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REPORTS OF CASES

DECIDED BETWEEN
FEBRUARY 15, 1947 AND NOVEMBER 28, 1947

IN THE

Supreme Court of Nebraska

JANUARY AND SEPTEMBER TERMS, 1947

VOLUME CXLVIII

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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

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JOHN W. YEAGER, Associate Justice
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Fourth	Burt, Douglas and Washington.	James M. Fitzgerald Herbert Rhoades Frank M. Dineen Arthur C. Thomsen Willis G. Sears William A. Day Henry J. Beal James T. English Jackson B. Chase	Omaha Tekamah Omaha Omaha Omaha Omaha Omaha Omaha Omaha
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IN MEMORIAM

HENRY H. FOSTER

At the session of the Supreme Court of the State of Nebraska, held on October 6, 1947, there being present Honorable Robert G. Simmons, Chief Justice, Honorable Bayard H. Paine, Honorable Fred W. Messmore, Honorable John W. Yeager, Honorable Ellwood B. Chappell, and Honorable Adolph E. Wenke, Associate Justices, and Honorable Ernest G. Kroger, District Judge, the following proceedings were had:

Honorable Ralph P. Wilson.

May it Please the Court:

We meet today to honor a man who devoted his life to the most important part of our system of jurisprudence, the education and training of young men and women for service at the bar and on the bench.

Henry Hubbard Foster, son of Hubbard A. Foster and Florence Jenkins Foster, was born December 3, 1876, in Buffalo, New York, and died in Lincoln, Nebraska, February 22, 1947.

Dean Foster received the degree of Bachelor of Arts from Cornell University in 1899 and the degree of Bachelor of Laws from Harvard University in 1908. Following his graduation from Harvard he was admitted to the bar in Illinois where he practiced law for two years in Peoria and was married on December 29, 1910, to Emma B. Adams.

After ten years service as Professor of Law at the University of Oklahoma, Dean Foster came to the University of Nebraska College of Law in 1920 and became Dean of that College in 1926, a position he held until

his retirement in 1945 when he became Dean Emeritus of the College of Law.

For a time he served as Acting Chancellor of the University, and for many years as legal adviser to the Board of Regents. In this capacity he aided materially in the solution of the many legal problems connected with the growth of the University.

Dean Foster's activities were not confined to teaching and the administration of the Law School; he became a national authority on real estate law and took a leading part in its modernization and simplification in Nebraska. He was instrumental in the establishment of the Nebraska Law Review which attained high standing in the legal profession. He was a member of the First Plymouth Congregational Church, the Nebraska and American Bar Associations, and many other organizations and fraternities.

Dean Foster was quiet, modest and unassuming—a devoted husband and father—a good citizen and conscientious public servant. No more could be said or asked of any man. He left surviving him his wife, his daughter Virginia of Lincoln, and his son Henry H. Foster, Jr., a graduate of the University of Nebraska Law School and now Professor of Law at the University of Oklahoma.

Your committee moves the Court that these proceedings be made a part of the permanent record of the Court; and as a mark of respect and sympathy, your committee further moves the Court that the Clerk be directed to send a certified copy of these proceedings to the bereaved family.

RALPH P. WILSON
MAURICE H. MERRILL
L. J. TE POEL
EARL CLINE
L. F. OTRADOVSKY
WILLIAM A. CROSSLAND

Judge Ralph P. Wilson continued:

Now, may it please the Court, if I may be permitted a personal tribute to Dean Foster.

It was my privilege and pleasure to serve with him on the faculty of our University Law School and under him as Dean during almost the entire period of his twenty-five years of service. I thus had an unusual opportunity to become closely acquainted with his character and ability. He devoted all of his time and energy without reservation to the building of a law school of high standards which was a credit to the University and the State. In all of his contacts and associations with his students and members of his faculty he was firm and steadfast in his requirements, but always patient and understanding with respect to their views and their problems. He was an inspiration to all of us. In his passing we have lost a true friend and counselor.

Mr. Maurice H. Merrill.

May it Please the Court:

"His life was gentle and the elements so mixed in him, that Nature might stand up and say to all the world 'This was a Man'."

Whenever I think of Henry Foster, these words of Shakespeare come to mind, so aptly do they describe him.

First among the elements of his character I would place kindness and a genius for friendship. These two qualities, which really are one, so thoroughly do they blend into each other, permeated his entire life.

As an administrator, he never "pulled his rank" on his faculty. He did not direct or command us. He counseled with us. He listened patiently to our views. He deferred to us when we convinced him. More often, he led us, by his gentle and tolerant clarity, to see the wisdom and truth of his position.

With his students, the same qualities prevailed. In the classroom he was patient and painstaking, gladly devoting all the time and effort necessary to clear up the difficulties which his students had. In his office, he was available for conferences and gave freely and generously of his time to perplexed students. His helpfulness extended to matters ranging far outside the field of legal study, as all the men and women who passed through the school will testify.

To young teachers, his friendship and kindness was a tower of strength. If a young man was having difficulty in getting his material across, Dean Foster would advise with him in perfect kindness and full understanding, and those who profited by his wise counsel were aided greatly in achieving a successful technique.

Another outstanding quality of Dean Foster was generosity. He was never jealous of the achievements of his colleagues. On the contrary, he rejoiced in them. He was prompt to aid students, materially as well as spiritually.

Akin to this broadly generous spirit was his outstanding tolerance. It was not the wishy-washy tolerance of the man who had no convictions. Rather it was the reasoned tolerance that arises from recognizing that there are many different roads to the truth, and that the great universal truth can be apprehended by man only dimly and in part, so that none of us rightly may assert infallibility. Because he so embodied the virtue of tolerance, he was able effectively to teach his students the characteristic manifestation of it in the professional life of a lawyer. Repeatedly he impressed upon them that opposition in the representation of clients must not descend to personal antagonism or sever the bonds of professional brotherhood.

Eminently characteristic of Dean Foster was his lofty, yet practical, idealism. Time will not permit a complete catalog of its manifestations. Let me recall a few. His tolerance, his idealism and his practicality combined to instill in him a deep reverence for the law as a civiliz-

ing force among men. In all his teaching and in public and private speech, he emphasized the high mission of the law in substituting orderly adjustment of disputes according to rule and principle for the rude adjustments made by forcible conflict and self-help. He lauded the professional contribution of the lawyer to this task, achieved through the presentment of conflicting claims by learned and ethical representatives instead of the personal brawling of the contending parties. Too, his students were never permitted to forget that the law is an instrument for enabling men to lead the good life; not an end in itself. He knew and taught that the law must keep pace with the times and serve the present age; that the rigidly logical application of doctrines and precepts must yield to the needs of society and to the effect of the rules in actual operation.

Henry Foster was a man of sound and practical scholarship. An outstanding manifestation of this was his leadership in the founding and development of the Nebraska Law Bulletin, now the Nebraska Law Review. Very dear to his heart was the organized treatment and discussion of the Nebraska law upon various subjects which appeared in the columns of that journal. Those of us who took part in that work received his enthusiastic support, and his own articles form a notable contribution thereto.

He loved the school to which he gave so many years. He sought to maintain in it the highest standard of excellence. He inspired in his faculty and students a like ambition. Thus he built a living monument in the hearts and in the lives of his students and associates. His influence will go on through the years in ever-widening circles, as the impulse moves out through a body of water when some object is cast therein, continuing on long after the source has disappeared and after the connection between impulse and effect has ceased to be perceptible. Thus Henry Foster's life will continue to bear fruit through the lives of those whom he taught and with whom he worked, and through the

lives of others whom these will influence, to many generations by whom his name may be unknown.

Today it should be a source of satisfaction to us all that we did not wait until now to pay tribute to Henry Foster. While he was yet alive and could take joy in the knowledge thereof, his students and associates united in expressing to him their appreciation of his service. Had we not done so, these words today would be as dust and ashes in my mouth.

"The wisest man could ask no more of Fate
Than to be simple, modest, manly, true,
Safe from the Many—honored by the Few,
To count as naught in World or Church or State,
But inwardly in secret to be great."

Henry Foster was a wise man. He sought no more in life than these things, and with them his cup was full—brim full and running over.

Mr. L. J. Te Poel.

May it Please the Court:

It was my privilege to know quite intimately the late Dean Foster from his arrival in this State to the end of his career. During those years he was animated by a zeal and enthusiasm for higher standards of legal education which inspired hope at times when progress seemed slow and achievement difficult. In the passing of the years, Nebraska should cherish the memory of Dean Foster's arduous efforts in the field of his chosen profession.

Mr. Earl Cline.

May it Please the Court:

For over 20 years I knew the Honorable Henry Hubbard Foster. For over 20 years I was closely associated with him. It is an honor and a privilege which I esteem

highly, to pay tribute to his great ability as a lawyer, to his career of distinction as a teacher, and to his sterling qualities as a man.

My first acquaintance with Dean Foster began in the 20's, when he was a professor in the College of Law of the University of Nebraska. Warren A. Seavey was then Dean of the College and I was a member of the Board of Regents of our University. Shortly, Dean Seavey resigned to accept a position on the faculty of Harvard College and Professor Henry H. Foster was unanimously elected Dean of the College of Law. He served in that capacity and as legal adviser to the Board of Regents during most of the 12 years that I was a member of the Board of Regents. I feel qualified, therefore, to speak of him and his work.

As a teacher, Dean Foster exemplified the scholar at his best. He knew the law thoroughly and, even more important to the great teacher that he was, knew how to impart this knowledge to others. Particularly in matters affecting real property and future interests, he was preeminent. In this field, he was one of the outstanding experts of our country and our time.

But he was more than an instructor in substantive law. He was an inspirational teacher, who immediately won and permanently retained the admiration and the good will of his students. Abundant evidence of this may be found among the members of the bar of this State who were his former pupils.

As Dean, as Acting Chancellor of the University, and as legal adviser of the Board of Regents, he displayed at all times great administrative ability, rare tact and diplomacy, and sound business judgment. In 1928, he made a particularly valuable contribution to the government and administration of the University. Many years had passed without any compilation of the by-laws and rules of the Board of Regents and without any collection of the statutes of the State relating to the University of Nebraska. Dean Foster undertook this laborious task.

He collected all of the statutes relating to the University, annotated them with decisions of the Supreme Court construing these sections and with all decisions of the Supreme Court in any way affecting the University. He completely revised and brought up to date the by-laws of the Board of Regents. This printed work of 208 pages was thoroughly and accurately indexed and cross-indexed and throughout the years has proven not only most usable but practically invaluable.

As Dean of the College of Law, he kept our law school on a high plane in instruction and scholarship, which resulted in its being considered one of the fine law colleges of this country.

The contribution of Henry H. Foster to the University and the State of Nebraska, as a profound scholar, an inspirational teacher, an able administrator, and as a good citizen, cannot be adequately acknowledged in words. It is a record of unsurpassed excellence. In every particular he measured up to every confidence reposed in him.

As a man, Dean Foster exemplified the finest type of American manhood. His character was above reproach. His reputation for honesty and industry were the highest. His personality was pleasing and genial. He loved his fellow-men, and they in return gave him not only their affection but their respect and admiration. Always and ever, he was a real gentleman, in all that those terms imply.

The lines of Fitz-Greene Halleck on the passing of Joseph R. Drake are particularly appropriate:

> "Green be the surf above thee,
> Friend of my better days!
> None knew thee but to love thee
> Nor named thee but to praise."

Mr. L. F. Otradovsky.

May it Please the Court:

It was my honor and privilege to be a member of one of the first classes to pass through the Nebraska College of Law under Dean Foster. Of all of the fine things that have been said and can be said of Dean Foster, to me it seems, quite appropriately, that one of the finest is that he was a great teacher. He was a great teacher in the sense that he was able to deliver his subject matter to his students in such a way that they could readily understand and assimilate it. I well recall his frequent use of the terms Blackacre and Whiteacre to make his points so clear by illustration that no student could fail to grasp them. However, his greatness as a teacher consisted of more than expounding the subject matter of his courses. He sought to develop in each of his students what he called *"the legal mind"*—the ability to analyze and solve a legal problem by legal reasoning based on fundamental principles of law and justice. To him the practice of law was an honorable profession; and he taught his students to practice it with honor to the profession. I am sure that each of us who graduated under Dean Foster shall always feel that we owe him a personal debt of gratitude for what we received from him as his students.

Mr. William A. Crossland.

May it Please the Court:

My colleagues have ably recounted to your honors the outstanding accomplishments and contributions and virtues of our beloved Henry H. Foster, and they were many. May I humbly speak of his great service to hundreds of young men as a teacher and a friend. To my mind his labors in these two fields are what made him great, what made him respected and loved by all.

He was an incomparable teacher. I have never seen his equal. He was a master of the classroom. His vibrant and gifted personality permeated the minds of his students. His mastery of the subjects he taught was complete, his learning profound. In the three years I was privileged to attend his classes I never saw him at a loss for an answer or a clear explanation. He knew what answers to give all of us to our queries and what was in our minds. He was a past master of the method of illustrating by example the practical meaning of the principles of law. He could make things so plain that even the most backward of his students could grasp them. He loved to innocently start argument among his students which quickly developed into spirited discussions which he skillfully guided with a master hand. He seldom lectured in a conventional way and it seemed that he was continually trying to find out what his students knew and thought about the subject in hand, why they so thought and their reasons for their conclusions. He preferred to have his students convince themselves by argument and reason than to speak to them ex cathedra. He literally followed the meaning of the word "educate" which means "to lead out." He had the rare gift of teaching his students to think and reason and that to my mind should be the constant goal of any teacher.

We will never forget him for his lively observations and spontaneous wit. We often wondered each day what would happen next and looked forward to his classes. His quaint sayings, his good-natured raillery, his sage observations are a part of the tender memory we treasure. He never used sarcasm, never humiliated or publicly reproved, was fair and just in his appraisal of us, always seeking to look upon the bright and humorous side of life, understanding our failings and patient with our frequent lack of industry and immature thinking. I have never seen him reprove a student who was unprepared when called upon. Rather he would take the student in hand and before the class endeavor

to draw out the essentials of the case. And those semester examinations were broad, fair and skillfully tested what we had learned. They always were headed with a note of advice. I recall especially an examination on Irrigation, which was headed as follows: "Gentlemen, this is an examination on water not wind. Govern yourselves accordingly."

He taught ideals as well as law. He instilled into our minds the highest standard of ethics so that his students never forgot them. He urged us to have a "love of excellence, a passion for perfection." He entreated us to be active in civic affairs, to accept and discharge our responsibilities in government, to defend, extend and improve the law. He observed to us that we should be less interested in amassing wealth and more interested in upholding our profession and serving mankind. All these and many more did he exhort us to follow and because we respected and loved him we tried to plan our lives accordingly. His influence on hundreds of young men can never be adequately measured.

A quarter of a century of priceless service he rendered as Professor and Dean of the College of Law, University of Nebraska, from 1926 to 1945, when he retired. Some 927 young men graduated from the College of Law, an estimated 3,000 students who did not graduate but were in his classes. When he retired in 1945, the May 1, 1945, roster of practicing attorneys graduated from the College of Law during its entire existence, reveals that 7/10 (69.36%) of all of them graduated while he was Professor and Dean! This, of course, does not include many graduates in many other states who are in the active practice. All of them learned their first law under our beloved Dean. He taught and trained these hundreds of young men at the most impressionable period of their lives. We cannot adequately comprehend the magnitude of his service. He could have gone to other law schools, have received greater remuneration, but he chose to cast his lot with us, to devote his life and talents to the young men of the College of Law of the University of Nebraska.

He worked, planned, sacrificed and builded the College of Law to an honored position. He loved his work and put his life, time and talents into it without stint and this commonwealth is deeply in his debt for the outstanding service he rendered.

Great as he was as a teacher, equally great was he as a friend. He entered into our pleasures as well as our studies with all the vigor of a young man. I don't believe he ever got old in spirit. He broke bread with us, he lustily sang with us, he stoutly defended us whenever trouble arose, he encouraged and counseled us, he rejoiced in our successes and comforted us in our defeats! He was one of us in school days and when we began our practice. He loved young men and helped them all the days of his active life and up to the time of his passing. Graduation was merely a time to say "Adieu" and not "Goodbye". He watched with delight our progress and comforted the discouraged. For many men his kindly counsel and assistance resulted in the difference between success and failure. Many a young man successful today in the profession freely acknowledged his debt to our beloved Dean. May I tell you of just one instance out of many. One young man had just barely enough funds to carry him through the first semester of his first year in law school. He related his plight to the Dean and bade him goodbye. The Dean saw great possibilities in this young man, told him to wait until the grades were announced, reached into his purse and made a friendly private loan to the young man, got him a scholarship, a part time job, and the young man finished his three-year course. He started in the practice and progressed rapidly, is now an able and successful lawyer. You would all know him if I chose to mention his name. Seventeen years passed before this great deed of kindness came to light when the recipient feelingly told me that he had Dean Foster to thank for his success in life. The many, many instances of such friendship practiced by our beloved Dean will never be known. Another instance revealed that

the Dean had succeeded in placing a promising young man in a position worthy of his talents where he proceeded to make a name for himself. Times without number young men have come to the Dean for counsel and guidance and he never failed them. Through the years he never forgot them, never lost sight of them. We need not wonder why our beloved Dean was loved and respected when we realize how much he gave to young men through the years. Because of this he was rich, rich in the rarest metal known to man, the gold of friendship. Unconscious of his greatness, he served others and in return they were proud and thankful to have him as a friend. He paid scant heed to his own welfare because he was far more interested in the happiness and welfare of his friends. On frequent occasions we have inquired about his health and usually found that he was more interested in the progress of his boys, as he called them. His eyes would light up and his face would be wreathed in a smile as we related all the news from them. He had the same spirit, forgetting self and serving others, of a dear old Catholic sister, head of an orphanage, when on many occasions I purposely inquired, "How are you, sister?"; and invariably she replied: "The children are well." Such rare spirits forget themselves in service to others.

What is the lesson to learn from the glorious life of our beloved Dean and friend? That service to our friends should be one of the main objectives of our lives. He has set us a wonderful example of what true friendship can accomplish, what it can mean to all of us. His life has abundantly proved the worth of service to others. It is an art we all appreciate but many of us sparingly practice. It is an art we all can cultivate and practice, be we of high or low degree. While engaged in the struggle for power, wealth, position or prestige, let us not forget to serve our friends and help them along the way of life. And as we serve them, so they will help us. We may think that we are the architect of our own fortunes. More often than not the reverse is true,

and had it not been for our parents, some teacher or friend, we would not have achieved what we have today. May we ever keep in memory the glorious and wonderfully successful life of our beloved Dean and friend and strive to emulate his many virtues.

Associate Justice Adolph E. Wenke.

It was my privilege to become acquainted with Dean Henry Hubbard Foster when I entered the College of Law of the University of Nebraska in the fall of 1920. That fall he came to the University from the University of Oklahoma where he had been a professor in the College of Law for some ten years. During my three years in the law school and during the years that followed, when he was Professor, Dean, and then Dean Emeritus, I always felt that there was a warm friendship between us. That this feeling was common to all who came to know him is evidenced by the contents of the many letters received from his former students, faculty associates, judges, lawyers, regents of the University, and others on the occasion of his being honored by the Law Alumni of the University of Nebraska.

As the representative of this Court it is my privilege to express our appreciation of his life's work. Dean Foster was inherently a friendly person and a fine companion. In his family life and as a citizen he exemplified the best. In honoring him today we especially call attention to some of his contributions to our profession.

Although for many years a dean he was primarily a teacher and spent practically all of his years actively engaging therein. He had the faculty of so presenting his subject that he placed it within the grasp of the average student. However, his real greatness as a teacher was not solely in his teaching of the subject but in his complete and comprehensive understanding of the ethics of the practice of our profession as it relates to the courts, the client, a fellow lawyer, and the public at large together with his ability to give his students a

proper understanding thereof. During the more than twenty-five years that Dean Foster was associated with the College of Law of our University this quality of his teaching helped lift the standards of our practice and will continue to do so for many years to come.

Dean Foster extended his interests far beyond the classroom. He was a willing and able counselor of his students. Many a student who is practicing law today owes much to Dean Foster for his advice and encouragement, without which he would probably have become discouraged and dropped by the wayside.

Dean Foster had a boundless zeal for his chosen profession and worked constantly for its improvement. As editor of the Nebraska Law Review and by numerous articles he prepared and published therein, he has added much of value. The accepted value of his articles is evidenced by their frequent citation in briefs filed in this Court. In association with others he prepared the Nebraska annotations to Restatement of the Law of Trusts.

Dean Foster was active in the work of the Nebraska State Bar Association and particularly with reference to the law of real property. As chairman of the section on real estate he inaugurated the idea of a comprehensive curative act, a uniform property act, and uniform standards for title. By his untiring efforts he helped to bring about their enactment into law. The first two were enacted during his lifetime by the 1941 Legislature and the latter was enacted into law by the 1947 Legislature.

Dean Henry Hubbard Foster gave unselfishly of his time and effort in the interests of our profession. By his life's work he has left it many lasting benefits. For this today we honor him and may his example be a constant inspiration to all of us.

Chief Justice Robert G. Simmons.

The statements made concerning the life and public service of Dean Foster meet the full concurrence of the Court.

We are honored this morning with the presence of Dean Foster's son and wife, his daughter and many of his friends. For them and for the court I thank the committee and each of its members for the full performance of the trust we placed in them. The motion of the committee is granted.

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CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

JANUARY TERM, 1947

ANNA DRYDEN, APPELLEE, V. OMAHA STEEL WORKS, APPELLANT.

26 N. W. 2d 293

Filed February 21, 1947. No. 32201.

1. **Workmen's Compensation.** To sustain an award in a workman's compensation case it is sufficient to show that an injury, resulting from an accident arising out of and in the course of the employment, activated a dormant disease and resulted in disability.
2. ———. Evidence showing the existence of a dormant disease, the happening of an accident of sufficient consequence to activate it followed by objective symptoms of such activation, and expert medical testimony that the accident activated the dormant disease and resulted in disability, is sufficient to sustain a finding that there was a causal connection between the employment and the disability.
3. ———. When an employee receives an accidental injury arising out of and in the course of the employment which activates a dormant disease, the failure to file a petition within a year is not a bar if the petition is filed within one year after the employee acquires knowledge of a compensable disability.

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

Spier, Ramsey & Ellick, for appellant.

John A. McKenzie, for appellee.

Heard before SIMMONS, C. J., PAINE, CARTER, YEAGER, CHAPPELL, and WENKE, JJ., and NUSS, District Judge.

CARTER, J.

This is a suit for the collection of benefits alleged to be due under the Workmen's Compensation Act. The district court found for the plaintiff and the employer appeals.

On April 29, 1943, Joseph R. Dryden was in the employ of the defendant, Omaha Steel Works, at which time he slipped and fell backwards, striking the back of his head on the edge of a metal crane support. He sustained lacerations on the back of his head which required immediate medical treatment, but did not result in any immediate disability. On May 7, 1943, an infection developed at the point of the injury, which required hospitalization and medical treatment. He remained in the hospital until May 28, 1943, on which date he returned home. On June 12, 1943, he returned to work. During his stay in the hospital he had chills and high fever, and a severe swelling of the scalp and face. The trouble was diagnosed as erysipelas and became so severe that the patient was at the point of death. Benefits due under the Workmen's Compensation Act were paid by the employer for this period.

On June 12, 1943, Dryden resumed his work. He worked steadily, putting in much overtime, until late in December 1944, when he was directed by the company's doctor to desist. On January 6, 1945, he was confined to his bed. On February 4, 1945, he was taken to a hospital. He died on February 11, 1945, of pulmonary tuberculosis. It is the contention of the plaintiff that the accident of April 29, 1943, and the infection subsequently growing therefrom lighted up the tuberculosis latently existing, and caused Dryden's death.

While it is true that it was not determined that Dryden was suffering from tuberculosis until February 9, 1945, there is no dispute in the medical testimony that pul-

monary tuberculosis was the cause of death. The evidence shows that Dr. Leo V. Hughes was the company's physician in charge of the case. It appears that on June 20, 1944, Dr. Hughes detected evidences of lung trouble and referred the case to Dr. E. L. MacQuiddy. Dr. MacQuiddy was unable to find any tubercular bacteria and concluded that Dryden was suffering from a fungus infection of the lungs of which ample evidence was found. It was not until February 9, 1945, that positive evidence of tuberculosis was discovered.

There is evidence in the record to the effect that as early as 1929, Dryden had a hacking cough, pain in the chest, and a shortness of breath, symptoms usually associated with tuberculosis but not conclusive of it. They are also symptoms of the fungus infection of the lungs first found by Dr. MacQuiddy. The evidence also shows a pronounced loss of weight from the time of the illness shortly following the accident in 1943. Dryden weighed 220 pounds before the accident in 1943, in the spring of 1944 he weighed 189 pounds, in November of 1944 he weighed 168 pounds, and on February 4, 1945, he weighed 138 pounds. There is no dispute in the evidence concerning the fact that Dryden lost weight substantially in this manner.

There is medical testimony in the record to the effect that the situation above recited indicates the existence of a latent tubercular condition on the date of the accident in 1943. Dr. William J. Nolan testified that the evidences shown to exist by the autopsy report indicate that the tubercular condition had existed for at least two years. Dr. Harry E. McGee testified that in 1929 he was the Dryden family physician. During that year, he said, evidences of a tubercular condition existed which in the light of subsequent events indicated that Dryden then had a latent tubercular affliction. Anna Dryden, wife of Joseph R. Dryden, testified that he not only had a hacking cough, pain in the chest, and shortness of breath prior to the infection

growing out of the accident in 1943, but that he had in addition thereto after his return to work on June 12, 1943, night sweats, a poor appetite, a steady loss of weight, and a continued tiredness. We think this evidence is sufficient to sustain a finding that a latent condition of tuberculosis existed on April 29, 1943, the date of the accident.

A more serious question is presented as to whether the evidence is sufficient to sustain a finding that the infection following the accident lighted up and activated the latent tubercular condition and thereby brought about Dryden's death on February 11, 1945. The evidence of Anna Dryden that Dryden was troubled with night sweats, a poor appetite, a gradual and pronounced loss of weight, considerable sputum, pain in the chest, and a hacking cough, tends to support this allegation. The medical experts seem to be in accord that these symptoms, taken together and considered in retrospect, indicate a tubercular condition. Dr. Nolan testified that tuberculosis can exist in a dormant condition for several years and then through an injury or disease, tending to lower the vitality and resistance of the afflicted person, the inactive germ may suddenly spring to life and produce the disease in an active form, its severity depending upon the extent to which the patient's vitality has been lowered and the virility of the organism which is the source of the disease. He testified that the infection following the accident in 1943 could well have been such an activating agency and in his opinion did light up the latent tubercular condition. The evidence of Dr. McGee is substantially to the same effect. The undisputed evidence of Anna Dryden and the foregoing expert medical evidence is sufficient to sustain the finding of a causal connection between the accident and the death. Dr. MacQuiddy agrees that the infection following the accident of April 29, 1943, was sufficient to light up a latent tubercular condition, but that it ordinarily would have occurred much sooner than in the present instance. He

testified that any opinion as to whether it did light up and activate the disease in the present case would be speculative and conjectural in view of the fulminating type of tuberculosis which Dryden had. A consideration of all the evidence leads us to the conclusion that it is sufficient to sustain a finding that Dryden was afflicted with a latent tuberculosis on April 29, 1943, which was activated and lighted up by the infection growing out of the accident, and caused the death of Dryden within the meaning of the Workmen's Compensation Act.

It is a well-established rule in this state that to sustain an award in a workmen's compensation case it is sufficient to show that an injury, resulting from an accident arising out of and in the course of the employment, and preexisting disease combined to produce disability or death. Cunningham v. Brewer, 144 Neb. 211, 16 N. W. 2d 533.

It is urged that the claim is barred by the statute of limitations governing such claims. § 48-137, R. S. 1943. Under this section a suit to recover compensation benefits must be commenced within one year from the date of the accident. With reference to latent disabilities growing out of an accident occurring in the course of the employment the rule is: When an employee receives an accidental injury arising out of and in the course of the employment which activates a dormant disease, the failure to bring suit within a year is not a bar if the action is commenced within one year after the employee acquires knowledge of a compensable disability. Clary v. R. S. Proudfit Co., 124 Neb. 582, 247 N. W. 417; Lind v. Nebraska National Guard, 144 Neb. 122, 12 N. W. 2d 652.

As heretofore set forth, Dryden returned to work on June 12, 1943, it being supposed that he had recovered from the accident of April 29, 1943, and the infection which followed it. He worked continuously from that date until late in December 1944. Even though he was under a physician's care a good share of that period, the source of his trouble was not discovered. It is rea-

sonable to assume, we think, that Dryden had no reasonable basis for supposing that his trouble was connected with the accident he sustained in April 1943, when the physicians in charge were unable to make a correct diagnosis of his case. It was not until February 9, 1945, two days before Dryden's death, that it was determined that he was suffering with pulmonary tuberculosis. Until the true nature of the disease was discovered, neither Dryden, nor those succeeding to his interests after his death, had any way of determining whether the disease stemmed from, or was activated by, the injuries sustained in the previous accident. "Within the meaning of the law barring claims for compensation of a workman, if not made within six months, a latent accidental injury, seeming at first to be trifling and noncompensatory, but subsequently resulting in a progressive disease and a disability, occurs when its true nature is discovered by him or when the diseased condition culminates in disability." Clary v. R. S. Proudfit Co., *supra*. The same rule applies to the filing of the petition as to the giving of notice. The fact that Dryden worked steadily at his employment to within 50 days of his death is consistent with the view that he was oblivious of the true nature of the disease and of any reasonable notice that it was connected with the accident. In addition thereto, the record shows that plaintiff inquired of Dr. Hughes, the employer's physician, in January 1945, as to whether Dryden then had a compensable disability, and he informed her that there was no connection between the then present disease and the injury sustained in April 1943. This opinion was undoubtedly founded upon an incorrect or incomplete diagnosis of the case, but it was one upon which she could be expected to rely. The plaintiff cannot be held to a greater degree of knowledge of the case than the company's physicians had. The petition was filed in the compensation court on February 9, 1946. Consequently, it was filed within one year from the time of the discovery of the true nature of

Dryden's condition and its connection with the accident.

AFFIRMED.

ANNA DRYDEN, SPECIAL ADMINISTRATRIX OF THE ESTATE OF JOSEPH RAY DRYDEN, DECEASED, APPELLEE, V. OMAHA STEEL WORKS, APPELLANT.

26 N. W. 2d 296

Filed February 21, 1947. No. 32202.

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

Spier, Ramsey & Ellick, for appellant.

John A. McKenzie, for appellee.

Heard before SIMMONS, C. J., PAINE, CARTER, YEAGER, CHAPPELL, and WENKE, JJ., and NUSS, District Judge.

CARTER, J.

This is a companion case to Dryden v. Omaha Steel Works, *ante* p. 1, released herewith. The cases were consolidated for briefing and oral argument in this court, and involve identical issues. The cases were heard in the district court upon the same evidence and were presented here upon the same bill of exceptions. The applicable principles of law are the same.

For the reasons stated in Dryden v. Omaha Steel Works, *ante* p. 1, the judgment of the district court is affirmed.

AFFIRMED.

FRANCIS STEELE, APPELLEE, V. JAMES NEMER, APPELLANT.
26 N. W. 2d 185

Filed February 21, 1947. No. 32184.

Negotiable Instruments: Payment. The evidence on an issue of payment of a promissory note is examined and held not to present a jury question.

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

James Nemer, pro se, for appellant.

Pierson & Scheele, Chambers & Holland, and *John R. Dudgeon,* for appellees.

Heard before SIMMONS, C. J., PAINE, CARTER, YEAGER, CHAPPELL, and WENKE, JJ., and NUSS, District Judge.

SIMMONS, C. J.

This is an action in replevin. Issues were joined and trial had. The trial court, on motion of the plaintiff, discharged the jury, entered judgment for the plaintiff for possession and nominal damages. Defendant appeals. We affirm the judgment of the trial court.

Plaintiff alleged that on September 12, 1945, he sold personal property consisting of the fixtures, equipment, and supplies of a cafe to the defendant; that on said date defendant executed and delivered to plaintiff a promissory note in the sum of $1,500, payable November 12, 1945, and secured the same by a chattel mortgage on the personal property involved; that defendant failed to make payment of the note; and that because of the default in payment and by the terms of the mortgage, the plaintiff was entitled to possession of the property. Plaintiff prayed for judgment of possession, or, in lieu thereof, judgment for $1,500. Defendant filed an answer and cross-petition and later on an amended answer in which he denied generally and alleged payment. A reply was filed. Trial was had with the result above stated.

Defendant was represented in the trial court by counsel. He appears here pro se. As we understand his appeal, he contends that he offered evidence establishing payment, and that the trial court erred in not submitting the issue to the jury.

The evidence shows that in June 1945, plaintiff and defendant entered into negotiations for the sale and purchase of the cafe property. There is no evidence of the agreement reached, except as to the purchase price of $8,100 preliminary to a formal contract that was not drawn. It is undisputed that defendant paid plaintiff $3,000, and took possession and operated the cafe for five days. At the end of that time possession was returned to plaintiff, defendant keeping the cash receipts for the period amounting to about $2,300, and plaintiff assuming all costs of operation including about $850 for pay roll, about $625 for bills incurred during the period, and about $400 for depleted inventory.

In August 1945, plaintiff and defendant again negotiated on the sale and purchase of the property, resulting in a written contract executed September 12, 1945, wherein defendant agreed to pay for the property the sum of $7,500. Of this amount, $6,000 was to be payable at the time of delivery of title and possession, and $1,500 to be represented by a promissory note payable in two months.

The note dated September 12 and payable November 12, 1945, was executed and delivered, along with the chattel mortgage. The $6,000 was paid by three separate checks for $1,000, $2,000, and $3,000 on different banks. Defendant entered into possession of the property.

The checks for $1,000 and $2,000 were honored and paid. The check for $3,000 was returned marked "Insufficient funds." On September 18, plaintiff presented the check to defendant. Defendant gave plaintiff two checks for $1,500, one dated September 18, 1945, and one "Post Dated" September 20, 1945. The $3,000 check was returned later to defendant. The postdated check

was returned marked "Payment Stopped" and not thereafter paid. The check for $1,500, dated September 18, 1945, was paid September 20, 1945. It is this check which defendant contends here constituted payment of the note dated September 12, 1945, and payable November 12, 1945. There is no evidence of any kind to support defendant's contention that the check of September 18 constituted payment of the note. Defendant's own testimony negatives any such contention and in fact corroborates plaintiff's testimony as to the origin and purpose of the check.

Defendant testified that plaintiff did not receive payment of the $3,000 check "For the reason that I had discovered that I was entitled to previous credits." Defendant admitted the giving of the two $1,500 checks on September 18, 1945, and the return to him of the unpaid $3,000 check. He admits the payment of the one $1,500 check and that payment was stopped on the other, and that it has not since been paid.

We are of the opinion that defendant's evidence does not present a jury question as to the issue of payment.

Defendant presents other matters in his brief. They are either without the record, without the issues, or without merit.

The judgment of the trial court is affirmed.

AFFIRMED.

LILA LEE GILMORE, A MINOR, BY HATTIE S. GILMORE, HER GUARDIAN AND NEXT FRIEND, APPELLEE, V. STATE OF NEBRASKA, DEPARTMENT OF ROADS AND IRRIGATION, APPELLANT.

26 N. W. 2d 296

Filed February 21, 1947. No. 32193.

1. **Appeal and Error.** A bill of exceptions filed in this court on appeal from the district court in a compensation case, must

be prepared, served, settled, and filed in accordance with section 25-1140, R. S. 1943.

2. ———. This court will, on its own motion, refuse to consider a document appearing in the record and purporting to be a bill of exceptions when not allowed as such by the trial court or authenticated by the certificate of the clerk of the trial court.

3. ———. If an appeal is taken from rehearing in the compensation court to the district court, where the bill of exceptions is neither offered in evidence nor served, settled, and authenticated as required by statute, then the issue in the district court and in this court on appeal therefrom is simply whether the pleadings in the compensation court were sufficient to sustain the award.

APPEAL from the district court for Dawes County: EARL L. MEYER, JUDGE. *Affirmed; appellee allowed $200 attorney fee for services in this court.*

Walter R. Johnson, Attorney General, Carl H. Peterson, and *Harold Salter,* for appellants.

Lawrence F. Welch, for appellee.

Heard before SIMMONS, C. J., PAINE, CARTER, YEAGER, CHAPPELL, and WENKE, JJ., and NUSS, District Judge.

CHAPPELL, J.

The guardian and next friend of plaintiff, Lila Lee Gilmore, twelve-year-old daughter of Nyle M. Gilmore, deceased, instituted this action to recover dependency benefits and burial expenses under the workmen's compensation law. After hearing before one judge of the compensation court, plaintiff was awarded $15 per week for a period of 142 5/7 weeks as dependency benefits, together with $150 burial expenses. Upon rehearing before the three judges of the compensation court, that award was affirmed and defendant appealed therefrom to the district court, with like result except that plaintiff was also awarded $150 attorneys' fees for services rendered in that court. From that affirmance defendant appealed to this court, assigning as error that the trial court acted without and in excess of its powers

and that the findings of fact are not conclusively supported by the evidence and do not support the award. We conclude that the assignments cannot be sustained.

This court has recently held that "A bill of exceptions filed in this court on appeal from the district court in a compensation case must be prepared, served, settled, and filed in accordance with section 25-1140, R. S. 1943." Ratay v. Wylie, 147 Neb. 201, 22 N. W. 2d 622. In the case at bar, the bill of exceptions from the compensation court, properly authenticated, together with the transcript therefrom, was filed in the district court but the bill of exceptions was never offered or received in evidence at the hearing there, and was filed in this court without being certified, allowed, or authenticated, as required by the statutes granting such appeals in this state. The time within which that may be done has long since elapsed.

Under such circumstances, although no motion to quash the bill of exceptions has been filed herein: "This court will, on its own motion, refuse to consider a document appearing in the record and purporting to be a bill of exceptions when not allowed as such by the trial judge or authenticated by the certificate of the clerk of the trial court." Ratay v. Wylie, *supra.*

In such a situation, this court will presume, as the trial court must have done, in the absence of any evidence properly before it, that the evidence adduced before the compensation court was sufficient to sustain the findings of fact made in its award and the only question presented, either in the district court or in this court on appeal therefrom, is whether the pleadings filed in the compensation court were sufficient to support the award and judgment.

In the light thereof, we will briefly review the pleadings. Plaintiff's petition contained in substance the following allegations: That on February 16 and February 20, 1942, an award was made by the compensation court finding that on April 7, 1936, Nyle M. Gilmore

sustained an accident and received a latent and progressive injury therefrom, which arose out of and in the course of his employment by defendant, but did not culminate in compensable disability until March 31, 1941, when he became totally disabled therefrom, and would continue to be so disabled for an indefinite time in the future. He was awarded compensation therefor at the rate of $15 per week, together with necessary medical and hospital expenses incurred as the result of such accident, from and after March 31, 1941, so long as his total disability continued. No appeal was taken therefrom, and Nyle M. Gilmore was paid compensation by defendant at that rate, together with certain medical and hospital expenses as ordered in the award, for a period of 182 2/7 weeks, up to and including September 27, 1944, the date of his death, which was due to, resulted from, and was caused by the accident and injury, thereby entitling plaintiff to recover dependency benefits and burial expenses.

Defendant's answer admitted plaintiff's total dependency upon Nyle M. Gilmore, her father. It thereafter denied generally and alleged in substance that Nyle M. Gilmore knew, or should have known, of his disability and filed no claim for compensation within six months of his accident and presented no petition to the compensation court within one year from the date of the accident, therefore the statute of limitations barred his claim for compensation, as a result of which plaintiff's claim for dependency benefits and burial expenses was also barred thereby.

In that connection we call attention to the fact that in Gilmore v. State, 146 Neb. 647, 20 N. W. 2d 918, this court held that the above award of compensation to Nyle M. Gilmore from defendant herein, entered by the compensation court on February 16, 1942, and February 20, 1942, but never appealed from, was a final order constituting an absolute bar to the defense of the statute of limitations interposed by defendant herein.

As a result, that question could not be relitigated in this related action.

Clearly, since that award to Nyle M. Gilmore was conclusive upon defendant, and plaintiff's petition sought, and the award gave her, the relief to which she was entitled by virtue of sections 48-122, 48-123, and 48-124, R. S. 1943, the pleadings were sufficient to sustain the award and judgment. Other matters are discussed in brief of counsel, but since they are not properly before this court, we will not discuss them. Under such circumstances, the judgment must be, and is hereby affirmed, and plaintiff is awarded $200 attorneys' fees for services rendered in this court.

AFFIRMED.

L. C. BARSTOW ET AL., APPELLEES, v. LEO L. WOLFF, APPELLANT.

26 N. W. 2d 390

Filed February 28, 1947. No. 32176.

1. **Replevin.** A plaintiff in replevin against whom a judgment has been rendered owes the affirmative duty of returning the property replevied to the defendant.
2. ———. Under such circumstances the plaintiff has no right to elect to keep the property and pay the value thereof in lieu of the return of the property.
3. ———: **Judgments.** The alternative money judgment provided for by statute affords a measure of relief only when the property cannot be returned.
4. ———: ———. A defendant in such a case is entitled to exhaust the powers of the court in securing a return of his property before he is obliged to accept the alternative money judgment.
5. ———: **Executions.** The denial, in such a case, of an application for a special execution to secure the return of the property only is a denial of a substantial right and constitutes a final order from which an appeal may be taken.

APPEAL from the district court for Cheyenne County:

J. LEONARD TEWELL, JUDGE. *Reversed and remanded with directions.*

Mothersead & Wright, for appellant.

Heaton & Clinton, for appellee.

Heard before PAINE, CARTER, YEAGER, and CHAPPELL, JJ., and NUSS, District Judge.

CARTER, J.

This is a replevin action in which the right of possession of the property replevied was found to be in the defendant. The defendant thereupon applied to the district court for a special execution commanding the sheriff to return the property to him. The trial court denied the application and defendant appeals.

The record shows that plaintiffs replevied a quantity of livestock including 47 calves from the defendant. At the trial the jury found the right of possession of the livestock to be in the defendant and fixed the value of the calves at $1,880, they being the only property involved in this appeal. The trial court entered judgment on the verdict, adjudging that defendant was entitled to possession of the property; and in case the calves could not be returned, that he have judgment for $1,880, the value fixed by the jury. The defendant then applied to the court for an order directing the clerk of the district court to issue a special execution for the return of the calves only. The application was denied and defendant contends that the denial of the application was error prejudicial to the rights of the defendant.

We think it is elemental that a plaintiff who has obtained possession of property by replevin is required, after judgment for the defendant in the replevin action, to return the property to the defendant. The plaintiff under such circumstances has no right to elect to keep the property and pay the value thereof instead of returning the property. 1 Freeman on Executions,

(3d ed.) § 4, p. 9; McIntosh Livestock Co. v. Buffington, 116 Or. 399, 217 P. 635; Swantz v. Pillow, 50 Ark. 300, 7 S. W. 167. We find no case deciding this precise point in this state. On the other hand, it has been held that a defendant under such circumstances is required to accept the return of the property replevied as a satisfaction of the judgment. The judgment is in the alternative simply for the purpose of fixing the value so as to afford a measure of relief where the property cannot be returned. It seems to us that if a defendant is required to accept the property replevied as a satisfaction of the judgment in his favor, he has the correlative right to demand the return of the property and to use the enforcing powers of the court in obtaining such a satisfaction of his judgment.

It must not be overlooked that the basis of a replevin action is the right of possession of the property involved. When a plaintiff takes possession of chattel property by replevin and fails to sustain his case, there is an absolute duty on his part to return the property to the defendant, and this court has so held. Eickhoff v. Eikenbary, 52 Neb. 332, 72 N. W. 308. The relief granted by the judgment for the defendant is primarily the requiring of the return of the property. It is only when the defendant cannot secure a return of his property after the powers of the court have been exhausted in his behalf that he is obliged to accept the alternative money judgment. 1 Freeman on Executions, (3d ed.) § 4, p. 9. The provision of the statute providing for the fixing of the value of the property taken, and for a money judgment when a return cannot be had, is in derogation of the common law. It is a remedy that is available to the defendant when the enforcing processes of the court fail to secure a return of the property. Kunz v. Nelson et al., 94 Utah 185, 76 P. 2d 577; Waite v. Dolby, 8 Humphr. (Tenn.) 275; Robinson v. Richards, 45 Ala. 354; Garland v. Bugg, 5 Munf. (Va.) 166. The practical reason for such a rule is apparent in the case

before us. It is altogether possible that the 47 calves here involved were worth only $40 per head at the time of the trial, as the jury found; yet, due to subsequent rises of the market and the increased growth of the calves, or because of some special value to the defendant, they could now be worth much more than that amount to him. The defendant is not obliged to permit a plaintiff to elect to keep the property and pay the judgment if it be advantageous, or to return the property if its retention and payment of the money judgment would indicate a loss. Swantz v. Pillow, *supra*. One whose property has been wrongfully taken in replevin is not required to subject himself to such an inequitable procedure, otherwise, injustice would be done by the party at fault. Consequently, the trial court under the record here shown should have granted the application for a special execution directing the sheriff to find the calves and return them to the defendant. To do otherwise has the effect of depriving the defendant of one of the major benefits of the litigation.

The claim is advanced that the denial of the special execution was not prejudicial to the rights of the defendant and, even if so, it is not a final order. In view of what we have said to the effect that a positive duty on the part of plaintiff exists to return property wrongfully replevied, and that a defendant under such circumstances is entitled to exhaust the processes of the court in securing a return of his property, we are of the opinion that the refusal to award the special execution was a final order. It deprived the defendant of a writ having for its purpose the securing of his property without reference to the alternative money judgment. This deprived him of a substantial right. There is nothing in the record concerning the whereabouts of the calves. It must be presumed that they have remained in the possession of the plaintiffs since they were taken under the writ of replevin. Hutchinson Gin Co. v. Latimer County Nat. Bank, 106 Okla. 159, 233 P. 438. The fact

that defendant was entitled to the usual form of execution at the hands of the clerk of the district court upon the filing of a praecipe therefor does not operate to deprive defendant of the benefit of a more specific or adequate process at the hands of the court.

A court, competent to pronounce judgment, is generally competent to issue execution. An application for an order directing the issuance of a special execution is, generally speaking, an application for the enforcement of the judgment in a particular manner. If a litigant requests an execution to which the nature of the action and judgment entitles him, and it is within the power of the court to grant, a failure to order the issuance of the execution amounts to a refusal to enforce the judgment in a manner to which the applicant is entitled. It is, therefore, a final order within the meaning of section 25-1902, R. S. 1943, which provides: "An order affecting a substantial right in an action, when such order in effect determines the action and prevents a judgment, and an order affecting a substantial right made in a special proceeding, or upon a summary application in an action after judgment, is a 'final order' which may be vacated, modified or reversed, as provided in this chapter."

We think the learned trial court was in error in denying the application for a special execution directing the sheriff to place the defendant in possession of the replevied property. The order denying a special execution is reversed and the cause remanded with directions to order the issuance of the special execution as prayed.

REVERSED.

WENKE, J., participating on briefs.

YEAGER, J., dissenting.

I respectfully dissent from the majority opinion in this case. It is not that I do not think that the defendant was entitled to the special execution sought by him, because I am clearly of the opinion that he was. I am of the opinion that the judgment in the replevin

action entitled him to a special execution and that the only thing required of him to obtain it was to demand it, by proper praecipe, from the clerk of the district court.

If the demand had been made by praecipe it would have become the duty of the clerk of the court in his official capacity to issue the special execution, and then for failure of the clerk in the performance of his duty in this respect it would have become proper by appropriate proceedings against the clerk before the court to compel the issuance of the execution.

This is not a proceeding wherein it is sought properly to have a judgment modified so as to cause it to contain something which should have been properly contained therein, in which event I would agree that the ruling thereon would be a final order within the meaning of the law, but it is a type of ancillary proceeding not known to the law of Nebraska asking the court, after the case has been judicially disposed of, to give directions to the clerk in the performance of his official ministerial functions.

I fail to see how this failure or refusal to deny the application herein made may be considered a final order for the purpose of appeal to this court.

LUCY I. GREEN, APPELLEE, V. MORRIS K. GREEN, APPELLANT.

26 N. W. 2d 299

Filed February 28, 1947. No. 32153.

1. **Divorce.** It is impossible to lay down a general rule as to the degree of corroboration required in a divorce action as each case must be decided on its own facts and circumstances.
2. ———. There may be extreme cruelty justifying a decree of divorce without physical injury or violence. Unjustifiable conduct on the part of the husband or wife, which utterly destroys the legitimate ends and objects of matrimony, may constitute extreme cruelty.

3. **Appeal and Error.** When the evidence on material questions of fact is in irreconcilable conflict, this court will, in determining the weight of the evidence, consider the fact that the trial court observed the witnesses and their manner of testifying, and must have accepted one version of the facts rather than the opposite.
4. **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 Hall County: ERNEST G. KROGER, JUDGE. *Affirmed as modified.*

Dryden & Jensen, for appellant.

Ray M. Higgins, for appellee.

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

MESSMORE, J.

The plaintiff, Lucy I. Green, instituted an action for divorce against Morris K. Green, defendant, in the district court for Hall County. From a decree granting the plaintiff an absolute divorce upon the grounds of extreme cruelty, the custody of Lenda Lee Green, a minor daughter of the parties, an allowance of $20 per month for support, maintenance, and education of the child until she reaches the age of 16 years or until further order of the court, a judgment for alimony in the amount of $1,200, the title and possession of the family automobile, attorney fees and court costs, and dismissal of the defendant's cross-petition, the defendant appeals.

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

Defendant assigns as error (1) the district court erred in finding for the plaintiff and against the defendant, and (2) the amount of alimony allowed the plaintiff is excessive.

The parties were married at Belmont, Kansas on January 21, 1941, and prior and subsequent thereto have been and are residents of this state. To this marriage one child, Lenda Lee Green, was born, now five years of age.

The record discloses that the defendant was engaged in various positions until in June 1942, when the parties moved to Long Beach, California where the defendant attended an electrical school for six weeks. Thereafter they moved to Oakland, California where the defendant was employed as a journeyman electrician. They lived with another family, the plaintiff keeping house and doing the washing thereby earning the rent, and the grocery bills were divided equally between the two families. In December 1942, the defendant received notice to report to Ft. Leavenworth, Kansas, for induction into the Army. When the defendant departed for the Army, the plaintiff testified he gave her $150 and took $90 with him. His testimony is that he gave her $550 and kept $25. In May 1941, the parties purchased a 1938 Chevrolet coupe. The plaintiff advanced $25, from a gift of $50 given her by her parents, on the purchase price of $310. The defendant testified that $90 constituted the down payment, and the monthly payments thereafter were $16 until the full amount was paid. The title of the car was placed in the plaintiff's name when the defendant left for the Army. The plaintiff went to her parents' home in Wood River, where she completed high school, using the $150. Thereafter the plaintiff was employed by a physician in Wood River. The defendant was sent to various camps, and stationed in New Jersey. She obtained employment in August 1943, the plaintiff joined him where he was and worked until the fore part of November 1944. Dur-

ing the course of this employment she paid $10 per week for an apartment and $1 per day for the care of the child. The defendant left for overseas duty January 29, 1945. During the time the defendant was in the Army the plaintiff received approximately $80 per month as an allotment, which she testified was used for living expenses. She returned to her parents' home and obtained employment at $18 to $20 per week. From all of her employment she saved approximately $2,000. While overseas the defendant sent the plaintiff $200, the proceeds from the sale of a watch which she had given him; $185; and four checks for $35 each, a total of $525, which amount she kept separate from her account. She made total bank deposits in the sum of $1,668. She testified to various amounts she advanced to the defendant, which she estimated at $200.

The defendant returned home on Christmas Day, 1945. Six weeks prior thereto he requested the plaintiff to be at the home of his parents at that time. Due to a delay in the delivery of a telegram with reference to his return, the plaintiff remained at the home of her parents. The defendant arrived at his parents' home, borrowed his father's car and drove to the home of the plaintiff's parents. The testimony as to what occurred when he arrived there is in direct conflict and cannot be reconciled. The plaintiff's testimony as to what occurred at the time of his arrival and until they departed, and which is corroborated, is to the effect that he was very angry; did not greet the child until she requested him to do so; did not speak to the family; required her to hurry; and refused to eat with them. They left hurriedly for his parents' home. He inquired about the money he sent home, and she gave him the $525. The defendant denies that he ever received this money from the plaintiff.

There was much discussion and difficulty between the parties as to their future plans and where they were going to live. The defendant desired to go into

partnership with his father and farm, using his father's machinery. The plaintiff objected to such an arrangement. She felt they had sufficient resources to establish themselves in a home, and that she would be required to work with his parents, and she did not desire to live in what she termed "the hills." During the time the defendant was overseas the plaintiff located a place near her parents' home on a milk route, and wrote to him about it, maintaining they could be self-sustaining if they took it, and could use her father's machinery to farm with. She also talked to him about this place when he returned. The defendant wanted the rest of the money she had deposited, and wanted the title to the car placed in his name. After looking at a farm in close proximity to his parents and not taking it, they secured another place near his parents' home.

Needing some cattle to start out with, she withdrew $1,668 from the bank, gave him $168 and deposited $1,500 in the bank at Amherst near where they lived. The defendant claims $1,300 was deposited in the Amherst bank and that the plaintiff had $400 in addition that he saw. The defendant purchased two cows for $115 each, some chickens for $20.25, and the plaintiff paid $93 for a cow the defendant's father had purchased.

A short time after they moved to the place near the defendant's parents' home, the defendant's father came to their place and wanted the defendant to look at a farm. The defendant returned with a receipt for $750 which constituted a down payment on the farm. He had withdrawn this amount from the bank to make the payment. The plaintiff had no knowledge of this transaction. Apparently, due to the plaintiff's objection to the purchase, this amount was returned to the defendant and retained by him. He also retained $320 from the sale of the three cows.

The plaintiff testified that the morning of the day the defendant made the down payment on the farm he pinched her, twisted her arms, and kicked her out

of bed, so after breakfast she told him she was going to visit her folks, whereupon she drew $609 from the bank and went to her parents' home. Shortly after the plaintiff left, the defendant went to her parents' home and demanded that she return to him, saying he would give her two days to return to Amherst, he would take the car and that there would be no more joint accounts; that she stole the money she withdrew from the bank when she left; and she would know nothing about his business affairs. He told her they would leave the state, and that she would have to go up and work for his folks. He left and returned a few days thereafter, and they reached an agreement to live on the Devore place where she desired to live, and the place she had selected. After they settled there, the plaintiff testified that the defendant pouted all the time, and the first night he asked her for all the money and the car. He was not pleasant, but was mean. In disciplining the child, the defendant administered a whipping in such a manner that the plaintiff objected. The defendant then pushed and shoved the plaintiff into a bedroom and told her to "keep out of this." The condition of the child after the whipping, showing marks on her body, was testified to by the plaintiff's mother. The plaintiff testified she could no longer endure the defendant's nagging, that nothing suited him so she left him on March 13, 1946, that she has not lived with him since, and states she can no longer live with him successfully. The defendant is engaged in farming with his father on a partnership arrangement. The plaintiff is employed as a PBX operator, and the child is in school.

"It is impossible to lay down a general rule as to the degree of corroboration required in a divorce action as each case must be decided on its own facts and circumstances." Brown v. Brown, 146 Neb. 908, 22 N. W. 2d 148.

"There may be extreme cruelty justifying a decree

of divorce without physical injury or violence. Unjustifiable conduct on the part of husband or wife, which utterly destroys the legitimate ends and objects of matrimony, may constitute extreme cruelty." Myers v. Myers, 88 Neb. 656, 130 N. W. 254. See, also, Faris v. Faris, 107 Neb. 214, 185 N. W. 347.

It is evident from the record that the objects of matrimony have been wholly destroyed in the present case. We conclude that the trial court did not err in granting the plaintiff a divorce on the grounds of extreme cruelty, and that the corroborative evidence was sufficient to warrant such finding and judgment.

In addition to the amounts heretofore set forth, it appears that when the defendant was discharged from the Army he received $320 which included travel pay, accumulated pay, and the first $100 of his discharge bonus. He claims that $200 of this amount was deposited in the joint account of the parties. There also appears evidence that the plaintiff paid insurance premiums amounting to $52 on a policy belonging to the defendant; also that the defendant purchased a few bonds, the amount of which is not set forth, and the defendant kept them. Both the plaintiff and defendant make separate accountings as to what each had after the separation. The plaintiff, in her amended petition, prays judgment against the defendant for $1,082, money that she claims as her own not returned to her but appropriated by the defendant. Her accounting shows the defendant had $1,985 at the time they separated. From the accounting as set forth by the defendant, the plaintiff had $2,034.98 at the time they separated. He claims he had $864 at the time of the separation. It is the defendant's contention that in addition to the $2,034.98, the plaintiff has judgment for $1,200, leaving her $3,234.98 to his $864.

The record is in hopeless conflict as to the accounting made by the respective parties and the amounts each received. As heretofore appears, the evidence is in

direct conflict especially as to these items: That at the time he left for the Army, the defendant claims he gave the plaintiff $550, while the plaintiff claims he gave her $150, this evidences a difference of $400; also, that the plaintiff testified she gave the defendant $525 which he sent home from overseas, and the defendant denies she ever gave him this money. This evidences a difference of $525. We will not detail other items because we are convinced it is impossible to reconcile the testimony with reference to the accounting in the present state of the record.

"When the evidence on material questions of fact is in irreconcilable conflict, this court will, in determining the weight of the evidence, consider the fact that the trial court observed the witnesses and their manner of testifying, and must have accepted one version of the facts rather than the opposite." Dier v. Dier, 141 Neb. 685, 4 N. W. 2d 731; Brown v. Brown, *supra*.

"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." Vocelka v. Vocelka, 146 Neb. 268, 19 N. W. 2d 363. See, also, Hild v. Hild, 135 Neb. 896, 284 N. W. 730.

From an analysis of the record we conclude that the judgment of the trial court on the allowance of alimony should be modified to the extent that the plaintiff have and recover of and from the defendant the sum of $600 as alimony, and costs of suit. Judgment affirmed as modified.

AFFIRMED AS MODIFIED.

MICHAEL J. BARRY, APPELLANT, V. J. WILBUR WOLF ET AL., APPELLEES.

26 N. W. 2d 303

Filed February 28, 1947. No. 32189.

1. **Judgments.** An order is not final when the substantial rights of the parties involved in the action remain undetermined and when the cause is retained for further action. In such a case, the order is interlocutory.
2. **Pleading: Appeal and Error.** The sustaining of a motion to make more definite and certain or to strike certain parts of a pleading, without further judicial action, does not constitute a final, appealable order.
3. ———: ———. An order overruling a demurrer to a petition, in the absence of further proceedings, is not a final order reviewable on appeal.

APPEAL from the district court for Douglas County: JAMES T. ENGLISH, JUDGE. *Appeal dismissed.*

M. L. McBride, for appellant.

W. R. King, Kelso Morgan, and *Joseph D. Houston,* for appellees.

Heard before SIMMONS, C. J., PAINE, CARTER, YEAGER, CHAPPELL, and WENKE, JJ., and NUSS, District Judge.

WENKE, J.

Michael J. Barry, a taxpayer of the city of Omaha, brought this action in the district court for Douglas County against the business manager and members of the board of education of the Omaha public schools and the county superintendent of Douglas County.

His petition, as supplemented, pleads three causes of action whereby he seeks to enforce the provisions of sections 79-1801, 79-1802, 79-1806, and 79-1807, R. S. 1943.

The first cause of action seeks to enjoin the defendants from purchasing any text books for school use unless they are purchased in accordance with the provisions of the foregoing statutes.

The second cause of action seeks an order to compel the defendants to bring a mandamus action against the

State Superintendent to compel him to perform his official duties as in said statutes provided, to wit: To publish and distribute a certified publishers' price list and contracts.

The third cause of action seeks to enjoin the defendants' use of a pamphlet, "A Library Book List," published by the State Superintendent, for the reason that it is not in accordance with the provisions of the foregoing statutes.

On June 21, 1946, before any issues had been joined, the plaintiff filed his motion requesting the trial court to compel the attendance in court of certain persons as witnesses. On the same day the trial court overruled this motion.

On July 5, 1946, the defendant W. J. Hauser, county superintendent of Douglas County, filed his demurrer to the plaintiff's three separate causes of action. No ruling has ever been had thereon.

On July 8, 1946, the other defendants filed a demurrer to plaintiff's second cause of action and a motion to make more definite and certain and to strike designated parts of the first and third causes of action. On September 11, 1946, the trial court sustained this motion and demurrer and gave the plaintiff until September 26, 1946, to further plead.

On September 16, 1946, plaintiff filed a motion stating that he would not further plead and asked that the case be set for immediate trial. On September 21, 1946, the trial court overruled the plaintiff's request for immediate trial.

Thereafter, on September 24, 1946, plaintiff filed his motion for new trial which was overruled on September 30, 1946. Plaintiff then appealed to this court.

The first question that presents itself is, are any of the orders entered by the trial court final so that an appeal may be taken therefrom?

Section 25-1911, R. S. 1943, provides: "A judgment rendered or final order made by the district court may

be reversed, vacated or modified by the Supreme Court for errors appearing on the record."

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

As stated in Lincoln Joint Stock Land Bank v. Barnes, 143 Neb. 58, 8 N. W. 2d 545: "An order is not final when the substantial rights of the parties involved in the action remain undetermined and when the cause is retained for further action. In such a case, the order is interlocutory."

The sustaining of a motion to make more definite and certain or to strike certain parts of a pleading, without further judicial action, does not constitute a final, appealable order. See State ex rel. Sorensen v. State Bank of Omaha, 131 Neb. 223, 267 N. W. 532; 2 Am. Jur., Appeal and Error, § 73, p. 893.

"An order overruling a demurrer to a petition, in the absence of further proceedings, is not a final order reviewable on appeal." Anson v. Kruse, 147 Neb. 989, 25 N. W. 2d 896. See 2 Am. Jur., Appeal and Error, § 71, p. 892.

Under these statutes and our holdings we find no final, appealable order was entered by the trial court. While a review of the trial court's rulings on the matters here complained of can be had on appeal, however, such review can only be had after a final order has been entered. Until such final, appealable order has been entered these rulings, which are interlocutory, are not appealable.

Because of the foregoing the appeal must be dismissed.

APPEAL DISMISSED.

LUTHER SKELTON, PLAINTIFF IN ERROR, V. STATE OF NEBRASKA, DEFENDANT IN ERROR.

26 N. W. 2d 378

Filed February 28, 1947. No. 32154.

1. **Witnesses.** A mentally defective person is competent to testify as a witness if he has sufficient mental capacity to understand the nature and obligation of an oath and possessed of sufficient mind and memory to observe, recollect, and narrate the things he has seen or heard. If he has been committed to a state hospital and is an inmate thereof then there arises a prima facie presumption that he is incompetent as a witness. However, such presumption is rebuttable by the voir dire examination of the witness alone or aided by extrinsic evidence. The burden of rebutting the presumption of incompetency is on whoever offers him as a witness.
2. ———. The question of competency of a person to be a witness is left to the sound discretion of the trial judge, leaving to the jury to determine the credit that ought to be given to the testimony.
3. **Criminal Law.** The trial court's action on the question of probation under sections 29-2217 and 29-2218, R. S. 1943, is discretionary and not reviewable.

ERROR to the district court for Adams County: EDMUND P. NUSS, JUDGE. *Affirmed.*

Harry F. Russell, for plaintiff in error.

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

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

WENKE, J.

By information filed in the district court for Adams County, Luther Skelton was charged with the crime of manslaughter and, also, with unlawfully assaulting Alfred T. Anderson with intent to inflict great bodily injury. These charges arose out of the death of Alfred T. Anderson on or about December 29, 1945.

A jury found the defendant guilty of unlawfully

assaulting Alfred T. Anderson with intent to inflict great bodily injury.

His motion for new trial having been overruled and a sentence imposed that he serve a term of not less than 18 nor more than 36 months at hard labor in the state penitentiary, the defendant, by petition in error, brings the record of his conviction here for review.

For convenience the plaintiff in error will be referred to as the defendant.

Defendant assigns the following as error: The trial court's ruling in permitting three inmates of the Hastings State Hospital to become witnesses and testify; its overruling of his motion for a directed verdict because of the insufficiency of the evidence to sustain the conviction; its overruling of his motion for a directed verdict because of his plain and reasonable defense as a matter of law; and its denial of his application for a parole as provided by statute.

Without reciting in detail the incidents leading up to and resulting in the unfortunate death of Alfred T. Anderson in the early morning of December 29, 1945, while an inmate of the Hastings State Hospital at Ingleside, Nebraska, and a patient in ward 30 thereof, we find it fully sustains the defendant's conviction of unlawfully assaulting Alfred T. Anderson with intent to inflict great bodily injury. In fact, it would support a finding of his guilt on either count.

The assigned error that defendant had a plain and reasonable defense as a matter of law apparently relates to the question of self-defense and that he was at the time acting in the performance of his duties as attendant. Some evidence was introduced as to both issues. They were submitted to the jury by the instructions but determined against the defendant. Under the evidence these issues presented a question of fact for the jury and not one of law for the court. Having been submitted to the jury, the claimed error is without merit.

While not assigned as error the defendant discusses

the admission of Exhibit 2, which is a statement made by defendant in the form of questions and answers and signed by him. He claims this exhibit should not have been received in evidence. The contents thereof relate to the incidents which resulted in the death of Alfred T. Anderson and defendant's connection therewith. We find from the foundation laid for its admission that it was freely and voluntarily made and signed with full knowledge of its contents, and that it was properly received in evidence.

Defendant contends that because of the provisions of section 25-1201, R. S. 1943, the court erred in permitting three inmates of the Hastings State Hospital to become witnesses and testify.

Wray Wycoff, Fred Domeier, and Mike Ortner were inmates of the Hastings State Hospital and patients in ward 30 during the night of December 28 and morning of December 29, 1945. They were permitted to testify as to what they saw and heard of the incident which resulted in the death of Alfred T. Anderson, who was also a patient in the same ward.

Before the witnesses were permitted to testify they were examined by counsel and court as to their understanding of the nature and obligation of an oath and also as to whether or not they were capable of giving a fairly correct account of what each had seen or heard in connection with the subject matter about which they testified. Medical testimony of the doctor in charge was offered on the same subject matter. By the instructions of the court the competency of these witnesses was also submitted to the jury. Their competency at the time of the trial having been passed upon both by the court and jury, and we think correctly, no error arises in permitting them to testify unless it can be said they were incompetent as a matter of law.

The statute above referred to is in part as follows: "Every human being of sufficient capacity to understand the obligation of an oath, is a competent witness

in all cases, civil and criminal, except as otherwise herein declared. The following persons shall be incompetent to testify: (1) Persons of unsound mind at the time of their production; * * *." § 25-1201, R. S. 1943.

It is the thought of the defendant that by their commitment the inmates of our state hospitals are declared to be of unsound mind and remain so as long as they are therein confined and are, therefore, under the provisions of subdivision one of the foregoing statute incompetent to testify as a matter of law. We have apparently never passed upon the question in this jurisdiction but we find many other jurisdictions which have the same or similar statutory provisions that have passed thereon.

As stated in 3 Jones on Evidence, 4th ed., § 723, p. 1300: "Mental defectives are allowed to testify, if they appear to the court to have sufficient understanding to comprehend the nature and obligation of an oath, and to observe and to remember correctly, and to be capable of giving a correct account of, the matter that they have seen or heard, and in reference to which they have been called to testify. The judge is to determine the competency by examining the witness himself, or upon the testimony of third persons."

This general rule is stated in Pittsburgh & W. Ry. Co. v. Thompson, 82 F. 720, as follows: " 'The general rule, therefore, is that a lunatic or a person affected with insanity is admissible as a witness if he have sufficient understanding to apprehend the obligation of an oath, and to be capable of giving a correct account of the matters he has seen or heard in reference to the questions at issue; and whether he have that understanding is a question to be determined by the court, upon examination of the party himself and any competent witnesses who can speak to the nature and extent of his insanity.' " See District of Columbia v. Armes, 107 U. S. 519, 27 L. Ed. 618, 2 S. Ct. 840. And in State v. Herring, 268 Mo. 514, 188 S. W. 169, as follows: " * * *

the universal rule at common law, now is that the lunatic may be sworn and may testify as a witness; provided, upon examination by the court (who is the sole judge of his competency, subject to review on appeal for an abuse of discretion) he shows that he understands the nature of an oath and that he possesses mental capacity sufficient to observe and recollect and narrate the things he saw or heard."

In disposing of a similar statutory provision of Ohio the court in Pittsburgh & W. Ry. Co. v. Thompson, *supra,* held:

"Rev. St. Ohio, s. 5240, excepting persons of 'unsound mind' from those who are competent as witnesses, is merely declaratory of the common law, which requires that the unsoundness must be such that the witness is incapable of understanding the nature of an oath or giving a coherent statement touching the matter upon which he is examined."

"The fact that a person has been found insane by the proper tribunal, and is an inmate of an insane asylum, does not make him absolutely incompetent as a witness, but is prima facie evidence of such unsoundness of mind as will disqualify him, and throws the burden of proving competency upon the party offering him. In such case it is proper for the court to hear evidence, including that of the medical men in charge of the asylum of which he is an inmate, as to the character and extent of his mental unsoundness, and to cause him to be examined upon the questions at issue in the suit, in order to determine how far his mind and memory are unbalanced. If it then appears that, while he has a delusion upon one subject, his evidence is clear, coherent, and consistent, there is no error in admitting it, leaving the question of its weight to the jury."

In the case of State v. Herring, *supra,* wherein we find an almost identical situation of fact under a like statute the court, after a lengthy discussion of the sub-

ject and citation of authorities, came to the following conclusion: "From the ruled cases we may deduce the rules: (a) That a person of unsound mind is competent as a witness, if, (1) upon examination he be found to be of sufficient mental capacity to understand the nature of an oath, that is, to know it is both a moral and a legal wrong to swear falsely, and that false swearing is a punishable crime in law, and (2) if he be possessed of sufficient mind and memory to observe, recollect and narrate the things he saw or heard; (b) that lawful confinement in an asylum for the insane, or an adjudication as an insane person, creates a prima-facie presumption of absolute incompetency as a witness; but (c) such presumption is rebuttable by the *voir dire* examination of the witness alone, or when aided by extrinsic evidence, and (d) the burden of rebutting the presumption of incompetency in case of confinement in an asylum or adjudication as an insane person is on him who offers the witness; but (e) that absent such confinement, or adjudication as an insane person, the burden of showing incompetency on account of unsoundness of mind is on him who objects on that ground."

We find this principle is universally supported by the holdings of other jurisdictions under like or similar statutes. In fact we have not found a contrary holding nor has any been called to our attention.

We think a mentally defective person is competent to testify as a witness if he has sufficient mental capacity to understand the nature and obligation of an oath and is possessed of sufficient mind and memory to observe, recollect, and narrate the things he has seen or heard. If he has been committed to a state hospital and is an inmate thereof, then there arises a prima facie presumption that he is incompetent as a witness. However, such presumption is rebuttable by the voir dire examination of the witness alone or if aided by extrinsic evidence. The burden of rebutting the presumption

of incompetency is on whoever offers him as a witness. See 7 A. L. R. 606; 68 A. L. R. 1319; State v. Kahner, 217 Minn. 574, 15 N. W. 2d 105; State v. Braden, 56 Ohio App. 19, 9 N. E. 2d 999; State v. Wildman, 145 Ohio St. 379, 61 N. E. 2d 790; In re Fink's Estate, 343 Pa. 65, 21 A. 2d 883.

As stated in State v. Meyers, 46 Neb. 152, 64 N. W. 697: "Section 328, Code Civil Procedure, provides: 'Every human being of sufficient capacity to understand the obligation of an oath, is a competent witness in all cases, civil and criminal, except as otherwise herein declared. The following persons shall be incompetent to testify: First—Persons of unsound mind at the time of their production,' etc. The competency of a person to testify as a witness concerning the matter in issue is, in the first instance, a question for the court, and whereas, in the case at bar, the presiding judge has seen and personally examined the proposed witness, all presumptions are in favor of the correctness of his finding. As said by NORVAL, J., in *Davis v. State*, 31 Neb., 248: 'The question of competency of a person to be a witness must be left to the sound legal discretion of the trial judge, leaving to the jury to determine the credit that ought to be given to the testimony.' "

Defendant, under the provisions of sections 29-2217 and 29-2218, R. S. 1943, made application to the trial court, after his conviction but before sentence, asking for an order, without pronouncing sentence, suspending further proceedings, and placing the defendant on probation under the charge and supervision of a probation officer or other suitable person. Hearing was had on the application and evidence offered in support thereof. The court denied the application and pronounced sentence. The defendant here seeks to have reviewed the court's order denying the application.

In construing these statutory provisions we have said: "In a criminal prosecution, after guilt of defendant has been legally established and subject to conditions pre-

scribed by statute, 'the court may, in its discretion, enter an order, without pronouncing sentence, suspending further proceedings and placing the accused on probation.' Comp. St. 1929, sec. 29-2214." Moore v. State, 125 Neb. 565, 251 N. W. 117. See Sellers v. State, 105 Neb. 748, 181 N. W. 862.

Apparently we have never passed on the question of whether or not the trial court's refusal to place the defendant on probation can be brought here for review.

In our judgment the act does not contemplate that requests to be put on probation should be the subject of formal applications, hearings, and orders but rather that the power is to be exercised by the court upon its own motion. The exercise of the power is plainly and purely discretionary with the trial court.

While, as here, a hearing may be had and evidence received, it is solely for the benefit of the trial court to aid it in determining whether or not it should exercise the power and place the defendant on probation. We think, as stated in The People v. Racine, 1 N. E. 2d 63 (362 Ill. 602): "Trial court's action on motion for probation is discretionary and not reviewable by Supreme Court."

To the same effect under similar statutes are People v. Dunlop, 27 Cal. App. 460, 150 P. 389; People v. Laborwits, 74 Cal. App. 401, 240 P. 802; Stanley v. State, 171 Tenn. 406, 104 S. W. 2d 819; Evans v. District Judge, 12 F. 2d 64.

From an examination of the record we find that the defendant has had a fair trial and that, in view of the facts as disclosed therein, the sentence is not excessive. The conviction and sentence are therefore affirmed.

AFFIRMED.

ROBERT L. BUFFORD, PLAINTIFF IN ERROR, V. STATE OF NEBRASKA, DEFENDANT IN ERROR.

26 N. W. 2d 383

Filed February 28, 1947. No. 32155.

1. **Juries: Trial.** Where two or more persons are severally indicted or informed against for the commission of an offense arising out of the same incident so that the same witnesses and testimony will necessarily be used against each and separate trials are had, jurors who sat in the trial of one are thereby disqualified to sit in the trial of another.
2. **Juries.** When the trial court erroneously fails to sustain the proper challenge of a juror for cause a reversal will not result unless it is made to appear that the error brought injury to the accused.
3. ———. The rule as announced in Curry v. State, 4 Neb. 545, and Thurman v. State, 27 Neb. 628, 43 N. W. 404, insofar as it conflicts with the rule herein announced, is modified.

ERROR to the district court for Adams County: EDMUND P. NUSS, JUDGE. *Affirmed.*

John E. Willits, for plaintiff in error.

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

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

WENKE, J.

By information filed in the district court for Adams County, Robert L. Bufford was charged with the crime of manslaughter and, also, with unlawfully assaulting Alfred T. Anderson with intent to inflict great bodily injury. These charges arose out of the death of Alfred T. Anderson on or about December 29, 1945.

A jury found the defendant guilty of unlawfully assaulting Alfred T. Anderson with intent to inflict great bodily injury.

His motion for new trial having been overruled and a sentence imposed that he serve a term of not less than

18 nor more than 36 months at hard labor in the state penitentiary, the defendant, by petition in error, brings the record of his conviction here for review.

For convenience the plaintiff in error will be referred to as the defendant.

Defendant assigns the following as error: First, the trial court's overruling of his challenge for cause of Pearl Sarver, a prospective juror, whose voir dire examination shows she served as a juror in the case of Skelton v. State, *ante* p. 30, 26 N. W. 2d 378; second its ruling in permitting inmates of the Hastings State Hospital to become witnesses and testify; and third, its denial of his application for a parole as provided by statute.

We have determined the questions raised by defendant's second and third assignments of error in the case of Skelton v. State, *supra,* contrary to his contention. No useful purpose would be served by repeating our holdings in this opinion.

In considering the first assignment of error it should be stated that the prosecutions of both Skelton and Bufford arise out of the same incident. This occurred in ward 30 of the Hastings State Hospital in the early morning of December 29, 1945, and resulted in the death of Alfred T. Anderson an inmate thereof. The witnesses and their testimony will naturally be almost the same.

The voir dire examination of Pearl Sarver, when called to serve as a juror, shows that she sat as a juror in the case of Skelton v. State, *supra,* wherein Luther Skelton was found guilty of unlawfully assaulting Alfred T. Anderson with intent to inflict great bodily injury. This is the same offense for which the defendant here has been convicted.

It is apparent that the same jury panel was used in both cases. While some of those who sat in the case of Skelton v. State, *supra,* were disqualified because they testified they had formed an opinion of the guilt or innocence of the defendant by reason thereof, how-

ever, six of such jurors on their voir dire examination said they had formed no opinion and knew of no reason why they could not serve as jurors in this case. The defendant challenged only the first of these, Pearl Sarver, because of her previous service. His challenge for cause was denied. Thereafter he did not challenge the other five for that or any other reason. They are R. H. Eigenberg, Pearl Turner, Iva Adcock, Reta Adams, and Ruth Stromer. It appears that R. H. Eigenberg signed the verdict in this case as foreman. Who the other members of the jury were is not shown by the record. It is apparent that after 24 prospective jurors had been passed for cause both the state and the defendant exercised all of their peremptory challenges leaving the remaining 12 to be sworn as jurors to try the defendant. Whether or not the juror Pearl Sarver was peremptorily challenged by either the state or the defendant and whether or not she served on the jury are not shown by the record. So far as the record shows all of the 12 jurors who were finally sworn to try the cause were not objected to by the defendant and were wholly and entirely acceptable to him.

It is provided by section 11, art. I, of the Constitution that anyone charged with a crime is entitled to "a speedy public trial by an impartial jury."

In Seaton v. State, 106 Neb. 833, 184 N. W. 890, we held: "Where two or more persons are jointly indicted or informed against for the commission of a single offense and sever in their trials, jurors who sat in the trial of one are thereby disqualified to sit in the trial of another." We think the same rule is applicable where two or more persons are separately indicted or informed against for the commission of an offense arising out of the same incident so that the same witnesses and testimony will necessarily be used against each.

As stated in Seaton v. State, *supra*:

"'* * * where a juror has participated in a verdict of guilty against another person charged with the same

offense, growing out of the same transaction, and necessarily to some extent depending upon the same evidence, he has, in some degree at least, prejudged the defendant. See *Jacobs v. State,* 1 Ga. App. 519, wherein this court said: "It is the duty of a trial court to see that defendants in criminal cases are tried by a jury such that not even the suspicion of bias (leaning) or prejudice (prejudgment) can attach to any member thereof." Unless the jury be absolutely impartial, the jury system becomes an "awkward instrument of justice," and the constitutional guaranty that "every person charged with an offense against the laws of this state * * * shall have a public and speedy trial by an impartial jury" * * * is worthless.' (See McKay v. State, 6 Ga. App. 527.)

"This rule is recognized in 17 Standard Ency. of Procedure, 347: 'A juror,' it is said, 'is incompetent where he has sat on a jury that tried another jointly indicted defendant, even though he says he has formed no opinion and can try defendant impartially.' " See, also, Obenchain v. State, 35 Tex. Cr. 490, 34 S. W. 278; People v. Mol, 137 Mich. 692, 100 N. W. 913, 68 L. R. A. 871, 4 Ann. Cas. 960.

Therefore, all of the jurors who had served in the Skelton case were disqualified to serve in this case. If they had been challenged for cause such challenge should have been sustained. However, the record shows such challenge was made solely as to the prospective juror Pearl Sarver. As stated in 35 C. J., Juries, § 404½, p. 364: "As a general rule an objection to a juror which is a good cause of challenge must be made in time or will be considered as waived. It is well settled that a failure to challenge or object operates as a conclusive waiver if the ground of objection is known to the party at the time the jury is impaneled, or is discovered during the progress of the trial, * * * ." "The right to challenge a juror for disqualification is a right which may be waived even in a capital case." 31 Am. Jur., Jury, § 117, p. 645.

Does the fact that the trial court erroneously ruled on

the challenge for cause of the prospective juror Pearl Sarver automatically create prejudicial error that will entitle the defendant to a reversal and a new trial? The record does not affirmatively show that she either served as a juror or that the defendant removed her by peremptory challenge.

"A peremptory challenge is one which may be exercised by the accused upon his own volition, and for which he need not give any reason and which is not subject to the control of the court." Thurman v. State, 27 Neb. 628, 43 N. W. 404. In Fetty v. State, 119 Neb. 619, 230 N. W. 440, in quoting from Mathes v. State, 107 Neb. 212, 185 N. W. 425, the court went on to say that: "' * * * peremptory challenges are not to be exercised until the jurors have been passed for cause and twelve men are in the jury-box.' "

It is the defendant's thought that since he exhausted all of his peremptory challenges and therefore had not waived his constitutional and statutory rights that any erroneous overruling of a challenge for cause of a prospective juror is ipso facto prejudicial error.

We held in Thurman v. State, *supra*: " * * * that the juror was incompetent and that the decision of the district court in overruling a challenge to him for cause was prejudicial error. * * * also, that the fact that the juror was peremptorily challenged by plaintiff in error, did not cure the error and that he was entitled to a new trial." Therein the court quoted from Curry v. State, 4 Neb. 545, as follows: "But he was retained against the challenge of the accused, who was compelled to resort to one of his peremptory challenges for his removal. In this there was error to the prejudice of the prisoner."

The true object of challenges, either peremptory or for cause, is to enable the parties to avoid disqualified persons and secure an impartial jury. When that end is accomplished there can be no just ground for complaint against the rulings of the court as to the compe-

tency of the jurors. With this thought in mind we shall reexamine our former holdings.

In People v. Rambaud, 78 Cal. App. 685, 248 P. 954, the court in discussing the question said: "While some of the earlier cases announce the rule that a disallowed challenge for cause will be considered upon appeal, under the circumstances here presented (which is the same as the situation at bar), all the later decisions and the ones which announce the correct rule, hold against the appellant's contention. In 8 Cal. Jur., page 610, we find the following: 'The rule, as laid down in the later cases, is that an erroneous disallowance of a challenge for cause is not prejudicial, even though the defendant finally exhausted his peremptory challenges, if it does not appear that he had occasion to or desired to use an additional peremptory challenge, or that the jurors finally accepted were not entirely satisfactory to him. In the earlier cases there is authority to the contrary. To warrant a reversal it must appear that an objectionable juror was forced upon the defendant and that he in some appropriate manner expressed his dissatisfaction with the jury as completed.'" The court went on to say: " * * * the important thing to be considered is whether the objectionable juror was forced upon the defendant and whether he had that to which he was entitled, a fair and impartial jury and not a jury composed of any particular individuals."

As stated in 1 Hyatt on Trials, § 565a, p. 601: "In practically all jurisdictions, if the record on appeal does not affirmatively show prejudice the appellate court will not presume it." See, also, 1 Thompson on Trials, 2d ed., § 120, p. 148.

As stated in State v. Costales, 37 N. M. 115, 19 P. 2d 189: "' * * * the better rule is that an erroneous overruling of a challenge for cause, even though the peremptory challenges are thereafter exhausted, will not warrant a reversal of the judgment unless it is further shown upon appeal that an objectionable juror was

forced upon the challenging party and sat upon the jury after such party had exhausted his peremptory challenges.' " See Colbert v. Journal Publishing Co., 19 N. M. 156, 142 P. 146.

As Stated in Bohanan v. State, 15 Neb. 209, 18 N. W. 129: "The challenge of this juror for cause ought to have been sustained, but as he did not sit in the case, having been excused or challenged peremptorily, and it not being shown that to exclude him the prisoner was compelled to exhaust his right of challenge, the overruling of it caused no injury."

As stated in 31 Am. Jur., Jury, § 116, p. 644: "According to the great weight of authority, the erroneous allowance of a challenge for cause is no ground of complaint where a competent and unbiased jury is finally selected."

We have come to the conclusion that our former holdings in Thurman v. State, *supra*, and Curry v. State, *supra*, are too narrow and technical in their application. In order to accomplish the purpose for which intended the rule therein announced may often cause unnecessary reversals when the defendant has actually been tried by a fair and impartial jury and one to which he had made no objection. We think the rule herein discussed, which appears to be the majority rule, is much more effective to accomplish the purpose for which it is intended. This rule is stated in Johnson v. State, 108 Tex. Cr. 499, 1 S. W. 2d 896, as follows: " * * * where the court erroneously fails to sustain the proper challenge of a juror for cause a reversal will not result unless it is made to appear that the error brought injury to the accused." See, also, State v. Tippett, 317 Mo. 319, 296 S. W. 132; Conley v. Commonwealth, 225 Ky. 275, 8 S. W. 2d 415; Carthaus v. State, 78 Wis. 560, 47 N. W. 629; State v. Raymond, 11 Nev. 98; Spies v. People, 122 Ill. 1, 12 N. E. 865; Johns v. State, 55 Md. 350. Insofar as the holdings in Thurman v. State, *supra*, and Curry v. State, *supra*, are in conflict herewith the same are modified.

While the court erred in overruling the defendant's challenge for cause of the prospective juror Pearl Sarver, the record does not show that she served as a juror nor that the defendant employed any of his peremptory challenges to exclude her therefrom. From all that appears in the record the defendant made no objection to the 12 jurors who actually tried him. The record does not disclose the defendant was injured thereby.

The record discloses that the defendant had a fair and impartial trial; that the evidence fully sustains his conviction; and that the sentence is not excessive. For the reasons herein stated the verdict of the jury and the sentence of the court should be and are affirmed.

AFFIRMED.

YEAGER, J., dissenting.

I feel that I must dissent from the majority opinion. It appears to me that the majority opinion on its face discloses a failure to recognize rights which have been recognized as fundamental under common law, under constitutional processes, under the statutory law of this land, and under unbroken legal interpretation in all common-law jurisdictions ever since the abandonment of the practice of trial of those charged with crime by a jury composed of men from the vicinity who had a familiarity with the facts of the case.

I do not need to point to authority for the statement that every one charged with a crime is constitutionally entitled to a trial by jury. I do not need to point to authority to say that the trial must be fair. And no more do I need to point to authority to say that in legal and constitutional contemplation it cannot be said that there was a fair trial unless the trial was had to a jury composed of jurors qualified to serve.

These propositions are not mere concepts but are bulwarks of our judicial system and of democratic processes and may never properly be lightly regarded or cast aside. It appears to me that they have been cast aside by the majority opinion in this case.

In this case, as pointed out in the majority opinion, Pearl Sarver was called as a prospective juror and on her voir dire examination she disclosed that she had been a juror in the case of Skelton v. State, *ante* p. 30, 26 N. W. 2d 378, and that in that case she had joined in a verdict of guilty. In that case Skelton was charged and tried for complicity in the crime for which Bufford was tried in this case. The defendant herein challenged her right to serve as a juror in this case on account of disqualification brought about by service as a juror in that case. The challenge was overruled by the trial court. Whether she served in this case or was removed by a peremptory challenge we do not know. On this question the record is silent. Five other prospective jurors who had served as jurors in Skelton v. State, *supra,* were called but the objection made to Pearl Sarver was not made as to them. One of the five is known to have served. This one was R. H. Eigenberg. He was the foreman and signed the verdict.

The majority opinion points out unequivocally that these six were disqualified to serve as jurors in this case.

It appears to be the opinion of the majority that since it is not made to appear that Pearl Sarver did serve the overruling of the challenge to her is not available here, and that since there was no challenge to Eigenberg his disqualification must be considered as having been waived.

To my mind this is both technical and fallacious. It is technical in that it is an exaction of a known futility. After the defendant had challenged one prospective juror and had a negative response at the hands of the court what basis except a technical one could there be for further challenge to other prospective jurors on the same ground? We no longer adhere to the rule requiring repeated objection to evidence of the same kind. Should we be more technical when lives and liberties are involved than in the determination of personal or property rights? I don't think so.

