent therewith will not be permitted to overturn the clear, positive terms of the written portion of the contract, which has been duly signed by both parties and witnessed.
2. **Accord and Satisfaction.** The burden of proof to maintain an alleged accord and satisfaction is upon the party seeking to enforce it.

APPEAL from the district court for Adams County: F. J. MUNDAY, JUDGE. *Affirmed.*

Stiner, Boslaugh & Stiner, for appellant.

Stewart, Stewart & Whitworth, for appellee.

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

PAINE, J.

This is an equitable action by plaintiff upon contracts, partly oral and partly written, to recover his one-half of the net profits of the construction of two trailer camps for the Farm Security Administration. Defendant claimed that the action was prematurely brought and that he had made settlement in full. The trial court denied plaintiff part of the relief asked, and held that no partnership existed, but that plaintiff was entitled to an accounting, and that no settlement had been made, and that plaintiff was entitled to judgment for $21,794.58 and, in addition, to one-half of $18,891.98 still due from the government, if and when paid; denied plaintiff expenses of suit other than court costs, and denied plaintiff an attorney's fee. Motion for new trial being overruled, the defendant appealed.

Plaintiff alleged in his amended petition that on December 22, 1941, plaintiff and defendant entered into a contract to form a partnership to construct a trailer camp at Parsons, Kansas, for the Farm Security Administration of the United States Department of Agriculture, pursuant to a contract secured by defendant on December 16, 1941. A written portion of the contract between the plaintiff and defendant set out that the parties would, at the completion of the Parsons, Kansas, trailer camp, divide all profits equally after all costs and expenses had been deducted.

It was further alleged that plaintiff agreed to go immediately to Parsons, Kansas, and supervise the construction of the trailer camp and purchase materials therefor, and would receive $200 a month for his expenses, including the use of his automobile; that the parties were equal partners, and would share profits and losses equally; that the plaintiff would contribute $2,000 as the capital of the partnership and devote his time and effort to constructing said camp.

It is further alleged that the defendant has received $72,423.22, and there is still due from the Administration the

sum of $5,985.78, and that the net profit realized from the payments already made by the Administration was $21,516.90, one-half thereof being the plaintiff's share; that on May 6, 1942, a supplemental verbal contract was entered into between the parties to construct another trailer camp at Wichita, Kansas, and on June 16, 1942, a supplemental writing confirmed said verbal agreement, and in writing the parties agreed to divide any and all profits equally after the completion of said Wichita trailer park; that the total amount received by the defendant on said construction at Wichita amounted to $113,969.02 at the time of filing the amended petition, and there was still due from the Administration the sum of $13,773.72 on the Wichita contract; that the net profit realized therefrom is $36,891.36, of which sum the defendant has failed and refused to pay the plaintiff $14,305.82, together with $1,335.04 for his expenses, making a total sum now due plaintiff for the Wichita park construction the sum of $15,640.86, together with one-half of the balance to be received from the Administration. Plaintiff prays that the defendant be required to account to the plaintiff for the balance due him under the contract for cash advanced and share of the profits due the plaintiff.

Defendant in his answer admits that the parties signed the writings as alleged in the petition, and that plaintiff performed the work in the construction of the trailer camps, and that defendant paid plaintiff the sum of $10,000; denies that they ever at any time entered into a partnership; alleges that defendant has repeatedly requested a final accounting from the Administration, and that the final amount due has not been arrived at, and that there are damages and penalties because of the alleged delay in the completion of the work, and that the Administration asserts the right to re-negotiate the contract and demand and recover large sums from the defendant, which will probably result in much and expensive litigation before a final accounting and settlement is arrived at, and that because thereof any action by the plaintiff against the defendant for the purpose of recovering any part of any alleged net profit for said work

was and is premature and cannot be maintained. Defendant prays that the petition be denied and dismissed and that the attachment and garnishment issued be discharged.

In his amended answer defendant alleges that plaintiff desired to withdraw from the work before the trailer camp had been completed at Wichita, and that there was a good-faith dispute between the parties, and the parties finally arrived at an understanding and agreement, by the terms of which the plaintiff agreed to accept the sum of $10,000 as an accord and satisfaction in full compromise settlement and discharge of all liability due plaintiff from defendant, and that the plaintiff received and accepted said sum of $10,000 and retained the same, and defendant is not now indebted to the plaintiff in any amount whatever, and prays that the petition be dismissed.

Thereafter a reply was filed to the amended answer, in which it is alleged that the final payment due from the Administration is delayed because of the failure of the defendant to furnish the papers which are required by the Administration before such final payments are made, and that the Administration has repeatedly requested defendant to furnish such papers; denies that there was any accord and satisfaction or compromise settlement made, and alleges that the $10,000 payment was simply a partial payment of a large amount then due from defendant to plaintiff.

There was a stipulation between counsel that this was an action in equity, and is at all times to be so considered by the parties and by the court. The trial was begun on January 19, 1944, and adjourned from time to time at the convenience of the parties, and the final evidence was taken June 20, 1944, and 30 days were given to submit briefs to the trial court. On August 1, 1944, the court reporter certified that he had completed the bill of exceptions, and the trial court had the benefit thereof and the briefs before deciding the case.

Thereafter on November 27, 1944, the decree was entered, in which the court found generally for the plaintiff and against the defendant, and found that a contract was

entered into for each of said projects, which contracts were partly oral and partly written; that a partnership was not entered into by the parties, but there was such an account between the parties as entitled the plaintiff to an accounting.

The court further found that the evidence did not sustain the contention of the defendant that the $10,000 paid to plaintiff on November 20, 1942, was made as part of an accord and satisfaction, but that in fact it was a partial payment of the amount due the plaintiff on the Parsons project; that there was due the plaintiff from the defendant $21,794.58, with interest at 6 per cent, for which amount plaintiff was awarded judgment against defendant; that the balance due from the government on the Parsons project was $5,118.26, and that the balance due on the Wichita project was $13,773.72, and that if and when such amounts, or any part of them, are paid to the defendant by the government, one-half of the amount so received shall be paid by the defendant to the plaintiff.

The court further found that the amount of $20,602.95, paid to the clerk of the district court in the garnishment proceedings, should be paid by the clerk to the plaintiff to apply on the amounts found due the plaintiff, if no supersedeas bond was filed within 20 days, and that the sheriff of Adams county should recover and sell the property attached as upon execution and the amount so realized should be applied to the amount due plaintiff; that the defendant should pay the costs of this action, and supersedeas bond was fixed at $35,000, but the plaintiff was not entitled to expenses of suit other than court costs, nor to any fee for his attorney. Motion for new trial and supersedeas bond in the sum of $35,000 were duly filed by the defendant.

The defendant sets out as errors relied upon for reversal that the court erred in finding that the action was not prematurely brought, in finding that in the action there had not been an accord and satisfaction, nor a compromise settlement made and performed. Defendant further alleges that the court erred in adjudicating certain sums due the plaintiff

from the defendant, and that the clerk and the sheriff should apply certain sums to the payment of the plaintiff's judgment for the reason that such findings are contrary to the law and not supported by the evidence.

The defendant's brief sets out several propositions of law: First, that this action could not be maintained when the claim alleged was not due at the time the suit was instituted; second, that the claim made by the plaintiff was disputed and unliquidated; and third, that the compromise or accord and satisfaction of a disputed, unliquidated claim, which rests on sufficient consideration, is conclusive of the rights of the parties.

The evidence discloses that the plaintiff had been raised in Dallas, Texas, and had been in the contracting business for many years, and since 1935 had been employed by the Farm Security Administration as a contract engineer and as an area construction engineer. In the fall of 1941 he was engaged as the government's representative as contract engineer in the construction of trailer camps at San Diego, California. Plaintiff had been planning to leave the Administration and go into contracting himself.

The defendant was a heating and plumbing contractor at South Pasadena, California. He testified that he was 48 years old and had lived in California since 1927, had built barracks in Boulder City and a pumping station and office building for the Metropolitan Aqueduct at Hayfield and other points, and in the spring of 1941 had built his first trailer camp at San Miguel as a subcontractor; that on December 26, 1941, he was awarded the Parsons contract, and on June 2, 1942, received the Wichita contract.

Plaintiff and defendant first discussed the proposed construction of a trailer camp at Parsons, Kansas, after a dinner in Burlingame, California, at the apartment shared by plaintiff and H. P. Hallsteen, who was the district engineer for five states of the Farm Security Administration. Later, on December 6, 1941, in the office of the Farm Security Administration in San Francisco, in the presence of Mr. Hallsteen, the plaintiff and defendant looked over the plans and

specifications for the Parsons job, and after figuring it over decided that the job could be done with a profit of $27,500. Plaintiff testified that defendant then said, "You're with the government there, so I'll have to put the bid in in my name, and then if I get the bid, then you can resign and come on down and run the job." Defendant said that payment on his subcontracts had been coming in slowly and he did not have any money to put in the Parsons job, and the plaintiff agreed to put in $2,000 on the job to carry it until payments began to come through. Plaintiff also testified that defendant said that his bonding capacity was about used up, and plaintiff would have to go over to the bonding company and indemnify the bond, to which plaintiff replied that, as they were going into the contract on a 50-50 basis, he would go over and sign the bond.

Plaintiff came to Parsons and supervised the contract, and defendant remained busy on other jobs he had contracts for, having some 21 other jobs, and plaintiff says that defendant only came to Parsons on four occasions, staying only a day or so each time. The same facts were true of the Wichita contract, except that plaintiff went to Washington and defendant was on the project about ten days during the plaintiff's absence. Both contracts were entirely completed. There is evidence to the effect that the Parsons contract was completed April 29, 1942, and accepted as of May 7, 1942, and the Wichita contract completed between November 15 and November 30, 1942.

The report of one of the auditors testifying in the case is that the contract price of the Parsons project, including all change orders and extras finally made by the government, was $77,541.48 and the total expenses were $50,906.33, leaving a net profit, as per books of account, of $26,635.15; and on the Wichita job, $126,066.46, and deducting the total expenses leaves a net profit of $51,685.09, or the total rather remarkable net profits on the construction of two trailer camps of $78,320.24. Another auditor did not reach exactly the same identical totals.

The defendant has contended in every possible manner,

by his pleadings and his evidence, that this action was prematurely brought. Defendant insists that no settlement was due plaintiff until the very last check had been received by the government in final payment of each of these two contracts.

The time when the settlement was actually due is specifically set out in exhibit No. 2, which reads as follows:

"December 22, 1941

"It is understood and agreed that we the undersigned R. E. Rippe and A. V. Cox will at the completion of the PARSONS, KANSAS, being constructed for the Farm Security Administration, United States Department of Agriculture, shall divide all profits equally after all costs and expenses have been deducted.

"(Signed) R. E. Rippe
R. E. Rippe

"(Signed) A. V. Cox
A. V. Cox

"Witness:
"(Signed) A. J. Rippe"
A. J. Rippe

The evidence of plaintiff in reference to the preparation of exhibit No. 2 is this: "A. * * * And I said, 'Well, now, that we've got this job, we better draw up some agreement here on the participation of the profit on a 50-50 basis'; and he said, 'Well, that's all right.' I said, 'The reason I think we ought to, there's no telling what's liable to happen to either one of us; and, of course, the contract is in your name, and in order to protect us we ought to have that agreement.' And he said, 'That's fine,' and he called in his wife and she made out the agreement. * * * Q. Is that Mr. Rippe's signature above the typewriting 'R. E. Rippe'? A. Yes, sir. Q. And your signature above the typewriting 'A. V. Cox'? A. Yes, sir. * * * Q. And this writing was typed out by Mrs. Rippe? A. Yes. Q. And who told her what to put into the writing? A. Both Rippe and myself." It was

then signed in duplicate and witnessed, and each party received a copy thereof.

The written memorandum on the Wichita contract, being exhibit No. 6, is practically the same, and was signed June 16, 1942, and closes with the similar words, "divide any and all profits equally after all costs and expenses have been paid."

When a contract is partly written and partly oral, and the written portion thereof is clear, certain and definite, and where such written terms used have an apparent intent, then the evidence of parol statements or recollections of one of the parties contrary thereto and inconsistent therewith will not be permitted to overturn the clear, positive terms of the written portion of the contract, which has been duly signed by both parties and witnessed. See *Smith v. Bailey*, 105 Neb. 754, 181 N. W. 926.

"In construing a paragraph of a contract which is in dispute, the court must endeavor to place itself in the position of the parties, and ascertain their intention, as well as the object and purpose to be accomplished by the doubtful provision, and interpret it in the light of the actual facts and circumstances surrounding them at the time it was made." *Lyman-Richey Sand & Gravel Co. v. State*, 123 Neb. 674, 243 N. W. 891.

The court is of the opinion that, according to the terms of the two written memoranda signed by the parties, the right accrued to the profits from each of said contracts immediately after the work had been completed and the costs and expenses paid. Therefore, the action was not prematurely brought, because it was begun long after both of the projects had been completed as per the terms of their written memoranda.

We will now take up the second error relied upon by defendant for a reversal and argued at length in the brief: "The court erred in finding and adjudicating that there had not been an accord and satisfaction or a compromise settlement made and performed by the parties hereto."

The defendant made strenuous and repeated oral claims

that the payment to plaintiff on November 20, 1942, of $10,000 was accepted by plaintiff as a complete accord and satisfaction and compromise settlement of all claims the plaintiff had against the defendant.

While large payments were being received by defendant from the government as the work progressed, still defendant refused all requests of plaintiff to divide up these payments, even after all costs and expenses had been paid, and the payments represented clear profits which were to be divided equally between the parties.

Plaintiff insisted that these payments being received represented profits, which defendant denied, and rather heated disputes occurred, defendant finding fault with the conduct of plaintiff and finally discharging him. Defendant endeavored to show that he settled the contract in full between them by the payment of this small sum of $10,000, the same being shown by exhibit No. 52, a check, No. 203, dated November 20, 1942, for $4,000, drawn on The Fourth National Bank of Wichita to the order of A. V. Cox, signed by R. E. Rippe, and exhibit No. 25, between the same parties, bearing the same date, but being check No. 190, drawn on the United States National Bank, of Denver, Colorado, for the sum of $6,000. No such claim was made by the defendant of the alleged compromise settlement in his original answer, but this is first found as an allegation in the amended answer.

The plaintiff denies positively that there was any settlement made. The defendant's bookkeeper, McBeth, who was present at conversations between the two men on this occasion and who wrote out the $4,000 check at defendant's direction and gave it to plaintiff, testified that he did not hear the defendant state at any time that the $10,000 paid that day was to be in settlement of plaintiff's share of the profits on either the Parsons job or the Wichita job, or both of them.

There was plenty of room on each of these two checks to have inserted that such check was in full of a compromise settlement of the entire claim of plaintiff, but nothing to

that effect appeared on either of the checks or on the stubs from which they were taken.

The burden of proof to maintain an alleged accord and satisfaction was upon the defendant as the party seeking to enforce it. See *McKinnon v. Holden,* 85 Neb. 406, 123 N. W. 439.

To meet this burden of proof, there should first be shown the meeting of the minds of the parties to the accord and satisfaction, accompanied by a proper and sufficient consideration upon which the accord and satisfaction was based, together with proof of the acceptance by the other party.

In our opinion, the claim that the $10,000 paid November 20, 1942, was a full and complete compromise settlement between these parties is not supported by any evidence except the oral statements of defendant, and entirely falls.

The plaintiff cross-appeals from the decree because of the failure of the trial court to include in the judgment one-half of the final payments to be received, but the decree as entered provided as to payments not received by the defendant when the amended petition was filed: "The defendant is hereby ordered to pay to plaintiff one-half of the balance of $5,118.26 due from the government on the Parsons project and one-half of the balance of $13,773.72 due from the government on the Wichita project if and when those amounts or either of them or any part of them are paid to the defendant by the government."

In our opinion, this is a sufficient judgment upon which plaintiff can enforce his ownership of one-half of such delayed payments, and it was not necessary for the decree to require defendant to execute an assignment thereof.

Finding no reversible or prejudicial error in the record, the judgment of the trial court is hereby affirmed.

AFFIRMED.

MESSMORE, J., concurring separately.

I separately concur with the majority opinion, but after a careful analysis of the record, my impression is that the use of the word "remarkable" profit should be "unconscionable" profit, and if contracts of this nature are permitted to

continue with such profits, which means in the last analysis the making of the rich over-night, practically speaking, then the future is without color in discerning the sacrifices made by those who constitute the great volume of the citizenship of this country.

This concurrence is merely a recognition of the high principles of constitutional government for which the youth of America have died, and the full purpose of this concurrence is to call attention to the woeful waste of the resources of this nation, and the lightness with which some government officials view the concept of this great and desperate global war.

ELLA HAMILTON, APPELLEE, V. FRED HUEBNER, DOING BUSINESS UNDER THE FIRM NAME AND STYLE OF VAN SUPER SERVICE, ET AL., APPELLANTS.
19 N. W. 2d 552

FILED JULY 6, 1945. No. 31939.

1. **Workmen's Compensation.** An award of compensation cannot be sustained if based upon possibilities, probabilities, conjectural or speculative evidence.
2. **Witnesses.** The value of the opinion of an expert witness is dependent on, and is no stronger than, the facts on which it is predicated. The opinion has no probative force unless the premises upon which it is based are shown to be true.
3. **Workmen's Compensation.** Mere exertion, which is not greater than that ordinarily incident to the employment, which combined with pre-existing disease produces disability, does not constitute a compensable accidental injury.
4. **Evidence.** The hearsay rule forbids the use of an assertion, made out of court, as testimony to establish the truth of the fact asserted, unless the circumstances under which the statement was made are such as to justify the waiver of the requirement that it be given under oath and subject to cross-examination.
5. ———. To render such assertions admissible it is required that (1) there be some shock to the feelings sufficient to render the utterance spontaneous and unreflecting; (2) the utterance must have been before there has been time to contrive and misrepre-

sent, i. e. while the nervous excitement may be supposed still to dominate and the reflective powers to be yet in abeyance; and (3) it must relate to the circumstance causing the shock to the feelings.

6. ———. A declaration, to be a part of the *res gestæ*, need not necessarily be coincident in point of time with the main fact proved. It is enough that the two are so clearly connected that the declaration can, in the ordinary course of affairs, be said to be a spontaneous explanation of the real cause.

7. ———. Statements made subsequent to the act may be admissible provided there has not been time for the exciting influence of the shock to lose its sway and be dissipated, or, as stated otherwise, provided the shock extends from the moment of the event to the time the statement is made.

8. ———. It is not enough that the speaker was under the stress of nervous excitement or pain when the statement was made, but it must appear that the speaker was under the stress of nervous excitement and shock produced by the act in issue.

9. **Workmen's Compensation.** The compensation act does not put upon the employer the burden of being an insurer of the well-being of his employee.

10. **Evidence.** Hardship in a particular case does not warrant an exception to the hearsay rule.

11. **Workmen's Compensation.** The burden of proof is upon the claimant in a compensation case to establish by a preponderance of the evidence that personal injury was sustained by the employee by an accident arising out of and in the course of his employment.

12. ———. The rule of liberal construction of the Workmen's Compensation Act applies to the law, not to the evidence offered to support a claim. The rule does not permit a court to award compensation where the requisite proof is lacking.

13. ———. The statute requires that this court, where it is found that the findings of fact are not conclusively supported by the evidence as disclosed by the record, consider the cause here *de novo* upon the record.

APPEAL from the district court for Madison County: FAY H. POLLOCK, JUDGE. *Reversed and dismissed.*

FREDERICK M. DEUTSCH, for appellants.

Moyer & Moyer, for appellees.

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

SIMMONS, C. J.

Plaintiff here seeks an award of compensation under the Workmen's Compensation Act. Her claim was denied by one of the judges of the compensation court. Rehearing was waived. Appeal was taken to and trial had in the district court, where an award was entered granting compensation. Defendants appeal. We reverse the judgment of the district court and dismiss the action.

Plaintiff is the widow of Earl T. Hamilton. The defendants are his employer and the insurance carrier.

Plaintiff filed her petition in the compensation court, alleging the employment of Hamilton, the nature of his employment and his wages. She further alleged that he received injuries arising out of and in the course of his employment; and that he died from the effects of the injuries. She prayed for compensation.

Defendants answered admitting the employment, the wages, and the death of Hamilton, and denying other allegations of the petition.

The matter was heard before one judge of the compensation court who found that the death did not result from an accident arising out of and in the course of the employment, and dismissed the petition. Plaintiff waived a rehearing and elected to appeal directly to the district court. Trial was had in the district court, resulting in a finding generally for the plaintiff. An award of compensation, medical, hospital and burial expense was made. A motion for a new trial was made and denied. Defendants appeal.

Defendants assign as error the following: That the evidence did not support the award and it was contrary thereto; that the court erred in ruling upon, and in the admission of, evidence in several particulars; that the court erred in its findings; and that the compensation award was excessive.

In summarizing the evidence, as it appears in the record, we include that which was admitted over objection of the defendants.

Defendant Huebner, hereinafter called the defendant,

operated a gasoline filling station, tire and battery shop, and related businesses. He operated trucks for the delivery of petroleum products. His establishment covered about one-fourth of a city block. On this location he had a filling station, an office, a tire and battery shop, and a garage for the storage of vehicles.

Deceased was 45 years of age, and up to the time of the events here involved apparently was in good health. He had worked for defendant for several years. His duties were primarily in the tire and battery shop, changing and repairing car, truck and tractor tires, tubes and batteries. He occasionally worked on the pumps and did other work about the establishment.

On one of defendant's trucks there was a small one to one and one-half horsepower four-cycle engine, similar to those used on some washing machines. This was mounted about four feet above the ground. Its function was to operate the device that measured the product delivered from the truck. The starting apparatus was a pulley, similar to that on an outboard motor, except that the pulley was mounted vertically on the side. The method of starting was also similar to the outboard motor operation. The pulley cord was sash-weight cord, from 30 to 36 inches in length, with a wooden handle on one end and a knot on the other. In starting the engine, about two feet of this cord were wrapped about the pulley and then pulled or jerked, the operator standing in front of the engine and pulling with the force away from it. It was not necessary that the person exerting the force assume a cramped or awkward position. The force necessary to turn the engine was much less than that used in cranking a small automobile engine. Normally this engine could be turned over against compression by taking hold of the starting pulley with one hand. Sustained force was not required, i. e., there was the pull, and if the engine did not start, then a rewind of the cord on the pulley and another pull were necessary. The cords became worn in this process and often broke at the frayed places.

Defendant's employee, Sellentine, operated this truck.

On the evening of October 18, 1943, the engine had failed to work. Deceased and Sellentine had spent some time late that day attempting to start it, but were unsuccessful. Defendant told Sellentine to take it to a garage the following morning to be fixed.

The truck was located about 125 feet from the filling station. On the morning of October 19, 1943, at about 8:00 o'clock, contrary to that instruction, deceased and Sellentine again attempted to start the engine, but were unsuccessful. They worked at it some minutes taking turns at pulling on the cord. Sellentine then returned to the pump. Some 15 or 20 minutes later deceased came to Sellentine at the station and told him the rope had broken. The two men returned to the truck, Sellentine got a new cord, attached the handle and went back to the station. Some 30 minutes later, or about 9:00 a. m., deceased came again to the station, said he had been unable to start the engine, suggested it be taken to the garage, and remarked that he had a severe pain in his chest. He made no statement of any untoward event or accident. He asked for no assistance. His appearance did not cause alarm to Sellentine, who then left with the truck for the garage.

Apparently a few minutes later, a tire company representative, who was acquainted with deceased, went into the tire shop. This building was about 75 feet from the station. There was nothing unusual about deceased's condition, except he was sitting down during working hours. This caused the representative to ask deceased what was the matter. He replied that he had a severe pain in the chest, and that he had been cranking a motor. It appears that in his testimony before the compensation commissioner, he stated deceased also said that the rope broke. Deceased asked for no help and his condition did not cause the tire representative any concern.

Deceased lived less than a block away across the street. He next appeared at his home sometime between 9:00 and 10:00 a. m. He entered the house, took off his cap and jacket, pounded his chest, remarked to plaintiff that he had

a terrible pain in his chest and that it was driving him crazy. He walked the floor, his face was white, and he appeared to be suffering intense pain. Plaintiff called the doctor. Plaintiff on direct examination was asked this question: "Did you make any inquiry or did he tell you what he had been doing or what had happened to him?" Objection was made based on incompetency, irrelevancy, immateriality and hearsay. The objection was overruled. Plaintiff gave this answer: "Yes. He said he had been working with a motor over at the station and when the rope broke he said 'I slipped and got a terrible jolt.' " This statement as to what deceased said was repeated in the evidence a number of times. Plaintiff also testified deceased said the pain came on immediately after the rope broke.

The doctor appeared in some 15 or 20 minutes. He examined deceased and found him in much pain, jittery, breathing with difficulty and ashen in color. He was able to talk. The doctor obtained a history. As a part of his history, deceased told the physician: "He said he was trying to start an engine and had worked something like an hour of (sic) maybe longer, I forget the exact time, he said the engine started with a rope and the rope broke and he fell to the ground quite hard and he was unable to work any more." He further stated that he suffered acute pain very shortly thereafter. This evidence was admitted over objection. The doctor diagnosed the illness as acute coronary thrombosis. Deceased died from that cause on November 21, 1943.

Plaintiff relies upon the testimony of her expert witness to sustain her claim that deceased died as a result of personal injuries received out of and in the course of his employment.

The doctor was asked if the *fall* which deceased had while he was working on the motor, and resulting from the breaking of the rope, had any direct connection with the thrombosis. He answered that "It could" by causing the arteriosclerotic material to become loosened and block the vessel, and stated that thromboses are known to have been caused

by trauma. He then was asked a hypothetical question which included the elements that deceased was working on the motor and while so engaged a rope which he was using broke and he fell heavily to the ground, and was asked to state what in his opinion produced the thrombosis. The doctor replied that it would look to him as though the deceased had an arteriosclerotic condition of his vessels and that "the exertion of cranking the motor and then the fall, the exertion set the condition from increased blood pressure, and then the fall tearing the sclerotic lining of the vessel loose, the force of the blood stream blocked the vessel." He further testified that in his opinion, and as the extent of his testimony, the thrombosis suffered by deceased resulted from two things—the exertion in attempting to start the motor, plus the fall or trauma. He further testified that there was no way to determine, in the absence of those elements, whether or not deceased would have sustained the thrombosis.

On cross-examination, the expert stated that the thrombosis could have been the result of a condition brought on by arteriosclerosis, or by mitral vegetation of the heart valves, or by a blood clot in the aortic region descending through the coronary artery, and that he premised his conclusion given on direct examination on the existence of arteriosclerosis. He testified that there is no way for any one to tell definitely, except by autopsy, and that it is pretty much a guess, what brings about a coronary thrombosis. He further testified that he would not expect a seizure, such as deceased had, to come on without overexertion, but that he would not say it would not happen; that it was a matter of conjecture; and that the doing of the things deceased was supposed to have done could have been a coincidence.

On redirect examination, he testified that in his opinion the coronary thrombosis in this case was caused by the exertion and the fall, because "it could be", and that a sudden jar and force in the vicinity of the heart "could" cause the breaking off of the diseased tissue and "could" subsequently result in a thrombosis.

We have many times held that an award of compensation cannot be sustained if based upon possibilities, probabilities, conjectural or speculative evidence. *Williams v. Watson Bros. Transportation Co.*, 145 Neb.466, 16 N. W. 2d 199.

However, viewing the expert evidence in its most favorable light to the plaintiff, it is quite apparent that the expert premised his conclusions upon the existence of two fact elements, an overexertion and a fall.

We recently have held: "The value of the opinion of an expert witness is dependent on, and is no stronger than, the facts on which it is predicated. The opinion has no probative force unless the premises upon which it is based are shown to be true." *Williams v. Watson Bros. Transportation Co., supra.* The question then is: Are the elements of overexertion and a fall shown to be true?

There appears to be no question but that the starter rope broke. A part of the broken rope is in evidence. It is two feet long. About four inches from the broken end there is a frayed place where the rope is worn more than half through, sustaining the testimony of a witness that these ropes break from wear near the end attached to the pulley, and not from force. But as to the rope plaintiff's expert witness testified that he would not say the breaking of it especially caused the thrombosis. "I do not see how the breaking of the rope could do it; it is only a factor. If he had extreme exertion that may have added to it."

There is no evidence in this record of any overexertion or of any particular amount of exertion in the work of attempting to start this engine. It does not appear that the deceased told the doctor of any overexertion. The testimony in the record as to the method of starting this engine, the short pull or jerk followed by a pause and rewinding, the small amount of force necessary in the process, all negative any inference or conclusion that there was or could have been any overexertion. Mere exertion, which is not greater than that ordinarily incident to the employment, which combined with pre-existing disease produces disability, does not constitute a compensable accidental injury. *Gilkeson*

v. Northern Gas Engineering Co., 127 Neb. 124, 254 N. W. 714; *Shamp v. Landy Clark Co.*, 134 Neb. 73, 277 N. W. 802; *Rose v. City of Fairmont*, 140 Neb. 550, 300 N. W. 574; *Brown v. City of Omaha*, 141 Neb. 587, 4 N. W. 2d 564.

Is there competent evidence to sustain a finding of a fall? It is noted that the deceased, when telling his fellow employee of the breaking of the rope, of his failure to start the engine and of his pain, made no reference to a fall, a jolt, or other unusual happening. Neither did he mention a fall or a jolt to the tire representative when he told of trying to start the engine and of his pain. These were the people to whom he first spoke after the alleged accident. The only testimony upon which the finding of a fall can be based appears in the statements made to the plaintiff and to the doctor. The plaintiff in her testimony does not say that the deceased told her of a fall, but of a slip and a "terrible jolt." The doctor testified that deceased said he had a hard fall to the ground. Plaintiff testified that her husband told the doctor that "when that rope broke he slipped and got a terrible jolt." Defendants objected to the introduction of this evidence as hearsay, and incompetent. As to the doctor's testimony, the defendants do not debate its admissibility as a history given for the purpose of diagnosis and treatment, but contend that it is hearsay and incompetent to prove the happening of the fact. Plaintiff submits that the statements are admissible as a part of the *res gestæ*. We go to that question.

The statements here considered are not offered solely to prove that the assertions were made, but to prove that the assertions made are facts. The facts sought to be proved here by these assertions are that the deceased in attempting to start the motor slipped and had a terrible jolt or a hard fall to the ground. The statements of the deceased were not made under oath, and not subject to the test of cross-examination which might establish or destroy their probative value.

There is a distinct difference between an extrajudicial statement offered to prove that it was in fact made and such

statement when offered to prove that the statement as made is in truth a fact.

The hearsay rule forbids the use of an assertion, made out of court, as testimony to establish the truth of the fact asserted, unless the circumstances under which the statement was made are such as to justify the waiver of the requirement that it be given under oath and subject to cross-examination. There are exceptions to the hearsay rule which permit such a statement to be submitted to the triers of fact for their determination of its probative value. These circumstances are such as add a degree of trustworthiness to a statement more than that which can ordinarily be attached to an extrajudicial assertion.

The competency of each statement must be weighed and determined in the light of the particular circumstances under which it was made. Due to the variable circumstances arising in each case, any attempt to base a decision on fact precedent is largely futile. There are a multitude of cases dealing with the subject and exhaustive discussions in the texts. We do not undertake an attempt to rationalize the decisions of the courts. Reference is made to 6 Wigmore, Evidence (3d ed.), ch. LIX, p. 131, and ch. LX, p. 177; 3 Jones, Commentaries on Evidence (2d ed.), ch. 12, p. 2186; Chamberlayne, Trial Evidence (2d ed.), ch. XXXVIII, p. 751.

This court has considered the rule in many cases. The last statement, which we have followed since, is found in *Tongue v. Perrigo*, 130 Neb. 564, 265 N. W. 737: "A statement to be admissible as a part of the *res gestæ* must have been spontaneous and impulsive, and made at a time and under such circumstances as to induce the belief that it was not the result of reflection and premeditation." The rule has been stated in varying language in other cases, such as *Missouri P. R. Co. v. Baier*, 37 Neb. 235, 55 N. W. 913; *Collins v. State*, 46 Neb. 37, 64 N. W. 432; *City of Friend v. Burleigh*, 53 Neb. 674, 74 N. W. 50; *Pledger v. Chicago, B. & Q. Ry. Co.*, 69 Neb. 456, 95 N. W. 1057; and *Milton v. City of Gordon*, 129 Neb. 888, 263 N. W. 208.

The Circuit Court of Appeals, Fourth Circuit, in *Chesapeake & O. Ry. Co. v. Mears,* 64 F. 2d 291, discussed the authorities, cited Wigmore, *supra,* sec. 1750, and held that to render such statements admissible it was required that "(1) There be some shock to the feelings sufficient to render the utterance spontaneous and unreflecting; (2) 'the utterance must have been before there has been time to contrive and misrepresent, i. e. while the nervous excitement may be supposed still to dominate and the reflective powers to be yet in abeyance'; and (3) it must relate to the circumstance causing the shock to the feelings." The court further said: "While a logical basis is not always given for the decisions, the cases almost uniformly hold that a statement made by an injured person as to the cause of his injury is admissible if the time which has elapsed since the injury is so short that he is still under the influence of the happening and his statement presumptively a spontaneous expression growing out of it and not the result of reason and reflection."

The mathematical elapsed time between the happening of the event and the making of the statement is not alone decisive. We have held: "A declaration, to be a part of the *res gestæ,* need not necessarily be coincident in point of time with the main fact proved. It is enough that the two are so clearly connected that the declaration can, in the ordinary course of affairs, be said to be a spontaneous explanation of the real cause." *Missouri P. R. Co. v. Baier, supra.*

Statements made subsequent to the act may be admissible provided there has not been time for the exciting influence of the shock to lose its sway and be dissipated, or, as stated otherwise, provided the shock extends from the moment of the event to the time the statement is made. See 6 Wigmore, Evidence (3d ed.), sec. 1750, p. 142.

It is not enough that the speaker was under the stress of nervous excitement or pain when the statement was made, but it must appear that the speaker was under the stress of nervous excitement and shock produced by the act in issue. See *Keefe v. State,* 50 Ariz. 293, 72 P. 2d 425.

Tested by these rules, and for the following reasons, we are of the opinion that the offered statements were incompetent to prove the fact of a severe jolt or fall, and that the trial court should not have considered, and that we should not consider, them as proof of the fact in issue. There is no evidence here that the deceased suffered a shock as a result of the alleged accident. The testimony of the two men to whom he first talked after the alleged accident negatives any shock or excitement. It is true that when he made the statements to the plaintiff and to the doctor he was under considerable stress and pain, but that stress was not caused by an accident but by the pain and physical condition resulting from the thrombosis; it was not a stress produced by the act in issue. Likewise, it is clear that the statements were not spontaneous and unreflected and involuntary. They are a narrative of past events in form and substance. The plaintiff testified that deceased made the statement to her after she had asked him what had happened. He made the statement to the doctor as a part of the history of his case. The statements were made after his reflective powers were called into action and as a result of that fact.

It necessarily follows that plaintiff's case fails of competent proof to show that an accident, to wit: A severe jolt or hard fall, was actually had by the deceased. It further follows that the testimony of plaintiff's expert witness has no probative force because the premises of fact upon which it is based are not shown to be true.

One further matter requires attention. It was argued to the trial court and here that in compensation cases a liberal policy should be followed in the admission of declarations as a part of the *res gestæ*, for the reason, as the trial court stated in a memorandum opinion, citing *Jacobs v. Village of Buhl*, 199 Minn. 572, 273 N. W. 245: "Otherwise there could be no compensation award for the death of employees who sustain injuries in the absence of eye-witnesses, and the beneficient purposes of the Workmen's Compensation Act would be unavailable to their widows." The reasoning in the Minnesota case is stated as follows: "Perhaps a liberal

interpretation of the rule of *res gestæ* may in a few cases result in giving compensation to dependents not legally entitled thereto, but a technical and strict administration of the rule would defeat many meritorious cases and transfer numerous dependents from industry upon which the compensation law intends to put the burden, to public charity."

We also are cited in the brief to the case of *Johnston v. Payne-Yost Construction Co.*, 292 Pa. St. 509, 141 Atl. 481, where the court acted upon a similar line of reasoning. Without undertaking to point out obvious distinctions between these cases and the case at bar, we do point out that the Minnesota court found competent evidence in the record other than the hearsay statement to support a finding that an accident occurred. In the Pennsylvania case, the court said: " * * * even in compensation cases, the material findings must have a basis of legal proof on which to rest, and may not be based on hearsay alone" and that they would not classify border-line evidence as entirely incompetent where, as in the case then being considered, " * * * unquestionably competent proofs indicate the probability of the fact at issue being as stated in such border-line testimony * * * ." These cases seem in the final analysis to get back to the proposition that the question of the competency of such statements must depend on the circumstances of each case.

We are unwilling to accept the doctrine, stated in the Minnesota and Pennsylvania cases, that evidence which would be incompetent as hearsay in other cases should be considered competent in cases for compensation under the Workmen's Compensation Act. So to hold would tend to change the liability of the employer from liability for injuries or death arising out of and in the course of the employment to the liability of an insurer of the wellbeing of his employee. The compensation act does not put that burden upon the employer.

"Hardship in a particular case does not warrant an exception to the hearsay rule, but the existence of a class of cases in which hearsay is the only possible proof necessitates an exception." 3 Jones, Commentaries on Evidence

(2d ed.), sec. 1195, p. 2191. The Supreme Court of the United States has said: "If the circumstance that the eyewitnesses of any fact be dead, should justify the introduction of testimony to establish that fact from hearsay, no man could feel safe in any property, a claim to which might be supported by proof so easily obtained." *Mima Queen v. Hepburn,* 7 Cranch 290, 2 S. Ct. 535. To deny compensation for failure of proof in this particular case does not necessarily mean that compensation must be denied in all death cases where there are no eyewitnesses to the alleged accident. We recently stated the following rules which are applicable to the case here: "The burden of proof is upon the claimant in a compensation case to establish by a preponderance of the evidence that personal injury was sustained by the employee by an accident arising out of and in the course of his employment. * * * A compensation award cannot be based on possibilities or probabilities, but must be based on sufficient evidence that the claimant incurred a disability arising out of and in the course of his employment. * * * The rule of liberal construction of the Workmen's Compensation Act applies to the law, not to the evidence offered to support a claim. The rule does not dispense with the necessity that claimant prove his right to compensation within the rules above set out, nor does it permit a court to award compensation where the requisite proof is lacking." *Chambers v. Bilhorn, Bower & Peters,* 145 Neb. 277, 16 N. W. 2d 173.

The statute requires that this court, where it is found that the findings of fact are not conclusively supported by the evidence as disclosed by the record, consider the cause here *de novo* upon the record. This appeal calls for an independent conclusion on the record. The conclusion is that the plaintiff has not made out a case for an award of compensation.

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

REVERSED AND DISMISSED.

YEAGER, J., concurring in the result.