The decisions of courts ought to respond to reason except only where constitutionally or legislatively inhibited. There is no constitutional or legislative inhibition here. It is known that a disqualified juror sat in this case. It is known that one with like disqualification was challenged and the challenge was overruled. In this light can it reasonably be said that this defendant had a trial to an impartial jury? I submit that it cannot be so said.

To support my contention I set forth here something which was quoted with approval in the majority opinion from Seaton v. State, 106 Neb. 833, 184 N. W. 890:

"'* * * where a juror has participated in a verdict of guilty against another person charged with the same offense, growing out of the same transaction, and necessarily to some extent depending upon the same evidence, he has, in some degree at least, prejudged the defendant. See Jacobs v. State, 1 Ga. App. 519, wherein this court said: "It is the duty of a trial court to see that defendants in criminal cases are tried by a jury such that not even the suspicion of bias (leaning) or prejudice (prejudgment) can attach to any member thereof." Unless the jury be absolutely impartial, the jury system becomes an "awkward instrument of justice," and the constitutional guaranty that "every person charged with an offense against the laws of this state * * * shall have a public and speedy trial by an impartial jury" * * * is worthless.'" See McKay v. State, 6 Ga. App. 527.

I fail to see how this court can say that unless the jury be absolutely impartial, the jury system becomes an awkward instrument of justice, and the constitutional guaranty that every person charged with an offense against the laws of this state shall have a public and speedy trial by an impartial jury is worthless, and at the same time say that the defendant's rights were properly safeguarded in this case.

And again, upon whom does the duty devolve to protect the rights of defendants in criminal cases? For the

answer to this question we need not look beyond the case of Seaton v. State, *supra,* and the quotation from it contained in the majority opinion and in this dissent. There it was said by quotation from Jacobs v. State, 1 Ga. App. 519: "It is the duty of a trial court to see that defendants in criminal cases are tried by a jury such that not even the suspicion of bias (leaning) or prejudice (prejudgment) can attach to any member thereof." It was the duty of the trial court under the clear circumstances of this case and under this authority to see to it that this defendant had a trial to a fair and impartial jury, and no amount of discussion of waiver or failure to further object by counsel for defendant can wipe out the failure of the trial court to accord to the defendant his constitutionally guaranteed right to a trial by a fair and impartial jury. And no more may this court be properly blinded to this failure of this guaranty. The conviction should be reversed and the cause remanded for a new trial to an impartial jury.

SIMMONS, C. J., dissenting.

I join in the dissent of YEAGER, J., for the reasons stated by him. I dissent further for a reason relating to the juror Pearl Sarver.

The majority hold: "Where two or more persons are severally indicted or informed against for the commission of an offense arising out of the same incident so that the same witnesses and testimony will necessarily be used against each and separate trials are had then jurors who sat in the trial of one are thereby disqualified to sit in the trial of another." The majority cite with approval the rule that "It is the duty of a trial court to see that defendants in criminal cases are tried by a jury such that not even the suspicion of bias (leaning) or prejudice (prejudgment) can attach to any member thereof." I agree with these propositions of law.

The majority hold that all the jurors who served in the Skelton case were disqualified to serve in this case. I

agree. Pearl Sarver served as a juror in the Skelton case. She was challenged for cause and the challenge overruled. The challenge should have been sustained and the trial court erred in overruling it.

The majority then hold that because the record does not affirmatively show that Pearl Sarver either served as a juror or that she was removed by peremptory challenge, the defendant was tried to a fair and impartial jury. I disagree.

The record does not show that the trial court performed its duty to see that the defendant was tried by a jury such that not even a suspicion of leaning or prejudgment attached to it. The record affirmatively shows that at the only point where the trial court was called upon to perform that duty, it refused to perform it.

The last the record shows of Pearl Sarver, she was sitting in the jury box, passed for cause against defendant's challenge. I submit the presumption is that she remained there, and that we should not presume the removal of prejudicial error, nor should we put upon the defendant the burden of showing that the prejudicial error was not removed.

We have held: "A fact, relation or state of things once shown to exist may be presumed to continue as long as such fact, relation or state would naturally continue; * * *." Reitz v. Petersen, 131 Neb. 706, 269 N. W. 811; 20 Am. Jur., Evidence, § 207, p. 205; 31 C. J. S., Evidence, § 124, p. 736. If we are to indulge in presumptions, we should presume that the disqualified juror remained on the jury. The record shows nothing to the contrary.

"The defendant in any criminal case is entitled as a matter of right to require in the first instance a compliance with the provisions of law safeguarding his right to a fair and impartial trial; and, if the provisions of law intended for his security are willfully disregarded, he may require the state to show that he has not been prejudiced by reason of such noncompliance." Roddie v. State, 19 Okl. Cr. 63, 198 P. 342.

To sustain the conclusion that the defendant was tried to a fair and impartial jury, the majority modify two of our decisions and adopt what they state to be the majority rule. I venture the statement that not one of the cases cited and relied upon by the majority is in point on the issue here presented and does not decide it. The cases cited and the instant case are comparable as to circumstances in this respect only—they deal with a situation where a disqualified juror was challenged for cause and the challenge overruled. There the similarity ends. In all the cited cases the disqualified juror is affirmatively shown to have been removed by the surgery of a peremptory challenge and an impartial jury shown to have sat. The question presented and decided in the cited cases was: Did prejudicial error occur when the defendant was required to use a peremptory challenge to remove a disqualified juror? The question here presented is this: Does prejudice exist where the record shows a disqualified juror was passed for cause against a challenge, and the record thereafter is silent as to whether or not that person sat on the jury? I am not prepared to say that our rule, as stated in our cited cases, should be modified. It is my thought that it should not be modified in any event until the issue is here.

P. T. MCGERR, APPELLEE, V. FRANK MARSH, APPELLANT.
26 N. W. 2d 374

Filed March 7, 1947. No. 32165.

1. **Appeal and Error.** If a motion for a new trial is filed in a case in which a judgment of dismissal was entered before any evidence was taken, then under section 25-1912, R. S. 1943, the time for taking an appeal to this court begins to run from the date of the entry of the order overruling such motion for a new trial.

2. ———. The holding in Huffman Automobile Co. v. Moline Plow Co., 110 Neb. 279, 193 N. W. 747, that the filing of a motion for a new trial in a case in which a judgment was entered dismissing the action before any evidence was taken is of no avail to extend the time of the appeal, is hereby overruled and set aside.
3. **Set-off and Counterclaim.** A counterclaim is a cause of action of a legal or equitable nature, in favor of the defendant, and arising out of the contract or transaction which is set forth in the petition as the foundation of the plaintiff's claim, thus giving the defendant the right to relief in the same action, to the end that a complete determination thereof may be had.
4. ———. The term counterclaim is broader than recoupment, set-off, or cross-action, and secures to defendant the full relief which a separate action at law or in equity would have secured.

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

William H. Heiss, for appellant.

Morrow, Lovell & Bulger, for appellee.

Heard before SIMMONS, C. J., PAINE, CARTER, YEAGER, and CHAPPELL, JJ., and NUSS, District Judge.

PAINE, J.

Plaintiff brought action in the county court, alleging that his tenant, the defendant, raised $6,135.50 worth of potatoes on his farm and instead of paying the plaintiff one-fourth thereof, or $1,533.85, he paid only $1,081, and converted the balance to his own use, and plaintiff prayed judgment for $452.85.

The defendant filed answer, admitting the relationship of the parties, and that the parties acted in accordance with the lease and the oral and specific directions of plaintiff; that defendant and his family had performed work for plaintiff, and defendant advanced money for him; that it was agreed that plaintiff should receive one-fourth of the potatoes raised; and that plaintiff was justly indebted to defendant for advances and services in the sum of $456.20, to wit: Defendant had paid out to E. R. Weatherfield $168 for digging a potato

cellar on the place, for other work on cellar, $203, for expense of spraying potatoes, $30.20, and for miscellaneous items, $55, making a total of $456.20 due defendant from plaintiff, which defendant had deducted from plaintiff's share of $1,533.87, and had by error in figures given a check for balance of $1,081.44 to the Gering National Bank, agent of plaintiff, marked on the face thereof, "for settlement for 1944 potato crop Paid in full." That by reason of his error in computation defendant overpaid plaintiff $3.77, for which amount he prayed judgment.

To this answer a motion was filed by plaintiff to strike out certain parts of paragraphs 2, 3, and 4 because plaintiff's petition was not founded upon contract, but upon tort, and therefore was not subject to set-off; and to make more definite and certain other parts, specifying dates of work done and dates of payment thereof. The motion was sustained in part, and defendant was required to set out the specific directions given by plaintiff, and whether in writing or verbal, and to attach a copy of any writing.

Thereupon, defendant filed an amended answer. To this plaintiff filed a further motion to strike the answer from the files because defendant had failed to comply with the order of the court. The court gave defendant ten days to file an amended answer to comply with the former order. Ten days thereafter a new answer, No. III, was filed, in which answer are set out portions of a letter from plaintiff's wife, directing defendant to sell their share of potatoes when he sold his, and deposit the money in the Gering National Bank. There was attached another letter from plaintiff's wife to defendant, in which she gave instructions about the potatoes, and then wrote in reference to plaintiff: "Dad is still in Hospital & very sick but thot perhaps a little better but will soon have used up all our rent money but hope for a good crop next year. Glad you are get-

ting out fertilizer all ready. The Chester Brown sent me a report on Beans. I have not sold yet. Thanks for your prompt answer."

Thereupon, plaintiff filed a four-page motion for judgment on pleadings because defendant has failed to comply with order of court, or, in the alternative, to strike out nine or more quoted portions of the answer, and that said items did not constitute a proper set-off or counterclaim, as plaintiff's action was founded on tort and not on contract. Said motion was argued, was sustained as to section 5 under paragraph 2, and overruled as to the balance.

On August 28, 1945, the cause came on for trial on the petition, answer No. III, and the reply. Evidence was taken. Two days later the case was argued to the court. Thereafter, the county court found for plaintiff generally, but for the defendant on certain items, and reduced the amount prayed for by plaintiff by allowing the defendant one-fourth the cost of spraying the potatoes, for pump repair, and share of weighing costs, making a total deduction of $30.20, and entered judgment for $422.65, with costs of $58.56.

Defendant appealed to district court, and after petition was filed, the plaintiff filed motion to strike out portions of the answer, alleging that the petition was founded on tort, and not on contract, and that items set out in the answer did not constitute a proper set-off or counterclaim. The plaintiff also charged that the Gering National Bank had only authority to receive deposits, and not to make settlement of any differences between plaintiff and defendant, and therefore he moved to strike out that part of paragraph 5, setting out the settlement made by defendant with said bank, in which defendant alleged he gave a check to said bank for plaintiff, said check stating on the front, "for settlement for 1944 potato crop Paid in full."

The motion was sustained, and defendant was given five days to plead further. Amended answer was filed by defendant; Admitting paragraphs 1 and 2 of the petition as to ownership of the land and the lease between the parties; in paragraph 3 setting out that the lease contained only a part of the entire agreement between the parties, and by the oral portion of the agreement the plaintiff agreed to build a potato cellar and defendant was to advance certain sums for plaintiff; and in paragraph 4 it was alleged that at the request of plaintiff the defendant engaged a person to dig said cellar, paying him $168 therefor, and then setting out other items in connection with raising potatoes, for which plaintiff owed defendant.

Plaintiff filed motion to strike paragraphs 3, 4, and 5, and the court sustained said motion and struck out said three paragraphs. Thereafter, plaintiff filed motion for judgment, but filed no reply.

On April 11, 1946, the court entered judgment, setting forth that, the defendant having elected not to plead further, the court finds there is due from defendant to plaintiff $451.71, with interest of $34.59, and entered judgment for $486.30 and costs of $78.56. On the same day defendant filed motion for new trial, setting out nine errors of the trial court.

The next day, April 12, defendant filed offer to confess judgment in the sum of $100 and accrued costs to that date in full settlement of all claims by plaintiff, and the record shows service of this offer on plaintiff's attorney on the same day.

On July 15, 1946, the court overruled motion for a new trial, and on July 27 supersedeas bond was filed. On July 29, 1946, certified copy of notice of appeal was filed in this court. On October 14, 1946, transcript was filed in this court. On October 25, 1946, plaintiff filed motion to dismiss the appeal on the ground that judgment was entered April 11, 1946. Notice of appeal was

filed July 27, 1946, which was more than three months subsequent to the date of judgment. No transcript was filed until October 14, 1946, more than three months subsequent to the entry of said judgment. Therefore plaintiff insists that this court has acquired no jurisdiction to review the judgment which was entered in the case, and the alleged appeal should be dismissed.

This motion to dismiss the appeal was submitted to this court some time ago and taken under advisement, to be disposed of with the main case after that was submitted, so we will now consider plaintiff's motion to dismiss the appeal.

In support of this motion, plaintiff cited several Nebraska authorities to the effect that, when no motion for a new trial is necessary, the fact that defendant filed one did not extend his time for filing his appeal in this court.

"Where a judgment at law is rendered on the pleadings alone, a motion for a new trial is not necessary to obtain a review in this court." First Nat. Bank of Sutton v. Sutton Mercantile Co., 77 Neb. 596, 110 N. W. 306.

"The filing of a motion for a new trial is unnecessary to obtain a review in this court of a judgment dismissing a cause before any evidence is taken for the reason that the petition does not state facts sufficient to constitute a cause of action." Huffman Automobile Co. v. Moline Plow Co., 110 Neb. 279, 193 N. W. 747.

This Huffman case, which plaintiff relies upon, holds in effect that in a law action under circumstances similar to the one at bar, a motion for a new trial is unnecessary, and therefore of no avail to extend the time of appeal.

The rule in equity cases is that the time for taking an appeal begins to run from the date of the entry of the decree or final order if no motion for a new trial is filed. When a motion for a new trial is filed in an

equity case, the time for taking an appeal begins to run from the date of the overruling of the motion. Dodge v. Healey, 103 Neb. 180, 170 N. W. 828; Union Central Life Ins. Co. v. Burgess, 131 Neb. 20, 266 N. W. 898; Douglas County v. Barker Co., 125 Neb. 253, 249 N. W. 607.

The statute involved is section 25-1912, R. S. 1943. The statute involved in Huffman Automobile Co. v. Moline Plow Co., *supra,* was section 20-1912, C. S. 1929, which is substantially the same as our present statute. Appeals in law and equity are made under the same statute; why should the rule not be the same in each?

It is our opinion that the interpretation of the statute made in the Huffman case is not warranted. A litigant should, in our opinion, be permitted to appeal from the judgment or from the overruling of the motion for a new trial, whether the case be in law or equity. While the matters to be considered on appeal may be different in an appeal from the entry of the judgment than in an appeal from the overruling of a motion for a new trial, we find no good reason for saying, when the wording of the statute is considered, that one must appeal from the judgment in a law action when a motion for a new trial will serve no useful purpose, and that an appeal may not be taken from the subsequent overruling of the motion for a new trial. Such rulings, we believe, lead to confusion and inconsistencies not based on reason. They create unnecessary pitfalls which we should eliminate.

It is our opinion that it was clearly contemplated in our present statute, section 25-1912, R. S. 1943, that the equity rule should be adopted in both cases. We therefore overrule the holding in Huffman Automobile Co. v. Moline Plow Co., *supra,* insofar as the same is in conflict with our holding in this case.

If the defeated litigant desires to give the trial court an opportunity to correct his judgment, if he has made

an error, by filing a motion for a new trial or rehearing, it is our opinion that the time for appeal to this court should not be cut off until that motion has been overruled by the district court, and it stands to reason that the rule should be uniform in all cases.

Taking up the judgment entered in the district court, we find that when the court struck out paragraphs 3, 4, and 5 of the answer it left just two paragraphs, to wit, paragraph 1, admitting ownership of land, and paragraph 2, admitting that the potatoes grown on that land in 1944 were sold to the Mack Potato Company, and also denying that any false or fraudulent representations were made by the defendant.

The defendant's assignments of error are based on the court's action in striking out all of defendant's amended answer except the two introductory paragraphs and the prayer at the end.

In his brief defendant does not specifically allege that his defense involves either a set-off or counterclaim, but that in raising the potatoes according to the agreement between the parties he advanced certain sums of money, performed certain labor, and that the settlement of these items due him out of plaintiff's share was merely carrying out the details of their agreement.

The raising of these potatoes, the digging and repair of a cellar in which to store them, using a poison spray for bugs, repairing the pump used in spraying them, the expense of weighing the potatoes, the labor ordered by plaintiff in connection with raising the crop, if proved as alleged by the defendant, would appear to the court to be items arising out of the very same transaction.

An analysis of these pleadings leaves the court with the impression that the matters set out in the answer partake of the nature of a counterclaim, which is discussed but not defined in section 25-813, R. S. 1943, reading as follows: "The counterclaim mentioned in section 25-812 must be one existing in favor of a de-

fendant and against a plaintiff between whom a several judgment might be had in the action, and arising out of the contract or transaction set forth in the petition as the foundation of the plaintiff's claim, or connected with the subject of the action."

Counterclaim "is defined judicially as a cause of action in favor of defendant upon which he might have sued plaintiff and obtained affirmative relief in a separate action." 57 C. J., Set-off and Counterclaim, § 11, p. 366, and cited in the notes thereunder we find that it is " 'Something of a legal or equitable nature * * * arising out of the contract or transaction set forth in the petition as the foundation of the plaintiff's claim, giving the defendant a right to relief necessarily involved, or properly involved, in the action, to the end that a complete determination thereof may be had.' Hodge v. Bishop, 96 Kan. 419, 421, 151 P. 1105."

In our opinion, the connection of the counterclaim with the subject of the action is more than casual or incidental, and complies with the holdings of this court that it must be immediate and direct. Live Stock Nat. Bank v. Marshall, 131 Neb. 185, 267 N. W. 414; 57 C. J., Set-off and Counterclaim, § 65, p. 415.

The term counterclaim is broader and more comprehensive than recoupment, set-off, or cross-action, and, subject to statutory limitations, secures to defendant the full relief which a separate action at law or in equity would have secured. See 57 C. J., Set-off and Counterclaim, § 17, p, 369.

Such claim or demand must be more than a mere defense to plaintiff's cause of action, or in reduction of his damages; "it must be an existing, valid, and enforceable cause of action in favor of the defendant against the plaintiff." 47 Am. Jur., Setoff and Counterclaim, § 37, p. 736.

In the opinion of this court, the items set out in the amended answer of the defendant in the instant case

had such a close relation to and connection with the matters alleged in the petition that it would be only just and equitable between the parties to settle them all in this one action, and not require the defendant to bring another suit against plaintiff on his claims. Having reached this conclusion, we hold that the trial court erred in striking out all of the claims of defendant from his answer and entering a judgment on the petition alone.

REVERSED.

WENKE, J., participating on briefs.

PHILIP TEWS BY HIS FATHER AND NEXT FRIEND, AUGUST TEWS, APPELLEE, V. JOHN BAMRICK AND EUGENE CARROLL, DOING BUSINESS UNDER THE FIRM NAME AND STYLE OF BAMRICK AND CARROLL, AND JAMES TRYON, APPELLANTS.

26 N. W. 2d 499

Filed March 7, 1947. No. 32146.

1. **Automobiles: Evidence.** Where it appears that a witness had no opportunity to formulate a basis for an opinion as to the speed of a motor vehicle, it is error to permit him to give an estimate.
2. ———: ———. However, where it appears that a witness had a reasonable time, means, distance, and opportunity to formulate a basis for an opinion as to speed of a car, such witness may express his opinion as to speed. The credibility and weight to be given such testimony is for determination by the jury.
3. **Trial.** When the defendant in a jury trial moves for a directed verdict such motion must be treated as an admission of the truth of all material and relevant evidence favorable to the plaintiff and of all proper inferences to be drawn therefrom, and if it tends to sustain plaintiff's cause of action, the case should be submitted to the jury.
4. **Negligence.** In an action for negligence the burden is on the plaintiff to show that there was a negligent act or omission by the defendant and that it was the proximate cause of plaintiff's injury or a cause which proximately contributed to it.

5. **Automobiles.** It is the duty of the driver of an automobile to exercise reasonable care in its operation and, when pedestrians are numerous and traffic is congested, the degree of care required must be commensurate with the danger reasonably to be anticipated.
6. ———. Under the law of this state the lawfulness of the speed of a motor vehicle, within the limits fixed by law, is determined by the further test of whether the speed was greater than was reasonable and prudent under the conditions then existing.
7. ———. What is a reasonable speed is necessarily largely dependent on the situation and the surrounding circumstances, it being obvious that a speed which would be safe, reasonable, and proper in some places and under some circumstances might be highly dangerous, unreasonable, and improper in other places and under other circumstances.
8. ———. Our statutes contemplate not only the installation of warning devices on motor propelled vehicles but that they shall be used opportunely by the drivers of such vehicles to apprise pedestrians and other travelers of the approach of an oncoming car. The duty to sound a signal warning of the approach of a motor vehicle depends largely on the circumstances of the particular case.
9. **Infants: Negligence.** A child of tender years is not chargeable with contributory negligence.
10. **Automobiles.** The fact that a child runs into the side of a car or truck does not automatically relieve the driver and owner thereof of liability for injuries received therefrom. If the driver, in the operation thereof, did not take such precautions as reasonable and ordinary care under the circumstances required and such conduct was the proximate cause of the accident, then the driver and owner would be responsible and liable therefor.

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

Morrow, Lovell & Bulger, for appellants.

Mothersead & Wright and *Robert G. Simmons, Jr.,* for appellee.

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

WENKE, J.

Philip Tews, as father and next friend of August

Tews, a minor, brought this action in the district court for Scotts Bluff County against John Bamrick and Eugene Carroll, doing business under the firm name and style of Bamrick and Carroll, and James Tryon.

The purpose of the action is to recover damages for injuries suffered by the minor, August Tews, due to the negligent operation by the defendant James Tryon of a semitrailer truck belonging to Bamrick and Carroll.

The jury returned a verdict for the plaintiff and judgment was entered thereon. Their motion for new trial having been overruled, the defendants appeal.

When spoken of herein as individuals August Tews, the minor, will be referred to as the boy; James Tryon as the driver; and all other parties by their proper names.

The following facts are either admitted by the pleadings or undisputed in the evidence:

The truck involved in the accident was a 1942 International semitrailer consisting of an International tractor and an Omaha Standard trailer and was owned by the copartnership of Bamrick and Carroll. These two units had separate brakes. Those on the tractor were four-wheel hydraulic brakes controlled by a foot pedal while the trailer had air brakes controlled by a lever located on the steering wheel. The truck was 39 feet 9 inches in length, the trailer being 28 feet 9 inches long and 8 feet wide, while the tractor was 16 feet 11 inches long and 6 feet 8 inches wide with an overlap of 5 feet 11 inches, the trailer extending 2 feet 7 inches beyond the front of the tractor's rear tires. The total weight, as equipped at the time of the accident, was approximately 19,000 lbs. On March 26, 1945, James Tryon, who had been working for the owners as a driver for about six months, was driving the truck north on South Broadway Street in the city of Scottsbluff. At about 12:45 p. m. he approached the driveway leading west from South Broadway and continuing west along the north side of the potato office. He was familiar with this driveway and its immediate surroundings, having used it almost

daily for the past six months. He proceeded to turn left onto the driveway in order to park his truck in the space available for that purpose. The parking areas were immediately to the north of the driveway. The owner of the land on which the buildings immediately to the south of the driveway are located had made this parking space available to the public in general but especially as a convenience for the people who traded with the businesses located in these buildings. After entering the driveway and at a point northeast of the northeast corner of the potato office the truck came in contact with the boy and resulted in his injuries, the extent of which is not here in question. At the time of the accident the boy was five years of age.

Before proceeding further with a more detailed discussion of the disputed or conflicting facts we will take up the question of certain admitted evidence which relates to the speed of the truck as it entered and proceeded onto the driveway.

It is the appellants' contention that this evidence should not have been admitted under the following rule: "Where it appears that a witness had no opportunity to formulate a basis for an opinion as to the speed of a motor vehicle, it is error to permit him to give an estimate." Knoche v. Pease Grain & Seed Co., 134 Neb. 130, 277 N. W. 798. And as stated in Fairman v. Cook, 142 Neb. 893, 8 N. W. 2d 315: "Where it appears that a witness had no reasonable time, means, distance, or opportunity to formulate a basis for an opinion as to the speed of a car, the testimony of such witness is insufficient to sustain a finding of excessive speed in the absence of other evidence on the subject."

Of course the opposite of this rule must necessarily follow, that is: "Where it appears that a witness had a reasonable time, means, distance and opportunity to formulate a basis for an opinion as to speed of a car, such witness may express his opinion as to speed. The credibility and weight to be given such testimony is for

determination by the jury." Crecelius v. Gamble-Skogmo, Inc., 144 Neb. 394, 13 N. W. 2d 627.

On this basis the appellants question the admissibility of the testimony of the witnesses Jerome McKerrigan, Harry Lang, and John Kaufman.

The evidence of Jerome McKerrigan shows that he was driving a pickup truck north on South Broadway immediately behind the truck here in question; that he observed the truck turn and drive onto the driveway; that while following the truck he observed the speed of his own pickup; and that he was an experienced driver. Without going into further detail, there is no question but what this witness was qualified to give his opinion as to the speed he thought the truck was traveling. However, appellants contend that because many of the facts which this witness testified to are so conflicting with those testified to by other witnesses that his testimony carries little or no weight. Although it does appear that in many details his testimony disagrees with that of other witnesses, nevertheless on matters where he is qualified to testify the question of his credibility and the weight of his testimony are for the jury.

The evidence of John Kaufman shows that he first saw the truck when it was making the turn from the highway onto the driveway; that he watched it come in; that he was an experienced car driver; and that he could guess or estimate the speed of a car pretty close. From the above brief statement of his testimony it is apparent that the witness was qualified to give his opinion. It is true that on cross-examination his qualifications were materially weakened but it still remained a question for the jury to determine its weight. In connection with this witness the appellants argue that his testimony was merely a guess because of his use of that word in connection with his opinion as to the speed of the truck. However, it is apparent that the witness used the words estimate and guess interchangeably and with the same meaning. There is no question but what, based on his

observation and experience, he testified to what, in his opinion, was the speed of the truck at the time.

The same is true of the witness Harry Lang. At the time the objection was made on direct examination he had testified to facts which would qualify him to give his opinion as to the speed of the truck. At that time the objection was properly overruled. Later, on cross-examination, he testified to facts which materially weakened the basis for his opinion. Under this situation we think it was a matter for the jury.

We find the objections to this testimony were not well taken.

The principal contention of the appellants is that there is insufficient evidence to sustain the verdict. The effect of this contention is that the trial court should have directed a verdict for the defendants and consequently the following rule is applicable: "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." Gohlinghorst v. Ruess, 146 Neb. 470, 20 N. W. 2d 381.

The case was submitted upon two issues. They are, that the truck was being driven at a speed greater than was reasonable under the conditions existing and that no warning was given of its approach.

Negligence is never presumed and cannot be inferred from the mere fact that an accident happened. Anderson v. Interstate Transit Lines, 129 Neb. 612, 262 N. W. 445.

"In an action to recover damages caused by alleged negligence, plaintiff must prove both negligence of defendant and that such negligence was the proximate cause of the injury complained of." Sippel v. Missouri P. R. Co., 102 Neb. 597, 168 N. W. 356.

" 'Proximate cause, as used in the law of negligence, is that cause which in a natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury, and without which the accident could not have happened.' Anderson v. Byrd, 133 Neb. 483, 275 N. W. 825." Bixby v. Ayers, 139 Neb. 652, 298 N. W. 533.

" 'In an action for negligence, the burden is on the plaintiff to show that there was a negligent act or omission by the defendant and that it was the proximate cause of plaintiff's injury or a cause which proximately contributed to it.' Miller v. Abel Construction Co., 140 Neb. 482, 300 N. W. 405." Bowerman v. Greenberg, 142 Neb. 721, 7 N. W. 2d 711.

" 'It is the duty of the driver of an automobile to exercise reasonable care in its operation, and when pedestrians are numerous and traffic is congested, the degree of care required must be commensurate with the danger reasonably to be anticipated.' " Kauffman v. Fundaburg, 123 Neb. 340, 242 N. W. 658. See Christoffersen v. Weir, 110 Neb. 390, 193 N. W. 922.

Likewise, "A motorist at a private crossing, especially one that is customarily used, must exercise the same degree of care as at an ordinary public street crossing, * * *." 2 Blashfield (Perm. ed.), § 1278, p. 410.

"Under the law of this state, the lawfulness of the speed of a motor vehicle within the *prima facie* limits fixed is determined by the further test of whether the speed was greater than was reasonable and prudent under the conditions then existing. Comp. St. Supp. 1939, sec. 39-11,101." Folken v. Petersen, 140 Neb. 800, 1 N. W. 2d 916. Now § 39-7,108, R. S. 1943.

" 'What is a reasonable speed is necessarily largely dependent on the situation and the surrounding circumstances, it being obvious that a speed which would be safe, reasonable, and proper in some places and under some circumstances might be highly dangerous, unreasonable, and improper in other places and under other

circumstances.' 42 C. J. 926." Ross v. Carroll, 138 Neb. 1, 291 N. W. 726.

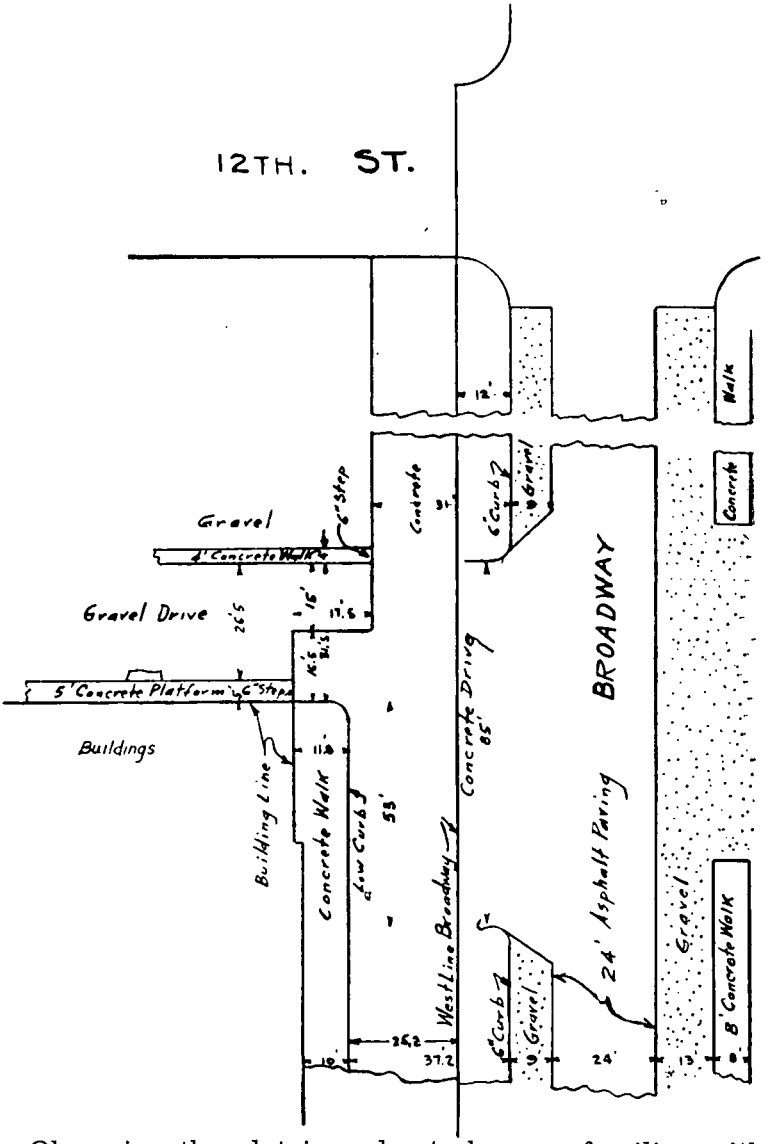
We have said that our statutes contemplate not only the installation of warning devices on motor-propelled vehicles but that they shall be used opportunely by the drivers of such vehicles to apprise pedestrians and other travelers of the approach of an oncoming car. The duty to sound a signal warning of the approach of a motor vehicle depends largely on the circumstances of the particular case. See section 39-774, R. S. 1943, Kauffman v. Fundaburg, *supra,* and Christoffersen v. Weir, *supra.*

As stated in 2 Blashfield (Perm. ed.), § 1311, p. 419: "On the other hand, the driver of an automobile is bound to assume that pedestrians will be using street crossings, and is under a common-law duty to give them or be ready to give them reasonable warning of the approach of his car, if the exercise of ordinary care so requires, which is usually a question of fact under the particular circumstances of the case."

It can be here said that the conduct of the boy was undoubtedly negligent, but we have often said a child of tender years is not chargeable with contributory negligence. See McKinney v. Wintersteen, 122 Neb. 679, 241 N. W. 112; Siedlik v. Schneider, 122 Neb. 763, 241 N. W. 535; and De Griselles v. Gans, 116 Neb. 835, 219 N. W. 235.

Nor does the fact that a child ran into the side of a truck automatically relieve the driver and owners thereof of liability for injuries received by the child. For if the driver, in the operation of the truck, did not take such precautions as reasonable and ordinary care under the circumstances required and such conduct was the proximate cause of the accident, then the driver and owners would be responsible and liable therefor.

The following plat is inserted in order to provide a picture of where the accident happened:



Observing the plat in order to become familiar with the place where the accident happened it will be noticed, commencing with a point approximately where the

extended north line of the driveway would hit South Broadway and from there a distance south of 85 feet, there is no curb on the west side of the street. The buildings south of the driveway are located from 35.2 to 37 feet west of the property line. East of these buildings and extending the full length thereof is a sidewalk from 10 feet to 11.8 feet in width which ends with the north edge of the buildings. At this point it is some 2½ inches higher than the driveway surface. East of the sidewalk is a surfaced area used for parking. Cars are parked along this sidewalk facing in a southwesterly direction with the front wheels against the walk. South of the driveway is a sidewalk 5 feet in width and ending at the east end of the buildings. This walk is raised about 6 inches above the surface of the driveway. North of the driveway is another cement walk raised approximately the same distance above the driveway surface. North thereof are two parking areas divided by another walk and reached by the driveway. This is the parking area already referred to.

This driveway, between these two walks, is 26.5 feet in width and has a gravel surface all the way along the north side of the building. When it reaches the east end of the buildings it will be noticed that the south 11.5 feet thereof is paved from there on out to the street and south to the walk east of the buildings while the north 15 feet continues to be gravel for a distance of 17.5 feet where it likewise becomes hard surfaced. This latter is important because of the point where the truck and boy came in contact.

Under the principle herein stated there is competent evidence, although disputed or conflicting, from which a jury could find the following: That there is considerable pedestrian traffic along the west side of South Broadway —this includes the people who trade at the stores, those who use the parking areas, and the public generally; that most of this traffic uses the sidewalk in front of the stores; that on reaching the north end of this sidewalk,

going north, they angle in a slightly northeast direction and then continue on north thereby avoiding any gravel and continuing on the hard surface; that the traffic coming from the north uses the same route; that this travel is particularly heavy during the noon hour when children are coming from or going to school and others are going to or from lunch; and that the driver was fully aware of that fact.

That at or about 12:45 p. m. of the day in question the driver was proceeding north on South Broadway driving the truck between 25 and 30 miles an hour; that on approaching the driveway he did not slow down but turned onto it at a considerable angle and without sounding his horn; that due to the fact that in turning, the rear wheels of the tractor, and especially the trailer, do not follow the front wheels of the tractor but turn considerably inside thereof and due to the further fact that a car was parked near the north end of the sidewalk, the rear of which was about in line with the north end thereof, the driver's attention was directed to the rear of his truck to make sure he would not hit the rear of this car; that while so proceeding he did not see or observe two high school girls who had left the northeast corner of the walk traveling in an easterly direction and who were compelled to jump back to avoid being hit; that he observed or could have observed the boy at the northeast corner of the walk as he came around two girls who were standing there; that the boy was skipping along and traveling in a generally north but slightly northeast direction apparently unaware of the approaching truck; that the driver did not sound his horn; that he did not apply any brakes until after he saw the boy and then only those on the tractor; that the application of these brakes did not become sufficiently effective so as to skid the wheels until the truck reached a point where the rear wheels of the tractor were about to leave the pavement on the north half of the driveway; that the boy and the truck

came together at a point about one foot north of the south edge of the gravel, which extends east on the north half of the driveway, and just east of the east edge thereof; that the contact on the truck was made at a point located just in front of the left rear dual wheel of the tractor and on the left front rounded corner of the trailer; that at the moment of contact the boy put his hands up against the trailer and appeared to attempt to turn but was immediately either knocked down or fell in front of the skidding dual wheels of the tractor; that he was pushed along in front of the wheels for a distance of some 8 to 10 feet and from that source received his injuries; that when stopped the truck was still at an angle and facing somewhat northwest.

As controlling of this situation the appellants cite many cases of this and other jurisdictions wherein the injured party suddenly and unexpectedly either jumped, walked, ran, fell, or was thrown into or in front of an automobile or truck and recovery was denied. In those cases the facts invariably disclose a situation where there was an insufficient lapse of time for the driver to effectively act to save the party from injury and because thereof the accident was inevitable. Of course in those situations the speed of the vehicle or the failure to sound a horn had no relationship to the cause of the accident and therefore were no part of the proximate cause thereof. The sudden action or conduct of the injured party was the sole proximate cause.

On the other hand the appellee cites cases wherein the courts approved the submission of the question to a jury on the basis of whether the driver saw or, by the exercise of ordinary care, could have seen the child in time to have avoided the accident by stopping, driving out of the way, or giving a warning of his approach.

The line of demarcation seems to be a question of whether there was time enough in which to act. If the

situation came about so suddenly that it was, as a matter of fact, impossible for the driver to respond then all the cases hold no liability attaches for the accident happened because of the sudden action of the injured party. However, where the facts disclose a situation that leaves the driver with sufficient time in which an ordinary prudent man could respond to the situation, then the question of whether or not his actions are negligent and the proximate cause of the injury becomes one of fact for the jury.

As stated in Hornbuckle v. McCarty, 25 A. L. R. 1508 (295 Mo. 162, 243 S. W. 327):

"If the driver of an automobile could by the exercise of ordinary care have discovered the peril of one crossing the street in such manner as to be likely to come in contact with the vehicle, and oblivious of his danger, in time by the exercise of ordinary diligence to have avoided the collision, his negligence in failing to do so, and not that of the pedestrian in walking into the side of the vehicle, is the proximate cause of the injury. * * *

"One about to drive an automobile across a crosswalk for pedestrians at a street intersection is bound to warn a pedestrian who, oblivious of his danger, is about to collide with the vehicle, or to stop, or pass behind the pedestrian."

Here the driver could have and admits having seen the boy at the northeast corner of the sidewalk east of the buildings. This point is some 16.5 to 17.5 feet from the point of the accident. The boy was then traveling at almost a right angle toward the course the truck was pursuing and apparently unaware of its approach. There is evidence to the effect that the boy was walking but assuming he was skipping, which some seem to remember is the way he was traveling, an ordinary boy of five years would not be traveling faster than five miles an hour. Based on the time it takes an average person to react to a situation there is evidence from which the jury could have found that the driver

had time in which to blow his horn and also stop the truck. Whether the driver's failure to stop was because of his inability, due to the speed of his truck, or his failure to act promptly and why he failed to blow his horn and the effect of such failure are matters for the jury's consideration. Likewise, whether or not they were the proximate causes of the injury.

In this respect we do not overlook the fact that the driver testified he was unable to blow his horn between the time he saw the boy and the accident and also that he applied the brakes just as soon as he could. But his conclusions are not conclusive as a matter of law. From this and the other evidence as disclosed by the record it became a question of fact for the jury whether, under the circumstances, he exercised ordinary care in regard thereto.

We think the two issues submitted to the jury find support in the evidence and therefore the court was correct in submitting them to the jury.

Appellants contend that the verdict is contrary to certain of the instructions given by the court. They base this contention on their version of the evidence which, of course, the jury was under no obligation to accept. It can be said of these instructions, particularly No. 20, that they were very favorable to the appellants and if the appellee were here complaining there would be a question if they were not too much so.

Appellants complain because the court refused to give two of the five instructions which they tendered. Some of what is contained in these instructions is in effect included in those given. Parts are not applicable to the situation as here disclosed by the evidence. We find no error was committed by the court's refusal.

Appellants complain of several instructions given by the court:

They contend that the court erred in giving instruction No. 15. This instruction informed the jury that, "* * * the crossing where the collision * * * occured is,

under the evidence of this case, a crossing that was customarily used by the public and under these circumstances, it was the duty of the driver of the truck to exercise the same degree of care as at an ordinary public street crossing." In view of the facts, which have already been sufficiently set forth, and the legal principles applicable thereto we do not think this instruction is erroneous but find it a correct statement under the circumstances of the situation as presented by the record.

They complain of instruction No. 17 but it is a correct statement, under our holdings, of what constitutes a proper speed under the circumstances and is without error.

They complain of the court's giving instruction No. 18 which informed the jury that the statutes of Nebraska provide as follows: "No person shall turn a vehicle from a direct course on a highway unless such movement can be made with reasonable safety, and then only after giving a clearly audible signal by sounding the horn if any pedestrian may be affected by such movement." See § 39-7,115, R. S. 1943.

Under the circumstances here involved the question of whether or not the truck's movements might affect the boy and whether or not the failure to sound the horn was a contributing or proximate cause of the injury were questions for the jury. We find no error in the giving of this instruction.

They also complain of instruction No. 21 which defines the duty of a driver upon observing children of tender years. Under the facts of this case we think this instruction was proper.

We find the court properly submitted the case to the jury and that it committed no prejudicial error in doing so. Therefore, the verdict and judgment entered thereon should be and are affirmed.

AFFIRMED.

YEAGER, J., dissenting.

In this case I respectfully dissent from the majority opinion. I am convinced that on the record a verdict should have been directed in favor of the defendants.

I am not complaining of the propositions of law set forth in the opinion. My contention is that the facts when weighed in the light of the principles of law announced do not support a verdict favorable to the plaintiff.

It is a fact that the plaintiff collided with the side of the truck and some considerable distance back from the front end. He walked, ran, or skipped into the side of it. The front end was well past him when this happened. If he did not see the 19,000-pound truck immediately in front of him could a jury, can this court, say with any degree of assurance or positiveness that his attention would have been attracted to the 19,000-pound truck which was already in front of him? If the truck had been moving slower or faster can it be reasonably inferred that the boy would not have run into it?

Affirmative verdicts in negligence cases must depend upon direct evidence or evidence from which reasonable inferences may flow, and not upon conjecture and speculation.

The verdict of the jury and the majority opinion are grounded on speculative inference flowing from speed and from failure to sound a horn. These speculative inferences are in my opinion insufficient to sustain the verdict.

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

26 N. W. 2d 393

Filed March 7, 1947. No. 32183.

1. **Trial: Juries.** Where the authority of a person to represent another becomes material during a trial of an action at law and the evidence upon that point is conflicting, the issue is one of fact for the determination of the jury.
2. **Husband and Wife.** A husband may act as agent of his wife in contracting for materials to be used in making improvements on her property, and the question of agency is one of fact to be determined from all the circumstances of each particular case.
3. **Bills and Notes.** Where a note signed by an accommodation maker is paid from the assets of his estate after his decease, the administrator has a cause of action against the accommodated party to recover the amount paid.
4. **Executors and Administrators.** When the administrator in such a case refuses or neglects to bring the action, the creditors of the estate ordinarily are entitled to do so. Under such circumstances they are subrogated to the rights of the administrator.

APPEAL from the district court for Scotts Bluff County: LYLE E. JACKSON, JUDGE. *Affirmed.*

Morrow, Lovell & Bulger, for appellant.

Neighbors & Danielson, for appellees.

Heard before SIMMONS, C. J., PAINE, CARTER, YEAGER, CHAPPELL, and WENKE, JJ., and NUSS, District Judge.

CARTER, J.

This is an action brought by The Mead Company and 11 other creditors of the estate of Otto H. Doerfler, deceased, against Zdenka A. Doerfler, the widow of the deceased, to recover the sum of $1,293.92 paid to L. W. Cox & Company from the funds of the estate. A verdict for the full amount and interest was returned by the jury and judgment entered thereon. The defendant appeals.

This is the second appearance of this case in this court. In the former appeal it was determined that

the facts alleged in the first cause of action were not vulnerable to a demurrer and that plaintiffs under the circumstances shown were entitled to maintain the action. Mead Co. v. Doerfler, 146 Neb. 21, 18 N. W. 2d 524. The allegations of the first cause of action on the former appeal constitute the cause of action presented in the present appeal.

The record shows that Otto H. Doerfler had numerous business transactions with L. W. Cox & Company in his lifetime. In 1935, L. W. Cox & Company sold a residence property to Zdenka A. Doerfler, which is the property primarily involved in this litigation. The house on this property was removed and replaced with a store building. The materials used in the accomplishment of this purpose were purchased by Doerfler from L. W. Cox & Company and charged to him on the books of the company. Subsequently, additions were built onto the store building. The materials were purchased from L. W. Cox & Company by Doerfler, and charged to him. Upon the completion of the work, notes were executed by Otto H. Doerfler and Zdenka A. Doerfler. After the death of Otto H. Doerfler, L. W. Cox & Company filed its claim in the estate of Otto H. Doerfler, deceased, for the amount remaining due on the notes. The record discloses that L. W. Cox & Company was paid $1,293.92 on its claim from the funds of the estate. It is the contention of the plaintiffs that the obligation owing to L. W. Cox & Company was that of Zdenka A. Doerfler, that Otto H. Doerfler acted as her agent only, and that he signed the notes as an accommodation maker. It is then contended that, as the estate of Otto H. Doerfler was required to pay $1,293.92 because of Doerfler's liability as an accommodation maker, plaintiff creditors are entitled to be subrogated to Doerfler's right of action against Zdenka A. Doerfler, the primary obligor. The question for determination is whether Otto H. Doerfler acted for himself in purchasing the materials in question and in the sign-

ing of the notes therefor, or whether he was acting as the agent for Zdenka A. Doerfler in such transactions and signed the notes as an accommodation maker only.

The evidence shows that Doerfler handled the purchase of the property for Zdenka A. Doerfler. He made repairs and constructed additions to the building with the full knowledge and acquiescence of Zdenka A. Doerfler. He operated the business, collected the rents, and made the payments on the notes. The business was operated as the "Thrifty Way Market." The only bank account was carried in the name of Otto H. Doerfler. Zdenka A. Doerfler testifies that Doerfler fixed the amount of the rentals and made collections of rent, although she ordinarily collected the rents. No rent was paid by Doerfler to Zdenka A. Doerfler for the use of the premises. It is shown that Zdenka A. Doerfler participated in the operation of the business. The situation is fairly well expressed in a reply by Zdenka A. Doerfler to an inquiry as to whether she wanted Doerfler to look after the rentals for her when she said: "I had to have his help; I didn't understand."

We think the foregoing evidence is sufficient to sustain the finding of the jury that Doerfler was acting as agent for Zdenka A. Doerfler in the handling of her property. The applicable rule is stated in Thomas v. George, 105 Neb. 44, 181 N. W. 646, in the following language: "The question of whether the husband acts with authority from the wife and is her agent is a question of fact to be determined from the circumstances of each particular case. Mere knowledge that a building is being constructed by her husband upon her premises, when that fact stands alone, is insufficient to show that her husband acted as her agent. Agency in such a case will not be presumed from the marital relation; but the fact that the wife has such knowledge, in the light of other evidence, may be of strong corroborative value. Owing to the close relationship existing between husband and wife, an agency

by the husband may be created by slight circumstances. It is unnecessary that they enter into any formal contract of agency, nor is it necessary that the wife expressly state to her husband that she gives him authority to act. Such an agency may be inferred from things said and acts done." Inasmuch as the jury determined that Doerfler acted in a representative capacity in procuring the materials for which the indebtedness was contracted, it is clear that he did not receive value in executing the notes and did so for the purpose of lending his name to Zdenka A. Doerfler. This made him an accommodation maker as that term is defined by section 62-129, R. S. 1943. If, as here shown, the accommodation maker is required to pay the debt of the party accommodated, a cause of action to recover the amount paid exists in favor of the accommodation party against the party accommodated. The plaintiffs stand in the shoes of the accommodation party under the equitable theory of subrogation. Nelson v. Webster, 72 Neb. 332, 100 N. W. 411; Criswell v. McKnight, 120 Neb. 317, 232 N. W. 586; Mead Co. v. Doerfler, *supra*. The fact that one of the parties is deceased does not change the rule. § 30-805, R. S. 1943.

Defendant complains of the instructions given by the court. The primary issue of fact was whether Doerfler was acting as his wife's agent or in a personal capacity. The jury was correctly instructed on the question of agency in instructions seven, eight, and nine. We find no prejudicial error in the instructions to the jury.

AFFIRMED.

EMIL PLACEK AND BANK OF PRAGUE, PRAGUE, NEBRASKA, A CORPORATION, PLAINTIFFS AND APPELLEES, AND LESHARA STATE BANK OF LESHARA, NEBRASKA, A CORPORATION, INTERVENER AND APPELLEE, V. M. D. EDSTROM, AS COUNTY ATTORNEY OF SAUNDERS COUNTY, NEBRASKA, DEFENDANT AND APPELLANT.

26 N. W. 2d 489

Filed March 7, 1947. No. 32141.

1. **Statutes.** A law is entitled to be considered remedial whether it remedies a defect of the common law or of a preexisting statute.
2. ———. In a limited and restricted sense, a statute may be penal yet remedial in its nature if designed to remove a condition inimical to the public welfare.
3. ———. In construing remedial statutes, there are three elements to be considered: (1) The old law, (2) the mischief, and (3) the remedy; and, unless restrained by constitutional authority, it is the duty of courts to so construe such acts as to suppress the mischief and advance the remedy.
4. ———. In enacting a statute, the Legislature must be presumed to have had in mind all previous legislation upon the subject. In the construction of a statute courts must consider the preexisting law and any other laws relating to the same subject.
5. ———. Where the general intent of the Legislature may be readily ascertained, yet the language used in a statute gives room for doubt or uncertainty as to its application, courts may resort to historical facts or general information to aid them in interpreting its provisions.
6. **Banks and Banking.** Chapter 11, Session Laws of Nebraska, 1945, deals not with charges for collection but with charges incident to paying and in that connection requires that if drawee state banks clear checks drawn upon them, it must be done at par, without deduction of a so-called exchange charge from remittances therefor to forwarding banks.
7. ———. When a drawee bank charges the amount of a check drawn upon it to the account of its depositor, it pays the check to itself as agent for the holder or forwarding bank, and thereafter holds such funds in a fiduciary capacity as such agent.
8. ———. In such a situation, the check is then paid, but it is only cleared when the proceeds received therefrom by the drawee bank are properly remitted in full to the forwarding bank as required by Chapter 11, Session Laws of Nebraska, 1945.

9. **Contitutional Law.** Section 10, article I, Constitution of the United States, has reference only to laws enacted after the making of contracts, the obligations of which are claimed to be impaired.
10. ———. Since Chapter 11, Session Laws of Nebraska, 1945, does not impair the obligations of any contract between drawee banks and any other person, either depositor or holder, it is not repugnant to section 10, article I, Constitution of the United States.
11. **Statutes: Constitutional Law.** Chapter 11, Session Laws of Nebraska, 1945 is not violative of section 14, article III, Constitution of Nebraska, since it does not amend or contain or in any manner, affect or repeal either sections 62-213 or 62-1,189, R. S. 1943.
12. **Banks and Banking.** Sections 62-213 and 62-1,189, R. S. 1943, and Chapter 11, Session Laws of Nebraska, 1945, relate to the same or closely allied subjects, having a common purpose or the same general purpose as component parts of the same general banking scheme or plan, therefore they are in pari materia, and although enacted at different times, should be construed together.
13. ———. The business of banking, although for private profit, is preeminently public in nature, and a proper subject of reasonable legislative regulation under the police power of the state, which is supreme except as limited by fundamental law.
14. **Constitutional Law.** No provision of the Constitution of the United States was ever intended to take from states the right to properly exercise their police powers which generally extend to all the great public needs which are lawfully recognized as immediately necessary to promote the public welfare.
15. ———. Chapter 11, Session Laws of Nebraska, 1945, being valid in classification is a reasonable exercise of the police power of this state, therefore not repugnant to section 3, article I, Constitution of Nebraska, or to section 1 of the Fourteenth Amendment to the Constitution of the United States.

APPEAL from the district court for Saunders County: HARRY D. LANDIS, JUDGE. *Reversed and remanded with directions.*

Walter R. Johnson, Attorney General, Homer L. Kyle, and *M. D. Edstrom,* for appellant.

Peterson & Devoe, for plaintiff-appellees.

E. S. Schiefelbein, for intervener-appellee.

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

CHAPPELL, J.

Bank of Prague and Emil Placek, its president, instituted this action to obtain a declaratory judgment construing Chapter 11, Session Laws of Nebraska, 1945, appearing as sections 8-163.01 and 8-163.02, R. S. Supp., 1945, and hereinafter generally designated as the act, to be permissive of an alleged new check-clearance exchange formula adopted by the bank after August 10, 1945, the effective date of the act, or in the alternative to declare the act unconstitutional and enjoin its enforcement. The act is generally known as the Par Check Law. The Leshara State Bank intervened, asking similar relief for itself and all other banks similarly situated who have strictly observed all provisions of the act since its effective date. All banks involved are state banks organized under the laws of this state and for convenience in this opinion will be generally designated as plaintiffs.

After trial upon the issues appropriately presented by the pleadings, the trial court concluded that plaintiffs' alleged new formula was prohibited by the act, and in its decree found generally for plaintiffs and against defendant, adjudged the act to be void as unconstitutional, and enjoined its enforcement. This was done upon the grounds that the act was repugnant to section 14, article III, Constitution of Nebraska, in that it was amendatory of sections 62-213 and 62-1,189, R. S. 1943, and neither contained nor repealed said sections as amended; that the act was repugnant to section 10, article I, Constitution of the United States, in that it impaired the obligations of contracts; and that the act was repugnant to section 3, article I, Constitution of Nebraska, and section 1 of the Fourteenth Amendment to the Constitution of the United States respectively, in that it deprived plaintiffs of property without due process of law, and denied them the equal protection of the laws.

Defendant's motion for new trial was overruled, and he appealed to this court, assigning substantially that

the trial court erred in so holding the act unconstitutional and enjoining its enforcement. We sustain that contention.

The act provides: "Section 1. All checks drawn on any bank or trust company organized under the laws of this state shall be cleared at par by the bank or trust company on which they are drawn; *Provided,* the foregoing direction shall not be applicable where checks are sent to banks or trust companies as special collection items. Sec. 2. Any officer or employee of any such bank or trust company who violates the provision of this act shall be guilty of a misdemeanor and, upon conviction thereof, shall be fined not less than five dollars nor more than ten dollars for each offense."

Concededly, the proviso contained in section 1 is not involved in any manner and no trust company is a party to this action. Generally speaking, the case is one of first impression, although landmarks of law point the way to constitutional validity.

We have no doubt that the act may be considered as remedial in character. This court has held that: "A law is entitled to be considered remedial whether it remedies a defect of the common law or of a preexisting statute." Securities Investment Corporation v. Indiana Truck Corporation, 129 Neb. 31, 260 N. W. 691. This court has also affirmed that in a limited and restricted sense a statute may be penal yet remedial in its nature if designed to remove a condition inimical to the public welfare. Nebraska District of Evangelical Lutheran Synod v. McKelvie, 104 Neb. 93, 175 N. W. 531.

As early as Harmon v. City of Omaha, 17 Neb. 548, 23 N. W. 503, this court put its approval upon the following sage statement appearing in 1 Blackstone's Com., p. 87: "In construing remedial statutes there are three points to be considered, viz.: The old law, the mischief, and the remedy. That is, how the common law stood at the making of the act, what the mischief was for which the common law did not provide, and what

remedy the parliament hath provided to cure this mischief, and it is the business of judges so to construe the act as to suppress the mischief and advance the remedy." We have adhered to that position ever since in cases too numerous to cite here.

It was said in Nebraska State Railway Commission v. Alfalfa Butter Co., 104 Neb. 797, 178 N. W. 766: "The intention of the legislature is the law, and such intention is to be gathered from the meaning of the language used, in the light of the necessity for or reason of the enactment and the objects sought to be attained, and, in determining the meaning of the language, its ordinary and its grammatical construction is to be followed, unless an intent appears to the contrary, or unless, by following such construction, the intended effect of the provisions would apparently be impaired."

This court held in Nebraska District of Evangelical Lutheran Synod v. McKelvie, *supra:* "The legislature must be presumed to have had in mind all previous legislation upon the subject, so that in the construction of a statute we must consider the preexisting law and any other acts relating to the same subject," and "Where the general intent of the legislature may readily be discerned, yet the language in which the law is expressed leaves the application doubtful or uncertain, the courts may have recourse to historical facts or general information, in order to aid them in interpreting its provisions."

The act involved will be construed, therefore, in the light of such judicial direction. As in every other field, there has come about an unprecedented but natural evolution in the business of banking. The public use of its facilities has become almost universal. Its business is no longer localized. The vast bulk of the financial business and commerce of the country is now consummated by the use of checks on banks. They are now generally recognized as a safe and efficient method by which bank credit is transferred from one person to another through-

out the state and nation, upon which the necessities of all business, trade and commerce, as well as the financial safety, convenience, and welfare of the public is dependent.

Before checks came into such general usage, banks naturally collected legitimate exchange charges from their customers or depositors for making their funds available, by one recognized mode or another, at a distant place where the customers wished to use them in making a purchase or paying a debt, and they are not now prohibited by the act or by any other law from doing so with profit to themselves. However, with the almost universal use of checks by bank depositors, that method became more or less obsolete. Thus, in making such funds so available, the charge originally made to its customer, the drawer or payer of the check who so transferred his funds to another place, was arbitrarily shifted by some banks in a manner hereafter apparent, from their customer or depositor, who received the benefit thereof, to the payee, or holder of the check, as a so-called exchange charge, without his permission. The latter practice was ultimately recognized as an unjust exaction and became a source of greatest irritation both to banks and to the public. All national banks and most state banks have now long since generally abandoned the practice. Those who have abandoned it are called "par banks," and those who have not are called "nonpar banks." Plaintiffs come within the latter category.

Prior to the effective date of the act, nonpar state banks were exacting the so-called exchange charge from out-of-town checks drawn upon themselves, by their own depositors, at the time when such checks were directly presented by out-of-town banks, wherein they had been deposited, in cash mail letters for clearance, with request for collection and remittance, which was customarily consummated by draft drawn upon a correspondent bank and mailed to the forwarding bank.

Under its original formula, plaintiffs computed such charges at the rate of 5 cents on each check of $10 or less, 10 cents on each check over $10, subject to a limitation of not more than 50 cents for any one cash letter. The charges so computed were deducted from the total of all checks received in any one cash letter, and after such deduction was made and credited as a profit to itself, a draft was drawn by the bank and mailed in remittance of the balance to the forwarding bank.

After the act became effective, evidently conceding that its original formula was prohibited by it, the Bank of Prague adopted a so-called new formula which it claims was not prohibited by the act. Under that formula, it computes the total of all checks received in any one cash letter, deducts therefrom an amount equal to 10 cents for each $100 or fraction of the total, and after such deduction, draws a draft for remittance of the balance, which is mailed to the forwarding bank. The only difference observable to us between the old formula and the new is that the amount exacted and deducted under either one or the other might not be the same. In fact, there is simply a distinction without a difference between the two, and if the act is constitutionally valid prohibiting one, it certainly prohibits the other or both of them.

We come then to the question whether or not the act is constitutional. Its efficient words are: "All checks drawn on any bank * * * organized under the laws of this state shall be cleared at par by the bank * * * on which they are drawn; * * *." The requirement is not that all checks shall be paid at par, nor that they shall be collected at par. It is the manner in which all checks must be cleared by all state banks, and not that they must be paid or collected at all events, that is prescribed by the act. It is par clearance which is required.

In First State Bank v. Federal Reserve Bank, 174 Minn. 535, 219 N. W. 908, it was said: "Primarily the

benefit from having checks cleared at par goes to the makers of such checks, the customers of the bank upon which they are drawn. If such a customer can send his check to another city or place in payment of his debts or purchases and have the check cleared at par, he saves money and inconvenience, saves purchasing a draft and paying the exchange thereon. He cannot compel his debtor or obligee at the other end to accept his check subject to exchange charges. His bank is to that extent favoring him and incidentally attracting customers to itself."

In Farmers and Merchants Bank v. Federal Reserve Bank, 262 U. S. 649, 67 L. Ed. 1157, 43 S. Ct. 651, 30 A. L. R. 635, it was said: "Par clearance does not mean that the payee of a check who deposits it with his bank for collection will be credited in his account with the face of the check if it is collected. His bank may, despite par clearance, make a charge to him for its service in collecting the check from the drawee bank. * * * Par clearance refers to a wholly different matter. It deals not with charges for collection, but with charges incident to paying. It deals with exchange. Formerly, checks, except where paid at the banking house over the counter, were customarily paid either through a clearing house or by remitting, to the bank in which they had been deposited for collection, a draft on the drawee's deposit in some reserve city. For the service rendered by the drawee bank in so remitting funds available for use at the place of the deposit of the check, it was formerly a common practice to make a small charge, called exchange, and to deduct the amount from the remittance." It was a similar deduction by a drawee bank which the act involved sought to eliminate, but there is nothing in the act which prevents the bank from charging its customer or depositor for such services rendered to him for his benefit. Therefore, the act does not compel such a bank to donate the use of its services or property without compensation. It is

not thereby, or by any law related thereto, as will be hereinafter observed, compelled to do anything without compensation. Such banks are simply told that if they do clear checks, it must be done at par without deduction of a so-called exchange charge from remittances to forwarding banks.

A check can be paid by an individual, but it can be cleared only by a bank. In other words, a check can be paid without being cleared. In this state, when checks are forwarded to a drawee bank by another bank in a cash letter, the drawee bank now ultimately becomes the agent of the forwarding bank, and the holder of the check. When it charges the amount of the check to the account of its depositor it pays the check to itself as agent for the holder or forwarding bank, and thereafter holds the funds in a fiduciary capacity as such agent. The check is then paid but not cleared. It is only cleared when such funds are properly remitted to the forwarding bank. This court has held that the drawee bank may and does now act in a dual capacity, to wit: (1) As drawee in paying the checks to itself, and (2) as agent for the holder or forwarding bank in receiving its payment and clearing the check by directly remitting the funds in their hands to the forwarding bank. State ex rel. Sorensen v. Nebraska State Bank, 120 Neb. 539, 234 N. W. 82. See, also, §§ 62-207 to 62-216, inclusive, R. S. 1943.

The legal relationship, therefore, of drawee banks as agents with their principals, the holders of the checks, is entirely distinct and different from their relationship as drawees with their depositors, the payers or makers of the checks. Their relation with the depositors is contractual, actual or implied. City of Lincoln v. First Nat. Bank, 146 Neb. 221, 19 N. W. 2d 156. The act, it will be observed, does not relate to or affect the contract of a bank with its depositors. Therefore, it does not impair the obligations of such contracts in violation of section 10, article I, Constitution of the United States.

A check is a negotiable instrument. § 62-1,185, R. S. 1943. As such, it contains an unconditional order to pay a sum certain in money. §§ 62-101 and 62-1,126, R. S. 1943. It is discharged by payment in due course. § 62-1,119, R. S. 1943. The bank's duty to its depositor is to honor and pay its checks if, when presented, the drawer has on deposit sufficient funds available for that purpose. That duty is fully discharged when the bank receives, honors, and pays the depositor's check and complies with the order contained therein to pay the sum certain. However, that duty is subject to the common-law right of the bank, preserved by section 62-213, R. S. 1943, to refuse to pay checks drawn upon it as drawee otherwise than at its own counter. Therefore, the bank may insist that the holder or his representative receive payment over the counter and is not required to forward the proceeds to another place. Therefore, if a drawee bank undertakes to and does pay checks presented otherwise than at its own counter, such as checks received by mail in cash letters, it does so entirely outside its contract with and its legal duty to the depositor who draws the check. By doing so, the bank assumes new and different relationships and duties not based upon its contract with its depositors.

Section 62-209, R. S. 1943, provides: "Where the item is received by mail by a solvent drawee or payer bank, it shall be deemed paid when the amount is finally charged to the account of the maker or drawer." When that is done we are no longer concerned with the bank's legal duty to its depositor. That duty has been fully performed because checks drawn by the depositor have been discharged by payment in full at par to the bank. From that point on, the bank's legal obligation is to the holder, arising from the fact that the bank is then the holder's agent and possesses and holds the entire proceeds of the paid check in an agency-trust relationship. At that point clearance begins. The

act provides that: "All checks * * * shall be cleared at par," but at that point, the plaintiff bank makes a deduction from a trust fund held by it and remits the balance thereafter. It is that mischief which the act sought to remedy, and it relates to and affects only the capacity of a drawee bank as agent for the holder of checks drawn upon and paid to itself.

Section 62-1,189, R. S. 1943, specifically provides that a check does not of itself operate as an assignment of any part of the funds to the credit of the drawer at the bank, and that the bank is not liable to the holder unless and until it accepts or certifies the check. Certification is not involved here. It is clear that prior to the time when the check is accepted by the bank, it is under no legal duty to the holder thereof. That duty which is fiduciary in character, arises only when the bank accepts the check, charges it to the drawer's account, and pays itself the money. It is terminated only when full remittance is made to the holder. The act simply requires full performance of that duty.

At this point, it is well to say that we fail to see how the act could be violative of section 14, article III, Constitution of Nebraska, since it does not amend, or contain, or in any manner affect or repeal either section 62-213 or 62-1,189, R. S. 1943, or any other statute of Nebraska previously existent. Without doubt those sections and the act in controversy simply relate to the same or closely allied subjects and have a common purpose or the same general purpose and are component parts of the same general banking scheme or plan, therefore in pari materia. It is fundamental in this jurisdiction that statutes relating to the same subject, although enacted at different times, are in pari materia and should be construed together. Morrill County v. Bliss, 125 Neb. 97, 249 N. W. 98, 89 A. L. R. 932; McQuiston v. Griffith, 128 Neb. 260, 258 N. W. 553; Enyeart v. City of Lincoln, 136 Neb. 146, 285 N. W.

314; Hadley v. Corey, 137 Neb. 204, 288 N. W. 826.

We have heretofore found that the act did not impair the obligation of any contracts between the bank and its depositors. We turn then to the obligations of drawee banks to the holders of the checks. It is an elementary proposition of constitutional law that the obligations of a contract cannot be said to be impaired by a statute which was in force when the contract was made. Generally speaking, the laws in force at the time a contract is entered into form a part of it and enter into its obligation, but the law then in force affording a remedy for its breach may be modified or changed without impairing the obligation of the contract if an adequate remedy is left. Norris v. Tower, 102 Neb. 434, 167 N. W. 728.

Section 10, article I, Constitution of the United States, has reference only to laws enacted after the making of contracts, the obligations of which are claimed to be impaired. Lehigh Water Co. v. Borough of Easton, 121 U. S. 388, 30 L. Ed. 1059, 7 S. Ct. 916; Munday v. Wisconsin Trust Co., 252 U. S. 499, 64 L. Ed. 684, 40 S. Ct. 365; New Orleans v. New Orleans Water Works, 142 U. S. 79, 35 L. Ed. 943, 12 S. Ct. 142.

In the last cited case, it was said: "* * * we think that before we can be asked to determine whether a statute has impaired the obligation of a contract, it should appear that there was a legal contract subject to impairment, and some ground to believe that it has been impaired; and that to constitute a violation of the provision against depriving any person of his property without due process of law, it should appear that such person has a property in the particular thing of which he is alleged to have been deprived."

Likewise, in Chicago, B. & Q. R. R. Co. v. Cram, 228 U. S. 70, 57 L. Ed. 734, 33 S. Ct. 437, involving a Nebraska statute, it was said: "The contention is made that the statute impairs the obligation of the contracts which existed between plaintiff in error and defendant

in error; but that contention was not made in the court below and cannot therefore be made here. Besides, there is no evidence of the contracts in the record. Contracts were pleaded and there appears to have been some attempt to introduce them in evidence, but unsuccessfully, and they were stricken from the bill of exceptions. But, assuming the contracts may be considered on this record, a complete answer to the contention that the statute impairs their obligation is, they were made subsequently to the statute and, therefore, are subject to it."

Contracts upon which plaintiff banks obligate themselves with holders of checks drawn on themselves are implied in law. They are necessarily of short duration and generally performed and fully executed the same day. Plaintiffs neither pleaded nor proved, nor did the trial court find that any such contracts were in existence and unexecuted on August 10, 1945, the effective date of the act. Every check drawn on plaintiff banks and received and paid by them thereafter was the subject of a new and separate contract between the bank and the holder, and embraced the act as an integral part thereof, which includes plaintiffs' statutory duty to remit the balance in full, that is to clear all checks at par.

Upon the basis of the analysis heretofore made, we conclude that the act did not impair the obligations of any contract between plaintiff banks and any other person, either depositor or holder, therefore it is not repugnant to section 10, article I, Constitution of the United States.

Finally, we have the question whether the act is unconstitutional upon the ground that it denies plaintiffs equal protection of the laws or deprives them of property without due process as in violation of section 3, article I, Constitution of Nebraska, and section 1 of the Fourteenth Amendment to the Constitution of the United States.

Section 8-110, R. S. 1943, specifically provides: "The business of banking, or the receiving of deposits of money or instruments of credit subject to be repaid upon check, draft, certificate, passbook or order; the discounting or negotiating of promissory notes, drafts, bills of exchange, and other evidences of debt; and the loaning of money upon personal or other security is hereby declared to be a quasi-public business and subject to regulation and control by the state."

It is generally held that: "Banks are indispensable agencies through which the industry, trade, and commerce of all civilized countries and communities are carried on; the business which they transact, though for private profit, is of a pre-eminently public nature, and is therefore universally recognized as a proper subject of legislative regulation under the police power of the state. The power of the legislature in this regard is supreme, subject only to such limitations as are imposed by the fundamental law." 7 Am. Jur., Banks, § 9, p. 30. See, also, Citizens State Bank v. Strayer, 114 Neb. 567, 208 N. W. 662; State ex rel. Chamberlin v. Morehead, 99 Neb. 146, 155 N. W. 879.

In speaking of due process of law and equal protection of the law, it was said by this court in Dysart v. Yeiser, 110 Neb. 65, 192 N. W. 953: "These constitutional provisions are intended to, and do, guarantee the right to make and enforce contracts as property rights, but the right to make and enforce contracts may be restricted and is subject to such limitations as the state, in the proper exercise of its police power, may impose. That is to say, it is subject to reasonable restraint and regulation in the interest of the public welfare."

In State ex rel. Sorensen v. Nebraska State Bank, 124 Neb. 449, 247 N. W. 31, it was held: "The business of banking involves more than the creation of a private debtor and creditor relation, and embraces the establishment of a public instrumentality for the discharge of a public purpose for the promotion of public good."

No part or provision of the federal constitution was ever intended to take from the states the right to properly exercise their police powers, which generally extend to all the great public needs which are lawfully recognized as immediately necessary to promote the public welfare. That such power may be exercised by a state within reasonable limits to regulate the business of banking, whose facilities are generally recognized as an indispensable condition of commerce, is well established. Noble State Bank v. Haskell, 219 U. S. 104, 55 L. Ed. 112, 31 S. Ct. 186, rehearing, 219 U. S. 575, 31 S. Ct. 299, 55 L. Ed. 341; Shallenberger v. First State Bank, 219 U. S. 114, 55 L. Ed. 117, 31 S. Ct. 189; In Re Opinion of Justices, 278 Mass. 607, 181 N. E. 833; Holland v. Nakdimen, 177 Ark. 920, 9 S. W. 2d 307; State ex rel. Chamberlin v. Morehead, *supra.*

In Wenham v. State, 65 Neb. 394, 91 N. W. 421, this court said: "All property in this state is held subject to rules regulating the common good and the general welfare of our people. This is the price of our advanced civilization, and of the protection afforded by law to the right of ownership and the use and enjoyment of the property itself. Rights of property, like other social and conventional rights, are subject to reasonable limitations in their enjoyment, and to such reasonable restraints and regulations by law as the legislature, under the governing and controlling power vested in them by the constitution, may think expedient. This power, legitimately exercised, cannot be limited by contract, nor bartered away by legislation. It is a power that is necessarily inherent in every form of government. This inherent power, reasonably used, may be said to be due process of law. * * * The police power of the state can not be put forward as an excuse for oppressive and unjust legislation, but it may be lawfully resorted to for the purpose of preserving the public health, safety or morals; and a large discretion is vested in the legislature to determine, not only what the interests of the public

require, but what measures are necessary for the protection of such interest."

In Pascagoula Nat. Bank v. Federal Reserve Bank of Atlanta, 3 F. 2d 465, of which the United States Supreme Court refused to take original jurisdiction because the constitutional question raised was not sufficiently substantial (269 U. S. 537, 70 L. Ed. 400), it was said: "The result of these provisions of the Reserve Act so construed is to require a member bank to pay without deduction checks drawn on it when presented by its Reserve Bank, whether paid over its counter or by the more convenient means of a check on its own deposits elsewhere. This takes none of the property or property rights of complainant without due process of law. Complainant may refuse to pay otherwise than in cash over its counter, according to the common law, as, on the other hand, the Reserve Bank may insist on that sort of payment. What is lost is the right to agree on a compensation for a more convenient payment by draft on more accessible reserves when both parties are willing so to agree. That the state, having power over the state banker and his business, may regulate his method of receiving and paying out his deposits was ruled in Farmers' & Merchants' Bank of Monroe v. Reserve Bank of Richmond, 262 U. S. 649, 43 S. Ct. 651, 67 L. Ed. 1157, 30 A. L. R. 635. A similar power must be recognized in the United States to regulate the banking in the Federal Reserve system. Complainant, being a national bank, chartered to do its business under the federal laws, cannot complain that those laws are not, or do not remain, such as it would prefer. It is not compelled to do anything without compensation. It is simply told that, if it does the thing in question, it must be done without compensation. Noble State Bank v. Haskell, 219 U. S. 575, 31 S. Ct. 299, 55 L. Ed. 341." We conclude, therefore, that plaintiffs were not deprived of property without due process of law.

In Farmers & Merchants Bank v. Federal Reserve

Bank, *supra,* it was said: "It is well settled that the legislature of a State may (in the absence of other controlling provisions) direct its police regulations against what it deems an existing evil, without covering the whole field of possible abuses. * * * If the legislature finds that a particular instrument of trade war is being used against a policy which it deems wise to adopt, it may direct its legislation specifically and solely against that instrument. * * * If it finds that the instrument is used only under certain conditions, or by a particular class of concerns, it may limit its prohibition to the conditions and the concerns which it concludes alone menace what it deems the public welfare." It will be noted that the classification of the act is all inclusive of all checks drawn upon and cleared by all state banks. The record in this case discloses ample grounds for such a classification. Hence, there was no denial of equal protection of the laws.

In the light of the situation heretofore presented, we can only decide that the act is an entirely reasonable exercise of the police power of this state and not repugnant to section 3, article I, Constitution of Nebraska, or section 1 of the Fourteenth Amendment to the Constitution of the United States.

We conclude that the trial court was right when it found that plaintiffs' new formula was prohibited by Chapter 11, Session Laws of Nebraska, 1945, but erroneously adjudged that the act was unconstitutional and void and erroneously enjoined its enforcement by the defendant. For the reasons heretofore stated, the cause is reversed and remanded with directions that the trial court enter a decree in favor of the defendant and against plaintiffs, in conformity with this opinion, with costs taxed to plaintiffs, Emil Placek and Bank of Prague, except that intervener shall be taxed with all costs of intervention.

REVERSED AND REMANDED WITH DIRECTIONS.

GEORGE HORKY, APPELLEE, V. IGNES SCHROLL AND FERDINAND SCHROLL, APPELLANTS.
26 N. W. 2d 396

Filed March 7, 1947. No. 32159.

1. **Assault and Battery: Damages.** In an action for assault and battery, the recovery is limited to compensatory damages and evidence of threats or words and acts of provocation are not admissible in mitigation thereof.
2. **Appeal and Error: Evidence.** The admission of cumulative evidence is ordinarily within the discretion of the trial court and its ruling thereon will not be held erroneous unless it clearly appears that such discretion has been abused.
3. ———: **Trial.** Where the instructions as a whole clearly present the issues of fact and applicable law to the jury, harmless error in instructions separately criticized on appeal does not require a reversal of the judgment on the verdict.
4. **Juries.** A verdict may be set aside as excessive by the trial court or on appeal only when it is so clearly exorbitant as to indicate that it was the result of passion, prejudice, mistake, or some means not apparent in the record, or it is clear that the jury disregarded the evidence or rules of law.
5. **Case Overruled.** Haman v. Omaha Horse Ry. Co., 35 Neb. 74, 52 N. W. 830, is distinguished and overruled insofar as in conflict with this opinion.

APPEAL from the district court for Sherman County: E. G. REED, JUDGE. *Affirmed.*

Blackledge & Sidner, for appellants.

Lamont L. Stephens, for appellee.

Heard before SIMMONS, C. J., PAINE, CARTER, YEAGER, and CHAPPELL, JJ., and NUSS, District Judge.

CHAPPELL, J.

Plaintiff instituted this action to recover damages for assault and battery. A jury awarded a verdict for $2,500, upon which judgment was entered. Defendants' motion for new trial was overruled, and they appealed to this court, assigning as error that: (1) The trial court erred in denying defendants the right to plead or prove acts of provocation; (2) erred in permitting

plaintiff to cumulate evidence as to the circumstances of the assault which was allegedly admitted by defendants' answer; (3) erred in giving instruction No. 9; and (4) that the verdict was excessive. We conclude that the assignments cannot be sustained.

Defendant Ferdinand Schroll is the son of defendant Ignes Schroll. Hereinafter they will be designated as defendants, or as father and son respectively. At the time of the alleged assault, plaintiff, a farmer, was 56 years old, weighed 170 pounds, and had high blood pressure, heart trouble, rheumatism, and a deformed right arm, while the son, a young farmer who struck the blows, was 19 years old and weighed 175 pounds.

Plaintiff, in his amended petition, alleged substantially as follows: That on September 22, 1945, on a public street in Ravenna, the son unlawfully assaulted plaintiff and struck him a large number of blows with his fists in and about his face and head, thereby knocking plaintiff to the pavement and rendering him unconscious, whereat the son, clad in shoes, kicked him about the head. That immediately before and during such assault the father was present and by word of mouth counseled, encouraged, advised, and directed the son to commit the assault and battery, saying repeatedly "Hit him," "Hit him again," "Kick him," and like words. That as a result of the assault and battery, plaintiff was cut, wounded, bruised, and nervously shocked, requiring medical aid with expenditures therefor, suffered great humiliation, physical and mental pain and anguish, and was permanently scarred and injured.

Defendants' answer, after denying generally, admitted that the son struck plaintiff but denied that he was at any time rendered unconscious or that he suffered injuries of the nature or extent alleged. They denied that the son kicked plaintiff or that the father at any time said "Kick him" or that he committed or caused to be committed any assault and battery upon plaintiff. It was admitted, however, that during the course of

the altercation the father said to the son "Hit him again." They alleged that any damage plaintiff may have sustained was due entirely to his own acts, in that when the son, without threat or gesture asked plaintiff in substance if he still meant what he had said about him, plaintiff clenched his fist, raised his arm, and with a threatening gesture toward the son, caused and provoked the altercation that ensued.

Defendants' answer originally also contained allegations substantially that plaintiff provoked the assault in that for many weeks prior to September 22, 1945, he had many times, to different persons and in the presence of third persons, falsely and maliciously conducted a continuous campaign of slander and vilification of the son, as "slacker"—"coward"—"yellow"—"afraid to fight," because he was not in the military service, when as a matter of fact, the son had been rejected for physical disability.

The first assignment of error relates to their complaint that the trial court, upon motion of plaintiff, struck the latter allegations from their answer and refused the admission of evidence in support thereof.

Defendants do not argue that such evidence was lawfully admissible for the purpose of showing justification, but argue that it was admissible to mitigate the damages actually resulting from the assault, or for the purpose of assisting the jury in fixing and determining the actual amount of the damages suffered by plaintiff, insofar as it would have a bearing upon the question of the extent of the alleged humiliation suffered by him.

In Haman v. Omaha Horse Ry. Co., 35 Neb. 74, 52 N. W. 830, it was said: "All the authorities agree that words of provocation alone will not justify an assault. * * * Where, however, the provocation is recent, it may be shown in mitigation of damages." It will be noted, however, that the defense in that case was justification and the latter sentence of the above quotation may be considered as dicta merely. In any event, it does not

correctly reflect the law in this jurisdiction and insofar as in conflict herewith, it is overruled. That conclusion is supported by Mangold v. Oft, 63 Neb. 397, 88 N. W. 507, wherein it was said: "But the defendant insists that the evidence of previous threats was admissible in mitigation of damages. In this state, the recovery in cases of this kind is limited to compensatory damages. No recovery can be had of punitive or exemplary damages. In theory, at least, the damages recoverable are the pecuniary equivalent of the injury. By offering such evidence in mitigation of damages, the defendant admits the assault, and that it was wrongful. As the law will not permit any assessment of damages against the defendant by way of punishment, neither will it permit any reduction of the pecuniary damages actually sustained by the plaintiff, for that purpose. In short, threats can not be shown in mitigation of compensatory damages. Goldsmith v. Joy, 15 Am. St. Rep., 923."

Also, in Glassey v. Dye, 83 Neb. 615, 119 N. W. 1128, it was said: "The sixteenth instruction given by the court told the jury that, if it believed from the evidence that plaintiff recently before the alleged assault had used provocative and threatening language toward the defendant, and at the time by language and conduct aggravated defendant into making an unlawful assault, they might take such circumstance into consideration in mitigation of damages. * * * Since punitive damages cannot be recovered in this state, it logically follows that the rules with regard to the mitigation of such damages, which obtain in states where exemplary damages are allowed, are not applicable here, and the above instruction is erroneous for that reason also. Mangold v. Oft, 63 Neb. 397." See, also, Langdon v. Clarke, 73 Neb. 516, 103 N. W. 62; 2 R. C. L., Assault and Battery, § 68, p. 587; 4 Am. Jur., Assault and Battery, § 165, p. 204; 5 C. J., Assault and Battery, § 116, p. 676; 6 C. J. S., Assault and Battery, § 44 (e), p. 867.

In the headnote to the annotation in 63 A. L. R. 890,

it is said: "There is a conflict of authority as to whether provocation may be shown in mitigation of compensatory damages, the better reasoning and the weight of authority supporting the rule that actual or compensatory damages are not in any case subject to mitigation by proof of mere provocation or of malice." The two Nebraska cases heretofore quoted from are cited, among many from other jurisdictions, as adhering to the majority, and we still do so.

To hold otherwise "would not only tend in some measure to encourage in such cases the manufacture of evidence of that character, but, by abrogating in effect one of the most firmly established rules of the law, would inevitably tend to countenance and encourage a resort by the individual to strong-arm methods for redressing his private wrongs, real or imaginary." Terry v. Richardson, 123 S. C. 319, 116 S. E. 273. If the son were slandered as alleged, the law provides a remedy therefor. We conclude that the trial court properly refused to permit defendants to plead and prove provocation in mitigation of compensatory damages, as proposed by them.

On the other hand, every relevant word spoken and every relevant act done by the parties on September 22, 1945, preceding, at the time of, and during the assault and battery, which could throw any light on their participation therein, was properly admitted in evidence by the trial court. An examination thereof clearly discloses that no part of it could be considered as having any logical bearing upon or relation to the extent of plaintiff's actual damages suffered because of his alleged humiliation.

In Ulrich v. Schwarz, 199 Wis. 24, 225 N. W. 195, 63 A. L. R. 886, relied upon by defendants, it will be observed that the words and acts held to have been admissible to aid the jury in determining plaintiff's actual damages suffered by reason of his alleged humiliation, not only were spoken or occurred earlier the same eve-

ning or at the time of the assault and battery, so as to be fairly considered as part of one and the same transaction, but also were of such character as to have some bearing upon and relation to the extent of plaintiff's actual damages suffered because of his alleged humiliation. Therefore, the rule stated in that case and relied upon by defendants, however logical it may appear to be, has no application to the case at bar.

The next question presented is whether the trial court erred in permitting plaintiff to allegedly cumulate evidence relating to the circumstances of the assault, which assault defendants claim to have admitted in their answer. It will be apparent from the pleadings heretofore summarized that defendants by their answer admitted only a small part of the material allegations of plaintiff's petition and denied all others. Under such circumstances, it was therefore not only necessary for plaintiff to prove the statements made by the father to hold him liable, since admittedly he did not touch plaintiff at any time, but it was also necessary for plaintiff to show how the assault was committed. The number and force of the blows struck by the son with his fist and that he kicked plaintiff about the head while down had a bearing directly upon the nature and extent of the injuries thus inflicted. The jury had a right to know, and plaintiff had a right to show by competent evidence, how the assault was committed, and all the relative facts and circumstances from which they could fairly determine the extent of plaintiff's injury and damages resulting from the assault and battery by defendants. 4 Am. Jur., Assault and Battery, § 159, p. 201; 5 C. J., Assault and Battery, § 107, p. 671, § 110, p. 672; 6 C. J. S., Assault and Battery, § 42, p. 863.

An examination of the record discloses that a large part of such evidence was not strictly cumulative. However, a part of the evidence adduced by plaintiff's witnesses was cumulative in corroboration of his pleaded theory of the manner and force of the assault and

battery, but its admission was clearly within the discretion of the trial court. Jones on Evidence, Pocket Edition, § 8, p. 6, § 900, p. 1157; Jones Commentaries on Evidence, 2d Edition, vol. 5, § 2317, p. 4531; Ogden v. Sovereign Camp, Woodmen of the World, 78 Neb. 806, 113 N. W. 524. Under the circumstances of this case, we cannot find that the trial court abused such discretion and thereby prejudiced defendants' rights.

Defendants argue that instruction No. 9 was erroneously given. True, the instruction could have been more appropriately phrased, but it contained no misstatement of the law, and an examination of the instructions as a whole, which we are required to do in determining the question, discloses that they presented the issues and the law applicable thereto fairly and clearly in a manner which could not have misled or confused the jury or have been prejudicial to defendants' rights. The applicable rule is that: "Where the instructions as a whole clearly present to the jury the issues of fact and the law applicable thereto, harmless error in instructions separately criticized on appeal does not require a reversal of the judgment on the verdict." Whittaker v. Omaha & C. B. Street Ry. Co., 137 Neb. 800, 291 N. W. 275. See, also, Shiman Bros. & Co. v. Neb. Nat. Hotel Co., 146 Neb. 47, 18 N. W. 2d 551.

Finally, defendants argue that the verdict was so excessive as to require reversal, but under the circumstances we decide that it was not. The son admitted in his own evidence that he struck plaintiff twice in the face with his fist, and that on the second blow, plaintiff went down, striking the side of his head on the pavement. There is competent evidence that they were hard blows and that there were more than two. Witnesses for plaintiff testified that they saw the son, clad in shoes, kick plaintiff hard about the head more than once while he was down, and that before and during the assault and battery they heard the father tell the son to "Hit him," "Hit him again," and "Kick him."

There is competent evidence that after the assault and battery, plaintiff was covered with blood and dazed, if not unconscious. He went to a physician, who took six or seven stitches in cuts near and upon his left eye lid, and two stitches in his right upper lip, which was cut clear through. He was bruised, sore, and unable to leave the doctor's office without assistance. There was bleeding from or near his left ear for several hours. He suffered pain, humiliation, and nervous shock, could not sleep or eat well for about a month, lost 15 pounds in weight, walked with a cane for some two weeks and was unable to perform his regular farm work or other employment for some time. At the time of the trial he had improved, but still had nervousness, headaches, and pain. There is also competent evidence that he had partial loss of hearing and buzzing in his left ear, with scars upon, numbness in, and drooping or sagging of both his eyelid and lip, which is permanent.

There are two recent cases decisive of the question. In Van Auker v. Steckley's Hybrid Seed Corn Co., 143 Neb. 24, 8 N. W. 2d 451, it was said: "In an action sounding in damages merely where the law furnishes no legal rule for measuring them, the amount to be awarded rests largely in the discretion of the jury, and with their verdict the courts are reluctant to interfere. A verdict may be set aside as excessive by the trial court or on appeal when, and not unless, it is so clearly exorbitant as to indicate that it was the result of passion, prejudice, mistake, or some means not apparent in the record, or it is clear that the jury disregarded the evidence or rules of law. 15 Am. Jur. 621, sec. 205; Heiden v. Loup River Public Power District, 139 Neb. 754, 298 N. W. 736; 3 Am. Jur. 452, sec. 893; 20 R. C. L. 282, sec. 66."

Also, in Sutton v. Inland Construction Co., 144 Neb. 721, 14 N. W. 2d 387, it was said: "No method of exact computation can be devised in determining compensatory damages in cases of this kind. We think the evidence

was such that the jury could properly arrive at the amount determined upon by them. We can find no yardstick whereby we can say as a matter of law that the verdict was excessive. Under such circumstances this court may not substitute its judgment for that of the jury, even if it be assumed that this court would determine that a lesser amount would constitute adequate compensation for the injuries sustained."

For the reasons heretofore stated, the judgment of the trial court is affirmed.

AFFIRMED.

WENKE, J., participating on briefs.

IN RE ESTATE OF RAYMOND P. ZENTS, DECEASED. CHARLES DUWANE ZENTS, APPELLANT, V. TERESA M. ZENTS, APPELLEE.

26 N. W. 2d 793

Filed March 21, 1947. No. 32185.

1. **Wills.** It is the court's duty in the construction of a will, under the provisions of section 76-205, R. S. 1943, to give effect to the true intent of the testator so far as it can be collected from the whole instrument, if such intent is consistent with the rules of law.
2. ———. The intention of the testator must be ascertained from a liberal interpretation and comprehensive view of all the provisions of the will. No particular words, nor conventional forms of expression, are necessary to enable one to make an effective testamentary disposition of his property.
3. ———. A bequest in a will whereby the testator gives to his brother "all my interest in and to the HUB BÅR * * *, which generally is the ownership of said business," is intended to, and does, convey to said brother the testator's one-half interest in both the cash in the till of said "Bar" and the bank deposit of said business.

APPEAL from the district court for Lincoln County: J. LEONARD TEWELL, JUDGE. *Reversed and remanded with directions.*

Beatty, Clarke & Murphy, for appellant.

W. A. Stewart and *V. H. Halligan,* for appellee.

Heard before SIMMONS, C. J., PAINE, CARTER, YEAGER, and CHAPPELL, JJ., and NUSS, District Judge.

PAINE, J.

This action comes to this court on a question arising as to the interpretation of two paragraphs in the will of Raymond P. Zents. One-half of a deposit of money in the bank account of the "Hub Bar" is claimed by the testator's brother, to whom had been bequeathed a one-half interest in said liquor business, and the same deposit is also claimed by testator's widow under the residuary clause of the will, which was in her favor.

Raymond P. Zents, died September 23, 1944, leaving a last will, which had been executed by him September 3, 1943. He left no children surviving him, but left to his widow a certain piece of business property which was owned by the two of them in joint tenancy, which building was appraised at $45,814.81. He left to his brother, Arthur A. Zents, and his sister, Mrs. Mark Moran, another business property and warehouse in North Platte, of the appraised value of $14,000. He left to Richard Jerome Enright, the nephew of his wife, two lots in the original town of North Platte, of the appraised value of $2,000.

In paragraphs 5 and 6 of the will, which are the paragraphs under consideration in this action, he provided as follows:

"5. I give and bequeath to my brother, Charles Duwane Zents of Des Moines, Iowa, all my interest in and to the HUB BAR situated and now being operated on North Jeffers Street in the City of North Platte, which generally is the ownership of said business, subject to a written contract outstanding with Carl Rippen whereby he may acquire an undivided one-half (½) interest by purchase in payment as in said contract provided, and

provided that should my said brother precede me in death, then I direct said interest and property shall pass to my brother, Arthur A. Zents, and my sister, Mrs. Mark Moran, and my nephew, Richard Jerome Enright, or to such of them as shall survive me, share and share alike.

"6. All the residue and remainder of my property of whatsoever kind and wheresoever situate, I give, devise and bequeath unto my beloved wife, Teresa M. Zents."

It will be seen that it is necessary to understand the relation of the deceased to the Hub Bar, as shown by the record, if we are to reach the proper conclusion in this matter.

Raymond P. Zents had been a successful plumbing contractor, and had accumulated sufficient means to retire. Carl Rippen had been an intimate friend of Zents for many years, and Zents decided to finance Rippen in the purchase of the Hub Bar in North Platte, Nebraska, from its owner, who had been called to the service of his country.

The parties entered into a partnership agreement on March 26, 1943, under the name of Rippen & Zents, in which the first party, Zents, agreed to furnish all the cash and credit necessary to purchase the liquor store known as the Hub Bar, including the stock, merchandise, and fixtures, and Rippen agreed to devote his entire time to conducting said business, for which he was to receive a monthly salary of $200. This agreement was offered and received in evidence as exhibit 1.

In addition, Rippen agreed to pay Zents back one-half of the net costs of the business, the written agreement providing that he should make payments monthly out of his half of the net profits. Rippen was to keep books of account and deposit all receipts in the McDonald State Bank in the name of the Hub Bar, and to have a financial statement made each month, together with an invoice of the stock on hand, by a certified public accountant, and after the first party had been repaid

one-half of the purchase price then the parties should divide the net profits of the business equally, after Rippen had received his $200 a month. Rippen agreed to secure the licenses and permits in his own name and to operate the business as the "Hub," and the bank account and business was to be carried and conducted in the trade name of the "Hub Bar," separate and apart from Rippen's individual account.

This in brief sets out the partnership contract under which the business was established. The provision that Rippen should pay Zents one-half of the net earnings monthly was apparently waived by Zents.

On the back of exhibit No. 1, the partnership agreement, appear the following endorsements of payments: "Received of Carl Rippen the following payments on this partnership agreement." July 8, 1943, $1,000; September 2, 1943, $1,000; November 13, 1943, $1,000; March 30, 1944, $1,000; August 4, 1944, $1,500; all received by R. P. Zents. Total payments, $5,500.

Carl Rippen testified as to how he made the first payment. He said that on July 8, 1943, he checked $1,000 out of the Hub Bar account to himself, and then $1,000 to his partner, R. P. Zents. He then gave Mr. Zents his check on his personal account for $1,000 on the partnership deal. Mr. Zents, when he got the first payment, by mistake wrote down $2,000 paid, and then, as appears on the back of exhibit No. 1, changed it to only $1,000, which was all Mr. Rippen had paid him from his personal account, the other $1,000 being the profit which Mr. Zents had received at the same time. The transactions were all handled the same way at each payment.

In regard to these payments, Mr. Rippen said that when he saw Mr. Zents he would tell him that they had too much money in the bank and should divide it; and that during last summer before his death Mr. Zents was taking trips to Arizona and Colorado for his health

and sometimes he would not see him for three or four months at a time.

He further testified that when the last payment was made on the partnership contract on August 4, 1944, being about a month and a half before Zents died, when he paid the final half, $1,500, on this transaction, it did not disburse all of the cash or profits on hand, but only enough was checked out to finish paying for Mr. Rippen's half interest, leaving the other partnership funds in the Hub Bar account in the bank.

Carl Rippen also testified that at no time was any of the personal money of himself or Mr. Zents kept in the Hub Bar account, but that it was all partnership funds; that at times it was difficult to buy any liquors during the war; and that as the liquor stock would run lower the cash in the partnership account would run higher. Rippen testified that at the time of the death of Mr. Zents each one of them owned a clear undivided one-half interest in the business and that there were no debts outstanding; and that the monthly pay roll for help was $600 to $700.

J. H. Hansen testified that he was a public accountant, had been acquainted with Mr. Zents for years, and audited the accounts of the Hub Bar monthly from a statement brought in by Mr. Rippen, with an inventory of the stock at the end of each month; that exhibit No. 4 is an operating statement, showing among other things the business of the Hub Bar from January 1, 1944, to September 23, 1944, the date of the death of R. P. Zents; that the total assets of the partnership on September 23, 1944, consisted of cash on hand, $50, cash in bank, $7,346.29, total, $7,396.29; that the inventory of liquors on hand that day was $7,062.82; that the fixtures and equipment, less depreciation, was $2,181.80; that the rent, license, and insurance prepaid was $428.28, making the total assets of the Hub Bar on September 23, 1944, $17,069.19.

It was stipulated that exhibit No. 5 was the original files from the county court of Lincoln County in the probate of the estate of Raymond P. Zents, and that the petition was filed, proper notice given, and will duly allowed; that Arthur A. Zents and Charles Duwane Zents were the duly appointed and acting executors of the estate; and that the widow, Teresa M. Zents, was granted the sum of $350 a month for widow's allowance and an additional sum of $200 in cash.

Among the papers in exhibit No. 5 is an application of Carl Rippen, dated December 23, 1944, to liquidate and close up the partnership of Rippen & Zents, and an offer to purchase the one-half interest of the estate therein. On January 10, 1945, there was filed an acceptance of this offer, signed by the executors, Arthur A. Zents and Charles Duwane Zents.

On January 25, 1945, an order was entered by the county judge, showing that all persons had been notified of the application of Carl Rippen. Teresa M. Zents, the widow, being present with her attorney, William A. Stewart, Jr., and no objections being made by any person, the court approved the application of Carl Rippen to acquire the undivided one-half interest of the estate in the Hub Bar.

It was stipulated that the sum of money paid to the executors by Carl Rippen, under order of the county court, for a one-half interest in the Hub Bar was made up of the following items: That one-half of the money in the McDonald State Bank on the date of the death of deceased was $3,673.14; that one-half of the cash in the till was $25; that one-half of all other assets outside of cash was $4,648.49; and that one-half of the profits of the business from September 23, 1944, being the date of the death of deceased, until the 6th day of February, 1945, was $2,693.10, making a total amount paid of $11,039.73. Upon receipt of this amount on February 6, 1945, the executors transferred to Carl Rippen the one-half interest in the Hub Bar owned by the estate.

On April 4, 1945, the executors filed application in the county court for a construction of the will, there being a doubt as to the ownership of the testator's one-half of the undivided profits in the partnership account of the Hub Bar, it being claimed by Charles Duwane Zents under the provisions of paragraph 5 of the will and by Teresa M. Zents, the widow, under paragraph 6, each of said parties having filed petition to the court for said sum of money.

On August 22, 1945, a hearing was had upon said petitions, and it was ordered that the application of Charles Duwane Zents be dismissed. The court found generally in favor of Teresa M. Zents; held that she was entitled to receive the money under the residuary clause; and found that it was not the intention of the deceased to devise to Charles Duwane Zents the accumulated profits from the operation of the Hub Bar.

Thereupon, Charles Duwane Zents appealed to the district court from such adverse finding of the county court. To his petition an answer was filed by Teresa M. Zents, setting out and alleging that she was the owner of said sum of $3,698.14 as residuary legatee in her husband's will. A reply was filed, bringing up the same issues heretofore set out. Trial was had to the district court on May 21, 1946, and the matter was taken under advisement.

Thereafter the district court decided that, in view of the partnership agreement between Carl Rippen and Raymond P. Zents, being exhibit No. 1, and its provision for a settlement of the cash account each month, and the words in the will, "which generally is the ownership of said business," and the fact that the withdrawal of $1,000 had been made from the cash account of the Hub Bar on the day before the will was drawn, it was not the intent of the testator to devise the cash account of the Hub Bar to his brother Charles, and that the interest of the deceased in said cash account passed to Teresa M. Zents upon the death of the deceased under the residuary

clause of the will. Therefore, the application of Charles Duwane Zents was denied and dismissed.

A motion for new trial, setting out ten errors of the court, was filed. The assignments of error charge that the judgment is contrary to law and the evidence; that the court erred in holding that all of the interest of the testator in the Hub Bar, which was the copartnership of Rippen & Zents, did not include his interest in the cash on hand and the partnership bank account, which was carried in the trade name; and that the court erred in holding that the widow was entitled to the one-half interest of the testator in the money on deposit in the name of the Hub Bar. It is also alleged that the court erred in finding that the testator had not bequeathed to his brother Charles his interest in the bank account of the Hub Bar, and should have found that it was the intention of the testator to bequeath to his brother Charles all of the testator's interest in the property and assets of the copartnership of Rippen & Zents, including the money on hand, which was used in the conduct of the business of said copartnership; and in finding that the widow as residuary legatee would take the testator's interest in the moneys belonging to the Hub Bar at the date of his death.

This brings us to the important question which is involved in this appeal, which is: Did this amount, being one-half of the balance of the Hub Bar checking account and cash in the till, amounting to $3,698.14, pass under the will to the testator's brother Charles, to whom he bequeathed all his interest in and to the Hub Bar; or did this amount pass to the widow under paragraph 6 of the will, in which he gave her all of the residue and remainder of his property of every kind?

We are cited to many opinions which set out the court's duty in such cases. This court very recently held: "It is the court's duty in the construction of a will, under the provisions of section 76-205, R. S. 1943, to give effect to the true intent of the testator so far as it can be collected

from the whole instrument, if such intent is consistent with the rules of law." Lacy v. Murdock, 147 Neb. 242, 22 N. W. 2d 713.

And, again: " 'No particular words, no conventional forms of expression, are necessary to enable one to make an effective testamentary disposition of his property. The court, without much regard to canons of construction, will place itself in the position of the testator, ascertain his will, and, if lawful, enforce it.' Weller v. Noffsinger, 57 Neb. 455." Krause v. Krause, 113 Neb. 22, 201 N. W. 670.

"The intention of the testator must be ascertained from a liberal interpretation and comprehensive view of all the provisions of the will. No particular words, nor conventional forms of expression, are necessary to enable one to make an effective testamentary disposition of his property." In re Estate of Dimmitt, 141 Neb. 413, 3 N. W. 2d 752. See, also, Woelk v. Luckhardt, 134 Neb. 55, 277 N. W. 836.

"In determining the intention of a testator, it is the duty of the court to examine the will in its entirety, giving consideration to its every provision, giving the words used their commonly and generally accepted meaning, and to indulge the presumption that the testator understood the meaning of the words used." Salmons v. Salmons, 142 Neb. 66, 5 N. W. 2d 123. See, also, Lincoln Nat. Bank & Trust Co. v. Grainger, 129 Neb. 451, 262 N. W. 11; In re Estate of Schuette, 138 Neb. 568, 293 N. W. 421.

"While * * *, the purpose of construction, as applied to wills, is unquestionably to arrive at the intention of the testator, that intention is not that which existed in the mind of the testator, but that which is expressed by the language of the will." 28 R. C. L., Wills, §174, p. 214. See Hill v. Hill, 90 Neb. 43, 132 N. W. 738, 38 L. R. A., N. S. 198.

While it appears to be most difficult to find cases closely in point, yet one New Jersey case involves a

somewhat similar provision. In Coyle v. Donaldson, 91 N. J. Eq. 138, 108 A. 308, the Court of Errors and Appeals of New Jersey in an opinion reversed a decision in the same case in 90 N. J. Eq. 122, 105 A. 605, rendered by the Court of Chancery of New Jersey, in which that court had held: "A bequest of 'my coal business' does not include cash on hand or a bank account kept in connection with the business, but does include the leasehold, wagons, horses and other equipment. The word 'business' cannot be restricted to the trade and good will." It was stated in the final opinion that, as to the meaning of the words or phrase in the 14th clause of the will, "the coal business now owned by me," the vice-chancellor in the lower court had decided that this term included only the horses, wagons, and good will of the business. The Court of Errors and Appeals said: "We think this construction is too narrow," and that "The word 'business,' in a contract, not only includes the good will of the business, but the money in bank and cash on hand, which came from the sale of goods, so held in McGowan v. Griffin, 69 Vt. 168."

The holding of the Court of Errors and Appeals is concisely expressed in the first syllabus, as follows: "The words in the will of James Coyle, 'the coal business now owned by me,' pass and include, not only the good-will of the business, the leasehold interest of the land on which the coal business was conducted, the horses, wagons, and other equipment used by the testator, in carrying on the business of coal merchant, but, in addition thereto, coal on hand, cash and checks, cash on deposit in check account 'James Coyle Coal,' and difference between bills receivable and payable; i.e., for coal sold and delivered."

A Canadian, who was the keeper of a country village grocery shop, by his will gave to his sister, Eliza Jane Isaac, "the House and land With all Household furniture and all the Stock and trade now in house and out of house With all Book Accounts now

Due me." It was argued that $267 on deposit with testator's banker and $60 cash on hand and a quantity of cordwood were not included in this gift. Meredith, C. J., said: "I have already stated the meaning which I would give to the words 'stock and trade,' and it follows from what I have said that the money in bank and in hand, if part of the capital employed in the testator's business, and so much of the cordwood as was intended for use in the business, * * * are embraced in the bequest of 'the stock and trade.'" In re Holden, 5 Ontario Law Reports, 156.

We have also found the case of Re Hawkins, in High Court of Justice, Chancery Division, a decision by Mr. Justice Astbury, in which a testator bequeathed his business and plant in London to his brother, and it was held that he had given the house, the bank balance, and book debts. Re Hawkins (1913), 109 Law Times Reports, 969.

The Hub Bar, in the instant case, was legally a partnership, and this court has said: "A partnership is an entity, distinct and apart from the members composing it, and for the purpose for which it was created, it is a person having its own assets and liabilities. Any benefit or liability attaching to a member of a partnership results from the partnership relation." State v. Pielsticker, 118 Neb. 419, 225 N. W. 51.

"Where a testator in his lifetime was dependent for a livelihood on the income from investments, and the general intention of his will is to make such disposition of his estate as to enable his wife to continue in the same home, and live in the same way that he and she had lived in his lifetime, the words of the will are to be interpreted in the light of this general intention, and under a bequest to the wife, of 'all money in the house and bank or on hand at the time of my death,' she would be entitled to all specific sums of money which testator had at the time of his death, attainable

for his immediate use in case of need." Wilkinson's Estate, 192 Pa. St. 127, 43 A. 411.

As throwing some light on the plan and desire of the testator in the case at bar, it will be noted in the 5th paragraph of the will, that if his brother Charles died first the testator provided that his half interest in the business of the Hub Bar should not go to his wife, but should go to his brother Arthur, his sister, and his wife's nephew, with no interest therein or part thereof to go to his wife. Now, stripping the bequest in paragraph 5 down to its simplest terms, it would read, I give my brother Charles all my (half) interest in and to the "Hub Bar," which generally is the ownership of said business.

If there had been outstanding bills of the Hub Bar, they would have been paid out of its bank account, and when the testator gave to his brother all of his interest in the ownership of said business we have reached the conclusion that the testator by the language he employed in his will intended to and did give to his brother the one-half interest in the Hub Bar bank account which belonged to, and had been accumulated in, that business and was a part thereof.

The judgment of the district court is reversed and the cause is remanded with directions to have a judgment entered in accordance herewith.

REVERSED AND REMANDED.

WENKE, J. participating on briefs.

FLORENCE L. CANADA AND JOHN M. CANADA, APPELLANTS, v. THE STATE OF NEBRASKA AND THE COUNTY OF GOSPER, APPELLEES.

26 N. W. 2d 509

Filed March 21, 1947. No. 32161.

1. **Fines: Embezzlement.** A fine in an embezzlement prosecution assessed against an officer charged with the collection

of public money operates as a judgment at law on all of the estate of the party convicted and is enforceable by execution.

2. ———: ———. The lien of a fine in an embezzlement prosecution operates against the property of the defendant within the county from the time of docketing the case by the clerk of the court wherein the conviction was obtained and the fine imposed.

3. ———: **Homestead.** If the sentence in an embezzlement action exceeds two years the lien of the fine in such action does not attach to a homestead interest not exceeding in value $2,000, and such fine may not be enforced against the homestead interest unless the same, being still owned, is abandoned as a homestead.

4. **Statutes.** Specific statutory provisions relating to a particular subject control over general provisions and other parts of the law which otherwise were broad enough to cover the subject and generally where there is a conflict between the two the special will prevail.

5. ———. A particular intention expressed in a legislative act, if in conflict with a general intention expressed in a later enactment, should be given effect, leaving the latter to operate only outside the former.

APPEAL from the district court for Gosper County: VICTOR WESTERMARK, JUDGE. *Reversed and remanded with directions.*

Beynon, Greenamyre & Hecht, for appellants.

Ted R. Frogge and *Cloyd E. Clark,* for appellees.

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

YEAGER, J.

This is an action by Florence L. Canada and John M. Canada, plaintiffs and appellants, against the State of Nebraska and County of Gosper, defendants and appellees, to quiet title in plaintiffs to Lot One and the north twenty-five feet of Lot Two, Block Twenty-six, Original Town of Elwood, Gosper County, Nebraska, held in joint tenancy by the plaintiffs, against the lien of a judgment in favor of the State of Nebraska for the benefit of the County of Gosper and against the plaintiff John M. Canada for $123,956.70.

The district court quieted title in favor of Florence L. Canada as to her interest in the joint estate but decreed that the interest of John M. Canada was subject to the lien of the judgment. From that part of the decree subjecting the interest of John M. Canada to the lien of the judgment the plaintiffs have appealed.

The facts in this case are not in dispute. The plaintiffs purchased the real estate in question in June 1937. It was conveyed to them in joint tenancy. It has always since acquisition been occupied by plaintiffs who are husband and wife as a homestead. Florence L. Canada has never consented that her interest should be homestead property. The value of the interest of John M. Canada does not exceed $2,000. On or about February 16, 1945, after conviction of the crime of embezzlement and in the criminal action wherein the conviction was obtained, a judgment was rendered against John M. Canada in favor of the State of Nebraska for the benefit of the County of Gosper for $123,956.70.

The plaintiffs, as grounds for reversal, contend that the court erred in decreeing that this judgment was a valid and subsisting lien against the interest of John M. Canada in this real estate. There are other assignments of error but in the light of the determination upon this one a discussion of the others is unnecessary.

In order to arrive at a determination of the questions involved it becomes necessary to examine certain statutes. The first of these is the one under which John M. Canada was charged, convicted, and sentenced and by virtue of whose terms the judgment was rendered against him. It is section 28-543, R. S. 1943, and the pertinent part is the following: "If any officer * * * charged with the collection, * * * of the public money, * * * shall convert to his own use, * * * any portion of the public money * * * every such act shall be deemed and held in law to be an embezzlement of so much of such moneys or other property as shall be thus converted, used, invested, loaned or paid out, which is

hereby declared to be a high crime. Such officer * * * shall be imprisoned in the penitentiary not less than one year nor more than twenty-one years, according to the magnitude of the embezzlement, and also pay a fine equal to double the amount of money or other property so embezzled, which fine shall operate as a judgment at law on all of the estate of the party so convicted and sentenced, and shall be enforced to collection by execution or other process for the use only of the party or parties whose money or other funds, property, bonds or securities, assets or effects of any kind as aforesaid have been so embezzled. In all cases, such fine so operating as a judgment shall only be released or entered as satisfied by the party in interest as aforesaid. * * * "

John M. Canada was an officer within the meaning of this statute and was convicted and sentenced agreeable to its terms and the judgment entered also agreeable to its terms. He was sentenced to serve a term in the state penitentiary of not less than 8 nor more than 15 years.

It will be observed that by the terms of this statute the fine operates as a judgment at law on all of the estate of the party so convicted and sentenced, and shall be enforced to collection by execution or other process, and that the fine so operating as a judgment shall only be released or entered as satisfied by the party in interest.

Section 29-2407, R. S. 1943, is the following: "Judgments for fines and costs in criminal cases shall be a lien upon all the property of the defendant within the county from the time of docketing the case by the clerk of the proper court, and judgments upon forfeited recognizance shall be a like lien from the time of forfeiture. No property of any convict shall be exempt from execution issued upon any such judgment as aforesaid, against such convict, except in cases where the convict shall be sentenced to the penitentiary for a period of more than

two years, or to suffer death, in which cases there shall be the same exemptions as at the time may be provided by law for civil cases."

By section 40-101, R. S. 1943, a homestead not exceeding in value $2,000 may be claimed. If it is in an incorporated city or village it shall consist of the dwelling and not to exceed two lots, and these shall be exempt from judgment liens, and from execution or forced sale, with certain designated exceptions not necessary to mention here. The judgment at law provided for in section 28-543, R. S. 1943, is not specified as an exception.

The parties agree that the interest of John M. Canada in the real estate in question is a homestead within the meaning of section 40-101, R. S. 1943.

The plaintiffs take the position that since John M. Canada was sentenced to serve a term of more than two years in the penitentiary and his homestead does not exceed in value $2,000 it is exempt from execution upon the judgment in question. They go further and say that it is also exempt from the lien of the judgment.

The defendants contend that section 28-543, R. S. 1943, is special and in conflict with section 29-2407, R. S. 1943, which is general, the effect of which would be to take a judgment obtained pursuant to its terms out from under the operation of 29-2407, R. S. 1943, insofar as homestead exemption is concerned. They insist that the words "which fine shall operate as a judgment at law on all of the estate of the party so convicted and sentenced" must be taken to mean that the fine shall operate as a valid judgment and a subsisting lien enforceable by execution against all real estate of the embezzler including the homestead.

It is well settled that specific statutory provisions relating to a particular subject control over general provisions and other parts of the law which otherwise were broad enough to cover the subject and that generally where there is a conflict between the two the special shall prevail. State v. Cornell, 54 Neb. 72, 74

N. W. 432; State v. Nolan, 71 Neb. 136, 98 N. W. 657; Mancuso v. State, 123 Neb. 204, 242 N. W. 430.

It is also well settled that a particular intention expressed in a legislative act, if in conflict with a general intention expressed in a later enactment, should be given effect, leaving the latter to operate only outside the former. State ex rel. Missouri P. R. Co. v. Clarke, 98 Neb. 566, 153 N. W. 623; Lee v. Lincoln Cleaning & Dye Works, 144 Neb. 659, 14 N. W. 2d 227.

We think, however, that nothing of benefit flows to the defendants from these rules. We are unable to find a conflict between the two statutory provisions when they are analyzed in the light of their context and in the light of other statutory provisions and their interpretations. We fail to observe that the provision is special in the sense claimed.

Referring first to the context, all that the provision does is to cause the fine to operate as a judgment at law on all of the estate of the embezzler, and to permit enforcement by execution or other process. No specific lien is granted and there is no suggestion in it that the right to claim the homestead exemption under the terms of section 29-2407, R. S. 1943, shall be destroyed. There is nothing in the provision to indicate that the Legislature intended anything more than that the fine should operate and have the same standing in every respect and be collectible as a judgment at law obtained in an action instituted for that purpose.

It follows then under this reasoning and under the provisions of section 40-101, R. S. 1943, coupled with the fact that John M. Canada was sentenced to serve a term of more than two years in the penitentiary, that this judgment in its relation to the homestead interest of John M. Canada must be treated the same as an ordinary judgment.

Treated in this wise it must be said that a homestead interest not exceeding $2,000 in value is exempt from any lien of the judgment and that it is free from execu-

tion or forced sale for the satisfaction of the judgment. § 40-101, R. S. 1943; Horbach v. Smiley, 54 Neb. 217, 74 N. W. 623; Goble v. Brenneman, 75 Neb. 309, 106 N. W. 440; Radbruck v. First Nat. Bank, 95 Neb. 288, 145 N. W. 715; Hess v. Eselin, 110 Neb. 590, 194 N. W. 469.

This, however, is not to say that plaintiffs are entitled to a decree quieting title to a $2,000-homestead interest in the real estate in question. They are entitled under the issues presented to a decree declaring that such interest is and shall be exempt from the lien of the judgment and from the levy of execution and forced sale so long as the same shall not have been, being still owned, permanently abandoned as the homestead, and to an injunction enjoining the defendants from proceedings to enforce the judgment during such time. Corey v. Schuster, 44 Neb. 269, 62 N. W. 470.

The case of Corey v. Schuster, *supra,* is directly in point on the rights of a judgment creditor with regard to the $2,000-homestead exemption of his judgment debtor, and with regard to the rights and liabilities of the judgment debtor in relation thereto. In that case the right of the creditor was referred to as an apparent lien. The prayer was for injunction and to quiet title against the apparent lien. Title was not quieted but injunction was granted. The district court there decreed: "It is hereby ordered and adjudged by the court that such judgments be, and they hereby are, declared no liens on said real estate, and said defendants are hereby enjoined from setting up any claim to or claiming any lien on said premises by reason of their said judgments."

This court modified the decree in a manner which clearly defined the rights of the parties in that case and in a manner which defines equally well the rights of the parties to this proceeding in the following terms: "The decree of the district court will therefore be so modified as to permit the appellants to at any time move the court for a vacation of the injunction granted

in this case on showing that the Coreys, still owning the legal title to said premises, have permanently abandoned the premises as a homestead, or that said premises have appreciated in value so that the interest of the Coreys therein is of a greater value than $2,000; and as thus modified the decree of the district court is affirmed."

It follows then that the decree herein must be and is reversed and the cause remanded with directions to the district court to enter a decree declaring that the judgment in question is not a lien on the homestead interest of John M. Canada, and enjoining proceedings to enforce it as a lien against this interest, unless, while still owning it, he abandons it as his homestead, or unless, while occupying it as a homestead, it becomes of greater value than $2,000.

REVERSED AND REMANDED WITH DIRECTIONS.

CORA GORSUCH, APPELLEE, V. JESS GORSUCH, APPELLANT, IMPLEADED WITH KATHRYN SUDDARTH, APPELLEE.
26 N. W. 2d 598

Filed March 28, 1947. No. 32102.

1. **Parent and Child.** Since they are not absolute rights but must yield to the best interests of the child, the natural rights of a parent to the custody and control of his infant child are subject to the power of the state, and may be restricted and regulated by appropriate legislative or judicial action.
2. ———. The state's power in this respect is based on its position as parens patriae, on the right of the child, as citizen and ward, to its protection, as well as upon the state's interest in its own perpetuation.
3. **Divorce.** As the welfare of the child is the one question of primary consideration to which all others must yield, the court must patiently examine the evidence in the light of the age of the child and its future needs of every nature. The question of its custody involves the study, not alone of the proposed home and its entire surroundings, but the temporal welfare of the child, as to food, clothing, discipline, and if of tender years,

careful nursing and medical attention when required, together with its secular and religious education and training.

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

F. J. Reed, for appellant.

Morrow, Lovell & Bulger, attorneys for appellee Suddarth.

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

PAINE, J.

The defendant, Jess Gorsuch, appeals from the decree rendered upon his second petition for the modification of a divorce decree with respect to the custody of his minor son.

The plaintiff, Cora Gorsuch, filed her petition for divorce on the ground of cruelty November 18, 1936, alleging that her husband had deserted her and her baby, Norman Paul, born July 3, 1936. A divorce was granted the plaintiff December 23, 1936, and she was awarded the custody of the child, with $10 a month support money.

On February 8, 1941, the defendant filed a petition alleging that plaintiff was an unfit person to have the custody of said child, and asked the court to modify the decree as to the custody of the boy, setting up that on May 11, 1939, he had been married and desired now to be given the sole custody of his son. On March 26, 1941, he filed a supplemental petition against Glen Suddarth and Kathryn Suddarth, who then had the custody of the child, and they filed answer and denied that defendant was a fit or suitable person to have custody of the child. Many witnesses testified at the trial, and the court awarded the custody of the child to the defendant, Jess Gorsuch. From this decree, the plaintiff, Cora Gorsuch,

and the interveners, Glen Suddarth and Kathryn Suddarth, appealed to this court.

The first opinion of this court in this case was released July 9, 1943, and appears in 143 Neb. 572, 10 N. W. 2d 466. It found that neither the plaintiff nor the defendant should have the custody of the boy, but his custody was granted to Mr. and Mrs. Suddarth, who were the only parents the boy had known, and they had provided him with a good home and with proper educational and religious surroundings.

Upon motion and brief for rehearing, a supplemental opinion was entered by this court under date of October 25, 1943, found in 143 Neb. 578, 11 N. W. 2d 456, in which this court decided that, from the evidence contained in the bill of exceptions, neither the father nor the mother was a fit, proper, or suitable person to have the custody of Norman Paul Gorsuch, the child involved.

On April 5, 1945, Jess Gorsuch filed a petition for the modification of the decree insofar as it awarded the care and custody of the minor child to the Suddarths, and prayed to award same to the defendant.

On May 22, 1945, Jess Gorsuch filed a supplemental petition, setting forth that Glen Suddarth had died and that Kathryn Suddarth is unable to make a proper or suitable home for the minor child, and that she will be dominated and controlled in its care and custody by Cora Gorsuch.

On June 2, 1945, Kathryn Suddarth filed an answer, in which she said that, notwithstanding the death of her husband, she was fully capable, both financially and otherwise, to continue to care for, rear and educate said child as if he were her own, and that his religious and secular education and general welfare have not changed by the death of her husband. She further alleged that she had cared for the child several months prior to September 6, 1937, while plaintiff was employed at housework; that since he was two and a half years old she had had him continuously, had provided the major

portion of his support, carefully preserved his health, clothed him properly, and expended considerable sums of money in so doing; and that a very deep and abiding attachment had grown up between the child and herself. She prayed that the petition of Jess Gorsuch be dismissed and it be decreed that said child should remain in her custody.

On July 20, 1945, Cora Gorsuch filed her answer. She alleged that the amount contributed by Jess Gorsuch was entirely inadequate for the care and support of the child, because of the rise in prices of food, clothing, and necessaries of life; that she was gainfully employed and was willing to contribute a reasonable sum to assist in the expense of caring for her son in the Suddarth home; that she was required to spend twelve hours each day working, and unable at present to provide him a home, but that when she is able to provide a home for him she intends to ask the court for the care, custody and control of her child; that she objects to the custody and control of the child being given to the defendant, Jess Gorsuch, for the reason that he is not a fit and suitable person to have the care, control, and custody of the child, and has been so adjudged by the court; and prayed that the custody of Norman Paul be left with Kathryn Suddarth.

On July 20, 1945, Jess Gorsuch filed a reply, denying the facts set out in the answers of Cora Gorsuch and Kathryn Suddarth.

Trial was had in the district court at Gering on July 20 and 21, 1945. All parties appeared in court with counsel. At the close of the two days' trial, in which the evidence of many witnesses was taken, the case was taken under advisement.

On October 19, 1945, written briefs having been submitted, it was ordered that a journal entry be drawn as per the oral instructions given by the court.

On October 22, 1945, Jess Gorsuch filed motion for new trial, in which he set up that the judgment and decree was contrary to the evidence, contrary to the law,

and not supported by the weight of the evidence; that the court erred in adjudging that the best interests of the minor child, Norman Paul, would be served by dividing his custody between his father and Kathryn Suddarth; and that the court erred in denying the custody of the child to Jess Gorsuch for nine months of the year and awarding his custody to a person who was a paid custodian.

On January 19, 1946, a decree was entered, in which the court stated: "That the record of the testimony in the former proceedings brought by the defendant, Jess Gorsuch, for modification of the original decree herein was offered in evidence in this proceeding, the same being the record in Case #31610 of the Nebraska Supreme Court, the opinion of which is reported in 143 Neb. 572, 578, and the Court finds from a careful examination of said record and of the testimony adduced in this proceeding, that the defendant, Jess Gorsuch, has failed to show that there has been any material change in the circumstances of the parties touching upon their respective suitability and fitness to have the custody of the said Norman Paul Gorsuch. The court, therefore, finds that the judgment of the Supreme Court in Case #31610 that neither the father or the mother is a fit, proper and suitable person to have the custody of Norman Paul Gorsuch, is binding upon this Court. * * * and finds that the best interests of said child require that he remain in the custody of the impleaded defendant, Kathryn Suddarth, until the further order of the court, * * * ."

The court further found that the incomes of both plaintiff, Cora Gorsuch, and Jess Gorsuch, defendant, had materially increased since the trial of the first petition; that the support and care of said child required the sum of at least $30 a month; and it was ordered that the plaintiff, Cora Gorsuch, and the defendant, Jess Gorsuch, should each pay to the clerk of the court the sum of $15 a month for the support of the child from

September to May of each year, commencing November 1, 1945, and continuing until further order of the court.

The court found that the death of Glen Suddarth was not such a change in the circumstances as to justify a modification of the former decree as to the custody of the child. It further found that the plaintiff, Cora Gorsuch, and the defendant, Jess Gorsuch, were each entitled to visit said child at the home of Kathryn Suddarth at reasonable times; that the defendant, Jess Gorsuch, was entitled to have the child visit him at his home at the Thanksgiving and Easter vacations and the long summer vacation of each year; that he should call at the home of Kathryn Suddarth and get said child and return said child at the conclusion of each vacation period; and that Kathryn Suddarth should have the right to visit the child at the home of Jess Gorsuch at reasonable times during such vacation periods.

A journal entry was entered January 19, 1946, in which the court announced that it was agreed by the attorneys that the motion for new trial filed by Jess Gorsuch prior to the journalizing of the judgment should stand as traversing the judgment finally entered January 19, 1946. From this decree Jess Gorsuch, defendant, appealed to this court.

To the decree entered January 19, 1946, Jess Gorsuch, defendant and appellant, has set out ten assignments of error. However, an examination of these alleged errors discloses that not all of them were called to the attention of the trial court in the motion for a new trial, and therefore will not be taken up in this opinion. We will consider only those set out heretofore in the motion for a new trial.

We will now examine the evidence as to the foster mother, Kathryn Suddarth, who has raised this boy in her home since he was a small child. She testified that he was in the fourth grade in school, and attended Sunday School; that she had never let the boy's mother, the plaintiff, Cora Gorsuch, take the boy; that she had not

taken him to Cora's apartment in Omaha, but had taken him to her sister's in Omaha twice, but did not stay there overnight; and that they had telephoned to Cora and she saw him on those two occasions. Two or three times Cora had come to Rising City on Saturday night, stayed for the week end to see her boy, and had gone back to Omaha on Sunday evening. Once Cora was there when Jess was there, which was in January 1944.

Mrs. Suddarth testified that her husband, Glen, died May 2, 1945; that he left her no real estate, but left a plumbing shop and equipment, which she still owns; that he also left $1,000 of bonds, and about $2,000 in the bank; and that she also had about $300 of her own savings. She also testified that he left an automobile and furniture, and also left a blacksmith shop, but she sold that for $100. She testified that if the boy was left with her she could, if necessary, do washing and ironing for a living and keep him with her. She stated that the house she has lived in in Rising City for the last five years belongs to the Wallace estate; that Ervin Wallace was Cora Gorsuch's father, and the Wallaces have permitted the Suddarths to live in said house for five years without paying any rent; that she had a very large garden connected with the house, where she raised enough potatoes and garden stuff to run them through the winter, and also raised a lot of chickens; that the boy, Norman, plays with three girls across the street and with two boys a block from home; that he never leaves without asking and telling her where he is going; that he has a dog to play with; that she had at her own expense bought clothing, including winter clothes, snow suits, pants and overalls, and heavy underwear, a bicycle, and also gave Norman spending money, and in addition bought him books to read; that he regularly attends the Lutheran Church and Sunday School, but she has never had him baptized in the Lutheran faith.

Cora Gorsuch testified as follows: "Q. Have you observed Mrs. Suddarth's conduct in connection with the

child? A. Well, she is very kind and affectionate towards him. Q. From your observation is the child contented? A. Yes, he is."

Mrs. Suddarth testified that Cora gives her money for Norman and had sent her money through the mail for that purpose, but that the father had made no contribution of money or clothing to the boy in the last two years, except paying the $10 a month as ordered; that he had never written to the boy, and had only written to her once when he asked if Norman could come out there to the ranch for Christmas, and she answered that there was no Christmas vacation.

We do not believe the assignments of error should be sustained in any respect. On the other hand, it is our view that the trial court was not justified in the liberal provisions of the decree entered in favor of the defendant.

The law as to the parents' rights in such a situation as the facts show in the case at bar appears to be: "Since they are not absolute rights, but must yield to the best interests of the child, the natural rights of a parent to the custody and control of his infant child are subject to the power of the state, and may be restricted and regulated by appropriate legislative or judicial action. * * * The state's power in this respect is based on its position as parens patriae, on the right of the child, as citizen and ward, to its protection, as well as upon the state's interest in its own perpetuation." 39 Am. Jur., Parent and Child, § 15, p. 602.

"The welfare of an infant is paramount to the wishes of the parent, where it has formed a proper and natural attachment for another person who has long stood in the relation of a parent with the parent's consent." In re Burdick, 91 Neb. 639, 136 N. W. 988. See, also, 17 Am. Jur., Divorce and Separation, § 683, p. 517.

"The welfare of the child being the one question of primary consideration to which all others must yield, the court must patiently examine the evidence in the light of the age of the child, its past and future. The question

involves the study of the proposed home itself, and its entire surroundings, the temporal welfare of the child, as to food, clothing, discipline, and, if of tender years, careful nursing when required, and medical attention." Kaufmann v. Kaufmann, 140 Neb. 299, 299 N. W. 617.

Appellant cites us to section 38-107, R. S. 1943, which states that the father and mother are the natural guardians of their minor children, and if either dies, or is disqualified, or has abandoned the family, the guardianship falls on the other.

We recognize this as the law in Nebraska, but in the case at bar the father absolutely abandoned his little boy for years, the mother turned the baby over to Mrs. Suddarth when it was perhaps eight months old and went to work, and for many years neither saw the little lad except at very infrequent intervals. Both parents appear now to have developed quite an interest in their child, and each is now required by the decree to contribute monthly the same amount to his support.

The evidence discloses that the mother works for long hours daily as a beauty operator in Omaha, and the father is a ranch hand in western Nebraska. This boy has been brought up in a small town, under very quiet and pleasant surroundings, during all these years by his foster mother, Mrs. Suddarth, who is, since the death of Mr. Suddarth, the only parent he has ever known, and her home is the only home he has ever known. We do not believe that it would be for the best interests of this little lad to be taken out to a ranch in western Nebraska for either the long or short vacation periods.

It is our opinion that both the plaintiff, Cora Gorsuch, and the defendant, Jess Gorsuch, should be allowed to visit their boy, Norman Paul, at reasonable times and places at Rising City, with the privilege of visiting with him in the absence of Mrs. Suddarth.

The trial court provided for the payment of support money of $15 a month from the plaintiff and the same amount from the defendant for only nine months in each

year. These payments, under our modification of the decree as entered, should be made monthly for the entire twelve months of each year.

With these various changes, all as set out herein, the decree entered by the trial court is affirmed.

AFFIRMED AS MODIFIED.

POLLOCK, District Judge, dissenting in part.

In my opinion the Court should not prohibit Norman from visiting his parents in their homes. There is no proof that either of them is morally unfit to associate with him or lives in an environment detrimental to his welfare.

The father appeals, chiefly contending: (1) The previous decision is not conclusive of his unfitness to have custody; and (2) the proof of changed circumstances entitles him to custody. In her cross-appeal the custodian contends Norman should not be allowed to visit in the home of his father.

The record discloses no evidence intended to reflect upon the conduct of Mr. Gorsuch since his remarriage in May 1939. It is undisputed that he and his present wife are church members, regular in their religious practices, use no liquor or tobacco, and enjoy the respect of their neighbors. They have the ability and desire to provide Norman with a good home containing various modern conveniences.

In recent years Mr. Gorsuch has been employed on a cattle ranch of twenty thousand acres located about nine miles from Hyannis. His employer provides him with a small house, produce of the value of about $1.50 a day, feed for his cattle, and pays him a salary which has been increased to $175 a month.

Evidence of changed circumstances is limited. It consists chiefly of the father's improved financial condition, his exemplary conduct in recent years, unsatisfactory visitation conditions in the Suddarth home, the death of the foster father, and the fact that Norman is becoming nervous.

Provisions in divorce decrees relating to care, custody, and maintenance of minor children are subject to modification if there is a material change of circumstances substantially affecting their welfare. § 42-312, R. S. 1943. The previous custodial decree is res judicata only under the circumstances of its rendition. It determined the fitness of the father to have custody at that time, not now.

The future welfare of a child may not be determined on the basis of previous conduct of its parents. 27 C. J. S., Divorce, § 317, p. 1191: "* * * past delinquencies are not of themselves an indicia of present fitness." 17 Am. Jur., Divorce and Separation, § 684, p. 519: "Moreover, a delinquent parent may in the course of time become entirely fit to have and retain the custody of his or her child. So, it has been held that the presumption of unfitness on the part of a father for the custody of his child, raised by refusal of the court to award it to him upon granting a decree of divorce against him, is overcome by evidence of an exemplary life for many months after the passing of the decree."

Since the mother makes no claims, the father asserts an absolute right to custody of his son upon proof of his present fitness. However, parental rights are preferential, not absolute. Custody is not awarded to punish or reward parents. Their rights, desires, and wishes should be considered and respected unless incompatible with the welfare of their children.

In the instant case, Norman has been satisfactorily reared in the Suddarth home for ten years. Bonds of affection have developed. He knows no other home. His custody should not be transferred except for the most cogent reasons. The controlling consideration is his best interests rather than the abandonment of parental rights. I concur in the view that his custody should not be disturbed.

A determination of visitation privileges was not previously sought in these proceedings. The trial court

modified the former decree to provide ordinary rights of visitation to both parents at reasonable times. Further, the father was allowed to have his son visit in his home during Easter and Thanksgiving vacation periods, and during the three summer months, on condition he provide transportation.

Norman's father and stepmother have attempted to visit him in the Suddarth home but the conditions of visitation proved unsatisfactory. On one or two occasions Mrs. Suddarth arranged for the mother to come from Omaha to be present. She declined to permit Norman to leave the house with his father unless accompanied by the mother. Norman was not cordial and was too timid to answer casual inquiries without asking Mrs. Suddarth what he should say.

Friction has developed between the father and Mrs. Suddarth. For much of six years they have litigated over Norman's custody. Each attempts to prove the other unfit for custody, but all evidence is too remote in point of time to be material to the issue of present fitness. It was only with the aid of counsel that the father first learned his infant child had been left in the Suddarth home. Norman has never visited his mother in her home. Until after the trial of this case his father had never seen him since he was a baby, except in the Suddarth home. After all evidence was adduced and before announcing a decision, the trial court sustained the father's motion for the specific privilege, independently of these proceedings, to allow his son to visit in his home during the Thanksgiving vacation period of 1945. The record is silent as to what transpired, but it may be assumed that if the circumstances of this trial visit were detrimental to the welfare of the boy such fact would have been shown. Shortly after this visit judgment was rendered.

The opinion of this court accords both parents visitation privileges in Rising City in the absence of Mrs. Suddarth. It does not permit visits in the home of

either parent. The trial judge whose decision was previously appealed, accorded complete custody to the father. Following reversal by this court, the trial judge who presided in these proceedings allowed the son to visit in the home of his father during two holiday periods, and the three summer months. Apparently both judges who saw and heard Mr. Gorsuch were impressed with his fitness to associate with his son. Norman will be eleven years of age next July. Until it is shown to be detrimental to his welfare I favor allowing him to associate with his parents and to visit in their homes. If he may associate with his parents in the absence of Mrs. Suddarth, I see no need to do so in Rising City.

It is stated in the opinion written by Justice Johnsen in York v. York, 138 Neb. 224, 292 N. W. 385: "Indeed, neither the father nor the child should be deprived, more than the necessities of the situation reasonably require, of the opportunity for mutual cultivation, through association, of acquaintanceship and love for each other. Wilkins v. Wilkins, 84 Neb. 206, 120 N. W. 907. (133 Am. S. R. 618.) And what youngster's life would not normally be enriched, in James Whitcomb Riley fashion, by a vacation at his grandparents, joined with the comradeship of his father? In any event, we believe with the trial court, until the contrary has been demonstrated, that the child will profit from the relationships which the decree permits."

This court has accorded visitation privileges to a mother whose husband charged her with adultery and was granted a divorce and custody. Hobza v. Hobza, 128 Neb. 598, 259 N. W. 516. The opinion recites that the mother deserted her young daughter without cause, and traveled over the state working in many towns as a housemaid. The trial court was affirmed in allowing her, "if she wishes, of taking the little girl with her, except when she is in school, for a reasonable length of time, perhaps a week, or even a month during the summer vacation."

The longest period this court has permitted visitation in the home of a parent denied custody is the summer vacation period. Carlson v. Carlson, 135 Neb. 569, 283 N. W. 214.

In Frazier v. Frazier, 109 Fla. 164, 147 So. 464, it was held under the circumstances of that case it was inadequate to only allow an eleven-year-old daughter to visit her father two weeks a year. The opinion says "The welfare of the child must, of course, be regarded as the chief consideration * * * but the inherent rights of parents to enjoy the society and association of their offspring, with reasonable opportunity to impress upon them a father's or a mother's love and affection in their upbringing, must be regarded as being of an equally important, if not controlling consideration in adjusting the right of custody as between parents in ordinary cases. No relationship in life should be regarded as more sublime, nor should any inherent right of an individual be esteemed more highly, than that which arises out of the natural relationship of love and affection which normally exists between parent and child, regardless of what may be the private individual code of morals, or the race, color, creed or station in life of the father or mother."

In Chadwick v. Chadwick, 275 Mich. 226, 266 N. W. 331, visitation privileges were restricted because of the immorality and misconduct of the father who had been convicted of a crime. The appellate court enlarged his rights of visitation saying: "Notwithstanding defendant's present incarceration, as the result of a criminal conviction, the law does not preclude repentance, reformation and forgiveness."

Solms v. Solms, 225 Mich. 341, 196 N. W. 344, is a case wherein a mother was allowed very limited visitation privileges because of her immorality. After she and a third husband had been married for eight months and had conformed to the rules of propriety and society the court enlarged her privileges, saying: "No good

can come to the boys nor to society in having the boys grow to manhood imbued with the knowledge that their mother was, and is, an immoral woman."

Where there was animosity between an unfit mother and the legal custodian of her child, it was held best that she have the daughter visit alone in her home where they could enjoy each other without restraint. Graff v. Graff, 241 Mich. 302, 217 N. W. 13.

In the recent case of Kane v. Kane, 314 Mich. 529, 22 N. W. 2d 773, it is stated: " 'Not only does the plaintiff have a legal right to specific and definite times for access to his child, but the child has a legal right to frequent and pleasant contact with his father. In the opinion of the court the future welfare of the child will be best subserved by making definite provision for the exercise of such rights.' "

A wife was granted a divorce and the custody of a three and a half-year-old daughter in the case of Fitch v. Fitch, 207 Iowa 1193, 224 N. W. 503. The husband was said to have inflicted on his wife intolerable and inhuman physical abuse over a long period. It was held erroneous to allow visitation privileges only so long as the father paid alimony. The opinion says: "Visitation or the denial thereof should not be made to appease one parent or punish the other. Such right of visitation should be allowed or denied, according to what is best for the child. Its welfare must receive paramount consideration, * * *. Unless these visitations with the father will in some way injure the child, they are not to be prohibited, under the facts and circumstances of this case. The associations between father and daughter should not be terminated merely because alimony is not paid. The good there is in the father ought to be afforded the child, and in addition to that, the little girl is entitled to have whatever benefit there may be in the continued acquaintance and association with her grandparents."

Visitation privileges were involved in Wilkins v. Wil-

kins, 84 Neb. 206, 120 N. W. 907. The opinion refers to a four-year-old daughter saying: "Provision was made in the decree that the father should have the right at any reasonable time, upon his good behavior, to visit said child and have said child visit with him in the village of Cook, not exceeding one hour. While the plaintiff is not here complaining. (sic) we deem it proper to say that this seems to us a totally inadequate recognition of the father's rights. He should have an opportunity to become acquainted with his child and to secure her attachment to him, and a child should not be deprived of the acquaintance of her father nor of his love and affection. This can only be secured by association. The father should have the right, if he so desires, to visit the child at reasonable times and with reasonable frequency, and should also have the right to have the child visit him. Such visits, however, should not be protracted for such a length of time, as to, in effect, remove the child from the custody of the mother. It is very difficult to lay down specific rules upon such a subject which will be just and adequate under the varying circumstances which must arise in the future.

It should be sufficient to say that the rights and privileges accorded to each parent should be exercised with good judgment and discretion, with mutual forbearance, and with proper regard to the rights of each other and to the welfare of the child."

If Norman Paul Gorsuch is unable to actually know and associate with his father, it will imply to him there is something shameful about his father, and will suggest to him a feeling of having been betrayed. It may produce conflicts in his sense of loyalty and cause him shame and embarrassment. He is at a very impressionable age. It would seem better, if the conduct of his father were reprehensible, which is not true, that the boy should actually know his father for what he is rather than be kept in a state of suspicion and uncertainty.

A boy of his age needs male influence more than in his early years, and especially since the death of the foster father. Any emotional instability would jeopardize his future welfare. It can be of no help to him to decree that he shall not visit his father. Children from broken homes too often become juvenile problems because of psychological maladjustment. It would be for his best interest to eliminate fear, confusion, uncertainty, inferiority, and inadequacy.

At the age of fourteen Norman may select his own guardian. Bradley v. Bradley, 126 Neb. 52, 252 N. W. 469. Meanwhile, I favor allowing him all possible benefit of acquaintanceship and association with his parents. Since friction unavoidably arises when the father visits in the Suddarth home Norman should visit him in his home, and the litigants should be admonished that no attempt to influence the boy against the other will be tolerated. Visits to the cattle ranch should not be unpleasant for this boy raised in a town of four hundred inhabitants.

My evaluation of the needs and best interests of Norman convince me the trial court did not abuse its discretion in allowing him to visit in the home of his father. Controversy could well arise over the period during which these original visits would be helpful to him. Perhaps they should be limited to only a week or two until their propriety has been confirmed.

I perceive no reason to prohibit this boy from associating with his parents or visiting in their homes under the circumstances stated. Accordingly, I respectfully dissent.

CHICAGO AND NORTH WESTERN RAILWAY COMPANY, A CORPORATION, APPELLANT, V. PAYNE CREEK DRAINAGE DISTRICT, APPELLEE.

26 N. W. 2d 607

Filed March 28, 1947. No. 32131.

1. **Taxation.** Statutory provisions authorizing assessments of special taxes against property benefited by public improvements are to be strictly construed, and it must affirmatively appear that the taxing authorities have taken all steps which the law makes jurisdictional; the failure of the record to show such proceedings will not be aided by presumptions.
2. **Drains.** Section 31-402, R. S. 1943, requires a certain number of landowners to petition for the formation of a drainage district, dependent upon the number of owners of real estate embraced within the district. The statute does not require that the number of signers be designated in the petition and, not having required such fact to be set forth, the same may be established by order of the county board acting upon the petition in creating the drainage district.
3. ———. The county board may fix the boundaries of a drainage district as set forth in the petition to the board when, after hearing all of the evidence in support of the petition and being fully advised in the premises, it finds that the proposed boundaries as set forth in the petition are reasonable and proper, and that the best interests of the district will be promoted and justice and equity be done to all persons by establishing and fixing the boundaries of the district as set forth therein.
4. ———: **Elections.** When a ballot for the formation of a drainage district affirmatively discloses that the voter is the owner of the number of acres voted, the mere fact that such voter may have written down the nature of the instrument by which he acquired title on the ballot in answer to "nature of title to or interest in above," does not invalidate the ballot, and is not a violation of section 31-406, R. S. 1943.
5. ———: ———. Within the contemplation of section 31-407, R. S. 1943, when the canvassing board certifies a true and correct exhibit of the votes cast for the formation of a drainage district and the board of directors, naming the place of the election and the date thereof, and the fact that the ballots are on file in the county clerk's office in accordance with the provisions of the law, it is sufficient compliance with said section of the statute.
6. ———: **Officers.** Where the required number of directors of a drainage district are elected as provided by law, and one fails to

qualify, the remaining duly elected and qualified directors may fill the vacancy by appointment, as provided for in section 31-409, R. S. 1943.

7. ———: **Taxation.** Section 31-411, R. S. 1943, provides in part: "The land least benefited shall be apportioned one unit of assessment, and each tract receiving a greater benefit shall be apportioned a greater number of units or fraction thereof, according to the benefits received." Where two tracts of land were assessed one-half unit each and the balance of the units were assessed in conformity with the statute and not proportionately out of line with the assessment of benefits for the tract involved, and such assessment constituted no change in the taxes on any of the tracts of land, the report of the drainage district board on fixing the benefits may constitute an irregularity in such respect but is not a jurisdictional defect.

8. ———: **Notice.** Where the record affirmatively discloses that the directors of a drainage district acted officially in the publication of required notices as provided for by section 31-412, R. S. 1943, substantial compliance with such statute has been had.

9. ———: **Officers.** Section 31-411, R. S. 1943, makes no requirements as to the qualifications of the engineer selected by the board of directors of a drainage district. The qualifications of such engineer can only be attacked directly, and not collaterally.

10. ———: **Taxation.** Section 31-411, R. S. 1943, requires detailed plans of the public work to be done in accordance with section 31-401, R. S. 1943, but does not require an estimate of the cost of such work. Such section is not supplemented by section 31-450, R. S. 1943, which applies only when the cost of the contemplated work equals 20 percent of the assessed value of the lands assessed for such improvement, and requires an estimate of the work to be done.

11. ———: **Injunction.** Where the plaintiff fails to allege in its petition for an injunction that the cost of the contemplated work for a public improvement equals or exceeds 20 percent of the assessed value of the land embraced within a drainage district and that an estimate of the cost of such work be furnished, such matter is not to be determined when a demurrer to the petition is considered on appeal. Since the issue was not raised in the proceedings for the organization of a drainage district, the proceedings are not subject to collateral attack.

12. ———: **Judgments.** Where a bona fide attempt has been made to organize a drainage district, the legality of its organization cannot be collaterally attacked for irregularities and defects not affecting the jurisdiction of the tribunal by which it was created.

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

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

T. L. Grady, for appellee.

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

MESSMORE, J.

This is a suit for an injunction, challenging the jurisdiction of the Payne Creek Drainage District to levy units of benefit against the property of the Chicago and North Western Railway Company, or to let a contract, or to proceed with the proposed drainage improvement, for the reason that there are jurisdictional defects in the procedure for the organization of the drainage district. The defendant district demurred to the plaintiff's petition filed March 4, 1946. The trial court sustained the demurrer, denied a temporary injunction, and dismissed the plaintiff's petition. Plaintiff appealed. Plaintiff thereupon filed a petition for injunction pending the appeal, the purpose being to maintain the status quo of the proceedings. The injunction was granted, conditioned upon the plaintiff filing a bond in the sum of $2,000, to be approved by the clerk of the district court, to pay all damages sustained by the defendant if the judgment appealed from is affirmed. The plaintiff did not appeal from any of the proceedings with reference to the organization of the drainage district.

The plaintiff as appellant contends that the trial court erred: In refusing to grant a temporary injunction; by dismissing the plaintiff's petition without first having a final hearing at which evidence might be taken; and by sustaining the defendant's demurrer.

The appellant sets forth in its petition certain claimed defects in the organization of the drainage district which it contends are jurisdictional, rendering the pro-

ceedings for the formation of such district null and void, and that this action for injunctive process constitutes the proper procedure in such a case.

"Drainage proceedings may be collaterally attacked where they are not merely irregular, but are void for jurisdictional defects, * * *." 28 C. J. S., Drains, § 36, p. 335.

Defects on the face of the record showing want of jurisdiction are ground for collateral attack. See 19 C. J., Drains, § 45, p. 635, note 70 (b); Donner v. Highway Comrs., 278 Ill. 189, 115 N. E. 831.

Appellant cites Haecke v. Eastern Sarpy County Drainage District, 141 Neb. 628, 4 N. W. 2d 744: " 'Statutory provisions authorizing assessments of special taxes against property benefited by public improvements are to be strictly construed, and it must affirmatively appear that the taxing authorities have taken all steps which the law makes jurisdictional; the failure of the record to show such proceedings will not be aided by presumptions.' Morse v. City of Omaha, 67 Neb. 426, 93 N. W. 734."

It is the appellant's contention, if the record fails to show affirmatively the necessary jurisdictional steps in the formation of a drainage district as required by chapter 31, article 4, R. S. 1943, jurisdiction does not exist, and the proceedings are null and void. We will discuss the alleged jurisdictional defects about which complaint is made in their logical sequence.

The appellant's petition alleges in substance that the petition for the formation of the drainage district did not set forth the number of landowners in the proposed district as required by section 31-402, R. S. 1943, to disclose whether the petitioners constituted the requisite percentage of landowners and, further, that the board of county commissioners made no finding or record of such facts.

Section 31-402, R. S. 1943, provides: "When the district proposed contains real estate owned by less

than twenty persons or corporations, one fourth of said number shall be sufficient to petition for the formation of such district. When there are more than twenty such owners, ten or more owners of real estate therein may sign a petition for the formation of such district, and file said petition with the county clerk of the county having the largest body of land within the proposed district. The petition shall suggest the boundaries of the district, the number of directors that the district shall have if formed, and the amount of bond each shall give."

The proceedings for the organization of the drainage district are attached to and made a part of appellant's petition. The petition for the formation of the drainage district, filed in the office of the county clerk of Stanton county on June 18, 1945, and addressed to the board of county commissioners, complied with section 31-401, R. S. 1943, which sets forth the conditions upon which a drainage district may be formed. The petition set forth that the undersigned owners of real estate embraced within the proposed boundaries requested the board of county commissioners to form a drainage district under the provisions of sections 31-401 to 31-450 inclusive, R. S. 1943, and suggested the boundaries of the proposed district to be fixed as lying within the district. The petition further set forth the name of the proposed district, that three directors be elected to manage the affairs of the district and be required to give bond in the sum of $500 each. The petition was signed by five real estate owners embraced within the proposed district.

Section 31-402, R. S. 1943, does not require that the petition for the creation of a drainage district must state the number of property owners and recite how many sign the petition. This provision of the statute indicates the petition for the organization of a drainage district will be sufficient if it appears that it is actually signed, as a matter of fact, by the required percentage

of property owners within the proposed district, and such fact may be shown in the proceedings for the formation of the district. The only mandatory requirements of the foregoing provision of the statute are that the petition shall suggest the boundaries of the district, the number of directors that the district shall have if formed, and the amount of bond each shall give. The appellant, in its petition, does not allege that the petition for the organization of the drainage district was not signed by a sufficient number of landowners. The petition for the formation of the drainage district discloses that the signers thereof petition the board of county commissioners to form a drainage district under the provisions of sections 31-401 to 31-450 inclusive, R. S. 1943. It will be noted that section 31-402, R. S. 1943, is included in the petition for the formation of the drainage district, so it is apparent that the county board of commissioners acted upon the petition to determine the percentage of signers thereof required by section 31-402, R. S. 1943.

The proceedings for the organization of the drainage district, which includes the order for publication of the notice of hearing to fix the boundaries of the drainage district, the hearing pursuant to the published notice, and the fixing of the boundaries as set forth in the petition, and the fact that 1195 acres of land voted out of a possible 1554 acres, all show conclusively that a sufficient number of landowners signed the petition for the organization of the drainage district. Appellant's contention is not meritorious.

The appellant contends the board of county commissioners at the hearing dated July 16, 1945, did not fix the boundaries of the district by description as required by law, but merely by reference to the petition for the organization of the district. The appellant further contends that the notice published by the county clerk and calling for the election on August 14, 1945, erroneously

stated that the county board of commissioners had fixed the boundaries by description.

Section 31-404, R. S. 1943, provides in part: "Thereupon the county board of such county shall take to its assistance the county surveyor of the county and shall determine whether or not the boundaries of the proposed district are reasonable and proper, * * *."

Section 31-405, R. S. 1943, provides: "Thereupon the county clerk shall publish one notice once each week for three weeks in a newspaper published in the proposed district, * * *. The notice shall state the filing of the petition; that it is filed under the provisions of sections 31-401 to 31-450, giving the title thereof in full; the boundaries of the proposed district as fixed by the county board; that an election will be held at a certain place in the proposed district, which place shall be named in said notice, * * *."

The two foregoing statutory provisions are involved in this assignment of error, and will be taken up in continuity.

The order fixing the boundaries provided: "That the boundaries of said proposed district, as set forth in the petition, are reasonable and proper and that the best interests of said district will be promoted, and justice and equity be done to all persons, by establishing and fixing the boundaries thereof as set forth in said petition." It appears from such order, by the language heretofore quoted therefrom, that the county board, in compliance with section 31-404, R. S. 1943, determined that the boundaries of the proposed district were reasonable and proper as set forth in the petition for the organization of the drainage district. We see no legal barrier to the board of county commissioners fixing the boundaries as set forth in the petition for the organization of the drainage district, especially so when the order discloses that after hearing all of the evidence in support of the petition, and being fully ad-

vised in the premises the board fixed the boundaries as suggested in the petition.

It is appellant's contention that the notice published by the county clerk, as provided for in section 31-405, R. S. 1943, erroneously stated that the county board had fixed the boundaries by description; that the statute commands the notice shall state "* * * the boundaries of the proposed district as fixed by the county board; * * *." The record discloses that the notice of fixing boundaries for the drainage district set forth the boundaries in detail, as described in the petition for the organization of the drainage district. We conclude that the notice is sufficient to meet the requirements of the law.

The appellant contends that at the election the ballots failed to disclose and show the nature of title or interest of any of the voters in any of the land. This alleged jurisdictional defect is not included in the allegations of the appellant's petition, but is set forth in its brief.

Section 31-406, R. S. 1943, provides: "Such election shall be by ballot which shall be signed by the voter, and shall have thereon a list of the land and lots which the voter claims the right to vote." This provision sets forth the form of the ballot which lists the property on which the voting is based, the description of the property, number of acres, total number of votes claimed on same, nature of title to or interest in same, and provides for the signature of the voter.

Section 31-407, R. S. 1943, provides in part: "At all the elections the county clerk, * * * and such assistants as he shall choose, shall constitute the election board and the canvassing board. Any person may cast one vote on each proposition to be voted on for each acre of land or fraction thereof, * * * which he may own or have an easement in, as shown by the official records of the county where the land or lots may be. Any corporation, * * * owning or having an easement in any land or lot, may vote at such election, the same as an individual may. * * * The board shall have the right

to refer to the official records of the counties where the real estate may be, for information as to who are entitled to vote. The board shall sign a statement giving the result of the election, and the same shall be recorded in the office of the county clerk."

It is true that the voters, in stating the nature of title to or interest in the land which is fully described in each ballot, wrote down the nature of the documents by which they acquired title. It is apparent upon the face of the ballots that the voters claimed to be owners of the land described in the ballots, which is sufficient to meet the statutory requirement.

With reference to section 31-407, R. S. 1943, the appellant contends that the canvassing board did not sign and record any sufficient statement as required by law, giving the result of the election; further, that there was no declaration as to who were elected directors.

The record shows the names of the voters; whether they voted for or against the formation of the drainage district; the number of acres each voter claimed to own and the total number of votes claimed, and recited on such exhibit the following: "Payne Creek Drainage District Election August 14, 1945." On another exhibit the canvassing board certified that in accordance with the provisions of the law, the "foregoing is a true and correct exhibit of the votes cast for the Formation of the Payne Creek Drainage District and the Board of Directors thereof," naming the place of the election and the date thereof, as shown by the ballots on file at the county clerk's office, signed by the canvassing board.

From the record it is apparent that sufficient compliance was made by the canvassing board with the statutory requirement. Appellant's contention is without merit.

The appellant contends, as a part of the organization procedure, the first board of directors must be elected and not appointed; that there is no authority to

appoint one member of the board of directors; and that there was no vacancy in the board of directors in the instant case until there had first been a duly elected and qualified board of three members.

Section 31-404, R. S. 1943, provides in part: "The board shall also determine the number of directors that the district shall have, if formed, and the amount of the bond to be given by each, and shall make a record of its action."

Section 31-405, R. S. 1943, notice of election, provides for the board of directors elected, giving the number of such board as fixed by the county board pursuant to section 31-404, R. S. 1943. The number of directors fixed by the county board in the instant case was three. The contention is, the record must affirmatively show that a board of three directors was elected and qualified. The record in the instant case discloses upon the ballots cast at the drainage district election the number of votes for each person voted upon as directors. The canvass of the election discloses the number of votes cast for directors.

Section 31-409, R. S. 1943, provides in part: "The person elected a director receiving the least number of votes shall hold office for one year, the next higher for two years, and so on, and the term of each shall be adjudged so as to make the term of one director expire each year." The statute then provides for the officers of the district, the annual election, the hours of the election and the place, and further provides: "Vacancies in the office of directors may be filled by the remaining directors until the next election. All directors and officers shall hold office until their successors are elected and qualified."

The record affirmatively shows that three directors were elected. One elected director failed to qualify. Subsequently, as provided for by section 31-409, R. S. 1943, the vacancy was filled by the two remaining elected and qualified directors. The appointed director qualified

as provided for by law. We believe the affirmative showing in the record disposes of the appellant's contention.

The appellant contends that only a full, elected board of directors had authority to act for the district; that the drainage district notice, published for the purpose of hearing all parties interested in the apportionment of benefits to the various tracts of real estate within the boundaries of the drainage district to be held by the board of directors of the district on October 2, 1945, giving the place, was signed by two directors of the district which did not constitute a full board of directors required to act as a unit. The notice referred to, required to be published once as provided for by section 31-412, R. S. 1943, was complete in its publication by having been published twice, a week apart. The record affirmatively discloses that at the time of the signing of the notice there were two elected, qualified directors, one of the directors elected failing to qualify. Section 31-412, R. S. 1943, makes no requirement that the notice as provided for therein shall be signed by the board of directors. Section 31-412, R. S. 1943, indicates that the notice heretofore mentioned is sufficient if the same be the act of the directors, and in this connection there is no allegation in the appellant's petition that the notice to be given was not the act of the directors. Under the circumstances two directors would constitute a sufficient quorum to transact the business of the corporation until a third director is appointed and qualified.

The control of corporate affairs vested in a board of directors may be exercised by a majority where there are no bylaws or rules of the corporation to the contrary. There is nothing in the proceedings for the organization of the drainage district in the record in the instant case to disclose that a majority of the directors cannot act officially as a quorum to transact the business of the corporation. See 14A C. J., Corporations, § 1850, p. 90, note 52, and cases cited thereunder; 19 C. J. S., Corporations, § 749, p. 92; 13 Am. Jur., Corporations,

§ 959, p. 917; 2 Fletcher Cyclopedia, Corporations, (perm. ed.) § 552, p. 433.

The appellant contends that the drainage district board disregarded the statutory method of fixing units of benefit.

Section 31-411, R. S. 1943, in part, provides as follows: "The land least benefited shall be apportioned one unit of assessment, and each tract receiving a greater benefit shall be apportioned a greater number of units or fraction thereof, according to the benefits received."

The record discloses that the report on fixing the units of benefit shows two tracts of land were assigned one-half unit each. It is the appellant's contention, therefore, that the foregoing provision of section 31-411, R. S. 1943, was violated, and such violation constituted a jurisdictional defect. The other real estate was assessed in conformity with the statute and was not proportionately out of line with the assessment of benefits with the tract here involved, and did not change the taxes on any of the tracts of land. The appellant, in its petition, does not allege that it was prejudiced in any manner by the assessment of units. The foregoing action on the part of the drainage district board is, at most, an irregularity, but does not constitute a jurisdictional defect.

"Errors of the board in making the apportionment of benefits may be corrected on appeal. * * * the findings or order of the board in determining the apportionment of benefits which are not of a jurisdictional nature will not be considered." White v. Papillion Drainage District, 96 Neb. 241, 147 N. W. 218. See, also, State v. Hanson, 80 Neb. 724, 115 N. W. 294.

The appellant further contends that the report of the board of the drainage district as to the units of benefit, was never signed by the board, but by one member thereof only, and was void, and constituted a jurisdictional defect. The report was filed in the county clerk's office on October 3, 1945, signed by one director. Three

months thereafter the two other directors of the drainage district signed the report.

The appellant also contends the publication of the notice of the apportionment of benefits was false and fraudulent for the reason that it discloses all three of the directors as signing the report, which was not the fact.

Section 31-412, R. S. 1943, provides in part: "The directors, having completed the apportionment of benefits, shall make a detailed report of same and file such report with the county clerk. Thereupon the board of directors shall cause to be published, once each week for three consecutive weeks in a newspaper published at the county seat of each county wherein any lands or lots are situated, a copy of the apportionment so far as the lands or lots within the county are concerned, and a statement of the total number of units of benefit in the district."

The appellant lays stress upon the word "directors" appearing in section 31-412, R. S. 1943, contending that when the "directors" do not sign the report, then such report is void. With this contention we are not in accord. The record shows upon its face, in the detailed report of the directors of the drainage district that, "pursuant to notice given in the manner required by law, the Board of Directors of the Payne Creek Drainage District made the following apportionment of benefits on a unit basis, as required by law, * * *." Clearly, the report constituted the act of the board of directors of the drainage district, and the fact that such report was not signed until a later date by two of the directors is, at most, an irregularity, but does not constitute a jurisdictional defect.

The appellant contends that the board never employed a competent engineer. The engineer who made the detailed plan appearing in the record was in the employ of the Federal Government, connected with the Soil Conservation Service of the Department of Agricul-

ture of the United States. It is the appellant's contention that section 31-408, R. S. 1943, requires that after the district is formed, as provided for by law, all work by the district shall be done under the supervision of the board of directors of the district. The appellant's petition alleges, in substance, that the appellee entered into an agreement, in writing, with the Soil Conservation Service of the Department of Agriculture of the United States, whereby the representative of said service should have authority to decide all matters with reference to the construction of the proposed improvements within said drainage district, and that the board of directors of the drainage district should yield to the federal representative all their authority in the premises; that there is no authority in law for the district to delegate its duty and authority, and its act in such respect is an unlawful act which renders the proceedings null and void.

Section 31-411, R. S. 1943, provides in part: "The board of directors having first, with the aid of such engineer, surveyor and other assistants as it may have chosen, made detailed plans of the public work to be done in accordance with section 31-401, * * *." This section of the statute provides that the board of directors may employ an engineer, surveyor and such other assistants to make detailed plans of the public work to be done in accordance with section 31-401, R. S. 1943. It makes no specific requirement as to the qualifications of an engineer, and the mere fact that an engineer in the employment of the Federal Government made the detailed plans for the drainage district does not mean that the drainage district has delegated its duty or authority to an agency of the Federal Government. If the appellant desired to test the qualifications of the engineer, it should have done so by direct attack.

With reference to the appellant's contention that the project here involved is a soil conservation project, this is utterly destroyed by the fact that a transcript

of the drainage district proceedings includes a copy of the petition to create the drainage district, and is made a part of the appellant's petition. The foregoing contention of the appellant is without merit.

The appellant contends that the drainage district board never adopted a plan of the proposed improvements and cites Haecke v. Eastern Sarpy County Drainage District, *supra,* contending the holding therein indicates that the proceedings in the instant case are wholly void for want of the adoption of a proper plan, and want of an estimate of the cost. Part of the holding in the cited case is that the act states that "the legislature intended that the first step in the making of improvements should be the securing of the services of an engineer and the making and adoption of detailed plans of the public works to be done, all as a condition precedent to the apportionment of benefits. The act states that shall be done 'first;' it is further patent that no valid apportionment of benefits can intelligently be made until that is done and that it is only for such improvements so planned that a lawful apportionment can be made."

It does not appear that any estimate was ever made of the total cost of the plan of improvement.

The cited case does not pass upon the applicability of section 31-550, Comp. St. 1929, now section 31-450, R. S. 1943, which will later be discussed in this assignment of error. The case involved a direct attack on the proceedings of the drainage district and in no manner conflicts with the instant case, as is hereafter explained.

Section 31-412, R. S. 1943, makes provision for presenting objections to the apportionment of benefits by reason of the improvement, by providing for personal appearance, appearance by counsel, or written objections. In the instant case there were no objections to the apportionment of benefits by reason of the improvement. Haecke v. Eastern Sarpy County Drainage Dis-

trict, *supra,* was an appeal from an affirmation of the apportionment of benefits to certain lands by landowners who had filed written complaints with the county clerk against said benefits fixed or determined by the district, and objected to any assessments that may be levied against any or all lands.

Section 31-411, R. S. 1943, being considered in this assignment of error, provides in part: "The board of directors having first, with the aid of such engineer, surveyor and other assistants as it may have chosen, made detailed plans of the public work to be done in accordance with section 31-401, * * * ."

The appellant cites section 31-450, R. S. 1943, as a section of the statutes supplementing section 31-411, R. S. 1943. From a reading and analysis of section 31-450, R. S. 1943, it only applies when the cost of the contemplated work equals 20 percent of the assessed value of the lands assessed for such improvement, and likewise requires an election to vote on proceeding with the work, and has no connection with section 31-411, R. S. 1943. The appellant, in its petition, does not allege that the proposed improvement in the drainage district here being considered would equal or exceed 20 percent of the assessed valuation of the lands.

Section 31-411, R. S. 1943, does not require any plan or estimate to be filed with the county clerk, it provides that the board of directors, having first secured the aid of an engineer, make a detailed plan of the work to be done. A detailed plan of the work is shown by the record for the organization of the drainage district dated October 2, 1945, and filed in the office of the county clerk November 28, 1945. Appellant's contention is not meritorious.

"The legality of the organization of a drainage district ordinarily cannot be collaterally attacked, except for defects which show that it has no de facto existence or the organization is void for want of jurisdiction.

"It is an established rule of law that where a bona

fide attempt has been made to organize a drainage or reclamation district, and such district exists as a de facto corporation, the legality of its organization cannot be collaterally attacked for irregularities and defects not affecting the jurisdiction of the tribunal by which it was created, * * *." 28 C. J. S., Drains, § 36, p. 333. See Omaha & N. P. R. Co. v. Sarpy County, 82 Neb. 140, 117 N. W. 116; Campbell v. Youngson, 80 Neb. 322, 114 N. W. 415; Dodge County v. Acom, 61 Neb. 376, 85 N. W. 292; Darst v. Griffin, 31 Neb. 668, 48 N. W. 819.

There are other matters of minor importance set forth in the appellant's brief which we deem unnecessary to discuss, in that the same do not in any manner constitute jurisdictional defects in the proceedings for the organization of the drainage district.

From a careful analysis of the appellant's petition and the proceedings for the organization of the drainage district attached thereto and made a part thereof, we conclude that the demurrer was properly sustained by the trial court; that none of the objections raised by the appellant to the organization of the drainage district constitute jurisdictional defects, but are, at most, irregularities and not subject to collateral attack; and the trial court did not err in denying the temporary injunction and dismissing the appellant's petition.

AFFIRMED.

HENRY A. SWANSON, APPELLANT, V. STATE OF NEBRASKA, APPELLEE.

26 N. W. 2d 595

Filed March 28, 1947. No. 32205.

1. **Criminal Law.** The common-law writ of error coram nobis to bring into the record facts which were unknown to the defendant at the time of trial through no lack of reasonable diligence on his part, which, if known at the time of the trial, would

have resulted in a different judgment, exists in this state under section 49-101, R. S. 1943.

2. ———. The purpose of a writ of error coram nobis is to enable the court to recall some adjudication, made while some fact existed which, if before the court, would have prevented rendition of the judgment, and which, through no fault of the party, was not presented.

3. ———. The application must set out the facts which would have prevented the rendition of the judgment and the evidence by which the existing facts can be proved, and must allege facts showing that by the exercise of diligence the petitioner would not have been able, and was not able, to produce the facts relied upon at the trial or before judgment.

4. **Pleading.** A general demurrer admits facts well pleaded, but not the conclusions of the pleader.

5. **Criminal Law.** An application for a writ of coram nobis will be denied, in the absence of a showing that the alleged acts of inefficiency on the part of the petitioner's counsel upon which the motion for the writ was predicated were not known, or by the exercise of reasonable diligence could not have been known, by the petitioner, before the close of the trial.

6. ———. Where the facts alleged are known to the applicant before or during the progress of the trial, or could have been known by the exercise of reasonable diligence, the writ must be denied.

APPEAL from the district court for Dawson County: I. J. NISLEY, JUDGE. *Affirmed.*

Henry A. Swanson, pro se, for appellant.

Walter R. Johnson, Attorney General, and *Erwin A. Jones,* for appellee.

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

MESSMORE, J.

The plaintiff filed an application for a writ of error coram nobis in the district court for Dawson county on July 31, 1946, to which the State of Nebraska as defendant demurred. The trial court sustained the demurrer for the reason that the application for writ of error coram nobis did not state facts sufficient to justify its issuance. Plaintiff appeals.

It appears from the the application for the writ of error coram nobis that the applicant was convicted of the crime of murder in the first degree, and sentenced to life imprisonment in the state penitentiary, having been committed December 5, 1939. The applicant and his wife were divorced in 1937. The custody of a five-year-old son of the couple was awarded to the mother and, by arrangement of the parties, the father was privileged to visit with and take the son with him on occasions. On October 23, 1939, while on an errand to his pasture, the applicant stopped at the Herbert Malm farm where his divorced wife was staying with the child, for the purpose of taking the child on a visit with him in to town. During the time he was there trouble occurred and, as a result, Malm was killed. Thereafter the applicant was charged with murder in the first degree.

The plaintiff and applicant, hereinafter referred to as the appellant, contends that in the trial, conviction, and commitment, he was deprived of the equal protection of the laws within the meaning of the due process provision of the Constitution of the United States and the Constitution of the State of Nebraska.

The ancient common-law writ of error coram nobis exists under the Nebraska Constitution and laws. See Carlsen v. State, 129 Neb. 84, 261 N. W. 339; Newcomb v. State, 129 Neb. 69, 261 N. W. 348.

In Carlsen v. State, *supra,* this court held: "The common-law writ of error coram nobis to bring into the record facts which were unknown to the defendant at the time of trial through no lack of reasonable diligence on his part, which, if known at the time of the trial, would have resulted in a different judgment, exists in this state under section 49-101, Comp. St. 1929 (now section 49-101, R. S. 1943)."

"It is stated in 2 R. C. L. 307, sec. 262: 'The purpose of the writ of coram nobis is to bring before the court rendering the judgment matters of fact which if known

at the time the judgment was rendered would have prevented its rendition.'" Carlsen v. State, *supra*. See, also, Hawk v. Olson, 145 Neb. 306, 16 N. W. 2d 181.

And, as expressed in Stephenson v. State, 205 Ind. 141, 179 N. E. 633, 186 N. E. 293: "The purpose of a writ of error coram nobis is to enable the court to recall some adjudication, made while some fact existed which, if before the court, would have prevented rendition of the judgment, and which, through no fault of the party, was not presented."

The application must set out the facts which would have prevented the rendition of the judgment and the evidence by which the existing facts can be proved, and must allege facts showing that by the exercise of diligence the petitioner would not have been able, and was not able, to produce the facts relied upon at the trial or before judgment. See 24 C. J. S., Criminal Law, § 1606 (6), p. 154. See, also, Stephenson v. State, *supra*.

It is a well established rule of law in this jurisdiction that: "A demurrer to a pleading admits only such facts as are well pleaded, mere conclusions of the pleader not being admitted." Busboom v. Schmidt, 94 Neb. 30, 142 N. W. 290. See, also, Carlsen v. State, *supra*.

With the foregoing authorities in mind, we proceed to a determination of this appeal by an examination of the record.

The appellant, in support of his contention, asserts he was deprived of regular and careful preparation, and effective representation by counsel at the trial.

The application for writ of error coram nobis discloses, in substance, that a law firm was employed to defend the appellant, by his father. To such employment the appellant claims he objected, his reason being that he did not think it well to have counsel unfamiliar with local conditions and handicapped by distance. The senior member of such law firm became ill and died before the trial was had in the district court. Apparently there was an application for a continuance due to the

illness of the senior member, requesting further time to prepare the case. The record does not show this application, or any affidavit in support thereof, or the ruling of the court thereon. Subsequent to the death of the senior member of the law firm employed, the other member of the firm carried on the defense of the appellant at the trial, with the assistance of local counsel.

In this connection, the appellant asserts that he was deprived of the defense of self-defense; that he was defended on the grounds of insanity and the unwritten law, and that at all times he was sane and can make adequate proof of such fact. He further contends that a map of the premises disclosing the buildings and location of them and certain other matters appearing thereon, was not introduced in evidence; also, that the five-year-old son was not called to testify; and that available witnesses were not called. The appellant further contends that he thought the case had been appealed to the Supreme Court of this state, and was advised when he made inquiry in January 1946, that the case had not been appealed.

The selection of counsel for the defense was a matter which was entirely within the province of the appellant and the members of his family. The state had nothing to do with the selection of counsel for the appellant. All of the matters upon which the appellant complains, with respect to selection of counsel to defend him, were known to him before the trial, or before the close of the trial.

An application for a writ of coram nobis will be denied, in the absence of a showing that the alleged acts of inefficiency on the part of the petitioner's counsel upon which the motion for the writ was predicated were not known, or by the exercise of reasonable diligence could not have been known, by the petitioner, before the close of the trial. See Mandell v. People, 76 Colo. 296, 231 P. 199.

The appellant asserts he desired to interpose the defense of self-defense. If this be a fact, it was known by the appellant at the time of the trial, and whether or not his counsel prepared a proper defense was a matter resting primarily with such counsel and the appellant, and was known at the time of the preparation for, and at the time of, the trial. It was also known to the appellant that the map, which he claims should have been introduced in evidence, was not so introduced at the time of the trial. Reasonable diligence would have disclosed whether or not there had been a writ of error lodged in the Supreme Court of this state.

With reference to the statement appearing in the application wherein the appellant asserts witnesses were available to incidents preceding October 23, 1939, and since the divorce, and makes reference to the prepared statement set forth in such application, all such matters were known to the appellant prior to and at the time of the trial. It was also known to the appellant that during the progress of the trial these witnesses were not called, and there is nothing appearing in the application to show what they would have testified to, had they been called. As to the calling of his five-year-old son to testify, this was a matter between the appellant and his counsel at the time of the trial.

We have refrained from setting forth in detail the allegations of the application for writ of error coram nobis. The same constitute, almost in their entirety, conclusions of the pleader which are not, and cannot be, admitted by demurrer. However, assuming the truth of the allegations of fact well pleaded in the application, it is apparent that it alleges only matters that were known to the appellant during the time of the trial and obviously known to the appellant's counsel.

"A petition for a writ of error coram nobis is insufficient which, as a ground for its issuance, alleges only an error of fact which was known to the petitioner before the questioned judgment was rendered. Coram

nobis does not lie to bring into the record facts known to petitioner before judgment. State v. Boyd, 117 Neb. 320." Carlsen v. State, *supra.*

If it appears that the defendant knew of such facts but failed to disclose them to the court, the writ will be refused. See State v. Boyd, *supra.*

"If one negligently and intentionally fails to challenge the court's attention to facts within his knowledge, he cannot expect to be relieved of the consequences. 16 C. J. 1327." Carlsen v. State, *supra.*

"The reason for the rule is apparent. If the defendant has knowledge of a fact which, if divulged, would be for his benefit, he should not be permitted to conceal such fact, take his chance upon the issue, and, being disappointed therewith, ask the court to relieve him from the consequences of his own intentional or negligent act. To allow such procedure would countenance trifling with the courts to an extent very much greater than their tenderness for the rights of persons accused of crime already has permitted." State v. Boyd, *supra.*

Where the facts alleged are known to the applicant before or during the progress of the trial, or could have been known by the exercise of reasonable diligence, the writ must be denied. See Dobbs v. State, 63 Kan. 321, 65 P. 658.

"* * * the writ of error coram nobis is rather more limited than formerly as a common-law remedy. It is never used where the Code provides a remedy. It is only available where there is no other remedy for a wrong. It is consequently very limited in scope. * * * Its purpose is not, and never was, to permit a defendant to retry his case again and again. But, as pointed out heretofore, in certain cases, it provides a corrective judicial process that the Constitution guarantees shall not be denied." Carlsen v. State, *supra.*

The showing here is manifestly insufficient. We discern very little from the facts pleaded, and are only

advised of appellant's conclusions that they would have been of benefit to him at the trial. Many of the facts inserted, though not well pleaded, are not of a character that entitled the appellant to relief in this sort of proceeding, and it is probably true that many of the wholly immaterial assertions were inserted upon the unfounded supposition of the appellant. The appellant's contention is without merit.

For the reasons herein given, we conclude that the judgment of the district court in sustaining the demurrer to the application for the writ of error coram nobis should be, and is, affirmed.

AFFIRMED.

GERTRUDE C. SCHRADER, APPELLANT AND CROSS-APPELLEE, v. HERBERT H. SCHRADER, APPELLEE AND CROSS-APPELLANT.
26 N. W. 2d 617

Filed March 28, 1947. No. 32182.