I find myself in full accord with the result arrived at in the majority opinion, but with some of the statements in the opinion and syllabus I find myself in disagreement.

For convenience I shall, for the most part, refer to the syllabus points rather than the corresponding parts of the opinion.

It will be noted that one of the questions of controlling importance was that of whether or not certain statements claimed to have been made by the deceased were *res gestæ* and on that account admissible. I agree that they were not admissible. I do not agree that the definition of *res gestæ* contained in point 5 and pursued in points 7 and 8 of the syllabus is correct.

A definition of *res gestæ* which has been approved by this court is quoted in the opinion as follows: "A statement to be admissible as a part of the *res gestæ* must have been spontaneous and impulsive, and made at a time and under such circumstances as to induce the belief that it was not the result of reflection and premeditation." *Tongue v. Perrigo*, 130 Neb. 564, 265 N. W. 737.

The majority opinion does not reject this rule but its effect is to narrow and restrict it. The effect of the rule of the opinion herein is to say that it is not enough that all the conditions contemplated by this definition shall be found to exist to render evidence admissible as a part of the *res gestæ*, but in addition thereto the court must be satisfied that those conditions flowed from *shock*. Under this definition the showing of *shock*, or evidence from which a reasonable inference thereof flows, becomes imperative as a foundation for the introduction of *res gestæ*. The effect is further to make a pathological finding a prerequisite to the admission of statements as *res gestæ*.

The term *shock* has been employed illustratively many times in opinions, and with that I find no fault, but seldom definitively as in the majority opinion. It appears that it was used definitively in *Chesapeake & O. Ry. Co. v. Mears*, 64 F. 2d 291. However in that opinion other definitive lan-

guage was used not employing this term. The other language referred to is contained in the majority opinion and will not be repeated here.

If I were inclined to restrict the definition of *res gestæ* I would desire to use a word or words capable of some measure of definiteness in understanding and definition. *Shock* is not so capable. Within certain limits it has an understanding by laymen, within broader limits it is understood by men of special training such as the medical man, the psychiatrist and psychologist, but it baffles even the scientist and the lexicographer in inclusive and exclusive definition. With its inexactitude of meaning it should not be written into legal definition to confound the legal profession and the courts.

MARY A. JOHNSON, APPELLEE, V. LESTER WASHBURN, APPELLANT.
19 N. W. 2d 563

FILED JULY 6, 1945. No. 31945.

1. **Courts.** By section 24-502, R. S. 1943, providing that county judges shall have concurrent jurisdiction with the district court in all civil cases in any sum not exceeding one thousand dollars, exclusive of costs, the county courts were given jurisdiction, to the extent authorized by the constitutional provision, in civil actions where the debt or sum claimed shall not exceed one thousand dollars. Const., art. V, sec. 16.
2. ———. In civil actions it is the debt or amount claimed by the plaintiff which determines the jurisdiction of the county court over the subject matter. Where that amount does not exceed one thousand dollars, the county court has such jurisdiction.
3. ———. Where the amount claimed is within the jurisdiction of the court at the time the action is brought, the fact that interest accruing before final judgment increases the amount to more than the jurisdictional limit will not defeat jurisdiction.
4. **Garnishment.** No proceedings against a garnishee shall be quashed, or a garnishee discharged, by reason of any informality or irregularity merely of the affidavit or summons provided for in sections 25-1056 to 25-1061, R. S. 1943.

APPEAL from the district court for Hamilton County: L. S. HASTINGS, JUDGE. *Affirmed.*

Charles F. Adams, for appellant.

Edgerton & Fraizer, for appellee.

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

SIMMONS, C. J.

In county court the amount claimed by the plaintiff in an action for rents was $1,000. Judgment was rendered for that amount, together with interest from the date of the filing of the petition and costs. Defendant contends that such judgment is void, as exceeding the jurisdiction of the court. He also contends that the garnishment proceeding was void. The trial court held against defendant. We affirm the judgment of the trial court.

On July 17, 1936, plaintiff filed a petition in the county court of Hamilton county. She alleged that defendant was indebted to her for rents in the sum of $1,184, plus additional interest; and that she waived all of said debt for the purposes of the suit only, and without prejudice, except for the sum of $1,000, in order that the action might be kept within the jurisdiction of the county court. She prayed judgment against the defendant for the sum of $1,000 and costs of suit.

Summons was issued, endorsed "If the defendant fail to appear, plaintiff will take judgment for $1000.00 with interest thereon at 6 per cent. per annum from the 17th day of July 1936." Personal service was had on the defendant.

August 4, 1936, the defendant having failed to appear or answer, default was entered. Thereafter judgment was entered against the defendant for the sum of $1,000 with interest at six per cent from July 17, 1936, and costs.

A transcript of this judgment was filed in the district court on September 28, 1936. Thereafter executions were issued and returned unsatisfied. An affidavit for garnishment was filed and service had upon the garnishee. In the

order of garnishment, the garnishee was ordered to appear before the "Clerk of the District Court" and there to answer. In the notice of garnishment served upon the garnishee, it was ordered to appear before the "District Court" and there to answer. The sheriff certified that the notice to the garnishee was to appear before the clerk. The garnishee, by written answer, disclosed that it had funds on deposit subject to check.

The defendant moved that the order of garnishment be quashed and the garnishee discharged for the reason that the purported judgment was absolutely void, contending that it was in excess of the constitutional and statutory jurisdiction of the county court. Defendant computed the amount of the judgment when rendered to be $1,002.83.

The defendant later filed a supplemental motion to quash and discharge for the reason that the clerk of the court had no power to order the garnishee to appear before him and make disclosure. The matter came on for hearing in the district court on the answer of the garnishee, and the defendant's motions to quash. The trial court overruled the motions and ordered the garnishee to pay the money into court. Defendant appeals.

The defendant concedes that the petition claimed a sum within the jurisdiction of the county court, but that the summons claimed a sum in excess of that jurisdiction, and because thereof the judgment was void. The defendant further contends that regardless of the petition and the summons, the judgment was absolutely void because rendered for a sum in excess of $1,000. That excess consisted of interest from the date of the filing of the petition to the date of the judgment.

The constitutional provision is: "County courts shall be courts of record, and shall have original jurisdiction in all matters of probate, settlement of estates of deceased persons, and in such proceedings to find and determine heirship; appointment of guardians, and settlement of their accounts; and such other jurisdiction as may be given by general law: But they shall not have jurisdiction in criminal cases in

which the punishment may exceed six months imprisonment or a fine of over five hundred dollars; or both; nor in civil actions in which title to real estate is sought or drawn in question; nor in actions on mortgages or contracts for the conveyance of real estate; nor in civil actions where the debt or sum claimed shall exceed one thousand dollars." Const., art. V, sec. 16.

It appears then that the county courts may be given jurisdiction by general law in civil actions where "the debt or sum claimed" shall not exceed one thousand dollars.

The legislative provision is that county judges shall have " * * * concurrent jurisdiction with the district court in all civil cases in any sum not exceeding one thousand dollars, exclusive of costs, * * * ." R. S. 1943, sec. 24-502. Prior to 1883 the jurisdiction was limited to " * * * any sum not exceeding five hundred dollars, exclusive of costs, * * * ." Comp. St. 1881, ch. 20, sec. 2, p. 205. It then was amended so as to provide: " * * * in any sum not exceeding one thousand dollars, exclusive of costs, * * * ." Laws 1883, ch. 38, sec. 2, p. 220. We find nothing in the present statute indicating an intent to limit the jurisdiction of the county court other than as limited by the Constitution. The legislative intent was to authorize the court to exercise jurisdiction to the extent allowed by the Constitution.

The precise question here is: Is the judgment void where the debt or sum claimed is within the jurisdictional limits, but interest, accruing after the filing of the suit, is included in such judgment? This problem has troubled the courts heretofore, and statements in the opinions are not entirely harmonious, when taken out of the light of the specific problem presented.

In *Brondberg v. Babbott*, 14 Neb. 517, 16 N. W. 845, it was said: "It seems to be well settled that in a court of limited jurisdiction it is the amount stated in the *ad damnum* clause of the writ that gives jurisdiction even in cases where the petition or bill of particulars states a different amount as that for which judgment is demanded." But there, both the petition and the summons stated the plaintiff's claim to

have been for a sum in excess of the jurisdiction of the court as then fixed by statute. It there was held that the court was without jurisdiction of the subject matter.

In *Union P. Ry. v. Ogilvy*, 18 Neb. 638, 26 N. W. 464, an action was brought in the county court seeking to recover $990 damages. On appeal to the district court plaintiff amended his petition so as to claim damages in the sum of $1,380. In the discussion it was said that the county court could not render judgment for more than $1,000. It was held that the power of amendment of the district court was limited to the highest sum for which the court from which the appeal was taken "was authorized to render judgment, and accrued interest." In the syllabus it was stated: " * * * That the petition could not be amended to claim more than $1,000, and accrued interest, being the limit of the civil jurisdiction of the county court."

City of Hastings v. Mills, 50 Neb. 842, 70 N. W. 381, presented a question concerning the allowance of costs. The Constitution provided that a justice of the peace should not have jurisdiction where the "amount in controversy" exceeded $200. The statute used the language "the sum in question." It was held that if a plaintiff claimed more than $200 he could not bring his action before a justice of the peace.

Bates & Co. v. Stanley, 51 Neb. 252, 70 N. W. 972, was a replevin action brought in the county court, and on appeal to the district court presented a question of jurisdiction. In the opinion, the constitutional provision was discussed and it was said: "This language excludes the hypothesis that jurisdiction depends upon the amount finally ascertained to be due. It is the amount claimed which under the constitution limits the jurisdiction. (*Beach v. Cramer*, 5 Neb., 98; *Brondberg v. Babbott, supra.*) In ordinary civil actions this can be readily determined from the petition, the summons, or both. (*Brondberg v. Babbott, supra.*)" In the syllabus it is said: " * * * such court cannot render a judgment for a larger sum than $1,000 exclusive of costs."

The defendant here cites language found in the opinion

by Judge Norval in *Bates v. Stanley, supra,* that " * * * the statute, and the constitution, limit the sum for which judgment may be entered by such court at $1,000. This limitation applies to all actions, including replevin." The above language is found in a dissenting opinion. *Huffman v. Ellis,* 52 Neb. 688, 73 N. W. 10.

Adams v. Nebraska Savings & Exchange Bank, 56 Neb. 121, 76 N. W. 421, dealt with a question of the jurisdiction of a justice of the peace. In the body of the opinion it was stated: "All our decisions indicate a want of power in a justice to render judgment for more than $200. This must be because the demand cannot be raised beyond that figure, by allowance of interest or otherwise." It further was stated: "We conclude that while accrued interest, if demanded, must be considered in computing the jurisdictional amount, nevertheless, as the plaintiff may remit the excess, if it appear that he is entitled to more than that amount (Code of Civil Procedure, sec. 1003), the amount is to be found from plaintiff's actual demand, and not from the amount that the bill of particulars indicates that he might properly demand. (*Stone v. Murphy,* 2 Ia. 35.) But when there is a variance as to the amount demanded between the prayer of the bill of particulars and the writ, the writ governs. If the judgment which may be rendered under the terms of the writ be within the jurisdiction of the court, jurisdiction of the subject-matter exists." The syllabi stated:

"In computing the 'amount in controversy' to ascertain whether a case is within the jurisdiction of a justice of the peace, interest accrued at the time of suit on an interest-bearing debt should be considered.

"It is not the amount which the bill of particulars shows the plaintiff might claim, but the actual amount of his demand, which ascertains the jurisdictional amount."

See, also, *Henke v. Deemer,* 101 Neb. 126, 162 N. W. 510, where the syllabus stated: "The bill of particulars and summons both disclosing that the amount of the debt with interest from the time it was claimed to the filing of the suit exceeded $200, a justice of the peace had no jurisdiction of the suit."

See, also, *Stake v. Western Assurance Co.*, 136 Neb. 735, 287 N. W. 222, wherein we referred to the above case and said: " * * * it is generally held that, if the interest accruing before final judgment increases the amount to more than the jurisdictional limit, it will not defeat jurisdiction."

We think it clear that in civil actions, it is the debt or amount claimed by the plaintiff which determines the jurisdiction of the county court over the subject matter. Where that amount does not exceed $1000, the county court has such jurisdiction. That amount is to be determined as of the time when suit is instituted. We find nothing in the Constitution or statute which requires that interest on the amount claimed, accruing after suit, should be included in the computation of the debt or amount claimed.

It appears to be the rule generally that where the amount claimed is within the jurisdiction of the court at the time the action is brought, the fact that interest accruing before final judgment increases the amount to more than the jurisdictional limit will not defeat jurisdiction. *Stake v. Western Assurance Co., supra*; 14 Am. Jur., sec. 214, p. 410; 21 C. J. S., sec. 54(b), p. 64, and sec. 58, p. 72; 15 C. J., sec. 68, p. 773; Annotation, 77 A. L. R. 994; *Jorgenson v. Farmers & Merchants Bank*, 44 N. D. 98, 170 N. W. 894.

We reach the conclusion then that the county court had jurisdiction of the subject matter of the action; that it had jurisdiction to issue the summons which it issued; and that it had jurisdiction to enter the judgment which it entered.

Defendant, by supplemental motion, moved to quash the order of garnishment for the reason that the clerk had no power to order the garnishee to appear before him and make disclosure. The statute provides: "No proceedings against such garnishee shall be quashed, or such garnishee discharged by reason of any informality or irregularity merely of the affidavit or summons provided for in sections 25-1056 to 25-1061." R. S. 1943, sec. 25-1059. The statute seems to have been enacted to cover such a situation as we have here.

The trial court did not err in overruling the motions to quash. Its judgment is affirmed.

AFFIRMED.

STATE FURNITURE COMPANY, APPELLANT, V. MINERVA ABRAMS ET AL., APPELLEES.
19 N. W. 2d 627

FILED JULY 6, 1945. No. 31957.

1. **Judgments.** Under the provisions of section 26-1,100, R. S. 1943, a motion to vacate a default judgment in the municipal court of metropolitan and primary cities must be made within ten days and in the manner therein provided.
2. **Process.** Upon notice and sufficient showing the court may permit an amendment to be made to the return of process to conform to the facts.
3. **Process: JUDGMENTS.** Generally, a judgment may be taken by default where it appears that the process has been duly served as by statute required although it is the fact of service rather than the proof of service that gives the court jurisdiction.

APPEAL from the district court for Douglas County: FRANK M. DINEEN, JUDGE. *Reversed and remanded with directions.*

Walter L. Cropper, Carl Self, and *Lloyd Crocker,* for appellant.

Charles F. Davis, for appellees.

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

WENKE, J.

The appellant, State Furniture Company, a corporation, brings this appeal from an order of the district court for Douglas county dismissing its petition in error from the municipal court of the city of Omaha.

The record discloses that appellant, on September 22, 1944, brought this action in the municipal court of the city

of Omaha against Minerva Abrams, Dorothy Abrams and Zack Abrams. The purpose of the action was to recover a judgment against the defendants for the sum of $267.25. Summons was issued the same day and delivered to Fred Kauth, a constable. His return thereon is as follows: "Received this writ on the 22nd day of September, 1944. I hereby certify that on the 23rd day of September, 1944, I served the within summons on the within named defendant, Minerva Abrams and Dorothy Abrams, by leaving at 2316 No. 25th St., their usual place of residence, a true and certified copy of this writ with all endorsements thereon for each of them. I also on the same day served the within named Zack Abrams, by delivering personally to him a true and duly certified copy thereof with all endorsements thereon, all done in the City of Omaha, Douglas County, Nebraska."

On September 29, 1944, appellant took default judgment against all of the defendants. On October 23, 1944, a special appearance of the defendant and appellee, Dorothy Abrams, was sustained and the judgment against her set aside and the garnishment proceedings being conducted against the Glenn L. Martin Nebraska Company released.

On October 30, 1944, appellant filed a motion to set aside the order of October 23, 1944, and correct the constable's return. In support thereof it filed the affidavit of Fred Kauth, the constable, setting forth in part as follows: " * * * that he received the summons filed herein on the 22nd day of September, 1944, and certified that he served the same on September 23, 1944 as follows: 'I served the within summons on the within named Minerva Abrams, Dorothy Abrams, leaving at 2316 North 25th Street, their usual place of residence, a true and certified copy of this writ with all the endorsements thereon for each of them. * * * '; that the affiant well remembers serving said summons and that the same was served upon Dorothy Abrams by handing to her sister a true and certified copy of the same at said defendant's usual place of residence, to-wit: 2310 North 25th Street, and not 2316 North 25th Street, in the City of Oma-

ha, County of Douglas, and State of Nebraska; * * * That the return on said summons was insofar as the Street number is concerned, a typographical error upon the part of this affiant in the making of his return, and that actual legal service was had upon said Defendant as aforesaid, at 2310 North 25th Street, Omaha, Douglas County, Nebraska, * * * ." Notice of hearing on this motion was given appellee. On November 9, 1944, the same was overruled.

On November 21, 1944, appellant filed its petition in error in the district court for Douglas county. On February 10, 1945, a judgment was entered in the district court dismissing the petition in error. It is from this judgment that the appellant appeals.

Two questions were presented to the district court by the petition in error and to this court by the appeal:

First, did the municipal court have the authority or power to set aside its default judgment?

Second, could the constable's erroneous return on the summons be corrected by amendment to show the service that he actually made and what was the effect of the return, as made, upon the jurisdiction of the court to enter the judgment?

Section 26-1,100, R. S. 1943, which applies to municipal courts of metropolitan and primary cities, provides as follows: "When judgment shall have been rendered against a defendant in his absence, the same may be set aside upon the following conditions: (1) That he pay the costs awarded against him; (2) that his motion be made within ten days after such judgment was entered; (3) that he notify in writing the opposite party, or his attorney, or cause it to be done, of the opening of such judgment and of the time and place of trial, at least five days before the time thereof, if the party reside in the county, and if neither the plaintiff or his attorney be a resident of the county, by leaving a written notice thereof at the office of the clerk of the court ten days before the trial; *Provided, however,* that the time of trial shall not be more than twenty days after the rendition of the judgment."

From this statute it is plain that a motion to set aside a default judgment in the municipal court in cities of the metropolitan and primary class must be made within ten days from the entry of the judgment and in the manner provided by the statute. The appellee failed to proceed within the time and in the manner so provided. The court was therefore without authority or power to vacate or set aside its judgment. See *Lynch v. Powers,* 198 Ia. 1060, 200 N. W. 725, and *Merkel v. Hallagan,* 207 Ia. 153, 222 N. W. 393.

Appellee calls our attention to section 26-1,201, R. S. 1943, and by the provisions thereof contends that the provisions of sections 25-2001 to 25-2009, inclusive, are applicable. Section 26-1,201, R. S. 1943, is as follows: "All provisions of the district court code of civil procedure, and all other provisions of this article and relating to matters for which no specific provision has been made herein, shall govern and apply to actions in the municipal court." This contention is without merit for this statute expressly provides: " * * * relating to matters for which no specific provision has been made herein, * * * ." Here we have a specific statute on the subject matter.

The sheriff's return shows the service to have been made at 2316 North 25th street. The record discloses that service was actually made upon the appellee by leaving the summons at her usual place of residence at 2310 North 25th street. The constable made an error in his return.

That an amendment may be made to the return of a process or other writ to conform to the facts is well recognized in this jurisdiction. *O'Brien v. Gaslin,* 20 Neb. 347, 30 N. W. 274; *Shufeldt v. Barlass,* 33 Neb. 785, 51 N. W. 134; *Wittstruck v. Temple,* 58 Neb. 16, 78 N. W. 456; *Mudge v. Mudge,* 111 Neb. 403, 196 N. W. 706.

Although generally a judgment may be taken by default where it appears that the process has been duly served as by statute required, it is the fact of service rather than the proof of service that gives the court jurisdiction. As stated in 31 Am. Jur., sec. 514, p. 129: "Jurisdiction to enter a

judgment against a defaulting defendant rests upon the fact of service of process, and as a general rule, a judgment by default may be taken only where it appears that process has been duly served upon the defendant."

In *Mintle v. Sylvester,* 197 Ia. 424, 197 N. W. 305, where the service was other than as shown in the return, the court held as follows: "In the instant case, the return showed good service, by personal service on the defendant. On the face of the record, the court had jurisdiction of the person of the defendant, and, in default of an appearance, on the record as it then stood, properly entered a default and decree. It is now made to appear, not that there was no service on the defendant, but that the service was not as recited in the return, and was substituted service, such as is provided for by Section 3518 of the Code. Since it is the fact of service upon which the jurisdiction of the court depends, this service did, in fact, confer personal jurisdiction of the defendant therein, and empowered the court to enter default and judgment." As stated in *Wheat v. McNeill,* 111 Cal. App. 72, 295 Pac. 102: " * * * the affidavit of service, though admitted to be erroneous as to the place of service, nevertheless showed the fact of service, and it was this fact that gave the trial court jurisdiction, * * * ." "A default judgment entered upon false proof of service cannot be set aside for want of jurisdiction, where it appears that there was a further valid service of process, although no proof thereof was made before judgment; * * * ." *McHugh v. Conner,* 68 Wash. 229, 122 Pac. 1018. And in *Schmidt v. Stolowski,* 126 Wis. 55, 105 N. W. 44, where the proof of service on the return was defective the court, in discussing jurisdiction, stated as follows: "The distinction between the fact of service, which is essential to jurisdiction, and proof of the fact of service, as the evidence of jurisdiction, has at times been lost sight of. If service of the summons in a case is, in fact, made on the defendants, that gives the court jurisdiction to render a valid judgment, so far as the service of process is concerned, though the evidence of record, constituting the proof of service, may fail in essential

particulars to establish that such service was in fact made. In cases where service was in fact had, the court has jurisdiction, and may after judgment permit an amendment of the record to supply omissions necessary to show that the service was in fact made." See, also, *Marin v. Titus*, 23 S. D. 553, 122 N. W. 596; *Cunningham v. Spokane Hydraulic Mining Co.*, 20 Wash. 450, 55 Pac. 756.

The return showed service upon the appellee at her usual place of residence at 2316 North 25th street. On the face of the record the court had jurisdiction of the person of the defendant and, in default of her appearance, properly entered a default judgment. It is now made to appear that the service was not as recited in the return to the summons but at her usual place of residence at 2310 North 25th street. Since it is the fact of service upon which the jurisdiction of the court depends this service did, in fact, confer jurisdiction of the court upon the person of the appellee and empowered it to enter the default judgment.

We are of the opinion that the facts show good service of the summons on the appellee and that the judgment entered is not void; that the appellant should have been permitted to amend the constable's return to conform to the service actually made; that the municipal court, under the provisions of the statute, was without authority to vacate or set aside its judgment; and that the district court should not have dismissed the petition in error but should have sustained it and granted relief in accordance with its prayer.

It is therefore ordered that the judgment of the district court is reversed and that judgment be entered in accordance herewith.

REVERSED, WITH DIRECTIONS.

STATE EX REL. ENA F. WOLSKI, RELATOR, V. ELDRIDGE G. REED, RESPONDENT.
19 N. W. 2d 545

FILED JULY 6, 1945. No. 31967.

1. **Mandamus**: JUDGMENTS. A judge of the district court may, if the ordinary remedy is inadequate, be compelled by mandamus to vacate or set aside an order or judgment granted by him when done without jurisdiction or authority.
2. ———. Mandamus will not issue to review the action of an inferior court where there is an adequate remedy at law, and the writ may not be used to usurp or take the place of an appeal or writ of error.

Original proceeding by the state, on the relation of Ena F. Wolski against Eldridge G. Reed. *Writ denied.*

Mothersead & Wright and *Hamer, Worlock, Randall & Tye,* for relator.

Minor & Minor and *Dryden & Jensen,* for respondent.

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

WENKE, J.

This is an original action brought for the purpose of securing a writ of mandamus to compel the respondent, Eldridge G. Reed, judge of the district court for Buffalo county, to vacate and set aside a temporary injunction issued against Ena F. Lippincott Wolski on March 9, 1945.

For the purpose of a clearer statement of the facts certain of the parties will be referred to by their first name: Ena F. Lippincott Wolski, who was the first wife of Harvey R. Lippincott, as Ena; Virginia Lippincott, the second wife of Harvey R. Lippincott, as Virginia; Harvey R. Lippincott, the husband of both, as Harvey; James W. Lippincott, the father of Harvey, as the father; Phillipina Zimmerman Lippincott, the stepmother of Harvey, as the stepmother; and Harvey Richard Lippincott, Jr., a son of Harvey and Ena, as Richard.

The litigation out of which this action arises had its beginning on February 26, 1937, when Ena obtained a divorce from Harvey in the Nevada courts. Harvey then married Virginia on November 4, 1937. Thereafter, on April 5, 1940, Ena commenced an action in the district court for Scotts Bluff county against Harvey to have the Nevada divorce decree declared void and to obtain a divorce and alimony. Decree was entered therein on March 11, 1941, in favor of Ena finding the Nevada decree void, granting her a divorce and awarding her permanent alimony in the form of an award of certain lands located in Scotts Bluff county.

Harvey and Ena had accumulated considerable land located in both Scotts Bluff and Buffalo counties. Part of the land located in Scotts Bluff county was awarded to Ena by the decree of March 11, 1941. During the trial of the case deeds from Harvey to Virginia of all the lands in both counties, bearing the date of January 20, 1940, were placed of record. The deed to the Buffalo county land was recorded on March 3, 1941, and the deed to the Scotts Bluff county land on March 6, 1941. Thereafter, on March 7, 1941, Virginia deeded all these lands back to Harvey. These deeds were deposited with Judge Perry of the district court for Scotts Bluff county. With the entry of the decree of March 11, 1941, the deed to the Scotts Bluff county land was recorded on the same day. However, the deed to the Buffalo county land was not recorded until February 1, 1945, during the hearing on the application for the temporary injunction.

Harvey appealed from the decree of March 11, 1941, to this court where the judgment of the lower court, holding the Nevada decree void and granting Ena an absolute divorce, was affirmed but the matter of awarding certain property as permanent alimony was reversed for further hearing. This opinion was released on March 27, 1942, and will be found reported as *Lippincott v. Lippincott,* 141 Neb. 186, 3 N. W. 2d 207.

On May 26, 1942, Virginia commenced the action in the

district court for Buffalo county against Ena, Harvey, the father and stepmother in which the temporary injunction here sought to be vacated and set aside was subsequently entered. The purpose and object of the action was to set aside the deeds she had given to Harvey to the Buffalo and Scotts Bluff county lands, dated March 7, 1941, and delivered to Judge Perry of the district court for Scotts Bluff county, and to find that she is the owner of all of said properties.

Service in this action was had on Ena in Scotts Bluff county, first by residential service and then by personal service. She filed her special appearance in response to each of the services made upon her. No ruling was had thereon at the time.

After the divorce action was returned to the district court a hearing was had to determine the amount of alimony to be awarded. On August 14, 1943, an award thereof was made whereby Ena was given part of the land located in Scotts Bluff county, described as the northwest quarter and the north half of the southwest quarter of section 6, township 22, range 57; the north half of the northeast quarter of section 1, township 22, range 58; and the school-land lease to the southeast quarter of the southeast quarter of section 36, township 23, range 58; and the rents therefrom commencing with the year 1943. For convenience this land will hereinafter be referred to as the home place.

It appears that deeds, bearing the date of April 15, 1943, were executed from Harvey to Virginia to all of the lands in both counties. The deed to the Scotts Bluff county land was recorded on April 17, 1943, but the record fails to show that the deed to the Buffalo county land was ever recorded.

Harvey appealed from the award of August 14, 1943, and as part of the supersedeas deposited with the district court for Scotts Bluff county a deed to Ena to the land in Scotts Bluff county which had been awarded her, and, commencing with 1943, an assignment to the clerk of the rents covering the same land. It appears that Harvey had leased the home place and other lands in Scotts Bluff county to Kent Lane

for a period of five years from March 1, 1941, to March 1, 1946.

On March 17, 1944, this court released its opinion, *Lippincott v. Lippincott*, 144 Neb. 486, 13 N. W. 2d 721, affirming the award of the lower court but directing Ena to make certain payments to either the father or stepmother and Harvey to make certain insurance premium payments as provided in an agreement between Harvey and his father.

This agreement, entered into by Harvey and his father on February 11, 1933, provided for certain payments to be made to the father, and then the stepmother, if she survive, and to pay an insurance premium, and made them a lien on certain property in Scotts Bluff county, including the home place.

Pursuant to the opinion, mandate was sent to the district court and judgment was entered thereon on April 20, 1944. Ena thereupon proceeded to collect the rents from the tenant, Kent Lane.

On September 7, 1944, Harvey and Virginia deeded all the Scotts Bluff and Buffalo county lands to Richard. The deed to the Scotts Bluff county land was recorded on October 16, 1944, and the deed to the Buffalo county land was recorded on September 12, 1944.

On October 13, 1944, Richard made application to and received permission from the district court for Buffalo county to be substituted as plaintiff for Virginia in the action which she had originally brought therein on May 26, 1942. On October 30, 1944, he filed his amended petition and made James W. Lippincott, Jr., Velma Lippincott Kellums, Harold W. Lippincott, C. R. Barton, clerk of the district court for Scotts Bluff county, and Kent Lane additional parties defendant. The object and purpose of the action remained the same.

On the application of Richard for an injunction against Ena the district court for Buffalo county did, on January 16, 1945, enter a temporary restraining order against her and enjoined her from entering upon or attempting to enter upon the home place in Scotts Bluff county and set the date

for hearing thereon as February 1, 1945, at 10 a. m. Notice thereof was served upon Ena in Scotts Bluff county and she filed her special appearance thereto.

On February 1, 1945, Ena's special appearance to the application was overruled and hearing had. It was during this hearing that the deed to the Buffalo county land from Virginia to Harvey, dated March 7, 1941, was recorded. After the hearing the matter was taken under advisement and on March 9, 1945, Eldridge G. Reed, district judge for Buffalo county, before whom the hearing was had, entered a temporary injunction against Ena and enjoined her from entering or attempting to enter upon the home place in Scotts Bluff county and fixed applicant's bond in the sum of $5,000. A bond was filed and approved.

As a basis or reason for the issuance of the writ the relator suggests that the court exceeded its jurisdiction for the following reasons: First, because the relator was in possession of the property and the court had no jurisdiction to enjoin her out of possession. Second, because the district court for Buffalo county had no jurisdiction of the subject matter, the lands involved in the injunction proceeding being situated in Scotts Bluff county.

For the purpose of this opinion we will assume that both propositions of relator are correct and that the district court was without jurisdiction to enter the temporary injunction.

This court has held that a judge of the district court may, if the ordinary remedy is inadequate, be compelled by mandamus to vacate or set aside an order or judgment granted by him when done without jurisdiction or authority. *State ex rel. Reynolds v. Graves*, 66 Neb. 17, 92 N. W. 144. The duty is imposed upon this court to prevent violation of law by inferior tribunals where there is no adequate remedy by the ordinary course of the law and mandamus is the appropriate remedy for that purpose. *State ex rel. Parmenter v. Troup*, 98 Neb. 333, 152 N. W. 748.

However, as stated in *State ex rel. Garton v. Fulton*, 118 Neb. 400, 225 N. W. 28: "Mandamus will not issue to review

the action of an inferior court where there is an adequate remedy at law, and the writ may not be used to usurp or take the place of an appeal or writ of error." We approve the following statement contained in *State ex rel. Cuming County Farm Bureau v. Tighe*, 124 Neb. 578, 247 N. W. 419: "In *State v. Fulton*, 118 Neb. 400, there is a concise and thorough review by Judge Good of many cases in this and other courts holding that mandamus will not lie to control judicial discretion, nor to review the action of an inferior court where there is an adequate remedy at law for review by appeal or proceedings in error. We adopt, without repeating it, the argument there."

If the court erred in the issuance of the temporary injunction this can be corrected on final hearing and, in the event the relator does not obtain the relief she thinks she is entitled to, she has a plain, adequate and speedy remedy in the due course of law by appeal to this court. Adequate bond has been provided to protect the relator against any damages she may suffer. The writ of mandamus will not issue merely to correct errors. It must appear that the relief asked for in the application can be obtained only by that means and that the relator has no adequate remedy in the due and ordinary course of the law. It is a writ that will seldom issue except when all other remedies have failed.

We have not overlooked the case of *State ex rel. Reynolds v. Graves, supra,* wherein a writ was granted requiring the district judge to vacate an order granting an injunction. The court there held: "A court or judge has no authority by a provisional injunction to transfer the possession of real or personal property from one litigant to another." However, as stated in *State ex rel. Garton v. Fulton, supra*: "The opinion in that case (*State ex rel. Reynolds v. Graves, supra*) goes further than any other opinion of this court that we have been able to find, in controlling by mandamus the action of a district judge." And we think farther than this court should ordinarily go.

Under the facts of this case, where the relator has an adequate remedy at law, is fully protected by bond as to any

damage which she may suffer and where it does not appear that any irreparable damage will likely arise, we think the writ should be denied.

WRIT DENIED.

CARTER, J., participating on briefs.

LINCOLN DRUG COMPANY, APPELLEE, V. EARL N. HARMAN, DOING BUSINESS AS HARMAN TRANSFER LINE, APPELLANT, JAMES A. DONALDSON ET AL., APPELLEES.
19 N. W. 2d 566

FILED JULY 13, 1945. No. 31955.

1. Carriers. The liability of a contract carrier for loss or damage to property being transported is determined by the contract made by the parties.
2. ———. In the absence of a contract provision on the subject a contract carrier is liable only for damage or loss occasioned by his negligence.
3. ———. When a contract carrier agrees to haul merchandise as directed by the consignee, the fact that the initial haul is made by his agent who is a common carrier does not increase the liability of the contract carrier for loss or damage not occasioned by his negligence, even though a through bill of lading was issued by the initial carrier.

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

Perry, Van Pelt & Marti and *Arthur E. Perry*, for appellant.

Beghtol, Foe & Rankin and *John C. Mason*, for appellee.

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

CARTER, J.

This is an action to recover $1,386.78 from Earl N. Harman, James A. Donaldson and Georgia Donaldson for the value of merchandise alleged to have been lost in the process

of delivering it from the Eastman Kodak Company's warehouse in Chicago, Illinois, to the Lincoln Drug Company in Lincoln, Nebraska. The trial court found that negligence was not established, dismissed the action as to the Donaldsons and entered judgment against Harman for the amount claimed on the theory that he was a common carrier. From this judgment defendant Harman appeals.

The record shows that on August 1, 1937, the Lincoln Drug Company entered into a written contract with Harman whereby it was agreed that the company would employ Harman to haul merchandise for it as directed and at the rates therein specified. On July 15, 1942, the Lincoln Drug Company ordered certain merchandise from the salesman of the Eastman Kodak Company upon which signed order the Lincoln Drug Company specified that it should be shipped via Chicago Transfer Company in care of Harman Transfer Line. On July 20, 1942, the merchandise was delivered to the Chicago Transfer Company and by them deposited at a loading dock in Chicago, where Harman had arranged for space. During the night the dock was broken into and the property in question taken therefrom by persons who have never been apprehended.

At the time the merchandise was delivered to the Chicago Transfer Company by the Eastman Kodak Company, a uniform straight bill of lading was made out to "Chgo Trans. C/O Harman Trans" which was signed "Harman Transfer" by "Lankin," Lankin being a truck driver for the Chicago Transfer Company. The bill of lading provided in part: "The carrier or party in possession of any of the property herein described shall be liable as at common law for any loss thereof or damage thereto, except as hereinafter provided." It is admitted that the Chicago Transfer Company is a common carrier and that the Harman Transfer Line was a contract carrier. Neither is it disputed that the liability of a contract carrier is for negligence only and that the liability of such a carrier could be increased by contract provision. Nor is it anywhere questioned that the liability of a common carrier is in effect that of an insurer

against loss from whatever cause except an act of God, the public enemy or of the owner of the goods.

There is much evidence in the record concerning the sale of the Harman Transfer Line, including its equipment and contracts for hauling, to the Donaldsons. Whether the Donaldsons were the sole owners of the Harman Transfer Line or merely the agents of Harman is not material under our view of the case on this appeal and for that reason we will not discuss the evidence going to that point.

We are of the opinion that Harman's liability must be determined by the contract he made with the Lincoln Drug Company. It will be noted that under that contract he agreed to haul for the Lincoln Drug Company as directed. The Lincoln Drug Company, in ordering the merchandise in question, specified that it should be delivered to the Chicago Transfer Company. This was done. The Chicago Transfer Company placed it in the loading dock where Harman was to pick it up and transport it to Lincoln. This is not a case where a common carrier received merchandise and undertook for itself to perform an entire service of transportation from point of origin to destination. The Lincoln Drug Company, under its contract with Harman and the shipping instructions given the Eastman Kodak Company, contemplated no such relationship. The transportation charges were paid on the rates provided in its contract with Harman. The hauling was done as directed by the Lincoln Drug Company. It was clearly the intent of the parties that the liabilities of each were determinable by the contract between Harman and the Lincoln Drug Company. This liability being that of a contract hauler and there being no evidence adduced of any negligence on Harman's part, a verdict should have been directed for Harman by the trial court. 13 C. J. S., sec. 74, p. 138; *Langendorf Clothing Co. v. Fara*, 272 Ill. App. 160; *Beatrice Creamery Co. v. Fisher*, 291 Ill. App. 495, 10 N. E. 2d 220.

The plaintiff contends that the bill of lading signed when the merchandise was delivered to the Chicago Transfer Company is binding upon Harman. Assuming that the sig-

nature of Lankin, the truck driver, was sufficient to bind Harman, it can avail the plaintiff nothing for it fixed Harman's liability as at common law and, he being a contract hauler, the common law imposes no liability upon him. His liability was for negligence only.

The plaintiff urges that Harman assumed a greater duty than his contract with it placed upon him. We find no evidence to support this contention. The plaintiff instructed the Eastman Kodak Company to ship the merchandise via Chicago Transfer Company, care of Harman Transfer Line. These instructions were followed and were consistent with the hauling contract made by the Lincoln Drug Company with Harman. There is no evidence in the record that Harman, or any one authorized to act for him, made any other or different contract than the one hereinbefore described. Nowhere in the record does it appear that Harman assumed by express contract to deliver the goods at their point of destination in good or safe condition and thus became an insurer. It is clearly the rule that the business of a contract carrier of goods is obtained by, and is dependent upon, his contract with the shipper. But unless he expressly contracts to the contrary, his liability is to be determined by the law applicable to a contract carrier.

The cases cited by plaintiff are clearly distinguishable. In *Klein v. Baker*, 112 Cal. App. 157, 296 Pac. 631, the private carrier agreed to deliver the goods to destination at a certain time without any reservation for contingencies. The goods were destroyed by fire in transit. The private carrier was held to his contract to deliver the goods to destination. In *Max Biederman, Inc. v. Henderson*, 115 W. Va. 374, 176 S. E. 433, the private carrier contracted unconditionally to deliver the goods safely. He did not do so and he was held to his contract. The defendant Harman made no such contract in the present case.

Plaintiff relies on *Galveston Wharf Co. v. Galveston, H. & S. A. Ry. Co.*, 285 U. S. 127, 52 S. Ct. 342, and *Sun Ins. Office Limited v. Be-Mac Transport Co.*, 8th Cir., 132 Fed. 2d 535. These cases are clearly distinguishable. In each

case the initial carrier was a common carrier who undertook to perform the entire transportation service from point of origin to destination. Under such circumstances all connecting carriers are liable as common carriers, even though they may be private or contract carriers otherwise. We do not question the correctness of these holdings, but they do not apply to the situation here presented.

In the present case the hauling contract was made between the consignee of the goods and a contract hauler. The consignor delivered the goods to the agent of the contract hauler as directed by the consignee. The agent of the contract hauler, a common carrier, delivered the goods to the contract hauler as directed. The loss occurred while the goods were in the legal possession of the contract hauler, without negligence on his part. Under the circumstances here shown the bill of lading must be considered in connection with the special contract entered into by the parties. In so doing we find no intention anywhere expressed to increase the liability of the contract hauler to that of a common carrier. Negligence on the part of the contract hauler not being shown, liability on his part does not exist.

REVERSED AND DISMISSED.

WOODMEN OF THE WORLD LIFE INSURANCE SOCIETY, APPELLANT, V. AMERICAN SOCIETY OF COMPOSERS, AUTHORS, AND PUBLISHERS ET AL., APPELLEES.

JOSEPH MALEC, APPELLANT, V. AMERICAN SOCIETY OF COMPOSERS, AUTHORS, AND PUBLISHERS ET AL., APPELLEES.

19 N. W. 2d 540

FILED JULY 13, 1945. Nos. 31921, 31922.

1. **Payment.** Where one voluntarily complies with the terms of a contract under the fear and apprehension of litigation, unaccompanied by any act of hardship or oppression, coercion or compulsion, he cannot thereafter avoid the contract and recover back the money paid in compliance therewith.
2. ———. When one, under a mistake of law or in ignorance

thereof, with full knowledge of all the facts and in the absence of fraud, coercion, compulsion, hardship or oppression upon the part of the payee, voluntarily complies with the terms of a contract by legislative enactment made void and nonenforceable against him, and thereafter brings suit to recover back the money so paid, he cannot, under the circumstances, prevail.

APPEAL from the district court for Douglas County: JAMES M. FITZGERALD, JUDGE. *Affirmed.*

Hotz & Hotz and *Rainey T. Wells*, for appellant.

Kennedy, Holland, DeLacy & Svoboda, Eugene N. Blazer, Schwartz & Frohlich, and *Herman Finklestein*, for appellees.

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

MESSMORE, J.

The two cases constituting the subject of this appeal, by agreement, are consolidated. They are actions at law to recover money judgments wherein the plaintiffs, pursuant to contracts made with the defendant, paid the defendant in compliance therewith and seek to recover the money so paid. A jury was waived and trial had to the court. The court entered judgment for the defendant. Motion for new trial was argued, submitted and overruled. Plaintiffs appeal.

The plaintiff, Woodmen of the World Life Insurance Society, is a fraternal, beneficial society, incorporated under the laws of Nebraska and duly authorized to operate the radio station known as W.O.W., situated in Omaha. For convenience this plaintiff will be referred to as the "society."

The plaintiff, Malec, is the assignee of 26 contracts that were entered into by music users with the defendant, and will be referred to as "Malec."

In the alternative, the plaintiffs will be referred to as appellants.

The defendant, American Society of Composers, Authors and Publishers is a voluntary association organized and existing under and by virtue of the laws of New York, com-

monly referred to as ASCAP, and will hereafter be so designated.

Eugene N. Blazer, defendant (appellee) represented ASCAP in Nebraska as their agent, and will hereafter be referred to as "agent."

The issues raised in the pleadings pertinent to a determination of this appeal are considered in the opinion with reference to the contentions of the respective parties.

The record discloses that on July 18, 1923, the society entered into a contract with ASCAP. Thereafter the contracts continued year after year on a fixed license fee. On September 1, 1932, the society and ASCAP entered into a contract that fixed a sustaining fee and a graduated scale of 3, 4, and 5 per cent of the net proceeds taken in by the society from its radio station, for a period of three years, the contract to terminate December 31, 1935. The license and sustaining fee provided for by the contract gave the radio station the right to perform publicly for profit copyrighted vocal and instrumental music compositions owned and controlled by ASCAP. At the expiration of this contract ASCAP wired the society in substance, on December 30, 1935, that it was prepared to extend the contract on the same terms for five years. On January 11, 1936, ASCAP again wired the society, calling attention to its previous telegram and stating, in substance, that unless it heard from the society by January 15, 1936, the offer of the extension of the contract was accepted, it would consider the society as an infringer if the society performed ASCAP music for profit without a license. On January 15, 1936, the society, by wire, requested the contract be continued. The contract provided $1,500 per year for a sustaining fee, and 5 per cent per year of the net receipts of the society's radio station. The contract was to terminate December 31, 1940.

The contracts held by Malec, as assignee, were termed annual "blanket" license fees for the right to have rendered upon the premises of the assignors copyrighted vocal and instrumental music compositions controlled by ASCAP.

These contracts were automatically extended, unless notice was given to terminate them, as provided therein. They were taken out by hotels, dance halls and pavilions, night clubs and others, and carried a specific consideration which varied according to the business, except radio stations, the latter on a basis like radio station W.O.W. The collections under the latter contracts were made by the agent and signed by him as agent and attorney in fact. This was also true of the society's contracts prior to September 1, 1932. There is no question but that all of such contracts were valid at the time they were entered into.

Under the United States Copyright Act, 17 U. S. C. A., sec. 1, the creator of a musical composition acquires certain exclusive rights where his work is copyrighted, among which is the right to publicly perform music for profit. Due to this right, the voluntary association of ASCAP came into being. This association was formed in 1914, under the guidance of Victor Herbert (a composer of music) and some of his contemporaries. The primary purposes of the voluntary association are to protect composers, authors and publishers of musical works against piracies of any kind; to facilitate the administration of the copyright laws for the protection of composers, authors and publishers of music works; to grant licenses and collect royalties for the public presentation of works of its members by instrumentalists, singers, mechanical instruments, radio broadcasting stations, or any kind of combination of singers, and to allot and distribute such royalties; to adjust and arbitrate differences and controversies between its members and others, and to represent its members in controversies, actions and proceedings involving the right of public performances of any of the works of its members. In other words, the association constitutes an agency analagous to a clearing house for its writer and publisher members. The rights obtained under the copyright law are assignable, and the member copyright owners assign this right to ASCAP who, in turn, makes licenses available to the commercial users of music entitling the holder to publicly perform for profit any of the compositions of the members.

On May 17, 1937, legislative bill No. 478, chapter 138, Laws 1937, p. 488, became effective, now appearing in article 13, sections 59-1302 to 59-1320, inclusive, R. S. 1943. The act made it unlawful for any described combinations of copyright owners to operate in this state. Section 59-1302 provided that any such combination was an unlawful monopoly and a combination in restraint of trade. Section 59-1307 declared: "All existing contracts, agreements, licenses or arrangements now existing within this state made by any person, firm or corporation with any combination, declared unlawful under section 59-1302, are hereby declared void and nonenforceable in any court within the boundaries of this state, * * * ", thus denying any such combination access to the courts of Nebraska for the purpose of enforcing its rights and those of its members. The effect of the act was to outlaw ASCAP and forbid it to do business in this state.

On June 7, 1937, Gene Buck, a member of ASCAP and at that time its president, filed a petition in the United States district court for the district of Nebraska, Lincoln division, to restrain and enjoin the Attorney General and the various law enforcing officers of this state from enforcing legislative bill No. 478, chapter 138, Laws 1937, p. 488, now article 13, sections 59-1302 to 59-1320, inclusive, R. S. 1943, against ASCAP. A temporary injunction was obtained November 13, 1937, and on January 25, 1940, the temporary injunction was made permanent and perpetual. The court, composed of three federal judges, declared the act unconstitutional, in violation of the due process and the equal protection clause, Amendment XIV of the Constitution of the United States, as well as the federal copyright act, and that the separability clause in the act did not apply. See *Buck v. Swanson,* 33 F. Supp. 377. The case was appealed to the Supreme Court of the United States, and on May 26, 1941, the injunction was dissolved, the case reversed and dismissed.

In *Watson v. Buck,* 313 U. S. 387, 61 S. Ct. 962, the Florida act was involved, which was similar to the Nebraska act,

and the questions raised in *Marsh v. Buck,* 313 U. S. 406, 61 S. Ct. 969, which involved the Nebraska act, were for the most part determined in the former case. In *Watson v. Buck, supra,* the court said: "We are pointed to nothing either in the language of the copyright laws or in the history of their enactment to indicate any congressional purpose to deprive the states, either in whole or in part, of their long-recognized power to regulate combinations in restraint of trade. * * *

"Under the findings of fact of the court below, ASCAP comes squarely within the definition of combinations prohibited by section 1 of the 1937 act."

ASCAP discharged its local agent and quit doing business in the state when the opinion in *Watson v. Buck, supra,* was rendered.

The appellants broadly assert that by the Supreme Court of the United States dismissing the injunctive action of the plaintiffs therein, the Nebraska legislation in its entirety was sustained and approved. The Supreme Court dealt with and sustained, as separable from the other criticized portions of the act, only what is now section 59-1302, and if there be any doubt upon that understanding, it is eliminated by the following language from *Watson v. Buck, supra,* which is the basic opinion on the question: "But at this time the record does not justify our passing upon any part of the statute except, possibly, that phase which prohibits activities in Florida by combinations declared unlawful."

The ultimate decision of the Supreme Court of the United States rested solely upon the validity of what is now section 59-1302, R. S. 1943. See *Remick Music Corporation v. Interstate Hotel Co.,* 58 F. Supp. 523, 541.

It is apparent that there is not the slightest warrant for the appellants argument that the act in its entirety was declared constitutional.

Having in mind the foregoing, a brief résumé of the evidence is appropriate. ASCAP collected from the contract holders from and after May 17, 1937, to approximately May 26, 1941. These are the payments involved in this appeal.

The payments made by the contract holders are reflected by two exhibits, exhibits 28 and 28½, the latter a corrected statement of the computation. The society contends a discrepancy exists in the exhibits, in that exhibit 28½ reflects payments made by the society monthly, and in fact no payments were made by it after the suit filed by ASCAP, June 7, 1937, until ASCAP had obtained a temporary injunction against the enforcement of the act, November 13, 1937, then the payments were resumed. However, throughout this period of time music controlled by ASCAP was played by the contract holders.

It will be remembered the Nebraska act became effective May 17, 1937. Thereafter, on May 22, 1937, the manager of the society, by letter, enclosed the society's check to cover the payment for April, 1937. These payments continued in continuity, with the exception previously noted, throughout 1937, 1938, 1939, and 1940, for a period of 100 months. On January 20, 1941, the auditor of the society wrote to ASCAP, in substance, as follows: "Replying to yours of the 17th instant, may we advise you that it is our belief that our check No. 64768, for $3,287.19 is in full payment of all license fees under our contract with you terminating December 31, 1940." The letter then referred to the contracts between the parties, and with reference to the last two contracts stated: " * * * we agreed to pay you a certain per cent of our income for a total of one hundred months. We have remitted to you one hundred checks covering the per cent of income so contracted received in the months of September, 1932, to December, 1940, both inclusive." The exhibit containing these letters of remittances of payment by the society admits of no other conclusion but that all of the amounts as provided for by the contracts between the parties were paid by the society in accordance therewith. From an examination of the record, this is likewise true of the contracts held by Malec, as assignee.

The manager and president of the society from 1932 to January, 1943, testified in substance that the society used the music of ASCAP until November, 1940, but paid in com-

pliance with the contract as heretofore set out; that the reason the society used ASCAP music from 1937 to 1941 was to avoid infringement suits, and it became necessary for the society to change its course of procedure in order to avoid paying 10 per cent of its net returns from the radio station instead of 5 per cent thereof, feeling ASCAP would raise the percentage figure that the society would have to pay. He also testified that he was familiar with the litigation involving the Nebraska act, its course and its termination.

Malec testified in substance that he was familiar with the same litigation, and that during 1937 and until 1941 he paid ASCAP certain sums of money in compliance with contracts, through its agent; that due to difficulties between Warner Brothers and ASCAP, Warner Brothers requested him also to obtain a license from them as well as ASCAP. He took the matter up with the ASCAP local agent and from his conversation with him determined that ASCAP could charge any amount it desired, because, under the circumstances, it would not reduce its license fee, so he refused payment. This resulted in an infringement action against him. He further testified that the ASCAP agent sent letters to those who had been investigated by its music detectives and it believed were rendering music of ASCAP for public performance for profit without first obtaining a license. These letters quoted the copyright law, the measure of damages thereunder, federal decisions, and excerpts from infringement cases. The record discloses a list of a number of infringement cases in the federal courts in this state for the years of 1928 to 1936, inclusive, and from 1942 including January, 1944. The record discloses no infringement suits in the years 1937 to 1942 inclusive. This evidence was offered for the purpose of showing the methods of ASCAP in forcing users of music for public performance for profit, controlled by it, by compelling such users to procure a license or be sued for infringement; that this method prevailed before the Nebraska act became effective May 17, 1937, and was one of the reasons that prompted the act.

The society and Malec, as assignee, contend that by reason of litigation involving the act as previously set forth, and the fact that ASCAP employs music investigators to enable it to enforce the taking out of licenses by use of the threat of infringement suits, there was no other alternative than to make the payments in compliance with the contracts.

It is apparent that the appellants were apprehensive of litigation, fearing that if they failed to comply with the contracts they would be faced with infringement suits and an eventual increase in future license fees. They therefore contend that the course of procedure adopted by ASCAP resulted in business compulsion and coercion, and, as a result thereof, the appellants are entitled to recover back the money paid pursuant to the contracts.

The appellants cite a number of infringement cases for the purpose of showing that under circumstances such as where orchestra leaders agreed to refrain from playing music of the kind involved, and prominent placards were posted stating the objections to the playing of such music, and that by inadvertence music controlled by ASCAP was played, or that a party did not intend to infringe, constitutes no defense to such an action, and *Buck v. Newsreel, Inc.*, 25 F. Supp. 787, states: "Defendants charged with infringement of copyrighted musical compositions could not interpose defense that plaintiffs were an illegal combination in restraint of trade in violation of the Sherman Anti-Trust Act."

In view of such cases, the appellants argue when the Nebraska act was nullified and an injunction issued against its operation by a federal court which also had jurisdiction in infringement suits in this jurisdiction, if the appellants, with knowledge of the lack of defense in infringement cases, failed to comply with the terms of the contract, ASCAP could, if it desired, destroy their business investment. Therefore, the payments were made to keep the appellants free from liability from defenseless infringement actions.

The appellants also cite a number of cases where undue

advantage is taken by the payee of the payer's situation and where payments are made to avoid injury to business and under apprehension of legal proceedings involving hardship or oppression, and that payments made under such circumstances are not classified as voluntary, but are involuntary payments.

We deem it unnecessary to analyze the distinction between the cases cited on the foregoing propositions and the cases at bar. It is obvious that most of the cases cited by appellants on voluntary and involuntary payment are to the effect that the complaining party was required to meet an affirmative demand of the opposing party or be compelled to quit business. There is no such testimony in the instant case. The evidence is to the contrary.

The theory advanced by the appellants is that ASCAP, as a monopoly, controlled a great part of the popular copyrighted music, and that such music was necessary to the progress of appellants' business, otherwise the business would endure hardship and oppression detrimental to its existence. It is true, ASCAP controlled a large part of the popular copyrighted music and has shown considerable growth in its membership. However, its music was not indispensable—other organizations licensed music for public performance for profit, and there was, and is, music in the public domain not controlled by any organization, available for use. The fact is that the society, when its contract with ASCAP was completed, did obtain copyrighted music from other sources. The record is bare of evidence that the appellants would suffer hardship or oppression in business, or even that their business would be detrimentally affected, in the event they did not play the music controlled by ASCAP.

Appellants also contend that the defense of voluntary payment is inapplicable as to these cases, because based on statutory liability created with the cause of action defined and granted in the statute. Under the statute ASCAP had no right to do business in this state. Appellants, by the statute, were permitted to ignore public performance rights when vested in an unlawful combination such as ASCAP.

If the appellants so believed the statute protected them, then they should have availed themselves of that protection in the courts and refused to pay any further sums under the contracts.

We believe the law announced in the following authorities governs in the cases at bar.

In *Kunkel Auto Supply Co. v. Leech,* 139 Neb. 516, 298 N. W. 150, this court said:

"The mere apprehension of legal proceedings, unaccompanied by any act of hardship or oppression allegedly causing a person to enter into a contract, is not sufficient ground for avoiding the contract so made.

"Where the parties are on equal terms, one threatened with civil suit must make his defense to the merits in the first instance." See, also, *Weber v. Kirkendall,* 44 Neb. 766, 63 N. W. 35; *Karschner v. Latimer,* 108 Neb. 32, 187 N. W. 83.

"Where one has voluntarily, with full knowledge of the facts, paid a disputed demand, which he claimed he did not owe, he cannot ordinarily recover it back on the ground of its invalidity." *Meyer v. Rosenblatt & Son,* 119 Neb. 471, 229 N. W. 771. See, also, *Renfrew v. Willis,* 33 Neb. 98, 49 N. W. 1095.

"A threat to do what one has a legal right to do cannot constitute duress. Such as * * * a threat of * * * a lawsuit * * *." 13 C. J., sec. 314, p. 399. See 55 C. J., sec. 1060, p. 1079; 66 C. J., sec. 177, p. 630; 17 C. J. S. 530, sec. 172.

In *Weber v. Kirkendall, supra,* this court said: "But one threatened with civil process, unaccompanied by any act of hardship or oppression, is required to make his defense in the first instance to the merits of the claim, and cannot postpone litigation by paying the demand and afterward maintain an action therefor."

"The reason of the rule that money voluntarily paid with full knowledge of the facts can never be recovered and its propriety are quite obvious when applied to a case of payment on a mere demand of money unaccompanied with any power or authority to enforce such demand, except by suit

at law. In such case, if the party would resist an unjust demand, he must do so at the threshold. The parties treat with each other on equal terms, and if litigation is intended by the one of whom the money is demanded, it should precede payment. When the person making the payment can only be reached by a proceeding at law, he is bound to make his defense in the first instance, and he cannot postpone the litigation by paying the demand in silence and afterward suing to recover the amount paid." 21 R. C. L., sec. 166, p. 143.

In the event the Nebraska act was unconstitutional in its entirety, or the part thereof invalidating existing contracts and denying access to the courts for enforcement thereof were void, then ASCAP had a right to resort to legal proceedings in infringement suits when the music under its control was performed publicly for profit without payment for license fees. In the event the act was valid in its provisions striking down existing contracts, the society and Malec, as assignee, had nothing to fear from an infringement suit, and should have met the issue thus presented at the threshold. See *Weber v. Kirkendall, supra; Kunkel Auto Supply Co. v. Leech, supra.*

" * * * where one under a mistake of law, or in ignorance of law, but with full knowledge of all the facts, and in the absence of fraud or improper conduct upon the part of the payee, voluntarily and without compulsion pays money on a demand not legally enforceable against him, he cannot recover it back; * * * . Where the rule stated obtains, no difference is ordinarily recognized, so far as concerns the right to recover voluntary payment, between ignorance and mistake of law." 48 C. J., sec. 312, p. 755. See *Baker v. City of Fairbury,* 33 Neb. 674, 50 N. W. 950; 40 Am. Jur., sec. 186, p. 843; 40 Am. Jur., sec. 205, p. 856; 21 R. C. L., sec. 202, p. 171.

We conclude that the appellants possessed full knowledge of all the facts and the parties were on an equal footing; that the payments made in compliance with the contracts were voluntarily made.

For the reasons given in this opinion, the judgment of the district court is affirmed.

Several questions are raised with reference to the constitutionality of the Nebraska act, sections 59-1302 to 59-1320, inclusive, R. S. 1943, repealed by the 1945 session of the legislature. In view of our holding, these questions need not be determined.

AFFIRMED.

JOHN E. MEKOTA, PLAINTIFF, V. STATE BOARD OF EQUALIZATION AND ASSESSMENT ET AL., DEFENDANTS.
19 N. W. 2d 633

FILED JULY 13, 1945. No. 31991.

1. **Constitutional Law**: STATUTES. By section 1, art. III, of the Constitution, the conditions and restrictions of the Constitution and statutes relative to a bicameral legislature in the state of Nebraska, so far as they may be applicable, attach to the present legislature of one chamber.
2. **Constitutional Law**. The words and terms of a constitutional provision are to be interpreted and understood in their most natural and obvious meaning, unless the subject indicates or the text suggests that they have been used in a technical sense.
3. ———. Courts may not supply what they deem unwise omissions, nor add words which substantially add to or take from the Constitution as framed.
4. ———. The Constitution as amended must be construed as a whole.
5. ———. Where the words of the Constitution are plain, direct, and unambiguous, no interpretation is needed to ascertain their meaning; a mere reading will suffice.
6. ———. No sentence, clause or word should be rejected as meaningless or superfluous, if it can be avoided.
7. ———. The courts should accord to the language of the Constitution the meaning which obviously would be accepted by a layman.
8. **Statutes**. A legislative act passed by a majority but less than a three-fifths vote providing an appropriation for an executive state office not in being at the commencement of the session at which the act is passed is not violative of the provision of section

7, art. IV, of the Constitution, that no appropriations shall be made in excess of the recommendations contained in the budget of the Governor unless by a three-fifths vote.

9. **Constitutional Law.** The budget requirements of section 7, art. IV, of the Constitution, apply only to departments, institutions and agencies of the state in being at the commencement of the legislative session.

10. **Officers.** The Department of Industrial Development as named in Legislative Bill 132 of the 58th regular session of the legislature is an office within the meaning of section 27, art. IV, of the Constitution.

11. **Statutes.** An act which assumes to vest a new board or department of state with executive powers and jurisdiction throughout the state creates an executive state office.

12. ———. The Department of Industrial Development as named in Legislative Bill 132 is an executive state office within the meaning of section 27, art. IV, of the Constitution.

13. ———. The passage of Legislative Bill 132 of the 58th legislative session was unconstitutional and void under section 27, art. IV, of the Constitution, for the reason that it failed to receive the votes of two-thirds of the members elected to the 58th session of the legislature. The act is therefore invalid.

Original proceeding by the state on the relation of John E. Mekota against The State Board of Equalization and Assessment. *Judgment for plaintiff.*

John E. Mekota, pro se.

Walter R. Johnson, Attorney General, Edwin Vail, and *Homer L. Kyle,* for defendants.

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

YEAGER, J.

This is an original action instituted in this court by the plaintiff as a taxpayer against the State Board of Equalization and Assessment, Dwight Griswold, Governor, Frank Marsh, Secretary of State, Ray Johnson, State Auditor, Carl G. Swanson, State Treasurer, and Robert Armstrong, State Tax Commissioner, as members composing the State Board of Equalization and Assessment, Ray Johnson, as State Auditor, Dwight Griswold, as Governor, and Frank

Marsh, as Secretary of State, under authority of section 25-21,149, R. S. 1943, being a part of the Declaratory Judgments Act, the purpose of which is to test the constitutionality of the passage and adoption of Legislative Bill 132 of the Acts of the 58th regular session of the Nebraska legislature. The bill with the designation, title and enacting clause is the following:

"Legislative Bill 132

"Introduced by C. Petrus Peterson of Lancaster, J E Conklin of Thayer, Arthur Carmody of Hitchcock

"A BILL FOR AN ACT relating to the future development of Nebraska; to create the Department of Industrial Development; to prescribe the general purposes, powers and duties of such department; to provide for the administration of the affairs of such department; to provide for the appointment and qualification of a director of such department, and the appointment and employment of necessary assistants; to establish a committee to advise and assist the department and its director and for the qualification and residence of its members; to provide an appropriation; and to provide for the prescribed quarterly reports.

"Be it enacted by the people of the State of Nebraska,

"Section 1. There is hereby created a department of government to be known as the 'Department of Industrial Development'. The department shall be provided with office space in the State Capitol.

"Sec. 2. The chief officer of the Department of Industrial Development shall be the director thereof, to be known as the Director of Industrial Development. The director shall be appointed by and hold office at the pleasure of the Governor, but his appointment shall be subject to confirmation by the Legislature. The director shall devote full time to the performance of his official duties. He shall, before assuming the duties of his office, take and subscribe the oath required of state officers, and shall execute to the State of Nebraska a bond in the penal sum of ten thousand dollars, with corporate surety to be approved by the Governor, conditioned for the faithful discharge of the duties of his of-

fice. The bond shall be filed in the office of the Secretary of State and the premium thereon shall be paid by the State of Nebraska.

"Sec. 3. The affairs of the Department of Industrial Development shall be administered by its director, who shall appoint and employ, with the consent of the Nebraska Development Committee, such technical, clerical, stenographic and other assistants and make such expenditures, within such appropriation as the Legislature may provide, as may be necessary to carry out the purposes of this act.

"Sec. 4. The general purposes to be accomplished by the Department of Industrial Development are: (1) To collaborate with agricultural and industrial groups in devising ways and means of assisting business concerns in the conversion of war plants, development of new industries, utilization of state resources, readjustment of war-boom towns and cities to a maximum use of their new facilities, and guidance of the migration of stranded war workers; (2) to energize and establish continuing contacts with local or regional planning agencies, planning agencies in the national government, and similar bodies in the fields of commerce and industry, labor and agriculture, for the purpose of exchanging information and assistance, harmonizing proposed plans, policies and programs, and securing proper timing in their execution; (3) to encourage community self-appraisal programs so that the problems peculiar to each community may be recognized and effectively met through planning at either the local or state level; (4) to encourage, guide and assist post-war preparations within the operating departments and agencies of this state and the local governmental subdivisions thereof; (5) to stimulate and assist post-war preparation and research by individual business concerns in respect to such matters as potential new products, production techniques and markets, and the discovery of new or enlarged uses of agricultural products; and (6) to assist in coordinating post-war planning and activities.

"Sec. 5. The Department of Industrial Development shall have the following powers and duties:

"(1) To supervise and direct surveys and report to the Governor, with such recommendations for legislation or other appropriate action as it may deem necessary, in regard to (a) industrial materials and facilities, (b) production and manufacturing facilities, (c) agriculture, food supply and land use, (d) transportation facilities, (e) labor supply, training and relations, human resources and the professions, trades and skills, (f) housing and related facilities, (g) health, hospitals and sanitation facilities, (h) welfare, (i) educational facilities, (j) recreational areas and facilities, (k) finance, and (l) any other type of activity directly or indirectly related to the purposes of this bill insofar as any or all of such matters or subjects pertain or are related to future development;

"(2) To furnish information to agricultural and industrial associations, chambers of commerce, public and private agencies, and individuals in regard to the possibilities of future development in Nebraska;

"(3) To cooperate with similar departments, commissions or councils in the federal government and in other states;

"(4) To adopt, amend and repeal rules, regulations and bylaws governing its procedure and activities;

"(5) To create committees to aid in the discharge of its powers and duties;

"(6) To require and direct the cooperation and assistance of state and local governmental agencies and officials; and

"(7) To do all acts and things, not inconsistent with law, for the further development of Nebraska's agricultural and industrial resources.

"Sec. 6. In order to avoid duplication of services and facilities, the Department of Industrial Development is directed to utilize the services and facilities of the University of Nebraska, the Department of Roads and Irrigation and all other existing officers, offices, departments, commissions,

boards, bureaus, institutions and other agencies of the state and of the political subdivisions thereof. All such officers and agencies shall cooperate with and extend their services and facilities to this department and to the committees created by it upon request.

"Sec. 7. To advise and assist the Department of Industrial Development in carrying out the provisions of this act, there is hereby created the 'Nebraska Development Committee', which shall consist of nine members to be appointed by the Governor and to serve at his pleasure. At least two of the members thereof shall be residents of each of the present congressional districts and at least one of the members from each of such districts shall be a farmer who is actually residing upon and deriving his livelihood from a farm. The committee shall select a chairman and vice chairman and the director shall serve as its secretary. Appointment of members shall be made without reference to their political affiliation and with reference to their special knowledge of industry, agriculture, labor, veterans' needs and interests, and other activities pertinent to the future welfare of Nebraska. The committee shall serve without compensation, but may be reimbursed for their actual and necessary traveling and other expenses incurred in carrying out the provisions of this act. The committee shall meet at the office of the Department of Industrial Development upon the written call of the chairman or any three members of the committee. The committee shall advise with the director in regard to the administration of the affairs of such department and outline the general policies to be followed by such department in carrying out the provisions of this act.

"Sec. 8. There is hereby appropriated out of the general fund of the State of Nebraska, not otherwise appropriated, the sum of one hundred thousand dollars for the biennium beginning July 1, 1945, and ending June 30, 1947.

"Sec. 9. On January 10, April 10, July 10 and October 10 of each year, the director shall file with the Clerk of the Legislature a detailed statement of all the expenditures of

funds under the provisions of this act during the three preceding calendar months."

The bill was approved April 16, 1945.

The bill received the votes of 22 members of the legislature, which was a bare majority, whereupon the presiding officer of the legislature declared that it had been constitutionally passed. It was then signed and transmitted to the Governor. The Governor signed it.

The plaintiff has alleged that the bill was not constitutionally adopted. He alleges, first, that it is an appropriation bill containing an appropriation of $100,000 not included in the Governor's budget message to the legislature and therefore under section 7, art. IV, of the Constitution could not be enacted without a three-fifths vote and, second, that the bill attempted to create a new executive office which attempt was ineffective for the reason that under section 27, art. IV, no new executive state office may be created except by a two-thirds majority of all members elected to the legislature.

He charges that the defendants expect to proceed to carry into effect the act.

The defendants by answer deny that the bill was unconstitutionally adopted and admit that they will, as officers of the state, put into effect its provisions. They join in the prayer for a declaratory judgment.

The pertinent portion of section 7, art. IV, of the Constitution, is the following: "The Governor * * * at the commencement of each regular session shall present, by message, a complete itemized budget of the financial requirements of all departments, institutions and agencies of the state for the ensuing biennium. * * * No appropriations shall be made in excess of the recommendation contained in such budget unless by three-fifths vote of each house of the Legislature, and such excess so approved by a three-fifths vote shall not be subject to veto by the Governor."

Section 27, art. IV, is the following: "No executive state office other than herein provided shall be created except by a two-thirds majority of all members elected to the senate and house of representatives respectively."

It will be noted that these two constitutional provisions carry reference to a senate and house of representatives. They were adopted while the state had a bicameral legislative system. Since that time under constitutional authority a unicameral system has been adopted and was in operation during the 58th regular session. By the terms of section 1, art. III, of the Constitution, the restrictions and limitations of section 7, art. IV, and section 27, art. IV, apply with the same force and effect to legislative proceedings under the unicameral system as they did to the bicameral. The portion of the section so declaring is the following: "All authority vested by the constitution or laws of the state in the Senate, House of Representatives, or joint session thereof, in so far as applicable, shall be and hereby is vested in said Legislature of one chamber. All provisions in the constitution and laws of the state relating to the Legislature, the Senate, the House of Representatives, joint sessions of the Senate and House of Representatives, Senator, or member of the House of Representatives, shall, in so far as said provisions are applicable, apply to and mean said Legislature of one chamber hereby created and the members thereof."

In this understanding we proceed to a consideration of plaintiff's first contention that the bill was not constitutionally adopted. In this consideration we are not aided greatly by precedent. On the attitude or approach to interpretation there is precedent. The opinion in *Elmen v. State Board of Equalization and Assessment*, 120 Neb. 141, 231 N. W. 772, which was a case wherein the court was called upon to interpret another phase of this same section 7, art. IV, laid down the following rules to be applied in constitutional interpretation:

"The words and terms of a constitutional provision, like those of a statute, are to be interpreted and understood in their most natural and obvious meaning, unless the subject indicates or the text suggests that they have been used in a technical sense."

By quotation from 12 C. J., sec. 54, p. 707: "Courts may not supply what they deem unwise omissions, nor add words

which substantially add to or take from the constitution as framed."

By quotation from *Hooper Telephone Co. v. Nebraska Telephone Co.*, 96 Neb. 245, 147 N. W. 674: "The constitution as amended must be construed as a whole, * * * ."

By quotation from *Stoppert v. Nierle*, 45 Neb. 105, 63 N. W. 382: "Where the words of a statute are plain, direct, and unambiguous, no interpretation is needed to ascertain their meaning; a mere reading will suffice."

By quotation from *Hagenbuck v. Reed*, 3 Neb. 17: "No sentence, clause or word should be rejected as meaningless or superfluous, if it can be avoided; * * * ."

"We are indebted to the suffrage of the people for the adoption of all amendments submitted and indeed for the adoption of the original Constitution which such amendments changed. From this fact it is patent that, where the language employed is plain, the courts should accord to it the meaning which obviously would be accepted by the layman."

The plaintiff contends that the constitutional language employed is an inhibition against any appropriation for any department, institution or agency of the state in excess of the recommendations contained in the Governor's budget message unless the same is adopted by a three-fifths vote of the legislature. By the terms of this same provision the Governor was required to present his budget recommendations at the commencement of the session.

The defendants contend that the provision applies only to departments, institutions and agencies of the state in existence at the time it is required that the Governor shall make his budget recommendations.

It is apparent that the Department of Industrial Development was not in existence at the commencement of the 58th regular session of the legislature.

It cannot be said with certainty what was the intention of the framers of this provision in the respect in question but we are of the opinion that in the light of the rules stated that the position of defendants is the more reasonable. Of

course the Governor could not have, at the time his budget recommendations were required, made a recommendation of appropriation for the Department of Industrial Development and it does not seem reasonable that it was intended that the provision should be applicable to that which could not be anticipated but which was within the legislative prerogative.

From the beginning it has been a prerogative of the legislature at its sessions to create and provide by appropriation for agencies of state not state offices, and in 1920, at the same time when section 7, art. IV, was acted on by vote of the people a new prerogative, that of creating new state executive offices, was extended to the legislature by section 27, art. IV, of the Constitution.

Again it will be noted that the provision contains these words: "No appropriations shall be made in excess of the recommendation contained in such budget * * * ." The plural, "appropriations," is used. This would imply a limitation upon increase of amounts named in the budget and required to be therein and not to matters which could not be contemplated or anticipated. It would also imply an intention that the limitation was to attach to named subjects of appropriation and not to appropriations generally.

And again let it be assumed that the legislature passed a bill creating a new executive state office under section 27, art. IV, which carried an appropriation for the fulfillment of its purposes, by the required two-thirds vote. The bill was vetoed by the Governor. It failed thereafter of passage over the veto. Under such circumstances there would be no new office but under the reasoning of plaintiff there would be an appropriation which could not be gotten rid of except by repeal since it was adopted by more than a three-fifths vote and therefore was not subject to veto by the Governor. If plaintiff's interpretation is to be accepted the two constitutional provisions would be thrown out of harmony in violation of the rule that the Constitution as amended must be construed as a whole. It is unreasonable to assume either that any such disharmony was intended or that the framers

of the amendments were so lacking in foresight as to permit such an inadvertence.

We therefore conclude under the rules that constitutional provisions are to be interpreted and understood in their most natural and obvious meaning; that the Constitution as amended must be construed as a whole; that no sentence, clause or word should be rejected as meaningless, or superfluous, if it can be avoided; and that where the language is plain, the courts should accord to it the meaning which obviously would be accepted by the layman, that the passage of Legislative Bill 132 was not unconstitutional under section 7, art. IV, of the Constitution.

A determination of the second proposition depends upon whether or not the bill creates a new executive state office. It is conceded that in its passage it did not receive a two-thirds majority vote of all members elected to the Legislature.

It appears that the first question for determination is that of whether or not the term "executive state office" includes executive state department. For answer we look to section 26, art. V, of the Constitution of 1875, and its interpretations and application. Section 27, art. IV, of the present Constitution was substituted for this one in 1920.

Both provisions employ the term "executive state office." The earlier provision prohibited the creation of new executive state offices. The later permits their creation but imposes a restriction thereon. The term is used in the same sense in both.

In *Iams v. Mellor*, 93 Neb. 438, 140 N. W. 784, a stallion registration board was considered to be an office within the meaning of the term. In *State v. Cornell*, 60 Neb. 276, 83 N. W. 72, while the question was not directly passed upon, the court considered a food commission an office. In *State v. Porter*, 69 Neb. 203, 95 N. W. 769, a brand and mark committee was classed under the term office as used in these provisions.

Under the authority of these cases it becomes necessary to hold that the "Department of Industrial Development"

as named in the bill in question is an office within the meaning of section 27, art. IV, of the Constitution.

Is it then an executive state office? We are convinced that it is.

This court, in *In re Railroad Commissioners*, rendered an advisory opinion to the Legislature on the question of whether or not railway commissioners, or the office of railway commissioner, would be a state executive office. The opinion appears in the appendix to 15 Neb. Reports, page 679. While there is nothing official about the opinion the then three members of the court agreed in the following words, which words contain the reason for the conclusion, that railway commissioners would be state executive officers: "Hence their duties would be executive, and if state officers, if paid out of the state treasury, and their field of duty coextensive with the territorial limits of the state, they would be state executive officers." They further concluded that the creation of such an office would be violative of section 26, art. V, of the Constitution of 1875.

The legislature of 1899 by chapter 50, section 2, created a state brand and mark committee. The committee was to be composed of three members to be appointed by the Governor and the Secretary of State. Generally speaking the committee was to have charge of livestock brand registration.

In interpretation of the act with respect to section 26, art. V, of the Constitution of 1875, this court, in *State v. Porter, supra,* said: "The act of 1899 assumed to vest the brand and mark committee with executive powers and jurisdiction throughout the state. This being so, the members of the committee would, if the act were valid, be executive state officers. But as there can be no executive state offices other than those mentioned in section 1, article V of the constitution, the legislation we are considering was, of course, abortive and void."

By chapter 1, section 1, of the laws of 1911, the Legislature created the stallion registration board composed of the secretary of the Nebraska state board of agriculture, the professor of animal husbandry of the University of Nebras-

ka, and the deputy state veterinarian. Generally, its duties were supervision and registration of stallions in Nebraska.

This court, in *Iams v. Mellor, supra,* held that the act was violative of the constitutional inhibition against the creation of executive state offices. In so doing it approved the declaration of *In re Railroad Commissioners, supra,* and also, *State v. Porter, supra.* In a reference to *State v. Porter, supra,* it was said: "Paraphrasing the language of Judge Sullivan, the act of 1911 assumes to vest the stallion registration board with executive powers and jurisdiction throughout the state. This being so, the members of the committee would, if the act be valid, be executive state officers; but there can be no executive state officers other than those mentioned in section 1, art. V."