1. **Divorce.** An unqualified allowance of alimony in gross, whether payable immediately in full or periodically in installments, and whether intended solely as a property settlement or as an allowance for support, or both, is such a definite and final adjustment of mutual rights and obligations between husband and wife as to be capable of a present vesting and to constitute an absolute judgment. Such an allowance is not subject to modification under the provisions of section 42-324, R. S. 1943.
2. ———. Where a divorce decree provides for the payment of stipulated sums monthly for the support of a minor child or children, contingent only upon a subsequent order of the court, marriage, or the reaching of majority, such payments become vested in the payee as they accrue. The courts of this state are without authority to reduce the amounts of such accrued payments.
3. ———. Where an award for child support is made in one amount for each succeeding month for more than one child, it will be presumed to continue in force for the full amount until the youngest child reaches his majority. The proper remedy, if this be deemed unjust, is to seek a modification of the

decree in the court which entered it on the basis of the changed circumstances.

4. ———. In a divorce action the decree for child support is at all times subject to review in the light of changing conditions, regardless of the particular language of the award. Either party may, upon sufficient showing of changed conditions, apply to the district court for modification of the order made with respect to allowance for child support.

5. ———. An application for a change with respect to an allowance for support and maintenance of minors, as provided in a decree of divorce, made at any time after the decree has been entered must be founded upon new facts or circumstances which have arisen subsequent to the entry of the decree. In the absence of such facts and circumstances the matter will be deemed res adjudicata.

6. ———. Upon the granting of an absolute divorce the trial court has the legal right to assign the property, both real and personal, acquired during the marriage, by the joint efforts of the parties, between the parties as the equities require.

APPEAL from the district court for Douglas County: HERBERT RHOADES, JUDGE. *Affirmed as modified.*

Gray & Brumbaugh, for appellant and cross-appellee.

G. H. Seig, for appellee and cross-appellant.

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

WENKE, J.

Plaintiff, Gertrude C. Schrader, appeals from an order of the district court for Douglas County modifying a decree of divorce as to alimony and the allowance for support and maintenance of minor children. Defendant, Herbert H. Schrader, who made the application to modify, cross-appeals.

The parties will be herein referred to as they appeared in the original divorce action. Appellant, Gertrude C. Schrader, will be referred to as plaintiff and appellee, Herbert H. Schrader, as defendant.

Plaintiff brought the original divorce proceedings on January 27, 1942, and obtained a decree in her favor on May 2, 1942. This decree provided that she should

have the custody of the five minor children who were: Herbert Henry Schrader, Jr., a son, age 17 years; Conquest Louise Schrader, a daughter, age 16 years; Theodore Francis Schrader, a son, age 13 years; Joyce Jeannine Schrader, a daughter, age 9 years; and Beverly Joan Schrader, a daughter, age 7 years.

The decree further awarded to the plaintiff "* * * the use and occupancy of the home now occupied by said parties at 4133 South 24th Street until the youngest child reaches the age of 18 years or until the further order of the Court; the sum of $115.00 per month, payable $57.50 on the 10th of May, $57.50 on the 25th of May, 1942, and of each succeeding month thereafter until further order of the Court for support and maintenance money for said minor children, $10.00 of said sum when and if paid being credited, however, on the sum of $1260.00 alimony herein awarded to plaintiff, so long as said plaintiff continues to occupy the aforesaid home at 4133 South 24th Street, Omaha, Nebraska, said alimony being payable $10.00 per month beginning with the month of May, 1942, and continuing until said $1260.00 has been paid; * * *."

On August 20, 1943, defendant filed his petition to modify the decree of May 2, 1942, as to the payment of $115 per month for the maintenance and support of the minor children in addition to giving the plaintiff the use of the home.

Defendant set forth as a basis for his petition the following: That his net earnings had decreased and his living costs had increased; that the son, Herbert Henry, Jr., had obtained gainful employment on June 9, 1942, and was at the time of the filing of the petition a member of the United States Marine Corps; that two of the children, Conquest Louise and Theodore Francis, had also obtained gainful employment and were no longer dependent upon the defendant for support; and that plaintiff received $4 per month rent from the garage

which is part of the home property of which he is the owner.

Hearing was had on this petition and the objections filed thereto. On October 15, 1943, the relief defendant asked for was denied. No appeal was taken from this order. The court, in refusing to modify the provision of the original decree of May 2, 1942, found that the son, Herbert Henry, Jr., was in the Army; that the daughter, Conquest Louise, was employed and paid a certain amount for board; and that such service and employment was temporary and not permanent.

Thereafter, on May 23, 1946, defendant filed another petition to modify the provisions of the original decree of May 2, 1942, as to the amount allowed for maintenance and support of the minor children and the use of the home property. As a basis for his request the defendant set forth the following: That the son, Herbert Henry, Jr., became a member of the United States Marine Corps in 1943 and was killed in action on February 26, 1945; that plaintiff, as beneficiary of an insurance policy on the life of the deceased, receives $49.80 per month from the United States Government and will continue to do so for a period of 20 years; that because of her son's death the plaintiff receives a pension of $45 per month from the United States Government; that she was beneficiary of a $2,000 policy of insurance which deceased carried with the Prudential Insurance Company of America; that the daughter, Conquest Louise, was married during the year 1943 and no longer is dependent upon the defendant; that the son, Theodore Francis, became a member of the United States Marine Corps on January 3, 1946, and is no longer dependent upon the defendant; that plaintiff receives $35 from her daughter, Conquest Louise, as rental for living in the home; and that plaintiff receives $5 per month as rental for a garage located on the home property.

On September 19, 1946, the trial court entered an order finding that the son, Herbert H. Schrader, Jr., had

been killed in action on February 26, 1945; that as a result of his death the plaintiff receives a pension of $45 per month and is also beneficiary of a $10,000 policy of War Risk Insurance which is payable in monthly installments; that the daughter, Conquest Louise, was married on December 27, 1943, and is no longer a dependent; that the son, Theodore Francis, enlisted in the United States Marine Corps on January 3, 1946, and is no longer a dependent; that since the entry of the decree on May 2, 1942, the defendant has paid into the office of the clerk of the district court the sum of $3,900 which he directed applied for maintenance and support; that he has paid in and directed applied on alimony a sum sufficient to reduce the balance to $50; that two of the children, Joyce Jeannine, now of the age of 14 years, and Beverly Joan, now of the age of 12 years, are still at home and dependent upon the parents for support; and that the provisions of the decree of May 2, 1942, respecting the use and occupancy of the real property owned by defendant should be continued for the benefit of the two children, Joyce and Beverly, until further order of the court.

The court thereupon ordered: " * * * that the liability of the defendant for maintenance and support of the minor children was, is, and should be shown of record to be fully paid and satisfied to date. * * * that the defendant pay the sum of $68.50 per month, plus the rentals (which now amount to $5.00 per month) from the garage * * *, for the support and maintenance of the two minor children, * * * that the defendant continue, until further order of the Court to permit the two children, Joyce Jeannine Schrader and Beverly Joan Schrader, to remain in the home owned by the defendant at 4133 South 24th Street, * * *; that the custody of said children remain in the plaintiff, and that while plaintiff resides therein with said children she shall not be required to pay, or be liable for, any rent for her personal use and occupancy of * * * said

property. * * * that plaintiff and defendant pay their respective attorneys fees and that the costs be paid equally by them."

Both parties filed motions for new trial and same were overruled. Plaintiff thereupon appealed and defendant cross-appealed.

The first question that presents itself is, does the court have power to modify the original decree by ordering the accrued monthly allowance for the support and maintenance of the minor children to be shown on the record as fully paid and satisfied although part thereof actually remains unpaid?

The decree of May 2, 1942, awarded the plaintiff the sum of $115 per month for the support and maintenance of the minor children. It further provided that $10 thereof, when and if paid, was to be credited on the sum of $1,260 alimony awarded the plaintiff so long as she continued to occupy the home. The alimony was payable at the rate of $10 per month and was to continue until the sum of $1,260 had been paid.

Under this provision of the decree there was due for the period from May 1942, to and inclusive of September 1946, the sum of $6,095, of which $530 was for alimony and the balance of $5,565 for the support and maintenance of the minors. During this period of time the defendant paid into court the sum of $5,110. While he directed how it was to be applied, the decree however expressly directed its division. When the payments are applied, as in the decree directed, it leaves a balance owing of $730 for alimony and $985 for support and maintenance.

That the trial court could not modify these allowances, by directing that these balances be shown as paid when no actual payment had in fact been made, has been fully determined by this court.

In Dunlap v. Dunlap, 145 Neb. 735, 18 N. W. 2d 51, we said: "An unqualified allowance of alimony in gross, whether payable immediately in full or periodically

in installments, and whether intended solely as a property settlement or as an allowance for support, or both, is such a definite and final adjustment of mutual rights and obligations between husband and wife as to be capable of a present vesting and to constitute an absolute judgment. Such an allowance is not subject to modification under the provisions of section 42-324, R. S. 1943."

And in Wassung v. Wassung, 136 Neb. 440, 286 N. W. 340, we said: "Where a divorce decree provides for the payment of stipulated sums monthly for the support of a minor child or children, contingent only upon a subsequent order of the court, marriage, or the reaching of majority, such payments become vested in the payee as they accrue. The courts of this state are without authority to reduce the amounts of such accrued payments." See, also, Morris v. Morris, 137 Neb. 660, 290 N. W. 720, and Sullivan v. Sullivan, 141 Neb. 779, 4 N. W. 2d 919.

It is defendant's thought that since three of the children are no longer dependent upon him for support, and have not been for some time, that a court of equity should be able to grant relief that, in effect, would apply retroactively. However, it will be observed that the original decree provides for the payment of support and allowance for said minor children as a group. We have said in In re Application of Miller, 139 Neb. 242, 297 N. W. 91: "Where an award for child support is made in one amount for each succeeding month for more than one child, it will be presumed to continue in force for the full amount until the youngest child reaches his majority. The proper remedy, if this be deemed unjust, is to seek a modification of the decree in the court which entered it on the basis of the changed circumstances."

Plaintiff seeks to construe the original decree to mean that defendant is only entitled to a credit of $10 per month on the alimony owing in such months as he voluntarily

pays the full amount of $115. In other words, that the court intended to give the defendant a bonus for faithful performance. We do not think the court intended such meaning. The decree provides, "when and if paid" the sum of $10 is then to be credited. It was clearly the intention of the court that of the $115 allowed, when paid, that the sum of $10 should be applied on the alimony and the balance for support and maintenance, just as long as the plaintiff occupied the home property.

It further appears that defendant directed more to be paid on the alimony than had accrued but the decree provides how the money paid in is to be distributed. The distribution should have been made as directed in the decree. When so made it leaves a balance owing for alimony of $730 and an accrued and unpaid balance for support and maintenance of $985. The latter amount, being due and unpaid, the plaintiff is entitled to have immediately paid.

The further question is presented: Do the facts justify the reduction made in the allowance for support and maintenance for the remaining minors?

That the court had jurisdiction to modify the decree if conditions had changed since the previous order is beyond question. As stated in Gibson v. Gibson, 147 Neb. 991, 26 N. W. 2d 6: "The decree for child support in a divorce action is at all times subject to review in the light of changing conditions, regardless of the particular language of the award. * * * Leave is given either party to apply to the district court for a modification of the order made, with respect to * * * allowance for its support, upon showing made of changed conditions." See §§ 42-312 and 42-324, R. S. 1943.

But, as plaintiff contends, what was considered at the time the order was entered on October 15, 1943, cannot be again considered for what was said in Dunlap v. Dunlap, *supra,* is as applicable to allowances for support and maintenance of minors as to payments of alimony. Therein we said: "The basis for changing such pay-

ments in the future must be founded upon new facts which have occurred since the decree was entered, and, in the absence of such facts, the matter is deemed to be res adjudicata between the parties." See, also, Chambers v. Chambers, 75 Neb. 850, 106 N. W. 993.

However, since the decree of October 15, 1943, the status of the dependency of the son, Herbert Henry, Jr., has become permanent in place of temporary by reason of his death on February 26, 1945. As a result of his death the plaintiff receives a mother's pension of $45 per month and insurance payments from the United States Government of $46 per month. Likewise, the status of dependency of the daughter, Conquest Louise, has become permanent in place of temporary. She was married on December 27, 1943, and at the time of the hearing had a 20 months old baby girl. She and the granddaughter are living in the home and paying $35 per month for board and room. The son, Theodore Francis, joined the United States Marine Corps on January 3, 1946, and is no longer living in the home. The only children remaining, who are minors and dependent, are the two daughters, Joyce Jeannine aged 14 and Beverly Joan aged 12. Without going further into detail we think the evidence establishes such a change of conditions, since the order of October 15, 1943, as to entitle the defendant to a reduction of the amount to be paid for the support and maintenance of the remaining two daughters. We find that the allowance of $115 per month should be reduced to the sum of $68.50 per month, commencing with October 1946; that half shall be paid on the 10th and the remaining half on the 25th of each month in which it becomes payable; that out of said payment the defendant shall receive a monthly credit of $10 on the balance of the alimony owing the plaintiff so long as the plaintiff continues to occupy the home property. We also think that the award to the plaintiff of the use of the home property carries with it such rent as she may collect from the garage located thereon

and that such rent is no part of the allowance as herein made.

In determining the amount allowed we have taken into consideration the fact that certain of plaintiff's costs are fixed, whether she has two or more children in her home, and that the cost of living has materially increased. But in view of all factors to be considered we find the amount as herein allowed to be fair and reasonable.

Defendant, by his cross-appeal, raises the question of the power of the court to assign the use of the home for the support and maintenance of the children. The original decree awarded the plaintiff " * * * the use and occupancy of the home now occupied by said parties * * * until the youngest child reaches the age of 18 years or until the further order of the Court; * * *." As stated in Cizek v. Cizek, 76 Neb. 797, 107 N. W. 1012: "Jurisdiction relative to divorce and alimony is given by statute, and every power exercised by the court with reference thereto must look for its source in the statute, or it does not exist." However, even prior to our present statute so authorizing (see § 42-321, R. S. 1943), we held in Reed v. Reed, 65 Neb. 849, 91 N. W. 857: "The right to the possession of the homestead, being a right accruing to the parties by reason of their marriage, is one which the court should settle upon granting a divorce; * * *." See, also, Turco v. Turco, 128 Neb. 50, 257 N. W. 485. Since such statutory authorization we have frequently held as stated in Bigelow v. Bigelow, 131 Neb. 201, 267 N. W. 409: "The trial court had the legal right to assign the property, both real and personal, acquired during the marriage by the joint efforts of the parties, between the parties as equity required upon the granting of an absolute divorce." See, also, Metschke v. Metschke, 146 Neb. 461, 20 N. W. 2d 238.

We do not think the order of September 19, 1946, in any way modified or attempted to modify the provision in the decree of May 2, 1942, as to the use of the home.

If the order of September 19, 1946, in any way attempted to do so it is not merited by the facts. The family has not grown up and should be kept intact in the home until the children have grown up. We think the award of the possession of the home to the wife, while the family was growing up and in her custody, was both wise and proper. Under such circumstances we think the court had full power to award her the possession of the home for the use of the minor children.

Defendant, in his brief, refers to a letter dated October 11, 1943, written by the judge who entered the order of October 15, 1943. This reference is made for the purpose of calling our attention to the basis for the judge's ruling as in said letter set forth. This letter is no part of the record and therefore not before us. We suggest that if a trial judge wishes to give the basis for his holding it is better procedure for him to do so in a manner so that it will become part of the record and not by letter addressed to either the parties or their counsel.

Plaintiff complains of the trial court's failure to allow her an attorney's fee as authorized by section 42-308, R. S. 1943. This statute makes the allowance thereof discretionary and we do not think, in view of all the facts, that the trial court abused its discretion. However, we allow the plaintiff an attorney's fee of $150 for services in this court, the same to be taxed as costs.

Plaintiff also complains of the trial court's taxing her with half the costs in that court. We find that all the costs, both in the trial court and here, including the attorney's fee here allowed, should be taxed to the defendant.

We therefore direct that the order of the trial court be modified in accordance with this opinion as follows: That there be found due the plaintiff as of October 1, 1946, a balance of alimony in the sum of $730 which continues to be payable at the rate of $10 per month commencing with October 1946; that there is due and

owing the plaintiff, as of October 1946, an unpaid balance for support and maintenance in the sum of $985 which amount the defendant is directed to pay; that commencing with October 1946, the allowance for support and maintenance of the two remaining minors is reduced from $115 per month to $68.50 per month, the same to be payable one-half on the 10th of October and one-half on the 25th of October and correspondingly in each month thereafter; that out of the sum of $68.50 per month, when paid, the defendant shall have a credit of $10 on the alimony payments due the plaintiff, this provision to continue as long as plaintiff occupies the home premises; that plaintiff is entitled to any garage rent which she may collect from the garage located on the home property; that plaintiff be given the continued use of the home property until the youngest of the children now remaining reaches the age of 18 years; and that the court costs, both in the trial court and this court, be taxed to the defendant, this to include the attorney's fee here allowed plaintiff in the sum of $150. As modified the order of the lower court is affirmed.

AFFIRMED AS MODIFIED.

WALTER W. EICHER, APPELLEE, V. MATTIE EICHER, APPELLANT.

26 N. W. 2d 808

Filed April 4, 1947. No. 32163.

1. **Divorce.** Condonation is foregiveness for the past upon condition that the wrongs shall not be repeated. It is dependent upon future good conduct. The repetition of the offense revives the wrong condoned.
2. ———: **Pleading.** Where condonation is relied upon as a defense, it should be pleaded. Where a repetition of the wrong condoned is relied upon, it should be pleaded.
3. **Pleading.** Where it is clear that all of the evidence to sustain or defeat an issue was adduced by the respective litigants in an equitable action in the district court, it is com-

petent on appeal for this court in the interests of justice to permit amended pleadings to be filed so as to conform to that proof.

4. ———: **Appeal and Error.** Under the provisions of section 25-852, R. S. 1943, power is given the court to conform the pleadings to the proof, when the amendment does not substantially change the claim or defense. A judgment based upon such proof will not be reversed for the reason that such amendment has not actually been made. If the evidence, admitted without objection, clearly proves a claim or defense, the pleading will upon appeal be considered amended accordingly.

5. **Divorce.** Where the record in a divorce case discloses that the wife's attorney has been allowed an adequate fee for services in the trial court; where the wife appeals and the husband has been required to pay the costs of the appeal and support the wife during its pendency; and where no reasonable justification for the appeal appears, an allowance of a fee to the wife's attorney will be denied in this court.

APPEAL from the district court for Seward County: HARRY D. LANDIS, JUDGE. *Affirmed.*

Max Kier, for appellant.

McKillip, Barth & Blevens, for appellee.

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

SIMMONS, C. J.

This is a divorce action which resulted in a decree for the plaintiff. Defendant appeals. The errors assigned and discussed are that the trial court erred in finding that defendant had committed acts of extreme cruelty; that plaintiff was entitled to a divorce; that the cause, if it existed, had not been condoned; in dismissing defendant's petition for separate maintenance; in failing to make proper orders relating to the custody of minor children; and in the alimony granted. We affirm the judgment of the trial court.

The parties were married in 1928. They have lived all their married life at Seward. Two children were born to the marriage who at the time of the trial were

17 and 8 years of age. The parties lived together in apparent harmony until about 1942. About that time an uncle of the defendant, and the defendant's mother came to live with them. Discord followed. The uncle died in August or September 1945. The mother moved out of the home in March 1945.

At least as early as 1943, defendant committed a battery on the plaintiff. These plaintiff testified continued with some regularity as occasion prompted. Plaintiff left the home.

On June 29, 1945, plaintiff filed petition for divorce, alleging extreme cruelty, the presence in the home of members of defendant's family over his objection, and the impairment of his health.

In August 1945, the plaintiff, defendant and their children went on a vacation to Colorado. Marital relations were resumed. Shortly after returning home, if not at the time, plaintiff again left the home.

On September 13, 1945, defendant filed an answer, consisting largely of a general denial, and a cross-petition in which she alleged, in effect, condonation by the resumption of marital relations on the trip to Colorado, and plaintiff's refusal to live with defendant thereafter. Defendant further alleged cruelty on the part of the plaintiff and nonsupport, and prayed for a divorce from bed and board, custody of the children, and child support.

Thereafter, and in September 1945, the parties and their attorneys met at the court room, presumably for a trial of the case. A conference was had in the court's chambers. The defendant told plaintiff she was pregnant. It later developed that she was not. Plaintiff decided he should return home and did so. Thereafter, trouble again occurred. In January 1946, defendant objected to plaintiff leaving the home one evening, and rather severely battered the plaintiff. He fell, injuring his back. He then again left the home.

On March 28, 1946, the matter came on for trial on the pleadings as above recited. Defendant secured

permission and then amended her cross-petition by an allegation that subsequent to the filing of her cross-petition plaintiff had asked the resumption of marital relations, had promised to conduct himself properly, had failed to do so, had continued his cruel conduct toward her, and that the parties had not lived together since February of 1946.

At the trial the story of the troubles of the parties was related to the court. There is no need here to recite the details of the evidence. The batteries were fully proved and in part admitted by defendant. There is medical evidence that plaintiff has an "anxiety neurosis," a "depressive melancholy" that is a direct result of his marital situation. This has improved during the separations and become worse during the periods of resumed relations. Both parties expressed opposition to further continuance of the marriage relation.

We are in accord with the finding the trial court made granting the plaintiff a divorce, and in denying defendant a decree of divorce from bed and board, unless the decree should be denied because of either condonation or the situation presented by the pleadings.

Condonation is forgiveness for the past upon condition that the wrongs shall not be repeated. It is dependent upon future good conduct. The repetition of the offense revives the wrong condoned. Heist v. Heist, 48 Neb. 794, 67 N. W. 790; Anderson v. Anderson, 89 Neb. 570, 131 N. W. 907; McNamara v. McNamara, 93 Neb. 190, 139 N. W. 1045; Riddick v. Riddick, 112 Neb. 813, 201 N. W. 557; Wetenkamp v. Wetenkamp, 140 Neb. 392, 299 N. W. 491. It is clear that there was a condonation of the cruelty upon which the petition of plaintiff was based. It is also clear that there was a repetition of the offense of cruelty, to wit, the battery in January 1946. That repetition revived the wrong previously condoned. There is no evidence upon which a finding of condonation thereafter can be based. Accordingly, we find no merit

in defendant's contention that a divorce should be denied because of condonation.

However, we are confronted with a question of pleading which we raise on our own motion. There was a condonation after plaintiff filed his petition. He filed no supplemental petition alleging events occurring subsequent thereto. The defendant pleaded condonement by her cross-petition and by the amendment. Her first allegation of condonation went to plaintiff's cause of action. Her amendment was an allegation that she had condoned plaintiff's alleged wrongful acts, and that he had thereafter repeated them. Plaintiff made no answer to the defendant's cross-petition.

It is obvious from an examination of this record that the trial court was fully advised as to all the facts, and the parties proceeded upon the theory that condonation and a repetition of the offenses reviving the wrongs were considered as issues, and were tried out and determined.

We do not approve this procedure, although an examination of the record in some of our decisions indicates that this practice has not been questioned heretofore. Plaintiff should have answered the cross-petition if he desired to take issue on the material allegations contained therein. But, even if treated as a default by plaintiff, it is not claimed here that defendant's evidence was sufficient to sustain a decree on her cross-petition. It is obvious that it was known to the parties that there would be evidence of a condonation and a repetition of the offense by the defendant, all occurring subsequent to the filing of the petition and answer and cross-petition. All of the evidence relating to these matters was without the pleadings, and admitted and considered without objection. The parties should have asked leave to amend their pleadings if either desired to rely upon these matters. Where condonation is relied upon as a defense, it should be pleaded. Where a repetition of the wrong condoned is relied upon, it should be pleaded. When this situation became apparent, the trial court should have

required the parties so to plead in order that the record reflect the issues tried and to be determined. As this record stands, the pleadings do not reflect the obvious fact basis of the decree.

However, this appeal brings the case here for trial de novo under the provisions of section 25-1925, R. S. 1943. Westphalen v. Westphalen, 115 Neb. 217, 212 N. W. 429. By the statute we are to reach an independent conclusion "under the pleadings and all the evidence" of the findings of fact "complained of upon the evidence preserved in the bill of exceptions."

Section 25-852, R. S. 1943, provides: "The court may, either before or after judgment, in furtherance of justice, and on such terms as may be proper, amend any pleading, process or proceeding, by adding or striking out the name of any party or by correcting a mistake in the name of the party, or a mistake in any other respect, or by inserting other allegations material to the case, or, when the amendment does not change substantially the claim or defense, by conforming the pleading or proceeding to the facts proved. Whenever any proceeding taken by a party fails to conform, in any respect, to the provisions of this code, the court may permit the same to be made conformable thereto by amendment."

Section 25-856, R. S. 1943, provides: "Either party may be allowed, on notice, and on such terms as to costs as the court may prescribe, to file a supplemental petition, answer or reply alleging facts material to the case, occurring after the former petition, answer or reply."

Where it is clear that all of the evidence to sustain or defeat an issue was adduced by the respective litigants in an equitable action in the district court, it is competent on appeal for this court in the interests of justice to permit amended pleadings to be filed so as to conform to that proof. Bennett v. Baum, 90 Neb. 320, 133 N. W. 439. See Homan v. Steele, Johnson & Co., 18 Neb. 652, 26 N. W. 472; Welton v. DeYarman, 26 Neb. 59, 42 N. W.

338; Scott v. Spencer, 44 Neb. 93, 62 N. W. 312; Pinkham v. Pinkham, 61 Neb. 336, 85 N. W. 285; Raley v. Raymond Bros. Clarke Co., 73 Neb. 496, 103 N. W. 57; Peterson v. Lincoln County, 92 Neb. 167, 138 N. W. 122; Pitman v. Henkens, 125 Neb. 621, 251 N. W. 282.

The parties have not asked permission to file amended or supplemental pleadings.

However, under the provisions of section 25-852, R. S. 1943, power is given the court to conform the pleadings to the proof, when the amendment does not substantially change the claim or defense. A judgment based upon such proof will not be reversed for the reason that such amendment has not actually been made. If the evidence, admitted without objection, clearly proves a claim or defense, the pleading will upon appeal be considered amended accordingly. Root v. Douglas County, 105 Neb. 262, 180 N. W. 46; Allertz v. Hankins, 102 Neb. 202, 166 N. W. 608; Berwyn State Bank v. Swanson, 111 Neb. 141, 196 N. W. 125; Luthy v. Farmers Mutual Hail Ins. Ass'n, 129 Neb. 579, 262 N. W. 490.

The cause is here for trial de novo on the record. It should be determined. Consistent with the above statutes and our decisions, the pleadings will be considered as amended to conform to the proof. A decree will not be denied because of the condition of the pleadings. Other courts have considered a similar problem and have reached a like conclusion. See Ferguson v. Ferguson, 145 Mich. 290, 108 N. W. 682; Egidi v. Egidi, 37 R. I. 481, 93 A. 908; Davison v. Davison, 182 Iowa 1116, 165 N. W. 44; Robbins v. Robbins, 234 Iowa 650, 12 N. W. 2d 564.

At the time of the trial the child Beverly, eight years of age, was in the custody of the mother. The decree was entered April 16, 1946. The trial court in that decree took under advisement the matter of the child's custody, but provided that the plaintiff should pay the defendant $35 for her support and maintenance up to May 15, 1946. This left the child in the custody of the mother. On May 15, 1946, the custody was placed in an uncle and aunt

from May 16, 1946, to September 1, 1946, at which time her temporary custody was to be returned to the mother until the further order of the court. Plaintiff was ordered to pay for her custody and care while with the uncle and aunt. The record discloses that defendant now has the custody of the child and has an award for support pending this appeal. Upon the receipt of the mandate in this action, the matter of future custody and support will be for the determination of the trial court.

We find no error in the trial court's orders as to the custody of the child Beverly. The other child is a boy 17 years of age. No order was made as to his custody and no complaint is made here as to that.

Finally, the defendant complains that the award of alimony is not sufficient. At the time of the marriage, the parties had little of property. The defendant had a cow worth $40, which was sold and the proceeds spent for household furniture. Plaintiff had a small tire and battery shop, its value not shown. At the time of the trial, plaintiff had gross assets of approximately $8,340, consisting of his shop equipment, stock of merchandise, bank accounts, book accounts, building and loan and other stock, household furniture and government bonds. He had outstanding wholesale and local accounts of $1,800, and outstanding checks of over $300 on his bank account. This would reduce the total of his worth to approximately $6,200.

However, included in the list of assets is the amount of $2,000 in U. S. Government "E" bonds, most of which were purchased in 1943. Apparently the value fixed is the maturity and not the present value. The present value is not shown. The record further reveals that for the last 13 years the parties have lived in a house owned by plaintiff's mother. They have not paid rent, but have maintained the property. The rental value is not shown. These facts we think are properly to be considered, although they cannot be exactly weighed in determining the net value of the accumulations of the plaintiff during

the period of the marriage. Also to be considered is the fact that in the list of assets is included furniture valued at $500.

The plaintiff is 45 years of age. The defendant's age is not shown. Neither party has perfect health.

The trial court awarded the defendant $1,750 payable in installments over a year and three months, and the furniture and household goods, except such items as are purely personal to plaintiff. The defendant thus was awarded cash and property totalling $2,250 out of the above estate. We see no reason for disturbing the amount awarded.

Defendant's attorney was allowed an adequate attorney's fee in the trial court. An additional allowance is requested for service in this court. Defendant has elected to make this appeal. Plaintiff has been required to pay the costs of the appeal and to support defendant during its pendency. We see no reasonable justification for the appeal. Under these circumstances, the allowance of an attorney's fee is denied.

The judgment of the district court is affirmed.

AFFIRMED.

CARTER, J., dissenting.

The parties to this action lived together as man and wife for two periods of time after the filing of the petition for a divorce. This was clearly a condonation of the acts furnishing the basis of the cause of action. Assuming that the original cause was revived by the subsequent acts of misconduct by the wife, I have a deep-seated conviction that the husband should not be permitted to obtain a divorce upon his original petition without first pleading the facts relative to the condonation and its revivor. See 17 Am. Jur., § 199, p. 250.

The fact that the defense of condonation and its subsequent revivor does not appear in the pleadings filed by the parties does not preclude their consideration by the court. "The court or the judge, as the representative of the interests of the public, may make

inquiries having a material bearing upon those interests, notwithstanding the issues which may be raised by the pleadings." 17 Am. Jur., § 322, p. 313. The purpose of this rule is to guard against fraud and collusion in the exercise of the court's jurisdiction.

The position assumed by the majority that the pleadings will be treated as having been amended to conform to the evidence eliminates the reasoning behind the foregoing rule. Indiscriminate cohabitation by parties in pending divorce actions will not be curbed by the adoption of the rule announced by the majority. The least that could be required under such a situation is that a mandatory duty be imposed upon the parties to state the truth to the court in the pleadings filed in the case. The public interest will not be subserved, public decency will not be maintained, and fraud and collusion will not be deterred in this type of action by merely advising litigants how it may be done rather than how it must be done. I am not in accord with the superficial treatment given this subject by the majority.

YEAGER, J., concurs in the foregoing dissent.

IN RE ESTATE OF MARY E. SCOTT. MARY E. STRUTHOFF, APPELLANT, V. DR. A. E. COOK, AS THE EXECUTOR OF THE ESTATE OF MARY E. SCOTT, APPELLEE.

26 N. W. 2d 799

Filed April 4, 1947. No. 32137.

1. **Gifts.** The essential elements of a gift inter vivos are donative intent, delivery, and acceptance.
2. ———. Once it is ascertained that it was the intention of the donor to make a gift inter vivos of an undivided interest in a chattel or chose in action, and all is done under the circumstances which is possible in the matter of delivery, the gift will be sustained.
3. ———. In such cases, the delivery may be symbolical or constructive if as nearly perfect and complete as the nature of the property and the attendant circumstances will permit.

4. **Trusts.** A constructive trust is a relationship with respect to property, subjecting the person by whom the title to the property is held to an equitable duty to convey it to another on the ground that his acquisition or retention of the property is wrongful and that he would be unjustly enriched if he were permitted to retain the property.
5. ———. If a party obtains the legal title to property by virtue of a confidential relation, under such circumstances that he ought not, according to the rules of equity and good conscience as administered in chancery, hold and enjoy the benefits, out of such circumstances or relations, a court of equity will raise a trust by construction and fasten it upon the conscience of the offending party and convert him into a trustee of the legal title.

APPEAL from the district court for Cedar County: SIDNEY T. FRUM, JUDGE. *Reversed and remanded with directions.*

Frederick M. Deutsch and *C. W. Peasinger,* for appellant.

Joseph G. Rogers and *Clarence E. Haley,* for appellee.

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

CHAPPELL, J.

Plaintiff brought this action to ascertain and enforce a constructive trust upon the proceeds of a registered $5,000 federal farm mortgage bond in the hands of the executor of the estate of Mary E. Scott, deceased. The bond itself, having come into possession of the executor of the estate, was sold, but as executor he still retained the proceeds therefrom. The questions presented by the pleadings and evidence were whether or not deceased in her lifetime made a gift inter vivos of the bond to plaintiff, and whether or not deceased and her agents, by reason of agreements with and representations to plaintiff upon which she relied, thereafter wrongfully obtained a disclaimer thereto from her. The trial court, after hearing, found and adjudged the issues generally for the defendant and dismissed plaintiff's

petition. Motion for new trial was overruled, and plaintiff appealed to this court, assigning as error substantially, insofar as important here, that the judgment was not sustained by the evidence and was contrary to law. We sustain plaintiff's contentions.

The evidence is without any substantial dispute. Mary E. Scott, a single, aged lady, died testate July 24, 1943. The inventory disclosed that she left an estate consisting of cash in bank, certificates of deposit, government bonds, and the bond involved, totaling $10,673.28, exclusive of interest accumulations. Her will, dated October 13, 1942, which was admitted to probate, after providing for payment of debts and the erection of a monument, gave $100 to each of four churches, $1,500 each to her next of kin and heirs at law, a nephew and four nieces, of whom plaintiff was one, and devised the residue to the United States.

The deceased will hereinafter be designated as the aunt. The other heirs at law had not even seen her for many years. However, during the lifetime of the aunt, plaintiff was her favorite niece and was often referred to as "her girl." They were in a close confidential relationship with each other; they corresponded weekly, and until a few years before the aunt's death, plaintiff frequently visited in her home where the aunt lived with an aged bachelor brother, Frederich Scott, until his death on May 6, 1942. After his death, at the written request of the aunt, plaintiff and her husband, who was an employee of the Internal Revenue Bureau in Los Angeles, California, visited the aunt in September 1942.

During that time the aunt freely expressed an intent to leave her property to plaintiff because plaintiff's father had assisted her financially during his lifetime. She instructed her lawyer to prepare a deed conveying her home to plaintiff, and a deed was so executed and delivered to plaintiff on September 24, 1942, before she left for her home in California. Thereafter, it was duly

recorded and forwarded to plaintiff by the aunt's lawyer. That transaction is not directly involved in this controversy. However, previously, on September 19, 1942, the aunt also informed plaintiff that she had a $5,000 federal farm mortgage bond issued to "Mary E. Scott or Frederich Scott or the survivor," which she desired to give plaintiff. Thereupon, the aunt, with plaintiff and her husband, went to the aunt's bank, where the bond was taken from the aunt's safe deposit box and she instructed the president of the bank to transfer the bond to plaintiff, "her girl," so that she would own the interest and take the place of the aunt's deceased brother, Frederich Scott. Thereupon, such an assignment was duly and properly prepared, signed, sworn to, and executed by the aunt, transferring the bond to "Mary E. Scott or Mary E. Struthoff or The Survivor," and authorizing the transfer thereof on the books of the Federal Farm Mortgage Corporation. The aunt then instructed her banker to send the bond to the proper authorities for that purpose. Pursuant thereto, the bank took possession of the bond and sent it to the Federal Reserve Bank.

In the presence of plaintiff and her husband, the aunt upon the occasion when she signed the deed to the home, also told her lawyer to prepare a will providing for payment of debts, the erection of a monument, the giving of $1,000 each to a nephew and four nieces, of whom plaintiff was one, and giving plaintiff all the residue of her estate. Such a will was duly and properly executed on September 25, 1942, by the aunt, after the lawyer had prepared it as directed by the aunt, and her lawyer, at the aunt's direction, mailed a copy thereof as executed, to the plaintiff. On September 27, 1942, the aunt also wrote to plaintiff, telling her about the execution of the will. It will be remembered that plaintiff was never thereafter informed that the aunt had executed a new will on October 13, 1942, which was also prepared by her lawyer, and plaintiff

had no knowledge thereof until after the aunt's death.

After the bond was sent to the Federal Reserve Bank it required proof of Frederich Scott's death. Delay was thus encountered, and the aunt, for reasons of her own not apparent here, changed her mind as indicated by her affidavit executed October 19, 1942, which was sent to the Federal Reserve Bank, requesting cancellation of the assignment made by her to plaintiff on September 19, 1942, and transfer of the bond to the aunt individually, falsely averring therein that plaintiff had no knowledge of such assignment, and averring that it was without consideration. In the meantime, the president of the aunt's bank, in her behalf twice wrote plaintiff's husband requesting that plaintiff execute disclaimer of her interest in the bond, which plaintiff refused to do. However, on November 28, 1942, the aunt's banker again wrote plaintiff's husband, urging execution of an enclosed disclaimer by plaintiff, representing that "as we understand from Miss Scott's Atty. these funds go to your wife after her death" in any event.

Pursuant thereto, and relying thereon, with knowledge of the provisions of the will of September 25, 1942 then in her possession, but without knowledge or notice of the aunt's subsequent will of October 13, 1942, and without any consideration whatever, plaintiff on December 2, 1942, executed the enclosed disclaimer. Likewise, for reasons not entirely clear and unimportant here, plaintiff thereafter under similar circumstances, executed three other disclaimers. Suffice it is to say that in reply to request on December 16, 1942, for one of them by the aunt's banker, plaintiff's husband wrote: "Sorry to have given you so much trouble. This was Miss Scott's idea in order to save probate costs and a good one." The implications thereof are clear to us. The bond had been given to plaintiff, which naturally took it out of the aunt's estate, but since, as represented to and believed by plaintiff, the aunt's will gave it to plaintiff in any event, she executed the disclaimers.

Under the circumstances, was there a gift inter vivos? We conclude that there was. The aunt was concededly competent and intended to make such a gift. Her words and acts affirmatively so established her intent. They are not consistent with any other theory. Certainly there was not only donative intent but also a delivery of the bond and acceptance thereof by plaintiff, which are the essential requirements of a gift inter vivos. 38 C. J. S., Gifts, § 10, p. 786. The fact that a disclaimer by plaintiff was considered by all as imperative attests its irrevocable character. Everything was done that could have been done to perfect a gift inter vivos. What more could be required when the aunt also retained an interest in the bond until her death, when all of it would pass to the plaintiff as survivor?

It is generally true that delivery is essential to constitute a gift inter vivos. Ordinarily actual delivery is necessary where the subject of the gift is capable of manual delivery, but where actual manual delivery cannot be made, the donor may do that which, under the circumstances, will in reason be considered equivalent to actual delivery. In such cases the delivery may be symbolical or constructive if as nearly perfect and complete as the nature of the property and the attendant circumstances will permit. Annotation, 145 A. L. R. 1386. See, also, 24 Am. Jur., Gifts, § 27, p. 744.

Stated in another way, once it is ascertained that it was the intention of the donor to make a gift inter vivos of an undivided interest in a chattel or chose in action, and all is done under the circumstances which is possible in the matter of delivery, as in the case at bar, the gift will be sustained. Annotation, 145 A. L. R. 1386; Smith v. Pacific Mutual Life Insurance Co., 130 Neb. 501, 265 N. W. 534; Dinslage v. Stratman, 105 Neb. 274, 180 N. W. 81, 14 A. L. R. 702.

In that regard, also, there was nothing inconsistent with retention of possession of the bond by the aunt or

her banker, since it was not incumbent upon the aunt to surrender it, inasmuch as she continued to own an interest analogous to a joint tenancy with right of survivorship in the bond, and her possession was not solely in her own right but partly as agent or trustee for plaintiff, who by the gift was vested with the same interest. Abegg v. Hirst, 144 Iowa 196, 122 N. W. 838, 138 Am. S. R. 285; Collins v. McCanless, 179 Tenn. 656, 169 S. W. 2d 850, 145 A. L. R. 1380; Beach v. Holland, 172 Ore. 396, 142 Pac. 2d 990, 149 A. L. R. 866; In re Estate of Dayton, 121 Neb. 402, 237 N. W. 303; 28 C. J., Gifts, § 22, p. 633, § 26, p. 637; 38 C. J. S., Gifts, § 18, p. 794, § 19, p. 797, § 22, p. 801.

Having concluded that there was a gift inter vivos, we turn to the question whether, under the circumstances, there was a constructive trust enforceable in equity. In Box v. Box, 146 Neb. 826, 21 N. W. 2d 868, this court held that: "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.

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

As early as Pollard v. McKenney, 69 Neb. 742, 96 N. W. 679, affirmed on rehearing at page 753, 101 N. W. 9, this court said: "Closely allied to resulting trusts, and frequently confused with them, are constructive trusts. This class of trusts arises from actual or constructive fraud or imposition, committed by one party

on another. 1 Perry, Trusts (5th ed.), sec. 166. Thus if one person procures the legal title to property from another by fraud or misrepresentation, or by an abuse of some influential or confidential relation which he holds toward the owner of the legal title, obtains such title from him upon more advantageous terms than he could otherwise have obtained it, the law constructs a trust in favor of the party upon whom the fraud or imposition has been practiced. Again, if a party obtains the legal title to property by virtue of a confidential relation, under such circumstances that he ought not, according to the rules of equity and good conscience as administered in chancery, hold and enjoy the benefits; out of such circumstances or relations, a court of equity will raise a trust by construction and fasten it upon the conscience of the offending party and convert him into a trustee of the legal title. Thompson v. Thompson, 16 Wis. 94; McClain v. Johnson, 43 Vt. 48; Hollinshead v. Simms, 51 Cal. 158." See, also, O'Shea v. O'Shea, 143 Neb. 843, 11 N. W. 2d 540; 65 C. J., Trusts, § 215, p. 454, § 226, p. 476.

This court reaffirmed and approved the above statement of the law and explained the occasion and manner of its application in Box v. Box, *supra*. In that opinion this court also approved the statement appearing in 54 Am. Jur., Trusts, § 225, p. 173, to the effect that: "While a confidential or fiduciary relationship does not in itself give rise to a constructive trust, an abuse of confidence rendering the acquisition or retention of property by one person unconscionable against another suffices generally to ground equitable relief in the form of the declaration and enforcement of a constructive trust, and the courts are careful not to limit the rule or the scope of its application by a narrow definition of fiduciary or confidential relationships protected by it. An abuse of confidence within the rule may be an abuse of either a technical fiduciary relationship or of an informal relationship where one person trusts in and relies upon

another, whether the relation is a moral, social, domestic, or merely personal one. The origin of the confidence reposed is immaterial. A confidential relationship within the rule need involve neither a promise for the benefit of another nor an express fiduciary relationship."

Referring to a constructive trust arising out of an oral promise to hold property in trust, or for a specified purpose, or to reconvey, the opinion also approved a statement appearing in 65 C. J., Trusts, § 223, p. 471, which recites that: "Such a trust will arise, however, out of such a promise made in connection with the receipt of the legal title to property, provided the grantor's purpose is an honest one, * * * where confidential relations exist between the parties and there is no other consideration for the conveyance except the promise, or where the promise is the inducing cause of the conveyance, no other consideration being given, and is relied upon by the grantor, or where the conveyance is made as security for a debt and the value of the land exceeds the amount of the debt. The promise need not be express in order to raise a trust, silent acquiescence on the part of the grantee being sufficient where he has knowledge of the grantor's intention and understanding of the transaction." See, also, Wiseman v. Guernsey, 107 Neb. 647, 187 N. W. 55.

In the case at bar, after the gift inter vivos was complete, plaintiff was led to believe, by the agreements and representations of the aunt and her agents, that the property had been willed to plaintiff in any event, at the same time concealing from her the fact that on October 13, 1942, the will of September 25, 1942, so disposing of it had been superseded by one giving it to others. They thereby obtained disclaimer from plaintiff of her interest in the bond without any consideration whatever, and the aunt accepted and retained the benefits therefrom during her lifetime.

Under such circumstances, a constructive trust will be and is imposed by equity in order to restore to

plaintiff the property of which she was thus deprived, the retention of which by the estate would result in an unjust enrichment.

For the reasons heretofore stated, the judgment of the trial court is hereby reversed with instructions to enter a judgment for plaintiff in conformity with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

YEAGER, J., dissenting.

I respectfully dissent from the majority opinion in this case. Since I do not agree with the conclusions and deductions which the majority have drawn from the record it becomes necessary to set forth testimony and deductions therefrom at considerable length.

Mary E. Scott, a spinster of the age of 87 years, died testate, July 24, 1943. On May 6, 1942, an unmarried brother, Frederich Scott, died testate. Prior to his death for many years this brother and sister had lived together. At the time of the death of Frederich this brother and sister were joint owners with right of survivorship of a Federal Farm Mortgage Corporation bond of the face value of $5,000. Up to the time of the incidents involved in this action Mary E. Scott had taken no steps to acquaint the Federal Farm Mortgage Corporation, the obligor of the bond, with the fact that Frederich had died and that as survivor she was the sole obligee.

In September 1942, the plaintiff and her husband, John H. Struthoff, came from their home in Glendale, California, to visit Mary E. Scott. Plaintiff was a niece. They remained and visited in the home of Mary for about nine days. During that time a deed was executed wherein Mary conveyed her home to plaintiff. During this visit Mary E. Scott, the plaintiff, and John H. Struthoff went to the bank where the bond was kept and Mary got the bond, took it to the desk of the president of the bank, and there a transfer was executed by the terms of which the bond was assigned

to Mary E. Scott or Mary E. Struthoff or the survivor. The assignment is as follows: "For value received the undersigned hereby assigns to Mary E. Scott or Mary E. Struthoff or The Survivor the within Federal Farm Mortgage Corporation registered bond and authorizes the transfer thereof on the books of the Federal Farm Mortgage Corporation. Mary E. Scott (Signature of Assignor) Personally appeared before me the above named assignor, known or proved to me to be the owner of the within bond or his duly authorized representative, and signed the above transfer, acknowledging it to be his free act and deed. Witness my hand, official designation and seal. F. S. Stegge (Signature of attesting officer) President, First State Bank, Randolph, Nebr. (Official designation) Dated at Randolph, Nebr. September 19th. 1942 (Seal)." Soon thereafter plaintiff and her husband returned to their home in California.

The bond with the endorsed assignment was sent by the president of the bank to the obligor corporation for transfer on its books and for cancellation and the issuance of a new bond to the assignees. On receipt of the bond the obligor corporation exacted proof of the death of Frederich. This proof was furnished in the form of affidavits by Joseph G. Rogers and Ralph Bacon. The affidavits bear the date of October 2, 1942. However, no bond was issued to the assignees.

On October 19, 1942, Mary executed a new assignment of the bond to herself alone. On the same day she made affidavit that the previous assignment was made without the knowledge or consideration of plaintiff and with the erroneous understanding that she, Mary E. Scott, could dispose of the bond prior to maturity without assignment by plaintiff, which she had learned was not the case under the regulations of the obligor. In the affidavit she asked that the assignment of September 19, 1942, be canceled and that the bond be

transferred to her individually in accordance with the assignment of October 19, 1942.

Apparently on receipt of this affidavit and the second assignment the obligor, or its agent, which appears to have been the Federal Reserve Bank of Kansas City, Missouri, requested a disclaimer from plaintiff of any rights under the first assignment as a condition of transfer under the second.

Request or requests for disclaimer were made by Frank S. Stegge, the president of the bank where the bond was kept prior to the assignments. Four separate disclaimers were executed by plaintiff and forwarded to Stegge. The first was executed December 2, 1942. We do not know the date of execution of the second and third but they were mailed by Stegge to plaintiff respectively on December 16, 1942, and January 1, 1943. The fourth was executed February 16, 1943. The first and the last are in evidence and are as follows:

"The undersigned Mary E. Struthoff, hereby disclaims any title or interest in a bond described as a 3% registered Federal Farm Mortgage Corporation Bond of 1944-49, in the sum of $5,000.00, numbered 311A, which bond was assigned to Mary E. Scott or Mary E. Struthoff or the survivor. Dated this 2d of Dec., 1942. (Signed) Mary E. Struthoff Witness: (Signed) Robt. M. Pratt Signature Guaranteed Glendale Branch Security-First National Bank of Los Angeles By D. H. Smith Vice-President Authorized Signature (Seal)"

"DISCLAIMER OF INTEREST I, Mary E. Struthoff, the second named assignee in the first assignment on the following described bond:

Loan	Denom.	Serial No.	Inscription
3 percent Federal Farm Mortgage Corporation bond of 1944-49	$5,000	311-A	Mary E. Scott or Frederich Scott or the Survivor

do hereby affirm that the assignment to me thereon

has not been completed by delivery, and I do hereby disclaim any and all interest in and to the said bond. Mary E. Struthoff (Signature). Personally appeared before me, Mary E. Struthoff, and signed the above disclaimer of interest, acknowledging the same to be her free act and deed. Witness my hand and official designation. Roland Bush (Signature) Assistant Branch Manager GLENDALE BRANCH Security-First National Bank of Los Angeles (Official designation) Dated at Glendale Calif. Date Feb. 16 1943 (Seal)."

Finally a transfer was made and a new bond to and in the name of Mary E. Scott was issued. After her death the bond was converted to cash by the executor and he now holds the fund as a part of the assets of the estate.

It is upon this fund that the plaintiff seeks to have a trust impressed in her favor. She seeks to have the trust impressed on the theory that by the assignment and the incidents surrounding it a valid and binding gift inter vivos of a joint interest in the bond came to her from Mary E. Scott and that by the death of Mary E. Scott she became the sole owner thereof.

Plaintiff contends that she was induced to sign the disclaimer of interest in the bond by a representation of Mary E. Scott made through an agent that the bond would come to her by will.

In order to make a valid gift inter vivos, there must be an intention to transfer title to the property, and a delivery by the donor and acceptance by the donee, and the transfer must be so complete that if the donor again resumes control over it without the consent of the donee he becomes liable as a trespasser. Ladman v. Farmers & Merchants Bank, 130 Neb. 460, 265 N. W. 252; Smith v. Pacific Mutual Life Ins. Co., 130 Neb. 501, 265 N. W. 534; First Trust Co. v. Hammond, 140 Neb. 330, 299 N. W. 496.

In this case it becomes necessary to determine what Mary E. Scott intended when she executed the assign-

ment to the plaintiff. Hild v. Hild, 135 Neb. 896, 284 N. W. 730.

In ascertaining whether or not a gift inter vivos was intended it is necessary to consider all facts and circumstances surrounding the transactions including subsequent declarations of the donor. Jones v. Ewart, 143 Neb. 717, 10 N. W. 2d 708; In re Estate of Vanicek, 145 Neb. 531, 17 N. W. 2d 477.

Pertinent facts and proper inferences from disclosed facts are that Mary E. Scott was mindful of her advanced years and of impaired health; that she had in mind the preservation of her estate and the safeguarding of her own well-being for her remaining span and the disposition of the estate on her death. The estate consisted of a home, and other assets amounting to almost $10,000. She had never been married and had no surviving brothers or sisters. She had a nephew and four nieces including plaintiff. Plaintiff was the favored of the five. There can hardly be any question that at the time the first assignment was executed that Mary E. Scott intended that plaintiff should succeed her in the ownership of the bond. It is not however certain that she intended this succession to take place prior to her decease.

The following evidence bearing on the question of intent appears in the testimony of plaintiff's husband: "Q Will you detail the facts and circumstances about that. A Well, we were in the kitchen in the morning. Aunt Mary and my wife were washing dishes, I was sitting in a chair at the table when she said, my girl, I have a bond, which would you rather have, the bond or the home. My wife said the bond would be better for her to have under the circumstances since we were so far away, so she says all right, we will take care of it right away, so we went to the bank about ten in the morning. Mr. Stegge and Aunt Mary got the bond out of the vault and Aunt Mary took it over to Mr. Stegge's desk and signed the endorsement on the back of the

bond in the presence of Mr. Stegge. * * * Q I misunderstood you, I thought it was between the time you saw Mr. Rogers and the time the deed was signed, but you think it was before that? A It may have been, I am not positive about that. Later she made the remark, I am going to give you both of them. Q Now at the time that this deed, Exhibit 2, was executed by your aunt, what, if any instructions did she give to Mr. Rogers in reference to her property? A Well, after the deed was signed she picked it up rather suddenly and said, talking to Mr. Rogers, I want all of my estate to go to my girl here and fix the other details, and Mr. Rogers replied, then we will have to make a new will. Then they went on to the details of making a new will. * * * Q What did Mary E. Scott direct Mr. Stegge to do, if anything, with reference to this bond at that time? A She explained to Mr. Stegge that she wanted her brother's interest in the bond assigned to Mrs. Struthoff, and arranged with him to go get the bond out of the vault and it was taken over to Mr. Stegge's desk and Miss Scott endorsed it on the back. Q Did she say anything as to who was to get the bond in the event of the death of the other? A She said she wanted the bond to go to her girl, Mary Struthoff. Q If she died first? A Yes. * * * Q Did she tell Mr. Stegge to send the bond down there so the names would be changed to the two of them? A She wanted Mr. Stegge to attend to the bond whatever was necessary to make the transfer proper. Q And transfer the interest to your wife? A That's right." On cross-examination: "Q What was said about—what did Miss Scott say about transferring the bond, just what did she tell Mr. Stegge? A She wanted my wife's name placed on the bond instead of her brother Fred's, who had passed away, so that she could enjoy the bond if she passed away. Q Did she say she wanted the bond made in such way that she would have control of the bond during her lifetime? A Not at that time. Q What sort of assignment did she ask Mr.

Stegge for, Mr. Struthoff, can you tell me that? A Well, she wouldn't have the ability to suggest about any kind of assignment or those things, but she wanted my wife's name placed in Fred's name on that bond—to take the same place he had while he was living."

The following appears in the testimony of Frank S. Stegge: "Q And pursuant to your talk with Miss Scott, you prepared this assignment on the back of the bond, is that right? A Yes, sir. Q And signed as a witness and as managing officer of the bank? A Yes, sir. Q After that was done, Miss Scott told you to send that in to the Federal Reserve Bank to secure the new bond payable to the two of them, is that right? A Yes, sir." Further in the testimony of this witness and relating to the time when Mary E. Scott desired issuance of the bond in her name alone appears the following: "Q And because of the trouble she was having, she began talking there and wanted the bond back in her name? A That was my opinion. Q She told you that? A No, she didn't give any reason why. Q At any rate she wanted it back in her name and told you to get it back in her name? A Yes, sir." The following appears in the testimony of Joseph G. Rogers, attorney for the deceased, on cross-examination: "Q When was it Miss Scott first told you that she didn't think she was assigning this bond and wanted it back in her name? A I would say it was about the 9th or 10th of October, 1942."

In the bill of exceptions appears a letter, Exhibit 10-A, dated December 16, 1942, dealing with the effort to obtain a sufficient disclaimer from plaintiff. It is from F. S. Stegge and is addressed to the husband of plaintiff. The letter was returned to Stegge with the following note which I think of significance as to the intent of Mary E. Scott when she made the assignment. "Sorry to have given you so much trouble. This was Miss Scott's idea in order to save probate costs and a good one. Wish you had known it required more than the her original signature. Struthoff"

This is substantially all of the evidence contained in the record bearing on the intent of Mary E. Scott in the making of the assignment. It will be observed that in none of it is there testimony or documentary evidence directly declaring that intent. It becomes necessary therefore to resort to inferences from the facts and circumstances disclosed by the record to determine this question.

In favor of the plaintiff is the circumstance that the assignment was absolute and definite in its terms. Also in her favor is the circumstance that directions were given to have the assignment made effective. Further the undisputed evidence that she intended favorable treatment of plaintiff in the disposition of the estate must be considered.

On the other side first and foremost consideration must be given to the fact that there is no statement of intention to transfer either title or possession immediately or to surrender control. Control was never surrendered. It is true that she said she wanted to place plaintiff in the situation of her deceased brother, the former joint owner, but there is a reasonable inference that she wanted full control during her lifetime. As soon as she found that the effect of the assignment was to interfere in that respect she set about to get rid of the interference. The size of the estate supports an inference that she did not intend to put the bond so far beyond her reach that its proceeds would not be available in case of need for support and maintenance. This has force in the light of the fact which is apparent from the record that there was no place for her to look for support except to this bond and the other assets of her estate. She declared that she wanted plaintiff to have her estate but never stated that she wanted her to have it before her own death. After the assignment was made she declared in substance that she wanted control in her lifetime. It is true that she did not declare that this had been her prior intention but for

reasons already given this appears highly probable.

Of significance also is the note of the husband of the plaintiff appearing on Exhibit 10-A. Plaintiff's case depends for the most part on the intent of Mary E. Scott as expressed in the testimony of this witness. This note has, without doubt, reference to the intent in the making of the assignment and expresses the understanding of the witness of her motive and purpose, if not the full intent. The purpose was to save probate costs. He said: "This was Miss Scott's idea in order to save probate costs and a good one." This is not to say that such a motive is a bar to a contention that she intended immediate transfer.

Then again it appears to me that the attitude of plaintiff on being apprised of the desire of Mary E. Scott to have the bond issued in her name and on being asked for disclaimer of interest in the bond is of significance. She never demurred but in due course and without protest executed four disclaimers in order to effect this purpose. I think it not unreasonably inferable from this that she understood from the beginning that Mary E. Scott intended to retain control of the bond during her lifetime. This is not conclusive of course but it requires consideration along with all the other facts and circumstances as disclosed by the record.

Plaintiff contends that she executed the disclaimers on the belief, induced by a letter of the witness Stegge, that she would receive the bond by will of Mary E. Scott. She offered evidence, which was rejected, that it was on advice of her husband in this connection that she signed the disclaimers. This being an action in equity with trial de novo I will consider the evidence as having been admitted. There is no allegation of fraud in the petition and no effort has been made to vacate or set aside the disclaimer on that or any other ground. There is a suggestion of fraud in the brief of appellant but I find no evidence of fraud or overreaching of any party to the action.

It is true that Stegge did on November 28, 1942, write a letter to the husband of the plaintiff in which was contained the following statement: "* * * as we understand from Miss Scottt's Atty. these funds go to your wife after her death, it is only that she wants controll of funds during her life time, personally I dont thing she will ever need to sell the bond, so if your wife will sign the disclaimer we will try and get this matter cleaned up." It is further true that on October 13, 1942, Mary E. Scott executed a will, the effect of which was to deprive plaintiff of any interest in the bond or the estate except to the extent of $1,500.

Whatever may have been the fact with regard to the contents of the will there is no evidence that the statement of Stegge was made with knowledge or consent of Mary E. Scott or even that Stegge had knowledge of the contents of the will and made his statement with reference thereto. Plaintiff before executing the disclaimers never sought information from anyone in a position to authoritatively or accurately inform her in this respect.

However this be, whatever reliance, if any, plaintiff placed upon the letter of Stegge cannot be considered as having weight in proof or disproof of the intent of Mary E. Scott when she executed the assignment. Neither may it be considered of value for any other purpose since the legal effect of the disclaimer which was acted upon by the obligor of the bond is not presented by the record. The plaintiff presented her case on the theory of gift inter vivos alone and the defendant has not resisted her right of recovery on the ground that assuming proof of a gift she may not recover since she disclaimed and thereby surrendered the gift.

In order to sustain a right of recovery the burden was on plaintiff, she having taken the affirmative on the issue, to prove that there was a gift of the bond. Krull v. Arman, 110 Neb. 70, 192 N. W. 961.

After a review of the evidence I have arrived at

the conclusion that plaintiff has failed to sustain the burden. Moreover I am convinced that the evidence preponderantly indicates that Mary E. Scott did not intend a transfer of title to the bond and a complete delivery such as would subject her to an action in trespass if she resumed control without the consent of the plaintiff.

I am of the opinion that at most it was her intention to place plaintiff in such a position as to permit plaintiff to succeed to title and possession of the bond on her death with the right to use the bond for her own purposes if the need arose in her lifetime. This conclusion effectually disposes of all the assignments of error contained in the brief.

Accordingly, as I believe, the decree of the district court should be affirmed.

HARRIET I. COLICK, APPELLANT, V. HARRY COLICK, APPELLEE.
26 N. W. 2d 820

Filed April 4, 1947. No. 32203.

1. **Divorce.** In a divorce suit, where the court has jurisdiction of the parties, it has power to adjust all their respective property interests.
2. ———. The right of a prevailing spouse to have a divorce decree set aside during the six-months' period pending finality thereof is not an absolute but a qualified right.
3. ———. During that period, the control of such a decree is within the sound judicial discretion of the trial court, but good reason must be shown for setting it aside, and such action must not be permitted to produce an unconscionable result, thereby abusing or misusing the judicial process.
4. ———. What constitutes good reason for setting aside such a decree or what constitutes an unconscionable result prohibiting it depends upon the facts and circumstances of each particular case.

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

Winters & Winters, for appellant.

Leon, White & Lipp and *B. J. Boyle,* for appellee.

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

CHAPPELL, J.

On January 11, 1946, the trial court found against defendant on his cross-petition and awarded plaintiff an absolute divorce with custody of their five-year-old daughter, and $50 a month for her support. The decree also approved a property settlement theretofore voluntarily signed, acknowledged, and executed by the parties. By virtue thereof, plaintiff received $5,000 cash, $2,500 cash in escrow payable to her upon condition at finality of the decree, war bonds aggregating from $1,600 to $2,100, a 1941 Chrysler coupe worth from $750 to $1,350, certain diamonds, jewelry, and furs worth $3,490, and all movable furniture and furnishings worth from $2,000 to $4,000 then in their home, the use and occupancy of which plaintiff was given until June 5, 1946. She also received all of her personal belongings and effects, and defendant was ordered to pay a subsequently incurred medical bill of $18 and plaintiff's attorneys' fees of $2,000 for services rendered. She also received $115 cash not accounted for in the settlement.

Defendant was awarded the home with certain fixtures therein. It was worth from $16,500 to $22,500 on the present market. He assumed payment of all taxes and insurance thereon together with all other obligations to date of filing the divorce action. He also received his personal belongings and effects, together with his bank account of $400 and certain other described personal property. In any event, howsoever it may be computed, exclusive of attorneys' fees and costs, plaintiff received approximately one-half to three-fourths of their property, a ratio apparently equal to or transcending any heretofore approved by this court.

Nevertheless, on April 1, 1946, having subsequently

employed another attorney and paid him a $500 retainer fee upon a one-third contingent additional recovery contract, plaintiff filed a petition to set aside the divorce decree substantially on the grounds that it was obtained by fraud, deceit, and unlawful concealment by defendant, acting by and through his attorneys, while in collusion and conspiracy with plaintiff's attorneys. On May 9, 1946, she filed an amended and supplemental petition, which was again amended on June 15, 1946 in elaboration of the original petition, but praying for the same relief.

On June 19, 1946, defendant answered, denying generally, and alleging substantially that the property settlement was not only adequate and generous, but was entered into by plaintiff voluntarily, with full knowledge of its provisions, defendant's property, and her lawful rights therein, after consultation not only with her own attorneys but with numerous other named reputable attorneys. Plaintiff filed reply, and after hearing on the merits, the trial court entered its decree finding and adjudging generally in favor of defendant and against plaintiff at her costs. Her motion for new trial was overruled and she appealed. In her brief she sets forth some nine assignments of error, which may be summarized as contending that the decree was not sustained by the evidence and was contrary to law. We find that her assignments of error are without merit.

At the outset it should be observed and understood that concededly plaintiff's present action was never designed or intended in any manner or means to effect a reconciliation. She took the position that a reconciliation was not only undesirable but impossible. Therefore she desired in any event to retain her absolute divorce with custody of their daughter and $50 a month child support. Her present action was instituted primarily to set aside the decree for the avowed purpose of seeking money and property from defendant additional to

that already received and obtained by the original property settlement approved by the trial court.

In the light thereof, it will be well to briefly review the history of plaintiff's original action. On July 16, 1945, after having surreptitiously persuaded defendant to deed their home to her for a consideration of "One Dollar and love and affection," and reduced the war bonds involved and $5,000 of defendant's cash to her possession, plaintiff filed a positively verified petition seeking separate maintenance from defendant on the ground of extreme cruelty. She alleged, among other things, that the parties had as a result of their joint efforts accumulated a home and other assets, the exact nature and extent of which were unknown to her. Thereafter, defendant was promptly restrained from residing in their home or imposing any restraint upon plaintiff's personal liberty. On July 20, 1945, the trial court granted plaintiff temporary alimony and child support in the sum of $35 per week which she received until after January 11, 1946. In addition, plaintiff continued and still continues to live in and occupy the home in violation of the property settlement approved by the court in its decree, which required that she vacate the same on June 5, 1946. Admittedly, she has also been using the Chrysler coupe and has been spending the $5,000 cash for her own purposes since the settlement.

Between July 16, 1945 and September 24, 1945, plaintiff's original reputable attorneys, one of whom was her uncle, withdrew their appearance for her, she having without legitimate reason claimed and asserted that they had double-crossed and betrayed her. She then consulted with other reputable attorneys who refused her case, but on September 24, 1945, having obtained representation by reputable attorneys, plaintiff filed an amended petition setting forth particularly sensational allegations of extreme cruelty by defendant, and praying for an absolute divorce. Among other things, she also alleged that defendant was possessed of a large amount

of property and money, the exact amount of which was unknown to her. She also prayed for custody and support of their child and for a reasonable and fair allowance for permanent alimony.

On October 25, 1945, defendant filed an answer and cross-petition, alleging extreme cruelty and praying for an absolute divorce from plaintiff. Defendant alleged that he was the actual owner of the home, although in the name of plaintiff, that plaintiff also had in her possession certain personal property of which he was the owner, and prayed that title thereto be quieted in him.

On December 15, 1945, plaintiff filed a reply and answer, and after denying generally, she alleged that defendant voluntarily transferred the home and personal property to her, and prayed for dismissal of defendant's cross-petition. It was in the light of the situation heretofore set forth, that plaintiff thereafter on January 10, 1946, entered into the property settlement involved, after having obtained the counsel and advice of no less than seven reputable attorneys, inclusive of the two who represented her therein.

Likewise, during the pendency of her action it appears without doubt that plaintiff attempted to injure and intimidate defendant. She personally lodged complaints against him with the United States District Attorney, the Department of Internal Revenue, the Nebraska Liquor Control Commission, the draft board, and certain newspapers, thereafter accusing all of fraud or bribery when no affirmative action resulted therefrom. It is interesting to note, also, that plaintiff has counseled with and employed no less than six attorneys since contemplating and instituting the present action, which was brought without prior consultation with or notice to any of the attorneys who were instrumental in perfecting the property settlement and obtaining her decree of divorce.

It is the rule that an attorney is required to exercise the utmost good faith in all his relations and dealings

with his client. Diedrichs v. Stephenson, 101 Neb. 366, 163 N. W. 153. It is also true that an attorney occupies a position of trust and confidence with his clients who have a right to believe and rely upon and be governed by his representations and conduct. Zimmer v. Gudmundsen, 142 Neb. 260, 5 N. W. 2d 707. Suffice it is to say, however, the record in this case fails to sustain plaintiff's contentions that her attorneys did not exercise the utmost good faith in their relations and dealings with her. Her own pleadings and evidence as well as the evidence of others demonstrate clearly that plaintiff at all times not only had knowledge of the provisions of the property settlement but knew about defendant's assets and was advised of and knew her rights pertaining thereto. As a matter of fact, she has had at all times and yet has practically all of defendant's assets in her possession and control. In that connection, there is no evidence that could sustain a finding that she ever was actually or constructively defrauded by anyone. Furthermore, the evidence conclusively establishes that in any event she received a most generous and adequate property settlement. No court would or could justly give her more.

Plaintiff's contentions that the home was hers by reason of a gift from her husband or that title thereto could not be lawfully awarded to defendant by the court, because its transfer to plaintiff was in fraud of creditors; that the $5,000 cash involved in the property settlement was her separate property as a gift from defendant; that the Chrysler coupe was a gift by defendant to plaintiff's mother, and that the war bonds involved were the property of plaintiff and their daughter, are untenable either in fact or in law. Her own evidence refutes those contentions. Other evidence and circumstances make the refutation conclusive. We will not otherwise discuss such contentions at length except to say that all of such property, except two $25 war bonds, was without doubt accumulated by the parties during the marriage relation, was all admittedly paid for by

defendant himself, and was in fact his property and not plaintiff's separate property or estate.

Under such circumstances the following cases are controlling precedent. In Bigelow v. Bigelow, 131 Neb. 201, 267 N. W. 409, this court held: "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." See, also, Felton v. Felton, 131 Neb. 488, 268 N. W. 341; Resnick v. Resnick, 137 Neb. 256, 288 N. W. 816; Johnsen v. Johnsen, 144 Neb. 208, 12 N. W. 2d 837; Metschke v. Metschke, 146 Neb. 461, 20 N. W. 2d 238. In Lippincott v. Lippincott, 144 Neb. 486, 13 N. W. 2d 721, it was recently held: "In a divorce suit, where the court has jurisdiction of the parties, it has power to adjust all their respective property interests."

The last cited case also sets forth at length rules of guidance for justly and equitably fixing the amount of permanent alimony in such cases which, for the sake of brevity, we will not repeat, since the trial court evidently observed them not only in approving but thereafter in affirming the property settlement.

Under the provisions of section 42-340, R. S. 1943, it is the rule that the right of a prevailing spouse to have a divorce decree set aside during the six-months' period pending finality thereof, is not an absolute but a qualified right. The control of such a decree is within the sound judicial discretion of the trial court but good reason must be shown for setting it aside and such action must not be permitted to produce an unconscionable result thereby abusing or misusing the judicial process. What constitutes good reason for setting aside the decree or what constitutes an unconscionable result prohibiting it depends upon the facts and circumstances of each particular case. Carpenter v. Carpenter, 146 Neb. 140, 18 N. W. 2d 737.

We have examined the record, bearing in mind the

rules heretofore set forth, and conclude that plaintiff not only failed to show good reason for setting aside the decree but that to do so would also produce an unconscionable result. Other matters are presented in plaintiff's brief but we do not deem it necessary to discuss them.

For the reasons heretofore stated, the judgment of the trial court is affirmed.

AFFIRMED.

IN RE ESTATE OF REES WILLIAMS, W. H. THOMAS ET AL., APPELLEES, V. ELIZABETH PARRY, APPELLANT.
26 N. W. 2d 847

Filed April 4, 1947. No. 32214.

1. **Executors and Administrators: Wills.** The right to offset an indebtedness owing by a legatee to the estate and apply it to the legacy may be properly asserted in the county court having exclusive, original jurisdiction over the administration of estates.
2. **Descent and Distribution: Wills.** The right to inquire into and determine the indebtedness of a legatee of an estate, and to order a deduction of the same from the legacy, is an incident to the authority of the court to make settlement and distribution of a decedent's estate.
3. **Guaranty.** A guaranty is a collateral undertaking by one person to answer for the payment of a debt or the performance of some contract or duty in case of the default of another person who is liable for such payment or performance in the first instance.
4. ———. A guaranty is collateral to, and made independently of, the principal contract which is guaranteed; and the guarantor's liability is secondary rather than primary or original.
5. ———. Where a guarantor, who has entered into a contract of guaranty at the request of, or with the consent of, the principal obligor, pays or is compelled to pay his principal's debt, the law raises an implied promise, unless there is an express one, on the part of the principal to reimburse the guarantor, and on the payment of the debt the guarantor at once has a right of action against the principal for reimbursement of the

amount which he has paid, with interest thereon at the legal rate.

6. ———. Where the guaranty is made at the principal's request or with his consent, since the principal knows the terms under which payment is to be made and that he has not made payment, no duty rests on the guarantor to notify the principal that he has made the payments when due.

APPEAL from the district court for Platte County: LOUIS LIGHTNER and RUSSELL A. ROBINSON, JUDGES. *Affirmed.*

Sterling F. Mutz, for appellant.

Wagner & Wagner, for appellees.

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

WENKE, J.

Appellant, Elizabeth Parry, appeals from an order of the district court for Platte County directing the appellees, the legal representatives of the estate of Rees Williams, deceased, to retain certain amounts out of the bequests made to her in the will of the deceased.

This action had its inception when Vivian Parry Thompson filed her claim in the estate of Rees Williams, deceased, in the county court of Platte County. The claim was based on a $1,200 note made by Rees Williams.

The legal representatives objected to the allowance of this claim and included in their objections a statement of the history of the indebtedness. They then alleged that the obligation, if any, on the claim filed was the original debt of Elizabeth Parry and prayed that if the court found the estate to be liable that the bequest to Elizabeth Parry be retained and charged to the extent of the estate's liability on the claim.

Elizabeth Parry was notified of these proceedings by letter. She thereupon filed objections, special appearances, demurrer, and an answer, all of which raise the question of the court's jurisdiction. Her objections and answer also deny any liability on the indebtedness.

After a hearing the county court allowed the claim of

Vivian Parry Thompson in the sum of $1,656.33 with interest at six percent from August 10, 1945; found that Elizabeth Parry was primarily liable on said indebtedness and that the estate was secondarily liable; and ordered the legal representatives to retain from the bequests to Elizabeth Parry the full amount of the claim as allowed. Elizabeth Parry thereupon appealed to the district court for Platte County. No appeal was taken from the allowance of the claim.

The district court affirmed the county court and directed that the legal representatives retain out of the bequests to Elizabeth Parry the amount by them paid to Vivian Parry Thompson on her claim allowed in the sum of $1,656.33 with interest at six percent. Her motion for new trial having been overruled, Elizabeth Parry appeals to this court.

Elizabeth Parry will herein be referred to as appellant and the legal representatives of the estate of Rees Williams, deceased, as appellees.

Rees Williams died testate on December 6, 1944. He was at the time of his death a resident of Platte County wherein his will has been duly allowed and admitted to probate. This will bequeathed to the appellant amounts in excess of the claim here involved. The estate is fully solvent and has assets sufficient to pay the claim of Vivian Parry Thompson.

The appellant contends the county court had no jurisdiction of the action because the issue involved is whether appellant was indebted to the estate and the amount exceeds $1,000. Also, that the court erred in not requiring the legal representatives of the estate to pursue the ordinary legal remedies for the collection of a debt in a court of competent jurisdiction, thereby permitting the issue of liability to be tried to a jury.

The present action is one involving the right of retainer. We have passed upon these questions in an action involving the right of retainer in the case of Nelson v. Janssen, 144 Neb. 811, 14 N. W. 2d 662. There-

in the amount involved exceeded $1,000. We therein held: "The right to offset an indebtedness owing by an heir to the estate and apply it to his distributive share, as far as personal property is concerned, may be properly asserted in the county court having exclusive, original jurisdiction over the administration of estates." We also held: "The right to inquire into and determine the indebtedness of a distributee of an estate, and to order a reduction of the same from his share, as far as personal property is concerned, is an incident to the authority of the court to make settlement and distribution of a decedent's estate."

And, as stated in Nelson v. Janssen, *supra*: "* * * under the doctrine which applies to the instant case, the administrator is not required to first reduce the note to judgment in a separate action."

The appellant further contends that the court erred in holding that Elizabeth Parry was indebted to the estate of Rees Williams, deceased. The record discloses the following:

Robert O. Parry died in France on October 15, 1918, during World War I leaving a $10,000 policy of War Risk Insurance of which he had made his five-year-old sister, Vivian Parry, born October 22, 1913, the beneficiary. On March 8, 1919, the appellant filed her petition in the county court of Platte County asking that she be appointed guardian of her minor daughter, Vivian Parry. She was appointed and qualified. This insurance was payable at the rate of $57.50 per month.

By March 3, 1931, there had accumulated in the guardianship a net of $8,227 as is evidenced by her report. Of this amount the appellant had used the sum of $4,600. This is shown in the report by her note and mortgage.

Apparently appellant's husband died intestate sometime prior to 1930 leaving an estate which included real property. This real property, or at least part thereof, was being partitioned. Of the land being partitioned, the ward, Vivian Parry, who was then 17 years of age,

wished to purchase the 80 acres described as the south half of the northwest quarter of Section 25, Township 19 North, Range 3 West of the 6th P. M. in Platte County. To accomplish this purpose she induced her uncle, Rees Williams, to buy it for her at a price of $8,800. She intended to pay for it by using the money in the guardianship. Because appellant had used $4,600 of the funds, as evidenced by her note and mortgage, she was unable to turn over all the funds in cash.

It is also apparent that the representatives of the Veterans Administration were at this time critical of appellant's handling of the ward's funds and seeking to have her resign. The reason for their interest was because of the source of the funds.

Rees Williams, in order to carry out the purchase of the 80 acres for the ward, borrowed $4,000 thereon and took from appellant her $4,000 note and mortgage. He took this note and mortgage with the understanding that he would place it in the guardianship with his guaranty. He had to make this guaranty in order to satisfy the county court and representatives of the Veterans Administration and to get them to approve this note and mortgage as an asset of the guardianship estate.

This $4,000 note was dated March 2, 1931, and due March 1, 1936, and signed by Elizabeth Parry and her two sons, Watkin Parry and Reese Parry, and payable to Rees Williams. It was secured by a mortgage on the interests of the signers in and to the southwest quarter of Section 25, Township 19 North, Range 3 West of the 6th P. M. in Platte County subject to a prior mortgage of $4,500 to Speice-Echols-Boettcher Company. The interests of these parties, as far as the record shows, was: Appellant a life estate plus a one-third of the fee and each of the sons a two twenty-sevenths interest in the fee.

Appellant then filed her resignation and asked that her brother, Rees Williams, be appointed guardian of the minor ward, Vivian Parry. The resignation was ac-

cepted and Rees Williams was appointed and qualified. The court charged appellant with $8,227 and Rees Williams acknowledged the receipt thereof from appellant and released her from all liability for said moneys.

Pursuant to his agreement and understanding with the appellant, the representative of the Veterans Administration, and the county court, Rees Williams carried the $4,000 note and mortgage in the guardianship with his personal guaranty thereof. As stated in one of his reports: "* * * I hold a mortgage against Elizabeth Parry, Watkin Parry and Rees Parry * * * for $4000.00 * * *. The latter is protected by my guarranty, * * *."

Vivian Parry was married on September 6, 1932, and became Vivian Parry Thompson. On January 14, 1933, she signed a receipt wherein she acknowledged she had "Received from Rees Williams, guardian of my property, a note of $4000.00 secured by real estate mortgage, * * *."

On January 16, 1933, the guardian filed his final report stating he had made settlement with the ward and accounted to her for the $4,000 note secured by a real estate mortgage.

The court thereupon discharged the guardian and entered an order which contained the following: "It is therefore considered, adjudged and decreed * * * that * * * the guardian and his bondsman released from further liability in the premises."

The $4,000 note was assigned by the following endorsement: "This note is hereby assigned to Vivian Parry Thompson under order of the County Court of Platte County, Nebraska, in the Matter of the Guardianship of Vivian Parry. Rees Williams Guardian of her property."

The mortgage was also assigned but there was deleted from the assignment the following: "* * * without recourse or in any event or for any cause."

Subsequently the Speice-Echols-Boettcher Company foreclosed its mortgage of $4,500 on the interests on which the $4,000 mortgage was a second lien. By August

18, 1937, this foreclosure had proceeded to sale but not confirmation and had been bid in by the company for less than the amount of its lien.

On August 18, 1937, six of the Parry children, each owning an undivided two twenty-sevenths interest in the fee of the land foreclosed, being the southwest quarter of Section 25, Township 19 North, Range 3 West of the 6th P. M. in Platte County, entered into an agreement with the Speice-Echols-Boettcher Company in order to save this land and for that purpose all agreed to convey their interests to Vivian Thompson. Rees Williams was also a party to this agreement. Appellant was apparently present and had knowledge of this agreement but was not a party thereto.

This agreement contains these provisions as to the $4,000 note and mortgage:

"WHEREAS, * * * Vivian Thompson holds a second mortgage upon said land in the sum of $4,000.00, for the payment of which said Vivian Thompson claims that Rees Williams is liable to her upon his endorsement thereof, * * *

"WHEREAS, it is the intention of the parties hereto by this agreement to effect a compromise and settlement * * * of the liability of Rees Williams to Vivian Thompson * * *.

"NOW THEREFORE, IT IS AGREED by and between the parties hereto as follows: * * *

"II. Vivian Thompson will release and satisfy her second mortgage * * *

"III. Rees Williams will give a note to Vivian Thompson in the sum of $1200.00 to draw interest at five percent per annum, due July 1, 1942, in full satisfaction of his liability to her.

"IT IS FURTHER AGREED * * *

"* * * The said Vivian Thompson shall have a prior right to share to the extent of $2500.00 in the proceeds of the sale of said lands, * * *."

The agreement was carried out. The sale was con-

firmed and all parties conveyed their interests to Vivian Thompson. She released her second mortgage and refinanced the indebtedness as in the agreement provided. On January 2, 1938, Rees Williams delivered his note to Vivian Parry Thompson in the sum of $1,200 due July 1, 1942. This is the note provided for in the agreement of August 18, 1937, and the note on which the claim was filed.

The title to the land is still held by Vivian Parry Thompson under the provisions of the agreement but subject to a balance of $5,400 to $5,500 on the mortgage debt placed thereon to refinance the indebtedness, as provided in the agreement of August 18, 1937.

Nothing was ever paid on the $1,200 note. The claim has been allowed, no appeal has been taken therefrom, and the estate is solvent.

At the time of receiving this note Vivian Parry Thompson gave Rees Williams the following receipt:

"FOR A VALUABLE CONSIDERATION, I hereby release Rees Williams * * * from his liability to me by reason of his guarantee of a certain note of $4000.00, dated March 2nd, 1931 executed by Elizabeth Parry, Watkin Parry and Reese Parry * * * said note * * * having been executed in favor of said Rees Williams and by him assigned to me with payment guaranteed.

"I also acknowledge receipt of a certain note for $1200.00 executed by said Rees Williams in my favor in accordance with contract and agreement dated August 18th, 1937."

"A guaranty is a collateral undertaking by one person to answer for the payment of a debt or the performance of some contract or duty in case of the default of another person who is liable for such payment or performance in the first instance." 38 C. J. S., Guaranty, § 1, p. 1129.

"A guaranty * * * is collateral to, and made independently of, the principal contract which is guaranteed; and the guarantor's liability is secondary rather than

primary or original." 38 C. J. S., Guaranty, § 2, p. 1130.

In the first instance appellant was charged with and accountable for $8,227 of the ward's funds. In order to have her resignation accepted and be discharged she agreed with Rees Williams to give him the $4,000 note which he in turn was to include as part of the guardianship assets with his personal guaranty of payment. This was agreeable to the representative of the Veterans Administration and the county court and later approved by it. It was the basis for her settlement. Under this arrangement and their agreement the appellant was primarily and Rees Williams was secondarily liable.

When the ward married on September 6, 1932, and thereafter made settlement with the guardian there was assigned to her the note and mortgage in the manner as hereinbefore set forth. Thereby she neither waived nor lost any of her rights in and to the assets of her estate. Whatever rights accrued to her during the guardianship were hers by reason of the assignment. That included Rees Williams' guaranty of the $4,000 note. The discharge of the guardian and his release from further liability did not release him from his personal guaranty of this note.

"Where a guarantor, who has entered into a contract of guaranty at the request of, or with the consent of, the principal obligor, pays or is compelled to pay his principal's debt, the law raises an implied promise, unless there is an express one, on the part of the principal to reimburse the guarantor, and on the payment of the debt the guarantor at once has a right of action against the principal for reimbursement of the amount which he has paid, with interest thereon at the legal rate." 38 C. J. S., Guaranty, § 111, p. 1298.

"Where the guaranty is made at the principal's request or with his consent, since the principal knows the terms under which payment is to be made, and that he has not made payment, no duty rests on the guarantor to notify the principal that he has made the payments

when due." 38 C. J. S., Guaranty, § 111, p. 1300.

By virtue of the agreement of August 18, 1937, and the subsequent delivery of the $1,200 note to Vivian Parry Thompson the liability of Rees Williams on his guaranty was settled. This note was given because of the guaranty and as payment on a debt for which Rees Williams was only secondarily liable insofar as the appellant is concerned. This note has now been allowed as a claim against the estate and no appeal taken. The estate is solvent and the only duty remaining, insofar as the legal representatives are concerned, is the ministerial duty of paying it.

Appellants contend that because the statute of limitations has run against the $4,000 note that this action cannot be maintained. At the time Rees Williams executed his $1,200 note limitations had not run on the $4,000 note. Pursuant to the agreement of August 18, 1937, the $1,200 note was given to settle his guaranty of the $4,000 note and in satisfaction thereof. The relationship between Rees Williams and appellant as to the indebtedness evidenced by the $1,200 note is one of secondary and primary liability. To the extent of whatever he has to pay on the $1,200 note Rees Williams is secondarily liable for this note was given in settlement of his liability as a guarantor. No statute of limitations has run thereon but even if it had it would not be applicable under the doctrine of retainer. Fischer v. Wilhelm, 139 Neb. 583, 298 N. W. 126.

Appellant further contends that because the record fails to show that the appellees have actually paid the claim that this proceeding is premature. She contends that a guarantor cannot maintain an action against one primarily liable until he has actually paid. Here the claim has been allowed, no appeal taken, and the estate solvent. The only duty remaining is for the appellees to pay. While the principle contended for has its proper application, when the facts so justify; however, we do not think it should be applied here. The principle of

retainer rests upon the broad principles of equity. Nelson v. Janssen, *supra*. Where, as here, a court dealing in equity has the property under its jurisdiction, it has the power to direct its application in order to carry out justice. The mere failure of the legal representatives to carry out a ministerial duty will not be permitted to prevent such application when the rights of the parties have been fully determined.

For the reasons herein stated we find the holdings of the trial court to be correct and its judgment is therefore affirmed.

AFFIRMED.

CARTER, J., participating on briefs.

THE COUNTY OF MADISON, APPELLANT, V. SCHOOL DISTRICT NO. 2 OF MADISON COUNTY, NEBRASKA, APPELLEE.

27 N. W. 2d 172

Filed April 11, 1947. No. 32166.

1. **Taxation.** The lien of taxes on real property attaches at the time provided by statute.
2. ———. Where a general tax has been levied and assessed on real property, and the title then vested in a governmental subdivision before the date fixed by statute for the tax to attach as a lien, the subdivision takes the property free of the tax burden.
3. ———. When a governmental subdivision purchases property upon which there exists a lien for taxes, the lien is not extinguished. It takes the property subject to the lien to the same extent as would a private purchaser.
4. **Execution: States.** As a general rule, in the absence of a statute expressly granting such right, the land and property of the state or its agencies or political subdivisions is not subject to seizure under general execution. General statutory provisions making property subject to execution are construed to apply only to the property of private persons or corporations, and not to that of the state or its governmental subdivisions.
5. **Schools and School Districts: Taxation.** The real property of a school district held and used for school purposes cannot be

sold to satisfy the lien of a tax under the provisions of chapter 77, article 19, R. S. 1943.

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

Hadley Kelsey, Andrew D. Mapes, Walter R. Johnson, Attorney General, and *Erwin A. Jones,* for appellant.

M. S. McDuffee, for appellee.

Heard before SIMMONS, C. J., PAINE, CARTER, YEAGER, and CHAPPELL, JJ., and NUSS, District Judge.

SIMMONS, C. J.

In this action plaintiff seeks the foreclosure of tax liens under the provisions of chapter 77, article 19, R. S. 1943. The petition sets out, as ten causes of action, the taxes levied for certain years on ten separate parcels of real estate; and prays for a determination of the amounts due, that the property be sold as upon execution, and for equitable relief.

Issues were made and trial had resulting in a finding that the alleged taxes involved are not enforceable and dismissing plaintiff's petition and causes of action. Plaintiff appeals, assigning error of the court in holding that the defendant is not required to pay taxes on real property acquired by it when such taxes have become a lien thereon prior to the acquisition by the defendant. We affirm the judgment of the trial court.

All the evidence was by stipulation. Questions of fact or pleading are not presented. Tax sale certificates have not been issued. The action is to foreclose the tax lien.