The defendants contend that the act in question creates a ministerial and not an executive state office. The decisions of this court recognize a classification of offices as ministerial (*State v. Loechner,* 65 Neb. 814, 91 N. W. 874), but we are convinced from an examination of the bill that the Department of Industrial Development does not fall within that classification.

In *State v. Loechner, supra,* the following appears: "Ministerial offices, it is said, are those which give the officer no power to judge of the matter to be done, and which require him to obey some superior. An executive officer, in the proper sense of the term, is one whose duties are mainly to cause the laws to be executed; such as the president, the governor of a state, or the chief executive officer of a city. It pertains to the execution and enforcement of the laws by one charged with that particular duty." In the same opinion, by quotation from *Flournoy v. City of Jeffersonville,* 17 Ind. 169, it is said: "A ministerial act may, perhaps, be defined to be one which a person performs in a given state of facts, in a prescribed manner, in obedience to the mandate of legal authority, without regard to, or the exercise of, his own judgment upon the propriety of the act being done." This latter conforms to the definition contained in Webster's New International Dictionary, 2d ed. (unabridged).

Examination of the bill discloses that there are six named and defined purposes and seven major named and defined powers and duties without anything the purport of which is to subject the department or any of its personnel to any type of control, supervision or direction in the accomplishment of its purposes or the performance of its powers and duties to any other department of the state or any official thereof. The only control outside the department is over the appointment of the director and the members of the "Nebraska Development Committee" provided for in the bill. The appointment of these is to be made by the Governor and their tenure of service is subject to his will.

The conclusion therefore is inescapable that the "Department of Industrial Development" as set up in Legislative Bill 132 of the 58th regular legislative session is a new executive state office within the meaning of section 27, art. IV of the Constitution.

It follows that since the bill did not receive a two-thirds majority vote of all members elected to that session of the Legislature it failed of constitutional adoption and never therefore became a valid law.

JUDGMENT FOR PLAINTIFF.

CARTER, J., participating on briefs.

NORA E. WILLIAMS, APPELLEE, V. E. ALVA WILLIAMS, APPELLANT.

19 N. W. 2d 630

FILED JULY 20, 1945. No. 31936.

1. **Divorce**: ABATEMENT AND REVIVAL. A suit for divorce abates on the death of either party before final judgment, and is not subject to revivor.
2. ———. When the marriage relation is extinguished by death prior to the time when the decree can go into effect, then the subject matter is gone, and the parties can never be divorced by operation of law.
3. ———. In a divorce action, the property interests involved are merely incidental to the principal object of the suit. If the de-

cree of divorce cannot take effect, matters incidental thereto do not take effect.

APPEAL from the district court for Dakota County: SIDNEY T. FRUM, JUDGE. *Motion for revivor denied; action dismissed.*

Mark J. Ryan, for appellant.

George W. Leamer, for appellee.

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

PAINE, J.

This is a divorce action. The plaintiff in her petition charged the defendant with extreme cruelty. The defendant by answer denied the charge, and by cross-petition alleged that the plaintiff was guilty of extreme cruelty. The trial court found generally for the plaintiff, awarded her an absolute divorce and permanent alimony, and dismissed the defendant's cross-petition. Motion for a new trial was overruled November 8, 1944, and defendant appealed to this court.

The cause was argued by counsel and submitted to this court on June 5, 1945, and on June 8, 1945, the defendant's death occurred, before a final decision and judgment in this court was rendered.

On June 9, 1945, a special administrator of the defendant's estate was appointed, and he presents to this court a motion to revive the action in his name, suggesting the death of defendant and praying for an order of revivor as to the property rights and permanent alimony awarded to the plaintiff, and upon hearing that such rights be fixed and determined, and upon payment thereof that the plaintiff be decreed to have no further interest in, or claim upon, the estate of the defendant now deceased.

To this motion the plaintiff filed her answer, admitting that the defendant died June 8, 1945, while the cause of action was pending in this court and before any final decision had been entered, and admitted the appointment of a special

administrator of the estate of defendant; denied that the alimony, as fixed and determined by the trial court, constituted a judgment which was in full and complete settlement and determination of the property rights of the parties. Plaintiff further charged that under the laws of Nebraska a divorce action cannot be revived, but that it is abated upon the death of either party, and prayed that the motion for revivor be dismissed and the action abated.

The first question to be determined on this appeal is whether or not the action should be revived in the name of the special administrator, especially with reference to the property rights as between the parties.

Section 25-322, R. S. 1943, provides that an action does not abate by the death of a party, if the cause of action survive. See *In re Estate of Samson,* 142 Neb. 556, 7 N. W. 2d 60, 144 A. L. R. 264.

The personal representative of the deceased urges the application of section 25-1402, R. S. 1943, which provides in part: "No action pending in any court shall abate by the death of either or both the parties thereto, except an action for libel, slander, malicious prosecution, assault, or assault and battery, * * * which shall abate by the death of the defendant."

In *Sovereign Camp, W. O. W. v. Billings,* 107 Neb. 218, 185 N. W. 426, it is said: "Though the statute cited, purporting to prevent the abatement of pending actions, be given a most liberal interpretation, it could not prevent an action in divorce from abating when death occurs at a time before a decree can become operative, for death would * * * destroy the subject-matter which forms the basis of the action."

And on page 221 this court said: "During the entire pendency of that decree, the marital relation continues. The decree cannot, under the law, take effect and dissolve the marriage until at the expiration of the six months' period. In order that a marriage status be dissolved by a decree of divorce, such status obviously must exist at the time of the taking effect of the decree. When the marriage relation is

extinguished by death prior to the time when the decree can go into effect, then the subject-matter, upon which the decree would otherwise have operated, is gone, and the parties to the suit manifestly can never be divorced by operation of law. The statute on abatement of actions, which provides that a pending action shall not abate by the death of a party, does not and cannot preserve the subject-matter of an action. A divorce action differs in character from every other. It is not based upon a claim for a money recovery, nor is it a proceeding for the establishment of property rights. Such other actions may ordinarily be as fully litigated, in favor of or against the estate of one of the parties, after the death of such party as before. There are salutary reasons why pending actions of that nature should not abate. But in a divorce action the money and property interests involved are only incidental to the principal object of the suit. Whether the object sought is a limited or an absolute divorce, the primary and underlying purpose of such action is a modification or dissolution of the marriage relation. The settlement of matters of permanent alimony and property rights is only the incidental means of carrying into effect the one ultimate object. Until the decree can become operative as a divorce, the provisions of the decree, as to those incidental matters, cannot go into effect."

In the case of *Westphalen v. Westphalen*, 115 Neb. 217, 212 N. W. 429, this court held: "A suit for divorce abates on the death of either party before final judgment, and is not subject to revivor." On page 219, this court said: "In such a case, it is not the interlocutory decree entered by the trial court that is controlling, but the final consideration thereof and decree entered by this court or directed by this court to be entered in the trial court, which annuls or continues the marital relations of the parties; and until such final consideration or decree, such original marriage relation continues."

In *Holmberg v. Holmberg*, 106 Neb. 717, 184 N. W. 134, where a divorce was granted and one of the parties died before the expiration of six months thereafter, such divorce

decree never became effective, and as to such divorce the action abated, and this court said: "The general rule in the United States is that a suit does not abate on the death of either party after a verdict or decision by the court, or of entering of an interlocutory judgment, when the cause of action survives. But where the cause of action does not survive, the action abates as if the death had occurred before the verdict or interlocutory judgment or decision, unless saved by a statute.

"An action for divorce does not survive. The purpose of the action being to dissolve the marriage relation, and that relation being dissolved by death, the proceedings after the death of one of the parties would be useless and of no avail."

And in closing the opinion the court said: "The ultimate purpose of the requested vacation of the divorce decree is to establish the defendant's property rights as the widow of the deceased plaintiff in his estate. All the avenues are open for the determination of such rights in the proper courts, where all the parties affected can be heard, and in such tribunals she can establish her status as the widow of the deceased plaintiff."

In 9 R. C. L., sec. 214, p. 414, it is said: "The primary object of suit for divorce is merely personal, that is, to change the status or relation of the parties to each other; to put an end to their relation of husband and wife. As incidental to that principal object the court has the power to make decrees relative to alimony, * * * . But all these are regarded as merely incidental to the decree of divorce sought, * * * . In case of the death of either party, therefore, the principal object can no longer be reached, for the marital relation has been already ended by the death. The court can no longer decree a divorce between parties one of whom has ceased to live, and with the failure of the principal object of the bill the incidents must also ordinarily fail. The suit abates absolutely on the death of a party before judgment and cannot be revived in the name of or against the representatives of the deceased party."

It is therefore apparent, under the holdings of this court,

that the appellant's contention that the action be revived in the name of the personal representative of his estate, is without merit and must be denied.

In *McCurley v. McCurley*, 60 Md. 185, 45 Am. Rep. 717, the wife brought action for divorce, which was resisted by the husband. Before a decree was finally entered, the husband died. Upon appeal the court held generally that upon his death before decree the suit abates. She is *eo instanti* simply then his widow, with the rights and liabilities as to his property, but interested now in its preservation; upon her husband's death her position toward even her own counsel is materially varied. See Annotation, 104 A. L. R. 667.

Section 42-340, R. S. 1943, provides that, when an appeal is taken in a divorce case, such decree shall not become final until such proceedings have been fully determined. See *Faris v. Hope*, 298 Fed. 727.

In 20 C. J. S., sec. 65, p. 318, it is said that if the suit abates by death of a party after judgment and pending an appeal, each party must bear his own costs incurred prior thereto, citing *Begbie v. Begbie*, 128 Cal. 154, 60 Pac. 667.

In *Jones v. Miller*, 35 Wash. 499, 77 Pac. 811, it is held: "Where the cause of action abates by the death of the party, the executor cannot be substituted and the cause retained on appeal for the purpose of determining the question of costs." See, also, *Millady v. Stein*, 19 Misc. 652, 44 N. Y. Supp. 408; Wells, Attorneys, sec. 192; 1 Am. & Eng. Ency. of Law, 958.

"If, under statutes giving the right to recover costs or disbursements as incidental to a judgment, the court is for any reason deprived of power to render judgment upon the issues presented by the pleadings of the parties, there can be no recovery of costs. Accordingly, it is held that if a suit is abated by the death of a party, no judgment for costs may be entered in favor of the survivor. Each of the parties must bear his own costs. The rule applies where the action abates after judgment and pending an appeal." 14 Am. Jur., sec. 13, p. 11. See, also, 20 C. J. S., sec. 65, p. 318; 27 C. J. S., sec. 226, p. 937.

In the opinion of this court, the pending action for divorce having abated, the motion for revivor is denied and the action is dismissed for the reason that the action has abated.

MOTION FOR REVIVOR DENIED AND ACTION DISMISSED.

FRANK JOHN KLINE, APPELLANT, V. METCALFE CONSTRUCTION COMPANY ET AL., APPELLEES.
19 N. W. 2d 693

FILED JULY 20, 1945. No. 31956.

Trial. A motion for a directed verdict must, for the purpose of a decision thereon, be treated as an admission of the truth of all material and relevant evidence submitted on behalf of the party against whom the motion is directed, and said party is entitled to have every controverted fact resolved in his favor, and to have the benefit of every inference that can reasonably be deduced from the facts in evidence.

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

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

Joseph T. Votava and *Bert E. Church,* for appellees.

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

PAINE, J.

This is a suit for damages for the loss of wages for the breach of a contract of employment. Trial was begun to a jury, and after both parties had rested motion of the defendants to discharge the jury and dismiss the case was sustained. Plaintiff appealed to this court.

The only assignments of error are that the decision of the court was contrary to the evidence and to the law, and that

the court erred in sustaining the motion of the defendants to dismiss the action.

The plaintiff, who had had some college training, had been an automobile salesman for ten or fifteen years, and in May, 1942, started to work as an auditor for United States government engineers, after he had passed a physical examination, and worked in such a position for about two months during the construction of the Mead ordnance plant by the same defendant companies.

Earl Moeller, who represented the defendants in all negotiations with the plaintiff in this case, testified that he first became acquainted with plaintiff at Cody, Wyoming, on the government project out there, at which time both of them were working for the United States engineers, but Moeller changed over from his job with the government engineers and accepted an important position as personnel manager for defendant companies on the Alcan Highway project from Edmonton, Canada, to Fairbanks, Alaska, while the plaintiff worked with the engineers at Scribner Airfield near Fremont.

The testimony shows that the plaintiff, in jobs at Mead, Cody and Scribner, was checking contracts and government orders, for the government required each item to be checked, instead of just taking the contractor's word for it. Earl Moeller, with whom he became intimately acquainted, had charge of the timekeeping department with the engineers at the Mead project and at Cody, Wyoming.

The evidence discloses that plaintiff wrote Moeller a letter on February 24, 1943, to Edmonton, addressing him as "Dear Earl", saying in brief in the letter, exhibit No. 1, that he would like to "come up on your job and be a small part of your big job". On February 25 Earl Moeller, personnel manager for the three defendants, answered the letter from Edmonton, on the letterhead of the defendant companies, being exhibit No. 2, addressing plaintiff as "Dear Frank", the last two paragraphs in said letter reading as follows:

"Now in regard to yourself. We could use a man of your

ability in our Personnel Department. It might be in Edmonton, Dawson Creek, or Whitehorse. I believe that you would fit into our picture very well as the job is not only to induct the laborers and assign them to their jobs, but it is also to keep them happy by insisting that suitable recreation facilities are provided and that the food is to their liking, and that they are assigned to foremen with whom they are satisfied. These are just some of the main points. Of course, you probably understand that this would not be a good place for people who get 'homesick'. * * *

"This is a wonderful climate up here and I know you would enjoy being here. We cannot offer you a job as long as you are with the Area Engineers but if you have a clear release this job would pay you $3600.00 plus your Sunday overtime. There would be about a ten per cent increase if you went up the road. I would like to hear from you again if you are interested and when you expect to be finished at Fremont."

Exhibit No. 3 is an answer from the plaintiff to Earl Moeller, personnel manager, beginning "Dear Earl", and acknowledged receipt of the letter and said he was "tickled to death" to get it, that it "sure sounds swell". He then said that he had already given his resignation to the Area Engineer, and that it would be accepted without question as of March 15, and as that project was about completed it would not be "putting anyone in the hole" by plaintiff's leaving. The plaintiff testified that, by dating his resignation March 10, with 27 days of annual leave his connection would expire April 6.

Exhibit No. 4 is a copy of the resignation, addressed to Captain Richard E. Blore, Area Engineer, and reads: "I hereby tender my resignation from my position as Assistant Clerk, CAF-3, $1620 per annum effective at noon April 6, 1943 for the reason that I am to be employed by a Contractor in Edmonton, Canada." At the bottom of the resignation Captain Blore had placed the notation that it was "Forwarded with recommendation that the resignation be accepted without prejudice effective noon April 6, 1943 ex-

piration of accrued annual leave. This recommendation is based on the fact that the employee's services can be dispensed with and the resignation is without misconduct or delinquency on the part of the employee."

Exhibit No. 5 is a letter on behalf of the three defendants and signed by Earl Moeller, and said that there was some "heat on proselyting"; that the army engineers at Edmonton "take exception to many applications of persons previously employed by the United States Engineers" on defense projects, and said that it must be handled in a very diplomatic way. Exhibit No. 5 contained the sentences: "When you are ready to leave Lincoln wire me collect and we will wire a ticket to you. * * * Write me as soon as you can."

Exhibit No. 6 is the answer to exhibit No. 5, dated at Lincoln, Nebraska, March 30, 1943, and sets out the exact words of his resignation, closing with this sentence: "You say to wire you collect which I think this will answer the same purpose. If everything is satisfactory, wire ticket so that I can leave here April 5, 1943."

In response to exhibit No. 6, plaintiff received a telegram from the defendants, sent by Moeller, being exhibit No. 7, April 9, 1943, reading as follows:

"FRANK J. KLINE=

"440 SOUTH 13=

"PICK UP TICKET AT CB & Q STATION YOU MUST SECURE DRAFT DEFERMENT IN DUPLICATE BIRTH CERTIFICATE HAVE UNITED STATES EMPLOYMENT CX SERVICE CARD NUMBER FIVE ZERO EIGHT AND CLEARANCE FROM WAR MANPOWER COMMISSION PROCEED TO STPAUL AND CHECK IN AT SIXTY THREE EAST SIXTH STREET FOR YOUR FINAL PHYSICAL EXAMINATION WITHOUT THIS FINAL PHYSICAL YOU CANNOT BE PLACED ON THE PAYROLL=

"METCALFE HAMILTON KANSAS CITY BRIDGE CO MOELLER EDMONTON CANADA. CB & Q CX."

Exhibit No. 8 was United States Employment Service

card, on required form No. 508, dated April 13, 1943, signed Benj. E. Ogden, Representative, by Barrett Castle, Supervising Interviewer.

Exhibit No. 9 is dated April 13, 1943, and is the draft deferment issued by the Local Selective Service Board No. 1, of Lancaster county, and authorizes the registrant to depart from the United States and to remain absent during the duration of his employment with defendant companies, to be engaged in defense construction. It sets out that the date of birth of the plaintiff was April 4, 1889. The plaintiff also secured his birth certificate, and had completed all of the detailed requirements and was ready to leave on April 14, 1943.

Exhibit No. 10 is a telegram addressed to plaintiff, sent by the defendant companies, by Erickson, received April 14, 1943, and reads as follows:

"FRANK J. KLINE=
"440 SOUTH 13 STREET
"LINCOLN NEBRASKA)=
"DUE TO CONDITIONS BEYOND OUR CONTROL WE ARE FORCED TO TEMPORARILY WITHDRAW OUR OFFER FOR EMPLOYMENT YOUR NAME WILL BE PLACED ON FILE AND SHOULD THE SITUATION CHANGE YOU WILL BE CONTACTED IMMEDIATELY=
"METCALFE HAMILTON KANSAS CITY BRIDGE CO ERICKSON.="

This man Erickson was employment agent of defendant companies at St. Paul, working under Moeller.

This was followed by a telegram, exhibit No. 11, from the defendant companies, signed "MOELLER EDMONTON CANADA," under date of April 18, and reading as follows: "ORDERS FROM DIVISION STOPPING ALL IMPORTING OF PERSONNEL FROM THE STATES SORRY RETURN TICKET TO THIY OFFICE."

It appears that Moeller did not know that Erickson had sent the telegram, exhibit No. 10, when he sent exhibit No. 11, which was very natural, for he had 175 men working in

his own department at that time and eventually hired 7,000 employees, which required the sending of 20,000 to 40,000 letters and telegrams, and teletype connections were installed between the Edmonton and St. Paul offices, so Erickson at St. Paul had sent plaintiff the first wire.

The sole question involved in this case is whether the court erred in directing a verdict for the defendants and entering a judgment in their favor.

The answer is signed only by Joseph T. Votava, United States Attorney, and by Bert E. Church, who the evidence discloses is Major Bert E. Church, of the Judge Advocate General's Department, and is litigation officer of the Seventh Service Command.

In verification of the answer, "Joseph T. Votava, being first duly sworn, on oath deposes and says that he is the United States Attorney for the District of Nebraska, and as such one of the attorneys for the above-named defendants;" etc. This answer first admits that the various letters and telegrams hereinbefore set out were transmitted between the parties, but denies that there was any contract. The answer alleges that the work being performed by the defendants was for the United States Government in aid of war effort and under direction and control of the War Department and the Division Engineer of the United States army. This answer in effect sets forth the ultimate denial of liability on the part of the Government.

The answer charges that plaintiff never passed the physical examination at St. Paul. The evidence clearly shows that some months before plaintiff was required to and did pass a physical examination before he was accepted as a clerk in the Area Engineer's office. It might also be noted that the telegram of discharge reached him before he left Lincoln for St. Paul, Minnesota.

The answer further sets out that plaintiff delayed getting his permit from the local draft board and clearance from the United States Employment Service until April 13, 1943, but clearly appears that he had them before the telegrams attempting to discharge him were sent.

The fifth paragraph of the motion of defendants for a directed verdict charges that plaintiff did not receive a release or certificate authorizing him to take up this contract from the War Manpower Commission. However, exhibit No. 18 is a letter from the state War Manpower Director, J. R. Kinder, to Major Church, J.A.G.D., in answer to a letter from the Major seeking information which Mr. Kinder said could not be given out under administration policy, but the director does state: "We find from our records that Mr. Kline was released without prejudice and obtained the necessary clearance from this office."

It is further charged by the defendants that plaintiff did not receive a clear release from his former employer, the office of United States Engineers. The evidence does show that plaintiff immediately sent in his resignation, and that his superior officer, Captain Richard E. Blore, area engineer, recommended the same.

The defendant contends that further negotiations for employment of plaintiff were prevented by superior authority making an impossibility of performance, which under the law excused defendants; in plain language, that a "freeze order" had been issued against defendants' hiring this plaintiff. To support this assertion, the defendants rely in their brief upon order No. 904, issued by the chairman of the War Manpower Commission, under date of April 16, 1943, restricting the transfer of workers from essential activities, as found in Vol. 8, No. 77, of the Federal Register.

Paragraph 904.4 thereof appears to allow any employer engaged in an essential activity to hire a new employee who was, during the preceding 30-day period, engaged in an essential activity, without regard to his wage, provided such hiring is approved by the War Manpower Commission, with certain conditions, none of which appear to be violated by the transfer of the plaintiff from one essential activity to another, for Captain Blore's recommendation shows that plaintiff's services could be dispensed with in the position in which he was then engaged.

Section 904.8 reads as follows: "Nothing in this regula-

tion shall be construed to prejudice existing rights of an employee under any agreement with his employer."

Without determining whether or not judicial notice must be taken of this order of the War Manpower Commission, as found in this Federal Register, an examination of it reveals that it did not take effect until April 18, 1943, a date subsequent to the abrogation of the purported contract in question.

It appears to this court that, if a contract had been established between the plaintiff and the defendants as of the date April 14, 1943, as this "freeze order" took effect on April 18, 1943, the rights of the plaintiff would not be prejudiced by it.

The so-called "freeze order" remained in effect for only a couple of days as to common labor, and while it was on a little longer as to office personnel, such as the plaintiff, yet within a short time it was lifted as to those employees also.

In this record appears the decision of the trial court in sustaining the motion for a directed verdict. Briefly, we will refer to several statements therein. The lower court said that the fact that plaintiff went back to work for the engineers on May 1 thereafter shows he did not have a release and "It seems to me that closes that issue. * * * Now it is purely speculative as to whether or not this plaintiff would have stayed on the job had he gone up there. * * * the measure of damages would be too speculative for any Court to allow a jury to dwell on it. I think the motion is good."

In this case it is very evident that many of the issues involved are highly controverted. The plaintiff produces evidence that, so far as lay within his power, he complied with every requirement made by defendants to secure the position they had offered him. The defendants deny this.

When, from the facts and circumstances proved, reasonable minds might draw different conclusions, should the issues not be submitted to a jury under proper instructions?

This court has said: "A motion for a directed verdict must, for the purpose of a decision thereon, be treated as an admission of the truth of all material and relevant evidence

submitted on behalf of the party against whom the motion is directed, and said party is entitled to have every controverted fact resolved in his favor, and to have the benefit of every inference that can reasonably be deduced from the facts in evidence." *Moncrief v. Interstate Transit Lines*, 129 Neb. 168, 261 N. W. 163. See, also, *Grantham v. Watson Bros. Transportation Co.*, 142 Neb. 362, 6 N. W. 2d 372.

" * * * it is error for the trial court to direct a verdict for either of the parties on an issue of fact on which the evidence is conflicting * * * ." *Stoffel v. Metcalfe Construction Co.*, 145 Neb. 450, 17 N. W. 2d 3.

In our opinion, the trial court was in error in sustaining the motion to discharge the jury and dismissing the action of plaintiff.

REVERSED.

NEWTON W. ELLIS, APPELLEE, V. UNION PACIFIC RAILROAD COMPANY, APPELLANT.
19 N. W. 2d 641

FILED JULY 20, 1945. No. 31889.

1. **Trial.** A motion for a directed verdict must, for the purpose of decision thereon, be treated as an admission of the truth of all material and relevant evidence submitted on behalf of the party against whom it is directed. Such party is entitled to have every controverted fact resolved in his favor, and to have the benefit of every inference that can reasonably be deduced from the evidence.
2. **Negligence.** In the law of negligence the last clear chance doctrine or rule is that, notwithstanding the negligence of a plaintiff, if, at the time the injury was done, it might have been avoided by the exercise of reasonable care on the part of the defendant, the defendant will be liable for the failure to exercise such care.
3. ———. Before the doctrine of last clear chance can apply, the defendant must have had a chance to have avoided the accident, for the doctrine presupposes time for action.

4. ———. In the absence of proof of opportunity to avoid injuring a person after his danger was discovered, or ought to have been discovered, there is no reason for the application of the last clear chance doctrine.
5. ———. A plaintiff will not be permitted to recover under the last clear chance doctrine if he, being in a perilous situation negligently created by himself, had the last clear chance to escape and neglected to do so up to the time of the accident.
6. ———. The doctrine of last clear chance does not apply where the negligence of the injured party is contemporaneous and active up to the time of the accident, and thus contributed to cause the accident.
7. **Railroads.** In an action for damages for personal injuries under the Federal Employers' Liability Act where an employer has failed to provide and maintain for an employee a reasonably safe place to work and in consequence and as the proximate cause thereof such employee receives injuries, the employer is required to respond in damages for negligence.
8. ———. The requirement of the Federal Employers' Liability Act that an employer shall furnish employees with a reasonably safe place to work means a reasonably safe place within which they are required to work.
9. **Master and Servant.** Where an employer furnishes to an employee two places to work, one obviously to the employee safe and the other obviously unsafe, with the place of working left to the choice of the employee and he chooses the latter and is injured, the employer cannot be held negligent for failure to furnish a reasonably safe place to work.
10. ———. Where an employee has placed himself in a situation of danger and seeks to avoid the consequences thereof the burden is on him to adduce evidence from which a reasonable inference can be drawn that in the exercise of reasonable care he did not or could not have known of his danger.

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

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

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

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

YEAGER, J.

This is an action at law for damages for personal injuries by Newton W. Ellis, plaintiff and appellee, against the Union Pacific Railroad Company, a corporation, defendant and appellant, under the Federal Employers' Liability Act. The case was tried to a jury and a verdict was returned in favor of plaintiff for $10,000. Judgment was entered on the verdict. Motion for new trial was duly filed and by the court overruled. The defendant has appealed from the judgment and the order overruling the motion for a new trial.

On March 15, 1943, plaintiff was employed by the defendant as an engine foreman in charge of a switching crew on the tracks and in the switching yards of defendant at Seattle, Washington, more particularly known as "Argo Yards." As such engine foreman he was in charge of the engineer, fireman and the switchmen and operations were under his immediate control and direction. On the day in question plaintiff began his duties at 4 o'clock p. m. The first work was done a mile or more from the scene of the accident. At some time after going on duty plaintiff received instructions from proper authority to pick up a loaded car at what is known as the Casein Plant. He proceeded with his engine and crew to the vicinity of a switch from which a spur track led to the Casein Plant where the engine was stopped. The engine was headed at that time in an easterly direction. The Casein Plant was to the south and the track from the switch to it led off southwest and then curved to the left around the west side of the building so that at the loading platform the track extended generally north and south. There was a curve in a part of the building to, in part, accommodate or compensate for the curve in the track. Investigation by plaintiff disclosed that there were two cars along side of the Casein Plant and that it was the more distant or the southernmost that was to be removed. On plaintiff's signal the engine backed on the spur and was coupled to the first car and then the two were coupled together whereupon the two cars were removed from the spur and

the second detached by plaintiff. Thereafter the switch was lined and the first car was returned or backed into the Case-in Plant spur to be spotted along side of the Casein Plant loading platform. At the time, plaintiff was on the ground and had proceeded toward the Casein Plant. He was, at the time of the accident, on the east side of the track and between it and the Casein Plant building. The car came around the curve and plaintiff was caught between it and the building on account of the narrow clearance between the car and the building at that point. He was injured in consequence of being so caught.

The plaintiff predicated his cause of action on negligence on the part of the defendant. The grounds of negligence alleged and necessary to be mentioned herein were: (1) That defendant failed to provide and maintain for plaintiff a reasonably safe place to work, and negligently failed to provide and maintain adequate, sufficient and safe clearance between the track upon which defendant moved its engine and cars and the said Casein Plant building; (2) that the car which came in contact with the plaintiff was too large to safely move on the spur track; (3) that the defendant failed to maintain the spur track in a reasonably safe condition and permitted it to become rough, uneven and unstable and permitted low joints to exist to such an extent as to cause the car in question, while in motion, to list, sway, pitch and lurch in the direction of the building, thereby reducing the clearance between the side of the car and the building; (4) that the defendant moved the car toward and past the building at a dangerous and excessive rate of speed; and (5) that defendant failed to exercise reasonable care for the safety of plaintiff by failing to keep a proper lookout and by negligently failing to warn plaintiff of the danger to which he was subjected while in a position he was necessarily occupying while engaging in switching operations. There was no effort made to sustain the remaining specific charges of negligence.

In its answer the defendant admitted that plaintiff was injured but denied that it was guilty of any negligence. Af-

firmatively it alleged that the accident and injuries to plaintiff resulted solely and proximately from the carelessness, recklessness and negligence of the plaintiff.

This allegation of negligence by the defendant was denied in a reply by the plaintiff.

As grounds for reversal of the judgment the defendant has set forth in its brief numerous assignments of error. The first five challenge the sufficiency of the evidence, in fact and in law, to permit the submission of the issue or issues made by the pleadings to a jury, or to sustain a verdict thereon in favor of the plaintiff. It therefore becomes necessary to review the evidence pertinent to the allegations of negligence set forth and the assignments of error and to analyze it in the light of applicable legal principles.

For the purposes of this review and analysis and in the light of the contentions of the defendant in this respect we proceed with a full recognition of the well established legal principle that the court must resolve in favor of the plaintiff all factual questions upon which there is a substantial conflict in the evidence. Those questions were for the jury under proper instructions. The rule as stated in the case of *Roberts v. Carlson,* 142 Neb. 851, 8 N. W. 2d 175, is as follows: "A motion for a directed verdict must for the purpose of decision thereon be treated as an admission of the truth of all material and relevant evidence submitted on behalf of the party against whom the motion is directed. Such party is entitled to have every controverted fact resolved in his favor, and to have the benefit of every inference that can reasonably be deduced from the evidence."

From the record it appears that at the time of the accident plaintiff was 42 years of age. He was first employed by the defendant in April, 1942, and continued in its employ until March 15, 1943, the date of the accident. He was employed as brakeman and switchman until February, 1943, when he was promoted to the position of engine foreman. He was not always in charge of the same crew or the same engine. His usual assignment did not include the Casein Plant spur. There is a sharp conflict in the evidence on the

question of whether or not he had ever participated in switching on this spur until the incidents involved here occurred. His testimony is that he was unfamiliar with the width of the clearance between the spur track and the Casein Plant buildings. During the afternoon he received an order from the yardmaster to remove a loaded car from the spur. About 7 o'clock p. m. with his crew he went to the switch leading into the spur and found thereon two cars, one loaded and one empty. The loaded car was removed after which, under his direction, the empty car was being returned to be spotted to the west and opposite the Casein Plant loading platform. The engineer was backing the car on the spur and receiving his signals for movement from plaintiff. Just before the accident occurred plaintiff was on the east side of the track and between the car and the building. A brakeman was farther south for the purpose of passing signals to plaintiff to be passed on by him to the engineer the purpose of all of which was to spot the empty car opposite the loading platform. According to plaintiff's testimony the brakeman passed from view on account of the curvature of the building, whereupon plaintiff turned and walked a few feet south. The car continued in the same direction and in consequence of the narrow space between the track and the building he was caught between the center of the car and the building. That he was caught because there was not sufficient clearance at that point is not questioned. As soon as the engineer saw the predicament he stopped the engine. He stopped it in the distance of 12 or 14 inches. Help responded at once from the crew but it was impossible to release plaintiff without movement of the car. The engineer pulled forward a few inches and plaintiff was extricated from his position. In the performance of his work and the control of the train it was proper for the plaintiff to be on the right side. A proper place also was on the opposite side. In the present instance it was less convenient to be on the left side in view of the curvature of the track and the fact that the engineer to whom signals were required to be transmitted was on the right side. The area

to the west or left side was open and on that side there was no impaired clearance. Some distance to the north or northwest and between the building and the spur track there was a standard of undetermined height, but probably six or seven feet high, on which was a sign facing outward from the building bearing in large type the words "Impaired Clearance." Plaintiff said that he had not seen this sign and there is no evidence to the contrary. It was in plain view. By inference plaintiff suggests that the sign was put in position after the accident but there is no evidence warranting the inference. During all of the time involved it was still light and from meteorological reports it appears that the sun had not set. There was evidence that the car was large but none that its width exceeded the width of cars in general use or that cars of its length were not standard.

We pass from this brief review of the evidence to elements of negligence charged and will first consider the charge that the car was moved at a dangerous and excessive rate of speed.

The evidence clearly indicates that the car was being operated at a very low rate of speed, in fact at such a low rate that the engineer, as hereinbefore pointed out, was able to stop it in the distance of 12 or 14 inches. There is nothing in the record from which a reasonable inference could be drawn that speed was in any wise a factor in the happening of the accident.

The next charge of negligence which will be considered is the allegation that the defendant failed to exercise reasonable care for the safety of plaintiff by failing to keep a proper lookout and in failing to warn him of his danger. Under the theory on which the case was tried the substance of the charge is that the engineer failed to keep a proper lookout and failed to warn plaintiff of his danger. The theory of plaintiff under this charge is that he has a right of recovery under "the last clear chance" doctrine.

The evidence is clear that the engineer did not observe the danger to plaintiff and of course did not warn him. The evidence is also clear that the engineer was not in a position

to better observe the danger to plaintiff than plaintiff was himself. In fact he was the length of a part of the car, the length of the tender and the distance from the tender to his position in the cab farther from the point of danger than was plaintiff and also he was operating his engine under the direction of the plaintiff.

Black's Law Dictionary (3d ed.), p. 1071, defines the last clear chance doctrine generally as follows: "In the law of negligence, this term denotes the doctrine or rule that, notwithstanding the negligence of a plaintiff, if, at the time the injury was done, it might have been avoided by the exercise of reasonable care on the part of the defendant, the defendant will be liable for the failure to exercise such care." See *Styles v. Receivers of Richmond & D. R. Co.*, 118 N. C. 1084, 24 S. E. 740; *McLamb v. The Wilmington & W. R. Co.*, 122 N. C. 862, 29 S. E. 894. This general rule has received restrictions and explanations at the hands of the courts when it has become necessary to apply it. One such restriction is that before the doctrine can apply there must be opportunity to avoid.

On this restriction this court has said: "Before the doctrine of last clear chance can apply, the defendant must have had a chance to have avoided the collision, for the doctrine presupposes time for action." *Diehm v. Dargaczewski*, 135 Neb. 251, 280 N. W. 898; *Moses v. Mitchell*, 139 Neb. 606, 298 N. W. 338. It was also said: "In the absence of proof of opportunity to avoid injuring such person after his danger was discovered, or ought to have been discovered, there is no reason for the application of the 'last clear chance' doctrine." *Johnston v. Delano*, 100 Neb. 192, 158 N. W. 1034; *Moses v. Mitchell, supra.*

Another restriction approved by this court is that if a plaintiff is found to have been in a perilous position negligently created by himself and he had the last clear chance to escape and neglected to do so up to the time of the accident the doctrine can have no application. On this proposition in *Long v. Guilliatt*, 137 Neb. 199, 288 N. W. 689, it was said: "It would be exacting too much of the law to permit

plaintiff to recover, if, in a perilous situation negligently created by himself, he had the last clear chance to escape and neglected to do so up to the very instant of the accident."

Still another restriction placed upon the rule by this court is the following: "The doctrine of the last clear chance does not apply where the negligence of the injured party is contemporaneous and active up to the very moment of an accident, and thus contributed to cause the accident." *Hughes v. Omaha & C. B. Street Ry. Co.*, 143 Neb. 47, 8 N. W. 2d 509; *Donald v. Heller*, 143 Neb. 600, 10 N. W. 2d 447.

These restrictions of the Nebraska decisions upon the doctrine find support in other jurisdictions including the federal courts. See *Soles v. Atlantic C. L. R. Co.*, 184 N. C. 283, 114 S. E. 305; *Newport News & M. V. Co. v. Howe*, 6th Cir., 52 Fed. 362, 3 C. C. A. 121; *Inland & Seaboard Coasting Co. v. Tolson*, 139 U. S. 551, 11 S. Ct. 653; *Grand Trunk Ry. Co. v. Ives*, 144 U. S. 408, 12 S. Ct. 679; *Southern Ry. Co. v. Gray*, 241 U. S. 333, 36 S. Ct. 558; *Marshall v. Hines*, 8th Cir., 271 Fed. 165; *Miller v. Union P. R. Co.*, 8th Cir., 63 F. 2d 574; *St. Louis S. W. Ry. Co. v. Simpson*, 286 U. S. 346, 52 S. Ct. 520.

It cannot be said under the evidence in this case that the engineer had an opportunity to avoid the accident after he observed or in the exercise of ordinary care should have observed the danger to plaintiff. Under the evidence it is clear that in the exercise of ordinary care the plaintiff had at least an equal opportunity with defendant's engineer to observe his danger, thus if the engineer was negligent so also was plaintiff contemporaneously negligent right up to the time of the accident. Therefore, assuming that the engineer was negligent, the contemporaneous negligence of plaintiff would defeat a recovery under the last clear chance doctrine.

On the other hand if it be contended that plaintiff was not negligent it cannot be reasonably contended under the evidence that the engineer was negligent. He testified, on behalf of plaintiff, that he did not perceive plaintiff's danger

and the evidence indisputably shows that he was not in any better position to observe than was plaintiff.

We must therefore hold that the plaintiff has failed to sustain by any competent evidence a right of recovery under the last clear chance doctrine.

Examination of the bill of exceptions discloses that the charge that the condition in which the spur track was maintained caused a reduced clearance between the car and the building is without support in the evidence. The only evidence bearing on this question is exactly to the contrary. The evidence is to the effect that in construction the elevation of the outer rail is probably above the inner, yet with the slow movement of the car at the time in question there was no listing, swaying, pitching or lurching in the direction of the building.

The remaining charge of negligence is that of whether or not the accident was caused by the failure of defendant to provide and maintain for plaintiff a reasonably safe place to work. If there is competent evidence that it did so fail and in consequence and as the proximate cause thereof plaintiff received the injuries complained of or some of them he is entitled to recover, this being concededly an action under the Federal Employers' Liability Act (Title 45, U. S. C. A., sec. 51 *et seq.*).

The plaintiff contends that by the failure of defendant to have provided sufficient clearance between its spur track and the Casein Plant building at the point where he was caught it failed in its duty to provide for him a reasonably safe place to work within the meaning of the law. The defendant on the other hand denies this and on its part asserts that plaintiff in placing himself in the position in which he received his injuries was guilty of negligence which was the proximate cause of those injuries.

A determination of this issue or these issues does not depend upon a resolution of disputed facts. It depends upon application of legal principles to a substantially undisputed set of facts.

There was not sufficient space within which to work at

the point where plaintiff was hurt. As already pointed out plaintiff was in charge of the train crew and it was his duty to control the movements of the train. It was the duty of the engineer to control the movements under the direction of plaintiff or the brakemen who were under plaintiff's control. Control was exercised in daylight by hand signals. Plaintiff was properly exercising control at the time of the accident. It was customary and usually more convenient to exercise control from the right than the left side and especially on a curve the inside of which was to the right, for the reason that it was easier to get signals to the engineer whose position is in the cab on the right side of the engine. It is also usual and customary and acceptable practice for trains to be controlled by the engine foreman and his brakemen from the opposite side by relay of signals, usually through the fireman, to the engineer, where convenience, safety or judgment requires. If the latter practice had been followed in this instance this accident could not have occurred, since on that side of the train there was no question of narrow clearance or obstruction.

On the question of negligence on the part of plaintiff warning or knowledge of the dangerous situation is a matter of importance. A warning of impaired clearance was appropriately placed by the carrier but plaintiff said he had not seen it and the effect of his testimony is that he was never in a proper position to see it. Also he said that he had never been in this vicinity and had no previous knowledge of the surroundings. For present purposes therefore it must be assumed that he had no previous warning of the condition complained of and was chargeable with no knowledge or information in regard thereto except such as would flow from reasonable observation under the conditions and circumstances in the light of his knowledge and experience in the work in which he was engaged.

Whether or not defendant was negligent depends upon the question of whether or not under the recited facts and within the meaning of the law the defendant furnished plaintiff a reasonably safe place to work, assuming of course

that plaintiff had no previous knowledge and was not warned of the impaired clearance between the track and the building.

As a condition to a finding of negligence against the defendant in this respect it must appear either that plaintiff was required to work in the position where he was injured, or that the surrounding conditions and circumstances coupled with his experience and the requirements of his employment were insufficient to reasonably apprise him of the danger of that position.

As already pointed out he was not required, in the performance of his service for the defendant, to work in the position where he was injured. A reasonably safe place elsewhere was provided. The choice of places within which to work was his own.

The evidence of plaintiff must be accepted the effect of which is to say that he was not in fact aware of the danger. Was the danger then under the circumstances of such a character that he should have, in the exercise of reasonable care, observed it? Upon the answer to this question depends the answer to the question of whether or not the defendant was guilty of negligence, and also that of whether or not the plaintiff was guilty of negligence which was the proximate cause of the accident.

The courts of other jurisdictions have spoken to this question in cases involving comparable states of facts under the Federal Employers' Liability Act. This court has passed on no case closely in point as to facts.

The first case to which we shall call attention having a similar state of facts is *Haring v. Great Northern Ry. Co.*, 137 Wis. 367, 119 N. W. 325. In the opinion it was said: "Appellant claims that the position of the car on the curve of the track left an open space between the ends of the car and the edge of the platform, and that this would naturally invite employees to occupy this space and lead them to believe they were in a safe place, and that therefore such a construction rendered the appliance defective and unsafe. Nothing unusual or extraordinary results from a car pass-

ing over a curve in proximity to a platform. It is manifest that this was an appropriate way of constructing the car and platform. The fact that the ends of the car in passing over the curve would be farther away from the platform than at the points between the ends is a natural condition which the deceased, as a reasonably intelligent person, must be presumed to know and note, and his omission to do so was an act of negligence."

In *Baltimore & O. R. Co. v. Newell,* 3d Cir., 196 Fed. 866, a case similar in principle but not in fact, the court said: "Railroading is at best a somewhat dangerous employment, and requires and bespeaks reasonable prudence and care on the part of those employed in its conduct. Undoubtedly there are, in the general course of its business, specific places and situations in which employés are required to work, and there is a clear legal duty imposed upon the railroad company to keep these places safe for that purpose. The question, therefore, that arises in the case before us is, was the space between the edge of the freight platform and the body of a freight car a place within which the plaintiff was required to work, and therefore to be kept reasonably safe for that purpose by the defendant? We think not. On the contrary, it was a place from which employés were excluded by the obvious situation. * * * But it is not as to the platform as a place to work upon that the allegation of unsafety is made, but as to the space between the side of a freight car and the edge of a platform, in which no employé was required to work. Clearly the railroad company was not obliged, in considering the dimensions of that space, to provide for the safety of one who voluntarily placed himself therein."

In *Stone v. Chicago & N. W. Ry. Co.,* 176 Minn. 104, 222 N. W. 641, which was a clearance case, the court said: "Plaintiff charged in her complaint that defendant negligently failed to provide and maintain a safe and sufficient clearance between the track and the platform but does not urge that claim here. It would clearly be untenable. Defendant did not construct either track or platform and did

not own or control either. The matter of constructing them and of locating them properly in relation to each other was an engineering problem. They were arranged for the purpose of bringing cars into a convenient position to be loaded from the platform. The plan did not intend a space for employes between cars and platform, and there was no need for employes to be in the space between them."

This court in *Sullivan v. Chicago & N. W. Ry. Co.*, 128 Neb. 92, 258 N. W. 38, a case not in point on the facts but in point on the question of obvious danger, said: "The defect upon which plaintiff relies to show negligence was not latent but obvious. * * * In an action by an employee against his employer, a railway company, under the federal employers' liability act, there is generally no liability for injuries from dangers that are obvious."

Other cases bearing on the question of injuries sustained by railroad employees in positions where it was not contemplated that they would be found and on the absence of negligence in situations where the danger is obvious are: *Canadian Northern Ry. Co. v. Walker*, 8th Cir., 172 Fed. 346; *McCann v. Minneapolis & St. L. R. Co.*, 159 Minn. 70, 198 N. W. 300; *Lenz v. Union P. R. Co.*, 128 Neb. 99, 258 N. W. 33; *Davis v. Hand*, 8th Cir., 290 Fed. 73; *Toledo, St. L. & W. R. Co. v. Allen*, 276 U. S. 165, 48 S. Ct. 215; *Delaware, L. & W. R. Co. v. Koske*, 279 U. S. 7, 49 S. Ct. 202; *Atlantic C. L. R. Co. v. Powe*, 283 U. S. 401, 51 S. Ct. 498.

The cases thus far cited and quoted from favor the position contended for by the defendant. Plaintiff cites a number of cases which he asserts support the contention that negligence on the part of the defendant and also of the plaintiff under the evidence was one for the jury. The case most closely in point and most favorable to his position is *Hemmingsen v. Chicago & N. W. Ry. Co.*, 134 Wis. 412, 114 N. W. 785.

Hemmingsen, an experienced brakeman, was working on the side of the track opposite a loading platform of irregular outline. He was ordered to cut off a car and immediately crossed the track in front of the cars where he was

caught between a car and the platform. The court in the opinion adhered to the rule that where the danger was known or should have been known there could be no recovery but concluded in that case that the question was one for the jury. The opinion speculates at considerable length on reasons why Hemmingsen did not observe his danger and why it was not obvious to him but finally, in the following words, points to an inference from the evidence that he did not have sufficient time or opportunity to become apprised of his danger and extricate himself therefrom: "Now it may well be that he was caught before he had time to know the danger or extricate himself from it, if he did discover it, while in the perilous position."

Under the rule of the cases in this respect the burden was on the plaintiff to adduce evidence from which a reasonable inference could be drawn that in the exercise of reasonable care he did not or could not know of his danger.

We think his evidence is not subject to such an inference. It was daylight. He gave the signal for the movement, then not seeing the brakeman who was to give a signal for the spotting of the car he turned and walked in the direction of the movement of the car between it and the building, of necessity in very close proximity to both, and thereafter paid no attention to the fact that the car was closing in on him until he was caught.

Reasonable regard for his own safety, especially in the light of his duties and his experience, required that he take some note of his surroundings. If after turning about he had paid any attention to his situation the accident could have been readily avoided. To a person in the exercise of reasonable and ordinary care the danger would have been obvious.

It follows therefore that, the plaintiff having failed to prove any of his charges of negligence, the court erred in submitting the case to a jury. It further follows that it is unnecessary to determine directly the question of whether or not plaintiff was guilty of negligence which was the proximate cause of the accident, or to pass upon other errors assigned as grounds for reversal.

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

REVERSED AND DISMISSED.

BOB C. COOPER ET AL., APPELLEES, V. SANITARY DISTRICT NO. 1 OF LANCASTER COUNTY, NEBRASKA, APPELLANT.
19 N. W. 2d 619

FILED AUGUST 8, 1945. No. 31857.

1. **Municipal Corporations.** An action against a municipal corporation to recover damages for trespass upon or injury to real estate is properly brought in the county where the real estate or some part thereof is situated.
2. **Drains.** A sanitary drainage district organized under chapter 31, art. 5, R. S. 1943, is liable for negligence in the construction and maintenance of its works.
3. ———. That portion of section 31-509, R. S. 1943, which purports to deprive the owner of lands of his action for damages because of a majority negative vote on the creation of a drainage district below a sanitary drainage district is unconstitutional and void.
4. ———. Whatever may be done by an upper riparian landowner in the protection and improvement of his land may be done by a legally organized sanitary drainage district.
5. **Waters.** The flood channel must be considered as a part of the channel of the stream and no structures or other obstructions can be placed in its bed which will have a tendency to dam the water back upon the property of upper riparian or adjacent owners.
6. **Waters: DRAINS.** An examination of the evidence reveals that the flood in question would have occurred whether or not the works of the drainage district had been constructed. Damages resulting from such floods are not chargeable to a drainage district organized in the upper reaches of the stream.
7. ———: ———. Where the construction of an artificial channel by a drainage district does not dam or retard the flow of the stream to the damage of upper owners, or make the position of owners of land downstream more hazardous, the artificial channel cannot be said to be negligently constructed.
8. ———: ———. Where some damage would have occurred even if the artificial channel had not been built, the drainage district is liable only for such damages in addition thereto as were

caused by the damming or retarding of the water to a greater height or for a longer time than would otherwise have occurred.

9. ———: ———. Where the plaintiff under such circumstances fails to show the extent of the increased overflow, either as to its quantity or duration, and the amount of damages arising therefrom, no basis for a judgment exists.

10. ———: ———. A drainage district organized in the upper reaches of a stream to drain the lands of the district is not required as a matter of good engineering practice to construct a channel of sufficient size in the lower reaches to carry off all the floodwaters of the watershed. Its only duty to lower landowners is to refrain from negligently creating conditions more hazardous than existed before their operations were commenced.

APPEAL from the district court for Saunders County: HARRY E. LANDIS, JUDGE. *Reversed and dismissed.*

Max Kier, for appellant.

Peterson & DeVoe, and *Davis, Stubbs & Healey*, for appellees.

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

CARTER, J.

Plaintiffs commenced this action against Sanitary District No. 1 of Lancaster county, Nebraska, to recover damages to growing crops on certain lands belonging to the plaintiffs in Saunders county, Nebraska, on account of negligence in the construction and maintenance of drainage channels in Salt Creek valley extending generally from Lincoln to the point where it empties into the Platte river. The verdict of the jury was for plaintiffs in the amount of $3,344.53. Judgment was entered on the verdict and the district has appealed.

Defendant is a sanitary district organized and existing under and by virtue of chapter 31, art. 5, R. S. 1943, and is wholly within Lancaster county. The district is vested with power to provide drainage for the lands in the district through the Salt Creek valley, Salt Creek being a natural stream which runs from Lincoln to a point below Ashland through parts of Lancaster, Cass and Saunders counties.

It is not disputed that the district is clothed with authority to establish, maintain and construct artificial channels and drains in the Salt Creek valley, within and below the district, for the purpose of draining the lands within the district.

The original channel in its meandering course from the city of Lincoln to the east line of section 10, township 12 north, range 9 east of the 6th P. M. in Saunders county, hereinafter referred to as the east line of section 10, was approximately 80 miles in length. The valley floor of Salt Creek is comparatively level. At Waverly, Nebraska, the width of the valley was about two miles from which point east it becomes narrower until at the east line of section 10 it has a width of one-quarter to one-half mile. The average fall per mile was 14 inches and the area drained west of the east line of section 10 was 1,135 square miles.

Between the years 1894 and 1938 the defendant, to alleviate flood conditions in the city of Lincoln, improved the drainage of Salt Creek valley by widening and deepening the channel and eliminating numerous curves and bends. The effect of these improvements was to reduce the length of the stream from the city of Lincoln to the east line of section 10 from 80 miles to 33 miles and to increase the fall from 14 inches to the mile to 36.5 inches to the mile. The water travel time between Lincoln and the mouth of the stream was thereby reduced from 31 to 7 hours. In 1941 and 1942 the defendant constructed a new channel from the east line of section 10 to connect with a previously constructed artificial channel, which new channel had a carrying capacity of much less quantity than the channel bringing the water to the east line of section 10.

On June 19, 1942, large quantities of water due to heavy rainfall along the upper and middle reaches of Salt Creek came down Salt Creek and its tributaries and flooded the lands of the plaintiffs lying adjacent to and northwest of section 10. It is the contention of the plaintiffs that their lands were flooded and their crops destroyed because of the negligence of the district in failing to construct a channel

east from the east line of section 10 of sufficient capacity to carry off all the water arriving at that point from the west and in negligently failing to construct said channel in a proper manner. In addition to a general denial, the district asserts that the lands of the plaintiffs were in the flood plain of Salt Creek in its natural state and from time immemorial were subject to overflow during rainy seasons. The district contends that the flooding in June, 1942, resulted from natural causes and was not attributable to an act of the district. Liability is denied on the further ground that the damage was the result of an act of God. The district further contends that by reason of an election held in Saunders county in June, 1928, pursuant to sections 31-507, 31-508 and 31-509, R. S. 1943, the plaintiffs are barred of any right to maintain this action for damages against it. The plaintiffs question the constitutionality of the foregoing sections of the statute and the bar which it purports to impose. It is upon these issues that the case must be decided.

The district contends that it can be sued in Lancaster county only and that the trial court was in error in holding that the action could properly be brought in Saunders county. It is a general rule that a municipal corporation can be sued only in the county where it is located. But there is a recognized exception to the rule in this state where the action is to recover damages for trespass upon or injury to real estate. In such cases an action is properly brought against a municipality in the county where the real estate or some part of it is situated. R. S. 1943, sec. 25-401; *State ex rel. Cary v. Cochran,* 138 Neb. 163, 292 N. W. 239; *State ex rel. Johnson v. Central Nebraska Public Power & Irrigation District,* 140 Neb. 471, 300 N. W. 379. The contention of the district on this point is without merit.

The contention of the district that plaintiffs are barred from maintaining this action by reason of an election held in Saunders county in June, 1928, pursuant to sections 31-507, 31-508 and 31-509, R. S. 1943, is also without merit. The provision relied upon by the district is clearly violative of the state Constitution. The particular provision of the

applicable statute is as follows: " * * * If a majority vote for the creation of a district, based on acreage represented, the sanitary district shall have jurisdiction to make the improvements recommended by the Department of Roads and Irrigation and to assess the special benefits thereof to the lands specially benefited. If a majority vote against the creation of a district, the work shall not be done, and in that event all owners of land included in the area defined by the Department of Roads and Irrigation shall be precluded from asserting any claim for damages against such sanitary district by reason of improvements previously made by it." R. S. 1943, sec. 31-509. All conditions precedent to the operation of this provision were admittedly present.

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

Section 3, art. I of the Constitution of Nebraska, is the following: "No person shall be deprived of life, liberty, or property, without due process of law."

In *Bunting v. Oak Creek Drainage District*, 99 Neb. 843, 157 N. W. 1028, it was held that a drainage district, organized under the provisions of chapter 19, art. 5, R. S. 1913, which appears with amendments as chapter 31, art. 4, R. S. 1943, was liable for damages for negligence in the construction and maintenance of its works. The defendant here was organized under the provisions of a similar statute as was the Oak Creek Drainage District and the reasons set forth for affixing liability for negligence there are equally applicable here. Responding there to the theory that the district was engaged in the performance of a sovereign function it was said: "The state is a sovereign and cannot be sued without its consent. Being a sovereign, it is presumed that it will do justice to its citizens without compulsion, and even the sovereign itself under our constitution cannot take or damage private property without compensation."

Responding then to the proposition that the district was

not engaged in the performance of its functions as acts of sovereignty the following was quoted in the opinion with approval from *Bradbury v. Vandalia Levee and Drainage District*, 236 Ill. 36, 86 N. E. 163: " 'The ground of distinction between corporations which are liable for the negligent or wrongful act of their agents or servants and those which are not is that public involuntary quasi-corporations are mere political or civil divisions of the state created by general laws to aid in the general administration of the government and are not so liable, while those which are liable have privileges conferred upon them at their request, which are a consideration for the duties imposed upon them. * * * Neither the state, nor any part of it, is divided by the legislature into drainage districts, nor do they have public duties thrust upon them without their consent. The organization of a drainage district is for the sole and exclusive benefit of the territory within the district * * * , and the lands within the district are assessed to pay the whole cost on the theory that they alone are benefited. * * * The organization is not different, in principle, from the organization of cities, villages or towns under a general law, on a petition of a certain proportion of the legal voters within the territory. It is correct to say that a drainage district is a quasi-corporation if the act under which it is organized does not make it a corporation in fact; but it is not created for political purposes or for the administration of civil government.' "

In disposition of the question of liability of the district for damages for negligence it was said in the opinion: "The district chooses its own board of directors and its work is done under its direction and supervision. It is given certain additional powers and privileges because the formation of the district 'will be for the public health, convenience and welfare.' It is given the power of eminent domain as are railroads and ordinary municipal corporations. In the conduct of their affairs they must not negligently injure others. If they do, they are liable for such injuries as cities and villages are."

Clearly therefore the quoted portion of section 31-509,

R. S. 1943, seeks conditionally to destroy rights guaranteed under sections 3 and 21, art. I of the Constitution of the state of Nebraska.

The more difficult question to be determined is whether or not actionable negligence on the part of the district has been shown sufficiently to take that question to the jury.

The record shows that Salt Creek in its natural state was a watercourse rising west of Lincoln and pursuing a winding and twisting course down the valley through Ashland to a point where it flowed into the Platte river. The source of the stream arises from the confluence of six major natural tributaries converging in or near Lincoln. From its source to its mouth there are 15 main tributaries all but one of which enter the stream west of Ashland. The natural drainage area of Salt Creek and these 14 tributaries is approximately 1,143 square miles. The drainage area of the defendant district contains approximately 765 square miles.

Pursuant to plans adopted from time to time by the district through the years, the channel of Salt Creek was straightened and widened from a point west of Lincoln to the east line of section 10, a point below plaintiffs' land. The carrying capacity of the stream in its natural state was about 2,600 second-feet. In making the improvements heretofore recited, the artificial channel was made progressively wider from Lincoln to the east line of section 10 with the result that its capacity was correspondingly increased. The capacity of the artificial channel immediately above the east line of section 10 is approximately 10,000 to 12,000 second-feet. The artificial channel constructed east from the east line of section 10 carried approximately 8,000 second-feet of water while the old channel at flood time was utilized to the extent of 2,000 to 3,000 second-feet to get water away at this point. There is no dispute in the evidence that the combined carrying capacity of the old channel and the artificial channel east of the east line of section 10 was much greater than the capacity of the channel as it existed prior to 1942.

One of the contentions advanced by the district is that it

had the same right as an upper riparian owner to make the improvement, the effect of which was to increase and accelerate the flow of water to the east line of section 10. It is urged that the rule in this state permits a riparian owner, in the interest of good husbandry, to increase and accelerate the flow in the natural course of drainage without liability for injuries caused a lower proprietor. This rule, with certain substantial limitations, applies to surface waters only, in this state. *Hengelfelt v. Ehrmann,* 141 Neb. 322, 3 N. W. 2d 576; *Steiner v. Steiner,* 97 Neb. 449, 150 N. W. 205, and cases therein cited. However, there is a clear distinction in the rules of law governing surface waters and floodwaters flowing as a part of a natural stream during flood season. We are committed to the rule that overflow waters flowing in the natural flood channel of a running stream are a part of the stream and are governed by the running water rule. *Hofeldt v. Elkhorn Valley Drainage District,* 115 Neb. 539, 213 N. W. 832; *Buchanan v. Seim,* 104 Neb. 444, 177 N. W. 751; *Murphy v. Chicago, B. & Q. R. Co.,* 101 Neb. 73, 161 N. W. 1048; *Brinegar v. Copass,* 77 Neb. 241, 109 N. W. 173. We think the rule with reference to floodwaters applies in the present case and that it is not therefore necessary to discuss the rule applicable to surface waters.

A watercourse is generally defined as a stream of water with a well-defined existence which makes it valuable to the riparian owners along its course. See, also, section 31-202, R. S. 1943. To such streams riparian rights attach. Where water appears upon the surface of the ground in a diffused state with no permanent source of supply or regular course, its flow is valuable to no one and it is regarded as surface water. But where such waters flow into and become a part of a stream, they cease to be surface waters and are then a part of the running water of the stream. Likewise, the running waters of a stream may at flood stage spill out upon low lands, become isolated and again be classified as surface waters. In the instant case the waters causing the damage to plaintiffs' lands were floodwaters as distinguished from

surface waters. Necessarily, floodwaters which have lost their identity with those of a living stream and returned to the classification of surface waters would be governed by the rules applicable to surface waters. But when the waters causing damage retain their identity with those of a stream, they cannot be properly treated as surface waters and must necessarily be treated as floodwaters when without the banks of the stream. This compels the holding that a stream which is accustomed to extend itself beyond its banks in times of high water and to flow over the adjacent lands in its flood plane in a broader stream, retains its character as a live stream and the law relating to floodwaters applies.

The situation is well expressed by an authoritative text writer as follows: "Every stream flowing through a country subject to a changeable climate must have periods of high and low water. And it must have, not only its ordinary channel which carries the water in ordinary times, but it must have, also, its flood channel to accommodate the water when additional quantities find their way into the stream. The flood channel of the stream is as much a natural part of it as is the ordinary channel. It is provided by nature, and it is necessary to the safe discharge of the volume of water. With this flood channel no one is permitted to interfere to the injury of other riparian owners. When the water rises until it reaches the margin of this flood channel, and begins to flow over it, it may do so in natural vents or outlets which are a part of the stream, and with which there can be no individual interference to the injury of other persons; or it may spread out uniformly over a large section of country in small volume and with no definite course or ultimate destination, but which will gradually be lost by evaporation or percolation into the ground. The principles which prevent interference with the water when a part of the rushing torrent, or when finding its way by well-defined outlets from one stream to another, do not apply with equal force to the water when it is spread out over the face of the country in such a way as to have lost its power to maintain a continued flow. By keeping these forms distinct, and considering in

every case to which of them a particular decision applies, most of the seeming conflict in the authorities disappears. Thus, the courts are very nearly agreed that the flood channel must be considered as a part of the channel of the stream, and that no structures or obstructions of any kind can be placed in its bed which will have a tendency to dam the water back upon the property of the upper riparian owner." 3 Farnham, Waters and Water Rights, sec. 880, p. 2562. That a riparian owner may not dam, retard or bank against the floodwaters of a running stream to the injury of lower proprietors is a settled question in this state. *Murphy v. Chicago, B. & Q. R. Co., supra; Hofeldt v. Elkhorn Valley Drainage District, supra.*

Whether or not the district has been negligent in the construction of its works which has resulted in a damming or an undue interference with the waters of Salt Creek to the damage of these plaintiffs constitutes a question of fact ordinarily to be determined by a jury. If the evidence, if believed, is sufficient to sustain a judgment, the verdict of the jury must stand.

In determining whether negligence on the part of the district has been shown, a brief review of the historical facts pertaining to Salt Creek and environs is pertinent. It is established by the evidence that the Salt Creek valley has always been subject to flood conditions. Practically every year the creek left its banks and inundated the low lands on the flood plane of the stream. It is evident that in its state of nature floods came regularly and overflowed the adjoining low lands. Ofttimes the water covered only the low sections of the bottom lands for short periods of time, such floods, if they may be called such, often proving beneficial to crops growing on such lands. At other times the floods were higher and covered more land for longer periods of time with the result that they damaged or destroyed crops growing on the agricultural lands in the valley. The largest flood appears to have occurred in 1908 when the whole valley was inundated. The flood of June, 1942, appears to have reached a high-water mark exceeded only by the flood of

1908. The flooding of the low bottom lands appears to have been of frequent occurrence while the larger floods appear to have occurred with regularity, although with less frequency. It is estimated by an hydraulic expert that floods similar to that of 1908 would occur at an average interval of one in each 50 years. The flood area was not limited to the lower reaches of the stream. The city of Lincoln, near the point where the headwater tributaries of the stream came together was subject to flood. To protect the city and the industrial development taking place in the part of the city close to the stream, the defendant district was organized. The purpose of the district was to provide drainage and flood protection for the lands within the district. It was no part of the duties of the district to drain or otherwise improve the lands below the district or to afford drainage or flood protection for such lands. It was the duty of the district, however, to use reasonable care in its construction of artificial channels, drains, grades, bridges and other work incidental to the accomplishment of its purposes. The question to be here determined is whether the district was free from negligence in its operations in so far as the lands of these plaintiffs are concerned.

The evidence shows that plaintiffs' lands contained a small area that was subject to flood whenever the stream reached a flood stage of ten feet above the normal elevation of Salt Creek. A much greater portion of the land required a flood stage of 14 feet to cause inundation. The record shows that the flood stage of the stream at the east line of section 10 was 16 feet above the normal height of the water in the stream. It is clear therefore that plaintiffs' lands were flooded to the extent alleged in their petition.

It is the contention of plaintiffs that the construction of the artificial channel from the city of Lincoln to the east line of section 10 resulted in a stoppage or retarding of the water at that point, a piling up of the water so to speak. It is urged that such damming or retarding of the floodwaters at that point caused the water to flow back and inundate plaintiffs' lands. We do not think the evidence is sufficient

to sustain a verdict based on any such theory as we will hereinafter demonstrate.

The record shows the normal water level elevation of the stream as 1,054 feet above sea level at the Schuyler railroad bridge located approximately one mile east of the east line of section 10. At the east line of section 10, the elevation was 1,057 feet. At the west line of section 10 it was 1,060 and approximately a mile and a half upstream at the point where it crosses the north line of sections 16 and 17, it was 1,064. The measurements of the high-water marks of the June, 1942, flood above the normal surface of the stream show stages of 17, 16, 15 and 17 feet, respectively, at the foregoing points. The peak water level of the flood was therefore 1,071, 1,073, 1,075 and 1,081 respectively, at the points heretofore mentioned. The variance in the different heights of the flood at these various points is explained by losses caused by breaks and washouts and by waters coming into the stream as a result of local rainfall and the return of spilled waters. These variances do not appear material in determining the question presented. Even with the variance in the maximum flood elevations, the high-water marks indicate a slope from west to east through the whole section of the watercourse we have here described. There is a two-foot fall from the west line of section 10 to the east line of that section and a further fall of two feet from the latter point to the Schuyler bridge. This indicates that there was no retarding or damming of the channel at the east line of section 10 as alleged. It is also apparent that no additional depth of the water at the east line of section 10 was created as a result of damming or retarding of the stream, a fact that is essential of proof in establishing a damming or retarding of the waters of the stream. It is true that the flood stage at the east line of section 10 was shown to be one foot higher than one mile upstream, but this is explained in the evidence as resulting from the return of spilled waters and runoff waters resulting from heavy local rains.

There is evidence in the record that the floodwaters ap-

peared to back up from the east line of section 10 and overflow plaintiffs' lands. It is elementary, of course, that water seeks its own level and as the waters of Salt Creek arose, they would flow into and over areas of lower elevation. It is not questioned that some floodwaters flowed in a northwesterly direction onto plaintiffs' lands. But it is just as positively established that the crest of the flood on plaintiffs' lands did not originate at the east line of section 10 for the simple reason that its highest stage at that point was lower than the highest stage on plaintiffs' lands. Many elevations on the lands of the plaintiffs which were flooded exceeded 1,073 feet, the highest stage of the flood on the east line of section 10. While it is true that waters at the east line of section 10 would spread out in any direction to that elevation, it could not cause a backwater on lands exceeding 1,073 feet in elevation. It is definitely shown that the crest of the flood on plaintiffs' lands exceeded considerably the elevation of 1,073 feet. Consequently, the waters causing the crest of the flood must have come from some other source, probably from the west and south, where higher peak flood elevations are shown. In any event, we think the evidence conclusively shows the absence of a dam or a piling of waters at the east line of section 10. The slope of the peak flood elevations east of the east line of section 10, the want of additional water depth at the point of the claimed damming or retarding of the waters, the failure to establish that a headwater was created at that point of sufficient height to provide a backwater capable of flooding plaintiffs' lands at the elevation it was flooded and the fact that it was the second largest flood in the history of the stream all furnish convincing proof that the construction of the artificial channel to the east line of section 10 was not the proximate cause of the flooding of plaintiffs' lands, either to the extent or for the length of time that they were inundated.

The evidence further shows that at the time of the June, 1942, flood, there was no flood in Lincoln or the defendant district. A short distance above the point where Rock Creek flows into Salt Creek, the same being about 11½

miles upstream from the Schuyler bridge, the stream was flowing 8,600 second-feet of water within the channel banks on June 20, 1942, while 14,000 second-feet was passing the Schuyler bridge on the same day. It is evident therefore that 5,000 or 6,000 second-feet of local water was augmenting the flow of the stream below Rock Creek and making a major contribution to existing flood conditions. This water, with the stream in a state of nature, would have flooded plaintiffs' lands, the capacity of the channel during that period being only 2,600 second-feet. It is also noteworthy that the peak elevations of the 1908 flood which occurred at a time when little work had been done by the defendant district, paralleled the peak elevations of the June, 1942, flood. This indicates that there was no more retarding or damming of the stream in 1942 than in 1908. There is also evidence in the record that plaintiffs' lands would have been flooded for a longer time and to a greater depth if the works of the defendant district had never been constructed. We think the facts upon which this statement is based substantiate this conclusion.

In *Murphy v. Chicago, B. & Q. R. Co., supra,* we said: "Plaintiff contends that the bridges by the obstruction they created on account of piling in the channel and insufficient openings caused the flood within this channel and over the other lands. We are convinced, however, from an examination of all the evidence that the waters were so high that, even if the bridge and railroad had not existed, they would still have followed the course through the streets of Homer and down the depression west of the stream, and we find the evidence insufficient to sustain the fifth cause of action."

The court summarizes in the syllabus the proper measure of damages in the following language: "If, however, some damage would have occurred, even if the railroad embankment had not been built, the company would only be liable for such damages in addition thereto as were caused by the damming or obstruction of the waters to a greater height or for a longer time than would otherwise have occurred."

Assuming, however, that plaintiffs' land would have

flooded with the Salt Creek watercourse in a state of nature, and that the negligence of the district made some contribution thereto, the burden is upon the plaintiffs to show the extent of the increased overflow and the amount of damages arising therefrom. There is no attempt made in the present record to make such an allocation of damages. This fact, coupled with our finding that plaintiffs' land would have been flooded whether the works of the defendant were built or not, is sufficient to defeat the judgment. *Compton v. Elkhorn Valley Drainage District*, 124 Neb. 299, 246 N. W. 340.

Plaintiffs' engineering expert testified that good engineering practices required the construction of an artificial channel with a capacity of 44,300 second-feet from the east line of section 10 to the Platte river. Such a construction would necessarily contemplate the removal of all flood and drainage waters above that point. The defendant district is not required to protect all the lands in the Salt Creek watershed above that point from flood and surface waters. Its duty, generally speaking, is to carry out its purposes without creating conditions more hazardous to lower landowners than existed before their operations were commenced. This rule does not require that the district should build an artificial channel with a capacity of 44,300 second-feet to escape a charge of negligence. Neither does a reasonable use of the stream and the use of good engineering practices require the construction of a channel of such magnitude by the district.

Floods such as the one presently before us are to be expected at occasional intervals throughout the years. Less often, floods of greater magnitude may occur. We cannot say under these circumstances that they constitute an act of God as that expression is known to the law. We think the evidence fails to show that the damage to plaintiffs' crops was caused by any negligence of the district or that the engineering practices employed constituted a negligent use of the watercourse under the evidence appearing in the record before us. The trial court erred in refusing to give

the district's tendered instruction number 1, directing the jury to return a verdict for the defendant. The judgment is reversed and the cause dismissed.

REVERSED AND DISMISSED.

YEAGER, J., concurs in the result.

CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

SEPTEMBER TERM, 1945

HOMER H. JOHNSON, APPELLANT, V. RADIO STATION WOW, INC. ET AL., APPELLEES.

19 N. W. 2d 853

FILED SEPTEMBER 20, 1945. No. 31685.

1. Courts. Where a judgment of the court of last resort of a state is reversed by the Supreme Court of the United States, such state court in entering a judgment on the mandate may properly decide upon its own jurisdiction and upon the jurisdiction of all the inferior courts to which its appellate power extends.
2. ———. A direction in a mandate of the Supreme Court of the United States ordering the court of last resort of the state to withhold execution on a judgment entered on issues solely within the jurisdiction of the state courts will be treated as advisory and not mandatory.

APPEAL from the district court for Douglas County: JOHN A. RINE, JUDGE. *Motions for judgment on mandate sustained.*

Stewart, Stewart & Whitworth and *Ralph W. Slocum*, for appellant.

Brown, Crossman, West, Barton & Fitch, Rainey T. Wells, Paul P. Massey, Peterson & Devoe, Cline, Williams & Wright, and *William P. Kelley*, for appellees.

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

CARTER, J.

The question before us is the nature of the judgment to

be entered on a mandate issued by the Supreme Court of the United States. The previous history of the case is fully recited in *Johnson v. Radio Station WOW, Inc.*, 144 Neb. 406, 13 N. W. 2d 556, and *Radio Station WOW, Inc., v. Johnson*, 326 U. S. 120, 89 L. Ed. 1397, 65 S. Ct. 1475. The opinion of the Supreme Court of the United States contains the following: "We think that State power is amply respected if it is qualified merely to the extent of requiring it to withhold execution of that portion of its decree requiring retransfer of the physical properties until steps are ordered to be taken, with all deliberate speed, to enable the Commission to deal with new applications in connection with the station." The mandate duly filed in this court requires that the cause be "remanded to the said Supreme Court for further proceedings not inconsistent with the opinion of this court."

It is a fundamental rule, recognized both by this court and the Supreme Court of the United States, that the courts of last resort of the states and of the United States are peers in their respective fields. In *First Trust Co. v. Smith*, 134 Neb. 84, 277 N. W. 762, we quoted the following language with approval from *Franklin v. Kelley*, 2 Neb. 79: "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." In *Erie R. Co. v. Tompkins*, 304 U. S. 64, 82 L. Ed. 1188, 58 S. Ct. 817, the Supreme Court of the United States restated the doctrine by adopting the language of Mr. Justice Field contained in his dissent in *Baltimore & O. R. Co. v. Baugh*, 149 U. S. 368, 37 L. Ed. 772, 13 S. Ct. 914, as follows: "I am aware that what has been termed the general law of the country—which is often little less than what the judge advancing the doctrine thinks at the time should be the general law on a particular subject—has been often advanced in judicial opinions of this court to control a conflicting law of a State. I admit that learned judges have fallen into the habit of repeating this doctrine as a convenient mode of brushing aside the

law of a State in conflict with their views. And I confess that, moved and governed by the authority of the great names of those judges, I have, myself, in many instances, unhesitatingly and confidently, but I think now erroneously, repeated the same doctrine. But, notwithstanding the great names which may be cited in favor of the doctrine, and notwithstanding the frequency with which the doctrine has been reiterated, there stands, as a perpetual protest against its repetition, the Constitution of the United States, which recognizes and preserves the autonomy and independence of the States—independence in their legislative and independence in their judicial departments. Supervision over either the legislative or the judicial action of the States is in no case permissible except as to matters by the Constitution specifically authorized or delegated to the United States. Any interference with either, except as thus permitted, is an invasion of the authority of the State and, to that extent, a denial of its independence."

The present action was one to set aside a lease of a radio station on the ground of fraud. This is a matter lodged solely within the jurisdiction of the Nebraska courts and the opinion of the Supreme Court of the United States in the present case unequivocally so holds. The only possible basis for the attaching of federal jurisdiction was as to whether the judgment of this court encroached upon the powers of the Federal Radio Commission when it directed the parties "to do all things necessary" to secure a return of the license to the defrauded society. In deciding that question, the Supreme Court of the United States decided the only question it had any power to determine.

The mandate of the Supreme Court of the United States directing this court to withhold its mandate on a matter solely within the jurisdiction of the state courts encroaches upon the plenary powers of this court and tends to undermine the autonomy and destroy the independence of the state courts in a field where they are admittedly supreme.

The contention advanced in the opinion that state power is amply respected, even if it is qualified to the extent of re-

quiring the withholding of execution, constitutes a specious argument. A recognition of a right on the part of the Supreme Court of the United States to in any manner interfere with the processes of this court within its exclusive field, or any other attempt by that court to impose its views upon this court on a matter within the sole jurisdiction of the state court, constitutes an entering wedge which will surely result in further encroachments upon state power. We recognize that state and federal courts each have fields solely within the jurisdiction of each, but we insist that there is an obligation on the part of each to abstain from all interference with the other when it perceives that the subject matter of the action is within the exclusive jurisdiction of the other. There is little or no danger of collision if each will measure its functions by the standard created for the guidance of both. But if the state court, to avoid such a collision of power, submits to the encroachment without asserting its rights, then an immunity to claim and usurp state power is established. In protecting the limits of our exclusive jurisdiction from invasion by pointing out the lurking danger, inquiry will be awakened, fundamental principles reinvestigated and constitutional limitations reexamined.

The effect of the restriction imposed is to restrain the issuance of the court's process for the enforcement of its judgment. This is specifically prohibited by section 265 of the Judicial Code, 28 U. S. C. A., sec. 379, which provides: "The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a State, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy." It has been held that the prohibition of this section extends not only to orders of the federal court which directly restrain proceedings in the state courts, but also to all orders which necessarily have that effect. *Amusement Syndicate Co. v. El Paso Land Improvement Co.*, 251 Fed. 345; *Reisler v. Forsyth*, 21 F. Supp. 610; *Stenger v. Stenger Broadcasting Corporation*, 28 F. Supp. 407.

The opinion of the Supreme Court of the United States recites that new situations call for new adaptations of judicial remedies. We agree with this as an abstract statement, but fail to see any application to the situation at bar. Certainly, such a pronouncement will not sustain an encroachment upon the jurisdiction of another independent court. It is further recited in effect that as the United States Supreme Court has had occasion to limit the jurisdiction of federal courts until state courts can pass upon state issues involved in federal court litigation, it constitutes a justification for interfering with the judicial processes of the state court. If a court may, by unilateral action, impose its will upon another occupying an exclusive field under any such theory of compensation, reciprocity or comity, the latter simply has no exclusive jurisdiction except at the sufferance of the former. The powers of the state and the independence of its judicial system do not rest on any such uncertain foundation.