The defendant is a school district operating under the laws of the state, its district boundaries including the city of Norfolk (population as of 1940, 10,490) and some adjacent territory. The defendant owns and uses all of the real property involved for school purposes. The records in the offices of plaintiff county show the taxes against the property and that they are unpaid.

The taxes involved fall into three classifications. The issues can be more clearly stated by following the classifications and determining the issue presented as to each classification. The stipulations are insufficient for us to consider here the various methods by which the defendant became vested with the titles involved.

Classification 1. The defendant secured the title in the taxing year before the date of the levy of the tax. All of the taxes involved in the first, fourth, and eighth causes of action, and a part of the taxes involved in the sixth, seventh, and tenth causes of action are in this classification. Article VIII, section 2 of the Constitution, provides in part: "The property of the state and its governmental subdivisions shall be exempt from taxation." See § 77-202, R. S. 1943. It need not be demonstrated that the defendant school district is a governmental subdivision. Substantially, the question presented as to the taxes and lands involved in this classification has been decided in American Province of the Servants of Mary Real Estate Corporation v. County of Douglas, 147 Neb. 485, 23 N. W. 2d 714. It follows that the trial court did not err in dismissing plaintiff's cause insofar as the alleged taxes involved in the first classification are concerned.

Classification 2. The defendant secured the title by deed in the taxing year after the date of the levy of the tax. A part of the taxes involved in the third cause of action and all involved in the fifth and ninth causes of action fall into this classification. The date of the delivery of the deeds is not shown. In the third cause of action the deed is shown recorded August 14, 1914; in the fifth cause of action the deed is shown recorded August 17, 1931; and in the ninth cause of action the deed is shown recorded October 1, 1942. For the purposes of this opinion we consider these dates as the time title passed.

In 1903, the Legislature enacted the following: "Taxes on real property shall be a first lien thereon from and

including the first day of October of the year in which they are levied until the same are paid." Laws 1903, ch. 73, § 14, p. 390, appearing as § 4935, Comp. St. 1907 and § 6302, Rev. St. 1913. In 1919, this act was amended as to a matter not material here. Laws 1919, ch. 163, § 1, p. 367. In 1921, this act was repealed and re-enacted in this language: "Taxes on *all* real property shall be a first lien thereon from and including the first day of *December* of the year in which they are levied until the same are paid, except * * * ." (The emphasized words indicate the changes.) Laws 1921, ch. 133, art. II, § 3, p. 547. This became section 77-203, Comp. St. 1929. In 1933, this act was repealed and chapter 134, Laws 1933, section 1, page 514, enacted providing: "Taxes on real property shall be a first lien thereon from and including the first day of January next following the date upon which the same may be levied, and until the same are paid." This language was contained in chapter 151, Laws 1935, section 1, page 557; in chapter 167, Laws 1937, section 2, page 637; in chapter 98, Laws 1939, section 2, page 422; and in chapter 157, Laws 1941, section 2, page 608. In the 1943 revision, the language is: "All general real property taxes levied for the state, or for any county, city, village or other political subdivision therein, shall be due and payable on January 1 next following the date of levy thereof, and commencing on that date shall be a first lien on the real estate taxed until paid." § 77-203, R. S. 1943.

The original act was before us for construction in Taylor v. Harvey, 90 Neb. 562, 134 N. W. 173, wherein we held that "Though general taxes on real estate are assessed and levied before October 1st, they do not become a lien or an incumbrance at an earlier date. * * * The lien of taxes is a creation of the legislature. It attaches only at the time provided by statute." So here the taxes involved, although assessed and levied before defendant became vested with the title, had not attached as a lien at that time. The defendant having received

title free of the lien, the lien did not attach thereafter because there was no taxable property to which it could attach as of the operative date of the statute.

The entire taxing process had not been completed when the defendant secured title. It is to be noted that under our statute the date of the lien is fixed at a date subsequent to the assessment and levy. This case is therefore clearly distinguishable from those cases where the statute fixed the lien date at and relates it back to a time prior to the assessment and levy, such as in the case of United States v. Alabama, 313 U. S. 274, 85 L. Ed. 1327, 61 S. Ct. 1011.

An almost identical case, both as to facts and applicable statutes, was presented to the Supreme Court of Kansas in City of Wichita v. Anderson, 119 Kan. 241, 237 P. 1024. That court held that the property was exempt, it having been purchased by the governmental subdivision before the taxes became a lien thereon. We agree with the conclusions there reached.

It follows that the trial court did not err in dismissing plaintiff's cause insofar as the alleged taxes involved in the second classification are concerned.

Classification 3. The defendant secured the title in a year following the taxing year or years in which the taxes were levied and became a lien upon the land. The taxes involved in the second cause of action and a part of those involved in the third, sixth, seventh, and tenth causes of action are in this classification.

The first question presented as to the taxes included in this classification is this: Is the lien of the tax dissolved and the property discharged therefrom because of the fact of purchase by a governmental subdivision? If that question is answered in the negative, then the question comes: May the lien be enforced by a sale of the property? We consider the questions in that order.

We have been cited to two of our decisions. The first is City Safe Deposit & Agency Co. v. City of Omaha, 79 Neb. 446, 112 N. W. 598. The decision there turned

upon the rule of estoppel. That question is not presented here. The second, Fontenelle Forest Association v. Sarpy County, 118 Neb. 725, 226 N. W. 327, was an action, as stated in the opinion, "* * * to cancel certain taxes, or assessments, levied against the property of plaintiff, and to enjoin county officials from collecting such taxes or thereafter attempting to levy any taxes upon the association's property." The question presented, and the facts recited in the opinion, do not present the question we have here. It is urged in the briefs here that there were taxes involved in that case which had been assessed and become a lien prior to the date of the acquisition by the association. We are asked to relate that decision to the fact situation stated in the briefs but not stated in the opinion. The rule is: "* * * the controlling effect of a decision must relate to the factual condition as stated in the opinion. To go behind facts so stated and materially to change the fact basis is to remove the decision as an authority." International Harvester Co. v. County of Douglas, 146 Neb. 555, 20 N. W. 2d 620. We do not deem the Fontenelle case as a precedent to be considered in the decision here.

There are many cases where courts have considered similar questions determining them sometimes separately, sometimes together. There are decisions holding that title secured by the state or one of its subdivisions passed free from the lien of the taxes that attached while the property was in private ownership. In some of the decisions the distinction is not made between taxes, a lien when the property was acquired, and taxes levied subsequent thereto. Some of the decisions find a difference between taxes which were a lien upon property acquired by a governmental subdivision and property acquired by those agencies that are permissively exempt, such as educational, religious, and charitable organizations (see article VIII, section 2 of our Constitution). Some of them consider the tax lien merged in the fee title. Some say the state should not be required to tax it-

self to pay taxes previously assessed. Some base the decision on grounds of public policy. Some use one or more of these reasons. They come to the conclusion that the property cannot be sold to compel payment of the tax. See City of Laurel v. Weems, 100 Miss. 335, 56 So. 451; State v. Locke, 29 N. M. 148, 219 P. 790; State v. Galyon, 154 Okl. 204, 7 P. 2d 484; City of Harlan v. Blair, 251 Ky. 51, 64 S. W. 2d 434; State v. County of Minidoka, 50 Idaho 419, 298 P. 366; State v. Snohomish County, 71 Wash. 320, 128 P. 667; State v. County of Maricopa, 38 Ariz. 347, 300 P. 175; Halvorsen v. Pacific County, 22 Wash. 2d 532, 156 P. 2d 907.

There also are decisions where the court refused to determine the effect of the transfer on the lien and held that in any event it was unenforceable by a proceeding against the property. State v. Reed, 47 Idaho 131, 272 P. 1008; Foster v. City of Duluth, 120 Minn. 484, 140 N. W. 129; State v. Burleigh County, 55 N. D. 1, 212 N. W. 217.

There also are cases holding that when a government or a governmental subdivision purchases property upon which there exists a lien for taxes, and the lien is not extinguished, it takes it subject to the lien to the same extent as would a private purchaser. United States v. Alabama, *supra;* Triangle Land Co. v. City of Detroit, 204 Mich. 442, 170 N. W. 549, 2 A. L. R. 1526; City of Santa Monica v. Los Angeles County, 15 Cal. App. 710, 115 P. 945; State v. Salt Lake County, 96 Utah 464, 85 P. 2d 851; In re Graley's Estate, 183 Wash. 268, 48 P. 2d 634; Childress County v. State, 127 Tex. 343, 92 S. W. 2d 1011; Public Schools of City of Iron Mountain v. O'Connor, 143 Mich. 35, 108 N. W. 426; City of Puyallup v. Lakin, 45 Wash. 368, 88 P. 578.

We have not undertaken in the above summary of the cases to point out the distinctions made by the courts in the decisions but rather to classify the cases as to results.

We are in accord with the conclusions reached by the latter group of decisions.

Our Constitution provides: "The property of the state and its governmental subdivisions shall be exempt from taxation. (Next follows provision for exemptions not involved here.) No property shall be exempt from taxation except as provided in this section." Art. VIII, § 2. See § 77-201, R. S. 1943. As has been pointed out, the statutes provide when general real property taxes shall become a lien and that they shall continue to be a lien until paid.

The meaning of these provisions is clear. The property of the state and its governmental subdivisions is not subject to taxation. Certain other property not involved here may be or is exempted from taxation. No other property is exempt. It is to be taxed. There is not involved here any effort to tax the property of the defendant school district. This is an effort to enforce a tax lawfully a lien on property when in private ownership, and for a period when it could not constitutionally have been exempted from taxation.

Our Constitution further provides: "The Legislature shall have no power to release or discharge any county, city, township, town or district whatever, or the inhabitants thereof, or any corporation, or the property therein, from their or its proportionate share of taxes to be levied for state purposes, or due any muncipal corporation, nor shall commutation for such taxes be authorized in any form whatever." Art. VIII, § 4.

Section 77-1737, R. S. 1943, provides: "No county or town board, city council or village trustees shall have power to release, discharge, remit or commute any portion of the taxes assessed or levied against any person or property within their respective jurisdictions for any reason whatever."

If we were to hold that the lien of the tax was dissolved and extinguished merely because the property subsequently became the property of the school district, we would, by judicial decision, be approving in effect that which the Constitution and the statute prohibit.

The defendant district is not the only subdivision of government that is a beneficiary of the taxes here involved. A portion of these taxes are due to the state, a portion to the county, a portion to the school district, and perhaps to other subdivisions. There can be no merger of a lesser estate in a greater estate under these circumstances.

If we were to hold that the lien of the tax is dissolved and the property passed free from the lien, and if in determining the sale price the amount of the tax was deducted from the value of the land, the result would be the enriching of the defendant school district at the expense of the other units entitled to the benefit of the tax. The effect would be to take the property of one unit of government and hand it to another. That the courts have no authority to do. On the other hand, if at the time of the sale, the amount of the tax was not deducted in determining the value of the land and the value paid to the vendor, then to the extent that the sale price was determined as for property free from the lien, the vendor would be receiving in effect a remission of the tax. That result clearly is forbidden by the Constitution and statute. If the property passes burdened by the lien, then neither of these results will follow either in whole or in part.

We are clearly of the opinion that when the title to the property in this classification passed to the defendant district, it passed subject to the burden of the tax and is so held until that burden is discharged.

This brings us to the question as to whether or not the plaintiff can enforce the lien in this proceeding by a sale of the property.

Under the provisions of chapter 77, article 19, R. S. 1943, the procedure, except as provided in the act, is in the same manner and to the same effect as in the foreclosure of real estate mortgages. § 77-1901, R. S. 1943. It contemplates the sale of the lands if not redeemed. § 77-1911, R. S. 1943.

The plaintiff calls attention to section 25-1555, R. S. 1943, providing: "Nothing in this chapter shall be considered as exempting any real or personal property from levy and sale for taxes." The chapter deals with executions and exemptions.

As a general rule in the absence of a statute expressly granting such right, the land and property of the state or its agencies or political subdivisions is not subject to seizure under general execution. General statutory provisions making property subject to execution are construed to apply only to the property of private persons or corporations, and not to that of the state or its governmental subdivisions. 33 C. J. S., Executions, § 35, p. 164; 21 Am. Jur., Executions, § 457, p. 229.

The public policy of this state is clearly in accord with this rule. From territorial days to the present time this state has had a statutory method of compelling the payment of judgments secured against governmental subdivisions. §§ 77-1619 to 77-1623, inclusive, R. S. 1943.

We conclude that the real property of the defendant district held and used for school purposes cannot be sold to satisfy the lien of the tax under the provisions of chapter 77, article 19, R. S. 1943.

The method of enforcing the collection of taxes is a matter for legislative determination. 61 C. J., Taxation, § 10, p. 81; 51 Am. Jur., Taxation, § 980, p. 859. Chapter 77, article 19, R. S. 1943, is a statutory procedure for the enforcement of taxes by foreclosure proceedings. It is a procedure enacted and designed to accomplish a particular purpose. From beginning to end it contemplates the ultimate sale of the property, if need be, to satisfy the tax. But the property here involved cannot be so sold. The tax is not a debt of the district in the ordinary acceptation of that term. The question of how much the district should be required to pay because of the lien on the property which it holds is not within the issues in this action. It cannot properly be determined in this action.

We have not overlooked the provisions of sections 77-1901 and 77-1902, R. S. 1943, which provide that these actions shall proceed in the same manner and with like effect as in the foreclosure of real estate mortgages, except as otherwise provided in the act. We discussed similar language in Douglas County v. Barker Co., 125 Neb. 253, 249 N. W. 607, and held that it invoked equitable jurisdiction, implied the exercise of equitable powers, and authorized a suit in equity for the foreclosure of tax liens. But the authority is so limited.

We are of the opinion that the remedy invoked by the plaintiff is not applicable here. Accordingly, the judgment of the trial court is affirmed.

AFFIRMED.

WENKE, J., participating on briefs.

WILLARD W. MOORE, DOING BUSINESS AS SCOTTSBLUFF SASH AND DOOR COMPANY, APPELLEE, V. ERNEST W. SCHANK, APPELLANT.

27 N. W. 2d 165

Filed April 11, 1947. No. 32180.

1. **Trial: 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. If there is competent evidence to support them, such findings will not be disturbed on appeal.
2. **Account Stated.** In an action founded upon an account, it shall be sufficient for the party to give a copy of the account with all credits thereon, and to state that there is due to him on such account from the adverse party a specified sum, which he claims with interest.
3. **Pleading.** The court will, when possible, sustain the theory intended by the pleader.
4. **Appeal and Error.** No judgment shall be reversed or affected by reason of any error or defect in the pleadings or proceedings which does not affect the substantial rights of the adverse party.
5. **Account, Action on.** In the absence of a contract upon the

subject, unsettled accounts do not draw interest until six months after the date of the last item.

6. **Judgments: Appeal and Error.** Where the excessive amount in a judgment is subject to exact determination, a remittitur may be required as a condition of affirmance for the correct amount.

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

Dwight Elliott and *Frank Glebe,* for appellant.

Morrow, Lovell & Bulger, for appellee.

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

SIMMONS, C. J.

This is an action to recover the balance due on an open account for goods sold and delivered. Plaintiff recovered a judgment. Defendant appeals. We require a remittitur and, subject thereto, affirm.

After several pleadings had been filed in this action, plaintiff secured permission to file and filed an amended petition. This matter went to trial upon the issues presented by plaintiff's amended petition; defendant's answer, counter-claim, and set-off; and plaintiff's reply and answer to counter-claim.

Plaintiff's petition sets out four causes of action. In the first cause of action plaintiff alleges that between August 1942 and April 1945, he sold and delivered to defendant, at his request, goods, wares, and merchandise, and advanced cash in the amount of $31,912.77; that the defendant by payments and the return of goods was entitled to a credit of $28,773.35, leaving a balance of $3,139.42; that numerous statements had been rendered showing said balance due, plus interest in the amount of $198, making a total of $3,337.42; and that defendant retained the accounts, examined the items as shown by plaintiff's ledger, agreed that the amount

as shown by the ledger was correct, and promised to pay the same. Plaintiff further alleged that subsequent to the commencement of the action, defendant had returned material of the value of $1,784, leaving a balance due of $1,553.42. Plaintiff attached an itemized statement of the account showing dates, items, debits, and credits (excepting the last credit of $1,784).

The errors assigned here do not require that we set out in detail the remainder of the pleadings.

Plaintiff's second cause of action alleged an account stated in the sum of $1,408.92. Plaintiff's third cause of action alleged a balance due of $1,637.50 for merchandise sold and delivered after the account stated. Plaintiff's fourth cause of action was for goods of plaintiff in the amount of $93, converted to the use of the defendant and charged to defendant by plaintiff. Plaintiff prayed for judgment on his second, third, and fourth causes of action, or in the event it was found there was no account stated between the parties, that he have judgment on his first cause of action.

Defendant filed a motion to require plaintiff to elect upon which cause he expected to maintain his action, or to strike the second, third, and fourth causes of action. Thereafter the parties filed, and the court approved, a stipulation waiving trial by jury and agreeing to trial to the court. Two days later the motion to elect was submitted and overruled.

Defendant then filed his answer and counter-claim, denying generally, admitting the purchase of goods, wares, and merchandise, but denying that the total sales were correct, admitting payments made, and denying an account stated. Defendant challenged the correctness of the base price of many items and denied receiving articles covered by three separate invoices. He further denied the legality of the charge of $198 for interest, and alleged that plaintiff was indebted to him in the sum of $1,531.39. Defendant sought to recover this amount as a counter-claim, together with two

other counter-claims for labor and material furnished the plaintiff. For reply, plaintiff made admissions and denials not material to the decision of the errors assigned here.

The matter was tried. The trial court found in favor of the plaintiff and against the defendant on the plaintiff's first cause of action, and determined that there was due the plaintiff the sum of $1,553.42 (which included $198 for the interest item). The court further found, "* * * it is unnecessary to determine whether or not, at said time or at any other time, an account was stated between plaintiff and defendant and it is further unnecessary to make any finding on the second, third and fourth causes of action, * * *." The court found for defendant on his counter-claims in the sum of $126.65. Judgment was rendered for the plaintiff against the defendant in the sum of $1,426.77. Motion for a new trial was made and overruled.

Defendant appealing presents here the contentions that the court erred in finding that the evidence was sufficient to obtain a judgment on plaintiff's first cause of action; that the court erred in considering plaintiff's first cause of action as both an action on an open account and an account stated and rendering judgment "based upon both theories"; in refusing to make plaintiff elect upon which cause of action he intended to rely and in forcing defendant to trial on all causes of action; and in allowing the interest charge of $198.

The rule is: "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." Faught v. Dawson County Irrigation Co., 146 Neb. 274, 19 N. W. 2d 358.

There is competent and ample evidence to sustain the court's findings based upon an open account. It is not necessary to review it. The assignment is without merit unless there is merit to defendant's contention that

the first cause of action pleads and rests upon an account stated and not an open account. It is obvious that the trial court did not render a judgment based upon both theories.

We are of the opinion that plaintiff's first cause of action is upon an open account. Section 25-837, R. S. 1943, provides: "In an action, * * * founded upon an account, * * * it shall be sufficient for the party to give a copy of the account * * * with all credits * * * thereon, and to state that there is due to him on such account * * * from the adverse party, a specified sum, which he claims with interest." Clearly, plaintiff pleaded an open account under the provisions of this act, and just as clearly, the pleading is not an account stated. While plaintiff alleged that he had rendered various statements of the account to defendant, and that defendant had examined plaintiff's ledger, agreed that the amounts were correct, and promised to pay the same, yet it is evident that the cause rests upon the open account which was pleaded and not upon the agreement and the promise. The trial court obviously so construed the pleading. It was obviously the theory of the pleader. We have held: " 'The court will, when possible, sustain the theory intended by the pleader.' " Rhoads v. Columbia Fire Underwriters Agency, 128 Neb. 710, 260 N. W. 174. We see no merit in defendant's contention.

Defendant's next contention is that the trial court erred in refusing to make the plaintiff elect upon which cause of action he intended to rely and forcing defendant to trial on all causes of action. The rule is that no judgment shall be reversed or affected by reason of any error or defect in the pleadings or proceedings which does not affect the substantial rights of the adverse party. § 25-853, R. S. 1943. We need not determine whether or not the action of the trial court was erroneous. It is not contended by defendant that any substantial right was affected, and it is not appar-

ent to us that the ruling had any such effect. There is no merit in the assignment.

This brings us to the assignment that the court erred in allowing an interest charge of $198. The charge was entered on the account on March 1, 1945, and was calculated on the basis of nine percent for one year on the amount that "had been due for a long time." Plaintiff testified that some days thereafter he told defendant of the charge, and that defendant agreed to pay it. Defendant denied the agreement. The court found that issue of fact in favor of plaintiff.

The original petition herein was filed on May 15, 1945. The rule is that in the absence of a contract upon the subject, unsettled accounts do not draw interest until six months after the date of the last item. Garneau v. Omaha Printing Co., 52 Neb. 383, 72 N. W. 360; § 45-104, R. S. 1943. The statutory rate of interest was six percent at the time; the contract rate was nine percent. § 45-102, R. S. 1943. It is evident that the interest charged cannot be sustained in the absence of a contract. Plaintiff argues that an agreement to forbear to sue is a sufficient consideration for a promise, and that such a consideration may be implied, actual forbearance being evidence of an agreement to forbear. We need not determine that contention. The charge was made before there was any promise to pay interest; there was no discussion of forbearance and no indication that there was a forbearance in fact as a result of the agreement. The promise is clearly one without consideration.

The trial court erred in including the amount of $198 in the judgment. Where the excessive amount in a judgment is subject to exact determination, a remittitur may be required as a condition of affirmance for the correct amount. Garneau v. Omaha Printing Co., *supra*.

The plaintiff is required to file with the clerk of this court, within 20 days from the filing of this opinion, a remittitur from the judgment of the sum of $198, as of

the date of the judgment. If not so done, the judgment rendered thereon will be reversed. In case the remittitur is so entered, the judgment will be affirmed as so reduced.

JUDGMENT ACCORDINGLY.

WILLIAM MEIER ET AL., APPELLEES, V. HELEN G. GELDIS ET AL., APPELLANTS.

26 N. W. 2d 813

Filed April 11, 1947. No. 32179.

1. **Bills and Notes.** One who makes payment of a promissory note to a third person not the owner of the note and not in possession of it, at a place other than the place of payment designated therein, assumes the burden of proving the authority of such third person to collect the money.
2. **Agency.** An agent who has authority to collect payments and interest on a note does not thereby have authority to collect the principal before it is due.
3. ———. The ostensible authority of an agent can be invoked against the principal only by one who has relied upon such authority in dealing with the agent. Such authority, once established, is prospective and ordinarily creates no retroactive evidentiary inference.
4. **Payment: Agency.** A debtor who makes payment to a third person not in possession of the note without adequate inquiries regarding its ownership and the powers of such third person, is negligent in failing to use ordinary business caution, and when loss results it must fall on such debtor under the rule that where one of two parties to a transaction must suffer loss through the misconduct of a third person, the burden must fall on the person whose negligence made the misconduct of the third person possible.

APPEAL from the district court for Douglas County: JAMES T. ENGLISH, JUDGE. *Affirmed.*

William N. Jamieson, for appellants.

Cranny & Moore, for appellees.

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

CARTER, J.

This is an action to foreclose a real estate mortgage on a residence property in the city of Omaha. From a decree in favor of the plaintiffs, ordering a sale of the property to satisfy the lien of the mortgage, the defendants appeal.

The record shows that on May 8, 1940, one Alice G. Ledyard, now deceased, executed and delivered her promissory note to the plaintiffs in the principal amount of $1,500, payable in installments, with interest at six percent from date until maturity and at the rate of eight percent after maturity. The amount due on the note is $1,479.43, which amount is not in issue. The defendants contend that the note and mortgage have been fully paid.

It appears that Alice G. Ledyard conveyed the property in her lifetime to one Mathison, who in turn conveyed it to the defendants Geldis. Payments were made to plaintiffs in accordance with the terms of the note and mortgage until September 12, 1943, at which time there was unpaid the approximate sum of $1,300. On that date defendants paid one John H. Owens the $1,300 by check and received a release of mortgage purportedly signed by plaintiffs. The release was duly recorded. The release was subsequently found to be a forgery. The $1,300 was retained by Owens and converted to his own use. The original note and mortgage were retained at all times by the plaintiffs. It is the contention of defendants that Owens was the agent of plaintiffs, with authority to collect the principal and interest due on the note and mortgage. This is denied by the plaintiffs and constitutes the issue in the present litigation.

The evidence shows that Owens had a power of attorney to act for Alice G. Ledyard in leasing, selling, or mortgaging the property in question and to receive moneys due her from the sale or rental thereof. It appears that in the spring of 1940, Owens sold a farm near Calhoun, Nebraska, on which plaintiffs had a first mort-

gage for $1,000. Owens called at the home of plaintiffs and advised them that the $1,000 mortgage was to be paid off. He then informed plaintiffs that he had a client who desired a loan for $1,500. He gave them the description of the property here involved. Plaintiffs went to Omaha, inspected the property, and made the loan to Mrs. Alice G. Ledyard. The note and mortgage were signed by Mrs. Ledyard and the check for the $1,500 was made payable to her, although it was delivered to Owens. Both principal and interest were payable at Blair, Nebraska, by express provision in the note.

Commencing in 1944, plaintiffs had several dealings with Owens, which the defendants claim constituted such a course of conduct as to authorize Owens to receive the $1,300 check as the agent of the plaintiffs. The transactions relied upon are briefly as follows: On March 28, 1945, Owens obtained $3,000 from plaintiffs on a note and mortgage purporting to be signed by Helen Geldis and George Geldis. The names of the signatories to the note and mortgage proved to be forgeries. On July 20, 1945, Owens obtained $12,000 from plaintiffs on a note and mortgage purporting to be signed by J. T. Maxwell. The signatures on this note and mortgage were also shown to be forgeries. It also appears that subsequent to 1940, Owens obtained $3,200 from plaintiffs on a note and mortgage purporting to be signed by Carl A. Swanson and Caroline G. Swanson. The signatures to this note and mortgage were shown to be forgeries. It further appears that Owens obtained $3,500 and $8,500 from plaintiffs on two mortgages purporting to be signed by Louise Elwood subsequent to 1940, both of which were forgeries. Upon the death of John H. Owens on August 9, 1945, the true nature of the foregoing transactions were first discovered.

The record discloses that when the property in suit was conveyed to the defendants, they took it subject to a mortgage of $500 to Mathison in addition to plaintiffs' mortgage of $1,500. Defendants paid in $20 per month

to Owens to apply on these mortgages. Owens in turn made the payments to plaintiffs on their mortgage as they became due. This he continued to do after converting the $1,300 to his own use. This, of course, is not such conduct as would make Owens the agent of plaintiffs in the collection of the amount due on the mortgage. Plaintiffs knew that Owens held a power of attorney from Alice G. Ledyard and they assumed that he was acting in her behalf. Plaintiffs state that Owens was not their agent in any of the transactions hereinbefore mentioned and that they never paid him a commission or other form of compensation. They did loan money to alleged clients of his and made the checks payable to Owens. While they thereby mistakenly assumed that Owens was honest in all his dealings, such evidence does not make him an agent for collection of a note and mortgage which was not in his possession. The evidence relied upon consists of transactions which occurred long after the one at bar. While we are of the opinion that the evidence does not show that Owens was the agent of plaintiffs in any of the transactions referred to, it certainly is not sufficient to sustain a finding that Owens was the agent of the plaintiffs in accepting the $1,300 due on plaintiffs' mortgage on September 12, 1943.

The question of agency is one of fact and there is no presumption of its existence. The party alleging the existence of the agency relationship assumes the burden of proving the agent's authority and that the acts of the agent, for which liability against the principal is sought, must be shown to be within the scope of the agent's authority. The doctrine of the ostensible authority of an agent can be invoked only by those who have dealt with the agent on the faith of such ostensible authority. Fike v. Ott, 76 Neb. 439, 107 N. W. 774. While we do not think the subsequent transactions referred to herein establish any ostensible authority for Owens to collect the amount due on the note and mort-

gage here in suit, assuming that they did, it could not benefit the defendants in this case for the reason that there is no retroactive evidentiary inference to be drawn from the establishment of the relationship in this manner. At the time of the payment of the $1,300 to Owens, the note and mortgage were not due. Assuming that Owens had authority to collect principal and interest on the note as it became due, this did not authorize him to collect the principal before maturity. Walsh v. Peterson, 59 Neb. 645, 81 N. W. 853; Porter v. Ourada, 51 Neb. 510, 71 N. W. 52. We think that defendants left these funds with their agent, Owens, for the purpose of paying off the mortgage lien, and when Owens embezzled the funds it did not constitute a payment of the mortgage debt. This is particularly so when Owens did not have the note and mortgage in his possession for delivery to defendants upon payment.

It is a cardinal rule that when one of two parties to a transaction must suffer a loss through the misconduct of a third person, the superior equities will be determined from all the material circumstances and the burden will be allowed to fall where equity and justice place it. Omaha Elevator Co. v. Chicago, B. & Q. R. R. Co., 104 Neb. 566, 178 N. W. 211. Under this rule the loss must fall upon the defendants, because by their failure to use ordinary business caution in demanding a return of the note upon its payment, and in dealing with Owens when he did not have the note in his possession, they made it possible for Owens to embezzle the money. It is not the duty of a creditor to seek out his debtor—it is the duty of the debtor to seek his creditor. If defendants had insisted upon the return of the note and mortgage upon their payment, and if they were not produced, for a satisfactory showing as to their ownership and the rights of Owens with reference thereto, Owens would never have been able to perpetrate and conceal the fraud. The defendants negligently failed to exercise the caution to be reasonably expected

under such circumstances. Equity requires that the loss fall upon them. Haskin v. Langdon, 127 Neb. 535, 256 N. W. 8. The judgment of the trial court is correct and it is affirmed.

AFFIRMED.

IN RE CLAIM AFFIDAVIT OF PARSONS, FOR THE USE OF THE WATERS OF MONROE CREEK FOR IRRIGATION.
CON PARSONS, APPELLANT, V. HARRY WASSERBURGER ET AL., APPELLEES.
27 N. W. 2d 190

Filed April 11, 1947. No. 32150.

1. **Waters.** The owner of land having an irrigation appropriation priority established before April 4, 1895, upon which there has been no adjudication is entitled, on proper application and due notice to interested parties, to an adjudication thereon by the Department of Roads and Irrigation.
2. ———. The Department of Roads and Irrigation by section 46-208, R. S. 1943, exercises the same power to adjudicate irrigation priorities established prior to April 4, 1895, as did the Board of Irrigation under chapter 69, Session Laws of 1895.
3. ———. The Department of Roads and Irrigation has jurisdiction to hear, determine, and make adjudication upon irrigation appropriation rights and priorities, and in the absence of an appeal as provided by law, the orders made in a proper proceeding in reference thereto are final and binding upon the parties and their successors.
4. ———. An adjudication by the Department of Roads and Irrigation upon irrigation appropriation rights and priorities, not appealed from, is res judicata upon later applications involving the same claims and the same parties or their successors.

APPEAL from Department of Roads & Irrigation. *Affirmed.*

Schnurr & Mumby and *Atkins & Lyman*, for appellant.

Neighbors & Danielson, for appellees.

Heard before SIMMONS, C. J., PAINE, CARTER, YEAGER, and WENKE, JJ., and NUSS, District Judge.

YEAGER, J.

This is an appeal by Con Parsons, appellant, from an order of the Department of Roads and Irrigation denying his application for an adjudication of a vested right to an appropriation of 9/14ths cubic feet of water per second of time from Monroe Creek in Sioux County, Nebraska, for irrigation of 34 acres of land in the northeast quarter of the southeast quarter of Section 28, and 11 acres in the southwest quarter of the northwest quarter of Section 27, all in Township 33, North, Range 56, West of the 6th Principal Meridian, in Sioux County, Nebraska.

Harry Wasserburger filed written objection to the application with the Department of Roads and Irrigation and he is denominated as appellee in the proceeding before this court.

Appellant contends that he has a vested right to the appropriation on account of appropriation and use prior to April 4, 1895, the date after which, by an act of the Legislature, prior appropriators had the right to have their priorities determined by the Board of Irrigation which was set up under the provisions of that act. The act is chapter 69, Session Laws of 1895.

Under section 20 of the act it was provided: "Each appropriation shall be determined in its priority and amount, by the time at which it shall have been made, * * *."

Section 49 provided: "Nothing in this act contained shall be so construed as to interfere with or impair the rights to water appropriated and acquired prior to the passage of this act."

The contention of the appellant is that there was an appropriation from Monroe Creek for these two land areas from a date prior to April 4, 1895, and that the appropriation has been used continuously from the orig-

inal date of appropriation which gives him the right to an adjudication by the Department of Roads and Irrigation of priority from the date of the original appropriation.

It is not questioned that if these lands had an appropriation prior to April 4, 1895, or that one was claimed for them, the owner thereafter had the right to an adjudication upon it, and still has unless there has already been an adjudication. The appellee contends that there has been an adjudication adverse to the appellant.

The action here was properly instituted before the Department of Roads and Irrigation since this Department, by section 46-208, R. S. 1943, exercises the powers and functions of the Board of Irrigation provided for in the act of 1895.

The appellee, by written objections filed, denied generally all claims of appellant and specifically denied that appellant had an appropriation with a priority date before 1895. Appellee claimed an appropriation, the date of which is not of importance here, for his own lands, the description of which is likewise not of importance. He further alleged that the Department of Roads and Irrigation had previously adjudicated that no appropriation existed for these areas prior to 1895 which adjudications were never appealed from, have become conclusive and final, and are res judicata of the claim of appellant in this proceeding.

The facts upon which a determination herein must depend are that Eli J. Wilcox, a predecessor to appellant in title to the northeast quarter of the southeast quarter of Section 28, and the southwest quarter of the northwest quarter of Section 27, all in Township 33, North, Range 56, West of the 6th Principal Meridian, in Sioux County, Nebraska, in July of 1895 petitioned for an adjudication and determination of an irrigation appropriation priority from Monroe Creek for the northeast quarter of Section 33, the southeast quarter of the southeast quarter

of Section 28, and the southwest quarter of Section 27, all in Township 33, North, Range 56, West of the 6th Principal Meridian, in Sioux County, Nebraska, dating from May 1, 1888. The lands herein involved were not included in the lands described in the petition filed in July 1895. Thereafter on December 13, 1897, an adjudication pursuant to law was made declaring and determining that there was an appropriation for about 100 acres within the three described quarter sections of land from May 1, 1888. The location of the area or areas upon the described lands was not indicated.

In March 1941 appellant, as successor of Eli J. Wilcox and others to the title to the lands involved in this case, that is the northeast quarter of the southeast quarter of Section 28, and the southwest quarter of the northwest quarter of Section 27, filed a petition with the Department of Roads and Irrigation the purpose of which was to have the adjudication of December 13, 1897, clarified and extended so as to declare that the areas of 34 acres and 11 acres respectively herein involved were within the adjudicated and declared appropriation of about 100 acres mentioned in the adjudication of December 13, 1897, and to have an appropriation priority declared therefor from May 1, 1888.

On July 28, 1941, the petition was, after hearing, dismissed by order of the Department of Roads and Irrigation on the obvious ground that this was an application to have lands not a part of a previously adjudicated appropriation included therein, a thing which the department could not do for the reason that the adjudication of December 13, 1897, was final, not appealed from, and could not be disturbed.

From this order of dismissal of July 28, 1941, no appeal was taken.

In the bill of exceptions appears an order of the Department of Roads and Irrigation dated September 28, 1945, denying a motion to vacate and set aside the order

of July 28, 1941. The motion was filed August 28, 1941, and from it no appeal was taken.

Then in July 1945 the appellant filed the present claim for an appropriation with a priority date of May 1, 1884. The pleadings and the evidence identify this claim with the one which the Department of Roads and Irrigation held was adjudicated adversely to appellant in 1897; the pleadings and evidence also identify it as the claim adjudicated adversely to him by the Department of Roads and Irrigation on July 28, 1941; and the pleadings further identify it with the motion to vacate the order of July 28, 1941, which motion was overruled on September 28, 1945. From none of these adverse findings and rulings has an appeal ever been taken.

It is to be borne in mind that the effort in this proceeding, though claiming an appropriation priority date of 1884, is not to obtain an adjudication upon a priority not previously adjudicated but to obtain an adjudication that these lands were in fact included in the claim of July 1895 and the adjudication thereon of December 13, 1897.

Clearly then appellant is seeking again an adjudication of that which has been thrice previously adjudicated adversely to him.

It is well settled by the decisions of this court that the Department of Roads and Irrigation has jurisdiction to hear, determine, and make adjudication upon irrigation appropriation rights and priorities, and in the absence of an appeal as provided by law, the orders made in a proper proceeding in reference thereto are final and binding upon the parties. See Farmers Canal Co. v. Frank, 72 Neb. 136, 100 N. W. 286; Enterprise Irrigation District v. Tri-State Land Co., 92 Neb. 121, 138 N. W. 171; Vonburg v. Farmers Irrigation District, 128 Neb. 748, 260 N. W. 383; State ex rel. Sorensen v. Mitchell Irrigation District, 129 Neb. 586, 262 N. W. 543.

This being true, the Department of Roads and Irriga-

tion correctly concluded that the present claim of appellant should be denied.

The order of the Department of Roads and Irrigation denying the claim of appellant is affirmed.

AFFIRMED.

ISAAC B. FLINT, IN BEHALF OF HIMSELF AND ALL PERSONS SIMILARLY SITUATED, APPELLANT, V. CLINTON J. MITCHELL ET AL., APPELLEES.

26 N. W. 2d 816

Filed April 11, 1947. No. 32212.

1. **Sheriffs and Constables.** A sheriff by statutory provision has charge of the county jail and is custodian thereof and of the prisoners therein.
2. ———. If in addition to his duties as sheriff the sheriff acts as jailer he is entitled to the fee provided by statute therefor.
3. ———. Where a sheriff is in full and actual charge of the jail and of the service performed in connection therewith he is the jailer and is entitled to the statutory compensation for acting as jailer.
4. ———. Under the statute the sheriff, when acting as jailer, shall receive $1.50 per day for each day when there are prisoners confined in the county jail.
5. **Statutes.** Long-continued practical construction of a statute by the officers charged by law with its enforcement is entitled to considerable weight in interpreting that law.

APPEAL from the district court for Lancaster County: JOHN L. POLK, JUDGE. *Affirmed.*

William Niklaus, for appellant.

Max G. Towle, Farley Young, Frederick H. Wagener, and *Herbert Ronin,* for appellees.

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

YEAGER, J.

This is a class action by Isaac B. Flint, a taxpayer of Lancaster County, Nebraska, in his own behalf and

all others similarly situated, plaintiff and appellant, against Clinton J. Mitchell and others, county commissioners of Lancaster County, Nebraska, defendants and appellees, the purpose of which is to enjoin the defendants from the direction of payment out of the funds of the county to Myles Holloway, sheriff of said county, of a fee of $1.50 per day for the days when there are prisoners in the county jail, for acting as jailer.

A trial was had to the court which resulted in a decision denying the injunction prayed by the plaintiff. From this decision the plaintiff has appealed. He has assigned as error (1) that the trial court erred in finding and adjudging that the statutes give to a county sheriff more than $1.50 for services performed as jailer, and (2) that the trial court erred in finding and adjudging that a county sheriff, who does not perform in person all of the duties of jailer, is entitled to the special fee provided by statute.

The determination of the questions involved in this case depends upon the proper meaning, interpretation, and application of certain statutory provisions.

That the sheriff has charge of the county jail and is the custodian thereof and the prisoners therein, there is no question. § 23-1703, R. S. 1943; § 47-105, R. S. 1943.

It is also true that if in addition to his duties as sheriff he acts as jailer he is entitled to the fee provided therefor by section 33-117, R. S. 1943. See Afflerbach v. York County, 95 Neb. 611, 146 N. W. 1050.

In this connection the plaintiff makes two contentions the gist of which are: First, the sheriff does not within the meaning of the law and under the facts act as jailer; and second, that if he does he is entitled only to $1.50 for the entire service rather than $1.50 per day the rate of pay sought to be enjoined in this action.

On the first question the plaintiff insists that the sheriff does not act as jailer since he does not perform

all of the duties and functions incident to the position himself; that he has one man called by him chief jailer and that he has other assistance which assistance is paid for by the county. The facts as to assistance are not disputed.

However, the defendants say that the sheriff has occupied living quarters in the jail since the commencement of his tenure; that he has at all times exercised complete control of the jail and supervision of those employed to assist him; that jail feeding has been under his control; and that when he has not been actually on duty he has been subject to call. These facts find full support in the record. These facts, defendants say, show that the sheriff at all times also acts as jailer.

Our attention is not directed by plaintiff to any authorities the effect of which is to say that a sheriff in order to be considered as acting as jailer and entitled to receive the fees as such must personally perform all of the duties of such position. The statute imposes no such requirement. The case of Dorcey v. Thurston County, 103 Neb. 43, 170 N. W. 499, is not in point on this question. There the board of county commissioners had appointed a jailer with knowledge of the sheriff. The court held under those circumstances that the sheriff was not entitled to the fee.

The case of Dunkel v. Hall County, 89 Neb. 585, 131 N. W. 973, was a case where the sheriff did not act as jailer. The jailer service was performed under contract with the county by others.

Here the sheriff is in actual charge as jailer. He is in full charge of the jail and all of the service performed in connection therewith.

It would be unreasonable to say that it was the legislative intent in the enactment of the statute permitting the sheriff to act as jailer that he could not so act unless he could or did perform all of the duties incident to the function in order to be able to collect the fee or fees provided by statute for the service.

Where in the very nature of things it was not contemplated that the function should be performed without assistance it cannot reasonably be said that the holder of the directive position cannot have the emoluments of the position unless he performs all of the duties himself.

The Kansas Supreme Court in Day v. Board of County Commissioners, 146 Kan. 492, 71 P. 2d 871, we think, expressed the proper attitude to be adopted in the present instance, as follows: "The contention the sheriff is not entitled to the services and furnishings enumerated in questions (c) and (d), merely because he does not perform all the tasks incident to the operation of the jail, is not in harmony with legislative intent nor with a practical view concerning the performance of his numerous statutory duties. Were he required to give attention to all the detailed duties of a night jailer, he would be unavailable for the various police duties which demand the prompt attention of an efficient sheriff at night and physically and mentally unfit to properly perform the functions of his office in the day time."

We hold that the record discloses that Myles Holloway, sheriff, is also jailer of the county jail of Lancaster County, Nebraska, within the meaning of the statutes and that he is entitled to the emoluments provided for that service by statute. Afflerbach v. York County, *supra,* supports the view that we here take.

We come now to the question of the emolument to which he is entitled. It is true, as appellant contends, that prior to 1915 the statute providing for pay of sheriff acting as jailer contained the words "one dollar and fifty cents per day shall be allowed the sheriff as jailer." See § 2441, Rev. St. 1913. It is also true that the statute was amended by Laws 1915, ch. 37, § 1, p. 106, and again by Laws 1921, ch. 102, § 1, p. 371, and that the statute thus amended appears as section 33-117, R. S. 1943. It is further true that the

words "per day" were left out of both amendments.

The proposition of law set forth in the brief upon which plaintiff relies to support his contention that Myles Holloway, sheriff, is entitled to only $1.50 rather than that amount per day does not properly or correctly reflect the statute in its present form. The proposition is set forth as the quotation of a complete sentence as follows: "Where there are prisoners confined in the county jail, one dollar and fifty cents shall be allowed the sheriff as jailer." These words do appear in the statute but they do not appear as a sentence but only as a part of a sentence. The complete sentence will not be quoted because of its great length.

It will be noted, however, on examination that immediately preceding that which appellant sets forth as a complete sentence and separated from it only by a semi-colon appear the following words: "* * * for guarding prisoners when it is actually necessary, two dollars per day, to be paid by the county; * * *." It becomes clear that to find the legislative intent it becomes necessary to read these parts of the sentence together as follows: "* * * for guarding prisoners when it is actually necessary, two dollars per day, to be paid by the county; where there are prisoners confined in the county jail, one dollar and fifty cents shall be allowed the sheriff as jailer; * * *." Thus read and reasonably applied no conclusion can be arrived at except that the Legislature intended that the words "per day" of the first of the two clauses should be supplied in the second.

Also this is the interpretation which has been placed upon this provision by the board of county commissioners of Lancaster County, Nebraska, as is disclosed by the record. This interpretation, of course, is not conclusive on the question of the proper determination to be given to the wording of this statute but it is entitled to consideration.

This board is an administrative body set up under provisions of the laws of Nebraska.

It is a well-settled principle of statutory interpretation that where an administrative body is set up under law with legal regulations likewise set up for their guidance, their interpretation upon which they have acted, though not necessarily controlling, should be given weight.

In Rohrer v. Hastings Brewing Co., 83 Neb. 111, 119 N. W. 27, it was said: "Long-continued practical construction of a statute by the officers charged by law with its enforcement is entitled to considerable weight in interpreting that law." This statement of principle was approved in Laub v. Furnas County, 104 Neb. 402, 177 N. W. 749, and again in State ex rel. Western Bridge & Construction Co. v. Marsh, 111 Neb. 185, 196 N. W. 130.

Bearing in mind this rule and the fact, as disclosed by the record, that the board of county commissioners of Lancaster County, Nebraska, for a long period of time, paid the sheriff $1.50 per day as jailer, obviously thus interpreting the requirements of the statute, and bearing in mind the apparent intent of the Legislature from the relation of clauses in the statute to cause the words "per day" of the first quoted clause to apply to the second quoted clause, we have concluded that the decision of the district court on the issues presented was correct.

The decree of the district court is affirmed.

AFFIRMED.

CARTER, J., participating on briefs.

RAYBURN R. CUNNINGHAM, APPELLANT, V. THE NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY, APPELLEE.

27 N. W. 2d 221

Filed April 18, 1947. No. 32204.

1. **Insurance.** The evidence is reviewed and a finding made that a premium payment on a life insurance policy was made in time.
2. ———. Stipulations in a contract of life insurance inserted for the benefit of the insurer may be waived by it.
3. ———: **Attorney and Client.** Section 44-359, R. S. 1943, does not authorize the allowance of an attorney's fee in this action.

APPEAL from the district court for Dawes County: EARL L. MEYER, JUDGE. *Reversed and remanded.*

Charles A. Fisher, for appellant.

Edwin D. Crites, Gerald M. Swanstrom, and *Stanley V. Jacobsen,* for appellee.

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

SIMMONS, C. J.

This is an action seeking a decree that a policy of life insurance had not lapsed. It involves the question of whether or not a premium payment was made in time to prevent default. The trial court found for defendant and denied the decree. Plaintiff appeals. We reverse and remand.

Plaintiff brought this action to secure a decree that a policy of life insurance issued by defendant to plaintiff was in full force and effect. Defendant sought a decree declaring the policy as not in force and effect. Plaintiff pleaded the policy, and further that by its provisions premiums were payable quarterly on the 6th day of March, June, September, and December of each year, with a 31-day grace period on all premiums after the first premium; that the right to have dividends applied on premiums was contained in the policy, and he had exercised that right; that during the life of the

policy he had made remittance by mail of the net due on the premium to defendant's agent in Lincoln, Nebraska; and that said remittances had always been accepted. Plaintiff further alleged that the net premium due on June 6, 1944, was $11.64; that on July 6, he had drawn his check on a Chadron bank payable to defendant's agent for that amount and had mailed it to defendant's agent in time to reach him on July 7. He also alleged that he had made tender of all subsequent premiums and that they had been declined.

Defendant pleaded the following provisions of the policy:

"No agent of the Company has any authority to waive forfeitures or to make, alter or discharge contracts."

"The insurance under this Policy is based upon annual premiums payable in advance, but payments may be made semi-annually or quarterly, in advance, at the premium rates therefor now in use by the Company, and change from the mode selected to either of the other of such modes may be made on any anniversary of the Policy. No premium after the first shall be considered paid (except it be duly charged as a premium loan) unless a receipt signed by the President or Secretary of the Company and countersigned by an agent authorized to receive such premium, shall be given therefor. Should default be made in the payment of any premium this Policy shall cease and determine except as hereinafter otherwise provided."

"A grace of thirty-one days, during which time the insurance shall remain in force, will be allowed for the payment of every premium except the first."

Defendant denied the payment within time of the premium due on June 6, 1944; alleged that it had not waived the terms of its policy with respect to payment of premiums; and admitted that by reason of the default it had declared the policy lapsed.

Plaintiff by reply alleged that by past practice defendant had waived the provisions of the policy and its

right to claim a forfeiture, and that by accepting and cashing the check above referred to defendant had waived any right to declare a forfeiture.

The trial court found generally for the defendant upon all issues joined.

This cause is here for trial de novo under assignments of error that fairly require an examination of the entire record.

When analyzed there is no material conflict in the evidence, except as to one matter which will be pointed out.

The defendant company maintains an agency in Lincoln for the collection of premiums. The cashier receives all letters and opens all the mail. When checks, accompanied by a premium notice, are received by the agency through the mail, the notice is checked by her to see if the remittance is received within the proper time. If unaccompanied by a premium notice or letter, the remittance is laid aside for the bookkeeper to check as against the record to ascertain if it is received within time. If it is found that it is past the grace period, the remittance is deposited and carried in a suspension account until advice is obtained as to how to handle it. If a question arises and if the date of mailing, as shown on the envelope, indicates that the remittance was mailed within the grace period, it is not considered as a default as the time of mailing governs. It also is the practice of the office to deposit all checks received in the morning on that day, and checks received in the afternoon mail are deposited on the following day.

Plaintiff, during the life of this policy, had received premium notices by mail. During the life of the policy he had made remittance by check by mail. Usually, the remittance was made toward the close of the grace period. Plaintiff paid the premiums quarterly, remitting the net due after deducting the dividend credit. The record shows that remittances on several occasions were received at Lincoln and receipts issued after the grace

period had expired. This defendant explains by the statement that they evidently were mailed during the grace period. The defendant made no objection to payments so received.

The premium here involved was due June 6, 1944. The grace period expired July 7, 1944. The premium due was $18, the dividend was $6.36, and the cash payable $11.64. The plaintiff made out his check, dated July 6, 1944, payable to defendant's agent, and testified that he mailed it that day from Whitney, Nebraska, in a self-addressed envelope furnished by the defendant. He testified that he did not particularly remember going to the post office with it, and based his statement in part upon his custom and habit of so mailing it toward the close of the grace period. He fixes the time of mailing by the date of the check. Apparently the premium notice was not enclosed with the check. In the regular course of the mail, a letter so mailed should have arrived in Lincoln at 7 a. m. on July 7, 1944.

The next thing the record shows about the check is that it was entered on the various records of the defendant and deposited in a bank on July 17, 1944. From that fact and the custom of handling this business, the defendant's witnesses testify that the check was received on July 17, 1944. Clearly the witnesses had no independent recollection or knowledge of when the check was received. However, at the time here involved, the defendant's bookkeeper was away on vacation and a new clerk was assisting in the office. Defendant's witnesses testify that the new clerk handled the check and made the deposit. This new clerk was not produced as a witness. The envelope in which the remittance was made is not in evidence. Defendant's witness thinks it was put in the wastebasket. The check was entered on a report "listed for special handling" as "Credit Suspension Account for automatic premium loan." The check cleared and was paid by the bank on which it was drawn in due course.

The plaintiff received his bank statement about July 22nd or 23rd and looking through it did not find the check. He was concerned. He called defendant's office by long distance and talked with the cashier, and asked if the check had been received. Here occurs the conflict in the evidence. Plaintiff testifies that the cashier told him the check had been received; that it was all right; and that she would write him about it "tomorrow." The cashier fixes the date of this call as "about two weeks after the grace period had expired * * * around August 5th." She testified that the substance of plaintiff's statement was that he knew the check "was late." She further testified that the substance of her answer was that if the policy contained an automatic premium loan provision and there was sufficient value in the policy, the premium would be automatically taken care of, and if not, it could be reinstated through the use of a health form. She also testified that she told him she would look it up and write him in detail; that she wrote plaintiff; and that the letter is an exhibit in the case. The earliest dated letter in the exhibits from the cashier to the plaintiff is dated September 5, 1944, and is in its entirety as follows: "We have been wondering why we have not heard from you with regard to the restoration of your policy No. 1 142 175. The Company has now forwarded to us the enclosed check for $6.36 representing the balance of dividend due on your policy at the time it lapsed. If you are going to reinstate this policy soon, this check may be returned without being endorsed. If you are not going to reinstate the policy, the check may be presented for payment any time." Under date of August 21, 1944, from its Milwaukee office, the defendant wrote the plaintiff that "In consequence of non-payment of premium due" the indebtedness against the policy had been satisfied; that there remained in force temporary insurance expiring November 19, 1944; and that if plaintiff wished to apply for reinstatement, to notify the defendant. Plaintiff, after receiving this letter, again

called the defendant's cashier, asked what had been done with the check, and was told that the check had been deposited, and that she would send him a reinstatement blank. He then again examined his bank statement and found the check. He explained that it was not his habit to reconcile his bank statement. The cashier testified as to this conversation and testified that she told him he could apply for a restoration of the policy.

On September 22, 1944, the cashier wrote the plaintiff as follows:

"We told you over the telephone that it would be necessary for you to complete a Health Form for this policy, and you agreed to do so, as soon as this form was received. As yet, we have not received the Health Form, and we cannot reinstate the policy until it is received.

"If you will have this Health Form completed by the Doctor there and returned to us promptly, the matter will be given attention. If you forward the Health Form, you should send in the gross premium, because the dividend check was mailed to you some time ago. Your prompt attention to this matter will be greatly appreciated."

The defendant admits that it received the $11.64 check, and that it deposited it to its account, but testified that it held it to plaintiff's credit. On September 5, 1944, the defendant sent the plaintiff a check for $6.36, representing the "balance of dividend due on your policy at the time it lapsed." On September 22, the defendant's agent sent plaintiff his check for $11.64. Plaintiff returned these two checks to the Lincoln office by letter dated September 25, 1944. These were returned to plaintiff on September 26, 1944, in a letter refusing to accept them on the ground that the policy was in a lapsed condition.

On September 29, the defendant from its Milwaukee office wrote plaintiff ratifying this action and advising that the general agent at Lincoln would cooperate with

him in reinstatement. Plaintiff was furnished various forms for reinstatement which he did not execute.

Plaintiff made tender of subsequent premiums which were returned.

That the check was mailed to defendant's agent, received by him, deposited, paid, and the proceeds retained by him for some time is not disputed. Under defendant's testimony it is the time of mailing and not the time of receipt by defendant that governs. The evidence as to handling of prior remittances made by plaintiff sustains this rule. The first precise question then to be determined is, did plaintiff mail the premium check to defendant before the grace period expired?

The plaintiff testifies positively that he mailed the check within the grace period. Defendant's witnesses testified that the check was not received until July 17; however, that is not the date received but the date the check was entered on defendant's records and deposited to its agent's account. Prior to the making of those entries, this check was handled by the agency cashier and an inexperienced clerk acting as bookkeeper. How long that handling took by the acting bookkeeper is not revealed by this evidence, save as the evidence is that the practice was to deposit all checks by at least the day after receipt. The testimony of the clerk was not offered. Defendant's witnesses had no independent recollection of when the remittance was received. The envelope that would have fixed the date of mailing was not kept. We do not intend an inference that the disposition of the envelope was to destroy unfavorable evidence. Yet we think the fact that the envelope was not retained is important. Defendant's witness testified as to the routine of handling remittances by mail. All mail was opened by the agency cashier. She testified that she received and opened this letter, but we assume that the answer was based on practice rather than on independent recollection. She testified that remittances were checked against notices by her to see if received on

time. If there was no notice enclosed, as was the case here, the remittance was "laid aside" for the bookkeeper to check to see if received on time. The defendant's agent adds one other practice. In explaining why receipts in some instances were issued after the expiration of the grace period, he stated: " * * * the date on the envelope would indicate when that check was mailed, and if it was mailed on the last day of the grace period, it would be acceptable." If an examination of the envelope in question was made when this remittance was questioned, it would have revealed whether or not mailed within time. The fact that there is no evidence here by the defendant as to the mailing date on the envelope is a circumstance to be considered in determining the fact question.

Defendant further relies upon the disputed telephone conversation in which the cashier testified that plaintiff said he knew the remittance "was late" and argues that to be an admission that he was in default. The witness' recollection is not too accurate on other matters connected with that conversation. She says that it occurred "about two weeks after the grace period had expired on this premium, on, I would say, around August 5th." But August 5 would be four weeks after the expiration of the grace period. She states that they then discussed the reinstatement of the policy, and that she promised she would write him and did. But her earliest letter to plaintiff was dated September 5, after he had received the letter of August 21, 1944, from defendant's Milwaukee office, and after plaintiff had called a second time about the policy. Even accepting her testimony that plaintiff said he knew the remittance "was late" does not require that we hold he said he knew he was in default. Late is defined as "Far advanced toward the end or close, as of the day, night, life, or other period; as, a *late* hour of the day." Webster's New International Dictionary (2d ed.), Unabridged. So here, the remittance was late in the grace period, but not necessarily beyond

it. Such a construction is in entire accord with plaintiff's position throughout this controversy.

The fact that plaintiff pleaded a waiver in his reply does not constitute an admission that he was in default, for here defendant states that "one of the vital issues tried was the question as to whether plaintiff mailed his premium check before the grace period expired." That having been an accepted issue in the trial court, it will not be departed from here.

We are of the opinion that this evidence requires a finding that the remittance was mailed in time, and that a default did not occur. The question of waiver in the event the premium was paid late need not be determined.

Stipulations in a contract of life insurance inserted for the benefit of the insurer may be waived by it. Hartford Life & Annuity Ins. Co. v. Eastman, 54 Neb. 90, 74 N. W. 394. So far as the stipulations pleaded are involved here, the evidence shows that they not only were waived as to this policy holder and policy, but were waived generally by the defendant at its Lincoln agency.

Plaintiff requests the allowance of an attorney's fee under the provisions of section 44-359, R. S. 1943, which provides: "In all cases where the beneficiary, or other person entitled thereto, brings an action at law upon any policy of life, * * * insurance * * * against any company, * * * the court, upon rendering judgment against such company, * * * shall allow the plaintiff a reasonable sum as an attorney's fee in addition to the amount of his recovery, to be taxed as part of the costs. If such cause is appealed, the appellate court shall likewise allow a reasonable sum as an attorney's fee for the appellate proceedings."

" 'It is the practice in this state to allow the recovery of attorneys' fees only in such cases as are provided for by law, or where the uniform course of procedure has been to allow such recovery. As a general rule of practice in this state, attorneys' fees are allowed to the successful party in litigation only where such allowance

is provided by statute.' " Shepard v. Shepard, 145 Neb. 12, 15 N. W. 2d 195.

Obviously, under the statute plaintiff is not entitled to an attorney's fee. It accordingly is denied.

The decree of the district court is reversed and the cause remanded with directions to enter a decree for plaintiff in accord with this opinion.

REVERSED AND REMANDED.

CARTER, J., participating on briefs.

CARTER, J., dissenting.

In my opinion the evidence was not sufficient to sustain a finding that the premium was paid in accordance with the provisions of the policy and the law applicable thereto. In addition thereto the opinion of the majority ignores the fact that the trial judge saw the witnesses, had an opportunity to judge their credibility, and determined the fact issue in favor of the defendant.

GEORGE KELLNER, APPELLANT, V. LAURA B. WHALEY, ET AL., APPELLEES.

27 N. W. 2d 183

Filed April 18, 1947. No. 32138.

1. **Deeds.** Whether or not a deed was delivered is ordinarily a question of the intent of the grantor, to be determined from all the facts and circumstances.
2. ———. No particular act or form of words is necessary to constitute a delivery of a deed. Anything done by the grantor from which it is apparent that a delivery was intended, either by words or acts, or both combined, is sufficient.
3. ———. The possession of a deed by the grantee, in the absence of opposing circumstances, is prima facie evidence of delivery, and the burden of proof is on him who disputes this presumption.
4. ———. Such a presumption exists in favor of a grantee who is unable to explain how he came into possession of the deed because disqualified from testifying on account of the death of the grantor.
5. ———. The fact that the grantee kept the deed without re-

cording for a number of years, allowed the grantor to remain in possession, and made no claim to the property until after the grantor's death, does not necessarily overcome the presumption of delivery, when the deed, fully executed, is in his possession.

6. **Evidence.** "Admissions" in the law of evidence are concessions or voluntary acknowledgments made by a party of the existence of certain facts.
7. ———. An admission should possess the same degree of certainty as would be required in the evidence which it represents, and hence mere conjectures or suggestions as to what might have happened if certain circumstances had occurred, are not competent.
8. ———. Evidence examined and held sufficient to constitute delivery of deeds in question.

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

Alfred D. Raun and *Van Pelt, Marti & O'Gara,* for appellant.

Mark J. Ryan and *A. P. Coleman,* for appellees.

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

MESSMORE, J.

This is an action brought by appellant, George Kellner, against the appellees to cancel two deeds to certain lands in Thurston County. The trial court found against appellant, dismissed his petition, and quieted title to the lands in appellees Laura B. Whaley and Lela E. Kilzer, sisters of the appellant. From this order appellant has appealed.

George Kellner, Laura B. Whaley, and Lela E. Kilzer are the sole and only heirs at law of Edward J. Kellner, single, who departed this life December 4, 1944.

For convenience, we will hereinafter refer to Edward J. Kellner as Kellner.

It appears from the record that Kellner for a number of years prior to his death was the owner of the lands in question. On October 12, 1939, he instructed an

attorney to prepare two deeds conveying land to his sisters, Laura B. Whaley and Lela E. Kilzer. The deeds were prepared according to instructions, signed and acknowledged by Kellner, and he left the attorney's office with them in his possession. At the time of Kellner's death the deeds were in the possession of one of the grantees, Laura B. Whaley, and she gave them to her husband to take to the lawyer who had prepared them, so that he might have them recorded. The deeds were recorded December 13, 1944. Walter L. Whaley, husband of Laura B. Whaley, testified that he first saw the deeds in the fall of 1939, and the next time he saw them was after the death of Kellner. They were in his home where his wife had kept them in a box, and they were in a box there when Kellner died. From the time the deeds were signed and acknowledged, until his death, Kellner continued to live on the land, farm it, collect the rents and profits, and pay the taxes.

The evidence shows that a real estate dealer had a conversation with Kellner in the spring of 1943, with reference to selling his land. Kellner wanted $100 per acre and agreed orally to pay a commission of $400 to the real estate dealer if he sold the land. There were several conversations had between these parties about selling the farm, and the farm was shown to some parties but no sale was made. In the fore part of September 1944, one Harold Sandquist, who had been acquainted with Kellner for five or six years, and his brother Sherman had a conversation with Kellner at the latter's farm, with reference to purchasing the farm. Kellner wanted $100 per acre, and was offered $95, which he rejected on two or more occasions.

Due to illness, Kellner became a patient at a hospital in Homer, Nebraska. On Sunday, December 3, 1944, an acquaintance, Patrick Mahaney, called on him, and in a conversation Kellner told Mahaney that he had been offered $95 per acre, and he thought he would sell the farm and move to town. This was a day prior to

Kellner's death. On December 2, 1944, at Kellner's request, an attorney accompanied Kellner's brother-in-law, Walter L. Whaley, to the hospital where the attorney prepared defendant's exhibit 4 appearing in the record, a written instrument dated December 2, 1944, wherein it is stated that Kellner transferred all of his personal property of every kind and description, wherever located, to Walter Whaley as trustee for his two sisters, with instructions to divide the personal property in such manner that the two sisters would own all his property, both real and personal, in shares of equal value, without disturbing the deeds held by them to his real estate. This instrument was signed by Kellner in the presence of the attorney and notary as witnesses, and was properly acknowledged. The notary testified that exhibit 4 was read by the attorney to Kellner, and Kellner signed it. He was asked if that was what he wanted, and he replied that it was. The instrument was then acknowledged and handed to the attorney.

The appellant offered certain testimony of the appellees taken in a deposition in the matter of the estate of Edward Kellner, deceased, in the county court of Thurston County, as admissions against interest, to which objections were made and overruled. This evidence is to the effect that there would have been no objection on the part of the appellees to Kellner selling the land to Sandquist or anyone else; that the deeds would have been delivered back to Kellner if he had requested them, and in the event of purchase, two deeds would be required from the grantees to the purchaser; and that Lela E. Kilzer did not consider the real estate so deeded as her real estate, and profited only as lessee, receiving a share of the crops.

A witness acquainted with Kellner and who had farmed a part of his land on crop shares in 1942 and 1943, and worked for him a part of 1944, testified to conversations in which Kellner told him he had made

and delivered his deeds to his sister, Laura B. Whaley, wanted his property divided equally between the two sisters when he was through with it, and did not want his brother to have any of his property.

It appears from the evidence that Lela E. Kilzer did not see or have possession of the deed made to her by Kellner until after the same had been recorded. She did not testify.

There is also in the record a deed, plaintiff's exhibit 3, from Kellner as grantor, to Walter L. Whaley and Laura B. Whaley as joint tenants, to 40 acres of the land here involved, dated May 13, 1944. This 40 acres of land also appears in the deed made by Kellner as grantor to Laura B. Whaley, dated October 12, 1939. It appears by the appellees' answer that prior to 1939, Laura B. Whaley and her husband owned the 40 acres evidenced by plaintiff's exhibit 3, and conveyed the same to Kellner prior to 1939, as security for a debt, and the 40 acres was reconveyed to the Whaleys when the indebtedness was paid, as agreed between the parties. The reply denies the allegations of the answer.

The foregoing constitutes an outline of the competent and material evidence upon which the court based its judgment.

This court has, from an early date, consistently held that delivery is largely a question of intent to be determined from the facts and circumstances of the given case.

In the case of Brittain v. Work, 13 Neb. 347, 14 N. W. 421, it was stated: "No particular act or form of words is necessary to constitute a delivery of a deed. Anything done by the grantor from which it is apparent that a delivery was intended, either by words or acts, or both combined, is sufficient." Other cases in point are: Brown v. Westerfield, 47 Neb. 399, 66 N. W. 439; Roepke v. Nutzmann, 95 Neb. 589, 146 N. W. 939; Flannery v. Flannery, 99 Neb. 557, 156 N. W. 1065; Ehlers v. Seip, 136 Neb. 722, 287 N. W. 202; Owens

v. Reed, 141 Neb. 796, 4 N. W. 2d 914; Smith v. Black, 143 Neb. 244, 9 N. W. 2d 193.

"Delivery of a written instrument like a deed is largely a question of intent to be determined by the facts and circumstances of the case. In the case at bar it depends on whether the intention of the grantor at the time was that the deed should operate as a muniment of title to take effect presently. * * * If such was the purpose, the delivery was complete, and the title to the property passed." Brown v. Westerfield, *supra.* To the same effect is Roepke v. Nutzmann, *supra,* and Smith v. Black, *supra.*

The law is well established in this jurisdiction that: "The possession of a deed by the grantee, in the absence of opposing circumstances, is prima facie evidence of delivery, and the burden of proof is on him who disputes this presumption." Roberts v. Swearingen, 8 Neb. 363. See, also, Brittain v. Work, *supra;* Nelson v. Wickham, 86 Neb. 46, 124 N. W. 908; Ladman v. Ladman, 130 Neb. 913, 267 N. W. 188; 10 R. C. L., Evidence, § 48, p. 898. Such a presumption exists in favor of a grantee who is unable to explain how he came into possession of the deed because disqualified from testifying on account of the death of the grantor. See Clark v. Holmes, 109 Neb. 213, 190 N. W. 493.

However, the appellant asserts that there are existing opposing circumstances which show that the deeds were not delivered. This is based on the evidence adduced at the trial as follows: Kellner resided on the premises from the time he signed and executed the deeds in question until his death, collected the rents and profits therefrom, farmed the land, and paid the taxes; he endeavored to negotiate a sale of the premises, and was the owner of the record title at the time of his death. In May 1944 he conveyed a 40 acre tract of land described in the deed dated October 12, 1939, to his sister, Laura B. Whaley, and her husband. Also,

the admissions against interest disclose that the deeds were capable of being recalled.

Appellant cites 16 Am. Jur., Deeds, § 133, p. 513: "The facts that the grantor continues to exercise acts of ownership and authority over the premises, such as the collection of rents and profits, and that he also sells a portion thereof and proposes to sell the remainder are inconsistent with the theory of an intentional delivery, operative and effectual to pass title."

The appellant contends that the cases of Flannery v. Flannery, *supra;* Owens v. Reed, *supra;* Lewis v. Marker, 145 Neb. 763, 18 N. W. 2d 210; and Shults v. Shults, 159 Ill. 654, 43 N. E. 800, are controlling under the facts and circumstances of the instant case. A careful reading of the foregoing cases and others cited by the appellant involving the same principle, discloses the distinction between such cases and the case at bar.

In Flannery v. Flannery, *supra,* the deeds were kept in a tin box in the grantor's bedroom and under his control until his death. During his lifetime he made it clear he intended to control the real estate as long as he lived, and expressed a purpose to change the deeds. There was no manual delivery or expressed intention to make one.

Owens v. Reed, *supra,* was a suit to quiet title to certain real estate claimed by the plaintiff under a deed executed by her brother and placed on record after his death. The defendant claimed under a residuary clause in the will, she having married George Reed, the plaintiff's brother, subsequent to the date of the execution of the deed. The plaintiff was a corenter of a safe-deposit box with her brother. The brother retained control of the real estate during his lifetime, and exercised complete dominion over it. The plaintiff had no occasion to use the box as a corenter and did not do so. The deeds were found in the safe-deposit box upon the death of the brother. The placing of the deeds in the safe-deposit box was not of itself

a delivery. The fact was, the safe-deposit box was used only by George Reed, and the rent thereof was paid by him. There was no delivery of the deed under such circumstances.

In the case of Lewis v. Marker, *supra,* Mrs. Elizabeth May died August 23, 1936, leaving as her sole heir her 16-year old daughter, the plaintiff. The defendant was appointed plaintiff's guardian. Prior to her resignation as guardian, she placed on record the deed in question, which she found in a safe-deposit box during the latter part of May or the first part of June 1938. The safe-deposit box was leased by Elizabeth May and the defendant, and each had access to it. The evidence showed that Elizabeth May did not use the box from the date of the execution of the deed to the date of her death. The fact that the deed was found in the safe-deposit box was not of itself sufficient to sustain the finding that there was a delivery of the deed in the lifetime of Elizabeth May. There was evidence that Elizabeth May intended to convey the residence to the defendant because of the minor daughter, and her belief that the defendant could better handle the property and care for the child. Under the circumstances, it was held that there was no delivery of the deed.

The facts in the other cases cited by appellant on the same principle clearly disclose that there was no intention on the part of the grantor shown that would constitute a delivery of the deed or deeds in such cases.

The essential fact to render delivery effectual always is that the deed itself has left the control of the grantor who has reserved no right to recall it, and it has passed to the grantee. The deeds in the instant case, and there is no evidence to the contrary, were in the possession of the grantee, Laura B. Whaley, prior to the time of the grantor's death, and at the time of his death. The distinction between the cited cases and the instant case is therefore obvious.

We believe the following cases are pertinent to a determination of this appeal.

"A deed, delivered to grantee in grantor's lifetime, is operative, though enjoyment of estate conveyed is postponed until grantor's death, as present estate or interest is transferred by such delivery.

"In suit to set aside deed to defendants for want of delivery, plaintiffs had burden of proving nondelivery of deed and producing evidence to overcome presumption of delivery due to defendants' possession of deed." Klatt v. Wolff, (Mo.) 173 S. W. 2d 933. See, also, Rohr v. Alexander, 57 Kan. 381, 46 P. 699; Zumwalt v. Forbis, 349 Mo. 752, 163 S. W. 2d 574; 16 Am. Jur., Deeds, § 372, p. 650; 26 C. J. S., Deeds, §§ 183, 184, pp. 591 to 595.

Zumwalt v. Forbis, *supra,* held: "The fact that the deed was not recorded until after the grantor's death is not of itself sufficient to show nondelivery."

In the case of McGee v. Allison, 94 Ia. 527, 63 N. W. 322, which is somewhat similar to the case at bar, the court held: "The fact that a grantee kept a deed without recording for a number of years, allowed the grantors to remain in possession, and made no claims to the property until after their deaths, does not alter the presumption of a delivery, when the deed, fully executed, is in his possession."

Further in the opinion it is said: "It is well settled, however, that, if a deed fully executed is found in the possession of the grantee, it is presumed to have been delivered by the grantor, and accepted by the grantee, at the date of its execution. Wolverton v. Collins, 34 Iowa, 239; Craven v. Winter, 38 Iowa, 480. This presumption is not conclusive, but it raises a strong implication, which can only be overcome by clear and satisfactory proof. Tunison v. Chamberlain, 88 Ill. 379. Such a rule is necessary to the security of titles. Any other would render all holdings uncertain, and would be disastrous in the extreme. * * *

"The testimony most relied upon to show there was

no delivery is * * * the admission of Lawrence Allison (grantee) that he did not take possession of the property, record his deed, or exercise any acts of ownership over the lot except to hold the deed until after the death of Mr. and Mrs. McHenry (the grantors); * * *. With reference to this first-mentioned testimony, the defendant has offered an explanation which is entirely consistent with his claim that he owned the property at all times after the deed was executed. Mrs. McHenry was his sister, and it is not unreasonable to suppose that because of this relationship he allowed her and her husband to remain in possession of the property after he became the owner of it; and the fact that she remained in possession, paid taxes, and made repairs thereon is not of itself, under the circumstances disclosed, inconsistent with the claim that she parted with her interest in it by a deed to her brother."

In the case of Cox v. McLean, 66 N. D. 696, 268 N. W. 686, it is said: "This deed came into the possession of the grantee at some time. There is no claim of duress, undue influence, or fraud in obtaining the deed. Before the presumption that a deed in the possession of the grantee was delivered to and accepted by the grantee is *ovrcome,* there must be evidence to rebut the presumption and this must be clear and convincing. * * * It is not overcome because of failure to record."

It is also said in this opinion: "Therefore, the presumption arises in favor of the defendant that she is the owner of this deed as it was in her possession for years before the death of the grantor, and also that it was delivered to her on the day of date. * * * failure to record until after the death of the grantor, or failure to take possession until after the death of the grantor, does not destroy the effect of testimony showing delivery." See, also, Cale v. Way, 46 N. D. 558, 179 N. W. 921; Rohr v. Alexander, *supra.*

Applying the language in McGee v. Allison, *supra,* to the instant case, under the circumstances disclosed

there is nothing inconsistent with the claim that the brother parted with his interest in the real estate by deeds to his sisters.

We have heretofore set out a summary of the evidence of Laura B. Whaley, Walter L. Whaley, and Lela E. Kilzer contained in a deposition which appellant contends constitutes admissions against interest.

In Smith v. Black, *supra*, this court said: "The criterion upon which the question of delivery depends is as to whether or not the intention of the grantor is that the deed shall operate as a muniment of title to take effect presently, or in other words, whether or not it has passed beyond the dominion, control and authority of the maker, and is no longer capable of being recalled."

It is the appellant's contention that the testimony with reference to the admissions against interest discloses that the deeds in question were capable of being recalled.

" 'Admissions' in the law of evidence are concessions or voluntary acknowledgments made by a party of the existence of certain facts." 31 C. J. S., Evidence, § 270, p. 1022.

Admissions against interest are defined as follows: "Any statement made by or attributable to a party to an action which constitutes an admission against his interest and tends to establish or disprove any material fact in the case is competent evidence against him." 31 C. J. S., Evidence, § 272, p. 1023.

"To be competent as an admission a statement must be one of fact, and a statement which is a mere opinion or conclusion or a conclusion of law is as a rule inadmissible." 31 C. J. S., Evidence, § 272, p. 1025.

"An admission should possess the same degree of certainty as would be required in the evidence which it represents, and hence mere conjectures or suggestions as to what might have happened if certain circumstances had not occurred are not competent; neither should an alleged admission be considered where the

subject matter to which it refers is left uncertain." 31 C. J. S., Evidence, § 277, p. 1029.

From an analysis of the alleged admissions against interest, it appears that for the most part they do not refer to an existing fact, do not possess the same degree of certainty as would be required in the evidence which the admission represents, and are conjectural. The facts are that from and after the date the deeds were prepared, signed, and acknowledged by the grantor, and for a period of five years or until his death, there is no evidence that he sought or desired to regain possession or control of the deeds. The offered testimony of admissions against interest, under the circumstances, are insufficient to show that the deeds in question were capable of being recalled. Further, defendant's exhibit 4, the substance of which is heretofore set out, discloses and affirms Kellner's intention that his sisters should own the real estate evidenced by the deeds, and that the same had been duly delivered to them.

The appellees offered certain of the alleged admissions against interest, contending under section 25-1202, R. S. 1943, that the appellant having introduced such evidence of a representative of a deceased person, then the appellees were privileged to introduce the testimony of such witnesses with reference to conversations and transactions had with the deceased person. The cases cited by appellees on this proposition of law need not be discussed. The testimony offered was primarily based on what might have happened, in the event the grantor in his lifetime sought to recall the deeds, a fact which never existed.

"A party claiming title under a deed made by a deceased person is an incompetent witness to prove the delivery of such deed." Wilson v. Wilson, 83 Neb. 562, 120 N. W. 147.

The objections to such evidence were properly sustained by the trial court.

The appellant predicates error on the admissibility

of testimony of one of the attorneys as to conversations and transactions which he had with decedent, contending that the testimony was privileged. The assignment of error is not discussed. However, the competent and material evidence appearing in the record sustains the appellees position in the case at bar. In considering a record de novo, we shall assume that the trial court disregarded all incompetent evidence. We have likewise, in determining this appeal from an independent investigation of the record, disregarded all incompetent evidence to which objection was timely made.

We conclude that the deeds in question were delivered to the appellees Laura B. Whaley and Lela E. Kilzer, and the judgment of the trial court should be, and is hereby, affirmed.

AFFIRMED.

IN RE ESTATE OF LINDEKUGEL. WILLIAM A. EHLERS, APPELLANT, V. HENRY G. LINDEKUGEL ET AL., EXECUTORS, APPELLEES.
27 N. W. 2d 169

Filed April 18, 1947. No. 32216.

1. **Appeal and Error: Courts.** When a transcript of the proceedings in the county court is filed in the district court, under section 30-1606, R. S. 1943, the district court becomes possessed of the action, and shall proceed in like manner as upon appeals from the county court in civil actions.
2. ———: ———. Section 24-544, R. S. 1943, provides that appeals from civil actions in the county court shall be taken in the same manner as from justice courts.
3. ———: ———. Section 27-1306, R. S. 1943, provides that the plaintiff in the court below shall, within 50 days from and after the rendition of the judgment in such court, file his petition as required in civil cases in the district court.
4. ———: ———. When the plaintiff fails to file a petition on appeal in the district court within 50 days from the date of the rendition of the judgment in the lower court, or at any time thereafter, and good cause is not shown for failure for so

doing, upon motion to nonsuit the plaintiff for such failure and no competent evidence appearing in the record to show good cause, this court will not presume such fact, and, under the circumstances, the trial court is not in error in sustaining the motion.

APPEAL from the district court for Lincoln County: I. J. NISLEY, JUDGE. *Affirmed.*

William A. Ehlers, pro se.

Crosby & Crosby, for appellees.

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

MESSMORE, J.

On May 13, 1943, one William A. Ehlers filed an application for order to show cause in the county court of Lincoln County against the executors of the estate of August Lindekugel, deceased. It appears from the application that the applicant is the assignee and owner of a certain claim filed by the Bank of Lincoln County, Hershey, Nebraska, against the estate, which was allowed on July 24, 1930, in the sum of $759.10 with interest at 10 percent per annum from January 13, 1930, until paid. Order barring claims was entered October 24, 1930. On July 7, 1931, the executors of the estate requested and obtained an order from the county court for an extension of time in which to sell and convert the assets of the estate, particularly certain land and water rights in Larimer County, Colorado, into cash. The time was extended until December 26, 1931, for such purpose. The application sets forth a factual situation wherein the applicant claims the executors failed to comply with the order of the court, were negligent in their duties in not properly handling the estate, and were guilty of waste and misappropriation of the funds of the estate by disobedience of orders of the county court. The prayer of the application is

to personally surcharge the executors with the amount due and unpaid on the allowed claim.

The executors filed an answer setting forth an explanation of their acts and doings in their official capacity in handling the estate; denying negligence on their part; and asserting the applicant had full and complete knowledge of all the transactions with reference to the subject matter set forth in his application. On August 15, 1944, the matter came on for hearing before the county court. On February 28, 1945, the county court entered judgment against the applicant. The applicant filed an appeal bond on March 12, 1945, to the district court, which was approved on the same day. Transcript of the proceedings in the county court was filed in the district court on March 26, 1945. On August 15, 1946, the executors of the estate filed a motion to dismiss the appeal for the reason that the applicant had failed to file his petition in the district court as provided for and required by section 30-1606, R. S. 1943. The matter was heard in the district court on September 28, 1946. On October 4, 1946, the district court entered an order dismissing the appeal. The applicant, William A. Ehlers, appeals from this order.

The applicant will hereinafter be referred to as the appellant, and the executors as the appellees.

The sole question presented for determination in this appeal is whether or not the district court erred in nonsuiting the appellant for failure to file his petition on appeal in the district court within 50 days from and after the date of the rendition of the judgment in the county court.

There is no bill of exceptions filed in this court.

Section 30-1606, R. S. 1943, provides, in substance, that in appeals in probate matters, upon the filing of the transcript the district court shall be possessed of the action, and shall proceed in like manner as upon appeals from the county court in civil actions.

In the case of Weideman v. Estate of Peterson, 129

Neb. 74, 261 N. W. 150, this court held: "The rule announced in Estate of Fitzgerald v. Union Savings Bank, 65 Neb. 97, that, 'on appeal to the district court from an order of the county court allowing or rejecting a claim against an estate, pleadings need not be filed unless directed by the court,' *held* abrogated by statutory changes of legislative enactment on which such rule was based." This court further held that the filing of a petition in the district court was now a requirement on appeal.

The appellant cites In re Estate of Jelinek, 146 Neb. 452, 20 N. W. 2d 325. In this case the appellees cross-appealed, contending that where several claimants file separate claims against the estate in the county court, which claims upon hearing are disallowed, it is necessary for each claimant to file a separate transcript with reference to their particular claim in order to confer jurisdiction in the district court, and citing sections 30-1601 to 30-1608, inclusive, R. S. 1943. This court held that the separate claims may be included in one transcript, and that the district court acquired jurisdiction to hear and determine the claims involved in the action. Other procedural steps were not in issue.

It appears from the brief of the appellees in the aforesaid case that the appellant and other claimants likewise had failed to file petitions in the district court. However, the plaintiff did file a petition in the district court on appeal after the expiration of 50 days from the date of rendition of the judgment in the county court. There was no contention made by the appellees that the plaintiff be nonsuited for failure to file a petition on appeal in the district court within 50 days from the date of rendition of judgment in the county court. It will be observed that the case did not determine the issue here involved.

Section 24-544, R. S. 1943, provides in part: "In civil actions brought under the provisions of sections 24-501 to 24-553, either party may appeal from the judgment

of the county court, in the manner as provided by law in cases tried and determined by justices of the peace."

With reference to appeals from justice courts, section 27-1305, R. S. 1943, provides that the parties shall proceed, in all respects, in the same manner as though the action had been originally instituted in such court.

Section 27-1306, R. S. 1943, provides that the plaintiff in the court below shall, within 50 days after the rendition of the judgment in the court below, file his petition as required in civil cases in the district court.

In the instant case the appellant is the plaintiff in the district court. He seeks affirmative relief.

Section 30-1601, R. S. 1943, provides: "In all matters of probate jurisdiction, appeals shall be allowed from any final order, judgment or decree of the county court to the district court by any person against whom any such order, judgment or decree may be made or by who may be affected thereby."

In the case of In re Grblny's Estate, 147 Neb. 117, 22 N. W. 2d 488, the defendant contended the trial court erred in refusing to nonsuit the plaintiff, or strike his petition on appeal from the files, for the reason that the plaintiff failed to get his petition on appeal filed within 50 days from the date of the judgment in the county court. The plaintiff had filed a motion asking leave to file the petition out of time, alleging that good and sufficient reasons existed for failure to sooner file the same. Evidence was adduced thereon, after which the trial court found for the plaintiff and permitted the filing. The evidence was not preserved in the bill of exceptions. This court held that the rule should be that where the district court, in an appeal perfected by the defendant from the county court permits the plaintiff upon application therefor to file his petition on appeal out of time, it will be presumed on appeal to this court, in the absence of a record to the contrary, that good cause was shown and the district court thereby exercised a sound judicial discretion. We followed Myers v. Hall

County, 130 Neb. 13, 263 N. W. 486, which holds: "Where the district court, on appeal by plaintiff from the county board, overrules a motion by defendant to strike the petition on appeal from the record and to enter a nonsuit, because the petition was not filed within the statutory period of 50 days, nor good cause for the delay shown, it will be presumed on appeal to the supreme court that good cause was shown, in absence of a record disclosing the contrary."

It will be observed by the cases, In re Grblny's Estate, *supra,* and Myers v. Hall County, *supra,* that petitions were filed on appeal in the district court out of time, good cause was presumed, and the trial court did not abuse his discretion in permitting the filing of the petition. In the instant case the appellant failed to file a petition in the district court on appeal at any time, and more than five months had elapsed from the date of rendition of the judgment in the county court before the motion for nonsuit of the plaintiff was heard.

In an affidavit appearing in the transcript, filed September 27, 1946, a day previous to the date the matter was heard in the district court, the appellant stated in substance that by correspondence between counsel for the respective parties, they were proceeding upon the theory that no petition upon appeal was required, and the affiant did not learn otherwise until the motion was filed to dismiss the appeal, and in a letter dated August 14, 1946, the appellee's counsel, for the first time, stated in substance that it had been their thought that filing a petition on appeal was not necessary, for under the old statutes that was true. The appellant then stated that he was ready to file petition on appeal if so required by the court, and ready for trial by jury when a jury would be called in Lincoln County for the trial of jury cases. The record fails to disclose any competent evidence for good cause shown as to why the petition on appeal was not filed as provided for by law.

In any event, the affidavit appearing in the transcript does not constitute a good or sufficient cause for the failure to file a petition on appeal as required by law. Under the circumstances there is no occasion for this court to presume good cause was shown because, as heretofore stated, more than five months had elapsed and the plaintiff failed to file a petition on appeal, and never has filed a petition. As heretofore pointed out, a clear distinction exists between the cases of In re Grblny's Estate, *supra,* Myers v. Hall County, *supra,* and the instant case.

Section 27-1307, R. S. 1943, provides in part: "If the plaintiff in the action before the justice shall appeal from any judgment rendered against such plaintiff, * * * shall fail to file his petition within fifty days from the date of the rendition of such judgment by the justice, unless the court, on good cause shown, shall otherwise order, or otherwise neglect to prosecute to final judgment, the plaintiff shall become nonsuited; * * *." See, also, Hess v. Hess, 78 Neb. 347, 110 N. W. 999; Jacoby v. Mitchell, 19 Neb. 537, 26 N. W. 255.

We conclude the trial court did not err, under the circumstances, in nonsuiting the appellant for failure to file a petition on appeal. Judgment affirmed.

AFFIRMED.

CARTER, J., participating on briefs.

ANNABELLE KOSER, APPELLEE, V. JACK D. KOSER, APPELLANT.

27 N. W. 2d 162

Filed April 18, 1947. No. 32175.

1. **War.** The Soldiers' and Sailors' Civil Relief Act (U. S. C. A., Title 50, §520) does not require the appointment of an attorney to represent all persons in the services named in the act who become parties to actions commenced in court, but only those who shall be in default of appearance.

2. **Divorce.** Where a husband and wife are permanently separated, and there are legal grounds for a divorce, they may agree upon a settlement of their property rights, and provide by contract for the support and maintenance of the wife, and if the provisions are fair and reasonable the agreement may be enforced by the courts.
3. ———. Equitably it is improper, in an action for divorce where the parties have agreed upon a settlement of their property rights and provided by contract for the support and maintenance of the wife, for the court to set aside the contract and impose a heavier obligation upon the husband without first affording him an opportunity to be heard thereon.
4. ———. The disposition of minor children and provision for their support in an action wherein a divorce is granted is not controllable by agreement of the parties but by the court on the facts and circumstances as disclosed to it.
5. ———. The decree of the trial court in a divorce action insofar as minor children are concerned is never final in the sense that it cannot be changed but is subject to review at any time in the light of changing conditions.