We respectfully assert that the Supreme Court of the United States cannot properly supervise or interfere with the exercise of the powers of the state courts within their exclusive fields and thus infringe upon the authority of the state or destroy the independence of its courts. Consequently, the attempt of that court to so do will be treated as advisory and not mandatory by this court. The right of this court to so protect its own jurisdiction cannot be questioned. In *Davis v. Packard,* 8 Peters 312, 33 U. S. 197, a case involving a similar question, it was said: "It is not to be admitted, that the court whose judgment has been reversed or affirmed, can rejudge that reversal or affirmance; but it must be conceded, that the court of dernier resort in every state, decides upon its own jurisdiction, and upon the jurisdiction of all the inferior courts to which its appellate power extends."

The mandate of this court will therefore issue on order by this court without reference to the advisory directions contained in the mandate of the Supreme Court of the United States. So ordered.

YEAGER, J., dissenting.

I cannot see that any good purpose is to be served by an opinion on the issuance of a mandate but since one has been adopted by the majority challenging the jurisdiction of the United States Supreme Court to give the direction contained in its opinion a clarifying statement ought to be made.

At the outset I will say that I find no fault whatever with the proposition that the courts of last resort are peers in their respective fields. I find no fault with the following quotation in the majority opinion from *First Trust Co. v. Smith,* 134 Neb. 84, 277 N. W. 762: "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." If this were all that is involved the matter could be very readily disposed of, but there are other considerations which must be taken into account.

In the original opinion, after making disposition of the radio station as distinguished from the license from the Federal Communications Commission to operate it, the following appears: " * * * that the license to operate the station be returned and that lessee is directed to do all things necessary for that purpose; that generally everything be done to restore the parties to their original position prior to the entering into the leases; * * * ."

A supplemental opinion was adopted dealing, among other things, with the license to operate the radio station but this language of the first opinion was never withdrawn and I submit that its substance was never modified.

In the supplemental opinion appears the following: "We conclude at the outset that the power to license a radio station, or to transfer, assign or annul such a license, is within the exclusive jurisdiction of the Federal Communications Commission." Notwithstanding this conclusion the direction of the original opinion was permitted to remain.

It is true that the supplemental opinion in the following

language conceded that this court had no jurisdiction over the issuance of the license: "It is true that the Federal Communications Commission may refuse to approve the reissuance of a license to the Woodmen of the World Life Insurance Society." But nowhere therein was the mandate to the lessee with regard to the license withdrawn.

It was on the ground that the state court had invaded the federal jurisdiction by its direction with regard to the radio license that the United States Supreme Court accepted jurisdiction. In its opinion that court recognized the full and complete jurisdiction of this court over the entire subject matter except the radio license. Over the license it held that this court had no jurisdiction, and properly so.

Perhaps unnecessarily but wisely the effect of the opinion was to recognize the fact that unless the license could accompany a retransfer of the properties of the station the full purposes outlined in the opinion of this court could not be accomplished. To that end direction was given to this court to withhold its mandate a sufficient length of time to allow for action by the Federal Communications Commission on an application for transfer of the license.

To my mind, since this allowance of time ought in any event to be made either by withholding the mandate of this court or by the district court after issuance of mandate, it is not a matter of consequence whether we consider the direction of the opinion of the United States Supreme Court as mandatory, directory, or merely advisory. It appears to me that the majority opinion is but a volunteer discussion upon a subject whereon no opinion is required at the hands of this court and that by it no useful purpose is served.

ALBERT WITTHAUER, A MINOR, BY ESTHER WITTHAUER, HIS MOTHER, NATURAL GUARDIAN, AND NEXT FRIEND, APPELLEE, V. PAXTON-MITCHELL COMPANY, A CORPORATION, APPELLANT.
19 N. W. 2d 865

FILED OCTOBER 5, 1945. No. 31946.

1. **Motor Vehicles: MASTER AND SERVANT.** The presumption that an employee, driving his master's truck when an accident occurs, is acting within the scope of his employment disappears when the evidence shows that such employee was engaged on his own personal affairs, and the plaintiff is then required to show by evidence that the act of driving the truck was within the scope of the employment.
2. **Evidence: TRIAL.** A presumption is not evidence, and will not prevent a directed verdict when the evidence rebutting it is convincing and undisputed.
3. **Trial.** When the facts are such that reasonable minds can draw but one conclusion, it is the duty of the court to decide the question, and not require the jury to deliberate upon evidence from which they can reach but one possible conclusion.

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

Votava & McGroarty, for appellant.

John A. McKenzie and *Edward J. Dugan*, for appellee.

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

PAINE, J.

This is an appeal by the defendant Paxton-Mitchell Company from a verdict of $2,500, returned against the said company and Joe Gryva, the driver of its truck, for personal injuries sustained by Albert Witthauer, a boy six years of age, who was struck by said truck. The defendant Joe Gryva filed a motion for a new trial, but did not appeal to this court when such motion was overruled.

The principal assignment of error by the defendant appealing is that the court failed to sustain a motion for a di-

rected verdict at the close of plaintiff's evidence and again at the close of all the testimony.

Plaintiff claims that the truck driver, while on the business of his employer, negligently ran the truck into and injured plaintiff. The defendant alleges that the driver was on a personal mission of his own. The main issue is, therefore, whether the driver was acting under the authority of the owner of the truck at the time of the accident.

The evidence discloses that it was a 1938 Ford pick-up truck. It had a cab, and racks on the sides, and was used principally in making deliveries between defendant's foundry and machine shop, and also around town. A record was required to be made of each trip of this truck. This exhibit No. 7 gives a list of trips made, speedometer readings and mileage on each trip, as well as property transported, its weight, etc.

The driver made four recorded trips during the morning of March 23, 1944, which was the day of the accident. His testimony was that each morning by 11:30 he was always back at the Martha street plant, which was the foundry, where they have a cafeteria, and he always picked up cooked lunches at 11:30 a. m. and took them to the other plant for those employees who had ordered them, and delivered them at such machine shop at Twenty-first and Pacific streets, where they have no cafeteria. On the day in question he got back to the foundry at 11:40 a. m., where he was off for his lunch time from 12:00 to 12:30. He usually prepared and brought his own lunch, as he was a bachelor, but this morning he got up too late to prepare it, and so on this day he ran this company truck up to the Dairy Cafe at Twenty-sixth and Leavenworth to get his own lunch. A boy who went to Technical High School waited on him there.

After he got his lunch he drove slowly back at about 12:15 p. m., and at Twenty-third and Leavenworth streets there was a row of cars parked all along the street, and one large green tractor-trailer somewhat obstructed his vision of the crosswalk. The driver admits that he saw the boy

just a foot or two away from the truck, and that he applied his brakes, but the boy ran into his truck; that he heard a thud, stopped the truck, with its rear end on the crosswalk, got out and picked up the boy, whose leg was broken, and told another fellow to call an ambulance, which soon came and took the boy to the hospital.

There was no direct route that he could have taken on his last authorized trip which would involve his going to Twenty-third and Leavenworth, where the accident occurred.

Three or four employees who were in authority over him testified that the driver was not on any mission of his employer at the time of the accident, and there appears to be no evidence in opposition thereto.

This court has said in *Harrell v. People's City Mission Home,* 131 Neb. 138, 267 N. W. 344:

"To hold the owner of an automobile liable for an accident which occurred when his car was being driven by an employee, it must ordinarily be shown that the employee was, at the time, engaged in his employer's business, with the employer's knowledge and consent.

"The presumption that an employee, driving employer's automobile when accident occurs, is acting within his employment is rebutted, where the evidence shows employee was engaged on his personal affairs."

In a case in which an employee was driving a truck home to get his dinner at the time of the accident and then went on an errand of his own, we said: "The great weight of authority, however, is to the contrary, and the decisions of this court are in accord with those cases which hold that a presumption is not evidence and will not prevent a directed verdict when the evidence rebutting it is convincing and undisputed." *Ebers v. Whitmore,* 122 Neb. 653, 241 N. W. 126.

And, again, in *Rose v. Gisi,* 139 Neb. 593, 298 N. W. 333, it was said by this court: "When evidence to the contrary is adduced on this subject, the presumption disappears and plaintiff is then required to show by evidence that the act of driving the truck was within the scope of the employment."

This court held in *Fairmont Creamery Co. v. Thompson*, 139 Neb. 677, 298 N. W. 551: "In every case, before the evidence is submitted to the jury, there is a preliminary question for the court to decide, when properly raised, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the burden of proof is imposed." This holding was cited with approval in *Burchmore v. Byllesby & Co.*, 140 Neb. 603, 1 N. W. 2d 327.

When the facts are such that reasonable minds can draw but one conclusion, it is the duty of the court to decide the question, and not require the jury to deliberate upon evidence from which it can reach but one possible conclusion.

In our opinion, it was the duty of the trial court to have sustained the motion of the defendant Paxton-Mitchell Company for a directed verdict at the close of the testimony. The judgment as against the defendant appealing is reversed and the action as to it is ordered to be dismissed.

REVERSED AND DISMISSED.

WENKE, J., participating on briefs.

STATE EX REL. WALTER R. JOHNSON, APPELLANT, V. TAUTGES, RERAT & WELCH ET AL., APPELLEES.
20 N. W. 2d 232

FILED OCTOBER 5, 1945. No. 31953.

1. **Common Law.** The common law is not immutable, but flexible, and by its own principles adapts itself to varying conditions.
2. ———: **COURTS.** The courts have power to modify the common law, adopting such of its principles as are applicable and rejecting such others as are inapplicable.
3. **Attorney and Client: PROCESS.** A nonresident attorney who voluntarily, and in performance of his business as an attorney, comes into the state to conduct litigation on behalf of a client, is not privileged from service of summons.
4. **Partnership: PROCESS.** Where the members of a copartnership reside in another state and are not within this state, service of summons upon the firm, as a firm, cannot be made in a county where it has no place of business.

APPEAL from the district court for Douglas County: FRANK M. DINEEN, JUDGE. *Affirmed in part and in part reversed and remanded.*

Walter R. Johnson, Attorney General, H. T. White, H. Emerson Kokjer, and *John S. Samson,* for appellant.

M. L. Donovan, for appellees.

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

MESSMORE, J.

This is an appeal from the ruling of the district court on two special appearances, objecting to the jurisdiction of the court. The respondents prevailed when the special appearances were sustained. From this ruling, the relator appeals.

On May 8, 1944, the relator filed his petition and named therein, among others, Tauges, (correct name Tautges) Rerat & Welch, a copartnership. The petition alleged that the respondents, William A. Tautges, Eugene A. Rerat and Walter J. Welch are each practicing attorneys engaged in the practice of law, maintaining their offices in Minneapolis, Minnesota, under and by the partnership name of Tautges, Rerat & Welch, and in their individual persons and as such copartners are made respondents; that these three defendants engaged other defendants (which are named in the petition but are not parties to this suit) to solicit personal injury suits against railroad and transportation companies within this state, for the purpose of bringing suits against such companies without the state, in violation of sections 28-739 and 28-740, R. S. 1943; that the practice indulged in by the respondents is in violation of the laws of this state, detrimental to the general public welfare and morale of the people of this state, and tends to bring the administration of justice in this state into ridicule and disrepute; and prayed the issuance of an injunction.

On May 8, 1944, summons was issued and return made on the same day, showing service on Tautges, Rerat & Welch as a copartnership, by delivering to William A. Tautges,

one of the copartners who was in charge of such at the usual place of doing business of such copartnership in Douglas county, Nebraska, personally, in said county, a due and certified copy of the writ with all endorsements thereon. On the same day the writ discloses that a summons was served personally on William A. Tautges, by delivering a true and certified copy with all endorsements thereon, to him in Douglas county.

On June 12, 1944, special appearance of respondent designated as Tautges, Rerat & Welch, a copartnership, was filed, objecting to the jurisdiction of the court over the person of defendant, for the reason that the relator undertook to secure service of process upon this defendant in Douglas county, Nebraska, by delivering summons to William A. Tautges, as one of the copartners who was in charge of the office at the usual place of doing business of such copartnership in Douglas county, Nebraska, personally, in said county, whereas in truth and in fact, the said defendant did not at said time nor at any other time, maintain an office in Douglas county, Nebraska; that at the time of attempting service of summons upon said defendant by delivering a copy of summons to William A. Tautges, he was a resident and citizen of Minnesota and had come into the jurisdiction of the Nebraska court as an attorney at law for the sole and only purpose of representing a litigant in the trial of a lawsuit, and at the time of delivery of copy of summons to him, he was in the courtroom where the lawsuit was being tried and was actually engaged in the trial; that the defendant, as a copartnership, is immune from service of process.

On the same day a special appearance was filed in behalf of the defendant William A. Tautges, setting forth that the relator undertook to secure service of process upon such defendant individually, by causing to be delivered to him in the courtroom of Honorable James M. Fitzgerald, one of the judges of the district court, while the respondent was engaged in representing a litigant in the trial of a lawsuit, and at the time of the attempted service of summons upon the respondent he was a resident and citizen of Minnesota

and had come into the jurisdiction of the Nebraska court as an attorney, for the sole and only purpose as heretofore stated. For the reason given, it was claimed that the respondent was immune from service of process at the time.

An affidavit of the respondent, Tautges, discloses that he is a citizen of Minnesota, resident of the city of Minneapolis, and has maintained a law office in that place since March 15, 1907, and since January 1, 1944, has occupied a law office at 800 Foshay Tower in Minneapolis; that on May 8, 1944, there was pending in the district court for the fourth judicial district of Douglas county, Nebraska, an action in which he represented the plaintiff as an attorney; that he left Minneapolis, Minnesota, for Omaha, May 5, 1944, arriving at the latter city May 6, 1944, solely in his capacity as attorney for the plaintiff in a lawsuit to be tried in the district court for Douglas county at Omaha, and for the purpose of additional preparation for trial of the case. The trial concluded on May 15, 1944, and he departed from Omaha on the first available passenger train, May 16, 1944; that on May 8, 1944, at approximately 4:30 o'clock p. m., while he was in courtroom No. 3 in Douglas county, and after the adjournment of the court, and while still engaged in consultation with the plaintiff and his co-counsel, he was served with the summonses as heretofore set out. The affidavit further recites that Tautges, Rerat & Welch are not a copartnership, but there exists an office association under such name, and that no office was ever maintained as a place of business within the state of Nebraska.

A supplemental affidavit discloses that William A. Tautges was admitted and authorized to practice in the district court in Nebraska for the purpose of trial and proceedings in the case then before the court, in which he was counsel.

The relator contends that the trial court erred in sustaining the special appearance of William A. Tautges, and in holding that an attorney from another state, while in the state of Nebraska for the purpose of trying a case pending in this state, was immune and exempt from service of civil process. This question has not been previously determined by this court.

In approaching a solution of the question thus presented, our attention is directed by the respondent to section 49-101, R. S. 1943, as follows: "So much of the common law of England as is applicable and not inconsistent with the Constitution of the United States, with the organic law of this state, or with any law passed or to be passed by the Legislature of this state, is adopted and declared to be law within the State of Nebraska."

In determining the applicability of the foregoing statute to rules of common law and as they may be applied in this state, this court in *Kerner v. McDonald*, 60 Neb. 663, 84 N. W. 92, 83 Am. St. Rep. 550, said: "Many principles of law have changed with the passing of time, through the gradual change of thought on the part of society and the flux and change of social organization; many others have ceased because the reason which called them into existence has ceased, * * * ."

In the *City of Lincoln v. Ricketts*, 84 F. 2d 795, the court held: "Common law is not fixed and immutable like statute law, but is flexible and adapted to meet new or unexpected conditions." In the body of the opinion it is said: "It will be noted that the Supreme Court of Nebraska, in construing the statute of that state adopting the common law of England, has declared * * * that this common law is in force only so far as applicable to conditions and surroundings and not inconsistent with the Constitution of the United States, the Constitution of Nebraska, or legislative enactments, passed or to be passed." See *Farmers & Merchants Ins. Co. v. Jensen*, 58 Neb. 522, 78 N. W. 1054, 44 L. R. A. 861; *Bloomfield State Bank v. Miller*, 55 Neb. 243, 75 N. W. 569, 44 L. R. A. 387, 70 Am. St. Rep. 381.

The foregoing are in keeping with *Funk v. United States*, 290 U. S. 371, 54 S. Ct. 212, 93 A. L. R. 1136: "The common law is not immutable, but flexible, and by its own principles adapts itself to varying conditions." See 11 Am. Jur., sec. 2, p. 153.

The courts have the power to modify the common law, adopting such of its principles as are applicable and reject-

ing such others as are inapplicable. 11 Am. Jur. 162, sec. 7, note 18, and cases cited therein. See, also, Annotations, 56 A. L. R. 277, 86 A. L. R. 475.

It is apparent that under the foregoing authorities, that the adoption of the common law, as provided for by section 49-101, R. S. 1943, *supra*, does not imply that all of the common-law rules are strictly in force in this state, but are subject to the conditions and modifications as reflected in the authorities cited.

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

The adoption of the common law in the most general terms by any state would not admit of an unqualified application of all its rules without regard to local circumstances and the then present enlightened conception of reason and justice, for the common law is applicable only in so far as it is suited to the genius, spirit, and objects of its intentments affecting the society of the state.

It is apparent from section 49-101, R. S. 1943, *supra*, the legislature did not intend to petrify the rules of the common law as declared by judicial decisions at any one time or

period, and to set them in such inflexible form as to make them absolute rules of decision throughout all times. The theory of our adopted system is that the law consists, not in the actual rules enforced by the decisions of the courts, but consists only in the principles from which these rules flow.

Having in mind the foregoing, we turn to the subject matter—whether attorneys while attending court in jurisdictions other than those in which they reside are exempt from service of summons upon grounds of public policy, for the purpose of protecting courts from interruption and delay and for promotion of free and fair administration of justice, as in the case of the nonresident parties and witnesses, is a matter upon which there is much difference of judicial opinion. See 42 Am. Jur., sec. 141, p. 122.

This court, in *Chicago, B. & Q. R. Co. v. Davis,* 111 Neb. 737, 197 N. W. 599, stated that the rule exempting nonresident parties and witnesses from service of process while attending a trial in a state other than their residence is wellnigh universal. So, we are concerned here only as to whether the rule should be extended to include nonresident attorneys who are in the state under the circumstances heretofore related. Many courts extend to a nonresident attorney immunity from the service of civil process during the time in which he is going to, remaining at or returning from the place where his client's business is transacted, upon the ground that the administration of justice demands such exemption, even though resident attorneys have no such privilege or immunity. See *Durst v. Tautges, Wilder & McDonald,* 7th Cir., 44 F. 2d 507, 71 A. L. R. 1394-1399; *Hoffman v. Bay Circuit Judge,* 113 Mich. 109, 71 N. W. 480.

In *Central Trust Co. v. Milwaukee Street Ry. Co.,* 74 F. 442, it is said: "The ancient rule in England extended to practicing attorneys generally the privilege from arrest by the ordinary process of court, on the theory that they were 'always supposed to be there attending,' and that the 'business of the court or their client's causes would suffer by their being drawn into any other than that in which their personal attendance is required.' 3 Bl. Comm. 289; Bac.

Abr. tit. 'Privilege.' * * * But, out of the common-law rule, it has become firmly established in the courts of the Union that 'all persons who have any relation to a cause which calls for their attendance in court, and who attend in the course of that cause, though not compelled by process, are, for the sake of public justice, protected from arrest in coming to, attending upon, and returning from the court. Tidd, Prac. 196; 1 Greenl. Ev. secs. 316-318, and cases cited.' In re Healey, 53 Vt. 694, 38 Am. Rep. 713, and notes, page 717. Necessarily, if not primarily, the immunity extends to the attorney representing the cause of his client before the court. In that view it is stated in Brooks v. Patterson, 2 Johns. Cas. 102, 'The object is that attorneys may not be drawn into other courts, or to other business, to the injury of the suitors,' but that 'the privilege is that of the court, for the sake of public justice, and is not intended as an accommodation to the individual.' And in the leading case of Parker v. Hotchkiss, 1 Wall. Jr. 269, * * * it is said, in the opinion * * * that the privilege is that of the court, and the immunity of the parties is incidental; that it arises 'in the necessities of the judicial administration, which could be often embarrassed, and sometimes interrupted,' if suitors and officers were not thus protected; * * * ."

In *Long v. Ansell,* 293 U. S. 76, 55 S. Ct. 21, speaking of common-law rule as heretofore set out: "That rule of practice is founded upon the needs of the court, not upon the convenience or preference of the individuals concerned."

In *Lamb v. Schmitt,* 285 U. S. 222, 52 S. Ct. 317, it is said: "The general rule that witnesses, suitors, and their attorneys, while in attendance in connection with the conduct of one suit are immune from service of process in another, is founded, not upon the convenience of the individuals, but of the court itself. *Page Co. v. MacDonald,* 261 U. S. 446; *Stewart v. Ramsay,* 242 U. S. 128, 130; *Hale v. Wharton,* 73 Fed. 739; *Diamond v. Earle,* 217 Mass. 499, 501; 105 N. E. 363; *Parker v. Marco,* 136 N. Y. 585; 32 N. E. 989. As commonly stated and applied, it proceeds upon the ground that the due administration of justice requires that a court

shall not permit interference with the progress of a cause pending before it, by the service of process in other suits, which would prevent, or the fear of which might tend to discourage, the voluntary attendance of those whose presence is necessary or convenient to the judicial administration in the pending litigation. See *Bridges v. Sheldon*, 7 Fed. 17, * * * ." See, also, *Brooks v. State ex rel. Richards*, 3 Boyce (Del.) 1, 79 Atl. 790; *Netograph Mfg. Co. v. Scrugham*, 197 N. Y. 377, 90 N. E. 962; *Read v. Neff*, 207 F. 890; *Williams v. Hatcher*, 95 S. C. 49, 78 S. E. 615; *Kansas Wheat Growers Assn. v. Moffat*, 129 Kan. 537, 283 Pac. 634.

The foregoing cases are in accord with the respondent's contention that the common law exempted nonresident attorneys from civil process for the reasons given therein.

From a case analysis of all the decisions respecting the question here involved, we believe the most substantial and logical holding would be that the effect of service of summons upon a nonresident attorney does not operate like an arrest, to deprive the client of the attorney's services, or tend to interfere with the dignity and authority of the court. Neither can we conclude that the service of process such as a summons on a nonresident attorney would delay or obstruct the orderly procedure in the administration of justice.

" * * * the mere service of summons upon an attorney while in attendance upon the court cannot be said to so embarrass the attorney and distract his attention from the cause of his client as to deprive the latter of the benefit of counsel, and thus deny him his legal right." 42 Am. Jur., sec. 141, p. 122. See *Paul v. Stuckey*, 126 Ark. 389, 189 S. W. 676.

In the case of *Chicago, B. & Q. Ry. Co. v. Davis, supra*, this court refused to extend the exemption and immunity to include nonresident attorneys where the nonresident attorney comes into the state for the purpose of taking depositions to be used in the trial of an action pending in another state, holding that under such circumstances, service of summons may be had upon the nonresident attorney, citing

Nelson v. McNulty, 135 Minn. 317, 160 N. W. 795, to like effect, and *Berlet v. Weary*, 67 Neb. 75, 93 N. W. 238, wherein a member of the legislature claimed immunity of the service of process while at the seat of the government. The court held: " * * * the law of this state makes no distinction as to the service of summons between members of the legislature and other persons, and that a member of the legislature in a proper case may be served with summons while at the seat of government for the purpose of attending the legislative session."

The respondent contends that *Chicago, B. & Q. Ry. Co. v. Davis, supra*, inferred that if a nonresident attorney came into this state to try a case pending in the courts of this state, he would be exempt from service of civil process. With this contention we are not in accord. *Chicago, B. & Q. Ry. Co. v. Davis, supra*, says: "Other cases supporting the view that a nonresident attorney is not exempt from civil process are: *Greenleaf v. Peoples Bank*, 133 N. Car. 292, 63 L. R. A. 499; *Paul v. Stuckey*, 126 Ark. 389, L. R. A. 1917B, 888."

In *Greenleaf v. People's Bank*, 133 N. C. 292, in the concurring opinion of Clark, C. J., citing from Judge Cooley in a note to his work on Constitutional Limitations (5th ed.) p. 161, it is said: " 'Exemption from arrest is not violated by the service of citation or declaration in civil cases.' Besides, there was at common law no exemption of lawyers from service of process other than *arrest*, and the reason for the latter was that it would be an injury to clients whose cause had been prepared for trial by such counsel to suddenly deprive them of his services, but service of a summons does not have that effect * * * .

"In England, Blackstone says (3 Bl. Com., 289) that lawyers could not be *arrested* on civil process while in attendance upon court, but could be served with a bill, without arrest, which was equivalent to service of summons."

In the Annotation to 71 A. L. R., p. 1402, a summary of the holding in *Greenleaf v. People's Bank, supra*, is made in the following language: " * * * there was no statute law

exempting attorneys from service of process, and that there was nothing in the common law affording them such protection; that the common-law immunity of such persons from arrest on civil process gave no reason for a privilege as to civil process not in arrest, since the privilege of exemption from arrest was not so much for the benefit of the lawyer as it was for that of the client, and for the court to whom the attorney gave aid in the due administration of justice."

In the case of *Paul v. Stuckey, supra,* the court refused to vacate a summons served on a nonresident attorney engaged in litigation. The court recognized the public policy necessitating the exemption of parties and witnesses when attending court in another county, but said: "We cannot see that the mere service of summons upon an attorney while in attendance upon a court in his professional capacity would in any way infringe upon the dignity or invade the prerogatives of the court. It could not interrupt the orderly progress of trials nor tend in the least to hamper and embarrass the courts in the administration of justice. Therefore, as we view it, the public good would not be adversely affected by such procedure, and the rule of public policy applicable to suitors does not obtain. * * *

"The effect of the service of summons upon a nonresident attorney does not operate, like an arrest, to deprive the client of the services of his attorney, nor does it tend to interfere with the dignity and authority of the court, and thus to delay and obstruct its orderly procedure in the administration of justice. Nor can it be said that the mere service of a summons upon an attorney, while in attendance upon the court could have the effect to so embarrass the attorney and distract his attention from the cause of his client as to virtually deprive the latter of the benefit of counsel and thus deny him his legal right.

"When an attorney goes into a jurisdiction other than that of his residence to represent a client before a court in a cause there pending he does so by virtue of private contract and of his own motion. His case is not like that of one who has to attend upon the court as a suitor, a juror, or a

witness. He is not under the protection of the court because he is in attendance thereon in obedience to its process or because he has entered its portals as a suitor."

To hold that nonresident attorneys are immune from the service of summons, or other process, not in arrest, while they are voluntarily in attendance upon the court upon their private business, would be to confer upon them a special privilege not enjoyed by resident attorneys. See *Kutner v. Hodnett,* 59 Misc. 21, 109 N. Y. Supp. 1068.

No rule of public policy in the administration of justice is infringed by denying the privilege to nonresident attorneys, of being exempt and immune from service of summons in this state, while in attendance upon the courts of this state, for their clients. To establish such a principle would be discriminatory as against those engaged in other professions or business because they might come within the boundaries of this state. The doctrine of equal rights to all and special privileges to none finds expression not only in the Constitution of the United States, but in the organic law of every state in the Union. The whole fabric of government rests upon the principle of equality and liberty.

"Any decision which separates the bar from the people, in sympathy or identity of privileges, would prove one of the greatest curses which could befall the profession. From the day when it is made, the bar itself will receive an impulse downward in the eyes of the community. * * * so extensive a question should be determined upon the broad foundation, that the general justice of the country should alike prevade all ranks and professions." *Elam v. Lewis,* 19 Ga. 608.

We conclude that the special appearance of Tautges, wherein he claims exemption and immunity personally from the service of summons in this state as a nonresident attorney, should be overruled and the trial court should enter order accordingly.

Relator next contends the court erred in holding that the service of process upon William A. Tautges while in Nebraska for the purpose of trying a suit pending in the courts

of this state, was not sufficient service upon the association of Tautges, Rerat & Welch, of which he was a member.

Section 25-314, R. S. 1943, provides as follows: "Process against any such company or firm shall be served by a copy left at its usual place of doing business within the county with one of the members of such company or firm or with a clerk or general agent thereof. * * * ."

The relator introduced several exhibits in an endeavor to show a copartnership. If these exhibits show anything, they disclose that these attorneys maintained their offices for the practice of law in Minnesota, and also as evidenced by a letter with a letterhead designating the location of the law offices of Tautges, Rerat & Welch as the 8th floor of the Foshay Tower, Minneapolis 2, Minnesota.

The relator pleads in his petition that the three attorneys engaged in the profession of law, maintaining their offices in the city of Minneapolis, state of Minnesota, under and by the partnership name of Tautges, Rerat & Welch, and in their individual persons and as such copartners, are made respondents herein.

"Where the members of a copartnership reside in another state and are not within this state, service of summons upon the firm, as a firm, cannot be made in a county where it has no usual place of doing business." *Stelling v. Peddicord*, 78 Neb. 779, 111 N. W. 793.

"Where the statutes so provide, process in an action against a partnership may be served by leaving a copy at its usual place of business with one of its members or with its clerk or general agent or other specified person, but to justify such procedure plaintiff must bring himself within the terms of the statute." 47 C. J., sec. 497, p. 973.

Section 25-1244, R. S. 1943, provides: "An affidavit may be used * * * to prove the service of summons, * * * ." The affidavits filed in the instant case, and the exhibits, disclose that the respondents, Tautges, Rerat & Welch, were not engaged in the practice of law as copartners in the state of Nebraska, and that such respondents did not have a usual place of doing business or maintain an office therefor in the state.

The sheriff's return is not conclusive of the fact, and respondents may show the true fact.

The trial judge properly sustained the special appearance of Tautges, Rerat & Welch objecting to the jurisdiction of the court in that service was not obtained upon this respondent as a copartnership.

For the reasons given in this opinion, the judgment of the trial court is affirmed as to the dismissal of the action as to the association of Tautges, Rerat & Welch, and otherwise reversed, and the cause is remanded with directions to enter order overruling the special appearance of William A. Tautges.

AFFIRMED IN PART AND REVERSED IN PART.

CARTER and CHAPPELL, JJ., concurring.

We agree fully with the finding of facts contained in the opinion and the law announced applicable thereto. The opinion, however, should not be construed as in any manner changing the common law method of obtaining service of process on a partnership by proper service upon all its members. Neither does it change the rule announced in *Winters v. Means*, 25 Neb. 241, 41 N. W. 157, to the effect that service of process upon a partnership will be allowed where all members of the partnership within the state are properly served, whether or not it has a place of business within the state.

IN RE ESTATE OF SOPHIE JELINEK.
MARY HAZUKA, APPELLANT, V. ESTATE OF SOPHIE JELINEK ET AL., APPELLEES.

20 N. W. 2d 325

FILED OCTOBER 19, 1945. No. 31923.

1. **Appeal and Error**: EXECUTORS AND ADMINISTRATORS. In a probate proceeding five separate claims were filed, heard and disallowed. All claimants took the necessary steps to perfect an appeal. The county court included the entire proceedings in one transcript, covered by one certificate, which was filed in

the district court. It is held that the district court acquired jurisdiction to hear and determine the claim involved in this action.

2. **Evidence.** Under the provisions of section 25-1202, R. S. 1943, a person is not incompetent to testify by reason of having a direct legal interest in the result, unless it clearly appears that he will gain or lose by the direct legal operation and effect of the judgment or final order that may be rendered in the proceeding in which the testimony is offered, or that the judgment that may be pronounced in that proceeding would be legal evidence for or against the witness in some other action.

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

J. J. Krajicek and *S. L. Winters*, for appellant.

Fitzgerald, Tesar & Welch, for appellees.

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

SIMMONS, C. J.

Plaintiff filed a claim for money loaned against the estate of Sophie Jelinek. Hearing was had in the county court and the claim disallowed. Plaintiff appealed to the district court. Defendants, in the district court, moved to dismiss the appeal on the ground that the transcript was insufficient to confer jurisdiction. The trial court overruled the motion. Issues were made in the district court and trial had. At the close of plaintiff's case in chief, on motion of the defendants, the trial court dismissed the action. Plaintiff appeals and defendants cross-appeal. We sustain the judgment of the trial court on the matter of jurisdiction and reverse its judgment of dismissal of the cause.

The transcript of the county court, which was filed in the district court, shows the following proceedings in that court.

A petition was filed for the appointment of an administrator of the estate of Sophie Jelinek, deceased. Letters of administration issued, and the administration of the estate proceeded. Mary Hazuka, hereinafter called the plaintiff, filed a claim for money loaned to the deceased in the amount

of $560.82. The administratrix filed objections to the allowance of the claim. Hearing was had and the claim was disallowed. Rose Tesnohlidek, a sister of plaintiff, James Jelinek and Joseph Jelinek, brothers of the plaintiff, each filed separate claims, similar as to form and substance. Separate similar objections were filed by the defendant administratrix, and separate and similar orders entered. There was also a claim for labor filed by John Tesnohlidek, husband of Rose, to which objection was made and the claim disallowed. Each of the parties gave separate appeal bonds.

The county judge combined the proceedings in one transcript, to which one certificate was attached. It was filed in the district court under the title, "In the Matter of the Estate of Sophie Jelinek, Deceased."

Thereafter, the defendants in the district court filed a motion to dismiss the appeal of the claim of the plaintiff, for the reason that she had failed to confer jurisdiction upon the court; that the court was without jurisdiction to hear the matter, and, in the alternative, to dismiss the claim for the reason that plaintiff had failed to file a petition as required by statute. Separate similar motions were filed as against each of the other claims. The trial court by one order overruled these motions.

Defendant by cross-appeal contends that the trial court erred in overruling the motion to dismiss the appeal of plaintiff, and urging that it was necessary for each claimant to file a separate transcript with reference to each claim in order to confer jurisdiction upon the district court.

Section 30-1601, R. S. 1943, provides for an appeal from any final order, judgment, or decree of the county court. Section 30-1605, *supra,* provides that when such appeal is taken, the county court shall, on payment of his fees, transmit to the clerk of the district court a certified transcript of the record and proceedings relative to the matter appealed from. Section 30-1606, *supra,* provides that upon the filing of such transcript in the district court, that court shall be possessed of the action, and shall proceed to hear, try and determine the same, in like manner as upon appeals brought

upon the judgment of the same court in civil actions. Other procedural steps are not in issue. Section 30-1608, *supra*, provides that if a claimant, appealing on account of disallowance of his claim, shall fail to enter such appeal in the district court as required, the district court may dismiss the appeal.

The five claims included in the transcript were treated by the parties as separate distinct claims in the county court and in the district court. It is not contended that the transcript of the county court failed to set out in any particular any of its record and proceedings relative to the claim of this plaintiff. The inclusion of other matters not necessary to her appeal did not prevent the vesting of jurisdiction in the district court and did not require that court to dismiss the appeal. We find the cross-appeal to be without merit.

In her petition in the district court plaintiff alleged that Joseph Jelinek died May 18, 1939, leaving surviving his widow Sophie, and four children, Joseph and James Jelinek, Mary Hazuka and Rose Tesnohlidek; that his estate was probated and a residue of personal estate, amounting to $2,243.28 was equally divided among the four children; that on January 16, 1940, this plaintiff loaned to Sophie Jelinek the sum of $560.82 (the one-fourth of the residue) that under an oral agreement the latter agreed to repay to the plaintiff; that Sophie Jelinek died January 27, 1943; and that the payment was not made. She prayed judgment for that amount.

Defendant estate and administratrix answered admitting the death of Joseph and Sophie Jelinek and the survivorship of the four children of Joseph. It further was alleged that Joseph, by his will which was probated, devised real estate to his widow and the residue to his four children; that an agreement was entered into between the widow, Sophie Jelinek, and the plaintiff, whereby the widow agreed to renounce her claim for a widow's allowance, homestead rights, and to take by statute if plaintiff would make provision for her support; and that pursuant to said arrangement plaintiff voluntarily gave said sum of money to Sophie Jelinek as

a gift and not as a loan. Payment also was pleaded. The reply was a denial.

We review the evidence in the light of the rule often stated by this court that "A motion for a directed verdict must, for the purpose of a decision thereon, be treated as an admission of the truth of all material and relevant evidence submitted on behalf of the party against whom the motion is directed, and said party is entitled to have every controverted fact resolved in his favor, and to have the benefit of every inference that can reasonably be deduced from the facts in evidence." *Kline v. Metcalfe Construction Co.*, *ante*, p. 389, 19 N. W. 2d 693.

Plaintiff contends that she offered competent and sufficient evidence to sustain the following factual situation.

The home property was devised by the father of plaintiff to the deceased, who was the stepmother of plaintiff. It consisted of a large house and a lot. The stepmother did not desire to live there alone. She went to live with the plaintiff. There was a family meeting one night in July, 1939, at which were present the four children of Joseph Jelinek, a son-in-law and a daughter-in-law, and the stepmother. The stepmother proposed that the children loan her the residue of the estate so that she could build a small house upon the rear of the property and there have a home. The four children agreed that each would loan his share to her for that purpose, and she agreed to repay them. When the estate was closed, the residuary share of each amounted to $560.82. Checks were made out for that amount to each of the children. Plaintiff endorsed her check and it was delivered to the stepmother, who cashed it and received the money. The claims of the other sister and two brothers are based upon similar oral agreements had with each and similar dispositions of their individual shares of the residue.

Plaintiff to sustain her position offered her brother James as a witness, it being admitted that he had a similar claim pending against the estate. He was asked to repeat the conversation had at the family conference. Objection was made that he was an incompetent witness. The objection

was based upon section 25-1202, R. S. 1943. He was permitted to testify, subject to a motion to strike. He testified as to a conversation between his sister, the plaintiff, and the stepmother. He stated that the stepmother asked for the loan to build the home; that plaintiff told her stepmother the children would lend her the money to build the house; that she was willing to lend her share; that the children talked it over and agreed to loan her the residue of the estate; and that the plaintiff and the others endorsed their individual checks for the residue and they were delivered to the stepmother. The trial court refused to permit the witness to testify as to what the stepmother said with reference to how or when she would pay the money back, and denied an offer to prove by the witness that she said she would pay it back.

The defendants then moved to strike the testimony of the witness for the reason that it was "within the limitation of the dead man's statute." The court reserved a ruling at the time.

Plaintiff next offered the testimony of Leo Hazuka, her husband. Over objections of the defendants, he was permitted to testify that the stepmother said she would like to build a cottage on the rear of her property and would do so if the children would lend her the money; that they talked it over and agreed to do so; that the plaintiff agreed to lend her the money out of the residue of the estate; that the stepmother said, "I will pay you back"; and that later on the stepmother expressed her appreciation of the loan from the plaintiff.

Plaintiff then offered her sister, Rose Tesnohlidek, as a witness. She likewise had a claim pending against the estate based on the same set of facts. Objection was made by the defendants to her testimony as "incompetent under the dead man's statute." The objection was overruled. She testified as to the family conversations that plaintiff decided to lend the stepmother $560.82 out of the residue; that they all agreed to do the same thing and loaned the money without any note because the stepmother promised to "remem-

ber us in her will"; and that the stepmother repeatedly said "she would take care of us after her death" and "would see that we got the money back."

At the close of plaintiff's case in chief, defendants moved for a directed verdict. The motion in effect was that the plaintiff had not offered any competent evidence that she had made a loan to the stepmother and had in fact made a gift of the money to her, and had failed to sustain the burden of proof. The trial court then struck the testimony of the witness, James Jelinek, on the ground that his testimony was a conversation with a deceased person by one interested in the matter; that the loan was of one fund in which each of the children had a separate interest; and that the several claimants were incompetent to testify. The court then sustained the motion to dismiss the case and entered an order doing so.

Plaintiff assigns as error the order of the court striking the testimony of James Jelinek and the order of dismissal. In these rulings we are of the opinion that the trial court erred.

So far as applicable here, section 25-1202, R. S. 1943, is as follows: "No person having a direct legal interest in the result of any civil action or proceeding, when the adverse party is the representative of a deceased person, shall be permitted to testify to any transaction or conversation had between the deceased person and the witness, * * * ."

The question here presented is: Do the witnesses whose evidence has been reviewed have a direct legal interest in the result of this litigation. In *Sorensen v. Sorensen*, 56 Neb. 729, 77 N. W. 68, a similar question was presented. It there was pointed out that by the provisions of the statute (now section 25-1201, R. S. 1943), except as therein stated, every person is a competent witness in any case, civil or criminal; that the reasons for disqualifying a witness must be found in express provisions of the law; and that a witness is not to be disqualified by a strained or strict construction of a statute. It there was held that to render the testimony incompetent it is not enough that the witness be interested in

the result, but such interest must be a right or an obligation recognized by law, and such as the final judgment in the proceeding would confirm or deny to the witness, or such as would enable the judgment to be used in another action in support of or against the alleged right or interest of the witness. It further was held: "The true test is, as it was at common law, will the witness gain or lose by the direct legal operation and effect of the judgment or final order rendered in the proceeding in which the testimony is offered, or will the judgment pronounced in that proceeding be legal evidence for or against the witness in some other action?" See, also, *Tecumseh National Bank v. McGee*, 61 Neb. 709, 85 N. W. 949; 70 C. J., sec. 262, p. 195; sec. 319, p. 252, and sec. 321, p. 254.

Tested by the above rule, it is quite apparent that the witnesses, whose testimony has been reviewed, were competent and that the trial court erred in striking the testimony of James Jelinek and in holding the testimony of the others to be incompetent to establish plaintiff's cause.

Each case, of course, rests upon its own set of facts, and for that reason an exhaustive review of our many decisions applying this statute will not be made. The competency of the witnesses and their testimony is too clear to require it. We think the conclusion reached in *Oft v. Ohrt*, 128 Neb. 848, 260 N. W. 571, definitely establishes the competency as witnesses of James Jelinek, the brother, and Rose Tesnohlidek, the sister. See, also, 145 A. L. R. 568.

To sustain the trial court, defendants rely principally upon the following language in *Anderson v. Estate of Akins*, 99 Neb. 630, 157 N. W. 334: "If the witness was jointly interested with the plaintiff in the claim that was being prosecuted, or if the two claims were so dependent upon the same facts as to amount to a joint interest in both, the objection to her testimony might be substantial, * * * ." This decision does not support the defendants' position, and that for two reasons. The facts as testified to by the witnesses do not bring this case within that language. Here the wit-

nesses were not jointly interested in the claim. Admittedly the claims were dependent, in part, upon the same facts but not so as to amount to a joint interest in both. It also is patent, from a reading of the opinion, that this court there posed a proposition which "might be substantial" but did not decide it because it was not presented.

Defendants further argue that the witness, James Jelinek, was incompetent because he was liable for costs and this court has held that such a liability is a direct legal interest, citing *Ransom & Co. v. Schmela*, 13 Neb. 73, 12 N. W. 926, and *Smith v. Perry*, 52 Neb. 738, 73 N. W. 282. This contention rests upon the fact that the instant claim, together with the claims of the witness and others, was included in one transcript and docketed in the district court under one title. However, it appears that during the progress of this litigation the trial court on motion of the claimants found that the cases should be separated and redocketed, and authorized that to be done. Obviously, it was done. Each party then has a liability for the costs in his own case. It does not appear that the witness had any liability for the costs in the instant case.

Defendants do not here contend that the witness, Leo Hazuka, husband of the plaintiff, is an incompetent witness, but rather seem to contend that his testimony becomes of no value because of the variance between it and that of the witness, Rose Tesnohlidek. The testimony of the latter witness was competent to be considered in support of plaintiff's claim of a promise to repay. See *Anderson v. Estate of Akins, supra; In re Estate of Skade*, 135 Neb. 712, 283 N. W. 851; *In re Estate of Baker*, 144 Neb. 797, 14 N. W. 2d 585.

The trial court erred in striking the testimony of James Jelinek, in refusing the offer of his evidence herein referred to, and in failing to consider the testimony of Rose Tesnohlidek and Leo Hazuka as competent to support plaintiff's cause. The evidence was competent and sufficient to take the issue to the jury.

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

REVERSED.

WENKE, J., participating on briefs.

JUSTENA METSCHKE, APPELLANT, V. AUGUST METSCHKE, APPELLEE.

20 N. W. 2d 238

FILED OCTOBER 19, 1945. No. 31962.

Divorce. Upon granting an absolute divorce, the court may divide the property, both real and personal, between the parties as the demands of justice and equity may require.

APPEAL from the district court for Dodge County: FREDERICK L. SPEAR, JUDGE. *Affirmed as modified. Appellant allowed $350 attorney fee for services in this court.*

William H. Lamme, for appellant.

E. L. Mahlin, for appellee.

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

PAINE, J.

This is an appeal by the plaintiff from a decree of divorce granted to her. The trial court found that the value of the property belonging to the parties was over $25,000, and awarded her alimony of $8,000, payable semiannually at the rate of $300, and interest at 3 per cent on the balance. The plaintiff was allowed attorney's fees of $350.

The assignments of error charge that the decree is contrary to the evidence and to the law. There is no question whatever that the plaintiff was entitled to the absolute decree of divorce which she received. The appeal is on the ground of the insufficiency of the award of alimony to the wife, as well as to its being doled out in many small payments over a long period of time.

The parties were married in 1904, the issue of the marriage being three children. The daughter became a schoolteacher, and died in 1929. One son, Walter, left home about 12 years ago to attend universities at Lincoln, Nebraska, and Ames, Iowa, and is married and self-supporting. The second son, Alfred, lived at home for two years after he was married, and then began farming on land which his parents deeded to him, subject to a $4,000 outstanding mortgage which he assumed.

An examination of the award of alimony discloses that, if the defendant pays it out regularly in the semiannual payments of $300, it will require more than 13 years to complete these payments. The plaintiff at the time of trial was 58 years of age and had an expectancy of 14 or 15 years, while the defendant, being 66 years of age, had an expectancy of between 10 and 11 years; in other words, if he does not live out his expectancy he will not have completed the alimony payments. This might interfere with the sale of the property, and is unsatisfactory in this case for a number of reasons.

The trial court went out and examined the land and the personal property and decided that the livestock, machinery and grain was of the value of $2,504, and found that there was cash or credit on hand or in bank in the amount of $850.23, making the total value of the personal property $3,354.23. The court estimated the value of the 200 acres of land at $27,000, which gave the total assets of the parties at the time of trial a value of $30,354.23. There was a note due to the Farmers State Bank of Dodge of $1,995, and a mortgage on the real estate of $2,700, making total debts of $4,695, and leaving the net worth of the parties at $25,659.23. This was in addition to a 1940 Ford car, six head of cattle, and household goods owned by plaintiff.

We believe that it is unnecessary to trace in this opinion the marital difficulties and the financial ups and downs of these frugal, hard-working people. The plaintiff undoubtedly did her full share of work in the field and in the home. The defendant was doubtless a hard-working man, and if it

had not been for the many drouth years, when the crops failed, they would have much more to show for their industry and frugality. It is claimed on the part of the plaintiff that, while she had a prolonged sickness and there were crop failures, he squandered and lost in speculations $6,000 to $8,000, but since that time he has settled down and no complaint of that kind is made against his conduct of late.

When the parties were married in 1904 they began farming land which the defendant's father provided them, and they paid the taxes only, and no rent, and later it was given to the defendant, and thereafter several thousand dollars was received by the defendant from his father and $2,000 from his father's estate. On the other hand, by the unfortunate investments made by the plaintiff's brothers she received nothing from the estates of her parents. Under such a state of facts it becomes most difficult to determine exactly how much of the assets were accumulated by their joint efforts.

In some divorce cases the relative earning capacities of the parties is a legitimate subject of inquiry, but in the case at bar, where the parties have always lived on a farm and each have done their full part in raising and selling crops, cattle, hogs, poultry, milk and other products, all of such income is clearly the result of their joint efforts.

In considering whether this court may give a portion of the real estate of these elderly people to the wife, we realize that in the opinion on rehearing in *Cizek v. Cizek*, 69 Neb. 800, 99 N. W. 28, it was said that "the district court has not jurisdiction to award real estate of the husband to the wife in fee as alimony, * * * ." However, since this opinion was adopted in 1904, our statute in 1907, as found in section 42-321, R. S. 1943, made it legal to make such an award in express terms. Since that time an award to the wife of land of the husband has been approved in *Bigelow v. Bigelow*, 131 Neb. 201, 267 N. W. 409, in which case many citations are given.

In the case of *Bartunek v. Bartunek*, 109 Neb. 437, 191 N. W. 671, this court charged specific debts of the husband

against real estate of the wife. And in *Johnsen v. Johnsen*, 144 Neb. 208, 12 N. W. 2d 837, this court said: " 'Upon the granting of an absolute divorce, the trial court may assign the property, both real and personal, acquired during the marriage by the joint efforts of the parties, between them as the demands of equity may require.' Rules of guidance for justly and equitably fixing the amount of alimony to be awarded have been established in *Felton v. Felton, supra; Phillips v. Phillips*, 135 Neb. 313, 281 N. W. 22; and *Hild v. Hild*, 135 Neb. 896, 284 N. W. 730."

In considering small payments of alimony extending over many years, there are cases in which this may be a proper solution for the payment of alimony, but "Generally, we do not approve of allowing alimony in the form of an annuity, or requiring the husband to pay a fixed sum each month during the life of the other party, or for an indefinite period of time." *Dunlap v. Dunlap*, 145 Neb. 735, 18 N. W. 2d 51. See, also, *Martin v. Martin*, 145 Neb. 655, 17 N. W. 2d 625.

In the case at bar, we believe that the decree providing for a definite amount of alimony, but in payments continuing long past the natural expectancy of life of the one who is to provide such payments, is not to be approved, considering the ages of the parties and many other facts involved in this case.

We find that the 80 acres lying in the west half of the northwest quarter of section 26 should be awarded to the plaintiff. All of the defendant's witnesses placed the value of this 80 acres at $6,800 or less, while the plaintiff's witnesses placed its value at over $8,000. We are inclined to fix the value of this 80 acres at $7,200, which is the value placed on it by the defendant himself. In addition to this land, we award to plaintiff the sum of $2,000, payable at the rate of $500 a year, with 4 per cent interest on the unpaid portion, such sum to be a lien on the 120 acres of well improved land given by the decree to the defendant, and with this modification the decree is in all other respects affirmed. An allowance of $350 to plaintiff's attorney for his services in this court shall be taxed as part of the costs.

AFFIRMED AS MODIFIED.

The following opinion on motion for rehearing was filed November 23, 1945: *Former opinion modified and motion for rehearing denied.*

PAINE, J.

The original opinion in this case will be found, *ante* p. 461, 20 N. W. 2d 238, and to that opinion this is supplemental.

There is complaint in the motion and brief for rehearing that the award of alimony is indefinite and uncertain.

The original decree in the lower court gave the plaintiff $8,000, payable in $300 semiannual payments. That award was set aside by this court, and in place thereof the plaintiff was awarded the 80-acre tract of land described in the pleadings and lying in the west half (W½) of the northwest quarter (NW¼) of section 26, and the sum of $2,000, payable at the rate of $500 a year. The first payment of $500 shall be due and payable when judgment is entered on our mandate, and the others annually thereafter on the same date. All of said amounts are to draw interest at four per cent annually from the date of the entry of the original decree of divorce by the lower court until the same are paid, and are to be a lien on the 120-acre tract given to the defendant. We also allowed a fee of $350 to plaintiff's attorney for his services in this court, to be taxed as part of the costs.

The award of specific items of personal property, including the sum of $144.80 awarded plaintiff, as made by the trial court, together with all other provisions of the decree of the lower court not specifically modified, is affirmed. The motion for a rehearing is hereby denied.

AFFIRMED AS MODIFIED.

RAY ANDERSON, APPELLANT, V. NEBRASKA DEFENSE CORPORATION, APPELLEE.
20 N. W. 2d 322

FILED OCTOBER 19, 1945. No. 31933.

1. **Trial.** An assignment of error in a motion for a new trial to the effect that the trial court erred in giving a group of instructions does not require a consideration of such assignment further than to ascertain that any one of the instructions was properly given.
2. ———. An assignment of error in a motion for a new trial to the effect that the trial court erred in refusing to give a group of tendered instructions does not require a consideration of such assignment further than to ascertain that any one of the tendered instructions was properly refused.
3. **Evidence.** A written statement made by a party out of court and contradictory of a claim made in an action is admissible in evidence in the action as an admission against interest, for the purpose of impeachment, or for the purpose of testing the credibility of such party as a witness.

APPEAL from the district court for Douglas County: THOMAS E. DUNBAR, JUDGE. *Affirmed.*

Walter L. Cropper, Lloyd Crocker, and *Carl T. Self,* for appellant.

Joseph T. Votava and *Bert E. Church,* for appellee.

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

YEAGER, J.

This is an action by Ray Anderson, plaintiff and appellant, to recover wages, overtime compensation, liquidated damages, and attorney's fees claimed to be due and owing by virtue of the provisions of certain of the laws enacted by the United States Congress known as the Fair Labor Standards Act of 1938, 29 U. S. C. A., secs. 201 to 219, inclusive. The case was tried to a jury and a verdict was returned in favor of defendant. Judgment was entered on the verdict. Motion for new trial was filed by plaintiff. This motion was overruled. From the judgment and the ruling on the motion for new trial plaintiff has appealed.

The plaintiff by his petition set forth in substance that from December 1942 to May 25, 1943, he was employed by the defendant in the production of goods for commerce and that in his employment he was a manual worker and not an executive and that during that period he worked overtime for which defendant had not paid; that the amount due for overtime was $816.83 and that agreeable to the terms of the Fair Labor Standards Act of 1938 he was entitled, in addition thereto, to a like sum of $816.83 or a total of $1,633.66 and an attorney's fee.

The defendant by answer to the petition set forth three defenses. The first was that the plaintiff was not engaged in commerce within the meaning of the Fair Labor Standards Act of 1938 and was not entitled to the benefits of the act; that the defendant was not indebted to plaintiff in any sum; and that plaintiff did not spend more than twenty per cent of his time doing manual labor. The second was that for the period covered by plaintiff's claim he was employed in an executive and supervisory capacity with a fixed salary and as such was not entitled to the benefit of the overtime provisions of the Fair Labor Standards Act of 1938. The third defense was that on May 4, 1943, a release and satisfaction of all claims for overtime was executed and delivered by plaintiff to defendant on payment by defendant of the sum of $196.08.

All issues presented by the pleadings were submitted to the jury and as above stated the verdict thereon was in favor of the defendant.

As grounds for reversal plaintiff sets forth eight assignments of error. The first five are complaints of error contained in instructions given by the court of its own motion. The sixth and seventh are complaints that the court erred in refusing to give two instructions tendered by the plaintiff. The eighth is a complaint that the court erred in admitting in evidence exhibit No. 5 over the objection of the plaintiff.

The first five assignments of error must be decided against the appellant for failure to conform to rules of practice long established and consistently adhered to by this

court. An examination of the transcript discloses that in the motion for new trial there is but a single assignment of error attacking the instructions given by the court of its own motion. It is the following: "That the Court errored (erred) in giving the Court's Instructions Number #1 to #19, inclusive."

With regard to this manner of attacking instructions this court said in *City of South Omaha v. Powell*, 50 Neb. 798, 70 N. W. 391: "Similar assignments in motions for new trials have been held insufficient repeatedly, and that they would be considered by the appellate court to the extent alone of ascertaining if any one of the instructions was correct * * * ." The rule was announced as early as *Weir v. Burlington & M. R. R. Co.*, 19 Neb. 212, 26 N. W. 627, and adhered to as late as the decision in *Holst v. Warner*, 116 Neb. 208, 216 N. W. 659. We have examined the instructions given. They are lengthy, and it could serve no good purpose to copy them here. It is sufficient to say that some of those given do not misstate the law.

The exception to the instructions refused was set forth in like manner as that to the instructions given, that is, there was an exception to the refusal to give the instructions as a whole. The practice of excepting to the refusal to give tendered instructions as a group has been condemned in like manner as exceptions as a whole to instructions given and by the same decisions of this court. See *Weir v. Burlington & M. R. R. Co., supra; City of South Omaha v. Powell, supra.* As with the instructions given we have examined the instructions refused and without setting them out we find that some of them do not correctly state the law.

As already pointed out, by the eighth assignment of error appellant contends that exhibit No. 5 was erroneously admitted in evidence. This contention cannot be sustained.

The exhibit was the basis for the third defense to plaintiff's cause of action. It is the following:

"In consideration of the sum of $196.08, receipt of which is hereby acknowledged, I Ray Anderson hereby release The Nebraska Defense Corporation from any and

all claims and demands to date for overtime pay arising out of my employment with said company. I accept the above amount as full payment, satisfaction and discharge of all such claims, demands, and causes of action, whether based on contract, or state or federal laws.

Date May 4, 1943 Ray Anderson

Witnesses:
D. W. Boylan
C. Y. Sanders

196.08, less:	Social security	$1.96
	Victory tax	9.10
	Net amount of check	$185.02
	Check #8956"	

It is not contended that it was not executed by plaintiff. There is no claim that it was not properly identified. The theory of plaintiff appears to be that legally under the Fair Labor Standards Act of 1938 a settlement could not be made for overtime for less than the full amount due as overtime, therefore an instrument showing the payment of a lesser amount was inadmissible as evidence.

The exhibit was at variance with the pleaded cause of action of plaintiff and his testimony in support thereof. It tended to support the contention of defendant that plaintiff, for the period he was claiming overtime pay, was not engaged in manual labor but was engaged in an executive and supervisory capacity, therefore without regard to whether or not a valid settlement could be made for overtime for less than the amount due the evidence was admissible as a test of his credibility as a witness, for impeachment, and as an admission against interest.

In *Brown v. Mulready*, 140 Neb. 500, 300 N. W. 421. is collected a large number of cases bearing upon the admissibility of statements, oral and written, made out of court and they fully sustain the view that this exhibit was admissible as evidence.

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

AFFIRMED.

WENKE, J., participating on briefs.

MARGUERITE GOHLINGHORST, APPELLANT, V. WILLIAM RUESS ET AL., APPELLEES.
20 N. W. 2d 381

FILED OCTOBER 26, 1945. No. 31932.

1. **Trial.** When the defendant in a jury trial moves for a directed verdict at the close of plaintiff's evidence, such motion must be treated as an admission of the truth of all material and relevant evidence favorable to the plaintiff and of all proper inferences to be drawn therefrom, and if it tends to sustain plaintiff's cause of action, the case should be submitted to the jury.
2. ———. But when other evidence of the plaintiff demonstrates to the extent that reasonable men cannot differ thereon, that such evidence is incapable of belief, the rule does not apply and a directed verdict may properly be granted.
3. **Evidence: TRIAL.** Where a plaintiff, without reasonable explanation, testifies to facts materially different concerning a vital issue than had previously been testified to by him under oath in another action, the change clearly being made to meet the exigencies of the pending action, the evidence is discredited as a matter of law and should be disregarded.
4. **Trial: COURTS.** A trial court is not required to helplessly sit by and permit a litigant to toy with the processes of the court by insisting under oath at different times on the truth of each of two contradictory stories according to the exigencies of the particular occasion presenting itself.
5. **Motor Vehicles.** Evidence examined and held insufficient to sustain a recovery by the guest against the host under the guest statute.

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

Fitzgerald, Tesar & Welch, for appellant.

Kennedy, Holland, DeLacy & Svoboda and *Raymond Crossman,* for appellees.

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

CARTER, J.

Plaintiff commenced this action to recover damages for personal injuries which she sustained while riding as a guest in an automobile owned by the defendant William

Ruess, and operated by the defendant Jane Schumacher. At the conclusion of plaintiff's evidence the court directed a verdict for the defendants. Plaintiff appeals.

The evidence adduced by the plaintiff when interpreted most favorable to her, as we are required to do in the case of a directed verdict, is substantially as follows: On October 18, 1941, plaintiff was invited by the defendants to accompany them from Omaha to Lincoln for the purpose of attending the Nebraska-Indiana football game being played on that date. It appears that William Ruess and his sister, Mrs. Schumacher, arrived promptly at 12 o'clock noon at the place where plaintiff and Jane Schumacher were employed. From that point on until the happening of the accident Jane Schumacher drove the car, plaintiff sat beside her in the front seat and Mr. Ruess and Mrs. Schumacher occupied the back seat. The evidence is that they proceeded west out of Omaha on the Dodge street road until they reached Highway No. 31, at which point they turned south. The accident occurred one mile south at the intersection of Highway No. 31 with an intersecting road known in this record as Pacific street.

The automobile in which defendants were riding was being driven at a speed of approximately 60 miles an hour. It appears that the parties had brought their lunch with them and as they were leaving Omaha the parties in the back seat began to eat it. The lunch was then passed up to the parties in the front seat, who also began to partake of it. Plaintiff testifies that on previous trips they had eaten their lunch on the way, but that Jane Schumacher had never before operated the car while eating her lunch. As the car turned south on Highway No. 31, Jane Schumacher was still eating lunch. As they approached the point of the accident, plaintiff testifies that Jane Schumacher was looking over some cookies which had been passed up to them and placed on the seat between them. While so doing she had only her left hand on the wheel. Plaintiff then saw a car entering the intersection from the left and said: "Watch out, Jane." Plaintiff testifies that she did not observe what Jane Schu-

macher did after the warning, but she was of the opinion that the car continued to the point of impact at a speed of at least 60 miles an hour. The plaintiff says that the car approaching the intersection from the east was in motion and that she did not see it stop or alter its course. She says that defendant's car was 185 to 190 feet north of the north side of the intersection when she first saw the car approaching from the east. The collision occurred in the northwest quadrant of the intersection. On cross-examination inquiry was made concerning the speed of the car approaching from the east. The court sustained an objection to the question on the ground that it was improper cross-examination, it not having been inquired about on direct examination. We think the inquiry was entirely proper. Plaintiff had testified that the car was in motion. Certainly she could be interrogated on cross-examination as to the speed of the car, it being an important fact under the issues. We think the trial court's ruling was too restrictive and that defendants' counsel were entitled, after plaintiff testified that she had seen the other car entering and proceeding across the intersection in which the collision occurred, to inquire on cross-examination into its speed, course of travel or any other fact bearing upon the cause of the accident.

On cross-examination it was developed that plaintiff had testified by deposition in a case growing out of the same accident brought by Anna K. Kelty, Special Administratrix, against William Ruess and Jane Schumacher. Plaintiff's testimony contained in the deposition was to the effect that she did not see the car approaching from the east until defendant's car reached a point 15 feet north of the north side of the intersection, at which time she exclaimed: "Watch out, Jane!" She testified that she did not recall what Jane Schumacher was doing immediately prior to the accident. She further testified in the deposition that the car approaching from the east was 25 or 30 feet east of the east line of the intersection when she first saw it and that it was traveling 70 or 75 miles an hour.

It is evident from the record that she told a story which

was very helpful to her host when the deposition was taken on February 18, 1942, and a story contradictory thereto on the material facts more than two years later that was beneficial to her in an action against the host. It is the contention of the defendants that where a plaintiff materially changes her sworn testimony in this manner to meet the exigencies arising in the trial of the case that it is discredited as a matter of law and should be disregarded.

We think the testimony of plaintiff was such that it cannot sustain a judgment in her favor. A plaintiff may not recite upon oath one statement of facts in one judicial proceeding and then, to meet the exigencies of the occasion in the trial of a different suit, recite under oath an entirely different story. As was said in *Gormley v. Peoples Cab, Inc.*, 142 Neb. 346, 6 N. W. 2d 78: "Such conduct cannot be tolerated to the extent, when it is clearly apparent, of requiring a trial judge to submit the credibility of such testimony to a jury, and of permitting a party to mock law and justice."

It is quite evident from this record that the plaintiff's evidence contained in the deposition not only was of great value to the host in defending the action of Anna K. Kelty for the death of her husband, an occupant of the other car, but, if true, it absolved the host of any liability to the plaintiff as his guest. In her action against the host, which she subsequently brought, she attempts to avoid the effect of her previous testimony, when asked if she did not so testify, by mechanically stating that "I don't know" or "I don't remember." In a case identical in principle where the effect of previous evidence was to absolve the defendant from liability and the witness materially changed her evidence to extricate herself from the effect of the former testimony, this court said: "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 cred-

ibility 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." *Peterson v. Omaha & C. B. St. R. Co.*, 134 Neb. 322, 278 N. W. 561.

No satisfactory explanation of the change in the testimony is given in the present case other than the simple expedient that she did not remember making the former statements. It is attempted to be shown that the deposition containing her first statements was taken in the hospital where she had been confined for a period of four months. The implication that any unfairness was practiced is dissipated by the record. At the time the deposition was taken she had been up and about. She had entertained visitors and exercised with the aid of crutches. No opiates had been recently administered and all the evidence except her own was to the effect that she was in possession of all her faculties. She was able to leave the hospital four days after the deposition was taken. Her lawyer was present when the deposition was taken and there is no evidence to indicate that he in any manner failed to protect her interests. Her brother was also present when she was interrogated. The lawyer representing Anna K. Kelty was present, as were the lawyers for others interested in the outcome of the litigation. The record is devoid of evidence that the plaintiff was in any way imposed upon. On the other hand, the motive for adapting the proofs in the present case so as to require its submission to a jury is manifest. The convenient loss of memory to escape the fatal effect of positive sworn testimony on the one hand, and an amazing resurrection of memory more than two years later as to facts and incidents tending to make a case, make the evidence incredible as a matter of law in the absence of any reasonable explanation of the conflict. The trial court is not required to helplessly sit by and permit a litigant to play fast and loose with the processes of the court by insisting at different times under

oath on the truth of each of two contradictory stories according to the exigencies of the particular occasion presenting itself. Courts must be vigilant in suppressing such schemes for the procurement of benefits by one to the detriment of another.

A similar situation existed in *Ellis v. Omaha Cold Storage Co.*, 122 Neb. 567, 240 N. W. 760, wherein it is said: "A principle of law applicable in this case is given in *Smith v. Boston Elevated R. Co.*, 184 Fed. 387, 106 C. C. A. 497, 37 L. R. A. n. s. 429, which arose on the second trial of the action. In the second trial plaintiff testified to a version of the accident that was inconsistent with her testimony at the first trial. The opinion says: 'As the inconsistency is in the testimony of a party, a stricter rule is applicable than where the inconsistency is in the testimony of an ordinary witness. * * * While it is true that upon a second trial the plaintiff's case may be changed or strengthened by new testimony, yet the right of a plaintiff at a second trial to make by his own testimony a complete departure from the case presented at the first trial is not unlimited. A plaintiff, we think, after having sworn to facts resting in his own observation and knowledge before one jury, should not be permitted to swear to facts directly inconsistent and to obtain from a second jury a verdict in his favor which will involve the conclusion that his testimony at the first trial was knowingly false. A party testifying under oath is more than a mere witness. He is an actor seeking the intervention of the judicial power in his behalf, and thus subject to the rule *"allegans contraria non est audiendus,"* which, as stated in Broom's Legal Maxims, page 130, "expresses in technical language the trite saying of Lord Kenyon that a man should not be permitted to 'blow hot and cold' with reference to the same transaction, or insist at different times, on the truth of each of two conflicting allegations according to the promptings of his private interest." ' The court refused her right to recover on her changed testimony."

It is the general rule in this jurisdiction that in a jury trial when the defendant moves for a directed verdict at the

close of plaintiff's evidence, such motion must be treated as an admission of the truth of all material and relevant evidence and all proper inferences to be drawn therefrom, and if the evidence so considered tends to sustain the allegations of the petition, and the petition states a cause of action, the case should be submitted to the jury. But this rule does not control where it appears that other evidence of the plaintiff demonstrates conclusively, or to a degree that the minds of reasonable men cannot differ thereon, that such evidence favorable to plaintiff is incapable of belief.

Plaintiff called Lloyd Baier, the driver of the other car involved in the accident, to testify in her behalf. He testified that he was proceeding west on a highway which was a continuation of Pacific street. He had been over the road many times before and was acquainted with conditions as they existed at the intersection where the accident occurred. The road from the east slopes down to Highway No. 31. The view to the north is obstructed by a bank until one reaches a point 25 to 30 feet east of the east line of the intersection. There was a stop sign on Pacific street and a warning sign approximately 600 feet east of the intersection. The witness Baier was familiar with the location of these signs prior to the day of the accident. He says he came up to the first warning sign at a speed of 35 or 40 miles an hour, that he then slacked his speed as he proceeded down the slope to Highway No. 31. He says he shifted gears at the stop sign and proceeded across Highway No. 31, but was unable to estimate the speed at which he proceeded. He does not testify that he stopped at the stop sign. He says he saw the car approaching from the north about a block away at the time he drove into the intersection. This evidence standing alone is insufficient to establish gross negligence in a suit by a guest in the approaching car against the host. We think the evidence tends to show that the witness Baier drove his car into the intersection without heeding the highway signs erected for his protection. Such evidence, standing alone, has no probative value in es-

tablishing the claim of the plaintiff against the owner or operator of the automobile approaching from the north.

We conclude therefore that as the host's automobile was being driven on a protected highway on the proper side of the road at a lawful rate of speed, and there being no credible evidence of any acts constituting gross negligence on the part of the owner of the car, the trial court properly directed a verdict for the defendants.

AFFIRMED.

WENKE, J., participating on briefs.

H. J. COFFIN, APPELLEE, V. HARRY E. MAITLAND ET AL., APPELLEES, EVERETT SATTERFIELD INTERVENER, APPELLANT.
20 N. W. 2d 310

FILED OCTOBER 26, 1945. No. 31935.

1. **Appeal and Error.** In a case tried to the court, the presumption obtains that the court, in arriving at a decision, will consider such evidence only as is competent and relevant, and this court will not reverse a case so tried because other evidence was admitted.
2. **Taxation.** Owners and others interested in realty, sold under decree foreclosing valid tax sale certificate, where foreclosure was commenced more than two years subsequent to issuance of tax sale certificate, are barred from the right of redemption on confirmation of such judicial sale.
3. **Judgments.** A decree foreclosing a tax sale certificate is not vulnerable to collateral attack for irregularities or defects in the foreclosure proceedings that do not go to the jurisdiction of the court.
4. **Process.** As required by section 25-519, R. S. 1943, where service by publication is had upon a defendant the notice must contain a summary statement of the object and prayer of the petition, mention the court wherein it is filed, and notify the person or persons thus to be served when they are required to answer.
5. ———. The form of the notice to be published, and what it shall contain, rest in the legislative discretion, subject to the restriction that it shall be of such a character that it will have

a tendency, in a reasonable degree, to convey information to interested parties that the action affects their rights.

6. ———. Where the statute prescribes certain things which the published notice shall contain, they all must be considered essential, and the absence of any of them in the published notice is fatal to the jurisdiction; but the notice need contain nothing which is not required by statute.

7. Case distinguished. Armstrong v. Griffith, 94 Neb. 515, 143 N. W. 461, distinguished and overruled in part to the extent stated in the opinion.

APPEAL from the district court for Loup County: WILLIAM F. SPIKES, JUDGE. *Affirmed.*

Guy Laverty, for appellant.

B. A. Rose and *W. F. Manasil*, for appellee.

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

CHAPPELL, J.

This is a proceeding by intervener, transferee of the former owner and holder of the record title, to redeem from a decree of foreclosure of a tax sale certificate and quiet title to certain lands in Loup County, Nebraska. Intervener's right was based upon an alleged void service by publication upon the alleged defendant landowners, Olin J. Life, Elizabeth J. Life, his wife, and Martin L. Moore, now single, from whom he had obtained quitclaim deeds. The trial court found generally for plaintiff and against the intervener who appealed to this court. His brief assigns numerous alleged errors, many of which are directed to admissions of evidence. Since the case is an equity proceeding tried without a jury and heard *de novo* in this court we will not discuss such assignments. It is the rule that: "In a case tried to the court, the presumption obtains that the court, in arriving at a decision, will consider such evidence only as is competent and relevant, and this court will not reverse a case so tried because other evidence was admitted." *Nelson v. Nelson*, 133 Neb. 458, 275 N. W. 829.

For the purposes of this opinion we need only give con-

sideration to intervener's contentions that the decree is not sustained by the evidence and is contrary to law. In doing so we find that they cannot be sustained.

Decision of the case depends primarily upon whether Martin L. Moore, transferor, was the owner and holder of the record title to the land involved at the time of the foreclosure of the tax sale certificate; whether the notice for service by publication upon him complied with section 25-519, R. S. 1943; and whether at the time of such service he was in fact a nonresident of the state. If such propositions are answered in the affirmative the judgment must be affirmed, otherwise it must be reversed.

Intervener in his brief and argument relies upon the rule: "The right to redeem is a favorite of equity, and will not be allowed to be taken away, except upon a strict compliance with the steps necessary to divest it, and by due process of law." *Sedlak v. Duda,* 144 Neb. 567, 13 N. W. 2d 892, 154 A. L. R. 490. Nevertheless, there are other rules of law which preclude his right to redeem if the trial court had jurisdiction in the original tax foreclosure proceeding. In *Connely v. Hesselberth,* 132 Neb. 886, 273 N. W. 821, it was held: "Owners and others interested in realty, sold under decree foreclosing valid tax sale certificate, where foreclosure was commenced more than two years subsequent to issuance of tax sale certificate, are barred from the right of redemption on confirmation of such judicial sale" and "A decree foreclosing a tax sale certificate is not vulnerable to collateral attack for irregularities or defects in the foreclosure proceedings that do not go to the jurisdiction of the court."

Bearing these rules in mind we have examined the record. It discloses that plaintiff filed the original tax foreclosure proceedings in the district court for Loup County on February 10, 1932, more than two years after he purchased the tax sale certificate at a valid, administrative tax sale by the county treasurer. An amended petition was later filed but it in no manner changed the allegations with reference to Martin L. Moore and ——— Moore, his wife. Both the peti-

tion and the amended petition alleged in substance that Martin L. Moore and ——— Moore, his wife, were the owners and holders of the record title to the land at the time the action was filed.

In this connection by its decree in the proceeding at bar, the trial court found that Olin J. Life and Elizabeth J. Life, his wife, were not the owners of the land but strangers to the title at all times here involved and that Martin L. Moore was in fact the owner thereof. We are convinced that no other finding could have been made by the trial court under the record and the evidence appearing in the record which includes the abstract offered by intervener himself. For these reasons we do not deem it necessary to discuss at length the nature of the alleged interests of Olin J. Life and Elizabeth J. Life, his wife, or their alleged right of redemption which intervener claims as their successor by quitclaim deed. Suffice it to say, that if they ever had any right, title or interest in the property this record discloses that they were completely foreclosed by the original tax foreclosure proceedings, even though residents of the state at that time. The case, *County of Douglas v. Feenan, ante* p. 156, 18 N. W. 2d 740, recently decided by this court, is directly in point and conclusively decides that question. It follows that if they were strangers to the title or if they had any right, title or interest in the property which was validly foreclosed, as above suggested, then their quitclaim deed to the intervener granted him no right, title or interest upon which he could base a right to redeem.

In the original foreclosure proceeding Martin L. Moore and ——— Moore, his wife, were served by publication upon motion of plaintiff supported by an affidavit in conformity with section 25-518, R. S. 1943, based solely upon the ground that they were nonresidents of the State of Nebraska. The trial court so found and ordered constructive service upon them.

Notice was thereafter published in a legal newspaper for the required number of consecutive weeks. In conformity with section 25-519, R. S. 1943, the publication of notice

contained a summary statement of the object and prayer of plaintiff's petition, including a description of the property; specifically named the court wherein the petition had been filed; and notified the persons by name as the defendants thus intended to be served when they were required to answer plaintiff's petition or otherwise judgment would be entered against them.

Intervener complains that the title of the case at the top of the notice did not contain the names of each defendant. It was worded: "IN THE DISTRICT COURT OF LOUP COUNTY, NEBRASKA H. J. Coffin Plaintiff -vs- H. E. Maitland, et al Defendants. NOTICE." The title itself, it will be observed, did not contain the separate names of each other defendant but they, including Martin L. Moore and ——— Moore, his wife, were otherwise specifically named, directly addressed and notified in the body of the notice as the only defendants intended to be served in every particular as required by statute.

In this connection it is stated in 42 Am. Jur., sec. 95, p. 83: "The form of the notice to be published, and what it shall contain, rest in the legislative discretion, subject to the restriction that it shall be of such a character that it will have a tendency, in a reasonable degree, to convey information to interested parties that the action affects their rights." However, as stated in 50 C. J., sec. 196, p. 535: "Where the statute prescribes certain things which the published notice shall contain, they all must be considered essential, and the absence of any of them in the published notice is fatal to the jurisdiction; but the notice need contain nothing which is not required by statute."

The following statement appears in Bowers, Process and Service, sec. 276, p. 406: "The courts are strongly inclined to ignore mere technical and unsubstantial defects in published process, and to hold the notice sufficient if it be of such a character that it will, to a reasonable degree, inform the parties defendant that the action affects their rights, and give them an opportunity to assert and defend those rights." As early as *McCormick v. Paddock,* 20 Neb. 486,

30 N. W. 602, this court held: "When service of the pendency of the action is made by publication, if the published notice is so specific as to advise the defendants of their interest sought to be affected by the proceeding it is sufficient."