APPEAL from the district court for Hall County: ERNEST G. KROGER, JUDGE. *Reversed and remanded.*

H. G. Wellensiek and *Donald H. Weaver,* for appellant.

John F. McCarthy, for appellee.

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

YEAGER, J.

For consideration here is the ruling of the district court on a motion of defendant, after default of said defendant and decree in favor of plaintiff in an action for divorce, child support, custody of child, and alimony, to set aside the default and the awards for child support and alimony and to permit him to defend against the allowance as to time for child support and as to amount for alimony. The parties are Annabelle Koser, plaintiff and appellee, and Jack D. Koser, defendant and appellant.

The district court overruled the motion and appellant has brought the ruling to this court for review.

At the time of the marriage, which was December 25, 1944, the plaintiff was a resident of Grand Island, Nebraska. Defendant was then, and still is, in the military service of this country. One child was born of the marriage. Sometime after the marriage the defendant was sent to service overseas. On January 10, 1946, which was apparently after the return of defendant from overseas, plaintiff filed her petition in this case for divorce, custody of the child, support for the child, and alimony. On the same day that the petition was filed a voluntary appearance of the defendant was filed and a waiver of time to plead and also a waiver of his rights under "the Soldiers' and Sailors' Relief Act of 1941 and the amendments thereto." On April 16, 1946, the parties entered into a separation agreement wherein, among other things, they made a settlement of their property rights in lieu of alimony and agreed upon allowances for the support of the minor child. Plaintiff accepted $500 in full in lieu of alimony and agreed to accept $10 per week for the support of the child until it should attain the age of 18 years or until the further order of the court. Defendant filed no pleading in the action.

Thereafter a hearing was had on the petition and default was entered against the defendant and on May 29, 1946, a decree was rendered, which was filed June 10, 1946, wherein plaintiff was granted a divorce, custody of the child, support for the child in the amount of $10 per week until it should become of age or until further order of the court, and alimony in the amount of $2,000 which was $1,500 in excess of the amount which the plaintiff had agreed to accept in lieu of alimony. With regard to alimony the district court specifically in the decree disapproved the agreement made by the parties.

On August 16, 1946, the defendant filed the motion, the ruling on which is the subject for consideration herein, to set aside the default, to set aside the alimony

allowance, and the award for child support and to allow him to defend against allowances in this respect. The grounds of the motion are: That the property settlement entered into was fair and reasonable under all the circumstances; that defendant was assured by plaintiff's attorney that the settlement would be approved and that he had no notice otherwise until after decree and default; that plaintiff's attorney advised him not to employ an attorney or be present or represented at the trial; that he has been at all times in the Armed Forces of the United States of America and no attorney was appointed to represent him as provided by law; that he entered his voluntary appearance and waived his rights under "the Soldiers' and Sailors' Relief Act of 1941 and the amendments thereto" on the assurance, upon which assurance he relied, of the plaintiff and her attorney that the property settlement would be approved by the court; and that plaintiff accepted the amount provided for her in the property settlement and is now precluded and estopped from receiving any additional amount.

It is this motion that the court overruled and it is from the order overruling this motion that the appeal herein was taken.

The assignments of error numbered 1 to 4 inclusive embody the contentions set forth in the motion. Assignments 5 and 6 deal generally with a journal entry which appellant contends failed to respond to the intention of the court. Specifically they refer to an alleged erroneous entry with regard to a provision for child support.

Taking up first the assignment of error that the district court erred in failing to appoint an attorney to represent defendant as provided by the Soldiers' and Sailors' Civil Relief Act (U. S. C. A., Title 50, § 520), it appears that the contention in this respect is without merit. To hold otherwise would be to read into the act intendments not found in the language thereof. The act does not protect against failure to defend by

all those in the services named in the act but only those who shall be in default of appearance. The act, U. S. C. A., Title 50, § 520 (1), in the following words points out those to whom the protection is extended: "In any action or proceeding commenced in any court, if there shall be a default of any appearance by the defendant, * * *."

The defendant herein does not fall within this class. In his case there was no default of appearance. There was specifically a voluntary appearance. It is true that there was a failure and waiver of pleading but there was in no sense a default and failure of appearance.

Assignments of error 2, 3, and 4 deal with the action of the court with respect to the allowance of alimony contrary to the agreement.

It is the well-settled rule in this jurisdiction that where a husband and wife are permanently separated, and there are legal grounds for a divorce, they may agree upon a settlement of their property rights, and provide by contract for the support and maintenance of the wife, and if the provisions are fair and reasonable the agreement may be enforced by the courts. Hiett v. Hiett, 74 Neb. 96, 103 N. W. 1051; Amspoker v. Amspoker, 99 Neb. 122, 155 N. W. 602; In re Estate of Lauderback, 106 Neb. 461, 184 N. W. 128; Ladman v. Ladman, 130 Neb. 913, 267 N. W. 188.

In the light of this rule the district court had the right to accept the agreement and embody it in the decree if it was found to be reasonable or to reject it if it was found to be unreasonable. We assume it was found on the divorce hearing to be unreasonable and that that was the reason for its rejection. But was it just and equitable under the circumstances, reasonably understanding that the defendant was relying upon the agreement and its acceptance by plaintiff, to reject it as unreasonable and impose a much heavier obligation upon the defendant without giving him an opportunity to be heard, and especially when the determination of

unreasonableness must have depended upon evidence furnished by plaintiff who had agreed upon the lesser amount with the defendant? Could the court properly vacate and set aside a contract which the law recognizes as valid and binding upon the parties, subject only to a finding on the question of reasonableness, without giving both parties thereto an opportunity to be heard? We do not think so.

We think that when the conclusion was reached that the agreement with regard to the amount which was to be paid in lieu of alimony was unreasonable and inadequate an opportunity should have been accorded to the defendant to have his day in court on that question and that now on his motion this opportunity should be accorded.

Appellant is entitled to no relief on account of the failure of the court to conform to the terms of the agreement with regard to child support. The disposition of minor children and provisions for their support in an action wherein a divorce is granted is not controllable by agreement of the parties but by the court on the facts and circumstances as disclosed to it. § 42-311, R. S. 1943; Boxa v. Boxa, 92 Neb. 78, 137 N. W. 986.

Also the decree of the trial court insofar as minor children are concerned is never final in the sense that it cannot be changed but is subject to review at any time in the light of changing conditions. § 42-312, R. S. 1943; Saum v. Saum, 144 Neb. 842, 14 N. W. 2d 844; Dunlap v. Dunlap, 145 Neb. 735, 18 N. W. 2d 51.

In the light of the statutes and the decisions the right of appellant as to the matter of child support is to make application for a modification of the order of the court.

The order of the district court is reversed and the cause remanded for further proceedings in accordance with this opinion.

REVERSED AND REMANDED.

ESSA HAMBLEN, APPELLANT, V. E. G. STECKLEY AND GRACE T. STECKLEY, DOING BUSINESS AS STECKLEY SEED CORN COMPANY, AND HORACE MORRIS, APPELLEES.

27 N. W. 2d 178

Filed April 18, 1947. No. 32177.

1. **Automobiles: Negligence.** The negligence of a person while driving an automobile with another as his guest may not ordinarily be imputable to the guest, but such guest may be responsible for the consequences of his own negligence.
2. ———: ———. It is the duty of an invited guest in an automobile driven by another, with knowledge of approaching danger, to exercise ordinary care to warn the driver of the danger, unless to a reasonably careful, cautious and prudent person it appears that the warning would be of no avail or go unheeded, or that the driver observed or should have observed the danger, as well as the guest, and for failure to give such warning the guest would be chargeable with contributory negligence.
3. ———: ———. It is the duty of an invited guest in an automobile driven by another, with knowledge of approaching danger, in the exercise of ordinary care to protest to the host if there is time and opportunity, unless it reasonably appears that such protest would go unheeded or would be of no avail, and for failure so to do the guest would be chargeable with contributory negligence.
4. **Trial.** 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.
5. **Negligence.** Slight negligence actually means small or little negligence, while gross negligence means just what it indicates, gross or great negligence, that is, negligence in a very high degree.
6. **Trial: Automobiles.** An instruction reciting the provisions of statutes regulating and controlling the speed of motor vehicles should include therein all the material applicable statutory limitations and qualifications to enable the jury to observe and understand the duty of drivers at the time and place in question.

APPEAL from the district court for Cass County: THOMAS E. DUNBAR, JUDGE. *Reversed and remanded.*

Francis M. Casey, for appellant.

Walter H. Smith, Fraser, Connolly, Crofoot & Wenstrand and *William H. Wright,* for appellees.

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

CHAPPELL, J.

Plaintiff sought in this action to recover damages from defendants for injuries allegedly sustained in a collison between a car in which she was riding and defendant Steckley's truck, at an intersection of two ordinary narrow country roads. Plaintiff's husband was driving the car south and defendant Morris, an employee of defendants Steckley, was driving the truck west. The roads sloped downward both from the north and the east to the intersection, and observation by drivers of motor vehicles approaching the intersection was naturally and artificially obstructed both to the east and to the north for some distance. A jury returned a verdict for defendants, upon which judgment was entered. Plaintiff's motion for new trial was overruled, and she appealed, assigning as error substantially that: (1) The trial court erred in submitting the question of plaintiff's alleged contributory negligence to the jury; (2) erred in giving instructions numbered 3, 7, 9, and 10 respectively; (3) erred in failing to grant her a new trial because the foreman of the jury failed to reveal on voir dire that he was a former employee of defendants Steckley; and (4) that the verdict was not sustained by the evidence and was contrary to law. We conclude that the first and second assignments of error should be sustained in part, requiring reversal, in which event it will not be necessary to discuss at length or decide whether or not the third and fourth assignments of error have merit.

Whether or not the trial court should have submitted the question of plaintiff's alleged contributory

negligence to the jury depends upon whether the evidence made that question one of law or fact. The rule in that connection was stated in Fulcher v. Ike, 142 Neb. 418, 6 N. W. 2d 610, wherein it was held: "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."

In the light thereof, we are required to discuss plaintiff's duty as a guest and determine whether there was any competent evidence that she violated it.

This court held in Crandall v. Ladd, 142 Neb. 736, 7 N. W. 2d 642, that: "The negligence of a husband while driving an automobile with his wife as a guest may not be imputable to her, but she may be responsible for the consequences of her own negligence in failing to warn him of known approaching danger or for failure to protest against his recklessness." See, also, Murphy v. Shibiya, 125 Neb. 487, 250 N. W. 746.

The duty of a guest was discussed in Gleason v. Baack, 137 Neb. 272, 289 N. W. 349, wherein it was held: "The duty of a guest riding in an automobile is to use care in keeping a lookout commensurate with that of an ordinarily prudent person under like circumstances. The guest is not required to use the same degree of care as devolves upon the driver. If the guest perceives danger, or if at certain times and places should anticipate danger, he should warn the driver. Ordinarily, the guest need not watch the road or advise the driver in the management of the car." See, also, Glick v. Poska, 122 Neb. 102, 239 N. W. 626.

Also, in Lewis v. Rapid Transit Lines, 126 Neb. 158, 252 N. W. 804, it was held: "Ordinarily, the guest passenger in an automobile has a right to assume that the driver is a reasonably safe and careful

driver; and the duty to warn him does not arise until some fact or situation out of the usual and ordinary is presented." See, also, Rogers v. Brown, 129 Neb. 9, 260 N. W. 794.

As recently as Fulcher v. Ike, *supra,* this court said: "As a rule of law it is the duty of an invited guest in an automobile driven by another, with knowledge of approaching danger, to exercise ordinary care to warn the driver of the danger, unless to a reasonably careful, cautious and prudent person it appears that the warning would be of no avail or go unheeded, or that the driver observed or should have observed the danger, as well as the guest, and for failure to give such warning the guest would be chargeable with contributory negligence. Also, it is the duty of an invited guest, with knowledge of approaching danger, in the exercise of ordinary care to protest to the host if there is time and opportunity, unless it reasonably appears that such protest would go unheeded or would be of no avail, and for failure so to do the guest would be chargeable with contributory negligence."

Bearing in mind the above rules, we have examined the record and conclude as a matter of law that there was no competent evidence justifying submission of plaintiff's alleged contributory negligence to the jury for its determination. It appears without dispute that she observed defendant's oncoming truck as her husband entered the intersection, and warned him at once of the approach of danger by collision therewith. Under the circumstances it could not reasonably be found that she failed to observe and perform any duty imposed upon her by the law.

In that situation it will be unnecessary for us to discuss at length whether or not instruction No. 7 erroneously attempted to define plaintiff's duty. It is sufficient to say that the instruction itself was not prejudicially erroneous but was erroneously given be-

cause it did not have application under the circumstances.

Likewise, for want of application, it would ordinarily be unnecessary for us to discuss at length whether or not instruction No. 3 was erroneous. However, having concluded that the instruction in and of itself was prejudicially erroneous, we are impelled to point out the reasons for it. In the instruction it was said: "Gross negligence may be defined as a wanton or reckless disregard for the safety of others."

This court has disapproved and held such an instruction to be erroneous upon several occasions not only in cases under the guest statute but also in those involving only the comparative negligence statute. It is true that gross negligence is inclusive of wanton or reckless conduct, but gross negligence is not so limited.

Beginning with Morris v. Erskine, 124 Neb. 754, 248 N. W. 96, this court took the position that under the guest statute: "Gross negligence means great or excessive negligence; that is, negligence in a very high degree. It may be said that it indicates the absence of even slight care in the performance of a duty, and such, we think, is the meaning intended by the legislature." In that opinion the court refused to hold and specifically disapproved the contention that gross negligence should be defined as an intentional failure to perform a manifest duty or that the injury must have been inflicted intentionally or in a wanton or reckless disregard for the safety of others.

In Gilbert v. Bryant, 125 Neb. 731, 251 N. W. 823, we adhered to that position, and in a discussion of the guest statute enacted by the Legislature it was said: "They did not define 'gross negligence' or use in connection with those words any such terms as 'abandoned, monstrous and approximately wanton disregard of safety' or 'intentional indifference to the danger.' They intended, of course, to increase, beyond want of ordinary care or slight negligence, the degree of negligence es-

sential to the right of a motorist's guest to recover damages for personal injuries."

Also, in Sterns v. Hellerich, 130 Neb. 251, 264 N. W. 677, it was held: "The term 'gross negligence,' as used in the automobile guest statute, signifies a degree of negligence greater than want of ordinary care or slight negligence, but not necessarily extending to wanton, wilful or intentional disregard for the guest's safety."

In the recent guest case of Landrum v. Roddy, 143 Neb. 934, 12 N. W. 2d 82, 149 A. L. R. 1041, this court disapproved an instruction defining gross negligence as: "* * * such an absence of care * * * as may be described as reckless and such as indicates a reckless disregard for the consequences." In the opinion it was said: "In Morris v. Erskine, *supra,* we said: 'Gross negligence means great or excessive negligence; that is, negligence in a very high degree. It may be said that it indicates the absence of even slight care in the performance of a duty, * * *,' and this definition has been approved in many of our decisions since that opinion. However, there are other decisions of this court defining gross negligence which do not use the exact language of the definition in Morris v. Erskine, *supra,* but do have the same meaning. None of these definitions refer to the requirement of the act as being reckless, nor do we think any such requirement was intended by the statute." See, also, Belik v. Warsocki, 126 Neb. 560, 253 N. W. 689.

Monasmith v. Cosden Oil Company, 124 Neb. 327, 246 N. W. 623, was not a guest case, but the comparative negligence statute was involved, and complaint was made that the trial court did not give a requested instruction defining slight and gross negligence. In the opinion the court said: "The court did, however, properly define negligence, but did not undertake to define the terms 'gross' and 'slight,' and we think it was not incumbent upon it so to do. The words 'slight' and 'gross' are words of common use which are under-

stood by every one of ordinary intelligence. An attempt to define these words would have been superfluous. Any one of common sense knows that slight negligence actually means small or little negligence, and that gross negligence means just what it indicates, gross or great negligence. No error was committed in the refusal to define words of ordinary meaning which are in common, every-day use."

This court quoted and approved the foregoing statement as recently as Johnson v. Batteen, 144 Neb. 384, 13 N. W. 2d 625, a case involving only the comparative negligence statute, wherein it was held: "Slight negligence actually means small or little negligence.

"Gross negligence means just what it indicates, gross or great negligence, that is, negligence in a very high degree."

In the light of the cases heretofore cited, we can only conclude that the trial court's definition of gross negligence set forth in instruction No. 3 was prejudicially erroneous even if under the evidence plaintiff's alleged contributory negligence had been an issue for submission to the jury.

Instruction No. 9, about which plaintiff complains, attempted to recite the statutory provisions regulating and controlling the speed of motor vehicles. We have examined the instruction and do not deem it erroneous simply because the court used the word "proper" instead of "prudent." As a matter of fact, the word "proper" is used in and is a part of section 39-723, R. S. 1943, from which the first paragraph of the instruction was evidently taken.

There is, however, another inclusion in and there are omissions from the instruction which give it a prejudicially erroneous character. The instruction reads in part: "The statutes further provide that *in such localities as the place in question in this case* the speed shall not exceed 60 miles per hour between the hours of sunrise and sunset, and 50 miles per hour between the

hours of sunset and sunrise, upon any highway outside of a city or village, and speed shall be decreased as may be necessary to avoid colliding with any person, vehicle or other conveyance on or entering the highway in compliance with legal requirements, and it is the duty of all persons to use due care." (Italics ours) In the absence of certain other applicable statutory limitations and qualifications omitted from and not recited in the instruction, it appears that the language used would naturally lead the jury to erroneously assume that at the time and place of the accident defendant driver had a lawful right to drive at a rate of speed which was in fact unlawful.

In that connection, section 39-7,108, R. S. 1943, as amended by chapter 93, Session Laws of Nebraska, 1945, specifically provides: "(1) No person shall drive a vehicle on a highway at a speed greater than is reasonable and prudent under the conditions then existing. * * * (3) The following speeds shall be prima facie lawful, but in any case when such speed would be unsafe, they shall not be lawful: * * * (c) sixty miles per hour between the hours of sunrise and sunset and fifty miles per hour between the hours of sunset and sunrise upon any highway outside of a city or village. (4) The fact that the speed of a vehicle is lower than the foregoing prima facie limits shall not relieve the driver from the duty to decrease speed when approaching and crossing an intersection, * * * when traveling upon any narrow * * * roadway, or when special hazards exist with respect to * * * other traffic or by reason of * * * highway conditions, and speed shall be decreased as may be necessary to avoid colliding with any * * * vehicle or other conveyance on or entering the highway in compliance with legal requirements and the duty of all persons to use due care; * * * ." The material applicable limitations and qualifications upon speed contained therein should have all been included in the instruction to enable the jury to observe and under-

stand the duty of the drivers in approaching the intersection of narrow country roads at a blind corner where special hazards existed with respect to other traffic by reason of highway conditions.

Instruction No. 10 about which plaintiff complains, related to the weight and credibility to be given the evidence concerning the speed of the vehicles involved. Plaintiff argues that the instruction was prejudicially erroneous because it did not recite a general rule but specifically made an unwarranted contrast between the position and opportunity of plaintiff and the defendant driver respectively to make observation of the other vehicle as it approached the intersection. It would serve no good purpose to repeat the language of the instruction. As we view it, the instruction could have been more appropriately phrased, but it was not prejudicially erroneous. However, in the light of the circumstance that the issues will in all probability again be presented to the trial court, we call attention to the fact that the instruction would clearly portray a proper applicable general rule if the words "such as the truck in this case coming toward him" and the entire last sentence of the instruction, were eliminated therefrom.

An examination of the record discloses that the questions of alleged negligence or concurrent negligence of the respective drivers and proximate cause, together with whether or not plaintiff was injured and the amount of her damages, if any, were for the jury to decide. In that situation, and since there will be a new trial in any event, it becomes unnecessary to discuss or decide whether or not plaintiff's third and fourth assignments of error have any merit.

For the reasons heretofore stated, the case is hereby reversed and remanded for a new trial.

REVERSED AND REMANDED.

CARTER, J., participating on briefs.

HAROLD WRIGHT, BY NEXT FRIEND, LOUIS A. WRIGHT, APPELLEE, V. ROLLAND CAMERON, APPELLANT.
27 N. W. 2d 226

Filed April 25, 1947. No. 32172.

1. **Appeal and Error: Trial.** A judgment will not be set aside because a more accurate statement of the law might have been made than that contained in the instructions, when from a consideration of the instructions as a whole no prejudicial error appears.
2. ———: ———. Instructions are to be considered together, to the end that they may be properly understood, and, when so construed, if as a whole they fairly state the law applicable to the issues presented by the pleadings and the evidence in support thereof, error cannot be predicated on the giving of the same.
3. **Negligence.** If the defendant's wrongful act is the proximate cause of a compensable injury to the plaintiff, then the question whether the defendant could or should have foreseen the result becomes immaterial. The principle established would certainly not be less true where the act complained of is not mere negligence, but a willful tort. That defendant could not foresee nor anticipate plaintiff's injury, therefore, avails him nothing.

APPEAL from the district court for Cass County: THOMAS E. DUNBAR, JUDGE. *Affirmed.*

L. R. Doyle and *Van Pelt, Marti & O'Gara,* for appellant.

Littrell & Patz, for appellee.

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

PAINE, J.

This is a law action for damages growing out of an assault and battery. Judgment was entered for $1,000 for the plaintiff on the verdict of the jury for that amount. Defendant appealed.

There is not a great deal of dispute as to the facts in this case. Plaintiff's father filed petition as next friend, alleging: That the minor was 19 years of age and a

resident of Cass County; that the defendant, Rolland Cameron, was also a resident of Cass County; that the defendant made a willful, unlawful, violent, and malicious assault by striking plaintiff in the face, inflicting injuries by breaking his jawbone in two places, which caused a lack of occlusion in his back teeth and an overlapping, or displacement, of his jaw, and the loss of several molar teeth; and that aside from the pain and suffering plaintiff lost his wages at the Cushman Motor Works in Lincoln from July 22, 1945, until August 27, 1945, was confined to the Lincoln General Hospital for six days, and required the services of a dental surgeon for some time thereafter.

On Saturday evening, July 21, 1945, plaintiff had driven to Ashland with his older brother and wife, who were shopping around for an hour or so, and upon returning to Greenwood plaintiff visited at a couple of taverns and a garage or filling station. A man gave him two bottles of beer, and he hid one under a bench on the west side of the D-X filling station, with the intention of taking it with him when he went home. He then went for a ride in Greenwood and out in the country with three other young people, and the four of them drank the other bottle of beer which had been given to plaintiff.

The plaintiff, Harold Wright, and the daughter of the defendant, Norma Jean Cameron, had both attended the Greenwood public school and knew each other, but there is no evidence that they had ever gone together. Harold had been standing on the sidewalk outside of "Heinie's Place," talking through the window with Mrs. Rolland Cameron, who was Norma Jean's mother. Just then Norma Jean and her girl friend, Ferne Comstock, came into the tavern. Plaintiff testified: "Q And from where you stood at the window, could you see them as they entered the door? A Yes. Q Go ahead and tell us what happened after they came in. A They walked over to the booth where Mrs. Cameron and Mrs Mac-

Dougal were sitting, and Norma Jean looked out the window and said, 'What are you doing here talking to two old married women when Ferne and I are in here,' and I told them I was mostly killing time now, and then Ferne and Norma Jean Cameron walked back outside and came around to the west side of the building where I was. Q Had you moved from the window? A No sir. Still at the window. Q Did they come where you were at the window? A That is right. Q Then what was done? A Well, I was standing there cleaning my finger nails first and then Norma Jean grabbed the finger nail file out of my hand and started cleaning out her finger nails and I got it back and then she asked me if I had any beer. Q What did you say? A I told her no. She said, 'come on give me a drink you old tightwad,' so I told her I had a bottle of beer, but that it was hot and she asked where it was and I told her down at the D-X station, and she still insisted she have a drink and I told her if she wanted a beer she had to go down to the D-X station and get it, and she said I would have to go with her, for me to show her where it was at, so I did; and I walked—Ferne Comstock was going with us, but she said she didn't want no hot beer, so she didn't go." Norma Jean in her testimony denied that she called him a "tightwad" or that she asked him for beer, but evidence shows he was standing within two feet of Norma Jean's mother while this conversation was taking place, and the mother was not called as a witness.

Norma Jean followed him to this filling station, which is on Highway No. 6, being the main highway from Omaha to Lincoln, on which there is heavy traffic. This filling station was about 125 feet from the place where Norma Jean had left her mother. Norma Jean testified that he walked ahead and she walked two or three feet behind him. When they got to this filling station he reached under the bench and got his bottle of

beer and gave her one drink and he took a drink, and within a minute or two her father appeared.

It appears that Ferne Comstock had told the defendant where his daughter, Norma Jean, had gone. The father followed them right over and inquired what was going on there. When neither one of them answered him he struck the plaintiff one blow, breaking his lower jaw in two places. The plaintiff then ran. Norma Jean testified that the plaintiff had treated her as a perfect gentleman, that he did not touch her in any way, and they were standing three or four feet apart at the time her father arrived on the scene.

Dr. Frederick W. Webster, a dental surgeon of many years' practice in Lincoln, testified that the plaintiff was brought to his office the next morning by his father, with his lower jaw fractured in two places, unable to talk, and in distress, with very intense swelling on the left side of his face. He wired the jaw together temporarily and put on a head bandage and sent him to the hospital for surgical treatment. His office charts and clinical records, showing the charges made, were refused admission in evidence.

With this summary of the facts, we will now examine the defense as set out in the answer in paragraphs 3 and 4:

"3. Alleges that on the 21st day of July, 1945, Harold Wright attempted to contribute to the delinquency of the defendant's minor child, and to debauch her by providing her with liquids containing alcohol and of an intoxicating nature; that the defendant, in protecting his said daughter from the attempted debauchery, used force only to prevent the said Harold Wright from continuing with his attempt to contribute to the delinquency of defendant's minor child and to her debauchery; that if the said Harold Wright was injured as alleged, it was while the said defendant was protecting his said daughter as above set forth, and that the said

defendant used only such force as was necessary in the protection of his said child.

"4. Alleges that the defendant did not intend to injure said Harold Wright, and that if the said Harold Wright suffered any injuries they were caused by and resulted from said Harold Wright's attempt to harm defendant's minor daughter as above set forth."

The defendant testified that he was 42 years of age; that he has a family of two sons and one daughter, Norma Jean; and that he does a general trucking business, hauling cream, grain, and other things. He said he had known the plaintiff for several years. He testified that about 11 o'clock this Saturday night he inquired of Ferne Comstock where Norma Jean was, and walked across the street and around to the west side of the filling station and found her there talking with a man, "and I pushed this man back and took her by the arm and led her around the corner," but he said that at the time he pushed or shoved him he did not know it was Harold Wright.

On cross-examination he said he gave a sweeping motion, struck him with his entire hand "and told him he better get going." Defendant testified that Heinie's tavern is about 125 feet from the filling station. He also admitted on cross-examination that he did not see any bottle of beer down there, nor hear his daughter make any outcry, or scream, or anything of that kind; that he did not see anybody have hold of his daughter; and that he went around the station with the intention of using the force that was necessary to get her away from whoever was there. He testified that his daughter minds him very well, and he was not in the least concerned about finding out who it was before he hit him. He admitted on cross-examination that he had had two bottles of beer himself during the evening, one bottle in each tavern.

The first assignment of error is in regard to the giving of instruction No. 12. The second assignment of error is

that the court failed to instruct the jury that if they found for the plaintiff they should limit the recovery to such injury sustained or pain suffered for that part of the assault and battery that was excessive. Third, it is charged that the court erred in failing to instruct the jury that if they found the defendant was justified in using all the force he did use to protect his daughter from the debauchery of the plaintiff no recovery could be had by the plaintiff. The defendant also charges as error that the trial court overruled the defendant's motion for a new trial, that the verdict was excessive and was given under influence of passion and prejudice, and that the court failed to instruct the jury on the defendant's theory of the case.

In the reply brief, but not in defendant's original assignments of error, it is charged that instruction No. 8 is an incorrect statement of the law and prejudicial in that it recognized that defense of defendant's daughter under certain circumstances would be a justification for the use of force, but that the instruction was erroneous in saying that the danger must be "actual and apparent." The evidence in this case does not show any justification whatever for the use of force. Accordingly, we are of the opinion that the trial court should not have instructed on the subject of justification. We have examined instruction No. 8 in the light of the circumstances and find that since there was no justification for the giving of any such instruction, it was favorable to defendant rather than prejudicial to him. In re Estate of Keup, 145 Neb. 729, 18 N. W. 2d 63.

We have also examined instruction No. 12, and find that it correctly stated the elements to be considered by the jury in determining the measure of plaintiff's damages, and correctly advised the jury how to arrive at the same.

"A judgment will not be set aside because a more accurate statement of the law might have been made than that contained in the instructions, when from a

consideration of the instructions as a whole no prejudicial error appears." Kocar v. Whelan, 102 Neb. 503, 167 N. W. 775.

"Instructions are to be considered together, to the end that they may be properly understood, and, when so construed, if as a whole they fairly state the law applicable to the issues presented by the pleadings and the evidence in support thereof, error cannot be predicated on the giving of the same." Pruitt v. Lincoln City Lines, 147 Neb. 204, 22 N. W. 2d 651.

If the defendant's wrongful act is the proximate cause of a compensable injury to the plaintiff, then the question whether the defendant could or should have foreseen the result becomes immaterial. The principle established would certainly not be less true where the act complained of is not mere negligence, but a willful tort. That defendant could not foresee nor anticipate plaintiff's injury, therefore, avails him nothing. See Lambert v. Brewster, 97 W. Va. 124, 125 S. E. 244.

Error is assigned that the verdict is excessive. In an examination of the evidence of pain and suffering, continuing over several weeks, because the lower jaw was broken in two places by defendant's blow, and the permanent loss of several molar teeth, and the other facts shown, we have reached the decision that the verdict of the jury was not excessive and this assignment of error has no support.

In another case this court has said: "The remedy by action to recover damages for assaults and batteries, when properly administered, is an efficient factor in the preservation of peace and order. Men of violent disposition, responsible financially, who care little for fines imposed by magistrates under criminal suits, have a wholesome dread of such actions in jurisdictions where they are properly enforced. They should not therefore be lightly regarded, but the right to recover in such cases should be upheld and enforced." Glassey v. Dye, 83 Neb. 615, 119 N. W. 1128.

After an examination of all the assignments of error, we reach the conclusion that there was no prejudicial error in the case, and the judgment is affirmed.

AFFIRMED.

ROBERT BLANCHARD, APPELLANT, V. ROBERT LAWSON, APPELLEE.

27 N. W. 2d 217

Filed April 25, 1947. No. 32135.

1. **Appeal and Error: Trial.** A judgment will not ordinarily be reversed for refusing to give tendered instructions where other instructions given by the court fairly and correctly covered the issues involved in the tendered instructions.
2. ———: ———. The inadvertent substitution of one word for another in an instruction is at most harmless error, when it is clear from the instruction itself or from the record and other instructions given that the jury could not have been confused or misled thereby.
3. ———: ———. Instructions should be considered together in order that they may be properly understood, and when, as an entire charge, they properly submit the issues to the jury, the verdict will not be set aside for harmless error in one of them.
4. ———: ———. Where the giving of an instruction is assigned as error but there is no discussion of the assignment in the briefs and no error is readily apparent on the face of the instruction, the assignment will not be further reviewed.
5. ———: ———. If an examination of all the instructions given by the trial court discloses that they fairly and correctly state the law applicable under the evidence, error cannot be predicated thereon.
6. ———. Where there is no prejudicial error found in the record and the verdict of a jury has sufficient competent evidence to support it, the judgment will be affirmed.

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

McKillip, Barth & Blevens, for appellant.

Chambers & Holland, for appellee.

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

CHAPPELL, J.

Plaintiff sought recovery for damages to his car by reason of its collision with a car driven by defendant at an intersection of county roads. The jury awarded defendant a verdict, upon which judgment was entered. Plaintiff's motion for new trial was overruled, and he appealed. His twelve assignments of error may be summarized as contending that the trial court erroneously submitted the case to the jury by the refusal and the giving of certain instructions. We conclude that his contentions cannot be sustained.

The following facts are undisputed. Plaintiff was driving from the north toward the south on a graveled county road approximately 25 feet wide, which gradually sloped upward to an intersection with a county dirt road approximately 20 feet wide, upon which defendant was driving from the west toward the east. The view of both drivers as they approached the intersection was obstructed by a high bank and plum thicket. Both drivers were familiar with the highways and well knew that their view was thus obstructed as they approached and entered the intersection. The front end of plaintiff's car struck the left side of defendant's car, a two-door sedan, at about the left door, crushing it inward, and pushing defendant's car eight or nine feet toward the south. Thereafter, defendant's car stopped with its front wheels in the south ditch of the east and west road at a point near the southeast corner of the intersection. The radiator of plaintiff's car was bent back down on the engine toward the driver. After the accident, plaintiff's car stood facing east with its left wheels near the center of the east and west road, and its front near the center of the north and south road. A trailer loaded with hogs and attached to plaintiff's car jackknifed around headed west against his car.

Other witnesses testified at the trial, but the evidence of plaintiff and defendant is primarily pertinent to decision and, except as above stated, was generally speaking in conflict.

Plaintiff testified in substance that he approached and entered the intersection at about 20 miles an hour, at which speed he could not have stopped in less than 35 feet. He says that he looked to the right, where observation was obstructed until in the intersection, and when at a point 8 or 9 feet therein, he saw defendant coming toward him on the wrong side of the road, at 40 miles an hour, without looking right or left. Thereupon, plaintiff applied his brakes, and turned his car left, but it was too late. There being nothing else to do, he shut his eyes, let her go, and defendant's car sideswiped him. Plaintiff also testified that defendant was just entering or ready to enter the intersection when he first saw him, and that thereafter defendant traveled 35 or 40 feet, while plaintiff traveled 12 or 15 feet before the collision.

Defendant testified in substance that as he approached the intersection on his right side of the highway, he slowed down, shifted into low, looked north at a point where he could see 15 or 20 feet back, and seeing nothing, started across at about 15 miles an hour. When he got almost to the center of the intersection, he looked again and saw plaintiff coming toward him, but could not estimate his speed. Defendant testified that he then tried to get away, by stepping on the gas, but could not. The front of plaintiff's car struck his car on the left side at or about the door or back of it, when his car was in the southeast quarter of the intersection, pushing it eight or nine feet south, where it stopped of its own accord in the ditch at the southeast corner of the east and west road.

Plaintiff first argues that the trial court erroneously refused to give his requested instructions No. 1 and 2, which prescribed generally the duty of drivers to have

and maintain a lookout for other traffic when approaching and crossing an intersection of highways. In that connection, it was pleaded by plaintiff in his petition that defendant was negligent because he drove into the intersection without having and maintaining a lookout for other users of the highway. An examination discloses that the trial court in other instructions given appropriately submitted that issue to the jury as a material allegation of negligence for its consideration in determining defendant's liability.

It is the rule in this jurisdiction that a judgment will not ordinarily be reversed for refusing to give tendered instructions where other instructions given by the court fairly and correctly cover the issues involved in the tendered instructions. See Miceli v. Equitable Life Assurance Society, 138 Neb. 367, 293 N. W. 112, affirmed on rehearing 138 Neb. 374, 294 N. W. 659. Bearing that in mind, we conclude that the trial court's refusal to give plaintiff's requested instructions was not prejudicially erroneous.

Plaintiff complains of instruction No. 8, given by the trial court. The word "east" instead of "west" was inadvertently used therein as indicating the direction from which defendant entered the intersection. There is good reason why the instruction could not be prejudicial to plaintiff. If defendant entered the intersection from the "east" it is apparent that the instruction would be favorable to plaintiff in that it would place him to the right of defendant, whereas plaintiff actually entered the intersection on the left. Furthermore, the same instruction, in a sentence immediately following that alleged to be erroneous, recited that " * * * defendant's automobile was to the right" which correctly reflected the facts. Also, the record itself is replete with undisputed evidence correctly showing the directions from which plaintiff and defendant approached and entered the intersection. The jury could not have been confused or misled by the instruction.

This court has pointed out that the inadvertent substitution of one word for another in an instruction is at most harmless error when it is clear from the instruction itself or from the record and other instructions given, that the jury could not have been confused or misled thereby. Tidd v. Stull, 128 Neb. 506, 259 N. W. 369; Albrecht v. Morris, 91 Neb. 442, 136 N. W. 48. It is generally held that instructions should be considered together in order that they may be properly understood, and when, as an entire charge, they properly submit the issues to the jury, the verdict will not be set aside on appeal for harmless error in one of them. Bancroft v. Kite, 142 Neb. 178, 5 N. W. 2d 196.

Plaintiff also assigns as error the giving of instruction No. 7, but we find no discussion of it in the briefs. Nevertheless, we have examined the instruction and finding that it correctly stated the law, we see no necessity for discussing it further. The applicable rule is that: "Where the giving of an instruction is assigned as error, but there is no discussion of the assignment in the briefs, and no error is readily apparent on the face of the instruction, the assignment will not be further reviewed." Miceli v. Equitable Life Assurance Society, *supra*. See, also, Rules, Supreme Court, 8A 2 (4).

Finally, we turn to plaintiff's primary contention. In that regard, he argues that the trial court erred in giving instructions No. 4 and 9 respectively. No complaint is made of their substance but plaintiff contends that they had no application. He does so upon the asserted premise that their subject, comparative negligence, was not strictly an issue because defendant's own evidence established his negligence as a matter of law. In other words, plaintiff argues that under the evidence, the trial court should have submitted to the jury only the question of the degree of plaintiff's negligence. The record does not disclose that plaintiff ever made any such request of the trial court by tendered

instructions or otherwise, but in any event, to have submitted the issues in the manner now proposed by plaintiff would have been erroneous. That is true, because under the comparative negligence statute, section 25-1151, R. S. 1943, even if it could be said that defendant was guilty of negligence as a matter of law, which we believe it could not, and it could be found that plaintiff was guilty of only slight negligence, the question whether or not defendant's negligence was gross in comparison therewith would still be a factual one for determination by the jury.

Having examined the record and all of the instructions given by the trial court, we conclude that they fairly and correctly stated the law applicable to the evidence, and that error cannot be predicated thereon. Gallagher v. Law, 135 Neb. 381, 281 N. W. 806.

It is well established that where there is no prejudicial error found in the record and the verdict of a jury has sufficient competent evidence to support it as in the case at bar, the judgment will be affirmed. Pruitt v. Lincoln City Lines, 147 Neb. 204, 22 N. W. 2d 651.

For the reasons heretofore stated, the judgment of the trial court should be and hereby is affirmed.

AFFIRMED.

WILLIAM MEIER ET AL., APPELLEES, V. GEORGE GELDIS, APPELLANT.

27 N. W. 2d 215

Filed April 25, 1947. No. 32199.

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

APPEAL from the district court for Douglas County: JAMES T. ENGLISH, JUDGE. *Affirmed.*

William N. Jamieson, for appellant.

Cranny & Moore, for appellees.

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

WENKE, J.

Plaintiffs, William Meier, Augusta Meier, and Beulah Meier, brought this action in the district court for Douglas County asking that the defendant, George Geldis, be adjudged to be a trustee for the benefit of the plaintiff of certain funds that he had received from John H. Owens and that he be required to account therefor. Decree was entered in favor of the plaintiffs. His motion for new trial having been overruled, defendant appeals.

The record discloses the following: On or about January 28, 1944, John H. Owens induced the plaintiffs to make a $3,200 loan. Plaintiffs understood this loan was being made for the benefit of Carl A. and Caroline G. Swanson, who are husband and wife, and was to be secured by their mortgage on 80 acres of land in Dodge County, Nebraska. On January 28, 1944, the plaintiffs delivered to John H. Owens for the Swansons the sum of $3,200 and in consideration thereof Owens delivered to the plaintiffs what purported to be a mortgage note of Carl A. and Caroline G. Swanson in the sum of $3,200 together with interest coupons thereto attached and a real estate mortgage on 80 acres of land in Dodge County securing the same. The mortgage had been recorded. The signatures of Carl A. and Caroline G. Swanson on all of these instruments were made by John H. Owens without authority from the Swansons and, in fact, were forgeries. The Swansons had never authorized Owens to secure the loan for them nor did they ever receive any part of the proceeds.

On January 29, 1944, after Owens had received the $3,200 he deposited $3,175 thereof to his account in the

Omaha National Bank. Immediately before this deposit was made his account showed a balance of $7.09. On January 31, 1944, before any other deposit was made to this account, Owens drew a check thereon payable to the Omaha National Bank in order to purchase a draft in the sum of $1,000. This draft was made payable to the defendant and delivered to him on the same day. The check was charged to Owens' account and sufficient of the deposit remained to cover it.

Prior to January 31, 1944, the defendant had talked to Owens about buying a farm and for that purpose had, on November 1, 1943, advanced to Owens the sum of $500. Again on November 26, 1943, he advanced a like sum for the same purpose. No contract was obtained and defendant asked Owens to return the money. He received from Owens the aforesaid draft in payment thereof. Owens died on August 9, 1945, and thereafter, on September 15, 1945, the plaintiffs discovered that the signatures of the Swansons were not genuine but were forgeries.

The loan has never been paid.

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

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

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

either as to the source or nature of the funds with which he was paid.

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

Also, in 65 C. J., Trusts, § 923, p. 994: "As a general rule, where trust property has been transferred to pay or secure an antecedent debt, the debt does not constitute such a valuable consideration as entitles the creditor to hold the property free from the trust if he has no notice thereof; * * *."

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

" * * * where the money or property is found in the possession of one who has parted with nothing, and who has not changed his position to his injury because of the apparent ownership of the one in possession of the money, it will be returned to the true owner. A pre-existing debt is not such a consideration as will constitute a party a bona fide holder for value, and one who receives money in payment of a pre-existing debt must therefore take it subject to prior equities. Hewitt et al. v. Powers (1882), 84 Ind. 295; Busenbarke, Executor, v. Ramey et al. (1876), 53 Ind. 499; Louthain et al. v. Miller

(1882), 84 Ind. 295; Busenbarke, Executor v. Ramey, 89 Ind. 17; New Albany National Bank et al. v. Brown et al. (1916), 63 Ind. App. 391, 114 N. E. 486." Peoples State Bank v. Caterpillar Tractor Co., 213 Ind. 235, 12 N. E. 2d 123. See, also, Porter v. Roseman, 165 Ind. 255, 74 N. E. 1105.

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

As stated in Allen Dudley & Co. v. First Nat. Bank, *supra,* in quoting from Shotwell v. Sioux Falls Savings Bank, 34 S. Dak. 109, 147 N. W. 288: "We deny that there is any recognized principle of law, or even any reason founded upon that necessity which is said to know no law, that will sustain either the justice or necessity of holding that, when a fund, even though it consists of money, can be fully and clearly traced into the hands of one who has neither paid a valuable consideration therefor nor changed his relation to the person from whom the fund was received so as to give rise to any equitable defense against the claims of the true owner of such fund—when one man has money which in equity and good conscience belongs to another—such fund should not be recovered by the equitable owner thereof."

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

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

For the reasons stated we think the holding of the trial court is correct and should be affirmed.

AFFIRMED.

ANNA M. LEWELLING, APPELLEE, V. IDA M. MCELROY ET AL., APPELLANTS.

27 N. W. 2d 268

Filed May 2, 1947. No. 32190.

1. **Deeds.** Where a grantor conveys land in consideration of an agreement of the grantee to care for the grantor during his lifetime, and the grantee neglects or refuses to comply with the contract, the deed may be set aside and the title quieted in the grantor.
2. **Trial.** As a general rule, after final hearing on the merits, leave will not be granted to either party to adduce evidence of any fact which existed prior to the closing of proofs, and was known or should have been known to the party or his counsel seeking the introduction of such additional evidence. This rule is, however, subject to exceptions, where the reason of the rule does not apply.
3. ———. The allowance of it is not a matter of right in the party but of sound discretion in the court, to be exercised cautiously and sparingly, and only under circumstances which demonstrate it to be indispensable to the merits and justice of the cause.

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

Joseph Ach and *Alfred A. Fiedler,* for appellants.

John E. Mekota, for appellee.

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

SIMMONS, C. J.

This is an action to cancel a deed to real estate on the ground that the consideration therefor was a promise to care for the grantor during her lifetime. The grantee died before the grantor. The trial court canceled the deed on condition. We affirm the judgment of the trial court.

The grantor brought this action. She died during its pendency but after she had testified. The action was revived in the name of the executor of her estate, and her nephew Bertwell and his wife. For that reason the original plaintiff will be referred to herein as the grantor. The grantee in the deed will be referred to as the grantee. The defendant Ida M. McElroy, the grantee's widow, will be referred to herein as the widow.

The grantor pleaded that the grantee and his wife promised that if grantor would convey the property to them, they would remain in the home and care for her as long as she lived, and that, relying on the promise and without any other consideration, she made the conveyance; and that they had not cared for her since the execution of the deed. She further alleged that the promise was made without any intention of complying therewith. The defendants deny the promise and necessarily the intent not to perform.

The property involved in this action is a tract of land of about six acres, improved by a house and outbuildings, and located at the outskirts of Western, Nebraska. It had been the home of the grantor for half a century. The grantor had been a widow for many years. She was 86 years of age when the deed was given. The grantor received a pension as a soldier's widow. She was thrifty and lived within her income. In 1926, she bought and thereafter rented another property of a value of about $1,500 or $2,000 in Western.

The grantee was a favored nephew of grantor, and not in good health. On June 16, 1943, he and his wife moved from Omaha to Western and lived with the grantor. The grantee secured employment at Western. On July 21, 1943, the grantor and the grantee went to a notary public in Western and the deed in question was executed and delivered. It was a deed of general warranty, reciting a consideration of $1,000. It was delivered on the date of its execution, and was filed for record and recorded on July 28, 1943. It bore revenue stamps canceled as of that date.

The grantor, the grantee, and his wife lived in the premises until November 24, 1943, when the grantee died. A week later the widow moved from the premises to Omaha, and did not thereafter live there. In February 1944, the widow leased the premises. On February 25, 1944, the widow wrote the grantor asking for possession by April 1, 1944. This lease later was surrendered when the grantor refused to vacate the premises.

The notary testified that he made out the deed at the request of the grantor, and delivered the deed to the grantee at the grantor's direction and in her presence. The grantor directed that the consideration be recited as $1,000. The notary testified that to the best of his knowledge no consideration ever was paid. There is some testimony that about that time the grantor paid a judgment of less than $1,000 to the notary, but that the consideration recited in the deed had nothing to do with the judgment. The widow, called as a witness by the plaintiff, testified that the grantor was offered $1 for the deed and refused it, and that so far as she knew neither she nor the grantee paid anything to the grantor. The grantor testified that she was not paid a cent for the property. Defendants moved to strike this testimony as improper under section 25-1202, R. S. 1943. The motion to strike was overruled. Defendants assign this as error. We need not determine this question. There is ample evidence that there was no money consideration.

Defendants plead that the conveyance was a gift. If error, it was error without prejudice.

What, if anything, was the consideration for the deed?

The grantor offered the testimony of three witnesses. The first was a neighbor woman and a friend of the grantor, who had lived nearby since 1941. She testified that shortly after the deed was delivered the grantee told her of it, and that he was supposed to take care of the grantor for the rest of her life. About the same time the grantor told the witness "they was supposed to take care of her." A doctor, who was the grantee's physician, testified that in September 1943, the grantee told him, "I have taken over Aunt Anna's property and I am to take care of her so long as she lives"; and that on the evening before the grantee died, when the grantee thought he was going to die, the grantee again made that statement to the doctor. The grantee's employer at Western testified that he took the grantee to Wilber to record the deed, and that on the trip over the grantee told the witness that "Aunt Anna had given the deed for taking care of her the rest of her life."

The grantor testified that when the deed was drawn, she asked that it be drawn so that "if I die he can have that property," and that the notary refused so to draw the deed. This the notary, as a witness for defendants, denied, but testified that a day or so after the deed was delivered he went to grantor and asked her if she did not want a reservation in the deed, and was told "no" and made some such a statement as "Guy is good to me" or "Guy will take care of me all right."

The widow testified that she knew nothing of the transaction. The doctor testified that after the grantee's death, the widow came to his office to pay the doctor bill and that during the conversation she told him that they (meaning herself and her husband) were to take care of the grantor so long as she lived; and that she was going back to Omaha and would come back down if needed. He advised her that she should turn the property back

to the grantor and he "thought" from the conversation that she was going to do that. The widow testified that she did not have a conversation to that "extent"; that she told the doctor she was going back to Omaha; that he asked, "aren't you going to stay with her—with us?" that she answered "No"; that he asked, "Are you going to give back the property to Mrs. Lewelling then?" and she said, "She doesn't want it; I have offered it to her and she doesn't want it." The widow further testified as to the following conversation with the grantor after the grantee's death: "I said to her, 'I suppose you are sorry that you gave Guy the property since things have turned out like they have.' And she said, 'No; you are a young woman and can work and take care of it, and I am an old woman, and', she says, 'I want you and Natalie to have the property.' "

The daughter Natalie testified that she heard the grantor make the statement, "I would just as soon you and Natalie would have the place." It is to be noted that these statements were made after the funeral and while the widow was still living in the home at Western.

There also is evidence that while the grantee was living, the grantor contemplated moving into her other house and had asked her tenant to vacate on April 1 following. She refused to state her reasons for the proposed move.

The widow thereafter leased the property and notified the grantor that she expected the premises to be vacant by April 1. The grantor testified that the widow came to the house and the grantor told her, "I want my property back" and that the widow told her that "if it isn't probated I will give it back." This statement the widow denied.

We are convinced, as was the trial court, that the promise was made by the grantee; that the widow knew of it; and that it was the sole and only consideration for the deed.

During the life of the grantee the three people lived

together in the home, the women doing the housework together. Some of the bills for running expenses were paid by each. During this period of time the grantor was taking pills for a heart ailment, but was not ill enough to need a doctor and was never down in bed. After the death of the grantee, and after the widow removed to Omaha, the grantor's health failed; she required and employed the neighbor lady to do her housework and care for her, and later required attendance both day and night at her home, which she secured and for which she paid.

Was there a failure of the consideration? What did the grantor contract to receive and the grantee to furnish?

The grantor had a home, a rental property, and her pension. These obviously were sufficient to furnish food and clothing and shelter. Just as obviously, she contracted to receive that attention and care that an old lady desired over and above physical wants. The care was to continue during the lifetime of the grantor. That she did not receive. There is no evidence that the grantee furnished it during his lifetime. The widow and defendants, who seek to retain the benefit of the transaction, failed to furnish it after the grantee's death.

As we view these facts, they result in a failure to perform the consideration for the deed.

We have repeatedly held that where a grantor conveys land in consideration of an agreement of the grantee to support, maintain, and care for the grantor during his lifetime, and the grantee neglects or refuses to comply with the contract, the deed may be set aside and the title quieted in the grantor. See McIntire v. McIntire, 75 Neb. 397, 106 N. W. 29; Tomsik v. Tomsik, 78 Neb. 103, 110 N. W. 674; McCoy v. Cunningham, 141 Neb. 708, 4 N. W. 2d 835. See, also, Wilcox v. Wilcox, 138 Neb. 510, 293 N. W. 378; Copass v. Wilborn, 139 Neb. 124, 296 N. W. 565.

Does the death of the grantee, under the circumstances

here existing, prevent the granting of equitable relief to the grantor? The subject is discussed in 12 C. J. S., Cancellation of Instruments, section 30, page 989, 26 C. J. S., Deeds, section 21, page 198; 9 Am. Jur., Cancellation of Instruments, section 31, page 376; Annotation, 34 A. L. R. 136. The promise here was personal. While the death of the grantee would not constitute a willful violation of the promise, it nevertheless resulted in a failure to perform the promise and a failure of the consideration so far as the grantor was concerned, for which an equity court should grant relief. Under the circumstances here the setting aside of the deed on the conditions made was equitable, just, and proper.

At the close of the trial in December 1945, both parties rested and submitted their cause. In March 1946, the death of the grantor was suggested and the revivor stipulated and ordered. In April 1946, by amended motion, supported by affidavits, defendants sought permission to withdraw their rest to introduce new and additional evidence they did not know about at the time of the trial. Permission was granted. The hearing was had. Defendants offered the testimony of one witness named in the motion, who testified as to conversations had with the grantor in January and March 1944, regarding her claimed interest in the property. On cross-examination it was disclosed that he had advised the widow of these conversations about the time they occurred. The trial court sustained a motion to strike made on the grounds that the evidence was known to the widow at the time of the trial and during the lifetime of the grantor; and that it would be improper to admit it at this stage of the proceedings.

Defendants then offered the testimony of the other witness named in the affidavit. Her affidavit disclosed that the conversation about which she proposed to testify took place between the grantor and the widow in 1944, so that obviously it was known to the defendant at the time of the trial. The trial court refused to admit

the proffered testimony. Defendants assign the refusal to admit and consider this evidence as error.

A recognized authority states: "As a general rule, after final hearing on the merits, leave will not be granted to either party to adduce evidence of any fact which existed prior to the closing of proofs, and was known or should have been known to the party or his counsel seeking the introduction of such additional evidence. This rule is, however, subject to exceptions, where the reason of the rule does not apply. There is no universal and absolute rule which prohibits the court from allowing the introduction of newly discovered evidence to facts in issue in the cause, after publication and knowledge of the former testimony, and even after the hearing. However, the allowance of it is not a matter of right in the party but of sound discretion in the court, to be exercised cautiously and sparingly, and only under circumstances which demonstrate it to be indispensable to the merits and justice of the cause. Likewise, admission of testimony taken, which is beyond the scope of the permission granted to take additional testimony, is discretionary." 30 C. J. S., Equity, § 489, p. 885. Under the circumstances existing here, an abuse of discretion is not shown.

At the trial it was established that the grantee and his wife had built a chicken house on the premises and repaired a roof at a value of $150, and that the widow had paid taxes on the premises in the sum of $115.23. The trial court conditioned the cancellation of the deed upon the payment of these items. The correctness of that action is not questioned here.

The judgment of the trial court is affirmed.

AFFIRMED.

BEN DOLEN, PLAINTIFF IN ERROR, V. STATE OF NEBRASKA, DEFENDANT IN ERROR.

27 N. W. 2d 264

Filed May 2, 1947. No. 32191.

1. **Criminal Law.** When a defendant in a felony case makes timely application for the production of a witness at his trial, or of the evidence such witness will give, and it is material to his defense, the court, or a judge thereof, should grant the request and, if necessary, allow a continuance of the trial until such evidence can be obtained, in strict accordance with the provisions of section 29-1904, R. S. 1943, and article I, section 11, of the Constitution of Nebraska.
2. ———. An arbitrary refusal by the court to grant a proper request of a defendant in a felony case for the production of a witness, or his evidence by deposition, to the prejudice of such defendant, indicates an abuse of discretion.
3. ———. It is the general rule that a reasonable time for the preparation of a defendant's case must be allowed in a felony case between the time of the appointment of counsel by the court for an indigent defendant and the date of trial.

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

J. A. Hayward and *L. R. Doyle,* 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.

PAINE, J.

Defendant was convicted of the offense of receiving stolen whiskey and was sentenced to the penitentiary for two years. He gave bond for $2,500, and by a petition in error brings the case here for a review by this court.

The following are the assignments of error:

(1) The court erred in overruling defendant's motion for a continuance of the case so that defendant could take the deposition of Anna Hager, the one and only material witness to his defense.

(2) The court erred in refusing to grant a continuance of the trial in order to give defendant's attorney time in which to prepare a defense.

(3) The court erred in appointing counsel for the defendant and forcing him to trial on the same day that he was appointed.

(4) It was error and a violation of the constitutional rights of the defendant, under the provisions of Articles V, VI, and XIV of the amendments to the Constitution of the United States of America, in refusing to grant a continuance, both for the purpose of obtaining the deposition of a material witness to the defense, and for the purpose of giving the counsel for defendant time to prepare his case.

In order to determine whether the trial court arbitrarily denied the defendant the right to a fair trial under the law by refusing him a continuance, it will be necessary to briefly review some of the record in this case.

On Sunday night, February 3, 1946, two men broke into a liquor store in Lincoln and stole liquor therefrom, and on February 7, 1946, they were arrested and sentenced to the penitentiary for seven years.

On February 7, 1946, the defendant was arrested, charged with receiving such property knowing it to have been stolen. He was given a preliminary hearing in the municipal court on February 15, 1946, being present in person and with his attorney, Mr. Marx. Defendant pleaded not guilty, evidence was taken, and he was bound over to the district court and recognizance was fixed at $2,000.

In the district court, on April 27, 1946, a motion and affidavit of the defendant for continuance was filed, setting out that his only witness was placed on a bus and forced by the police to leave town, and that he had been unable to locate her "until the past day or two," that her testimony would be very material in his behalf, and that she "knows that the goods were

placed in my house without the knowledge it was stolen."

The defendant filed another motion and affidavit on April 29, 1946, setting out in brief: That he was charged with a felony. That Mrs. Ann Hager was the only witness whose testimony would be material to his defense. That a day or two after his arrest the police ordered her out of town and a policewoman put her on the bus and ordered her not to come back to Lincoln. That this was after the police were told that her testimony was material to his defense. That only in the last day or two had he learned that she was residing at Fulton, Missouri. That he had told his counsel the testimony this witness will give, and was advised by counsel that such testimony was not only material, but absolutely essential, to his defense. The defendant also filed a poverty affidavit on April 29, 1946.

J. A. Hayward, an attorney, appearing in the case for the first time, filed an affidavit on April 29, 1946, in which he stated that defendant had discussed the case with him and told of a witness, Mrs. Ann Hager, who if present would testify to certain facts, and that her testimony would be highly material to his defense, but she is out of the state of Nebraska, living at Fulton, Missouri, and will not return to the state because she was told by the police not to return. Defendant asked that the court compel the attendance of this witness at his trial.

On April 29, 1946, the defendant was duly arraigned, pleaded not guilty, and the case was set for trial. Thereupon, the hearing was had on the motions and affidavits for continuance. The defendant called his former attorney, J. Jay Marx, and the state called the chief of police, Joe Carroll, and Gene Masters, captain of detectives.

Mr. Marx said that he represented this witness, Mrs. Anna Hager, in a divorce proceeding now pending in the same court, and he testified: "I represented Mr.

Ben Dolen until last week." He testified that on February 15, 1946, at the time of the preliminary hearing, he told the chief of police, Joe Carroll, that Mrs. Hager was the only witness that Mr. Dolen would have and it was very important that she remain in the city so she could testify at the time the case was called in the district court, but that they had her pack up a few of her belongings and wired her husband for railroad fare, put her on a bus and told her if she came back they would put her in jail. "Q. But you did talk to her personally? A. I did.. I talked to her at her home in West Lincoln while Detective Robbins was also present but I don't believe he overheard my conversation. We went into another room and I talked to her and at that time she told me she didn't want to leave and wanted to be here and wanted to testify but that they weren't letting her."

He said that later on, when the defendant, Ben Dolen, was in his office, he called her husband at Quincy, Illinois, over the telephone and he said she was not there, but was in some town in Missouri. He further testified that he had discussed with her the evidence in the Dolen case, and that in his opinion, unless she was there to testify, Mr. Dolen would not have a proper defense.

The two police officers testified to the effect that Mrs. Hager told them that she was scared of defendant Dolen, wanted to get away from him, and wanted to go back to her husband; that she wired her husband and got money from him to buy a bus ticket, and she told them that she had been half crazy ever since they put the stolen liquor in the basement of her house. It appears from the evidence that Mrs. Hager's baby was in College View, and that Miss Stahnke, of the police department, took Mrs. Hager out to College View, brought her baby in, and placed them on the bus. It also appears that Mrs. Hager bought a ticket for Omaha.

With these facts before us, we will discuss the law relating to this matter.

"Where any issue of fact is joined on any indictment, and any material witness for the defendant resides out of the state, or, residing within the state, is sick or infirm or is about to leave the state, such defendant may apply in writing to the court in term time, or the judge thereof in vacation, for a commission to examine such witness upon interrogatories thereto annexed, and such court or judge may grant the same, and order what and for how long a time notice shall be given the prosecuting attorney before the witness shall be examined." § 29-1904, R. S. 1943. See, also, § 25-1251, R. S. 1943.

A provision of the Nebraska Constitution is pertinent, and reads: "In all criminal prosecutions the accused shall have the right to appear and defend in person or by counsel, to demand the nature and cause of accusation, and to have a copy thereof; to meet the witnesses against him face to face; to have process to compel the attendance of witnesses in his behalf; and a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed." Const., art. I, sec. 11.

"Under the Federal Constitution and the Constitutions of most, if not all, of the states, one accused of a crime has the right to have compulsory process to procure the attendance of witnesses. The right thus given is that of issuing subpoenas as in civil cases. It does not allow a defendant to burden the prosecution with the work of securing the attendance of witnesses in his behalf. * * * If they are beyond the limits to which the process of the court runs, the defendant is entitled to a commission to take their testimony by deposition, for he has the right to have their testimony before the court even if its process is powerless to compel their attendance." 14 Am. Jur., Criminal Law, § 163, p. 881.

It is thus seen that the granting of a continuance is

as much in the discretion of the court, where the absent witness is a nonresident, or temporarily out of the state, as where he is in the state. It thus appears that the law guarantees him that right, and a reasonable time must be allowed defendant to secure such evidence.

Generally this court has held that "An application for a continuance is addressed to the sound discretion of the trial court and its ruling thereon will not be held erroneous, unless an abuse of discretion is disclosed by the record." Maher v. State, 144 Neb. 463, 13 N. W. 2d 641. See, also, Smith v. State, 127 Neb. 776, 257 N. W. 59.

We realize that, where the evidence does not appear to the court to be of any importance, or where it is too remote to affect the verdict, or if the witness would simply add to the state's expense one more to many witnesses already ordered brought in for the defendant, whose evidence would be immaterial or merely cumulative, then there would ordinarily be no abuse of discretion in denying the application for an order to take the deposition of or have such witnesses produced to testify for the defendant.

But, in the case at bar, this witness, Anna Hager, and the defendant were the only people in that house when the thieves put the whiskey in the cellar that night. She is the only witness to the facts that the defendant can possibly have, as stated in his affidavits.

We do not agree with the theory advanced by some courts that "An 'abuse of judicial discretion' means merely that the reviewing court would have decided differently under the same circumstances." Swall v. Anderson, 140 P. 2d (Cal. App.) 196.

Rather, it is our view that, when judicial discretion is exercised contrary to law or to the commonly-recognized legal principles, it indicates an abuse of discretion. See C. I. T. Corp. v. Waltrip, 48 S. W. 2d (Tex. Civ. App.) 340; Borger v. Mineral Wells Clay Products Co., 80 S. W. 2d (Tex. Civ. App.) 333.

We hold in the instant case that defendant made timely application to secure the evidence of his only witness and the application should have been granted.

The second assignment of error is the refusal to grant a continuance to give defendant's attorney time in which to prepare a defense. The record shows that on Monday, April 29, 1946, motions and affidavits were filed for a continuance. The court ordered a hearing thereon at once, and the witnesses testified. However, the court took the matter under advisement until Saturday, May 4, 1946, at which time he overruled defendant's motions and set this felony case for trial to the jury on Monday, May 6, 1946, at which time the court entered an order appointing J. A. Hayward as defendant's attorney and, overruling all objections to continuance, impaneled a jury.

In preparing the case for the defendant, the attorney just appointed found a long information on file with the names of ten witnesses endorsed on the back of it who were to be called as witnesses for the state.

It is contemplated that there are good reasons why the state is required by section 29-1602, R. S. 1943, to endorse on the back of the information the names of all of its witnesses. One reason must be, so that the defendant's attorney will confer with his client and have time to make a good-faith investigation as to the facts about these witnesses and their connection with the case, and also so that he will be able to properly cross-examine them at the trial to bring out all the facts in evidence before the jury.

Even in a civil case this court has recognized the necessity for time for the proper preparation of a case. "Where the district court refused to allow the defendant a continuance, and the defendant was thereby prevented from presenting its theory of its defense to the court and jury, and was denied a fair trial, the action of the court will be deemed to be an abuse of discretion, for which a new trial will be

granted." Richelieu v. Union P. R. R. Co., 97 Neb. 360, 149 N. W. 772.

In felony cases a defendant is entitled to have a lawyer appointed, as provided in section 29-1803, R. S. 1943, with some time for consultation with the defendant and for investigation of the information against him, and the witnesses thereon named. It is important that the defendant have aid of his counsel in the preparation of his case, as much as in the trial thereof. See Powell v. Alabama, 287 U. S. 45, 77 L. Ed. 158, 53 S. Ct. 55, 84 A. L. R. 527.

It is the general rule that "The duty imposed on the courts to assign counsel to defend one accused of a crime who is himself unable to employ counsel was not intended to be a mere empty formality. It means more than the mere appointment of counsel. Such duty is not discharged by an assignment at such a time or under such circumstances as to preclude the giving of effective aid in the preparation and trial of the case. It is a general rule that a reasonable time for the preparation of a defendant's case must be allowed between the time of assignment of counsel by the court and the date of trial." Annotation, 84 A. L. R. 544.

It is to be noted that, in the case at bar, the affidavits attached to the several motions for continuance were not controverted by any counteraffidavits. It appears to this court that there was not sufficient time for defendant's counsel, after his appointment, to become familiar with all the facts necessary for him to ascertain to secure to this defendant the legal rights the law affords to him.

In our opinion, under the record in this case, it was prejudicial to the rights of the defendant to compel his attorney to proceed with a jury trial without sufficient time to examine into the case.

Therefore, we pass upon this petition in error without considering the evidence given on the trial of the main case, the instructions to the jury, or the verdict and sen-

tence, for we have reached the conclusion that this case should be remanded for further proceedings because of the refusal, under all the facts as shown in the motions and affidavits, to grant a continuance.

REVERSED AND REMANDED.

KATIE MARIE SPECHT, APPELLANT, V. BENJAMIN SPECHT, APPELLEE.

27 N. W. 2d 390

Filed May 2, 1947. No. 32168.

1. **Divorce.** The fixing of alimony in a divorce action is always to be determined by the facts of each case.
2. ———. In fixing alimony in a divorce case the court will take into consideration the estate of each party at the time of the marriage, the respective contributions thereafter, the duration of the marriage, the wife's loss of her interest in the husband's property by virtue of the divorce, the social standing, comforts, and luxuries of life which the wife would probably have enjoyed except for the enforced separation, the conduct of the parties leading to the divorce, the party to whom the divorce is granted, the age and condition of health of the parties, and all other facts and circumstances, and make an award which appears to be fair and equitable.
3. **Attorney and Client: Divorce.** The fee allowed for the service of an attorney for a woman in a divorce action should be sufficient to adequately compensate for the service necessary to be performed.
4. ———: ———. On appeal in a divorce action from the amount of the fee allowed to the wife for her attorney this court will interfere only to correct patent injustice where the allowance is clearly excessive or insufficient.

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

Bertrand V. Tibbels, for appellant.

Mothersead & Wright and *Robert G. Simmons, Jr.,* and *Lewis F. Shull,* for appellee.

Heard before PAINE, CARTER, YEAGER, and CHAPPELL, JJ., and NUSS, District Judge.

YEAGER, J.

This is an action wherein Katie Marie Specht, plaintiff and appellant, sued Benjamin Specht, defendant and appellee, for divorce. In the action she sought a division of property, alimony, and attorney's fees. The ground of action was a charge that defendant had been guilty of extreme cruelty toward plaintiff.

In the action the defendant filed a cross-petition whereby he sought a divorce from plaintiff likewise on the ground of extreme cruelty.

The action was tried to the court at the conclusion of which plaintiff was granted a divorce from defendant and alimony in the amount of $11,000 payable $125 per month commencing June 1, 1946, and continuing until the full amount shall have been paid. Plaintiff was awarded an attorney's fee of $400.

The plaintiff appealed. She did not appeal from that part of the decree awarding her a divorce but only from that part which pertains to division of the property, alimony, and attorney's fees. She contends that the award in these respects is insufficient and erroneous.

The defendant has cross-appealed and as grounds of reversal asserts that the court erred in granting plaintiff a divorce; that the court erred in refusing to grant defendant a divorce; and that the amount of alimony was excessive.

Plaintiff and defendant were married at Fort Collins, Colorado, on March 1, 1929. Plaintiff at the time was 37 years of age and defendant was 42 years of age. Each of said parties had been previously married and each had children by the previous marriage. Plaintiff had six children and defendant five. Plaintiff's children, at the time of the marriage, ranged in age fifteen to five years. The parties, immediately after the marriage, moved onto a rented farm near Gering, Nebraska.

Plaintiff's six children and four of defendant's children, the oldest of which was about seventeen years of age and the youngest about four, were taken into the home.

Plaintiff brought with her to the new home some household goods. No one attempted to fix its value. From the evidence we infer that it had no high intrinsic value. According to his testimony the defendant had at the time of the marriage invested in property and in money between $4,200 and $4,300. This plaintiff has denied. Her denial is based on inferences which we think find no tangible support in the evidence. We think defendant's testimony must be accepted in this regard. In addition to this defendant received $480 from Germany after the marriage. All other property which the parties had at the time of the trial was accumulated after the marriage.

The action here was instituted by the filing of a petition on December 6, 1945. As already stated the alleged ground for divorce was cruelty. In support of her charge plaintiff adduced evidence of violence upon her by the defendant, cursing at and quarreling with her, partial treatment unfavorable to her children, abusive treatment of her children, requiring some of them to leave the home without just cause, accusing certain of her children of theft from the home, refusal to allow her daughter or daughters to come to the home to care for her at a time when she was convalescing from an operation, and cutting off her ability to make purchases against defendant's credit.

The defendant in support of his charges of cruelty against plaintiff adduced evidence of violence of plaintiff upon defendant, partiality of plaintiff unfavorable to the children of defendant, abuse of defendant's children, and quarreling with defendant.

Without attempting to detail the evidence, the record discloses that during the very early period of the marriage harmony prevailed but soon the parties began to

curse each other. Both admit this. In this respect the record does not disclose that one was worse than the other. That they quarreled often is also admitted and the record fairly discloses that the background of the quarreling was alleged mistreatment of the children of one by the other or alleged partiality. Plaintiff claimed in instances that defendant unduly, unnecessarily, and partially punished her children, that defendant favored his own by giving them more money and presents than he gave to her children, and that without cause he caused her children to leave home.

On the other hand defendant claimed that plaintiff was more severe in the punishment of his children than of her own, that she refused to attend to the wearing apparel of his children as she did for her own, and that she was partial in the assignment of quarters to the children in the home of the parties.

On the record it is impossible to evaluate and place all of the blame for the long-continued inharmonious condition existing between these parties. In all probability all of the blame cannot be placed on one side. We do believe, however, that the legitimate and proper ends of matrimony have been destroyed as between these parties.

In looking for the primary cause or causes for this condition we have looked for and think we have found in the evidence certain incidents which are determinative.

There is evidence of partial punishment or at least partial treatment of plaintiff's children, denied of course by defendant, which if taken alone would not be convincing but when considered with other evidence it carries considerable weight. An instance is an occasion when a son of defendant and a daughter of plaintiff had a violent disagreement. There is nothing to indicate that one was more to blame than the other. The result was that defendant's son was not punished but plaintiff's daughter was quite promptly taken to the train, given $15 for transportation and expense, and

sent away from home to Cheyenne, Wyoming. This was not just for a trip but it was clearly intended as a permanent separation from the family. She was allowed to return later but more in the status of hired help than as a member of the family. On another occasion a son of plaintiff failed to get up for work. The evidence does not disclose the reason. He was given $15 and ordered to leave home. He was allowed to come back in the winter to feed cattle for his board. He was without shoes, having only a pair of rubber boots. Defendant did not provide him with shoes and paid him nothing. Defendant bought three of his sons automobiles. He paid $200 for each of two and $1,200 for the third. He made no similar or comparable gifts to any child or children of plaintiff. He said when plaintiff's children left home he gave each of them $15 and when they got married a shower was given. On one occasion he placed in the bank to the credit of one of his sons something over $2,000. When it was discovered by plaintiff he drew it out and says that he applied it on the purchase of his farm. Whether he so applied it is not made certain by the record. He probably did. He says that he did not intend it as a gift but that it was so placed only as assurance that he would not spend it but would have it available to apply on the purchase price of the farm. Sometime before this action was commenced plaintiff was in a hospital for a serious operation. She indicates that she did not expect to recover. Two of her daughters appear to have been looking after the household. During this time some pieces of "fancy work," as it was described, were removed. Defendant discovered that these articles were missing. The daughters had taken them. He accused them of taking them wrongfully and denied them admission to the home. He upbraided plaintiff on account of it whereupon she informed him that they were taken at her request. The daughters were still thereafter denied admission to the home. Plaintiff

wanted one of her daughters to come to the home and care for her during her convalescence after leaving the hospital. This the defendant refused. He wanted his daughter or daughter-in-law. This the plaintiff refused. In consequence plaintiff stayed with her daughter. At this time or thereabouts, the time is not made certain, defendant cut off her credit. Later plaintiff returned home but not for long. The discord continued but the details of it do not appear in the evidence. Plaintiff left and went to stay with two of her sons and immediately commenced this action which is the third in a series. We shall not discuss the other two but desire only to call attention to the fact.

We think the incidents indicate an attitude of cruelty on the part of defendant which under all the circumstances of this case was destructive of harmony between these parties.

The cruelties charged by defendant have not been and will not be discussed except to say that they have not been in part sufficiently proved and to the extent that they have been sufficiently proved they compare with charges by plaintiff which have not been sufficiently proved or if sufficiently proved were not considered by either party as disrupting cruelties or cruelties sufficient to justify a severance of the marital relationship.

We are of the opinion therefore that plaintiff has sustained sufficient of the allegations of her petition to entitle her to a divorce from the defendant.

We come now to the question of whether or not the court under all the circumstances as disclosed made a sufficient award to the plaintiff by way of alimony, division of property, and attorney's fees.

As already pointed out plaintiff brought to the relationship little of intrinsic value. The defendant apparently brought not more than $4,780. The defendant rented land for farming purposes and purchased equipment for those purposes. The first year, among other crops, approximately 60 acres of beets were raised. The

first year in the production of beets and other crops and in the care of livestock plaintiff and defendant and all of the children who were old enough to do so worked at such tasks as were best suited to their respective ages and abilities. This state of affairs continued until such times as the children of the parties, one by one, left or were sent away. There is no evidence of idleness on the part of anyone in the household. There is no competent evidence of favoritism in the assignment of tasks. All appear to have contributed to the utmost in furtherance of the family enterprise. Farming and beet raising and cattle feeding were expanded and extended. With this extension and expansion and apparent frugal living the enterprise prospered. During none of the time before any child of either party left home was he or she ever paid wages. It appears that the maximum that any child up to the age of 15 years received as spending money was 25 cents a week. Thereafter they received $1 a week. All money, except the milk or cream check and money from eggs and chickens, came into the hands of defendant. At sometime, which time is not certain, the plaintiff was refused permission to receive the milk or cream check. During the time she received this check she was required to use it for the purpose of providing clothing and other necessities for the family.

In 1938 defendant purchased a 160-acre farm for $16,000. He paid $6,640 on the purchase price. At the time of the trial the full purchase price had been paid except for $650. A small house on the farm was enlarged and improved into a nice modern country home. Defendant says his expense in this connection outside of his labor was about $2,800. Other farm buildings were constructed and improved. This farm is the only real estate owned by either of the parties.

At the trial plaintiff called two real estate men who testified expertly as to the value of the farm with its improvements. One gave it as his opinion that the

value was $200 per acre. He placed the value at from $32,000 to $35,000. The opinion of the other was $200 to $225 an acre, or from $32,000 to $36,000. The defendant testified that he thought it was worth about $28,000.

Plaintiff also called a witness who gave his opinion as to the value of the personal property on the farm not including household goods. He placed a value thereon of $9,655.78. Of the property thus appraised by this witness defendant testified, as nearly as we are able to determine from the record, that articles included therein and representing a valuation of approximately the sum of $1,510.60 belonged to two of his sons. With this deduction this witness' valuation of defendant's personal property on the farm would be about $8,145.18. Defendant says that this valuation is too high but he has fixed no value himself and has called no witness as to value.

The cash position of defendant is very much in doubt. On April 23, 1946, he owed the bank $2,125.23. On that date he apparently increased his indebtedness to $3,200. Shortly before the trial herein he sold a shipment or carload of cattle. The number sold or the proceeds thereof were not disclosed in this record. While we can only speculate as to the amount of money received for this carload of cattle we cannot escape a conclusion that it went a long way toward, if it did not in fact equal, the bank loan of $3,200. In addition to this on May 16, 1946, defendant had on deposit in his checking account $187.68.

We think under the circumstances of defendant's failure to make disclosure as to the proceeds of the sale of cattle that it is fair to conclude that they did at least equal the bank loan. This conclusion would leave him in the position of having cash of $187.68.

If then we are to accept the minimum values placed upon the property in question by plaintiff's evidence and deduct therefrom the balance of the mortgage and plaintiff's value of the personal property which defend-

ant claims was appraised as his but not owned by him we must find the net value of the estate is, as nearly as we can determine, $39,682.86. It is to be noted that in his evidence the defendant has made no effort to fix the value of personal property. He has contented himself with the general statement that the values placed thereon in plaintiff's evidence are too high. If we are to take plaintiff's values on personal property, and we think we must, and the defendant's value of the real estate, then the net valuation would be $4,000 less or $35,682.86.

What then is plaintiff, in the light of the value of the estate which has been accumulated and all other facts, and particularly those relating to the accumulation, entitled to as alimony?

In Lippincott v. Lippincott, 144 Neb. 486, 13 N. W. 2d 721, it was said: "The matter of fixing the amount of alimony in a divorce action is always to be determined by the facts of each case."

In that case by quotation from Phillips v. Phillips, 135 Neb. 313, 281 N. W. 22, it was said: "* * * the court will take into consideration the estate of each party at the time of the marriage, and their respective contributions since, the duration of the marriage, the wife's loss of her interest in the husband's property by virtue of the divorce, the social standing, comforts and luxuries of life which the wife would probably have enjoyed except for the enforced separation, the conduct of the parties leading up to the divorce, 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." See Swolec v. Swolec, 122 Neb. 837, 241 N. W. 771; Nathan v. Nathan, 102 Neb. 59, 165 N. W. 955; DeVore v. DeVore, 104 Neb. 702, 178 N. W. 621.

In this case no issue is made of altered social position or loss of luxuries because of separation. The cause

for divorce we have already indicated was attributable to defendant. The defendant brought not more than $4,780 to the marriage. Everything else was accumulated by the joint efforts of the parties and their children during the marriage. Plaintiff's contribution was not limited to the usual and onerous duties of a farmer's wife in the care of household, garden, chickens, and ministration to the needs and wants of her husband and children, but in addition to these duties, which involved the ministration at first to a husband and ten children and later to lesser numbers, she went out and worked with the husband and children at least in the beet fields. There is nothing to indicate that she did not carry on at all times in this wise except during limited periods of disability up to the time of the final separation. It is apparent from the record that idleness here on the part of anyone was intolerable and not tolerated by the defendant.

Under all the facts and circumstances it appears clear under the rules laid down by this court that some approach should be made in this case to an equal division of the property, making due allowance for the estate which defendant brought to the marriage. Undoubtedly plaintiff and her children contributed much to the estate which has been accumulated. It is true that all of her children have long since left home and that two of his remain, but taking into consideration a certain amount of favoritism which has been pointed to and a lack of capacity for work of two of defendant's sons, we cannot think that his children have contributed in a substantially higher degree than hers.

Plaintiff suggests that here there can be no physical division of property by way of alimony. We likewise observe no feasible plan of physical division. We have concluded, as did the trial court, that alimony should be a decree and judgment in favor of plaintiff and against defendant for a fixed sum of money.

Taking therefore into consideration the respective es-

timates as to the value of the estate and the absence of mathematical certainty as to either of them, the amount which plaintiff brought to the marriage, the balance owing upon the real estate mortgage, the elements entering into the value of farming equipment, particularly at this time, the unpredictability of future real estate values, the respective ages of the parties, and all other pertinent matters disclosed by the record, we have come to the conclusion that the award of alimony made by the trial court of $11,000 was inadequate and that in justice and equity it should be increased to $16,000. We are of the opinion that it should be payable at the rate of $150 a month instead of $125 as provided in the decree.

The remaining assigned error to be discussed is that of whether or not the fee allowed for plaintiff's attorney was inadequate. This court is committed to the rule that the allowance of a fee for the service of any attorney for a woman in a divorce action shall adequately compensate for the service necessary to be performed. Beatty v. Beatty, 128 Neb. 258, 258 N. W. 461. However, no fixed or definite measure of value for such services has ever been supplied. We think none can be supplied but that each such situation must be considered on its individual merits.

In this case there is no direct evidence as to the value of the services of the attorney for plaintiff. The only thing that the trial court had and this court has to look to for this purpose is the proceedings before the court. In the light of its observations the trial court allowed a fee of $400.

In Dumas v. King, 157 F. 2d 463, it was stated: "While trial courts and appellate courts equally are regarded as experts on the value of legal services, * * * a trial court ordinarily has a better opportunity for practically appraising the situation, and an appellate court will interfere only to correct a patent injustice, where the allowance is clearly excessive or insufficient, * * *."

Weighed in the light of this observation, which we consider basicly sound, we are unable to say that the fee allowed in this case was clearly insufficient or patently unjust.

It is therefore the opinion of the court that the portion of the decree of the district court awarding a decree of divorce to plaintiff should be and is affirmed; that the portion awarding an attorney's fee of $400 and costs should be and is affirmed; that the award of $11,000 as permanent alimony payable in installments of $125 per month be and it is reversed and that the district court be and is directed to decree to plaintiff an award of $16,000 as permanent alimony to be paid in installments of $150 per month commencing as of June 1, 1946, and continuing on the first day of each month thereafter until the full amount shall have been wholly paid, the same to bear no interest, and in case of death of plaintiff prior to the full payment, all installments thereafter accruing shall be paid to the personal representative of plaintiff for the benefit of her heirs or legatees.

Plaintiff is awarded a fee of $500 for the services of her attorney in this court.

AFFIRMED IN PART,
REVERSED IN PART, WITH DIRECTIONS.

WENKE, J., participating on briefs.

ROY PETTIJOHN, PLAINTIFF IN ERROR, V. STATE OF NEBRASKA, DEFENDANT IN ERROR.

27 N. W. 2d 380

Filed May 2, 1947. No. 32207.

Criminal Law: To sustain a conviction in a criminal case the record must contain evidence sufficient to establish beyond a reasonable doubt that the accused is guilty of the offense with which he was charged and convicted.

ERROR to the district court for Hitchcock County: VICTOR WESTERMARK, JUDGE. *Reversed and remanded.*

Ted R. Frogge and *Morrison & Hanson* for plaintiff in error.

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

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

WENKE, J.

Plaintiff in error, Roy Pettijohn, was convicted in the district court for Hitchcock County of the crime of obtaining money by false pretenses. He was sentenced to be imprisoned in the penitentiary for a period of one year. He appeals from that conviction.

The information charges: That Roy Pettijohn did, on the 23rd day of July 1945, knowingly and falsely represent to Henry P. Reese, intending thereby to unlawfully and fraudulently cheat and defraud him, that he, Roy Pettijohn, had secured a purchaser in the person of Albert Meints for the real estate of Henry P. Reese, pursuant to a contract entered into between Reese and Pettijohn; that Reese then informed Pettijohn that he did not desire to sell the land; that thereupon Pettijohn informed Reese that the purchaser was ready, able, and willing to perform and that if he, Reese, refused to sell that he, Pettijohn, would be entitled to the sum of $500 by virtue of the contract; that Reese, relying upon these representations, executed and delivered to Pettijohn his note and chattel mortgage in the sum of $500; that on August 30, 1945, Pettijohn sold the note to the McCook National Bank; that on March 30, 1946, Reese paid the bank the full amount due on the note in the sum of $520.83; that the representations made by Pettijohn were false for the reason that Pettijohn had not secured Albert Meints as a purchaser for the real estate of Reese and that Albert Meints had not agreed to purchase it and had not entered into any contract therefor.

For convenience the plaintiff in error will be referred

to as the defendant and the defendant in error as the state.

The evidence is very conflicting. However, the jury has determined its weight by finding the defendant guilty. By reason thereof the evidence can be said to establish the following: That Henry P. Reese and Alice Reese, husband and wife, lived on their farm about three miles southwest of Culbertson, Nebraska; that they owned this farm, which is described as the east half of Section 30, Township 3, Range 31, in Hitchcock County; that on July 9, 1945, the defendant came to their home; that as a result of his visit the Reeses then and there entered into a contract with the defendant giving him, for a period of thirty days, the exclusive right to sell their farm on the terms as therein set forth, which terms included the right of a purchaser to immediate possession of the farm, except the buildings and pasture; that the contract provided defendant would receive a commission of $500 upon sale of the farm; that on or about July 17, 1945, the defendant brought Albert Meints, a farmer who lived near Palisade, out to the Reese farm; that Meints had some property in Colorado and was interested in a trade; that Reese told Meints he was not interested in trading; that Reese never saw Meints thereafter with reference to a sale of his farm; that on July 23, 1945, Reese drove from his farm to Culbertson; that on the same day, but after Reese had gone, defendant came to the Reese farm; that Mrs. Reese told defendant that Reese had gone to Culbertson; that she also told defendant that they wanted to back out of the land deal; that defendant then drove to Culbertson and met Reese near the Bree and Foerste hardware store; that defendant then told Reese that he had the farm sold to Meints; that defendant did not have the farm sold to Meints and Meints had not agreed to buy it; that Reese then told defendant he would not sell the farm because the corn crop looked good and he wanted to keep it; that defendant then told Reese that he owed

him $500 commission; that Reese believed the defendant when he told him he had the place sold to Meints and thought he was telling the truth; that relying thereon Reese agreed to pay the $500; that Reese did not have the money but agreed to and did give the defendant his note in the sum of $500 due March 1, 1946, and a chattel mortgage on 160 acres of corn and 20 acres of cane as security therefor; that the exclusive listing contract was then returned to Reese; that on August 30, 1945, the defendant sold the note to the McCook National Bank and received therefor the sum of $503; that on March 30, 1946, Reese paid the McCook National Bank the sum of $520.83 in full satisfaction of the note and mortgage.

Section 28-1207, R. S. 1943, enumerates the different acts that constitute a criminal offense under its provisions and provides in part: "(1) Whoever by false pretense or pretenses shall obtain from any other person, * * * any money, goods, merchandise, credit or effects whatsoever with intent to cheat or defraud such person, * * * of the same; * * * ."

The trial court proceeded under this section of the statute and submitted to the jury the question of the guilt or innocence of the defendant of obtaining money by false pretenses. Will the record sustain such a conviction?

Subsection (4) of the above statute provides: "whoever shall obtain the signature * * * of any person to any promissory note, * * *, or any other instrument in writing fraudulently or by misrepresentation, * * * ."

Is there a fatal variance between the charge in the information, the issues submitted to the jury, and the proof offered at the trial?

That the obtaining of money by false pretenses and the obtaining of a signature to a promissory note or other written instrument by false pretenses are different offenses is evident from the foregoing subdivisions of section 28-1207, R. S. 1943.

"To warrant a conviction in a criminal case, the state is required to establish beyond a reasonable doubt that the accused is guilty of the offense with which he is charged." 22 Am. Jur., False Pretenses, § 103, p. 502. See Davis v. State, 118 Neb. 828, 226 N. W. 449; Davis v. State, 121 Neb. 399, 237 N. W. 297.

Subdivision (4) of the statute makes the obtaining of a signature to a promissory note or chattel mortgage by false pretenses a crime. There is nothing in the statute that makes the subsequent sale thereof a crime nor is it any part of the crime itself; nor does the statute require that any part of the note be paid.

"The rule with reference to allegation and proof in false pretense cases, as to the description of the property obtained, is the same as the rule in larceny; that is, one cannot allege in the indictment or information that one thing was fraudulently obtained, and secure a conviction by proving that something else was obtained. The allegata and the probata must correspond, or at least substantially correspond." 22 Am. Jur., False Pretenses, § 99, p. 500. See 35 C. J. S., False Pretenses, § 49c, p. 700.

As stated in the case of State v. La Vere, 194 Iowa 1373, 191 N. W. 93:

"These things being established, the proof of the crime is complete, and the State is not required to go further and show that the person whose signature was thus fraudulently obtained suffered actual loss or damage thereby. State v. Jamison, 74 Iowa 613. If, for illustration, a person by fraud and false pretense obtains the signature of another to a promissory note which is delivered, and becomes, apparently at least, the legal obligation of the one so imposed upon, and soon thereafter the culprit is arrested, with the instrument still in his possession, the crime is surely none the less complete because he has not yet received any benefit from his wrongful act, or because the party whom he entrapped into signing and delivering the note has suf-

fered no actual loss or injury therefrom. See People v. Genung, 11 Wend. (N. Y.) 18; Commonwealth v. Wilgus, 4 Pick. (Mass.) 177; Tarbox v. State, 38 O. St. 581; State v. Pryor, 30 Ind. 350; In re Rudebeck, 95 Wash. 433 (163 Pac. 930).

"* * * if the crime was committed at all, it was consummated when the signing and delivering of the note were procured. What followed thereafter is important only as evidence bearing upon the allegations of fraud by which that wrong was accomplished."

"* * * in order to establish this crime it is not necessary for the state to establish any loss or damage to the signer. It is, therefore, the act of fraudulent procurement of a signature that is made a crime." State v. Aughinbaugh, Ohio App., 32 N. E. 2d 478.

" 'The offense is complete when the signature is obtained by false pretenses with intent to cheat or defraud another. It is not essential to the offense that actual loss or injury should be sustained.' " Commonwealth v. Lacey, 158 Ky. 584, 165 S. W. 971. See, also, People v. Genung, 11 Wend. (N. Y.) 18, 25 Am. Dec. 594; State v. Hanscom, 28 Or. 427, 43 P. 167; Gillespie v. State, 194 Ind. 154, 142 N. E. 220; Haines v. State, 135 Neb. 433, 281 N. W. 860; West v. State, 63 Neb. 257, 88 N. W. 503.

In Patterson v. State, 25 Ariz. 276, 215 P. 1096, 35 A. L. R. 366, the court held that an allegation that she parted with $50 of her money was not sustained by showing that she was an accommodation endorser. Therein the court went on to say: "The rule with reference to allegation and proof in false pretense cases, as to the description of the property obtained, is the same as the rule in larceny; that is, one cannot allege in the indictment or information that one thing was fraudulently obtained and secure a conviction by proving something else was obtained. The *allegata* and the *probata* must correspond, or at least substantially correspond. It was necessary therefore for the prosecution

to show by their evidence that Mrs. Armer, because of the nonexistence of the drawee in said draft, parted with $50 of her money. What did she part with? She was an accommodation indorser, nothing more or less. She loaned her name and credit to the defendant so that he could go to the Citizens' State Bank, or anywhere else for that matter, and get the money."

As stated in Pollock v. State, 19 Ala. App. 156, 97 So. 237: "So the result is that this record discloses that the defendant was convicted of the offense charged in the first and third counts in the indictment, without any evidence whatever to support the material allegation that he obtained from J. B. Martin the sum of $500 by means of false pretense. If it should be conceded that the defendant did by false pretense obtain the signature of Martin to a written instrument or note, and the note was subsequently paid by Martin, as to which fact there is some evidence that the note was subsequently paid by Martin to the corporation, such proof would not support a conviction for obtaining money by false pretense." See State v. Gibson, 169 N. C. 318, 85 S. E. 7, and the same case in 170 N. C. 697, 86 S. E. 774.

Whether Reese paid any part of the note is not material for as stated in Moline v. State, 72 Neb. 361, 100 N. W. 810: " * * * the value of an instrument in writing, within the meaning of the statute, must be taken to be the amount of the liability expressed therein, * * *." If the note were still in the possession of the defendant and remained unpaid the defendant would be criminally liable if he obtained it in the manner as in the statute set forth. The act is complete when the note or written instrument is obtained. It does not require payment nor does subsection (1) of section 28-1207, R. S. 1943, make it a different or an additional crime when a note so obtained is subsequently paid pursuant to its terms.

The state cites many cases in which checks, drafts, warrants, etc., are either considered as cash or as an assignment of the funds and equivalent to the payment

of cash, or the method used by which the cash is paid. See Brennan v. State, 140 Neb. 277, 299 N. W. 525, on rehearing 141 Neb. 205, 3 N. W. 2d 217; State v. Detloff, 201 Iowa 159, 205 N. W. 534; People v. Hoffmann, 142 Mich. 531, 105 N. W. 838; State v. Briggs, 74 Kan. 377, 86 P. 447; State v. Brantingham, 66 Mont. 1, 212 P. 499; Schaumloeffel v. State, 102 Md. 470, 62 A. 803; State v. Joseph, 115 Ohio St. 127, 152 N. E. 186. These cases are undoubtedly correct and state the proper rule. But there is a difference in the legal effect of a check, draft, or similar item drawn upon funds and directing the payment thereof and of a note by which the maker agrees to pay when due. None of the cases cited hold that the making and delivery of a note is the same as the payment of cash.

For the reasons stated we do not think the evidence establishes the offense of obtaining money by false pretenses.

For the reasons stated the verdict and sentence of the trial court are reversed.

REVERSED.

CARTER, J., participating on briefs.

GEORGE H. SCHMIDT, APPELLEE, V. HAROLD HENDERSON, APPELLANT, CONSOLIDATED WITH MINNIE SCHMIDT, PLAINTIFF, V. MATILDA WENTZ NEVILLE ET AL., DEFENDANTS.

27 N. W. 2d 396

Filed May 9, 1947. No. 32200.

1. **Trial: Juries.** The question of whether or not a party is entitled to a trial by jury is determinable by the nature of the case at its inception.
2. **Accounting.** An action for an accounting may under one set of circumstances find its remedy in an action at law and under another find it within the jurisdiction of equity.

3. **Equity.** The basic reason for equitable jurisdiction in an action for an accounting is inadequacy of remedy at law.
4. ———. Equity jurisdiction is not available for ordinary cases of mutual accounts between creditor and debtor but it is available where intimate or confidential relations of the parties are involved.
5. **Landlord and Tenant.** Where, by the terms of a lease, rent is reserved in a share of the crops, the landlord and tenant are tenants in common of growing crops.
6. **Appeal and Error.** An action in equity for an accounting is triable de novo on appeal to this court.
7. **Statute of Frauds.** Every contract for the leasing of land for a longer period than one year is void unless the contract or some note or memorandum thereof is in writing and signed by the party by whom the lease is made.
8. **Specific Performance.** A court of equity has power to compel specific performance of an oral lease for more than one year where there has been part performance.
9. **Statute of Frauds.** An oral lease for only one year but entered into prior to the beginning of the term is void under the statute.
10. ———. An oral lease for one year entered into before the commencement of the agreed term, though void, becomes valid on entry into possession at or after the commencement of the agreed term.
11. **Partition.** A lease of property held in common does not prevent partition. Partition of such property is subject to the rights of the lessee.
12. **Forcible Entry and Detainer.** The action of forcible entry and detainer is a statutory proceeding and original jurisdiction thereof is conferred on justices of the peace, county courts, and municipal courts.
13. ———. District courts are without original jurisdiction in actions of forcible entry and detainer.
14. **Courts.** Consent of parties cannot confer upon a court jurisdiction of the subject matter of an action.

APPEAL from the district court for Webster County: STANLEY BARTOS, JUDGE. *Reversed and remanded with directions.*

George J. Marshall, for appellant.

Clifford H. Phillips, for appellee.

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

YEAGER, J.

This was an action at its inception by George H. Schmidt, plaintiff, against Harold Henderson, defendant, in one cause of action. Later by amended and supplemental petition it became an action in three causes of action. It comes here in three causes of action. The first cause of action was for reformation of a lease, the second was for an accounting of rents, and the third on its face was for a writ of assistance in favor of plaintiff and against the defendant. By title appearing on the transcript, the bill of exceptions, and the briefs, it appears as George H. Schmidt, plaintiff, v. Harold Henderson, defendant, consolidated with Minnie Schmidt, plaintiff, v. Matilda Wentz Neville et al., defendants. When or how the two cases became consolidated is not made clear.

The plaintiff at the inception of the action is the appellee and the defendant is the appellant. These two parties will be hereinafter referred to as plaintiff and defendant.

The defendant by his pleadings conceded the right to reformation and the first cause of action was dismissed by the court, but for the purposes of the case the lease was treated by the parties as having been reformed.

To the second and third causes of action the defendant filed answer. He also filed a cross-petition wherein he sought an accounting against the plaintiff.

Trial was had on the second and third causes of action, and on the second cause of action and the cross-petition the court found that defendant had failed to account for crop rents of the value of $543.76 and 42 bushels of barley and that plaintiff was indebted to defendant in the amount of $224.20. In accordance with the finding the court rendered judgment in favor of plaintiff and against defendant in the amount of $319.56 and 42 bushels of barley or the value thereof in Red Cloud, Nebraska, on the 26th day of April 1946. On the third cause of action, or presumably so, a writ of assistance was

allowed. From the judgment on these two causes of action the defendant has appealed.

In order that an understanding may be had of the true situation presented by this record it becomes necessary, before proceeding with a discussion of the stated grounds of reversal, to outline the ramifications of this case, some of which are exceedingly strange, before it came to this court.

In 1944 plaintiff was agent for Minnie Schmidt and others who were owners as tenants in common of the northeast quarter of Section 23, Township 3, North, Range 10, West of the 6th Principal Meridian, in Webster County, Nebraska. On February 12, 1944, plaintiff, as agent, leased this land to the defendant for one year from March 1, 1944, to March 1, 1945, and on December 2, 1944, he again leased the land to the defendant. The second lease period was from March 1, 1945, to March 1, 1946. Both leases were in writing. The agreed rental to be paid to the extent necessary to set it forth here was one-third of all grain delivered to market at the expense of the lessee, for pasture $2 an acre, and in the case of the planting of cane the lessor was to receive one acre of corn for each three acres of cane or $5 for each acre of cane planted.

In October of 1945 Minnie Schmidt instituted action for partition of the described land. That case was docketed as case No. 5278. The land was sold to plaintiff herein pursuant to decree in that case and the sale was confirmed by the court on April 2, 1946. The defendant herein was a defendant in that action as tenant in possession. The effect of the decree of partition was to declare that he had no interest in the title to the land but the decree in nowise adjudicated his right to possession as occupying tenant.

Plaintiff filed his original petition herein on March 1, 1946, wherein he asked for an accounting of rents on the two leases hereinbefore mentioned. This was before confirmation of sale. This case was docketed as case

No. 5293. An answer and cross-petition was filed by defendant and a trial had on issues joined. Apparently a decree or judgment was rendered but it was set aside on motion for new trial which was granted. On May 15, 1946, an amended and supplemental petition was filed bearing the consolidated title under which the case comes to this court. That petition contained but one cause of action. Then on May 25, 1946, a second amended and supplemental petition was filed. This is the petition which comes to this court in three causes of action.

On April 16, 1946, plaintiff filed an application in case No. 5278 for a writ of assistance the purpose of which was to cause defendant and Hulda Henderson to vacate the real estate in question. The status of Hulda Henderson is not described. An order to show cause why the writ should not be allowed was issued and served. On April 25, 1946, the defendant answered in writing the order to show cause. No action is shown to have been taken on the order to show cause and the response thereto until the trial herein.

Apparently it was after April 25, 1946, and before May 15, 1946, that cases No. 5278 and No. 5293 were consolidated since the third cause of action in the petition on which the case before us was tried was substantially an application for a writ of assistance to carry into effect that part of the decree in case No. 5278 in effect declaring that the defendant had no interest in the lands in question.

In answer to the third cause of action the defendant alleged that he was entitled to retain possession under an oral lease for one year from March 1, 1946, which by reason of part performance by him was valid and binding upon the plaintiff. The same showing as was made in the answer to the third cause of action was made in response to the order to show cause on the application for writ of assistance in case No. 5278.

Notwithstanding the unusual and extraordinary steps

which have been taken in this litigation no procedural attack has been made upon any of them.

On the trial the first cause of action was dismissed; on the second cause of action and the cross-petition which pertained thereto a judgment was rendered in favor of plaintiff for $319.56 and 42 bushels of barley or the value thereof in Red Cloud, Nebraska, on the 26th day of April 1946; and apparently no disposition was made of the third cause of action in case No. 5293, but it appears that a writ of assistance was ordered in case No. 5278.

It should be pointed out here that the defendant made a demand for a jury trial of the second cause of action.

The defendant assigns as grounds for reversal (1) that the judgment on the second cause of action is not sustained by the evidence, (2) that the judgment on the second cause of action is contrary to law, (3) that the court erred in refusing to grant a jury trial on the second cause of action, (4) that the court erred in not compelling the real parties in interest to appear in the third cause of action, (5) that the judgment on the third cause of action is not supported by sufficient evidence, (6) that the judgment on the third cause of action is not sustained by law, and (7) that the court decided both causes of action on secondary evidence when the best evidence was produced.

The assignment relating to real party in interest requires no further discussion beyond the statement that this question was never presented for consideration by the pleadings and at no time before the filing of his motion for a new trial was it presented to the court.

The first question to be considered is that of whether or not the request for a jury trial on the second cause of action should have been granted.

The question of whether or not a party is entitled to a trial by a jury is determinable by the nature of the case at its inception. Daniels v. Mutual Benefit Life Ins. Co., 73 Neb. 257, 102 N. W. 458; Yager v. Exchange Nat.

Bank of Hastings, 52 Neb. 321, 72 N. W. 211; Gandy v. Wiltse, 79 Neb. 280, 112 N. W. 569.

In this jurisdiction an action for an accounting may under one set of circumstances find its remedy in an action at law and under another find it within the jurisdiction of equity. This court, recognizing equity jurisdiction in certain actions for an accounting, in Dickerson v. Surety National Farm Loan Ass'n, 127 Neb. 67, 254 N. W. 679, said: "We think the real basic reason for equitable jurisdiction is inadequacy of remedy at law." This statement and recognition of equity jurisdiction was approved in Sickler v. City of Broken Bow, 143 Neb. 542, 10 N. W. 2d 462.

In Lamaster v. Scofield & Cowperthwait, 5 Neb. 148, it is pointed out that equity jurisdiction is not available for ordinary cases of mutual accounts between creditor and debtor but it is available where intimate or confidential relations of the parties are involved.

The case at bar is not one of ordinary mutual account between a creditor and debtor but is in essence an accounting and dissolution of a tenancy in common of personal property. The tenancy was one wherein the rent reserved in part was a share of crops to be raised.

This court in Wendt v. Stewart, 74 Neb. 855, 105 N. W. 550, said: "Where, by the terms of a lease, rent is reserved in a share of the crops, the landlord and tenant are tenants in common of the growing crops, * * * ."

Taking into consideration the facts of this case we are convinced that an adequate remedy was available only within equitable jurisdiction and that the court did not err in its refusal to grant a jury trial.

This view of the situation then requires that we consider the case de novo and arrive at a decision independent of that arrived at by the trial court. In Dickerson v. Surety National Farm Loan Ass'n, *supra,* it was stated: "Plaintiffs in their brief contend that this is an action in equity for an accounting. If such is the case, then the action is triable *de novo* in this court."

Plaintiff's claim is that for the years 1944 and 1945 he was entitled to receive as rental 1,266 bushels of corn and 120 bushels of barley or the value thereof whereas he received only 813 bushels and 48 pounds of corn and 58 bushels of barley. He claims that 3,000 bushels of corn were raised in 1944 and 800 in 1945 and that 360 bushels of barley were raised in 1945. The defendant denies that any more was produced than the amount accounted for.

No rent corn was marketed from the farm for either year until April 1946. The rent corn received by plaintiff for both years was shelled and marketed in April 1946 and the amount was 813 bushels and 48 pounds.

In 1944 defendant raised both yellow and white corn. When the corn was husked he apparently placed it in a driveway between two corn cribs. Also in 1945 both yellow and white corn were raised. The rent corn this year was placed part on the 1944 yellow corn in the driveway and part in a crib.

The testimony of plaintiff is insufficient from which to draw any reasonable inferences as to the amount or value of corn produced in either year. He went no further in his testimony than to give his own estimate of the acreage and to give what he says was defendant's estimate of acreage and probable yield. In addition he testified that he thought there was evidence of the removal of corn. He concluded that the 1945 corn had been removed since, as he said, the corn which remained was old and was without the fresher color of the new corn. He said that he had obligated himself to pay defendant three cents a bushel or $12 for the removal of 400 bushels of the 1944 corn from where it had been piled on the ground after husking. He further testified that he saw cobs lying around where corn had been eaten by stock and chickens. He stated that from 10 to 20 bushels of corn had run out where some boards had been broken off.

As to barley plaintiff testified that the defendant told him that there were about 120 bushels. Plaintiff guessed that there could have been a hundred bushels. The barley marketed weighed out 58 bushels and a few pounds. He said he saw hogs eating barley south of the barn.

On behalf of plaintiff Clyde Smith testified that he examined corn in the driveway of the barn and in a bin on the land in question and described corn which he observed. He was permitted to give his opinion that all corn observed was 1944 corn. He stated however that he was not certain in his response.

This brief review, we think, presents a fair reflection of the evidence of plaintiff having probative value on the question of crops produced out of which he was entitled to one-third as rent.

This evidence at most leads but to a conjecture that plaintiff did not receive all of the corn and barley that was coming to him as rent. There is no competent evidence of removal of either corn or barley by the defendant. There is evidence that a small quantity of corn, not to exceed 20 bushels, had run out where it was eaten by defendant's hogs and chickens and evidence that defendant's hogs were being fed barley but none directly as to the place from whence it came.

It is clear that if plaintiff had a right of recovery of rent out of corn and barley that right has not been established by his evidence.

We think however that plaintiff's evidence along with the evidence of defendant establishes a right of recovery in some amount. Defendant testified that in 1944 he raised 79 acres of corn and that he put in the crib as rent 425 bushels of white corn and 220 or 230 bushels of yellow. Taking his minimum estimate we find on his admission that he placed in the crib 645 bushels of corn that year. He also testified that in 1945 plaintiff got 420 bushels of "white corn." So on the testimony of defendant the rent corn for the two years was 1,065 to 1,075 bushels. This was 252 to 262 bushels more than was

shelled out in April 1946. The corn during all of the period was under the exclusive control of defendant and it is reasonably inferable from his evidence that it is his position that all corn placed in the bins and the driveway was shelled out except about 10 bushels which escaped from the bin on account of broken boards and were eaten by his stock.

If this be true, and we think we must so accept it, then defendant should be required to account for at least 252 bushels of corn. The evidence does not indicate clearly whether the shortage was in white or yellow corn or both. Under the circumstances we think it equitable to assume that the shortage was in both and in the proportion that the shortage bears to the total amount produced. This would indicate a shortage of approximately 200 bushels of white corn and approximately 52 bushels of yellow. At the time the corn was sold the white was worth the ceiling price of $1.19 per bushel. The yellow was worth the ceiling price of $1.04 per bushel. Thus the amount of the shortage of corn for which defendant should be and is required to account is $292.08.

There is evidence pointing to a possible shortage of barley but it is so indefinite and uncertain that a finding in this respect cannot be made.

By the terms of the leases it was required that the shelling and marketing of grain was imposed on the defendant. In this respect he failed and plaintiff was required to pay for the shelling and marketing. This he did at an expense to him of $59.50. This amount is a proper charge against the defendant.

The evidence sufficiently establishes that as cash rent plaintiff is entitled to $88.

The amounts found to be due plaintiff growing out of the farm leases and the operation of the farm are, for corn $292.08, for shelling and marketing corn $59.50, for cash rent $88, total $439.58.

By answer and cross-petition defendant claims that he is entitled to recover of and from the plaintiff $495.20

for labor and material in and about the repair and improvement of the buildings, fences, and structures on the land. On these items the evidence is not clear but we think it supports a conclusion that the parties agreed upon a settlement for material furnished before August 1945 for $136. We think the evidence supports a claim for labor prior to August 1945 in the amount of $88, which includes $12 for hauling corn in 1945, which plaintiff agreed to pay. We find that defendant has failed to prove a right of recovery on the balance of the claim set up in his cross-petition. Therefore on his cross-petition defendant is entitled to recover from plaintiff $224.00.

In conformity with a judgment or decree apparently entered following an earlier trial of this case, which was set aside, plaintiff paid defendant $112. This subject is dealt with in the pleadings herein. In an accounting here this must be taken into consideration in an adjustment of accounts and allowance made therefor in favor of plaintiff.

Therefore we find that the total amount due and owing from defendant to plaintiff before adjusting it with the amount owing by plaintiff to defendant is $551.58; that the amount due to defendant from plaintiff before adjustment is $224; and that after adjustment there is due from defendant to plaintiff $327.58.

With regard to the writ of assistance we fail to see how this could properly be the basis of a cause of action in case No. 5293. No objection, however, was made by the defendant. Presumably the parties considered it proper on the basis of the consolidation of the two cases. It was a repetition of an application made in case No. 5278. The trial court must have considered the matter of a writ of assistance foreign to case No. 5293 since, though there was but one journal entry, the journal entry ordered the writ of assistance issued in case No. 5278.

The defendant defended against the application for a writ of assistance in both cases on the ground that he

had a valid lease for one year from March 1, 1946, to March 1, 1947. He contends that his lease was oral but that it was made valid and was taken out of the operation of the statute of frauds by part performance on his part. Plaintiff denies that there was an oral lease or any other kind of lease under which there was any performance at all.

Section 36-105, R. S. 1943, provides: "Every contract for the leasing for a longer period than one year, * * * of any lands, shall be void unless the contract or some note or memorandum thereof be in writing and signed by the party by whom the lease or sale is to be made."

Section 36-106, R. S. 1943, provides: "Nothing contained in sections 36-101 to 36-106 shall be construed to abridge the powers of a court of equity to compel the specific performance of agreements in cases of part performance."

This provision is supported by abundant authority. See Crnkovich v. Crnkovich, 144 Neb. 904, 15 N. W. 2d 66; Taylor v. Clark, on rehearing, 143 Neb. 563, 13 N. W. 2d 621; Caspers v. Frerichs, 146 Neb. 740, 21 N. W. 2d 513; Hackbarth v. Hackbarth, 146 Neb. 919, 22 N. W. 2d 184; Garner v. McCrea, 147 Neb. 541, 23 N. W. 2d 731; Herbstreith v. Walls, 147 Neb. 805, 25 N. W. 2d 409.

Within the meaning of section 36-105 an oral lease, though for only one year, if entered into prior to the beginning of the term, is void under the statute. Thostesen v. Doxsee, 77 Neb. 536, 110 N. W. 319; Kofoid v. Lincoln Implement & Transfer Co., 80 Neb. 634, 114 N. W. 937. Such a lease however may become valid by entry into possession at or after the commencement of the orally agreed term. See Friedhoff v. Smith, 13 Neb. 5, 12 N. W. 820; Thostesen v. Doxsee, *supra;* Kofoid v. Lincoln Implement & Transfer Co., *supra.*

As to the existence of the oral lease for the year from March 1, 1946, to March 1, 1947, defendant said it was agreed upon on August 21, 1945. He said he was to

give one-third rent for grain, $5 an acre for cane, and $1.50 an acre for pasture. He said also that at the time plaintiff made a memorandum of the terms and agreed to prepare and submit in proper form a lease containing the terms. This was never done.

Plaintiff denied that an oral lease was entered into but says in that connection that it was agreed that defendant should have a new lease provided the farm wasn't sold. He said that he wrote the terms of the new proposed lease on a slip of paper.

This all occurred prior to the commencement of the partition proceeding to which defendant was made a party as occupying tenant.

There is nothing in the petition which seeks to have the tenancy of defendant, if he had a tenancy, terminated or to have it in anywise adjudicated. Likewise there is nothing in the decree or journal entry purporting to be an adjudication upon the tenancy.

There having been no adjudication upon any rights of the defendant to possession as lessee in the partition action we fail to see how a writ of assistance to cause him to vacate could properly issue on the decree therein.

On the record here, if the defendant had a lease, he continued to be the lessee after partition. The rule is stated in 47 C. J., Partition, § 933, p. 615, as follows: "While a lease of all or a part of property held in common does not prevent a partition, a partition of leased premises must be subject to the rights of the lessee, * * *." See Henderson v. Henderson, 136 Iowa 564, 114 N. W. 178; Haeussler v. Missouri Iron Co., 110 Mo. 188, 19 S. W. 75, 33 Am. S. R. 431, 16 L. R. A. 220; Albert v. National Outfitting Co., 270 Pa. 183, 113 A. 205; Hanna v. Clark, 204 Pa. 149, 53 A. 757.

This being true we are of the opinion that the writ of assistance was erroneously issued in case No. 5278.

If we are to say that the writ of assistance was properly issued in case No. 5293 then we will be required to say that a party seeking possession of real estate from

a tenant holding over his term, assuming that the defendant is a tenant holding over, may go into equity, and that resort for such purpose to the action of forcible entry and detainer is no longer necessary. It will be remembered that under the pleadings and evidence no question of title but only the right of possession is involved.

The action of forcible entry and detainer is purely a statutory proceeding and original jurisdiction thereof is conferred on justices of the peace. Section 27-1401, R. S. 1943; Blachford v. Frenzer, 44 Neb. 829, 62 N. W. 1101; Armstrong v. Mayer, 60 Neb. 423, 83 N. W. 401. Like jurisdiction may be exercised by county courts (§ 24-502, R. S. 1943) and by municipal courts (§ 26-119, R. S. 1943), but district courts have no original jurisdiction in such cases. Armstrong v. Mayer, *supra.*

It becomes clear then that plaintiff, for want of jurisdiction in the district court, was not, in case No. 5293, entitled to a writ of assistance or a decree determining the right of possession as between the plaintiff and defendant to the lands in question.

It is true that the question has not been raised by the parties, but even if they had agreed to confer jurisdiction upon the district court still that court would have been without jurisdiction to determine the question thus presented.

In Armstrong v. Mayer, *supra,* this court said: "The fact that the plaintiff appeared in the district court and tried the cause without raising the question of jurisdiction is immaterial, since consent of parties can not confer upon a court jurisdiction of the subject-matter. The judgment of the district court from which this error proceeding has been prosecuted is *coram non judice.*"

We conclude therefore that the district court erred in ordering the issuance of a writ of assistance in either of the consolidated cases.

The decree and judgment of the district court is re-

versed and remanded with directions to dismiss the third cause of action.

The decree and judgment as to the second cause of action is reversed and the cause in that respect remanded with directions to the court to enter judgment in favor of plaintiff and against the defendant in conformity with this opinion for $327.58.

REVERSED WITH DIRECTIONS.

FRANK JOHN KLINE, APPELLEE, V. METCALFE CONSTRUCTION COMPANY, A CORPORATION, ET AL., APPELLANTS.
27 N. W. 2d 383

Filed May 9, 1947. No. 32170.

1. **Appeal and Error.** Where a case has been reversed for error in instructing a verdict for the defendant and remanded generally, the holding that the plaintiff is entitled to have the case submitted to the jury becomes the law of the case upon a second trial, where the evidence is substantially the same.
2. ———. The rulings on the admission of testimony can be reviewed by this court when, either by general or specific assignment in the motion for new trial, they are called to the attention of the trial court.
3. **Evidence.** A letter written by a public officer stating what the records of his office disclose is not competent evidence of the facts stated.
4. **Trial.** Where the evidence is insufficient to sustain a verdict for plaintiff, dismissal of action is proper.
5. **Contracts.** To establish an express contract there must be shown what amounts to a definite proposal and an unconditional and absolute acceptance thereof.
6. ———. When a party makes an offer with certain terms or conditions but accepts an acceptance or counter offer which is not completely responsive to the proposal he is bound by the contract thus made and cannot fall back on his original proposal in case of subsequent disagreement.
7. **Trial.** The giving of erroneous instructions is not cause for reversal, if the instructions are more favorable to the complaining party than he is entitled to under the law.

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

Joseph T. Votava, for appellants.

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

Heard before SIMMONS, C. J., PAINE, CARTER, YEAGER, and CHAPPELL, JJ., and NUSS, District Judge.

WENKE, J.

Plaintiff, Frank John Kline, brought this action in the district court for Douglas County seeking to recover damages for loss of wages caused by the defendants' breach of his contract of employment with them. The jury returned its verdict in favor of the plaintiff and the court entered a judgment thereon. Their motion for new trial having been overruled, the defendants appeal.

This action was previously appealed to this court and is reported as Kline v. Metcalfe Construction Co., 146 Neb. 389, 19 N. W. 2d 693. The sole question involved in the former appeal was whether or not the trial court erred in directing a verdict for the defendants and entering a judgment in their favor. We therein held that the facts, as set forth in the opinion, presented a jury question and reversed the trial court and remanded the cause for further proceedings. The case was retried on the same pleadings and substantially the same evidence as before.

In Callahan v. Prewitt, on rehearing, 143 Neb. 793, 13 N. W. 2d 660, we held:

"Where on appeal findings of fact are made which become the law of the case and there is a remand for a new trial, on such retrial, such findings are binding on the parties, the trial court and this court, unless on the retrial the facts relating to the issues upon which the findings were made are materially and substantially different from those adduced on the former trial, and

the burden of showing a difference shall rest upon the party making the claim.

"The determination of the question of whether or not the evidence on a retrial is different from that adduced on an earlier trial is one for the court and not for the jury."

"Where a case has been reversed for error in instructing a verdict for defendant, and remanded generally, the holding that plaintiff is entitled to recover becomes the law of the case upon a second appeal, where the evidence upon both trials is substantially the same." Yeggy v. Fidelity Reserve Co., 118 Neb. 792, 226 N. W. 444. See, also, Fitzgerald v. Union Stock Yards Co., 91 Neb. 493, 136 N. W. 838.

Therefore the court did not err in submitting the case to the jury unless the appellants are right in their contention that certain evidence was erroneously received over their objection and, in the absence thereof, they were entitled to a directed verdict.

The error complained of is the court's ruling on exhibit No. 9.

The appellee contends that the appellants failed to set out in their motion for new trial that the court erred in admitting in evidence exhibit No. 9 and therefore this court cannot consider the trial court's ruling thereon.

Assignment No. 10 of the appellants' motion for new trial is as follows: "Because of errors in the admission of evidence on behalf of the plaintiff, duly excepted to and objected to by the defendants, and which evidence was prejudicial to said defendants."

We held in Dunbier v. Mengedoht, 119 Neb. 706, 230 N. W. 669: " 'The rulings on the admission of testimony cannot be reviewed unless the same were either by general or specific assignments called to the attention of the trial court by the motion for a new trial.' Flower v. Nichols, 55 Neb. 314."

We find the general assignment in the motion for new trial to be sufficient.

Exhibit No. 9 is a letter from the state director for Nebraska of the War Manpower Commission. It is as follows:

"June 29, 1944 * * *

"Your requests in their entirety concerning the case of Frank John Kline, 440 South 13th Street, Lincoln, Nebraska, cannot be complied with under ordinary circumstances because of an administrative policy on disclosure of information. However, we have made an attempt to assist you insofar as it is possible.

"We find from our records that Mr. Kline was released without prejudice and obtained the necessary clearance from this office. Since there is this discrepancy concerning his release, we suggest that you get in touch with his former employer, the US Engineers, as the release was signed by Captain Richard Blore, Area Engineer.

"We trust that this information will be of some assistance to you."

On the first trial this exhibit was received without objection and considered as part of the evidence in the case as is evidenced by the opinion. On the second trial objection was made thereto on the ground that it is hearsay and not the best evidence.

The objection was well taken on both grounds.

As stated in Boehmer v. Heinen, 143 Neb. 200, 9 N. W. 2d 216: "Any statement, oral or written, the persuasiveness or probative value of which depends partly or wholly on something other than the credit to be given to the witness testifying or the instrument which contains it and renders necessary a resort to the veracity and competency of some other person, is hearsay and not properly admissible as evidence." See, also, Dier v. Dier, 141 Neb. 685, 4 N. W. 2d 731; 31 C. J. S., Evidence, § 194, p. 930; and 20 Am. Jur., Evidence, § 455, p. 403.

"A certified copy of a letter written by a public officer stating in a general way what the records of his office disclose is not competent evidence of the facts stated."

Moore v. Parker, 59 Neb. 29, 80 N. W. 43. And as stated in Sampson v. Northwestern National Life Ins. Co., 85 Neb. 319, 123 N. W. 302: "The certificate offered was a mere statement by the officer of what the books contained, and was not the best evidence."

In their answer the appellants alleged: "Said plaintiff failed to obtain a 'clear release' from his employment with the Area Engineer, and the District Engineer, U. S. Engineer Office, Omaha, Nebraska, which was made a condition precedent to his employment by the defendants."

This issue was submitted to the jury as part of instruction No. 3 as follows:

"The burden is upon the plaintiff to establish by a preponderance of the evidence the following propositions: * * * 5. That he had a 'clear release' from the United States Engineer's Department with whom he was employed in Nebraska, as the term 'clear release' is hereinafter defined. * * *."

Instruction No. 4 is as follows: "By the term 'clear release' as used in these instructions is meant such release from his then employment by the U. S. Engineers as would enable him to accept work with another war agency or essential activity."

It is appellants' contention that, in the absence of exhibit No. 9, there is no evidence in the record showing that appellee was ever released from the United States Engineers and, since that was a specific requirement of the appellants' offer, they are entitled to a directed verdict.

Where the evidence is insufficient to sustain a verdict for plaintiff, dismissal of action is proper. Bauer v. Wood, 144 Neb. 14, 12 N. W. 2d 118.

As stated in 17 C. J. S., Contracts, § 42, p. 378: "* * * the offerer has a right to prescribe in his offer any conditions as to time, place, quantity, mode of acceptance, or other matters which it may please him to insert in and make a part thereof, and the acceptance,

to conclude the agreement, must in every respect meet and correspond with the offer, neither falling short of nor going beyond the terms proposed, but exactly meeting them at all points and closing with them just as they stand, and, in the absence of such an acceptance, subsequent words or acts of the parties cannot create a contract."

In Evans v. Platte Valley Public Power & Irr. Dist., 144 Neb. 368, 13 N. W. 2d 401, we approved the following from Federal Reserve Bank v. Neuse Mfg. Co., 213 N. C. 489, 196 S. E. 848:

"That a contract is not made so long as in the contemplation of both parties thereto something remains to be done to establish contract relations is too well established to require the citation of authority. * * * In negotiating a contract the parties may impose any condition precedent, a performance of which condition is essential before the parties become bound by the agreement."

"To establish an express contract there must be shown what amounts to a definite proposal and an unconditional and absolute acceptance thereof." Farmers Union Fidelity Insurance Co. v. Farmers Union Co-Operative Insurance Co., 147 Neb. 1093, 26 N. W. 2d 122.

However, as stated in 17 C. J. S., Contracts, § 44, p. 385: "Where one makes an offer with certain terms or conditions, and accepts an acceptance which is not responsive to the proposal, he is bound by the contract thus made, and cannot fall back on his proposal in case of subsequent disagreement. This acceptance has made a new agreement on the terms of the new offer."

In order to determine the question here involved it will be necessary to examine the evidence relating thereto. The record does not contain any competent evidence that the appellee ever obtained a clear release from the United States Engineers. This was apparently due to the failure of Captain Blore, area engineer, to send appellee's resignation and his, Captain Blore's, recom-

mendation thereon to the District Engineer's office in Omaha until April 24, 1943. The officers who had authority to act thereon were stationed in the District Engineer's office in Omaha.

The negotiations, out of which this litigation arises, had their inception when appellee, an auditor with the United States Engineers located near Scribner, Nebraska, wrote to his friend, Earl Moeller, personnel manager of the appellant corporations and in charge of hiring their personnel, asking for a job.

On February 25, 1943, Moeller replied to this letter advising appellee they could use a man of his ability in their personnel department and then went on to say: "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."

On March 1, 1943, appellee replied to Moeller's letter of February 25, 1943, and advised him that: "I have already given my resignation to the Area Engineer, and I know it will be accepted without question, as of Mar. 15th, so will be looking to you for further orders * * *."

Captain Blore was the area engineer in charge of the Scribner Airfield and the resignation tendered to him by appellee is as follows:

"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.

"I respectfully request resignation without prejudice."

On March 24, 1943, Moeller wrote to appellee and advised him as follows: "I am very sorry to hear that your government resignation was of the type that it is. These engineers here are so much tougher than they were in the states that I am afraid if they should learn of your release it would react against both yourself and the company. However, as you know, what we don't

know on these jobs won't hurt us. Consequently we should not have your release mentioned or designated on your application."

There is nothing in the record to show where Moeller got the information upon which he bases the foregoing statement as to the resignation. Appellee replied to the foregoing letter on March 30, 1943, and informed Moeller as follows:

"Received your letter yesterday and am answering to give you a clear picture of the situation here.

"My resignation to the Government will in no way effect, I am sure, either you or M. H. K. as Capt. Blore is in sympathy with the resignation and will cooperate in every respect for any future controversy that might come up. Will give you exact wording of his reply to my resignation:

" 'Forwarded with recommendation that the resignation be accepted without prejudice effective noon, April 6, 1943, expiration 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 employed. Signed Richard E. Blore, Capt. Corps of Engineers, Area Engineer.'

"I hope this will clear things up for you and also for me as I have been sort of uncertain and I would like to clear up the situation. * * * If everything is satisfactory, wire ticket so that I can leave here April 5, 1943."

Moeller knew the United States Engineers' procedure in regard to a resignation and the necessity thereof. While appellee had advised him he was sure the resignation without prejudice would be accepted yet he had at no time advised him that it had been accepted. Here appellee informed Moeller of what he had done as to his resignation and suggested that if everything was satisfactory to wire him a ticket.

In response to this letter the appellee received the following telegram dated April 9, 1943: "PICK UP

TICKET AT CB & Q STATION YOU MUST SECURE DRAFT DEFERMENT IN DUPLICATE BIRTH CERTIFICATE HAVE UNITEDSTATES 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 KANSASCITY BRIDGE CO MOELLER EDMONTON CANADA."

The evidence shows that in response to the telegram the appellee obtained CX-508 at the United States Employment Service office; that he was advised at the office of the War Manpower Commission that CX-508 was a sufficient release from their office; that he obtained an occupational draft deferment from the draft board; that he had a birth certificate; and that he picked up the ticket at the railroad ticket office.

Appellee testified as follows: "Q—Now, what did you do then? A—I had waited so long to find out, I wanted to be absolutely sure that I had done everything that had been requested of me in the telegram; I didn't want to leave anything undone to keep from going up there because I was anxious to go up there, and I saw after reading over the telegram later that it asked—that I had to have a release from the War Manpower Commission. I went back to the U. S. Employment Agency —both the agencies were in the same building, and the same people as far as I know—I went back to them and asked them about getting a release from the War Manpower Commission and they told me that this CX-508 was all that was necessary for me to have. Q—Did you contact the defendants with reference to this matter? A—I told Mr. Moeller in a telephone conversation what I had and that I didn't have any clearance from the War Manpower Commission as far as credentials were

concerned, but he said if I had CX-508 that was all that was necessary."

Thereafter, by reason of two telegrams, one from the appellants' office in St. Paul, Minnesota, dated April 14, 1943, and the other from Moeller at Edmonton, Alberta, Canada, dated April 18, 1943, the appellee was advised not to report and to return his ticket.

From the foregoing facts, which are undisputed, it is apparent that at the inception the appellants' offer of employment required appellee to have a clear release. However, after Moeller's letter of March 24, 1943, which in part relinquished this requirement, appellee wrote Moeller advising in full what he had done and stating that if what he had done was satisfactory to wire him a ticket. Moeller thereupon wired him a ticket and advised what additional requirements he would have to comply with. Having done so, but feeling uncertain because he had no written evidence of clearance from the office of the War Manpower Commission, he called Moeller and advised him in regard thereto. Moeller advised him that what he had was all that was necessary. We think these facts, as a matter of law, bring this within the rule as hereinbefore quoted from 17 C. J. S., Contracts, § 44, p. 385, that when one makes an offer with certain terms or conditions, and thereafter accepts an acceptance or counter offer which is not completely responsive to the proposal, he is bound by the contract thus made and cannot fall back on his proposal in case of subsequent disagreement.

By its instructions the court placed upon the appellee the burden of establishing an issue which, under the facts of this case, should not have been submitted. But such is not an error of which the appellants can complain. As stated in In re Estate of Keup, 145 Neb. 729, 18 N. W. 2d 63: "'"The giving of erroneous instructions is not cause for reversal, if the instructions are more favorable to the complaining party than he is entitled to under the law." (Webb v. Omaha & S. I. R.

Co., 101 Neb. 596, 164 N. W. 564).' Holley v. Omaha & C. B. Street Ry. Co., 110 Neb. 541, 193 N. W. 710. The rule is stated in 5 C. J. S., sec. 1678, p. 824, as follows: 'Any error in sending the case or an issue to the jury is not a basis for objection on appeal where it operates in favor of appellant; and so a submission of the case to the jury furnishes appellant with no ground of complaint where the evidence is such as to warrant the court in directing a verdict against him. * * * or where such submission gives the jury an opportunity to find against appellee on a question of fact that should not have been submitted to it; * * *.' "

For the reasons stated we find the verdict and judgment of the trial court should be affirmed.

AFFIRMED.

WENKE, J., participating on briefs.

NUSS, District Judge, dissenting.

I cannot bring myself to agree with the conclusion of the majority, although I agree with them on everything down to the question of waiver, or, accepting of a counter offer, as the majority terms it. My disagreement with the majority is (1) that the issues and the theory of the case have been changed and (2) that there is no evidence of any waiver of the "clear release."

The case was brought by the plaintiff, defended by the defendants, and tried and submitted by the court, upon the issue and theory, not of waiver, but of performance of the condition precedent as to a "clear release." To that end Exhibit 9 was offered and received. The plaintiff did not claim that the defendants had waived anything or receded in any degree from their original requirement of a "clear release." Consistent with that theory of the plaintiff he offered Exhibit 9, which if admissible would sufficiently have shown a "clear release." The majority affirm the case not on the basis that Exhibit 9 was admissible, not on the basis that the evidence showed performance, but upon the theory that there was a waiver of that re-

quirement. Indeed, the court goes further and holds that by the submission of that issue of performance of the condition precedent the case was submitted more favorably to the defendants than they had a right to expect. The majority concedes that to constitute a "clear release" the resignation of the plaintiff would have had to be accepted by the proper officer in the Omaha office. The majority concedes that the letter of resignation and recommendation of Capt. Blore was not forwarded until about ten days after the defendants had withdrawn the offer. The majority concedes that Exhibit 9 was inadmissible and that there is nothing else whatever tending to show a "clear release."

I cannot agree that the submission of such issue with nothing but inadmissible evidence to support it can be favorable to a defendant who has throughout the whole trial and up until he comes into this court been led to believe that the plaintiff had to prove performance. The verdict of the jury is consistent with the whole theory of the case. With Exhibit 9 submitted to it and being informed that it could consider the exhibit, the jury logically arrived at the conclusion that the plaintiff had a clear release. The jury, however, did not pass upon the question of waiver. That matter has now for the first time been brought into the case. If the question of waiver is in the case the jury should have passed on that and it is my opinion that this court should not substitute a verdict based on waiver for an erroneous verdict based upon inadmissible and prejudicial evidence.

Nor do I believe there is any evidence of waiver in this record. The original offer of February 25, 1943, contained the condition precedent that "We cannot offer you a job as long as you are with the Area Engineers but if you have a clear release," they could offer him a position. On March 1 the plaintiff wrote to defendants that he had given his resignation to the area engineer "and I know it will be accepted without question, as of

Mar. 15th." The defendants then and at all times thereafter had every reason to believe that the resignation would be accepted in due course and doubtless assumed that it had been accepted. With reference thereto the majority says: "While appellee had advised him he was sure the resignation without prejudice would be accepted, yet he had at no time advised him that it had been accepted." In all deference I submit the important fact is that he did not advise them that it had *not been accepted.*

In brief, the burden of proof was on him to prove his case. The burden was on him to prove that they knew or, at the least, had sufficient reason to know that his resignation had not been accepted. Had that been the evidence, then I could freely agree that the telegram of April 9, 1943, would have constituted a waiver or a recession from the condition precedent. The record is utterly void of any evidence to show that the defendants knew or should have known that the plaintiff's resignation had not been accepted. They had every right to assume that that requirement had been fully complied with when they sent their telegram of April 9 setting out the routine requirements which the exigencies of war and the rules and regulations of the war agencies demanded.

CHARLES E. O'BRIEN, APPELLANT, V. JOHN W. FRICKE ET AL., APPELLEES.
27 N. W. 2d 403

Filed May 9, 1947. No. 32219.

1. **Appeal and Error: Equity.** Actions in equity, on appeal to this court, are triable de novo in conformity with section 25-1925, R. S. 1943, subject, however, to the condition that when the evidence on material questions of fact is in irreconcilable conflict this court will, in determining the weight of the evidence, consider the fact that the trial court observed the witnesses

and their manner of testifying and must have accepted one version of the facts rather than the opposite.

2. **Specific Performance.** Specific performance of a contract by a court of equity is not generally demandable or awarded as a matter of absolute legal right, but is directed to and governed by the sound legal discretion of the court, dependent upon the facts and circumstances of each particular case. It will not be granted where enforcement would be unjust and may be denied when the party seeking it has failed to perform.
3. ———. In suits for specific performance, courts will not attempt to make a new contract for the parties litigant which they did not make themselves, or enforce new conditions which could not have been within the minds of the contracting parties, or enforce a contract which does not contain the substance of the agreement made by the parties.
4. **Contracts.** A condition precedent in the law of contracts either may be a condition which must be performed before the agreement of the parties shall become a binding contract or it may be a condition which must be fulfilled before the duty to perform an existing contract arises.
5. ———. A contract, the fulfillment of which by express or implied agreement is made to depend upon the act or consent of a third person over whom neither party has any control, cannot ordinarily be enforced unless the act is performed or the consent given and except for the fault of the promisor, reasons given for failure or refusal to act or give consent are immaterial.
6. **Specific Performance.** A party who seeks specific performance must show not only that he has a valid legally enforceable contract but also that he has substantially complied with its terms, by performing or offering to perform on his part the acts which formed the consideration of the undertaking on the part of defendant or that he is ready, able, and willing to perform his obligations under the contract and do whatever has been made a condition precedent on his part, or show a valid excuse for nonperformance of the covenants incumbent upon him.
7. ———. Specific performance of a contract for the sale of real estate will not be decreed where the agreement is not binding on both parties and the mutuality of obligation is not such that it may be legally enforced by either.

APPEAL from the district court for Douglas County: JAMES T. ENGLISH, JUDGE. *Affirmed.*

Charles E. O'Brien, pro se and *Rosewater, Mecham, Shackelford & Stoehr,* for appellant.

Collins & Collins, for appellees.

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

CHAPPELL, J.

Plaintiff, as vendee, brought this action seeking specific performance of a farm land contract with abatement of the purchase price because plaintiff was allegedly induced to enter into the contract by misrepresentations of defendant owners relating to the condition of the improvements and the number of acres under cultivation. The trial court found that the allegations of the defendants' amended answer were true, entered judgment for defendants, and dismissed plaintiff's action. Motion for new trial was overruled, and plaintiff appealed, assigning generally that the trial court erred in refusing to award him the relief sought. We conclude that his contentions cannot be sustained.

Defendant Werner Hellbusch was made a party solely by reason of his tenancy on the land. Hereinafter, in speaking of defendants, we refer only to the owners of the land, who are alleged to have contracted to sell it to plaintiff.

Plaintiff alleged substantially in his amended and supplemental petition that on or about February 4, 1945, defendants advertised their 450 acre farm for sale in the Omaha World-Herald, representing that the land had good improvements and contained 300 acres of cultivated land. He alleged that relying on those statements and representations, he was induced to enter into a written contract with defendants, by which he agreed to purchase, and defendants agreed to sell and convey the land to him, free and clear of all encumbrances, for a consideration of $14,625. The contract was, however, "subject on the further condition that

after acceptance by mortgaging said land I can borrow $7,312.50 unconditionally from the Federal Land Bank and $2,925.00 unconditionally from the Land Bank Commissioner," purchase to be closed "upon completion of above loans." Plaintiff further alleged that the aforesaid representations made by defendants were false, by reason of which the farm was of less value and he was unable to obtain the loans for those amounts and thus comply with the contract. However, being desirous of purchasing the land as agreed, but with a reasonable abatement of purchase price, it was alleged that plaintiff offered and still offers to perform in that manner but defendants refused and still refuse to so perform. It was prayed that the court determine upon a reasonable and just abatement, less rents paid by the tenant; require defendants to specifically perform upon that basis; and award general equitable relief.

Defendants, in their amended answer, after denying generally, admitted publication of the advertisement without their knowledge, by a real estate agent with whom they had listed the property for sale. However, they specifically denied that plaintiff relied thereon or that they ever intentionally misled or made any misrepresentations to plaintiff as an inducement to enter into the contract. It was alleged in substance that he inspected the land and its improvements on at least two or three occasions, had full knowledge of the condition of the farm improvements and was orally informed of the actual number of cultivated acres of land prior to entering into the contract. They also alleged that plaintiff, relying upon his own investigations, specific knowledge, and judgment, prepared and presented the proposed contract which contained not only a reduction of $2,250 in purchase price, but also his own terms and conditions which defendants accepted. It was alleged that they have never refused to comply with and perform the terms of the contract as made, the performance of which was conditioned solely upon plaintiff being

able to borrow $10,237.50, representing 70 percent of the purchase money unconditionally as recited therein, and that when the dependent condition failed, plaintiff could not perform; therefore, the contract, being wholly executory, no longer existed, failed of enforcement for want of mutuality of obligation, and with defendants acquiescence was thereupon rescinded and abandoned by plaintiff. Their prayer was for dismissal of the action.

Plaintiff's reply completed the issues and among other things denied generally the allegations of defendants' answer. Other matters were alleged in the pleadings but in view of our conclusions it will be unnecessary to recite them.

Being equitable in character, the action is triable de novo in conformity with section 25-1925, R. S. 1943, which requires this court to: " * * * reach an independent conclusion as to what finding or findings are required under the pleadings and all the evidence, without reference to the conclusion reached in the district court or the fact that there may be some evidence in support thereof." That rule, as applicable to the record before us, is: "Subject, however, to the condition that when the evidence on material questions of fact is in irreconcilable conflict this court will, in determining the weight of the evidence, consider the fact that the trial court observed the witnesses and their manner of testifying and must have accepted one version of the facts rather than the opposite." Rettinger v. Pierpoint, 145 Neb. 161, 15 N. W. 2d 393.

Relevant evidence appearing in the record establishes without question that plaintiff was careful, since he admittedly did not have sufficient money with which to pay the purchase price, to so word the contract and have a complete understanding with defendants that there should be no contract and that there would be no obligation on his part to perform the contract until or unless he was first able to unconditionally obtain the loans from third parties over which none of the

parties to the contract had any control. In other words, the instrument was not to become an effective contract binding plaintiff to perform or pay the price until or unless he was able to consummate the loans and thereby obtain $10,237.50, the amount of money required by him to pay the purchase price, which he was unable to do. He was unable to obtain loans aggregating more than $8,500, and now seeks to change the conditions of the contract without defendants' consent, and enforce performance by them primarily upon the basis of a proportionately reduced consideration, or even for a less amount. We have concluded under the pleadings and all the evidence adduced, that defendants were not at fault for plaintiff's failure to perform, and upon that premise we will discuss applicable rules of law decisive of the case.

The specific performance of a contract by a court of equity is not generally demandable or awarded as a matter of absolute legal right but is directed to and governed by the sound legal discretion of the court, dependent upon the facts and circumstances of each particular case. It will not be granted where enforcement would be unjust, and may be denied where the party seeking it has failed to perform. Wilson v. Bergmann, 112 Neb. 145, 198 N. W. 671; Wineberg v. Baker, 123 Neb. 411, 243 N. W. 122; In re Estate of Nelson, 127 Neb. 563, 256 N. W. 27; Tate v. Krentz, 128 Neb. 68, 257 N. W. 495; Wiiest v. Pounds, 142 Neb. 882, 8 N. W. 2d 211; 58 C. J., Specific Performance, § 13, p. 855.

Related thereto is the rule that if a purchaser is aware of a deficiency in the subject matter actually existent at the time of entering into a contract for the purchase of real estate, he will not, in a suit for specific performance, be entitled to any compensation or abatement of price unless equity and good conscience clearly require it. Moore v. Lutjeharms, 91 Neb. 548, 136 N. W. 343.

It is axiomatic that the contract sought to be performed must be the contract which the plaintiff and

defendants made. Union Central Life Insurance Company v. Cover, 137 Neb. 260, 289 N. W. 331. That is true, because in suits for specific performance, courts will not attempt to make a new contract for the parties litigant which they did not make themselves, or enforce new conditions which could not have been within the minds of the contracting parties, or enforce a contract which does not contain the substance of the agreement made by the parties. Anderson v. Schertz, 94 Neb. 390, 143 N. W. 238.

In Evans v. Platte Valley Public Power and Irrigation District, 144 Neb. 368, 13 N. W. 2d 401, this court recently used language which has application to the case at bar. Therein it was said: "'A condition precedent in the law of contracts either may be a condition which must be performed before the agreement of the parties shall become a binding contract, or it may be a condition which must be fulfilled before the duty to perform an existing contract arises.' 17 C. J. S. 792, sec. 338. See, also, 12 Am. Jur. 849, sec. 296. A contract, the fulfillment of which by express or implied agreement is made to depend upon the act or consent of a third person, over whom neither party has any control, cannot be enforced unless the act is performed or the consent given. See 17 C. J. S. 940, sec. 456f; 13 C. J. 634. And, except for fault of the promisor, reasons given for failure or refusal to act or give consent are immaterial. See 17 C. J. S. 969, sec. 468b, 939, sec. 456d; 13 C. J. 648.

"As usual, we find in the authorities a transposition of words but the same result. In Federal Reserve Bank v. Neuse Mfg. Co., 213 N. Car. 489, 196 S. E. 848, the court said:

"'That a contract is not made so long as in the contemplation of both parties thereto something remains to be done to establish contract relations is too well established to require the citation of authority. * * *

"'In negotiating a contract the parties may impose any condition precedent, a performance of which condi-

tion is essential before the parties become bound by the agreement. A promise, or the making of a contract, may be conditioned on the act or will of a third person.' See, also, Gund v. Roulier, 108 Neb. 589, 188 N. W. 185 (on rehearing, 108 Neb. 595, 190 N. W. 220); Hanneman v. Olson, 114 Neb. 88, 206 N. W. 155. In Garner v. Grogan, 136 Okla. 261, 277 Pac. 649, we find this statement: 'When an obligation to pay money is, by agreement, made to depend upon the action of another party, over whom neither party has control, payment cannot be exacted unless the specific act is performed.' See, also, Beams v. Young, 92 Okla. 294, 222 Pac. 952, and Gordon v. Pollock, 124 Okla. 64, 253 Pac. 1021."

It is elementary that mutuality of obligation is an essential element of the right to enforce specific performance of a contract in a court of equity. Mercer v. Payne & Sons Co., 115 Neb. 420, 213 N. W. 813; 49 Am. Jur., Specific Performance, § 16, p. 26; § 34, p. 46; § 35, p. 49. It has long been the rule in this jurisdiction that specific performance of a contract for the sale of real estate will not be decreed where the agreement is not binding on both parties and the mutuality of obligation is not such that it may be legally enforced by either. Hoctor-Johnston Company v. Billings, 65 Neb. 214, 91 N. W. 183.

As a matter of course, it is apparent that defendants could not have exacted payment from plaintiff or required him to specifically perform. There was no mutuality of obligation because until or unless the condition was performed, he was not bound by the contract. Under the circumstances presented here, plaintiff could not prevail upon the theory that the condition, being for his sole benefit, could be and was waived by him. He is bound by the rule that a party who comes into equity, seeking specific performance, must show not only that he has a valid legally enforceable contract, but also that he has substantially complied with its terms by performing or offering to perform on his part

the acts which formed the consideration of the undertaking on the part of defendant, or that he is ready, able, and willing to perform his obligations under the contract and do whatever has been made a condition precedent on his part or show a valid excuse for nonperformance of the covenants incumbent upon him. 49 Am. Jur., Specific Performance, § 40, p. 53. As appropriately stated in the latter citation: "A proposed purchaser is not able to perform when he is depending upon third persons for the funds to make the purchase, which funds such persons are in no way bound to furnish." In the case at bar, such persons were not only in no way bound to furnish such funds, but they also refused to do so.

Bearing in mind the rules of law heretofore set forth, we have examined the record and conclude that the evidence fails to sustain the allegations of plaintiff's petition but rather amply sustains the truth of the allegations in defendant's amended answer. We will not recite the evidence in extenso, since it would serve no good purpose and would unduly prolong this opinion. Other matters which are not relevant in the light of our conclusions, and other propositions of law which are not decisive of the case, were also presented and argued in briefs of counsel, but it becomes unnecessary to discuss them.

For the reasons heretofore stated, the judgment of the trial court should be and hereby is affirmed.

AFFIRMED.

GERTRUDE CHESNUT ET AL., APPELLANTS, V. MASTER LABORATORIES, A CORPORATION, ET AL., APPELLEES.
27 N. W. 2d 541

Filed May 16, 1947. No. 32134.

1. **Executors and Administrators.** Under section 30-406, R. S. 1943, an executor may lease decedent's land until debts have been paid and the estate settled, and a lease for a longer period of time is voidable, but not void, and may be ratified by the heirs.
2. **Wills.** Residuary devisees are estopped to invalidate an option to purchase real estate inherited by will where the evidence affirmatively discloses that they have acquiesced in and ratified such option.
3. **Assignments: Landlord and Tenant.** Covenants against assignment or underletting are not favorably regarded by the courts and are liberally construed in favor of the lessee.
4. ———: ———. The scope of an assignment in a lease will not be enlarged by the courts, and the covenant will not be considered as violated by any technical transfer that is not fairly and substantially an assignment.
5. **Landlord and Tenant.** Forfeitures of estate under leases are not favored in law and the right to forfeit must be clearly stipulated. If a forfeiture has not been stipulated for, a covenant or condition which is merely implied, or an express one not clearly within the forfeiture clause, will not sustain a claim of forfeiture for breach.
6. ———. The restriction against an assignment of a lease may be waived by the act, or acts, or conduct of the lessor in recognition of the validity of an assignment, and with knowledge thereof, as where, with knowledge of the facts, the lessor permits an assignee to remain in possession, and accepts subsequently accruing rents from him when the lessor is vested with knowledge of the alleged breach of the lease.
7. ———. Where the owners of property sue for damages and predicate their cause of action upon a written lease, they have thereby ratified the lease as a valid contract binding upon them and the party sued.
8. **Trial.** Evidence examined and held sufficient to sustain the judgment of the trial court.

APPEAL from the district court for Douglas County: HENRY J. BEAL, JUDGE. *Affirmed.*

Fischer, Fischer & Fischer, and *Emmet S. Brumbaugh,* for appellants.

Kennedy, Holland, De Lacy & Svoboda, and *L. J. Tierney,* for appellees.

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

MESSMORE, J.

This is an action to obtain a declaratory judgment setting aside and holding for naught a written lease and option contained therein to purchase certain real estate.

The plaintiffs' petition sets forth facts which will appear later in the opinion in the summary of the relevant and material evidence adduced from the record. Under the facts so alleged, it is the plaintiffs' contention that the executrices of the estate of William Pfeiffer, deceased, exceeded their authority in leasing real estate for a period of time longer than their term of office, and also exceeded their authority in giving an option to purchase such real estate. It is the further contention of the plaintiffs that the voluntary dissolution of the lessee corporation, and the taking over of the business by a partnership under the same firm name and style, effected an assignment of the lease contrary to the terms thereof. The prayer of the petition is to have the court determine the controversy between the parties under the lease and their rights and duties thereunder; that the defendants, John E. Von Dorn and Agnes C. Von Dorn, be declared as tenants from month to month in the premises; also, that the lease and option to purchase contained therein be set aside and held for naught.

The answer of the defendants sets forth that since the dissolution of the corporation the partnership composed of John E. Von Dorn and Agnes C. Von Dorn as legal successors of the Master Laboratories, Incorporated, continued to occupy the premises and carry on the same business the Master Laboratories, Incorporated had

engaged in, and to pay rent as provided in the lease, all with the full knowledge, acquiescence, approval, ratification, and consent of the plaintiffs; further, defendants allege that the lease and option contained therein are in full force and effect. Defendants pray dismissal of the plaintiffs' petition.

The trial court held that the plaintiffs were estopped from denying the validity of the lease; that the trustees of the corporation were entitled to enforce the lease and option to purchase; also that the dissolution of the corporation did not terminate the lease nor work a sale, assignment, underletting, or relinquishment of the lease in violation of the terms thereof. From this judgment the plaintiffs appeal.

For convenience the plaintiffs will hereinafter be referred to as appellants, and the defendants as appellees.

It appears from the record that William Pfeiffer, during his lifetime, was the owner of real property located at 2523 Leavenworth Street, Omaha, Nebraska. He died on or about February 13, 1941, leaving a will dated April 3, 1937. The will was admitted to probate, and Gertrude Chesnut and Louise Koscielski, daughters of William Pfeiffer, deceased, were appointed executrices. Clarence L. Pfeiffer, a son, also nominated in the will as executor, declined to serve. Paragraph 6 of the will gave the residue of the estate in equal shares to Gertrude Chesnut, Louise Koscielski, and Clarence L. Pfeiffer after certain provisions of the will had been complied with.

John E. Von Dorn and Agnes C. Von Dorn were the principal stockholders in the Master Laboratories, Incorporated. There were a few qualifying shares in the names of employees of the corporation. In 1942, the corporation was desirous of changing its location. As a result, John E. Von Dorn contacted D. C. Siampaus, a real estate dealer, who showed him the property of the Pfeiffer estate located at 2523 Leavenworth Street. The building was in a bad state of repair, and to accommodate the business of the corporation would require extensive

improvements. Negotiations followed between Mr. Von Dorn and Mr. Siampaus with reference to the corporation leasing the premises. The corporation was interested in obtaining a long-term lease with an option to buy the premises, because of the amount of improvements that would be required to carry on the business. Different offers were made as to the amount of rent, and Siampaus discussed the matter fully with the executrices of the Pfeiffer estate. It was finally agreed to lease the premises to the corporation for a period of ten years, from May 1, 1942 to April 30, 1952, at a rental of $110 per month with an option to purchase to run for five years from the date of the lease. The amount of the purchase price was fixed at $14,000 cash. Siampaus and the executrices understood that $10 per month of the rent was paid for the option, although the amount of rent and the amount paid for the option were not divided in the lease. The lease contained the following provision in substance: It was agreed that the corporation should, at its own expense, do any necessary remodeling inside the building, the estate to pay for repairs necessary on the building itself, unless such repairs were the result of the negligence of the employees of the corporation.

The corporation went into possession of the building under the lease and made extensive improvements and remodeling of the building which necessitated an expenditure of $13,000. A great many of the improvements made, exclusive of the equipment necessary to carry on the business of the corporation, were of a permanent nature and enhanced the value of the building. The appellants disputed the amount the appellees spent for the improvements, and produced a witness who testified that the total cost of fixing the offices and other improvements would not exceed $3,600.

At the time of the execution of the lease, and approximately a year and a half after the corporation went into possession of the building, Siampaus endeavored to sell the building to the corporation for $12,500. The record

shows that Siampaus was the agent of the executrices, and that they knew all of the details of the lease and option to purchase. The attorney for the executrices was also acquainted with the details of the transaction and drew the lease and option in accordance with the negotiations had respecting it. Siampaus sold other property for the executrices upon which there were options to purchase, and was paid a commission by them on this transaction.

On July 19, 1943, by proper legal notice, the corporation was dissolved. Thereafter a partnership was legally formed consisting of John E. Von Dorn and Agnes C. Von Dorn, his wife, doing business under the firm name and style of the Master Laboratories. The Von Dorns became the trustees of the corporation. As a partnership, the Von Dorns, who were the principal stockholders of the corporation, carried on the same business that the corporation had engaged in, and are the identical parties who constituted the corporation.

Distribution of the assets of the estate was made, and the receipt of Clarence L. Pfeiffer for his distributive share appears in the record, dated April 27, 1945, filed May 16, 1945. Having completed the distribution of the assets of the estate, the executrices were discharged on May 16, 1945. On May 1, 1945, a check in the amount of $110, made payable to the estate for the rent to June 1, 1945, was accepted by the executrices and became part of the assets of the estate. On May 29, 1945, a part of the second story, the roof, and the first floor of the building were destroyed by fire. On June 5, 1945, Gertrude Chesnut, Louise Koscielski, and Clarence L. Pfeiffer brought suit in the district court against the Master Laboratories, Incorporated, for damages in the amount of $8,000 alleged to have been caused by the negligence of an employee of the defendant resulting in fire and damage to the building. The petition recited that the executrices of the William Pfeiffer estate entered into a written lease with the defendant. The lease is attached

to and made a part of the petition, and is the same lease in question in the instant case. After the fire the Master Laboratories continued occupancy of the useable part of the premises and offered to pay a reasonable rent for the same, which was not accepted.

Clarence L. Pfeiffer resided in Michigan and from 1941 to 1944, due to the nature of his work and the time required by it, the estate matters were handled by his sisters, the executrices. It is apparent from the record that he was informed of matters relative to the estate, knew of the lease and the option to purchase, and was not in favor of the option.

The foregoing constitutes a summary of the material and relevant evidence except as the same may hereafter appear in the opinion.

The appellants advance the following legal propositions to support their contention that the court erred in entering judgment for the appellees. We take up these propositions of law in continuity.

The executrices exceeded their authority in leasing the premises for a period of time longer than their term of office. Section 30-406, R. S. 1943, provides in part: "The executor * * * shall have a right to the possession of all the real as well as the personal estate of the deceased, and may receive the rents, issues and profits of the real estate, until the estate shall have been settled, or until delivered over, by order of the county court, to the heirs or devisees, * * * ."

In analyzing this provision of the statute this court, in Muller v. Harms, 117 Neb. 657, 221 N. W. 898, held: "Under the statute granting to an administrator the right to possession of decedent's real property and to the rents thereof 'until the estate shall have been settled,' an administrator's lease for a longer period is not necessarily 'void' as distinguished from 'voidable,' but may be accepted and ratified by mutual consent of the lessee and the heirs and continued in full force after the settle-

ment of the estate and the discharge of the administrator, the heirs subsequently receiving the rent."

It is apparent that section 30-406, R. S. 1943, does not declare that lease agreements made by an executor in excess of the powers granted are void. At most, the statute made the lease voidable upon timely exercise of a right to declare it void. See, also, Globe & Rutgers Fire Ins. Co. v. Rose, 91 Fed. 2d 635.

It is apparent that the executrices in the instant case may lease the land of the deceased person at any time until the debts against the estate have been paid and the estate is settled. If such a lease be entered into by the executrices for a longer period of time, the lease is not void, but is voidable by the heirs, and can also be ratified by them. We are to determine whether or not, under the evidence, the lease in question was acquiesced in and ratified by the residuary devisees; and whether or not they are estopped from denying the validity of the lease.

The appellants rely on a part of 33 C. J. S., Executors and Administrators, § 150, p. 1111, as follows: "A representative of a decedent's estate in his official capacity is bound by the laws of estoppel, although his official acts ordinarily will not estop him as an individual and his individual acts usually do not estop him in his official capacity. * * * acts of an executor * * * will not bind or estop him in his individual capacity, * * * ." The part of the text not quoted is also of importance in determining the question presented. It is as follows: "However, unauthorized acts of the representative cannot bind the estate or give rise to an estoppel against it; and except where his acts as a representative and as an individual are so closely connected and associated that it is impossible to distinguish his actions in one capacity from the other, or where his acts as a representative have resulted or will result in his individual profit, acts of an executor * * * in his representative capacity will not bind or estop him in his individual capacity, and conversely, except where the estoppel is based on, and can be supported by,

equities against the estate, his acts as an individual cannot operate as an estoppel against him in his representative capacity."

The following authorities are likewise pertinent to a determination of this assignment of error.

In Wells v. Steckelberg, 52 Neb. 597, 72 N. W. 865, this court held: "One who in a representative capacity assumes to sell and convey to another the entire estate in land, is estopped as against the purchaser from asserting an estate in his own right in the same land, * * *." In the body of the opinion the court said: "That an estoppel arises against the assertion of a right in oneself by reason of a conveyance made in a representative capacity, see Poor v. Robinson, 10 Mass., 131." In that case a release was made by executors purporting to act under a power in the will. The power did not in fact extend to the estate in question, and the court held that the release was void. However, the executors were also heirs, and the court further held that as such they were estopped from setting up title as against the release they had made as executors. See, also, Little v. Giles, 25 Neb. 313, 41 N. W. 186.

In the case of Black v. Beagle, 59 Wyo. 268, 139 P. 2d 439, the court said: "The fact that the appellant conveyed the premises in his capacity as administrator of the estate of Zettie Beagle would make no difference. He is estopped in his personal capacity as to what is done in his representative capacity." The court in its opinion cites Wells v. Steckelberg, *supra,* and Poor v. Robinson, *supra.*

The reason for the rule is set out in Bliss v. Tidrick, 25 S. D. 533, 127 N. W. 852, where the court said: "And it certainly conforms to common sense and justice that where a person, the heir to an estate and also the representative of such estate, intending to convey the interest to such lands owned by the estate for the benefit of the estate and through it for the benefit of the

heirs, including such representative, enters into an instrument of conveyance with a purchaser in good faith and for value purporting to carry out the intention of such parties that the title to the property shall be conveyed, such person should be forever estopped, regardless of any covenants or warranties, from being heard to say that the instrument executed was void and of no effect."

In the instant case two representatives of the estate gave a ten-year lease in their representative capacity. They were residuary devisees, and as owners of the property claim that the lease is not valid against them. We have heretofore set forth the facts which disclose a ratification and acquiescence in the lease by them. Clarence L. Pfeiffer, a residuary devisee and also an owner of the property, likewise acquiesced in and ratified the lease. Furthermore, the residuary devisees, as individuals and owners of the property, filed an action in the district court for damages against the corporation charging that one of its employees by negligence caused the building to set on fire. The lease here in question is made a part of the petition, and certain clauses therein are quoted and relied on.

"One who brings suit upon a contract necessarily asserts that it is valid and enforceable, else he could not derive a cause of action from it. Hence if one is aware of facts which would justify him in rescinding a contract or other transaction into which he has entered, but nevertheless institutes an action upon it, this is an election to affirm it and a waiver of any right of rescission, and the election so made is final." Black on Rescission and Cancellation, (2d ed.) Vol. 3, § 612, p. 1476. See, also, 17 C. J. S., Contracts, § 443, p. 926; Darnell v. Waldrop, (Tex.) 57 S. W. 2d 392.

"Where a party to a contract elects to sue upon it for damages resulting from an alleged breach of its terms by the defendant, he thereby ratifies it as a valid contract, binding alike upon himself and the defendant."

Stramel v. Hawes, 97 Kan. 120, 154 P. 232. See, also, Darnell v. Waldrop, *supra.*

The appellants next contend the executrices exceeded their authority in giving an option to purchase when the will provided they were restricted to sell the real estate for cash only. The appellants cite and rely on the following text statements to sustain their position on this assignment of error: "An executor acting under a will in making a sale of the property of the testator is generally held to a strict execution of the powers conferred. To effect a valid sale all the directions of the power must be complied with. So a power to sell does not necessarily include a power to give an option, * * *." 11 R. C. L., Executors and Administrators, § 483, p. 400.

"A power given to an executor to sell the testator's property does not necessarily include a power to give an option to purchase such property, * * *." 21 Am. Jur., Executors and Administrators, § 696, p. 772. See, also, 33 C. J. S., Executors and Administrators, § 285, p. 1309, and § 274, p. 1293. The appellants also rely on the following authorities: Moffit v. Fitzer, (Iowa) 141 N. W. 935; Hickok v. Still, 168 Pa. 155, 31 A. 1100; Moore v. Trainer, 252 Pa. 367, 97 A. 462; Trogden v. Williams, 144 N. C. 192, 56 S. E. 865.

We have examined the foregoing cases and find that they are not applicable to the case at bar. In the case of Moffit v. Fitzer, *supra,* the question at issue was the assessability of the property in the hands of the executors, the executors having sold the property under contract. There was no option agreement involved in the contract.

In Hickok v. Still, *supra,* there were no heirs or devisees involved, and no question was presented whether or not an heir would be bound by an option contract made by him as an executor.

In Moore v. Trainer, *supra,* there was no question involved as to the right of an heir to repudiate an option made by him as an executor.

In Trogden v. Williams, *supra,* the heirs and devisees, as in the instant case, did not execute the option agreement. They were not the plaintiffs as here, in an action to repudiate individually something they had done in a representative capacity.

We deem the following authorities applicable to this assignment of error:

"An unauthorized contract of sale entered into by the representative is not binding on, and cannot be enforced against, the estate, although the heirs are named in the contract, but it is not signed by them. This rule applies to an option to purchase given by the representative, to a contract to sell and give a conveyance on obtaining permission of the court, or to a contract to obtain a conveyance, under an agreement to sell made by decedent, where the contract was not made on behalf, or with knowledge, of the heirs. However, such a contract of sale is not necessarily void, as it may bind the representative individually." 33 C. J. S., Executors and Administrators, § 270, p. 1287.

"An unauthorized sale of real estate by the executor or administrator is binding on the heirs or devisees if it is ratified by them, or by their ancestor, as where without fraud or mistake they receive the proceeds from such sale; * * *." 33 C. J. S., Executors and Administrators, § 273, p. 1289.

Whether or not there is ratification, acquiescence, and estoppel depends upon the facts in each individual case. We repeat the following facts which disclose acquiescence and ratification of the option in the instant case. It was known to the executrices and to Clarence L. Pfeiffer, through their agent and their attorney, that Mr. Von Dorn wanted a long-term lease with an option to purchase. The agent obtained authority to propose a lease for ten years with an option to purchase for $14,000 cash on or before five years from the date of the lease. This was agreeable to all parties concerned, and the attorney representing the executrices drew the

option and lease. They also received a separate consideration each month for the option, as heretofore explained. Mr. Von Dorn told the agent of the executrices that he expected to buy the premises; he wanted to use the money that he had available at the time to fix the building up; and the deal would have to be arranged so that he could buy it later. We are convinced that under the circumstances of this case the residuary devisees as owners of the real estate acquiesced in and ratified the option to purchase as contained in the lease, and are estopped to deny its validity.

The appellants contend the voluntary dissolution of the corporation and the taking over of the business by a partnership under the same firm name and style effected an assignment of the lease contrary to the terms thereof. It is agreed between the parties that generally a dissolution of a corporation does not invalidate its lease, but the trustees or successors succeed to the rights of the corporation under the lease. The appellants contend, however, that in this case there is a different situation because the lease contains the following clause: "* * * that it (the Master Laboratories, a corporation) will not sell, assign, underlet or relinquish said premises without the written consent of the lessor, under penalty of forfeiture of all its rights under this lease, at the election of the party of the first part * * *." Therefore, when the corporation was dissolved the trustees were vested with the benefits under the lease and by them the lease was, in effect, assigned to a partnership which was contrary to the quoted clause in the lease and gave the appellants the right to elect to forfeit the lease, which they have done and seek to do in this action.

In considering this assignment of error, the contention is that the dissolution of the corporation worked an assignment of the lease by operation of law. The covenant against assignment in the instant lease did not provide for forfeiture if the term should be assigned by operation of law. "A covenant not to assign or sublet is to be

construed strictly against the lessor in the absence of a statute to the contrary. Such covenants are not favored, and will not be extended by implication. * * * While a covenant against an assignment of a lease can be so drawn as to provide for forfeiture by an assignment by operation of law, such a covenant will not be inferred." 35 C. J., Landlord and Tenant, § 61, p. 978.

Since the lease under consideration made no provision with reference to an assignment by operation of law, nothing can be read into it to the effect that it would be terminated by dissolution of the corporation. Construing the lease as required by law, it is apparent that there was no intention on the part of the lessors to provide a forfeiture of the lease by operation of law.

Forfeitures of estate under leases are not favored in law and the right to forfeit must be clearly stipulated. If a forfeiture has not been stipulated for, a covenant or condition which is merely implied, or an express one not clearly within the forfeiture clause, will not sustain a claim of forfeiture for breach. See Easley Coal Co. v. Brush Creek Coal Co., 91 W. Va. 291, 112 S. E. 512.

Covenants against assignment or underletting are not favorably regarded by the courts and are liberally construed in favor of the lessee, but this means only that the scope of an assignment in a lease will not be enlarged by the courts, and that the covenant will not be considered as violated by any technical transfer that is not fairly and substantially an assignment. See White v. Huber Drug Co., 190 Mich. 212, 157 N. W. 60.

The cases of H. P. Hood & Sons v. Perry, 248 Mass. 350, 142 N. E. 794, and White v. Huber Drug Co., *supra*, cited by the appellants in support of this assignment of error are not applicable. The two cases do not involve circumstances where there had been a dissolution of a corporation and a continuation of the same business and parties by a partnership.

The corporation did not cease to exist upon the filing of the notice of dissolution, nor did the corporate lease

cease to exist. Section 21-186, R. S. 1943, provides: "All corporations operating or organized under this act, whether they expire by the limitation in their articles of incorporation, or are otherwise dissolved, shall nevertheless be continued for the term of five years from such expiration or dissolution as bodies corporate for the purpose of prosecuting and defending suits by or against them, and of enabling them gradually to settle and close their business, to dispose of and convey their properties, and to divide their capital stock but not for the purpose of continuing the business for which said corporation shall have been established; * * *."

Five years have not elapsed since the dissolution of the corporation. The appellants give recognition to the continuation of the corporation for the purposes indicated in the statute. They instituted the instant suit against the Master Laboratories, Incorporated, a corporation, John E. Von Dorn and Agnes C. Von Dorn, trustees of the corporation, and against the Von Dorns individually, and as partners. So, the Von Dorns are present in this case in their corporate, partnership, and individual capacities, and the court is requested to determine the rights of the parties under the lease.

Generally, a lease to a corporation is not terminated by the corporation's dissolution unless the lease so provides, especially in view of the statute directing that corporation's officers act as trustees after forfeiture of its charter. See Perry v. Shaw, 152 Fla. 765, 13 So. 2d 811.

Appellants assert the executrices were lulled into believing that the corporation still continued to exist, for the reason that as late as May 1, 1945, the rent check received by them was on a Master Laboratories, Incorporated, form. They claim they knew nothing about the dissolution of the corporation, and the acceptance of rent from the date of the dissolution of the corporation, July 19, 1943, to May 16, 1945, cannot work an estoppel against the appellants for the reason that they were not

in full possession of the facts, citing 31 C. J. S., Estoppel, § 70, p. 264. "It is generally indispensable to the application of the doctrine of equitable estoppel that the person claimed to be estopped shall have had full knowledge of the real facts at the time of his representation, concealment, or other conduct relating thereto and alleged to constitute the basis of the estoppel."

We are of the opinion the executrices were vested with all of the facts with reference to the dissolution of the corporation and the formation of the partnership. The notice of dissolution of the corporation was given as required by law. This notice advised the world that the corporation had been dissolved; and that all its assets upon dissolution were placed in charge of the trustees who assumed the obligation to pay and discharge any and all existing obligations against the corporation. On September 14, 1943, the Von Dorns filed with the county clerk their certificate of partnership, stating that they were about to engage in business under the firm name of Master Laboratories. The rent, as provided for in the lease, was paid, and the executrices accepted it during this period of time. If the publication of a notice properly made of dissolution of a corporation, and the filing of the proper articles of partnership means anything, then surely these appellants had notice.

"The restriction against assignment or subletting may be waived by the act, acts, or conduct of the lessor in recognition of the validity of an assignment or subletting, and with knowledge thereof, as where, with knowledge of the facts, he permits an assignee or subtenant to remain in possession, and accepts subsequently accruing rents from him, but the acceptance of rent must be with knowledge of the breach." 35 C. J., Landlord and Tenant, § 71, p. 983. See, also, 32 Am. Jur., Landlord and Tenant, § 341, p. 303. Even in the event there had been a breach of the lease as contended by the appellants, we are convinced they waived it, for the reason that they had full knowledge of the facts with reference to the dissolution

of the corporation and the forming of the partnership.

From an independent investigation of the record, we conclude the trial court was not in error in entering judgment for the appellees, and the judgment should be, and is, affirmed.

AFFIRMED.

KATHRYN DE LAIR, APPELLEE, V. CHARLES DE LAIR, APPELLEE, LEWIS W. DAVIES, APPELLANT AND INTERVENER.
27 N. W. 2d 540

Filed May 16, 1947. No. 32178.

1. **Appeal and Error.** When a case is sent back by the Supreme Court to the trial court with specific directions, the trial court has no alternative except to follow the directions given in the manner set forth therein.
2. **New Trial.** When, in an equity case, this court upon appeal directs the district court to enter a different judgment than the one appealed from, the defeated party may, within three days from the rendition of the judgment in the district court and within the term, file a motion for a new trial, under section 25-1142, R. S. 1943.
3. **Judgments.** Matters expressly, or by distinct and necessary implication, adjudicated at a former hearing will not be considered again in the same case.

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

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

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

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

WENKE, J.

This is the same case as De Lair v. De Lair, 146 Neb. 771, 21 N. W. 2d 498.

Therein we ordered: "The action of the lower court

is therefore reversed, with directions to order the sheriff's return to be amended to show that service was had on Charles De Lair in person."

Upon the return of the case to the trial court the appellee here, Kathryn De Lair, moved for a judgment on the mandate. On the same day the appellant here, Lewis W. Davies, filed his motion asking that he be permitted to show cause why the return on the summons should not be amended.

The court overruled the appellant's motion and entered a judgment in accordance with our opinion and the mandate. Appellant filed his motion for new trial, which was overruled. Thereupon appeal was taken to this court.

As to the procedure upon return of the case to the district court, we held in Regouby v. Dawson County Irrigation Co., 128 Neb. 531, 259 N. W. 365: "It is a well-known rule of law that, when a case is sent back by the supreme court to the trial court with specific directions, the trial court has no alternative except to follow the directions given in the manner set forth therein. Story v. Robertson, 5 Neb. (Unof.) 404; State v. Sheldon, 26 Neb. 151; Oliver v. Lansing, 51 Neb. 818; Farmers & Merchants Bank v. German Nat. Bank, 59 Neb. 229; State v. Dickinson, 63 Neb. 869; State v. Thompson, 69 Neb. 157; Gadsden v. Thrush, 72 Neb. 1; Gund v. Ballard, 80 Neb. 385; State v. Farrington, 86 Neb. 653; Kerr v. McCreary, 86 Neb. 786; Jobst v. Hayden Bros., 88 Neb. 469; Bliss v. Live Stock Nat. Bank, 124 Neb. 880; 9 Bancroft, Code Practice and Remedies, 9787, sec. 7440, and notes."

We find the court's ruling on the appellant's motion correct.

In Ward v. Geary, 115 Neb. 58, 211 N. W. 208, we held: "* * * when, in an equity case, this court upon appeal directs the district court to enter a different judgment than the one appealed from, the defeated party may, within three days from the rendition of the judgment

in the district court and within the term, file a motion for a new trial, under section 8825, Comp. St. 1922 (now § 25-1142, R. S. 1943)."

Appellant raises several questions that were determined by this court on the first appeal. As stated in Kuhns v. Live Stock Nat. Bank, 138 Neb. 797, 295 N. W. 818: "'Matters expressly, or by distinct and necessary implication, adjudicated at a former hearing, will not be considered again in the same case.' Edney v. Baum, 70 Neb. 159, 97 N. W. 252." See, also, Callahan v. Prewitt on rehearing, 143 Neb. 793, 13 N. W. 2d 660.

Further, with reference to appellant's contention that the decree entered was obtained through fraud practiced upon the court by offering perjured testimony, we find what purports to be a bill of exceptions was never allowed by the trial judge. Therefore it cannot be considered by this court. Bednar v. Bednar, 146 Neb. 726, 21 N. W. 2d 438. The affidavits and other written instruments appearing therein cannot be considered. Berg v. Griffiths, 127 Neb. 501, 256 N. W. 44. In the absence thereof there is nothing for our consideration.

For the reasons stated we affirm the judgment of the trial court.

AFFIRMED.

LEWIS W. DAVIES, APPELLANT, V. KATHRYN DE LAIR ET AL., APPELLEES.
27 N. W. 628

Filed May 16, 1947. No. 32222.

1. **Courts.** As a general rule, one having no right or interest to protect cannot invoke the jurisdiction of the court as a party plaintiff in an action.
2. **Equity.** Equity will not interfere with a judgment on a mere showing of a nominal or technical violation of the plaintiff's rights; substantial injury must be shown.
3. **Trial.** The intentional production of false testimony will, in

a proper case, justify the annulment of a decree or judgment which is the product of such testimony.

4. **Judgments.** It is not sufficient for a party seeking the vacation of a judgment or decree to show that it was obtained by the fraud of his adversary, but he must go farther and show that the failure to obtain a just decision is not attributable to his own fault or negligence.

5. ———. It is, as a rule, not sufficient to allege generally that due diligence has been used, but the facts constituting diligence must be set out.

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

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

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

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

WENKE, J.

Lewis W. Davies brought this action in the district court for Richardson County against Kathryn De Lair. The purpose of the action is to set aside the judgment rendered by the district court in the case of Kathryn De Lair v. Charles De Lair, No. 9614, pursuant to our opinion and mandate in the case of De Lair v. De Lair, 146 Neb. 771, 21 N. W. 2d 498, and to obtain a new trial. The judgment complained of amended the sheriff's return to show that service was had on Charles De Lair in person. The basis for the action is plaintiff's claim that the successful party obtained the judgment by practicing fraud upon the court in the trial of the case. From an order sustaining the defendant's demurrer to plaintiff's second amended petition and dismissing the action, motion for new trial having been filed and overruled, plaintiff appeals.

Whether an action is based on the statute or an independent suit in equity, we have followed the rule that the trial court can, in a proper case, vacate or set aside

a judgment or decree and grant a new trial when the judgment or decree sought to be set aside has been obtained by the successful party through fraud practiced in connection with the trial of the case. Munro v. Callahan, 55 Neb. 75, 75 N. W. 151; Klabunde v. Byron Reed Co., on rehearing, 69 Neb. 126, 98 N. W. 182; Arnout v. Chadwick, 74 Neb. 620, 104 N. W. 942.

Does the plaintiff have such an interest in this litigation as will entitle him to maintain the action?

As stated in 47 C. J., Parties, § 30, p. 21: "For a standing as party plaintiff it is necessary, not only that plaintiff have a legal entity or existence, and that he be possessed of legal capacity to sue, but also that this person have, in the cause of action asserted, a remedial interest which the law of the forum can recognize and enforce. It is a rule of universal acceptation that to entitle any person to maintain an action in court it must be shown that he has a justiciable interest in the subject matter in litigation, either in his own right or in a representative capacity."

And in 39 Am. Jur., Parties, § 9, p. 858: "Assuming the legal existence of the proposed plaintiff and his legal capacity to sue, the next question is whether he possesses any right for the protection or vindication of which he may invoke the jurisdiction of the court. As a general rule, one having no right or interest to protect cannot invoke the jurisdiction of the court as a party plaintiff in an action."

"Equity will not interfere with a judgment, on a mere showing of a nominal or technical violation of the plaintiff's rights; substantial injury must be shown." Van Every v. Sanders, 69 Neb. 509, 95 N. W. 870.

For as stated in 39 Am. Jur., Parties, § 10, p. 859: "* * * courts are instituted to afford relief to persons whose rights have been invaded, or are threatened with invasion, by the defendant's acts or conduct, and to give relief at the instance of such persons; a court may and properly should refuse to entertain an action at the in-

stance of one whose rights have not been invaded or infringed, * * *."

Appellant was sheriff of Richardson County when the divorce action of De Lair v. De Lair, No. 9614, was filed in the district court for that county on July 25, 1934. As one of his duties he served the summons issued in that case and caused a return thereof to be made. He then filed the summons, with the return, in the office of the clerk of the district court and it became part of the files in that case. Thereafter, on August 21, 1944, both plaintiff and defendant in the divorce action filed a motion therein asking the court to amend the sheriff's return to show that service had been had on the defendant, Charles De Lair, in person in lieu of "by leaving at his usual place of residence" as shown by the return. Appellant filed his motion therein, on November 14, 1944, objecting to such amendment and stating under oath that the return was true and correct. As hereinbefore stated, this action is for the purpose of setting aside the judgment entered pursuant to our mandate.