In *Armstrong v. Griffith*, 94 Neb. 515, 143 N. W. 461, it was said: "For a notice to be a good notice by which jurisdiction is acquired, it should address the defendant or defendants intended to be served. It may be that no particular form is necessary, but the defendant intended to be served should be directly addressed or the name should be included in the title of the case contained in the notice." We have examined the notice published in that case which is in the abstract of record on file in this court. It was addressed: "Notice to Non-Resident Defendant", not "Defendants" as stated in the opinion. There was but one defendant. We are of the opinion that the court overlooked the fact that the defendant named in the body of the notice was the only defendant in the case and therefore was clearly the defendant intended to be served. The first sentence above quoted is correct in every respect but we are of the opinion that the latter sentence is too restrictive and insofar as it conflicts with the correct rule hereinafter stated in this opinion, it is overruled. In that connection the correct rule applicable here is that if the names of the defendants intended to be served clearly appear either in the caption or in the body of the notice informing them when they are required to answer it is sufficient. It follows as a matter of course that the notice must also contain a summary statement of the object and prayer of the petition and mention the court wherein it is filed.

We conclude that while it would have been proper and commendable practice to have included the defendants' names in the title of the case at the top of the notice the statute does not specifically require it and we cannot say under the circumstances presented here that the notice was void and subject to collateral attack.

The abstract discloses that plaintiff filed *lis pendens* notice of the original foreclosure proceedings on October 13,

1932. The proceedings were pursued to decree, order of sale and sheriff's sale at which the plaintiff purchased the property. Thereafter, on May 9, 1935, the trial court confirmed the sale finding that the premises sold for their reasonable value, ordered a sheriff's deed delivered to plaintiff, granted him possession and awarded him a writ of restitution.

The intervener was county clerk and *ex officio* clerk of the district court for Loup County at all times during the pendency of the foreclosure proceedings and had full notice and knowledge thereof. On March 10, 1942, he filed a request to redeem and later on September 28, 1942, he filed another such request which included a prayer that the title to the premises involved be quieted in him. In the latter application he sets forth the chain of title in conformity with the abstract and alleges that Martin L. Moore on November 10, 1928, obtained a warranty deed to the property from one P. C. Erickson and his wife, and was the owner of the record title at all times thereafter until September 27, 1941, when Martin L. Moore, single, conveyed it to intervener who was from that time the owner and holder thereof. He also alleges that the service of publication upon Martin L. Moore and ——— Moore, his wife, and all subsequent proceedings were void for want of jurisdiction because at all times involved Martin L. Moore, single, was a resident of the state of Nebraska. He specifically prays therein that Martin L. Moore be found by the trial court to have been the owner of the land at the time decree of foreclosure was entered and to find that intervener was now the owner thereof and entitled as such to redeem.

At this point it should be stated the evidence discloses that intervener at the time of obtaining quitclaim deed from Martin L. Moore represented that he was an abstracter and needed a quitclaim deed to straighten out the title. Such a deed which recites a consideration of $5.00 was then executed by Martin L. Moore, single, for a consideration of $10.00. Intervener also received a quitclaim deed on August 30, 1941, from Olin J. Life and Elizabeth J. Life, his

wife, who were strangers to the title and gave them one dollar each not as consideration for the deed although so recited therein but "just a matter of good fellowship."

An attempt was made by intervener during the trial to show that Martin L. Moore was not in fact the owner of the property at the time the foreclosure was commenced but had theretofore transferred all of his interests to Olin J. Life. However, there is no competent evidence to sustain any such contention and it is contrary to evidence adduced by intervener and contrary to his own pleadings including a separate answer filed by Martin L. Moore himself. On the other hand, if it were true, as heretofore stated, the interests of Olin J. Life and Elizabeth J. Life, his wife, if they ever had any, were theretofore properly foreclosed in the original tax foreclosure proceeding.

It is now a rule in this jurisdiction that a judgment or decree affecting the title to land owned by a resident of this state the only notice given being by publication in conformity with section 25-519, R. S. 1943, but based solely upon the provisions of section 25-517, R. S. 1943, as to nonresidence as distinguished from subsection 6 thereof, is void and subject to collateral attack where no appearance was made by or for such resident. See *County of Douglas v. Feenan, supra.* It follows, of course, that if the owner were in fact a nonresident at the time such notice was given, then the judgment or decree would be valid and not subject to collateral attack as attempted in this proceeding.

Therefore the question of whether Martin L. Moore was a nonresident of Nebraska at the time the service by publication was had upon him in the original tax foreclosure proceedings became an important jurisdictional issue in this proceeding. The pleadings filed therein make the alleged residence or nonresidence of Martin L. Moore at that time an issue. A large part of the evidence adduced by the parties was devoted to that question which to recite would prolong this opinion beyond necessity.

The trial court found therefrom in its decree entered in these proceedings that Martin L. Moore was a nonresident

of the state of Nebraska at the time constructive service was had upon him in the original tax foreclosure proceedings which gave jurisdiction to the court. It was also found that the interests of Martin L. Moore in the premises had been lawfully foreclosed; that he had no right of redemption and that Olin J. Life was not the owner of the premises involved but a stranger to the title, therefore intervener had no right, title or interest which would permit him to redeem the premises. In its decree the trial court also found that the original decree of foreclosure, sale to plaintiff and confirmation thereof were valid and that the title to the premises should be quieted in him.

We conclude that there is ample competent evidence in the record sustaining the trial court's findings and decree. For the reasons heretofore stated the judgment is affirmed.

AFFIRMED.

WENKE, J., dissenting.

I disagree with that part of the opinion of the majority holding that jurisdiction was obtained of Martin L. Moore under the provisions of section 25-519, R. S. 1943, by reason of the notice published; and the overruling in part of the opinion of *Armstrong v. Griffith,* 94 Neb. 515, 143 N. W. 461.

It should be stated that section 25-519, R. S. 1943, is the identical statute under which *Armstrong v. Griffith, supra,* was decided.

In order to show the similarity between the two notices involved, the one in this case, which is held sufficient, and the one in the case of *Armstrong v. Griffith, supra,* which this court held insufficient, and that no difference in fact exists, we will set them out in full.

The notice here involved is as follows:

"IN THE DISTRICT COURT OF LOUP COUNTY, NEBRASKA

H. J. Coffin Plaintiff
-vs-
H. E. Maitland, et al
Defendants.

NOTICE

To the above name defendants:

"You and each of you are hereby notified that the plaintiff on the 15th day of February, 1932 commenced an action against you in the District Court of Loup County, Nebraska and filed his petition therein, the object and prayer of which petition was to foreclose a certain tax sale certificate issued by the County Treasurer of Loup County, Nebraska against the defendants.

"And the said petition further prays for the foreclosure of a certain tax sale certificate issued by the County Treasurer of Loup County, Nebraska against the defendants Olin J. Life and Elizabeth J. Life, his wife, Martin L. Moore and ——— Moore his wife, first real and true name unknown, and a lien on the premises described as follows:

South half, the Northeast Quarter, the North half of Northwest Quarter and the Southeast Quarter of Northwest Quarter of Section 9, Range 20 West of the 6th P. M., Township 23, Loup County, Nebraska

"You and each of you are hereby required to answer said petition on the 21st day of November, 1932 or otherwise a judgement and decree will be entered against you.

H. J. Coffin
By B. A. Rose, His Attorney."

The notice involved in *Armstrong v. Griffith, supra,* is as follows:

"NOTICE TO NON-RESIDENT DEFENDANT.

"You and each of you will take notice that on the 9th day of July, 1900, the county of Keya Paha plaintiff herein, filed in the district court in and for the county of Keya Paha and state of Nebraska, against Muscatine Mortgage & Trust Company, non-resident defendants, the object and prayer of which are to foreclose the tax liens hereinafter described. In its first cause of action stated in said petition the plaintiff seeks to foreclose a tax lien upon the N½, NW¼, section 1, and the E½ NE¼, of section 2, in township 32, north of range 20 west of the Sixth principal meridian, located in the said county of Keya Paha and state of Nebraska; that the taxes involved in said first cause of action are the taxes

that were levied on said premises in the years 1896, 1897, 1898 and 1899, that there is now due the plaintiff upon its tax lien the sum of $46.50, for which sum with interest from this date on $37.50 thereof at ten per cent per annum. The plaintiff prays for a decree that defendants be required to pay the same or that said premises may be sold to satisfy the amount found due.

"You are required to answer said petition on or before the 27th day of August, 1900."

In the latter case it was held: "Where jurisdiction in a tax foreclosure case is sought to be acquired by publication, there should be a strict compliance with the provisions of the statute; and, if the notice published is insufficient, a sale under it will be considered void in an action to redeem brought by one who holds the legal title." It further states: "For a notice to be a good notice by which jurisdiction is acquired, it should address the defendant or defendants intended to be served. It may be that no particular form is necessary, but the defendant intended to be served should be directly addressed or the name should be included in the title of the case contained in the notice. * * * As the publication is not directed to the Muscatine Mortgage & Trust Company, the defendant to be served, and that company is not pointed out as the defendant intended, therefore the notice published cannot be a sufficient notice. These provisions of section 79 (now section 25-519, R. S. 1943) are mandatory, and, unless complied with, there is no jurisdiction."

An examination of the notice published in each of the cases disclose that they come within the rule above set forth. In the notice published in the case at bar the title of the case at the top of the notice did not contain the name of Martin L. Moore, the defendant intended to be served, neither was he directly addressed therein in any manner which could be said to point him out or notify him that he was the defendant intended to be served.

With the overruling in part of *Armstrong v. Griffith, supra,* I cannot agree. The language overruled is as follows:

"It may be that no particular form is necessary, but the defendant intended to be served should be directly addressed or the name should be included in the title of the case contained in the notice."

Approximately 32 years ago this court so construed the statute here involved. It has become a rule of property in this state and should not now be disturbed.

We stated in *McConnell v. McCook Nat. Bank*, 142 Neb. 451, 6 N. W. 2d 599: "The legislature passed an act which we have construed. Our construction has not been since questioned by the legislature. * * * That construction has become a rule of property in this state."

In the case of *Patterson v. Reiter*, 91 Neb. 56, 135 N. W. 222, the question of again considering the sufficiency of a notice in a tax foreclosure proceeding was presented to the court. From the opinion it appears that the court had previously passed on the same matter. In refusing to consider the matter, the court stated: "The judgment there announced has stood unchanged and unchallenged for more than three years, and, considering the nature of the question involved, it ought now to be considered as a rule of property in this state. We must therefore decline to again consider the question."

It is further stated in *Nortnass v. Pioneer Townsite Co.*, 82 Neb. 382, 117 N. W. 951: "When a former decision of this court has established a rule of property, which has been relied upon for many years as the foundation of real estate titles, the court will not overturn such rule, although it cannot assent to the reasoning upon which it is based." See, also, *Grandjean v. Beyl*, 78 Neb. 354, 114 N. W. 414.

There is still another reason why our former decision should not be disturbed. We recently stated in *Johnsen v. Benson Food Center*, 143 Neb. 421, 9 N. W. 2d 749, that: "We observe no ground or reason for a departure from the interpretation previously placed on this statute. We must assume that this interpretation expresses the intention of the legislature in its enactment since it has been convened in regular session four times since the publication of the

opinion in *Drum v. Omaha Steel Works, supra,* without legislative expression of a contrary intent."

I think that where our previous decision has become a rule of property and where many regular sessions of the legislature have been convened in the 32 years since publication of this court's opinion interpreting the statute without legislative expression of a contrary intent, that this court should assume that such interpretation expressed the legislative intent and not now engage in judicial legislation by giving it a different interpretation.

I am authorized to say, that Simmons, C. J., concurs in this dissent.

CARTER, J., concurring:

The language of the dissenting opinion conveys an inference which in my opinion should be clarified. The dissenting opinion states: "The language overruled is as follows: 'It may be that no particular form is necessary, but the defendant intended to be served should be directly addressed or the name should be included in the title of the case contained in the notice.' " The majority opinion does not hold that a legal notice which complies with the foregoing quotation is not a valid notice, if other statutory requirements have been met. It does not overrule the quoted language, but holds merely that it is too restrictive for reasons that are clearly and correctly stated.

I am also of the opinion that no basis exists for adhering strictly to the announced rule in *Armstrong v. Griffith,* 94 Neb. 515, 143 N. W. 461, for the reason that it has become a rule of property. The correct rule with reference thereto is that where judicial decisions are presumed to have entered into business transactions and to have been acted upon as a rule of contracts and property, it is the duty of the courts, on the principle of *stare decisis,* to adhere to such decisions without regard to how it might be inclined to decide if the question were new. The rule is based on the thought that when parties have relied upon such decisions as settled law and rights have vested thereunder, their correctness or incorrectness in the abstract is of less

importance than that the rule of property so established should be constant and invariable. 15 C. J., sec. 342, p. 947.

But such is not the case here. The majority opinion does not have the effect of divesting or in any manner damaging any titles that may have vested under the rule announced in *Armstrong v. Griffith, supra.* Instead of restricting the rule announced in that case, it relaxes it. Instead of unsettling property rights vested under the case of *Armstrong v. Griffith, supra,* it confirms all such rights as well as others that may arise under the rule as it has been extended in the majority opinion. Such a situation, I submit, does not give rise to a proper application of the doctrine of a rule of property as it is understood in the law.

SIMMONS, C. J., dissenting:

The concurring opinion states: "It (the majority opinion) does not overrule the quoted language, but holds merely that it is too restrictive * * * ." The majority opinion is that the quoted language in *Armstrong v. Griffith,* 94 Neb. 515, 143 N. W. 461, "is too restrictive and in so far as it conflicts with the correct rule hereinafter stated in this opinion, it is overruled." The syllabus point, written by the majority, is that the case is "distinguished and overruled in part * * * ." The language used is not so important. The majority opinion does overrule that part of the Armstrong case which determines that a notice, to be sufficient, either be directly addressed to the party intended to be served or include his name in the title of the case contained therein. That is its intent.

While it may be that a notice meeting the requirement of the statute, as construed by this court in *Armstrong v. Griffith, supra,* would be good under the majority opinion, yet a notice could be held sufficient under the majority opinion which would be defective under the Armstrong case. Such is the situation here.

The concurring opinion states that the majority opinion does not have the effect of divesting or in any manner damaging any titles that may have vested under the rule announced in the Armstrong case. I agree, so far as it relates

to the tax purchaser's title. But, when applied to the title of the owner (tax debtor), it will have the effect of divesting or damaging titles that may not have been divested under that rule.

The situation in the instant case is similar to that which was presented to this court in *Ambler v. Patterson,* 80 Neb. 570, 575, 114 N. W. 781, 117 N. W. 990. There a notice ran to several different persons and described different tracts of land. This court held that such a "blanket notice," to redeem from a tax sale, was not sufficient. In the course of the opinion language was used which has a particular application to the case at bar. It was said: "A thorough examination of what is known as the 'Scavenger Act' (Comp. St. 1903, ch. 77, art. IX) convinces us that it was the intention of the legislature to allow the owner of land, against which a decree of sale for delinquent taxes has been entered, every opportunity to save his land, either by paying the amount of the decree prior to a sale, or by redeeming from the sale afterwards made. That the act should receive a liberal construction in favor of the owner to comply with this evident purpose of the legislature should not be denied; and it is our duty to afford the owner the opportunity to redeem his land where full and actual compliance with the statute has not been observed. * * * it would be unfair to the owner of the land, especially where the notice is given by publication, to require him to examine a list of numerous names to see if his own appears therein, or numerous descriptions of real estate to ascertain whether any of his own lands were among the descriptions."

The concurring opinion states that strict adherence to the rule announced in *Armstrong v. Griffith, supra,* need not be had for the reason that it has become a rule of property. It proceeds on the theory that the doctrine of a rule of property is not to be applied where a rule is rendered less restrictive or "has been extended." The rule of property doctrine has not been so limited in its application in this state.

In *Patterson v. Reiter,* 91 Neb. 56, 135 N. W. 222, we were

asked to review the decision in *Ambler v. Patterson, supra,* so as to hold a notice good that admittedly was insufficient, and so as to hold a title valid that admittedly was void under the Ambler decision. In short, it was urged that our previous construction was "too restrictive." We refused, holding that "The judgment there announced has stood unchanged and unchallenged for more than three years, and, considering the nature of the question involved, it ought now to be considered as a rule of property in this state."

Courts of other jurisdictions in tax matters have refused to extend and render constructions of statutes less "restrictive" because they had become rules of property. See *Carter v. Chevalier,* 100 Cal. App. 567, 280 Pac. 706; *Britt v. Harper,* 132 Ark. 193, 200 S. W. 787; *Henderson v. De Turk,* 164 Cal. 296, 128 Pac. 747; *Burr v. White Oak Lumber Co.,* 149 Tenn. 191, 258 S. W. 798.

The tax sale purchaser is entitled to the protection which the law gives him; likewise, the owner of the fee should not have his title divested in a tax proceeding without strict compliance with the law. We so held in the Ambler and Armstrong cases.

Rights which tax sale purchasers would have had under the present holding of the majority may have been held void or surrendered or not asserted under the rule in *Armstrong v. Griffith.* Rights which owners may have successfully asserted under that decision are now placed in question. Those latent questions, heretofore deemed settled by the Armstrong case, will now be activated by this decision. In *Grandjean v. Beyl,* 78 Neb. 349, 354, 110 N. W. 1108, 114 N. W. 414, this court said: "To overrule these cases would penalize many persons whose money was invested on the strength of these decisions and would introduce uncertainty into the law relating to real property. The courts have always been reluctant to change or overrule decisions which have established rules of property under which rights may have been acquired."

As I see it, the majority now violate that principle, and that without regard to whether they term their act one of

overruling or rendering less restrictive the construction of the statute.

ROSE FILLEY ET AL., APPELLEES, V. SAMUEL MANCUSO ET AL., APPELLANTS.

20 N. W. 2d 318

FILED OCTOBER 26, 1945. No. 31942.

1. **Fraudulent Conveyances.** In an action brought to set aside a conveyance of land and subject the same to the payment of the plaintiff's judgment, the petition sufficiently states a cause of action if it alleges that the conveyance was made for the purpose and with the intent to defraud creditors.
2. ———. In such an action the financial condition of the grantor at the time of making the conveyance is merely an evidential fact bearing on the question of fraud, and need not be pleaded; aliter, his financial condition at the time of the commencement of such action.
3. ———. In such actions a petition wherein it is alleged that the grantor fraudulently conveyed the property with the intent to place it beyond the reach of his creditors, and that the conveyance was made without consideration, states a cause of action, without alleging that the grantee had knowledge of or participated in the fraud.
4. ———. A conveyance between relatives which has the effect of hindering or delaying a creditor in the collection of his claim is presumptively fraudulent and, in litigation between the creditor and the parties to the conveyance over its alleged invalidity, the burden is on the parties to the conveyance to establish the good faith of the transaction.
5. ———. Intent to make a mortgage or an assignment thereof to defraud creditors may be established by proof of facts from which such inferences may reasonably be drawn.
6. ———. Where the testimony relied upon to show good faith is given by interested relatives, the reasonableness or unreasonableness of their evidence bears considerable weight in arriving at a just conclusion.
7. ———. Where the grantee, at the time the conveyance was made, had knowledge of the intent of the grantor to hinder and delay his creditors by the conveyance of his property, the conveyance is void as to existing creditors whether or not an adequate consideration was paid.

APPEAL from the district court for Douglas County: FRANK M. DINEEN, JUDGE. *Affirmed.*

Joseph O. Burger, for appellants.

Beckman & Beckman, for appellee.

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

CHAPPELL, J.

This is an action in the nature of a creditor's bill to have adjudged that a warranty survivorship deed and two real estate mortgages executed by defendants, Samuel Mancuso and Mary Mancuso, his wife, were junior and inferior to plaintiff, a preexisting but now a judgment creditor. It is claimed by plaintiff that the deed and mortgages, involving seven separately described parcels of real property in Douglas County, were executed by defendants without consideration and for the purpose of defrauding plaintiff creditor who seeks sale of the properties involved as upon execution and application of the proceeds in satisfaction of her judgment. On January 26, 1945, after issues joined and five separate hearings thereon, the trial court entered its decree finding generally and specifically for plaintiff. Defendants, Samuel Mancuso, Mary Mancuso, Elvira Mattioli, and Virginia M. Potter, together with Fred G. Mancuso who although never actually a defendant was permitted four years and nine months after the action was commenced to file an answer and cross-petition involving one of the properties only, appealed to this court. Certain other defendants were nominal parties only and appear as appellees. There is no cross-appeal.

Assignments of error substantially set forth in the brief are: (1) That plaintiff's petition as to the two mortgages does not state facts sufficient to support a decree. (2) The overruling of Fred G. Mancuso's motion for continuance based upon military service. (3) Permitting plaintiff to reopen her case on June 24, 1944. (4) That the decree adjudging the Virginia M. Potter mortgage void as to plain-

tiff and inferior to her judgment and adjudging the Elvira Mattioli mortgage paid and a purported unrecorded assignment thereof to Fred G. Mancuso inferior to plaintiff's judgment is contrary to law and not sustained by the evidence. (5) That in any event plaintiff's judgment was dormant at date of decree. We find that none of these contentions can be sustained.

At the outset it will be well to recite the history of the judgment which plaintiff seeks to enforce. The respective proceedings and dates thereof are important to decision. Plaintiff filed suit against defendants, Samuel Mancuso, a real-estate and insurance agent for many years, and Mary Mancuso, his wife, in the district court for Douglas County to foreclose a real-estate mortgage for $6,000 executed by them upon a residence property in Omaha, Nebraska, in 1928, to secure repayment of moneys theretofore collected by Samuel Mancuso and never accounted for by him. On April 20, 1935, decree of foreclosure was entered finding the unpaid debt and interest to be $6,732. On October 27, 1936, under order of sale, the sheriff sold the property for $3,450, which was confirmed by the trial court. However, upon appeal therefrom this court on November 19, 1937, reversed the confirmation and sale and remanded the cause for further proceeding. *Filley v. Mancuso,* 133 Neb. 538, 276 N. W. 157.

On January 11, 1938, under another order of sale, the sheriff sold the property for $3,400. On January 18, 1938, the sale was confirmed and deficiency judgment entered against both Samuel Mancuso and Mary Mancuso, his wife, for $5,207.74 with interest at ten percent and costs. Upon appeal therefrom this court on October 28, 1938, sustained confirmation of the sale and sustained the deficiency judgment as to Samuel Mancuso only. *Filley v. Mancuso,* 135 Neb. 403, 281 N. W. 850. See, also, *Filley v. Mancuso,* 142 Neb. 106, 5 N. W. 2d 91.

The record shows that, in response to præcipe, executions upon plaintiff's judgment were issued respectively on December 22, 1938, May 8, 1939, November 19, 1941, January

4, 1943, and February 1, 1945, without satisfaction thereof, which establishes conclusively as a matter of fact that plaintiff's judgment was not dormant as provided in section 25-1515, R. S. 1943. The latter observations therefore dispose of appellants' fifth assignment of error adversely to them.

We turn then to the question of whether plaintiff's petition states facts sufficient to support a decree. In this connection it is the rule that: "In an action brought to set aside a conveyance of land and subject the same to the payment of the plaintiff's judgment, the petition sufficiently states a cause of action if it alleges that the conveyance was made for the purpose and with the intent to defraud creditors." *McIntyre v. Malone,* 3 Neb. (Unof.) 159, 91 N. W. 246. Also in such actions: " * * * the financial condition of the grantor at the time of making the conveyance is merely an evidential fact bearing on the question of fraud, and need not be pleaded; aliter, his financial condition at the time of the commencement of such action." *Dufrene v. Anderson,* 67 Neb. 136, 93 N. W. 139. Further, " * * * a petition wherein it is alleged that the grantor fraudulently conveyed the property with the intent to place it beyond the reach of his creditors, and that the conveyance was made without consideration, states a cause of action, without alleging that the grantee had knowledge of or participated in the fraud." *Nebraska Nat. Bank v. Hallowell,* 63 Neb. 309, 88 N. W. 556.

Bearing the above rules in mind we have examined plaintiff's petition wherein we find that she not only charges that the instruments were made for the purpose and with the intent to defraud plaintiff creditor in literal terms but under the circumstances the facts pleaded are sufficient to show such a purpose and intent. We are of the opinion that the allegations are sufficient to support a decree.

It is interesting to note defendants do not argue that plaintiff's petition does not state facts sufficient to support a decree as to defendants, J. Bank Williams and Irene M. Williams. In this connection also the evidence is conclusive, and defendants do not argue otherwise, that the deed to them, a son-in-law and daughter of grantors, on September

20, 1938, of all the property involved was void as to plaintiff and inferior to her judgment.

In a discussion of the second and third assignments of error it must be remembered that this action was filed April 24, 1939, notice of which was filed in the appropriate book of mortgages on that date, approximately six years before the present decree was ever entered. Fred G. Mancuso, a son of Samuel Mancuso and Mary Mancuso, claims to be the assignee of a purported assignment of the Elvira Mattioli mortgage on September 18, 1940. However, the assignment was never recorded and he never claimed any interest in such property until January 24, 1944, when given permission to file an answer and cross-petition. A hearing was had on January 26, 1944, wherein plaintiff adduced evidence and both parties rested. No request was made by defendants or by Fred G. Mancuso, or their attorney who represented all of them, for any continuance at that hearing. Neither was the case decided at that time. On June 24, 1944, before decision on the merits, plaintiff made application to withdraw her rest and show the relationship of the parties. The trial court in its discretion permitted her to do so and we find no error prejudicial to defendants therein which effectively disposes of the third assignment of error.

Defendants then requested continuance upon the ground that Fred G. Mancuso was in active military service. Thereupon continuance was granted indefinitely upon the suggestion of attorney for defendants that he would soon take the deposition of Fred G. Mancuso, who was then in Arkansas, or see if he could obtain a furlough and be present in court. On October 19, 1944, further evidence was adduced in plaintiff's behalf without objection and the question of continuance deferred. On January 22, 1945, without objection plaintiff adduced evidence that Fred G. Mancuso had been present in the city of Omaha several days upon two occasions, in the early summer and again in September 1944, at a time when his evidence could have been adduced in open court or his deposition taken. Defendants adduced evidence admitting he was in Omaha several days upon two occasions

but that the latter was in August rather than in September.

At the conclusion of this hearing plaintiff's attorney proposed that since Fred G. Mancuso claimed an interest in only one of the properties involved that the court proceed with the issues involving the other properties. Thereupon defendants' attorney did not object but informed the court: "It won't take very long." The court then set the matter for hearing at 2 p. m., January 26, 1945. On that date attorney for defendants appeared at the hearing and requested the court to have the record show that his motion for continuance was overruled. He then proceeded to and without further objection, did introduce all of his clients' defensive evidence upon all the issues involving all the property. Bearing in mind that courts should be ever watchful to protect the interest of litigants in military service, we are of the opinion that under the circumstances presented in the case at bar, the trial court committed no error in doing that which defendants' own attorney requested it to do.

Prior to disposition of the question whether the decree is sustained by the evidence it will be well to examine some applicable rules of law. In *Evers v. Evers, ante* p. 104, 18 N. W. 2d 673, it was held that: "Intent to make a mortgage to defraud creditors may be established by proof of facts from which such inferences may reasonably be drawn." By analogy under the circumstances presented here the same rule would apply to an assignment thereof. See, also, *Peterson v. Wahlquist,* 125 Neb. 247, 249 N. W. 678. In *Luikart v. Bosse,* 142 Neb. 157, 5 N. W. 2d 128, we approved the rule stated in 27 C. J. 415, wherein it is said: "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."

It is also well established in this jurisdiction that: "A conveyance between relatives which has the effect of hindering or delaying a creditor in the collection of his claim is presumptively fraudulent and, in litigation between the creditor and the parties to the conveyance over its alleged

invalidity, the burden is on the parties to the conveyance to establish the good faith of the transaction." *McBride v. Helmricks*, 140 Neb. 843, 2 N. W. 2d 118. And "Where the testimony relied upon to show good faith is given by interested relatives, the reasonableness or unreasonableness of their evidence bears considerable weight in arriving at a just conclusion." *Hilton v. Clements*, 137 Neb. 791, 291 N. W. 483. See, also, *Evers v. Evers, supra.* It was held in *McBride v. Helmricks, supra*: "Where the grantee, at the time the conveyance was made, had knowledge of the intent of the grantor to hinder and delay his creditors by the conveyance of his property, the conveyance is void as to existing creditors whether or not an adequate consideration was paid." This is true because, as stated in the opinion: "The law will not permit one man to assist another in defrauding a third person where it appears that they were actuated by motives denounced by the statute * * * ." Secs. 36-401, 36-405, 36-406, R. S. 1943.

The evidence and circumstances which we do not deem it necessary to relate clearly indicate that the mortgage given to a daughter, Virginia M. Potter, dated September 1, 1936, and not recorded until June 14, 1937, upon all but two parcels of the property involved, was executed not only without consideration but for the purpose and with the intent to defraud plaintiff creditor and it is junior and inferior to her rights as found by the trial court. The mortgagee herself did not even attempt to defend it. Only the father, mortgagor, testified in support of its validity, and we find that he failed to establish the good faith of the transaction.

That the Elvira Mattioli mortgage upon a single parcel, executed September 17, 1935, due and payable September 17, 1940, was *bona fide* in its inception cannot be disputed. She was not a relative of the Mancusos. However, the record discloses that the note and mortgage were paid in full by Samuel Mancuso on September 18, 1940, after it was due and she then had no interest remaining. The trial court evidently correctly concluded, under the issues and evidence

presented, that it was paid by Samuel Mancuso, who instead of obtaining a release took an assignment of the mortgage from the mortgagee to Fred G. Mancuso, who then lived in Kansas City, for the purpose and with the intent of defrauding plaintiff then a judgment creditor.

The record discloses that after Elvira Mattioli had been served with summons in the present action she demanded of Samuel Mancuso that he pay her in full. Thereupon he told her that he would borrow the money and pay her. She was paid in full by him on September 18, 1940. It is conceded that all of her business transactions were with Samuel Mancuso and that she had none whatever with his son. The father says that it was paid with the son's money but there is no evidence explaining the details of the transaction. There is no explanation of how or where or when it was paid by the son.

It is interesting to note that in answer to the question, "Did he request you to pay Mrs. Mattioli?" Samuel Mancuso answered: "She wanted the money and I couldn't get the money, and I wrote him and he told me to get the money and pay for it." Whether the son's name appeared as assignee in the assignment as originally executed is even questionable since the objective evidence clearly indicates an erasure and substitution of his name therein. Every fact and circumstance indicates without doubt that Samuel Mancuso obtained the execution of the purported assignment for the purpose and with the intent to defraud plaintiff, then a judgment creditor, with full notice and knowledge thereof on the part of Fred G. Mancuso. We are of the opinion that the judgment of the trial court was correct in every respect and it is hereby affirmed.

AFFIRMED.

WENKE, J., participating on briefs.

CLARENCE JUMP, PLAINTIFF IN ERROR, V. STATE OF NEBRASKA, DEFENDANT IN ERROR.
20 N. W. 2d 375

FILED NOVEMBER 2, 1945. No. 32000.

1. **Rape**: WITNESSES. In a prosecution for rape, the prosecutrix may testify in chief, if within a reasonable time under all the circumstances after the act was committed she made complaint to another, to the fact and nature of the complaint, but not as to its details; and that other may likewise testify in chief to such fact and nature of the complaint, but not as to its details.
2. **Rape**: EVIDENCE. In a prosecution for rape under section 28-408, R. S. 1943, if it satisfactorily appears from the evidence that the prosecutrix is not the sister or daughter of the accused, a conviction will not be reversed because no witness testified in direct language to those facts.
3. ———: ———. The evidence has been examined and found sufficient as to resistance to sustain the verdict.
4. **Criminal Law**. The sentence is found excessive and reduced by authority of section 29-2308, R. S. 1943.

ERROR to the district court for Buffalo County: E. G. REED, JUDGE. *Affirmed as modified.*

Dryden & Jensen, for plaintiff in error.

Walter R. Johnson, Attorney General, and *Homer L. Kyle*, for defendant in error.

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

SIMMONS, C. J.

Plaintiff in error, herein called the defendant, was charged with the rape of one Agnes Martin, in violation of the provisions of section 28-408, R. S. 1943. He was tried, found guilty and sentenced to imprisonment for a period of sixteen years. He appeals. We reduce the sentence and as so modified affirm the judgment of the trial court.

Defendant assigns as error: (1) The admission in evidence of statements of the prosecuting witness made to third parties not in the presence of the defendant; (2) that no proof was offered or received that the prosecuting wit-

ness was not the sister or the daughter of the accused, and the failure to sustain a directed verdict on that ground; (3) that the evidence of resistance was not sufficient to sustain a verdict of guilty; (4) that in any event, the sentence of the court is excessive and should be reduced under the provisions of section 29-2308, R. S. 1943.

The complaining witness is a married woman and a registered nurse. At the time involved herein, she was living with her husband and infant child in a house at Shelton, Nebraska. The husband was employed in Lexington, Nebraska, and absent from home except on week ends.

Defendant is a married man, 22 years of age, and at the time in question was living with his wife and infant child, and employed in Shelton, Nebraska.

The event upon which this charge is based occurred March 14, 1945. On January 23, 1945, defendant and his family moved into a two-room house on a lot adjoining the residence of the complaining witness. Mrs. Martin and the defendant had not been acquainted prior to that time, although it may be that each knew who the other was. There were some contacts between the new neighbors. Defendant offered evidence of visiting back and forth.

On March 13, 1945, defendant came at noon to the Martin home to borrow mustard to fix a mustard plaster for his child who was sick. That evening at supper time Mrs. Martin called at defendant's home and inquired about the health of the baby. Defendant offered testimony that during the evening the doctor and his wife's parents were at his home, and it was decided to take the baby and its mother to her parents for the night. That was done about 10:30. The defendant was home alone. Mrs. Martin denied knowledge of that fact.

Mrs. Martin and her son went to bed and to sleep early in the evening. Her husband was not at home. At 12:00 o'clock that night the defendant came to the bedroom window of the Martin home, knocked on the window, awakened Mrs. Martin, and asked her to come over to his house, saying the baby was sick. Defendant denied that he referred

to the baby. Mrs. Martin put on her robe and went with defendant to his home. When she arrived there, she went in; defendant locked the door. Mrs. Martin found that he was alone. The assault followed. Mrs. Martin returned to her home and 15 minutes later took her baby and went to a friend's house, where she arrived at 12:38. She is described by the witnesses as crying and hysterical at that time. She made complaint to the friend. The trial court refused to permit Mrs. Martin to state what she said. The friend then was sworn and testified that Mrs. Martin said, "Jack Jump raped me." Defendant moved for a mistrial. The village marshal came to the home a few minutes later. He was permitted to testify that Mrs. Martin complained to him that Jack Jump had just raped her. Defendant again moved for a mistrial.

The rule is stated in *Krug v. State,* 116 Neb. 185, 216 N. W. 664: "In a prosecution for rape, the prosecutrix may testify in chief, if within a reasonable time under all the circumstances after the act was committed she made complaint to another, to the fact and nature of the complaint, but not as to its details; and that other may likewise testify in chief to such fact and nature of the complaint, but not as to its details."

It is recognized in *Dodson v. State,* 119 Neb. 340, 228 N. W. 859, that there is an exception in the case of words or statements which are of the *res gestæ.* We do not deem it necessary to consider the admissibility of the evidence on that theory. The state had the right to show that the prosecuting witness complained and the nature of the complaint. This is pointed out in *Krug v. State, supra,* where it is said that the state should have put before the jury and into the record the nature of what the prosecutrix complained to the witness, i. e., that the defendant had raped her or had intercourse with her at the time in question.

The fact that the name of the defendant was included in the statements does not constitute prejudicial error. The admission of testimony, including the naming of the defendant, was approved in *Welsh v. State,* 60 Neb. 101, 82 N. W.

368, and cited with approval in *Younger v. State,* 80 Neb. 201, 114 N. W. 170. In this instance we see no possible prejudice to the defendant from the inclusion of his name in the evidence. Whether or not what he did constituted rape was challenged. His identity as the actor was not challenged but admitted. The record shows that before the challenged statements were admitted the county attorney stated: " * * *the defendant has stated by his counsel that intercourse took place, but that it was voluntary intercourse * * * ." Defendant did not challenge that statement. Prejudicial error did not occur in the admission of the evidence just discussed.

The second assignment is that the court erred in not sustaining a motion for a directed verdict for failure of the state to prove that the prosecuting witness was not the sister or daughter of the defendant. In his petition in error he limits the assignment to failure to prove that she was not the sister of the defendant. The defendant was 22 years of age. Obviously, the prosecuting witness was not his daughter. The evidence is that both Mrs. Martin and the defendant had lived in that general community for some years and they did not know each other until the time immediately preceding the event in question. There is no evidence whatever indicating a blood relationship. No such contention was made. The rule is: "If it satisfactorily appears from the evidence that the prosecutrix is not the wife, sister or daughter of the accused, a conviction will not be reversed because no witness testified in direct language to these facts." *Hanks v. State,* 88 Neb. 464, 129 N. W. 1011. We are satisfied that the evidence is sufficient in this case and that the assignment is without merit.

The third assignment of error is that the evidence of the prosecuting witness as to resistance was not sufficient to sustain a verdict of guilty. The testimony of the prosecuting witness is that she was in delicate health; that she was startled and shocked when she found herself alone with the defendant; that she was grabbed and her arms pinned down; that she called for help; that defendant struck her in

the chest twice, placed his hand over her mouth, said he would not hurt her if she did not "holler," pushed her on to the bed, held her down; and that she was afraid and could not struggle. She had marks on her face that night after the event and bruises of recent occurrence were on her body the following morning.

There is no contention advanced here of any pre-arrangement, inducement, persuasion, or consent. Defendant admits the use of force sufficient to accomplish his purpose. The inference is readily drawn from his testimony that he was prepared to use more force if necessary, and that greater resistance would have resulted in the use of greater force. The statute is "forcibly and against her will." Sec. 28-408, R. S. 1943. We think the evidence sufficient to sustain the verdict. See *Murphy v. State,* 15 Neb. 383, 19 N. W. 489; *Richards v. State,* 36 Neb. 17, 53 N. W. 1027; *Cardwell v. State,* 60 Neb. 480, 83 N. W. 665; *Guerin v. State,* 138 Neb. 724, 295 N. W. 274.

Defendant contends that in any event the sentence is excessive. Defendant is 22 years of age; he had previously been convicted of a car theft and sentenced to imprisonment in the reformatory for a period of one to three years; he had served fifteen months and was out on parole when the present offense was committed. When thirteen years of age he had been committed to the Industrial School. He admitted the commission of two other offenses involving property about the time of the car theft. However, even considering his unfavorable past record, we are of the opinion from the record as a whole that the sentence is excessive. By authority of section 29-2308, R. S. 1943, the sentence is reduced. We conclude that a sentence of ten years is warranted by the evidence.

The judgment of the district court, therefore, is modified and the sentence reduced to ten years at hard labor, Sundays and holidays excepted, and, as thus modified, is affirmed.

AFFIRMED AS MODIFIED.