Appellant was not a party to the original divorce proceedings and did not become such by reason of serving the summons and making his return thereto. An officer serving a summons and making a return thereto does not thereby become a party to the suit. The divorce proceeding being personal in its nature, there can be no possible injury to the rights of the appellant because of any amendment made to the return. In the absence thereof it cannot be said that he has an interest which a court will enforce.

It may be true that the appellant desires to maintain the correctness of his return but as said in Foster v. Mansfield, C. & L. M. R. R. Co., 146 U. S. 88, 36 L. Ed. 899: "A court of equity is not called upon to do a vain thing. It will not entertain a bill simply to vindicate an abstract principle of justice or to compel the defendants to buy their peace, and if it appear that the parties really in interest are content that the decree shall stand,

it should not be set aside at the suit of one who could not possibly obtain a benefit from such action."

While the foregoing fully disposes of the case, we will, however, discuss the merits of the appellant's position.

It is the rule in this state that, "* * * the intentional production of false testimony will, in a proper case, justify the annulment of a decree or judgment which is the product of such testimony. Munro v. Callahan, 55 Nebr., 75; Barr v. Post, 59 Nebr., 361." Secord v. Powers, 61 Neb. 615, 85 N. W. 846. See, also, Miller v. Estate of Miller, 69 Neb. 441, 95 N. W. 1010.

"A general demurrer admits only facts that are well pleaded and does not admit conclusions of law or the conclusions of the pleader. Scully v. Central Nebraska Public Power and Irrigation District, 143 Neb. 184, 9 N. W. 2d 207." In re Estate of Reikofski, 144 Neb. 735, 14 N. W. 2d 379.

While the appellant's second amended petition, to which the demurrer was sustained, contains many conclusions we will assume, for the purpose of this discussion, that it states sufficient facts that it can be said that appellee obtained the judgment complained of by producing false testimony, within the rule announced in Secord v. Powers, *supra.*

However, as stated in Miller v. Estate of Miller, *supra:* "* * * it is not sufficient for a party seeking the vacation of a judgment or decree to show that it was obtained by the fraud of his adversary, but he must go farther and show that the failure to obtain a just decision is not attributable to his own fault or negligence. Secord v. Powers, *supra.*"

"* * * equitable relief from a judgment on the ground of its procurement by perjured testimony may not be secured where the applicant was guilty of negligence or other fault in relation thereto. Before a court of equity will intervene in regard to a judgment because of perjured testimony, it must appear that the applicant has used due diligence in doing whatever lay in his

power to protect his interests." 31 Am. Jur., Judgments, § 663, p. 237.

In In re Estate of Reikofski, *supra,* we approved the following from 49 C. J., Pleading, § 32, p. 58: "It is, as a rule, not sufficient to allege generally that due diligence has been used, but the facts constituting diligence must be set out."

" 'The petition, complaint, or moving papers must show, not generally or inferentially, but by specific averments, that the applicant (petitioner) has not been in fault, or that he has exercised due diligence and vigilance.' 34 C. J. 329." In re Estate of Reikofski, *supra.*

"The general rule is that a party seeking equitable relief against the enforcement of a judgment must be without fault generally, or negligence in particular, and that such relief will not be granted where the matter complained of arose in any way from the negligence or carelessness of the complainant and could have been prevented by the use of reasonable diligence on his part. If he is negligent or careless either in preparing or trying his action at law, the doors of chancery will remain closed, and relief will be denied." 31 Am. Jur., Judgments, § 685, p. 247.

The record discloses that on August 21, 1944, Kathryn De Lair and Charles De Lair each filed a motion to amend the return to show personal service on the defendant, Charles De Lair. On September 9, 1944, there was filed in the case with the clerk of the district court all of the depositions used at the hearing on December 14, 1944. Therein and filed as part thereof were the affidavits which were also used at the December 14, 1944, hearing. These depositions and affidavits contain all of the evidence which the appellee used at that hearing about which the appellant complains. On November 14, 1944, the appellant intervened and filed his motion objecting to the proposed change and therein stated that his return was true and correct. Had ap-

pellant or his counsel examined these depositions and affidavits they could have fully informed themselves of the nature of the proof the appellee intended to make. In fact, the motion itself would indicate what they intended to prove. The record completely refutes any possible surprise. If counsel had but sought to inform himself he would have been fully forewarned and possibly forearmed.

As stated in Secord v. Powers, *supra:* "But, as was said in Barr v. Post, *supra,* it is not the policy of the law to encourage actions of this kind. There must be an end to litigation. A party can not be permitted to experiment with his case at the expense of the public. He is not justified in assuming that his adversary will not produce evidence to make good the averments of his pleading. 'Whenever an issue exists in any action or proceeding,' says Mr. Freeman in his work on Judgments (vol. 2, 4th ed., sec. 489), 'each of the parties should anticipate that his adversary will offer evidence to support his side of it, and should be prepared to meet such evidence with counter-proofs. Where he has an opportunity to do this, and does not avail himself of it, * * * he can not, in effect, obtain a retrial of the issue before another tribunal by charging that the judgment against him was procured by perjury.' "

And in Miller v. Estate of Miller, *supra:* "It is true, as is urged, that the fraud in procuring the decree stands admitted by the demurrer; it is also true that the law abhors fraud, and, ordinarily, will not permit a party to retain the fruits of his fraudulent acts. But the peace and repose of society forbids that litigation should be prolonged indefinitely. The law, therefore, requires a litigant to present his defense seasonably. If, through his own negligence or want of diligence, he fails to do so, equity will not relieve him from the consequences of his own neglect or want of care. Were it otherwise, no man could know with certainty that any controversy was finally settled and at rest. As the peti-

tion shows no sufficient excuse for the failure of the appellants to contest the will when it was offered for probate, it is insufficient to justify a vacation of the decree."

Actually, if all of the facts which appellant now wants to prove had been produced at the hearing it would have presented only a controversial issue as to how the service was actually made. After losing litigants often consider themselves victims of false testimony and probably believe it to be willful and that their adversaries knew it to be so. That is the very nature of evidence as to many controverted issues. But there must be an end to litigation and therefore there is an obligation on the part of litigants to prepare for the trial and to be ready to meet the issues when tried and if they fail to do so they cannot later be heard to complain.

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

AFFIRMED.

EVA HUNTER, APPELLANT, V. DONALD P. MILLER, COMMISSIONER OF LABOR FOR THE STATE OF NEBRASKA, APPELLEE.

27 N. W. 2d 638

Filed May 23, 1947. No. 32245.

1. **Unemployment Compensation Insurance: Master and Servant.** The Placement and Unemployment Insurance Law (chapter 48, article 6, R. S. 1943) is to be liberally construed so that its beneficent purposes may be accomplished. This rule of construction applies to the law and not to the evidence to support a claim by virtue of the law. The rule does not dispense with the necessity of claimant establishing a right to the benefits of the act, nor does it permit an award of benefits where the requisite showing that claimant is entitled to the benefits of the act is lacking. The act cannot be extended by construction to noncompensable claims.

2. ———: ———. Registration for work under the act, alone, is not sufficient to show a prima facie right to the benefits of the act.
3. ———: ———. A hard and fast rule as to when a claimant is available for work under section 48-627, R. S. 1943, cannot be adopted. It depends upon the facts and circumstances of each case.

APPEAL from the district court for Antelope County: LYLE E. JACKSON, JUDGE. *Affirmed.*

W. G. Whitford, for appellant.

Clarence A. H. Meyer and *John E. Sidner,* for appellee.

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

SIMMONS, C. J.

The plaintiff here seeks the benefit of the Placement and Unemployment Insurance Law (chapter 48, article 6, R. S. 1943). The principal question presented is this: Was she "available for work" within the meaning of that phrase in section 48-627, R. S. 1943? The appeal tribunal denied her the benefits of the act. She appealed to the district court where benefits were denied. She appeals here. We affirm the judgment of the district court.

At the time this action began plaintiff was a married woman, the mother of two children. Her home was at Oakdale. Before her marriage she did housework. After marriage she was not employed until just prior to January 1945, when she was employed in a diet kitchen for less than two months. In January 1945, she secured work at the ordnance plant near Grand Island, where she worked until June 1945. She quit because of a temporary illness.

Apparently her husband worked at the ordnance plant also, and they had living quarters at Grand Island. About the time the plaintiff left her employment, the husband secured employment at North Platte and plaintiff went there to be with him. His employment was

terminated and they returned to Oakdale, living one mile out of town. The husband was employed around Oakdale for a time, and became unemployed in December 1945. Both husband and wife then applied for the benefits of the act.

At the hearing before the appeal tribunal, plaintiff testified that she was unable to secure employment at Oakdale; that it was a town of 560 population with no industries other than "stores" and hardly any work was available; and that housework was not available. A report of an investigator shows that plaintiff reported she would accept only daytime employment, and that she would not accept work as sales clerk or waitress, but would as a cook.

She was offered a job at Norfolk as a cook, but refused it because there was no assurance of living quarters for herself and her family, and she had no transportation.

At the hearing before the district court, plaintiff testified that since the hearing before the appeal tribunal her husband had died; that she had moved into the village of Oakdale and had been working four or five days a week. The nature of her employment is not shown, nor is the time and length of the employment.

The plaintiff contends here that the act should be liberally construed. The defendant agrees. We think the rules applied to the Workmen's Compensation Act should be applied here. The act is to be liberally construed so that its beneficent purposes may be accomplished. This rule of construction applies to the law and not to the evidence to support a claim by virtue of the law. This rule does not dispense with the necessity of claimant establishing a right to the benefits of the act, nor does it permit an award of benefits where the requisite showing that claimant is entitled to the benefits of the act is lacking. See Hassmann v. City of Bloomfield, 146 Neb. 608, 20 N. W. 2d 592. Likewise, the act cannot be extended by construction to noncompens-

able claims. Burlage v. Lefebure Corporation, 137 Neb. 671, 291 N. W. 100; Woodmen of the World Life Ins. Society v. Olsen, 141 Neb. 776, 4 N. W. 2d 923.

The plaintiff further contends that registry with the employment office creates a prima facie case of availability for work within the meaning of the act, and that the burden of proof does not rest upon her to show availability for work, but that when she registered for work a prima facie case of availability was shown. Section 48-627, R. S. 1943, provides that an unemployed individual shall be eligible to receive benefits "only" if the Commissioner of Labor finds certain facts. Registration for work and reporting at an employment office in accordance with regulations is but one of several required findings, among which is the further finding that claimant is "able to work, and is available for work." The contention of the plaintiff in this regard cannot be sustained.

A hard and fast rule as to what constitutes availability for work cannot be adopted. It depends in part upon the facts and circumstances of each case. However, the courts have suggested certain tests.

" 'The availability requirement is said to be satisfied when an individual is willing, able, and ready to accept suitable work which he does not have good cause to refuse, that is, when he is genuinely attached to the labor market.' " Reger v. Administrator, Unemployment Compensation Act, 132 Conn. 647, 46 A. 2d 844.

"There is no requirement in the quoted section, nor elsewhere in the act, that a claimant shall be available for work in any particular place, such as the locality in which he earned his wage credits or where he last worked or resided. The mere fact that a claimant has moved from one locality to another does not create a basis for holding him unavailable for work. If he registers for work in the new locality, and labor-market conditions there afford reasonable opportunities for work, he is available for work. Even if it appears that

he might more readily have been employed had he remained in his former locality, he is nevertheless available for work if he is willing to take work for which opportunities exist in the new locality." Sturdevant Unemployment Comp. Case, 158 Pa. Super. 548, 45 A. 2d 898.

Does the record here show that plaintiff was willing, able, and ready to accept suitable work which she did not have good cause to refuse? Was she genuinely attached to the labor market? Was she willing to take work in the locality of Oakdale?

It is not shown that plaintiff sought work at Grand Island where she had been employed, nor at North Platte when residing there with her husband. She attached herself to the labor market in the vicinity of Oakdale. The only industries there were the "stores." The record shows that she advised the representative of the commissioner that she would not accept work as a sales clerk, but would like to work as a cook. She accordingly closed the door to the only available employment that she states existed in Oakdale. She was advised by the employment service that a job as a cook was available at Norfolk. She was unwilling to accept that job or any other job away from Oakdale, unless housing facilities for herself and her family were assured. She made no effort to secure such facilities. Her reasons for refusing employment, while understandable, were nevertheless personal to her. It is not shown that there was any reason why the job offered was not acceptable. She was willing to accept employment only on her own terms. She was not genuinely attached to the labor market. We reach the conclusion that plaintiff was not available for work within the provisions of the act.

The judgment of the district court is affirmed.

AFFIRMED.

C. H. HALEY, DOING BUSINESS AS HALEY CHEVROLET COMPANY, APPELLEE, V. EDNA N. FLEMING, APPELLANT.

27 N. W. 2d 626

Filed May 23, 1947. No. 32248.

1. **Courts.** The clerk of the county court is authorized by section 24-548, R. S. 1943, to execute a certificate to the transcript of the proceedings of the county court.
2. **Appeal and Error.** The judgment of dismissal of appeal from county court to district court is affirmed under authority of Lynde v. Wurtz, 147 Neb. 454, 23 N. W. 2d 703.
3. **Attorney and Client.** An attorney's fee requested under section 25-1801, R. S. 1943, is denied because the record shows neither pleading nor proof of the existence of the conditions precedent to an allowance of an attorney's fee under that statute.

APPEAL from the district court for Dawson County: I. J. NISLEY, JUDGE. *Affirmed.*

V. H. Halligan, for appellant.

William S. Padley, for appellee.

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

SIMMONS, C. J.

Plaintiff brought an action in the county court to recover judgment for parts, labor, and materials furnished defendant in the repair of an automobile. Issues were made. The cause was tried to a jury resulting in a judgment for plaintiff on October 18, 1946. On October 28, 1946, an appeal bond was filed and approved. At that time defendant was advised that she was required to file a transcript in the district court within 30 days from the date of the judgment. The transcript was prepared and ready for execution of the certificate on October 30, 1946. On November 13, the county judge left the county and remained away until November 17. He returned to his office on November 18. The clerk of the county court was present at all times during business hours during the absence of the judge.

The defendant testified that on November 13, 1946, she called by long-distance telephone in a person-to-person call for the judge, intending to ask if the transcript was ready. She was advised of the absence of the judge. She did not seek to talk with the clerk. She did this again on November 15 with the same result. On November 19, she called by telephone, then went to the county court. The certificate was executed. She secured the transcript and on that day filed it in the office of the clerk of the district court. On November 22, 1946, plaintiff moved for judgment because of the failure to file the transcript within time. A hearing was had and the appeal was dismissed. Defendant appeals, assigning as error that the delay was not caused by any neglect or omission on her part and inferentially that the delay was caused by the absence of the judge from his office.

The clerk of the county court is authorized by section 24-548, R. S. 1943, to make the required certificate. The clerk testified that she ordinarily did not execute the certificates, but that she had authority to do so, and on occasion had done so. The absence of the county judge did not prevent the execution of the certificate nor the delivery of the transcript.

In Lynde v. Wurtz, 147 Neb. 454, 23 N. W. 2d 703, we reexamined the authorities and restated the rules applicable here. There, as here, the question was whether the transcript was not filed within time by reason of the neglect, fault, or laches of the court, or of the defendant. That is a question of fact. It is obvious that the failure here was that of the defendant in not calling at the county court so as to secure the transcript and file it within time. The evidence negatives any fault, neglect, or laches of the court.

Plaintiff asks for an allowance of an attorney's fee under section 25-1801, R. S. 1943. We have before us only the evidence taken on the motion to dismiss. There is neither pleading nor evidence in this record showing the existence of the conditions precedent to an allowance

of an attorney's fee under that statute. It accordingly is denied.

The judgment of the district court is affirmed.

AFFIRMED.

YEAGER, J., participating on briefs.

BYRON SELVAGE, PLAINTIFF IN ERROR, V. STATE OF NEBRASKA, DEFENDANT IN ERROR.

27 N. W. 2d 636

Filed May 23, 1947. No. 32196.

Rape. To constitute the crime of forcible rape upon a woman of the age of 18 years or upwards, possessed of her natural physical and mental powers and not terrified by threats or force, she must resist to the extent of her ability and persist in such actual resistance, by every means at her command, until the act is consummated.

ERROR to the district court for Nuckolls County: STANLEY BARTOS, JUDGE. *Reversed and dismissed.*

Leon A. Sprague, for plaintiff in error.

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

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

PAINE, J.

This is an appeal by defendant as plaintiff in error from a verdict of guilty and sentence for the crime of rape.

The defendant, Byron Selvage, aged 24 years, and a co-defendant, Everette Duncan, aged 19 years, were charged in an information with the crime of rape, under section 28-408, R. S. 1943, and upon being duly arraigned each entered a plea of not guilty and demanded separate trials, which request was granted. The instant case is that of defendant Byron Selvage. After a trial

lasting several days, the jury returned a verdict of guilty, upon which verdict he was sentenced to the penitentiary for five years.

The defendant sets out five assignments of error, but it is only necessary in this opinion to consider the first assignment of error, viz., "Evidence as to resistance by the prosecutrix and corroboration thereof was not sufficient to sustain a verdict of guilty and the court erred in not sustaining the defendant's motion for a directed verdict."

The prosecuting witness was a young woman 18 years of age, who was doing regular farm work on her father's farm, such as shucking corn, milking, etc., was in good health, and weighed about 140 pounds. She went to a dance in the city of Superior with her brother and the dance closed at about one o'clock in the morning. The evidence does not disclose that she was acquainted with the defendants, although she had a few weeks previously danced with Selvage. They invited her to ride down to a cafe with some others, and told her they would take her home. She thereupon told her brother of this fact, and he drove on home without her. She sat in the back seat of the car with the defendants and visited with them for about twenty minutes while the owner of the car and his "date" were in the cafe. When he returned the defendants requested him to drive them down to the ball park, which was several blocks away. There the prosecutrix and the defendants got out and the others drove back uptown. The prosecutrix tells that she walked about a block into the park, where intercourse was proposed, which she indignantly refused, and then charges that Selvage forcibly threw her to the ground, tightly held her while the co-defendant raped her, and then the other forcibly held her, against her physical resistance and protests, while Selvage raped her.

The evidence discloses that, while this was going on, a car with its lights on drove up and turned within

15 or 20 feet of the prosecutrix, and the two young men very hurriedly got some distance away, while she remained there alone while the car was turning. She made no outcry, nor attempted to communicate with the people in the car in any way. There is little doubt, from the evidence, that she could have made an attempt to escape from the defendants at this time, which she did not do. She testified that later, at a different place in the park, each defendant repeated or completed the crime, and then the three of them walked back several blocks to the same cafe and remained inside for about an hour, where they drank coffee and waited to get a car to take them to Nelson. When a car was finally secured to take them, and while the three were riding in the back seat, she testifies that the two defendants, forcibly and against her will, were guilty of similar acts, but that while she resisted to the utmost she made no complaint to those riding in the front seat.

Upon reaching home about 5:30 a. m., she went directly to the bedroom of her father and mother and made complaint, and told them all that had occurred to her. The next day her father took her to the county attorney, and he requested that she be examined by a physician in Nelson.

On direct examination the doctor was asked: "Q What, if any, other condition did you observe about the female organs there besides the tearing or rupturing of the hymen as you testified? A Well, there seemed to be—there was a little bruising is the effect that looked like there had been sort of mistreating—that is, it was slightly swollen as if they had been roughly handled, see."

On cross-examination the doctor testified generally that he did not find any bruises or abrasions on her legs, or arms, or body.

From a reading of the evidence in the bill of exceptions, we have reached the conclusion that the case comes clearly within our recent opinion in the case of

Cascio v. State, 147 Neb. 1075, 25 N. W. 2d 897, in which there is a complete discussion of a very similar case, with abundant citations of authority. It was there held: "In a prosecution for rape, competent evidence must show beyond a reasonable doubt not only that defendant committed the act charged but that he did so under such circumstances that every element of the alleged offense existed, and where the evidence fails to meet that test, it is insufficient to support a conviction."

"The importance of resistance is to establish two elements in the crime—carnal knowledge by force by one of the parties and non-consent thereto by the other. These are essential in every case in which the complainant had the use of her faculties and physical powers at the time, and was not prevented by terror or the exhibition of brutal force. If there is a lack of resistance, there is small occasion to use force." 44 Am. Jur., Rape, § 6, p. 905.

"Resistance or opposition by mere words is not enough; the resistance must be by acts, and must be reasonably proportionate to the strength and opportunities of the woman. She must resist the consummation of the act, and her resistance must not be a mere pretense, but must be in good faith, and must persist until the offense is consummated." 44 Am. Jur., Rape, § 7, p. 905.

"To constitute the crime of rape, where it appears that at the time of the alleged offense the prosecutrix was conscious and had the possession of her natural mental and physical powers, and was not terrified by threats or in such position that resistance would be useless, it must appear that she resisted to the extent of her ability." Oleson v. State, 11 Neb. 276, 9 N. W. 38.

Section 28-408, R. S. 1943, under which this information is drawn, requires that the defendant shall have carnal knowledge of the woman "forcibly and against her will." In the case at bar, the prosecutrix was of sound mind and body, she made no outcry at any time, and made no attempt to escape, although having an op-

portunity to do so. She made no complaint whatever to many persons with whom she came in close contact in the cafe immediately after the alleged attack. The first complaint was made to her parents some hours afterward. No bruises were found on her body.

These and many other facts found in the evidence throw grave doubt on the question of prosecutrix offering the resistance required by law, for corroborating evidence of force is lacking in this case.

The facts shown in the record make the rule applicable as announced in the case of Whomble v. State, 143 Neb. 667, 10 N. W. 2d 627: "This court recognizes the rule that the jury are the judges of questions of fact but does not hesitate to set aside a verdict when the evidence is clearly insufficient under applicable law to sustain it."

We have reached the conclusion that the evidence is wholly insufficient to support the verdict and judgment. The trial court should have sustained the defendant's motion for a directed verdict, and the judgment is reversed and the action dismissed.

REVERSED AND DISMISSED.

EDWARD SCHNEIDER, APPELLANT, V. OWEN DAILY ET AL., APPELLEES.

27 N. W. 2d 550

Filed May 23, 1947. No. 32167.

Attachment. An officer in possession of personal property under an order of attachment becomes liable for the value of the use of the property during the period it is wrongfully retained by him after the attachment has been dissolved.

APPEAL from the district court for Kearney County: FRANK J. MUNDAY, JUDGE. *Affirmed.*

J. E. Willits, for appellant.

William H. Meier and *Charles A. Chappell,* for appellees.

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

CARTER, J.

This is an action against a county sheriff and his bondsmen for damages resulting from the sheriff's failure to return attached property to the plaintiff after the dissolution of the order of attachment. At the close of all the evidence the trial court sustained defendants' motion for a directed verdict, and plaintiff appeals.

On July 31, 1939, J. W. Bodle commenced an action against Ed Schneider in the county court of Kearney County to recover $102 and interest alleged to be due for work and labor performed by Bodle for Schneider. On the same date Bodle caused an order of attachment to be issued out of said county court, the affidavit for the attachment stating that Schneider "is about to convert his property or a part thereof into money for the purpose of placing it beyond the reach of his creditors and has property and rights in action which he conceals." Pursuant to the order of attachment directed to him, the sheriff attached a threshing-machine engine and separator, a Chevrolet truck, a Buick sedan, and a tank, all of which the appraisers valued at $245. On August 12, 1939, Schneider filed his motion to dissolve the attachment. The motion was overruled and the attachment sustained by the county court on August 18, 1939. The case proceeded to trial before a jury. A verdict for Bodle was returned in the amount of $102 with interest and costs. Judgment was entered on the verdict and Schneider appealed to the district court. On October 21, 1941, Schneider filed his motion in the district court to dissolve the attachment. On January 16, 1942, the district court sustained the motion to dissolve the attachment, and the sheriff was directed to release, return, and restore the attached property to

Schneider. On November 13, 1942, a certified copy of the findings and judgment dissolving the attachment were served upon the sheriff. It is the contention of Schneider, the plaintiff in the case at bar, that the sheriff has never released the property from the attachment, or returned it to him.

The evidence shows that the threshing-machine engine and separator were attached and left on the farm of Henry Sinsel, where it was found. The sheriff testifies that he authorized Schneider to use the threshing outfit within Kearney County. This is denied by Schneider. The Chevrolet truck and the tank were left on the Schneider farm. The Buick sedan was stored in a garage at Minden at the request of Schneider, according to the sheriff's evidence. This is also denied by Schneider.

On January 16, 1942, the date the attachment was dissolved, the sheriff caused Schneider to be informed that the attachment was released. On November 13, 1942, as hereinbefore stated, Schneider caused a certified copy of the judgment dissolving the attachment to be served upon the sheriff.

In the case before us, Schneider, the plaintiff, offered evidence to the effect that he had been in the threshing business for eight or ten years prior to the levy of the attachment. He testifies to the general crop returns in 1939 to 1945, inclusive, and to the amounts of the various kinds of grains that he could thresh each day. He testifies, also, that he was obtaining $15 per week from the sale of cream, and that he was compelled to sell his cows when the automobile was attached. He claims that because of the unlawful attachment and the failure of the defendant sheriff to release the attached property to him after the attachment was dissolved, he has been damaged $1,000 per year for six years, a total of $6,000.

It is evident that the property in question was held under an order of attachment from July 31, 1939, to

January 16, 1942. While liability might accrue upon the bond given to secure the issuance of the order of attachment in the event of its wrongful issuance, no liability accrued to the sheriff and his bondsmen during this period.

As to the liability of the sheriff and his bondsmen for failure to release the property upon the dissolution of the order of attachment, a much different question is posed. In the first place, we think the Chevrolet truck and the tank were clearly released from the attachment upon the entry of the court's order, they being on the Schneider farm in the physical possession of Schneider. We think, also, that the threshing rig was released when the sheriff's deputy so advised Schneider. It was left where it was attached on the farm of a neighbor close by. The only damage that could be logically claimed, assuming that the release was not sufficient, would be the cost of getting it home. The plaintiff will not be permitted to stand by on such a technical excuse and bring action for a large amount of damages when they could have been avoided by the simple expedient of taking his machine at the place where it was attached. He will be required to mitigate his damage the same as any other litigant. There is no evidence in the record upon which a judgment could be properly entered against the sheriff and his bondsmen for failure to release the threshing rig. Assuming that defendants were liable for failure to release the property upon the dissolution of the attachment, the evidence of probable profits is so indefinite and speculative that no reasonable basis for fixing the damage exists. If plaintiff's claim is based upon the destruction of his business, that resulted primarily upon the levy of the attachment and not because of the failure of the sheriff to release the property. The same may be said as to the Buick sedan. If the production and sale of cream was lost to plaintiff because of the levy of the attachment, it constitutes no element of damage against these defendants in the present case.

There is no competent evidence of the value of the use of the sedan during the time the defendant is alleged to have unlawfully retained it. We find no evidence in the record sufficient to sustain a judgment. Harper v. Young, 139 Neb. 624, 298 N. W. 342; Silurian Mineral Springs Co. v. Kuhn, 65 Neb. 646, 91 N. W. 508. The trial court was required under these circumstances to direct a verdict for the defendants.

AFFIRMED.

CHAPPELL, J., not participating.

DE LORS NUSS, APPELLEE, V. FERDINAND NUSS, APPELLANT.
27 N. W. 2d 624

Filed May 23, 1947. No. 32181.

1. **Divorce.** A decree of divorce shall not be granted solely on the declarations, confessions, or admissions of the parties, but the court shall require other satisfactory evidence of the facts constituting grounds for divorce.
2. ———. A divorce from the bonds of matrimony may not be granted unless the evidence as to the grounds for divorce is corroborated.
3. **Judgments: Appeal and Error.** A litigant may not voluntarily accept payment of the part of a judgment or decree which is in his favor and thereafter prosecute an appeal from the part which is against him.
4. **Appeal and Error.** The retention, or acceptance of the return, of money by a husband under a decree of court which was in custodia legis but which belonged to the husband, may not be considered such voluntary acceptance of payment of the part of a judgment or decree in his favor as will prevent his prosecution of an appeal from the part of the judgment or decree which was against him.

APPEAL from the district court for Lancaster County: RALPH P. WILSON, JUDGE. *Reversed and remanded with directions to dismiss.*

George I. Craven, for appellant.

J. Jay Marx, for appellee.

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

YEAGER, J.

This is an action for divorce by plaintiff and appellee against defendant and appellant. In the action plaintiff was granted a divorce from defendant; custody of the minor child of the parties; $450 from the savings of the parties and all household goods of the parties as alimony; $125 as an attorney's fee; and $30 a month until the further order of the court for child support. There was a balance of savings in the amount of $375. This was ordered paid to the clerk of the district court and out of it all court costs were ordered paid and the balance to be applied monthly on the payments for child support.

From the decree the defendant has appealed. He seeks a reversal of the decree in its entirety and a dismissal of plaintiff's petition. As grounds for reversal he sets forth numerous assignments of error but for the purposes of this opinion it becomes necessary to consider only two, namely that the decree is contrary to the evidence and that it is contrary to law.

The allegations of the petition upon which plaintiff relied as grounds for divorce were that defendant had been guilty of cruelty. The specific allegations are that on several occasions he assaulted her; that he nagged her; that he threatened her; and that he falsely and unjustly accused her of infidelity.

By answer the defendant denied the allegations of cruelty charged against him, and prayed for a dismissal of the petition.

The record discloses that the parties were married August 17, 1941. One child was born of the marriage. The child was born August 9, 1944. The parties lived together in Lincoln, Nebraska, from the date of the marriage until January 1944, when the defendant was inducted into the armed services of the United States. Defendant returned from service in December 1945 and

thereafter the parties resumed living together again in Lincoln, Nebraska.

To support the charges of cruelty contained in her petition plaintiff gave testimony of numerous instances of physical violence; threats; abusive and neglectful treatment; and nagging of, upon, and toward her by the defendant. She also gave testimony of attempted sexual perversion by defendant upon and toward her. This charge was not made in her petition. Her testimony as to incidents involved in her charge of cruelty covered the entire period of the married life of the parties and one instance antedated the marriage.

Significantly the plaintiff adduced no evidence either directly or inferentially supporting or corroborating her charges of violence, threats, nagging, or sexual perversion.

There is no evidence outside of the testimony given by plaintiff, except one instance testified to by defendant, that defendant ever struck, threatened, or nagged plaintiff. This incident was an occasion in 1942 when plaintiff was out with a party and came home after one o'clock a. m. Plaintiff got out of a taxicab with a soldier who accompanied her to the door. He testified that the next day he questioned plaintiff about the incident. She then flew into a rage and scratched him whereupon he slapped her and then held her hands so that she could do no more scratching.

There is no evidence whatever that defendant falsely and unjustly accused plaintiff of infidelity. There is no evidence of accusation at all. Though defendant made no accusation of infidelity he could not well have been criticised for so doing had he done so in the light of plaintiff's conduct as it was disclosed by the admissions contained in her testimony in this case.

There is evidence that the defendant did complain and object to plaintiff's association with other men and of her conduct in these associations. That he did complain there is no question. That he had just cause for

complaint there can be likewise no question, and for his complaints he cannot reasonably be charged with cruelty.

It is too much to expect of a man that he will remain completely quiescent with knowledge that before he entered the armed services his wife was unduly familiar with other men, with knowledge that during the period of his service his wife was regularly in the company of other men and on occasion entertained them in her apartment, and with further knowledge that after his return undue familiarities with other men were engaged in, and especially when this knowledge came from personal observations and the admissions of his wife. That he had this knowledge and made such observations is conclusive from the record.

Section 42-335, R. S. 1943, provides: "No decree of divorce and of the nullity of a marriage shall be made solely on the declaration, confessions or admissions of the parties, but the court shall, in all cases, require other satisfactory evidence of the facts alleged in the petition for that purpose."

In Haines v. Haines, 79 Neb. 684, 113 N. W. 125, it was said: "There was no corroboration of the plaintiff's testimony as to the misconduct complained of, and we do not think that the court erred in refusing the plaintiff a divorce."

In Christensen v. Christensen, 144 Neb. 763, 14 N. W. 2d 613, it was said: "It is elementary in this state that it is not error to deny a divorce from the bonds of matrimony on the charge of extreme cruelty on the part of the defendant where the evidence of the plaintiff as to alleged misconduct is not corroborated."

The testimony of the plaintiff as to her charges of cruelty against the defendant which, except for her own conduct, might be a basis for a decree of divorce in her behalf stands wholly without corroboration. Therefore under the statute and the decisions of this court

the trial court erred in granting a decree of divorce to the plaintiff.

The plaintiff contends that the defendant is barred from any right of appeal on account of having accepted benefits awarded to him under the decree. She rests her contention in this respect on the following rule: "A litigant cannot voluntarily accept payment of that part of the judgment in his favor and afterward prosecute an appeal from that part of the judgment against him." Larabee v. Larabee, 128 Neb. 560, 259 N. W. 520. See, also, Harte v. Castetter, 38 Neb. 571, 57 N. W. 381.

We think this rule can have no application here. In the first place there was no judgment or decree in favor of defendant for any amount. In the second place the parties had an accumulated estate of $950. It stood in the name of the plaintiff. Plaintiff testified that $500 of the amount came from the sale that she had made of an automobile belonging to the defendant. In disposing of the estate the trial court relieved the defendant from its entire control. It was ordered, however, that out of this estate the court costs should be paid. Defendant's portion of the costs was $4. The clerk of the court sent him a check for that amount. The effect of the decree in this respect was to take from the defendant all of his interest in this estate except $4. It is difficult to see how this could be the acceptance of a benefit under the decree. The contention is without merit.

The decree of the district court is reversed and the cause remanded with directions to dismiss plaintiff's petition.

REVERSED WITH DIRECTIONS.

DAVID DRIETH, PLAINTIFF IN ERROR, V. IRA DORMER ET AL., DEFENDANTS IN ERROR.
27 N. W. 2d 843

Filed May 23, 1947. No. 32195.

1. **Easements.** A decree granting a prescriptive right to an easement for a roadway over the land of another protects only the reasonable use of the way as it was used over the period which gave the prescriptive right.
2. ———. A decree, to the extent that it purports to extend the right of a dominant tenant in an easement for a roadway acquired by prescription beyond reasonable use thereof as it was used over the period when the right was being acquired, is invalid and no rights flow therefrom.
3. ———. The creation of a private way by prescription does not take away from the owner of the land over which it passes any portion of the fee of the soil.
4. ———. A private way acquired by prescription carries with it only such incidents as are necessary to its reasonable enjoyment.
5. ———. The owner of land over which a private way has been acquired by prescription has the right to the use of the way for any purpose so long as he does not interfere with the right of passing, resting in the owner of the easement.
6. **Courts: Pleading.** The judgment of a court upon a subject within its general jurisdiction, but which is not brought before it by any statement or claim of the parties and is foreign to the issues submitted for determination, is a nullity.

ERROR to the district court for Scotts Bluff County: CLAIBOURNE G. PERRY, JUDGE. *Reversed and remanded.*

Morrow, Lovell & Bulger, for plaintiff in error.

Atkins & Lyman, for defendants in error.

Heard before SIMMONS, C. J., PAINE, CARTER, YEAGER, CHAPPELL, and WENKE, JJ., and NUSS, District Judge.

YEAGER, J.

This is a proceeding in error from the district court for Scotts Bluff County, Nebraska, wherein David Drieth is plaintiff in error and Ira Dormer and Ione M. Dormer are defendants in error, to reverse a judgment finding plaintiff in error guilty of contempt of court

and imposing penalty therefor. The judgment was entered pursuant to an application filed in an action in said court wherein Ira Dormer and Ione M. Dormer were plaintiffs and David Drieth and Anna Drieth were defendants. This action will be later herein referred to and discussed.

For the purposes of this case the defendants in error will be referred to as plaintiffs and the plaintiff in error will be referred to as the defendant.

During all of the times herein in question plaintiffs were the owners as joint tenants of the northwest quarter of the southeast quarter of Section 34, Township 22, North, Range 53, West of the 6th Principal Meridian, in Scotts Bluff County, Nebraska, and the defendant was the owner of the east half of the southeast quarter of the said section of land.

In April 1943 plaintiffs instituted an action wherein David Drieth and Anna Drieth were made defendants and wherein they claimed title by adverse possession to a roadway extending from the east line of said Section 34 westerly a quarter of a mile across defendants' land approximately on the division line between the northeast quarter of the southeast quarter and the southeast quarter of the southeast quarter thereof, thence north for approximately 50 rods on defendants' line between the northeast quarter of the southeast quarter and plaintiffs' land. In the allegations the width of the road claimed was not described but in the prayer plaintiffs prayed for a road 25 feet in width. There were other issues presented and tried but it is not necessary to mention them herein. The defendants therein traversed the allegations of plaintiffs' petition and a trial was had on the issues joined.

Following the trial a decree was entered the pertinent part of which is the following:

"WHEREFORE IT IS CONSIDERED, ORDERED, ADJUDGED AND DECREED that the defendants be and they hereby are permanently enjoined from inter-

fering with or molesting in any way the plaintiffs use of said road and bridge above described; and that the easement for the use of said road is forever quieted in the plaintiffs and in the NW¼ of the SE¼ of said Section.

"And it is further ordered that the defendants are permanently enjoined from interfering with the bridge above referred to or the maintenance or repair of the road by the plaintiffs; and it is further ordered that that part of the road North of the lateral and extending West to the East line of the NW¼ of the SE¼ of said section is subject to the use of the defendants in their farming operations, including as a turn row, but that no part of said road running North from said lateral is subject to any use by the defendants; and it is further ordered that said road is appurtenant to the NW¼ of the SE¼ of said section."

From the decree the defendants therein, one of whom is the defendant herein, appealed to this court. The cause was heard here and an opinion rendered therein. It appears as Dormer v. Dreith, 145 Neb. 742, 18 N. W. 2d 94.

The following from the opinion is the only portion pertinent here:

"* * * the evidence does not justify granting an easement for a road over 20 feet in width, and the decree is hereby limited to this width, and no more.

"Finding no other errors in the record, the decree of the trial court is modified as to the width of the road, and affirmed."

On April 15, 1946, which was after the rendition of the opinion of this court and the issuance of the mandate thereon, the plaintiff Ira Dormer filed in the district court action what he terms an accusation against the defendant herein and Anna Drieth and Harold Drieth. In the accusation he charged that the defendant was guilty of contempt of court in that said defendant, Anna Drieth, and Harold Drieth, son of de-

fendant, knowingly, contumaciously, willfully, and contemptuously violated the decree of the district court as modified by the opinion and mandate of this court in the following particulars: (1) That on July 25, 1945, defendant and Harold Drieth stopped plaintiffs from maintaining and repairing the road by refusing to allow the plaintiffs and a surveyor to measure and determine the 20-foot width of the road; (2) that on August 9, 1945, Anna Drieth interfered with plaintiffs' use and maintenance of the east and west road by placing herself in front of a tractor pulling a grader which was being used for the purpose of maintaining the 20-foot roadway; (3) that defendant on August 10, 1945, interfered with the maintenance and repair of the east and west road by knocking down and pulling up surveyors' stakes on the north line thereof; (4) that from August 10 to September 8, 1945, the road was flooded which prevented the hauling of dirt onto the east and west road for repair and maintenance; (5) that on November 23, 1945, defendant and Harold Drieth stopped and forbade a road maintainer from leveling and maintaining the east and west road and forced the operator of a maintainer to leave the road and the premises; (6) that on March 23, 1946, Harold Drieth interfered with plaintiffs' use, repair, and maintenance by discing the entire length of the east and west road and approximately half of the north and south road; and (7) that defendant and Harold Drieth on divers dates trespassed with motor vehicles and farm equipment on the north and south road.

On the accusation an order to show cause was issued. Following rulings on motions to quash, which rulings were adverse to the accused persons, the defendant filed an answer. A trial was had on the accusation and the answer thereto in consequence of which defendant was found guilty of contempt and as punishment therefor he was ordered to pay damages in the amount of $300 and an additional $300 for attorney's fees and for costs

and expenses incurred for a survey and photographs, and the costs of the proceeding.

From this finding and judgment and the ruling on the motion to quash, the defendant has brought this action here by petition in error for review.

The assignments of error are numerous but in the light of the conclusion we have reached after an examination of the entire record we deem it unnecessary to discuss any of them except those which present the question of whether or not the accusation is sustained by the evidence and the matters incidental to the determination of that question.

As pointed out in that portion of the decree quoted herein plaintiffs were decreed to have title quieted in them to an easement for use of a road. The decree enjoined defendant from interference with maintenance and repair of the road. The use of the east and west portion of the road was subjected to use by the defendant in his farming operations. The north and south portion was not so subjected.

We say here that the decree could not have properly gone further in the grant of right to plaintiffs than to protect them in the reasonable use of the roadway as it was used over the period which gave them their prescriptive right. If the decree purported to go beyond that it was to that extent invalid and no rights flowed therefrom.

The rule as to the right of the dominant tenant with regard to an easement obtained by prescription is well stated in 28 C. J. S., Easements, § 74, p. 751, as follows: "Where an easement is acquired by prescription, the extent of the right is fixed and determined by the user in which it originated, or, as it is sometimes expressed, by the claim of the party using the easement and the acquiescence of the owner of the servient tenement."

In 17 Am. Jur., Easements, § 100, p. 997, the rule is stated as follows: "If an easement is acquired by prescription, the purpose for which the easement may

be used is limited by the user under which the easement was acquired. The presumption of a grant is afforded only because possession amounting to a continuous claim of title has been acquiesced in for a period necessary to give a prescriptive right. Therefore, the presumed grant can never extend further than the user in which the other party has acquiesced."

The following cases support the rule as it is stated in Corpus Juris Secundum and the American Law Reports: Allen v. Neff, 102 W. Va. 230, 135 S. E. 2, 50 A. L. R. 1293; Hawley v. McCabe, 117 Conn. 558, 169 A. 192; Burnham v. Burnham, 132 Me. 113, 167 A. 693; Ferguson v. Standley, 89 Mont. 489, 300 P. 245.

The following from 17 Am. Jur., Easements, § 101, p. 998, we think states correctly the rule applying to the rights of an owner over whose lands a private way has been acquired by prescription: "The creation of a private way does not take away from the owner of the land over which it passes any portion of the fee of the soil. Regardless of how acquired, a private way carries with it by implication only such incidents as are necessary to its reasonable enjoyment. The owner of the land has the right to use the way for any purpose whatever, provided he does not interfere with the right of passage resting in the owner of the easement. Hence, the grant of a right of way, which is not exclusive in its terms and which can be reasonably enjoyed without being exclusive, leaves in the grantor and his assigns the right of user in common with the grantee. The owner of the servient tenement may even sow crops on the right of way if such action does not interfere with the rights of the owner of the dominant tenement." See Dudgeon v. Bronson, 159 Ind. 562, 64 N. E. 910, 95 Am. S. R. 315; City of Bellevue v. Daly, 14 Idaho 545, 94 P. 1036, 15 L. R. A. N. S. 992; West Coast Power Co. v. Buttram, 54 Idaho 318, 31 P. 2d 687; Collins v. Alabama Power Co., 214 Ala. 643, 108 So. 868, 46 A. L. R. 1459.

If the decree of the district court or the opinion and

mandate of this court went beyond the determination of plaintiffs' prescriptive right to the use of this roadway it was to that extent invalid and unenforceable since it is clear that by the pleadings plaintiff asserted only a prescriptive right to the use of a roadway.

In Branz v. Hylton, 130 Neb. 385, 265 N. W. 16, it was said by quotation from 15 R. C. L., Judgments, § 328, p. 854: "It is also a general principle of law that a court cannot set itself in motion, nor has it power to decide questions except as presented by the parties in the pleadings. Anything that is decided beyond them is coram non judice and void. Therefore where a court enters a judgment or awards relief beyond the prayer of the complaint or the scope of its allegations the excessive relief is not merely irregular but is void for want of jurisdiction, and is open to collateral attack."

In Petersen v. Dethlefs, 139 Neb. 572, 298 N. W. 155, it was said: "A finding foreign to any pleading and not necessary to the relief grantable to any litigant in a case is contrary to the course of the law and the practice of the courts."

In the same opinion it was said:

"The following rule is in force in this state:

" 'A judgment of a court upon a subject within its general jurisdiction, but which is not brought before it by any statement or claim of the parties and is foreign to the issues submitted for its determination, is a nullity.' " The quotation is from Lincoln Nat. Bank v. Virgin, 36 Neb. 735, 55 N. W. 218.

The question of whether or not the defendant was guilty of contempt of court must be determined from the facts as disclosed by the record and an application of these rules thereto.

The first charge is without any support in the evidence. The defendant did object to the survey, but on being told by the surveyor that he as surveyor had the right to make the survey there was no further interference.

The second charge was proved but the acts of plain-

tiffs' employee which were stopped and prevented were not permissible under the decree in the light of the facts and the legal principles announced. The thing which was prevented by defendant and his wife was the cutting of a shallow ditch to the north of the traveled way but within twenty feet of the south line of the way and through some beans that had been planted by the defendant. The purpose and design of the ditch was to fill in depressions in the road, to elevate the roadway, and to prevent irrigation waste water and rain water from flowing on and across the roadway into an irrigation lateral to the south.

There had been no similar ditching or raising of the roadway prior to this time, and this was the usual and natural direction of flow of water from the lands to the north. If plaintiffs had been permitted to accomplish their purpose water would have backed up on the lands of defendant to his damage. Plaintiffs acquired no such right through the use which ripened into the easement. Defendant in doing what he did was only insisting upon restriction to the condition which existed at all times while plaintiffs were acquiring their prescriptive right. What was done was not an interference with any proper right given to plaintiffs by the decree or the opinion and mandate of this court.

As to the third charge there is evidence that surveyors' stakes were knocked down but in this we find no contempt. They were set in defendant's field and for a purpose which by the evidence and our discussion of the second charge was foreign to any right of plaintiffs.

As to the fourth charge while it may be true that over the period mentioned plaintiffs were prevented from causing dirt to be hauled for the improvement and maintenance of the roadway still it cannot be said that defendant was guilty of contumacious conduct. Defendant had the right to irrigate his crops and to have the waste water flow naturally and in the usual course therefrom. If the way was too soft for use it was because of the flow

of waste irrigation water thereon in its natural and usual course. Plaintiffs' easement was clearly subject to this burden.

The fifth charge is not sustained by the evidence. There is evidence of complaint concerning maintenance but none that it was ever stopped or that any employee employed for that purpose was forced to leave the road or premises. The maintenance and leveling had been completed at the time complaint was made.

As to the sixth charge the evidence does not sustain the charge that the defendant did anything to interfere with the use, repair, or maintenance of the roadway. There is evidence that the used roadway showed marks of a disc but not to the extent of in any wise interfering with the use, maintenance, or repair thereof or of disturbing detrimentally its condition.

The facts sustain the seventh and last charge of the accusation but as has been made clear in the statement of legal principles herein these acts constituted no violation of the proper and valid provisions of the decree. As owner of the fee the defendant had the right to do the things complained of in this charge. He had the right to use it as the owner of the fee subject only to the easement for use as a roadway by the plaintiffs.

It is the opinion of this court therefore that the evidence fails to sustain the allegations of the accusation and that the judgment of the district court should be and is reversed.

REVERSED.

NUSS, District Judge, dissenting.

JAMES O'GRADY, APPELLEE, V. EMIL J. VOLCHECK ET AL., APPELLANTS.

27 N. W. 2d 689

Filed May 23, 1947. No. 32206.

1. **Judgments.** A judgment of the municipal court obtained by fraud, prejudice, or undue means may be set aside by that court only within four days of the entry thereof by that court.
2. ———. On the setting aside of a judgment of the municipal court for fraud, prejudice, or undue means a new trial shall be granted and a date set for a new trial and the opposite party given at least three days' notice thereof.
3. ———. The municipal court has no power to vacate or set aside its judgments obtained by fraud, prejudice, or undue means except such as is provided by statute.
4. **Courts.** The provisions of the district court code of civil procedure have no application to the municipal court in matters for which specific provision is made in the act defining and controlling procedure in the municipal court.
5. **Judgments.** The proper function of a nunc pro tunc order is to correct a record which has been made so that it will truly record the action had, which through inadvertence or mistake has not been truly recorded.
6. ———. A nunc pro tunc order is one the design and purpose of which is to make the record speak the truth.
7. ———. The purpose of a nunc pro tunc order is not to correct, change, or modify affirmative action previously taken by the court.

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

Paul I. Manhart and *C. J. Wilson,* for appellants.

Oscar T. Doerr and *Frank C. Yates,* for appellee.

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

YEAGER, J.

This is an appeal by Emil J. Volcheck and William Christensen, appellants, from a judgment of the district court for Douglas County, Nebraska, sustaining the prayer of a petition in error filed in that court by James O'Grady, appellee herein.

The substantial and pertinent facts upon which the determination here depends are the following: On August 16, 1943, the appellee herein filed a petition in the municipal court of the city of Omaha, Douglas County, Nebraska, wherein he claimed damages against appellants herein on account of an alleged assault and battery. On September 16, 1943, a trial was had on the petition and judgment was rendered in favor of appellee and against appellants for $600. On September 20, 1943, appellants filed a motion to vacate the judgment and for a new trial for fraud practiced upon the court. On notice to appellee hearing was set on the motion for September 24, 1943. On that date a hearing was had and hearing continued to September 25, 1943. On September 25, 1943, the motion was sustained and the judgment set aside. On September 28, 1943, the appellee filed a motion to vacate the order setting aside the judgment and appellants moved for an order setting aside the judgment nunc pro tunc as of September 20, 1943. On September 30, 1943, appellee's motion to vacate the order setting aside the judgment was overruled and appellants' motion for a nunc pro tunc order was sustained and an order was entered setting aside the judgment as of September 20, 1943. By this order a new trial was granted.

Thereafter on October 2, 1943, appellee filed in the district court for Douglas County, Nebraska, a petition in error challenging the validity of the order of the municipal court vacating the judgment entered on September 16, 1943, and also challenging the validity of the nunc pro tunc order of September 30, 1943.

Notwithstanding many pleadings filed and many other contentions the validity of the two orders mentioned was the only question properly presented to the district court and likewise it is the only one properly here.

The district court found and adjudged in effect that the order of September 25, 1943, purporting to vacate the judgment, and the order of September 30, 1943, pur-

porting to enter its order vacating the judgment nunc pro tunc as of September 20, 1943, were void and ineffectual and that the judgment of September 16, 1943, remained in full force and effect.

The determination of this question requires an interpretation and application of certain statutory provisions defining the power and control of the municipal court over its pronounced judgments.

Section 26-194, R. S. 1943, which is a provision of the act defining the powers and functions of the municipal court, is the following: "It shall be lawful for the judge before whom a cause has been tried, on motion, and being satisfied that the verdict was obtained by fraud, prejudice or undue means, at any time within four days after the entering of judgment, to grant a new trial, and he shall set a time for the new trial, of which the opposite party shall have at least three days' notice."

This is the only provision of the act empowering the municipal court to vacate its judgments on account of fraud, prejudice, or undue means. It has not been previously construed by this court. However in the present instance it does not appear to require construction but only application since its terms are clear and plain.

It is clear that under this statute a judgment of the municipal court may not be set aside for fraud, prejudice, or undue means unless it is done within four days from the date of entry of the judgment. The judgment under consideration here was not set aside until the ninth day after entry.

If then the municipal court has no power beyond that granted by the statute then the order vacating the judgment was invalid and of no effect. The appellants contend that it has general and inherent power to vacate its judgments for fraud independent of this statute.

To support their position in this connection appellants rely on section 26-1,201, R. S. 1943, as follows: "All provisions of the district court code of civil procedure, and all other provisions of the statutes of Nebraska not in

conflict with the 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 provision appellants urge confers upon the municipal court the same rights with reference to vacation of judgments as is possessed by the district court with reference to the vacation of its judgments.

With this contention we cannot agree.

It will be observed that by the specific terms of this section the provisions of the district court code and of other statutes are applicable only in the absence of conflict with the provisions of the municipal court act.

It will also be observed that there is a conflict in this section with the district court code in this, that the section limits the time within which a municipal court judgment may be set aside on account of fraud, prejudice, or undue means to four days from the date of entry thereof, whereas the power of the district court is not so limited.

In the interpretation of a statutory limitation upon the power of the municipal court contained in another section of the statute (§ 26-1,100, R. S. 1943), to vacate a judgment, this court, in State Furniture Co. v. Abrams, 146 Neb. 342, 19 N. W. 2d 627, pointed out that the court was without power to vacate its judgment except in conformity with the provisions of the statute. In the opinion it was said: "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."

We hold therefore that the order of September 25, 1943, purporting to vacate the judgment entered on

September 16, 1943, and to grant a new trial was under the statute ineffective for that purpose.

As one of their assignments of error appellants assert that section 26-194, R. S. 1943, is an invalid limitation upon the time for vacation of judgments obtained by fraud. They appear to have abandoned it since it is in no wise presented in propositions of law or argument. The subject therefore will not be considered herein.

Appellants contend in effect that the order of September 30, 1943, termed nunc pro tunc order purporting to vacate the judgment on September 20, 1943, amounted to a vacation of the judgment within four days of the date of entry.

The validity of the order of September 30, 1943, depends upon the question of whether or not it was within the true meaning of the term, a nunc pro tunc order. This court in Calloway v. Doty, 108 Neb. 319, 188 N. W. 104, explained the proper function of a nunc pro tunc order as follows: "It must be borne in mind that the proper function of a *nunc pro tunc* order is not for the purpose of correcting some affirmative action of the court which ought to have been taken, but its true purpose is to correct the record which has been made, so that it will truly record the action really had, but which through some inadvertence or mistake has not been truly recorded. In other words, it is an order to make the record speak the truth." See, also, Wescott v. Mathers, 129 Neb. 846, 263 N. W. 231; Central West Investment Co. v. Barker Co., 79 Neb. 47, 112 N. W. 291.

Analyzed in the light of these decisions it cannot be said that the order of September 30, 1943, was a nunc pro tunc order. It was not made to correct a record which had been previously made so as to truly record the action really had which through inadvertence or mistake had not been truly recorded. The order was not to make the record speak the truth. The order was clearly made for the purpose of recording action

as of an earlier date on a matter whereon on the earlier date there had been no previous action.

No authority is cited granting to the municipal court any such power or authority and we think there is no such authority. The order of September 30, 1943, was clearly invalid and ineffective as a vacation of the judgment in question.

For the reasons herein set forth the judgment of the district court is affirmed.

AFFIRMED.

IN RE ESTATE OF ADDIE E. ANDERSON, DECEASED. THEODORE KNOELL, EXECUTOR, APPELLANT, V. D. A. GIBBONS, APPELLEE.

27 N. W. 2d 632

Filed May 23, 1947. No. 32224.

1. **Limitations of Actions.** In this state the statute of limitations is a statute of repose; it prevents recovery on stale demands. If the petition in an action sets forth facts which show upon its face that it is barred by statute, and in avoidance thereof further facts are alleged to remove the bar of the statute, all of which are positively denied by the answer, together with the added allegations that the cause of action is barred by the statute of limitations, the plaintiff cannot recover without first establishing the facts so alleged in avoidance.
2. ———. A voluntary payment upon a claim otherwise barred by the statute of limitations is one that was intentionally and consciously made and accepted as part payment of the particular indebtedness in question under such circumstances as would warrant a clear inference that the debtor assented to and acknowledged the greater debt to be due as an existing liability.

APPEAL from the district court for Dodge County: RUSSELL A. ROBINSON, JUDGE. *Reversed and remanded.*

Mapes & Johnson, for appellant.

Charles H. Yost, for appellee.

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

CHAPPELL, J.

A claim was filed by appellee, hereinafter called claimant, against the estate of Addie E. Anderson to recover unpaid principal and interest upon a promissory note executed and delivered to her as maker to claimant as payee. The instrument, dated December 30, 1930, was executed and delivered in and due and payable in Kansas. It was for the principal sum of $100, due six months from that date with interest at percentages stated therein. Claimant, to avoid an apparent bar of the statute of limitations, alleged in his petition for allowance of the claim that on May 11, 1933, the maker paid $9.67 and on August 11, 1942, the maker paid $3.50 on the note, which payments were endorsed thereon. The executor filed objections to allowance of the claim, denying that the alleged payments were ever made and alleging that the claim was barred by the statute of limitations of both Kansas and Nebraska. It was stipulated in the record, however, that the law applicable to the statute of limitations was the same in both states.

The county court allowed the claim, and upon appeal to the district court a jury returned a verdict finding for claimant, upon which judgment was entered. The executor's motion for new trial was overruled, and he appealed to this court. His assignments of error were seven in number, but in our view of the case we are required to discuss only the question whether or not the verdict and judgment thereon were sustained by the evidence. We conclude that they were not.

Preliminary to any recitation of the evidence, however, we will discuss rules of law applicable in such cases.

Section 25-205, R. S. 1943, provides: "An action upon

* * * any agreement, contract or promise in writing * * * can only be brought within five years."

Section 25-216, R. S. 1943, provides: "In any cause founded on contract, when any part of the principal or interest shall have been voluntarily paid, or an acknowledgement of an existing liability, debt or claim, or any promise to pay the same shall have been made in writing, an action may be brought in such case within the period prescribed for the same, after such payment, acknowledgement or promise; * * *."

In re Estate of McEachen, 139 Neb. 250, 297 N. W. 153, called attention to the fact that prior to 1913 the word "voluntarily" was not in the statute, but that the commission on revision inserted it to clarify the statute and conform to prior decisions of this court holding that such payments must have been voluntarily made.

It has long been the rule that: "In this state the statute of limitations is a statute of repose; it prevents recovery on stale demands. If the petition in an action sets forth facts which show upon its face that it is barred by statute, and in avoidance thereof further facts are alleged to remove the bar of the statute, all of which are positively denied by the answer, together with the added allegations that the cause of action is barred by the statute of limitations, the plaintiff cannot recover without first establishing the facts so alleged in avoidance." Baxter v. National Mtg. Loan Co., 128 Neb. 537, 259 N. W. 630. See, also, Scott v. DeGraw, 90 Neb. 274, 133 N. W. 179; 37 C. J., Limitations of Actions, § 773, p. 1246.

We turn then to a discussion of the elements which must be established by the evidence to toll the statute of limitations in cases similar to the one at bar.

As early as Kyger v. Ryley, 2 Neb. 20, this court, in discussing whether or not an alleged part payment of a note otherwise barred removed the bar of the statute, used the following language: "The case wants the very first element of a valid payment to take the case out of

the statute, which is an intelligent, or at least conscious, consent on the defendant's part, that what was due to him should be applied on his debt."

The statute here involved was discussed by this court in Whitney, Clark & Co. v. Chambers, 17 Neb. 90, 22 N. W. 229. In that opinion it was said: "* * * a part payment in order to bar the statute must be equivalent to an acknowledgement of an existing liability or to a promise to pay the same."

In Moffitt v. Carr, 48 Neb. 403, 67 N. W. 150, after citing the above case with approval, this court held: "Part payment, within the meaning of section 22 of the Code of Civil Procedure, is a voluntary payment made by the debtor himself or by someone authorized by him to make such payment." See, also, 34 Am. Jur., Limitation of Actions, § 339, p. 266.

Thereafter, in Bosler v. McShane, 78 Neb. 86, 110 N. W. 726, affirmed on rehearing 78 Neb. 91, 113 N. W. 998, this court said, in speaking of the statute: "This cannot be construed so as to permit a payment made by a volunteer * * *."

In re Estate of McEachen, *supra,* cited and quoted with approval from the above cases. In that opinion it was also said: "A voluntary payment is one that is intentionally and consciously made. It calls for the free exercise of the will. It involves the element of assent and an acknowledgement of the existence of the debt."

In 34 Am. Jur., Limitation of Actions, § 338, p. 265, the above propositions are restated by use of the following language: "The principle on which part payment takes a case out of the statute of limitations is that the party paying intended by it to acknowledge and admit the greater debt to be due. If it was not in the mind of the debtor to do this, the running of the statute will not be stopped by reason of such payment. Therefore, a part payment, to have the effect of tolling the statute of limitations, must be made and accepted as payment of part of the particular indebtedness in ques-

tion, under circumstances such as warrant a clear inference that the debtor recognizes the whole of the debt as an existing liability, and indicate his willingness, or at least his obligation, to pay the balance. The payment must be distinct, unequivocal, and without qualification, and the debt or obligation must be definitely pointed out by the debtor, and an intention to discharge it in part made manifest."

Likewise, in 37 C. J., Limitations of Actions, § 782, p. 1252, it is said: "In order to take a claim, otherwise barred, out of the statute by proof of part payment within the statutory period preceding the commencement of the action, there must be clear and positive evidence of the making of such a payment within the required time; that the payment was made on the claim in suit; that the intention was to make a part payment; and that the payment was made by the debtor or some one authorized to act for him. While the indorsement on a note of part payment may, in connection with other evidence in corroboration thereof, be sufficient evidence of part payment, standing alone it is not sufficient evidence of part payment, or of the time thereof, especially where the indorsement was made by the payee or holder; it is necessary to adduce other evidence, such as evidence that the indorsement was made at the direction or with the consent of the maker, or that it was actually made by the owner of the note or at his direction at a time when the note was not barred, or that payment was actually made by the maker at such time."

In Johnson v. Ghost, 11 Neb. 414, 8 N. W. 391, this court approved the following statement taken from Wachter v. Albee, 80 Ill. 47: "Where a party permits a debt to run, making no effort to collect it until the statute of limitations can be pleaded in bar of the action, he is in no position to call upon the court to aid him upon slight proof; on the contrary, the evidence ought to be clear and satisfactory to overcome the bar of the statute."

In the light of such authorities, we will summarize briefly the evidence.

It is undisputed that the note was executed and delivered to claimant by the maker for a loan of money. The proof of the first payment thereon, May 11, 1933, is not questioned, but that situation is immaterial here because the last alleged payment of $3.50 on August 11, 1942, if voluntarily made, was the only one that could have tolled the statute in any event.

In that connection, claimant's secretary was the only witness in his behalf. She testified that she endorsed the payment on the back of the note. Her evidence in substance was that the maker was in claimant's office on that date, but the money was not paid to the witness by the maker, nor was the maker present when the money was handed to the witness or when credit therefor was endorsed on the note. Neither did the witness then, prior thereto, or thereafter, ever have any conversation with the maker about the alleged payment. The witness never actually saw the payment made and did not know whether it was paid in claimant's office or out in the street. In fact, she admittedly did not know whether or not the payment was ever actually made to claimant. The extent of her information was that the maker and claimant were in his treatment room; he then came out into another room with the money in his hand, and told the witness to "Give Addie credit on the note for that."

Admittedly, the maker was not present at that conversation. There was no evidence that she ever had any knowledge of it or of the claimed part payment or its endorsement on the note. Concededly, the alleged part payment was endorsed on the note after it was barred by the statute. Under such circumstances it could not be said that there was any evidence that the payment was ever voluntarily made or authorized to be made by the maker to claimant as part payment of the note,

or that the endorsement thereof on the note was made at the direction of or with the consent of the maker.

The will of the maker, executed November 27, 1945, and received in evidence, which directed the payment of her just debts, did not specifically refer to or recite that the note involved was such an obligation. Its operation could not have tolled the statute. Neither could its substance throw any light upon the question of whether or not the alleged payment was voluntarily made.

We conclude that if all the evidence adduced were admissible, which we do not deem it necessary to either discuss or decide, it could not lawfully be found or adjudged that the claimant was entitled to recover.

Heineman v. Thimgan, 136 Neb. 357, 285 N. W. 920, relied upon by claimant, is entirely distinguishable upon the facts, which were governed by rules of law related to but different from those at bar.

The verdict and judgment were clearly wrong because not sustained by the evidence. Therefore, the judgment is reversed and remanded for further proceedings.

REVERSED AND REMANDED.

CLARA C. PIECHOTA, ADMINISTRATRIX OF THE ESTATE OF VIRGINIA PIECHOTA, DECEASED, APPELLEE, V. CARL RAPP ET AL., APPELLANTS.

27 N. W. 2d 682

Filed May 29, 1947. No. 32225.

1. **Pleadings: Trial.** It is proper for the trial court within its sound discretion to allow amendments to the pleadings where, without any specific directions, the cause has been remanded generally.
2. **Automobiles.** An adult son of the owner of a family purpose automobile who was on vacation visiting his parents, and while so doing used the automobile for his own purposes with the owner's consent, was not a member of the owner's family within the scope of the family purpose doctrine.
3. **Evidence.** The admission of evidence based on skid marks

as to the speed of a car, as detailed in the opinion, held prejudicial error.

4. ———. The admission of evidence as to the possible earning capacity of a deceased child, under the facts as detailed in the opinion, held to permit the jury to calculate plaintiff's damages upon a purely speculative, uncertain, and conjectural basis, and to be prejudicial error.
5. ———. Where the evidence shows that the deceased child lived with and assisted her grandmother, it was not error to permit the mother (plaintiff) to testify that the grandmother was dependent on the mother for support.
6. ———. A plea of guilty entered by the defendant in a criminal action may be used against him as an admission that he committed the acts charged against him, in any subsequent action to which he is a party and which involves the same subject-matter.
7. **Death: Descent and Distribution.** Where an only child, born out of wedlock, dies intestate without issue, the mother is next of kin as that phrase is used in section 30-810, R. S. 1943.
8. **Evidence.** That a matter is judicially noticed means merely that it is taken as true without the offering of evidence by the party who should ordinarily have done so. It has no other effect than to relieve one of the parties of the burden of resorting to the usual forms of evidence.

APPEAL from the district court for Sherman County: E. G. REED, JUDGE. *Reversed and remanded.*

Davis & Vogeltanz and *Kirkpatrick & Dougherty,* for appellants.

H. G. Wellensiek and *Donald H. Weaver,* for appellee.

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

SIMMONS, C. J.

This action is brought under the provisions of sections 30-809 and 30-810, R. S. 1943, to recover damages for the death of a 17-year-old girl. Plaintiff is the mother of the deceased. Defendant John Rapp was the owner of the car and father of defendant Carl Rapp, the driver of the car. Issues were made and trial to a jury had, resulting in a verdict and judgment for the plaintiff

against both defendants. Defendants appeal. We reverse the judgment of the trial court and remand the cause.

The accident happened about one a. m., July 4, 1945, on a black-top highway in Ashton, Nebraska. Approaching the scene of the accident there was a slight turn to the right in the highway and then a sharp turn to the left. The car, following a curved course, went off the highway and struck the corner of a building, wrecking the car, and causing the instant death of the decedent.

Plaintiff sued as administratrix of the estate in a petition filed April 27, 1946, and alleged that she was sole and only next of kin. Plaintiff charged negligent and careless operation in several particulars. Summarized, they were that defendant operated the car while under the influence of intoxicating liquor and was grossly negligent. Relying on the family purpose doctrine, defendant John Rapp was joined as the owner of the car.

Defendant John Rapp answered, admitted that plaintiff was administratrix, denied generally, and alleged that deceased was riding in the car as the guest of Carl Rapp; that defendant Carl Rapp had reached his majority and was not a member of defendant John Rapp's family; and that the car was not being used on any business of defendant John Rapp and not for a family purpose.

Defendant Carl Rapp answered, admitted that plaintiff was administratrix, denied generally, and alleged that the deceased was a guest and that he was not on a joint enterprise with deceased. These answers were filed August 6, 1946.

A reply was filed August 17, 1946, to these answers, denying new allegations not consistent with the petition.

The cause came on for trial September 18, 1946. At the opening of the trial defendants asked leave to file an amended answer setting up the defenses of assumption of risk, contributory negligence, and joint enterprise. Plaintiff objected. The trial court denied leave to file the amended answer on the ground that the change of

issues might result in a delay of the trial. The matter went to trial on the issues as made.

At the time of the hearing on motions for new trial, which were based in part on the refusal to permit the filing of an amended answer, evidence was offered that on Friday, September 13, 1946, additional counsel for defendants entered the case; that they then advised plaintiff's counsel that leave would be asked to file an amended answer setting up these defenses; that plaintiff's counsel advised defendants' counsel he would object; that the proposed amended answer was not submitted to plaintiff's counsel until the morning the case was for trial; and that court was open on the day of September 17, and no effort then was made to secure leave to file. Plaintiff's counsel was present in court that day. Defendants' first assignment of error is that the trial court erred in denying defendants the right to file the amended answer.

For errors, to be discussed later herein, the judgment must be reversed and the cause remanded. It is proper for the trial court within its sound discretion to allow amendments to the pleadings where, without any specific directions, the cause has been remanded generally. 5 C. J. S., Appeal and Error, § 1969(d), p. 1522; 3 Am. Jur., Appeal and Error, § 1241, p. 737; State ex rel. Davis v. American State Bank, 115 Neb. 81, 211 N. W. 201; Markel v. Glassmeyer, 137 Neb. 243, 288 N. W. 821. Accordingly, we do not deem it necessary to determine whether or not the trial court erred in denying permission to file the amended answer.

Defendants' next assignment of error is that the trial court erred in instructing the jury that if they found the defendant Carl Rapp liable, then the defendant John Rapp was liable as owner of the car under the family purpose doctrine. We have followed the family purpose doctrine. In Linch v. Dobson, 108 Neb. 632, 188 N. W. 227, we held: "Where the head of a family has purchased or maintains a car for the pleasure of his family, he is,

under the so-called 'family purpose' doctrine, held liable for injuries inflicted in the negligent operation of the car while it is being used by members of the family for their own pleasure, on the theory that it is being used for the purpose for which it is kept, and that in operating it the member of the family is acting as the agent or servant of the owner." There is no question but that the car here involved was maintained for a family purpose. The question comes, was defendant Carl Rapp a member of the family of the defendant John Rapp within the scope of that doctrine?

The defendant Carl Rapp is an adult, unmarried son of the defendant John Rapp and was 26 years of age at the time of the accident. He left home in 1939 and went to California where he secured employment and where he had been living. He had been employed as a locomotive fireman on the Southern Pacific Railroad for three years prior to his visit home. He came home for a visit about June 1, 1945. He ate, slept, and lived at the home of his parents. He paid nothing for these accommodations. He was treated as a son in the home and reciprocated to his parents in kind. While home he drove the car when and as he wanted with his father's consent. He intended to leave for the return trip to California the morning of July 4. On the evening of July 3, he took the car with his father's knowledge and consent, and drove to Farwell to visit relatives. Another man accompanied him. While there he went to a wedding dance, met the deceased, and agreed to take her and another girl home to Ashton. The accident followed on the return trip. Sometime during the latter part of July, he returned to California.

In Hogg v. MacDonald, 128 Neb. 6, 257 N. W. 274, we adopted and followed the following rules for determining the existence of the family relation under the family purpose doctrine:

" '1. It is one of social status, not of mere contract.

" '2. Legal or moral obligation on the head to support the other members.

" '3. Corresponding state of dependence on the part of other members for their support.' " See, also, Gorman v. Bratka, 139 Neb. 718, 298 N. W. 691.

In Creaghead v. Hafele's Administrator, 236 Ky. 250, 32 S. W. 2d 997, the court was presented with a case essentially similar in facts to the instant case. There an adult daughter, self-supporting, residing in another state, while spending her vacation at home was using her father's car with his consent for her own purposes. She was involved in an accident resulting in the death of a child. The court held that the father was not liable under the family purpose doctrine, stating that the father "was under no obligation, moral or legal, to support her, and at the time of the accident she was merely a visitor in his home," and the fact that the car was being used for the purpose of the daughter with the consent of the father was not sufficient to establish liability. See, also, Scott v. Greene, 242 Ill. App. 405; Jones v. Golick, 46 Nev. 10, 206 P. 679; McGee v. Crawford, 205 N. C. 318, 171 S. E. 326; Cole v. Wright (Tex.), 18 S. W. 2d 242; Adkins v. Nanney, 169 Tenn. 67, 82 S. W. 2d 867; Miracle v. Cavins, 254 Ky. 644, 72 S. W. 2d 25.

We are of the opinion that the evidence is insufficient to show that the defendant Carl Rapp was a member of the family of defendant John Rapp within the scope of the family purpose doctrine. The trial court erred in instructing the jury that under the family purpose doctrine, if they found the defendant Carl Rapp liable, they should also find the father liable.

Defendants next assign as error the admission of evidence of the sheriff as to speed based on experiments conducted by him. The sheriff testified as to having made experiments as to speed on curves and as to one that he had conducted on this particular curve a week or two after the accident. He was a driver of experience

and was well acquainted with this road. The car involved in this accident was a Chevrolet. The sheriff used a Dodge car which was "about the same class of car." The road was in the identical condition. The sheriff was allowed to testify that he drove around the curve at a speed of 45 miles per hour. He later was asked if, from his experience, from his examination of the highway, from the pictures taken, and from the impact of the car, he had an opinion as to the minimum speed that the defendant's car must have been traveling when it went around the curve. He answered that he had. He then was asked, "What, in your opinion, would be the minimum speed that a car would have to be traveling, in order to make the skid-marks as you saw them there on the highway?" He answered, "Approximately 60 miles per hour." All of this evidence was admitted over objection. The "skid marks" were marks made on the pavement by the right wheels of the car before it left the pavement.

In Crecelius v. Gamble-Skogmo, Inc., 144 Neb. 394, 13 N. W. 2d 627, we said: "With regard to the matter of admission of evidence of experiments this court has said: 'While experiments are sometimes admitted to illustrate a given subject, we are not aware of any rule that permits onlookers to testify as to the result, without laying the foundation and showing that the result of the experiment can be relied on as a substantive fact. This means that, as a foundation for this testimony, it must be shown that the person who makes the experiment is competent to do so; that the apparatus used was of the kind and in the condition suitable for the experiment, and that the experiment was honestly and fairly made. Without these facts established, "the result" is without probative force.' "

In this instance the plaintiff was undertaking to establish the speed of the car. The sheriff made an experiment from which it could be concluded that the curve could be safely driven at 45 miles per hour. The

sheriff knew the road, was obviously watching it, and driving the car for the purpose of conducting an experiment. According to the plaintiff's witnesses the defendant Carl Rapp knew the road slightly, and was driving while under the influence of intoxicating liquors. We find in this record no testimony that would qualify the sheriff to testify as to the speed of a car based on skid marks. The conclusion that the jury could draw from this testimony was that the defendant Carl Rapp must have been driving in excess of 60 miles an hour when he came to the curve. As we view it, the evidence was inadmissible and its reception prejudicial. See Nelson v. Hedin, 184 Iowa 657, 169 N. W. 37; Everart v. Fischer, 75 Ore. 316, 321, 145 P. 33, 147 P. 189; Shams v. Saportas, 152 Fla. 48, 10 S. 2d 715.

Defendants' next assignment of error goes to the admission over objection of evidence as to future earning capacity. The deceased was 17 years of age and a graduate of Ashton High School. Plaintiff called as a witness the county superintendent of schools. He testified that Ashton was a Class "B" school; that a graduate of Ashton High School in order to teach school was required to pass a teacher's examination as prescribed by the state, and had to have 12 hours of college work; that teachers were needed in Sherman County; and that the salary range was from $105 to $150 a month for 9 months.

In Gill v. Laquerre, 51 R. I. 158, 152 A. 795, a father testified that he intended to educate his child to become a school teacher (no such testimony appears here); teachers were called to testify as to their earnings and the amount they were able to save after paying their living expenses. The testimony was held inadmissible. The court said: "Parents may influence but they cannot always determine the occupation of their children and such testimony injects further uncertainty into a case already replete with uncertainties." The admission of this evidence allowed the jury to calculate the plaintiff's

damages upon a purely speculative, uncertain, and conjectural basis. Its admission was prejudicial error.

The defendants' next assignment goes to the admission of other evidence.

The plaintiff is an unmarried woman. The deceased was born out of wedlock. Deceased lived all her life with plaintiff's mother at Ashton. Plaintiff was employed at Loup City. Plaintiff testified that she paid her mother for the keep of deceased; that deceased helped with the housework. On redirect plaintiff was asked if her mother was dependent upon her for support, and answered, over objection, that she was. If, as plaintiff testified, the grandmother was dependent on the mother, then to the extent the deceased helped in the care of the grandmother, she was assisting the plaintiff. Plaintiff lost that assistance. We see no prejudicial error in the admission of the challenged evidence.

The defendant John Rapp complains of the admission of the following exhibits in evidence over objection: A complaint filed in district court charging the defendant Carl Rapp with willfully and unlawfully driving an automobile in such a manner as to indicate a willful and wanton disregard for the safety of persons and property; the record showing a plea of guilty to the charge of reckless driving; the judgment record showing the assessment and payment of a fine; a receipt of the county treasurer for the amount of the fine, and the receipt issued to counsel for the fine and costs. The defendant Carl Rapp assigns as error the introduction of the judgment record and the two receipts. The record shows that appearance and plea were made by counsel for defendant Carl Rapp. The correct rule is: "A plea of guilty entered by the defendant in a criminal action may be used against him as an admission that he committed the acts charged against him, in any subsequent action to which he is a party and which involves the same subject-matter." Wisnieski v. Vanek, 5 Neb. Unof.

512, 99 N. W. 258. Under this rule only the plea of guilty was admissible.

Defendants' next contention is that the mother is not the "next of kin" under the provisions of section 30-810, R. S. 1943, which authorizes the action "for the exclusive benefit of the widow or widower and next of kin," and that by reason thereof plaintiff cannot recover. The testimony of plaintiff is that the deceased was an only child; that plaintiff had never married; and that no man had ever acknowledged in writing that he was the father of deceased. We construed the phrase "next of kin" in Warren v. Englehart, 13 Neb. 283, 13 N. W. 401, as comprehending "all those persons who are entitled to inherit personalty under the statutes of descent and distribution." In Fitzgerald v. Donoher, 48 Neb. 852, 67 N. W. 880, we said: "Under this statutory law in relation to damages the right of any party thereto is dependent upon the degree of kinship to the deceased, which must be such as to confer the right to inherit the estate." Section 30-110, R. S. 1943, provides: "If a child born out of wedlock shall die intestate, without lawful issue, his estate shall descend to his mother, or, in case of her decease, to her heirs at law." Here there is no question raised but that the deceased died intestate and without issue. The mother is within the term "next of kin" as used in the statute.

Defendants contend that the trial court erred in permitting a doctor to testify over objection that alcohol dulls the senses, slows the reflexes and befuddles the intellect, depending on the amount consumed and the tolerance of the person who has imbibed. There was evidence tending to show that defendant Carl Rapp had imbibed intoxicating liquor. Defendants' contention is that this was a matter of common knowledge, of which court and jury could take judicial notice. That a matter is judicially noticed means merely that it is taken as true without the offering of evidence by the party who should ordinarily have done so. 9 Wigmore, Evidence

(3d ed.), § 2567, p. 535. It has no other effect than to relieve one of the parties of the burden of resorting to the usual forms of evidence. Ohio Bell Telephone Co. v. Public Utilities Commission, 301 U. S. 292, 81 L. Ed. 1093, 57 S. Ct. 724. If, as defendants contend, the matter involved was one of which judicial notice could be taken (a matter which we do not decide), then the plaintiff by offering evidence assumed a burden which she did not carry, and made an issuable fact out of it. We do not see where defendants are prejudiced. There is no merit in the assignment.

Defendants contend that the trial court erred in giving certain instructions and in refusing to give certain requested instructions. Defendants also contend that in any event the verdict is excessive. Having reached the conclusion that, for the errors determined herein, the judgment must be reversed and the cause remanded, we do not deem it necessary to determine these assignments.

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

REVERSED AND REMANDED.

NATHAN KESSELMAN ET AL., APPELLANTS, V. HERBERT GOLDSTEN ET AL., APPELLEES.

27 N. W. 2d 692

Filed May 29, 1947. No. 32209.

1. **Principal and Agent.** An act of an agent, although without actual authority from his principal, may be with such apparent authority as to bind his principal.
2. ———. Apparent authority of an agent cannot be restricted or extended by bylaws or other instructions to the agent by the principal in the absence of notice.
3. ———. Whatever an agent or employee does in the lawful exercise of his authority is imputable to the principal.
4. **Statute of Frauds: Specific Performance.** Specific performance of an oral contract to convey real estate may not be

decreed on the basis of part performance unless the acts of part performance by the promisee, in relation to the subject matter, in and of themselves unequivocally indicate the existence of the contract alleged and cannot be accounted for on any other reasonable hypothesis.

5. ———: ———. Specific performance of an oral contract to convey real estate may be decreed if there have been acts of part performance by the promisee, in relation to the subject matter, and the acts of part performance in and of themselves unequivocally indicate the existence of the alleged contract and cannot be accounted for on any other reasonable hypothesis.
6. **Cemeteries.** In the purchase of a plot in a cemetery the purchaser is bound by the vested rights of others of which he has actual or constructive knowledge.
7. ———. The survey and platting of real estate and the sale of plots therein with reference to the plat constitutes a common-law dedication of the passageways notwithstanding the plat and survey has not been recorded.
8. ———. By purchase of a lot in a platted cemetery the purchaser obtains an easement for the free and unobstructed use of the passageways therein.
9. ———. When a lot in a platted cemetery adjoining a passageway has once been sold for burial purposes, the lot and alley being designated on the plat, the passageway may not be interfered with or modified by the owners of the cemetery or by any other person or persons.

APPEAL from the district court for Douglas County: JAMES T. ENGLISH, JUDGE. *Affirmed.*

Joseph H. McGroarty, for appellants.

Morsman & Maxwell, Leon, White & Lipp and *Ray R. Simon,* for appellees.

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

YEAGER, J.

This is an action by plaintiffs and appellants against the defendant Congregation B'Nai Israel to require the said defendant to specifically perform an alleged oral agreement to remove a cement walk over what plaintiffs claimed was a portion of a burial plot purchased

by them from the said defendant in Golden Hill Cemetery. This defendant will be hereinafter referred to as the Congregation. Herbert Goldsten and David Goldsten were made parties defendant for the reason, as it was alleged, that they wrongfully placed the walk and that they and the defendant Congregation B'Nai Israel refused to remove it. All defendants are appellees here.

A trial was had to the court whereupon a decree was rendered denying the relief prayed by plaintiffs and dismissing their petition. From this decree plaintiffs have appealed.

There are four assignments of error but they may all be summarized in the single statement that plaintiffs contend that under the facts and the law the trial court should have by its decree granted the relief prayed for in the petition.

Pertinent proved facts are that the Congregation at all times involved herein was the owner of Golden Hill Cemetery, a platted cemetery, the plat of which apparently was never recorded. On March 6, 1941, plaintiffs went with William Milder, a member of the Congregation and its representative, to the cemetery and selected a burial plot. The plot was not selected by reference to the cemetery plat but from observation and description by Milder. Milder gave the dimensions as 12 by 18 feet. The length was east and west. On the east end of the plot selected and across its width was a cement walk 18 inches in width. Milder stated that this was a part of the plot and that the synagogue (Congregation B'Nai Israel) would remove it. He said that the defendants Goldsten Brothers had placed it there without authority. No dealings were had by plaintiffs with any other member of the Congregation until long after the date of selection of the plot. The day after the plot was selected the body of plaintiffs' father was buried thereon. Receipt for payment of the purchase price of the lot was issued March 26, 1941.

It is the substantial contention of plaintiffs that they

contracted with William Milder as the representative of the Congregation and that by the contract with him the Congregation is bound; that by the contract thus entered into with Milder they purchased burial rights upon the plot described to them which included the area occupied by the 18-inch cement walk on the east end thereof; and that they are entitled to a decree of specific performance the effect of which would require the Congregation to remove the walk.

The contention of the Congregation is that plaintiffs purchased Plot 11, as it appears on the plat of the cemetery, whose dimensions were 12 feet by 16 feet and nothing more, and that the 18-inch strip on which the cement walk rests is no part of this plot but is a path reserved for the use and benefit of all owners of burial lots in the cemetery; that plaintiffs purchased their plot with full notice of the cement walk and its purpose and that they are barred and estopped from claiming any interest therein.

The defendants Goldsten for their defense substantially assert that they caused to be laid the 18-inch walk in question; that it is not a part of Plot 11 or of plaintiffs' plot but belongs to the Congregation and was reserved and dedicated by the Congregation and in the plat of the cemetery for the use and benefit of all owners of burial lots in the cemetery; that they own burial lots therein and have the right to its use; that plaintiffs purchased their plot with full notice of the walk; and that the said defendants are entitled to a decree protecting their right to the use of the walk against interference by the plaintiffs.

In support of their contention plaintiffs say substantially that the only contract of purchase they had was with William Milder on behalf of the Congregation, that it was entire, that it included the 18-inch strip, that it called for the removal of the walk, and that the agreement of purchase was binding on the Congregation in its entirety. They rely for support of their contention

upon the facts as disclosed by the record and on the following legal principles.

An act of an agent, although without actual authority from his principal, may be with such apparent authority as to bind his principal. Such apparent authority of the agent cannot be extended or restricted by bylaws or other instructions to the agent by the principal in the absence of actual notice thereof. Sindelar v. Hord Grain Co., 116 Neb. 776, 219 N. W. 145; Drainage District v. Dawson County Irrigation Co., 140 Neb. 866, 2 N. W. 2d 321.

"Whatever an agent or employee does in the lawful exercise of his authority is imputable to the principal, and where the acts of an agent or employee will bind the principal, his representations, declarations and admissions respecting the subject matter will also bind him, if made at the same time and constitute a part of the same transaction." Whitaker v. Keogh, 144 Neb. 790, 14 N. W. 2d 596. See Webster v. Wray, 17 Neb. 579, 24 N. W. 207; Oberne v. Burke, 30 Neb. 581, 46 N. W. 838.

In opposition to this position of plaintiffs the appellees contend substantially that there was no valid and enforceable contract with the Congregation for the sale of the 18-inch strip for the following reasons: That the plaintiffs purchased their plot with reference to the description contained in the plat and the physical boundaries thereof as disclosed by boundary stakes; that William Milder was without authority to bind the Congregation to the sale of the 18-inch strip; that there was no contract in writing for the sale of the strip; that the cemetery was duly platted for cemetery purposes and lots and plots had been sold therein with reference to the plat which gave lot and plot owners vested rights in and to the use of the 18-inch strip as a passageway and that therefore no sale could be made thereof which would take away or burden these rights; and that the plaintiffs purchased their plot with full knowledge of

the condition and use to which the strip was being put which knowledge estopped them to assert any right to it as a part of their plot.

On the facts and the legal principles set forth it must be said that what William Milder did and what he said with regard to the sale of the plot in question, within the limits of which the Congregation could be legally bound, were binding upon it. This must be true because no other person ever participated in any negotiations with the plaintiffs, and on what took place between him and plaintiffs, they paid the price exacted of them, received the conveyance, and entered upon the use and occupancy of the plot. The contract was fully consummated by the Congregation on the action of William Milder as its agent. It cannot now in equity well be said that the Congregation should not be bound by the exercise of the apparent authority which plaintiffs had every right to believe was actual.

Further on the facts the claim of plaintiffs as to content and substance of the contract must be accepted as true. This is true because their testimony contains the only competent information as to its content and substance. There is no evidence to the contrary. On the record then it must be said that there was a contract and that it was for the sale of the plot including the 18-inch strip with provision that the Congregation would remove the cement walk.

Is the contract vulnerable to the attack that it was oral and therefore void under the statute of frauds and unenforceable in a court of equity? We think not.

The contract as proved, while oral, was entire; there was performance of each and every part thereof by both parties except removal of the walk by the Congregation; and the performance unequivocally indicates the existence of the contract alleged and may not be accounted for on any other reasonable hypothesis. The record in this respect meets the affirmative requirements of the controlling legal principle as follows:

"Specific performance of an oral contract to convey real estate may not be decreed on the basis of part performance unless the acts of part performance by the promisee, in relation to the subject-matter, in and of themselves unequivocally indicate the existence of the contract alleged and cannot be accounted for on any other reasonable hypothesis." Taylor v. Clark, on rehearing, 143 Neb. 563, 13 N. W. 2d 621. See, also, Cahill v. Mockett, 143 Neb. 730, 10 N. W. 2d 679; Crnkovich v. Crnkovich, 144 Neb. 904, 15 N. W. 2d 66; Diez v. Rosicky, 145 Neb. 242, 16 N. W. 2d 155; Lintz v. Apking, 145 Neb. 714, 18 N. W. 2d 55; Caspers v. Frerichs, 146 Neb. 740, 21 N. W. 2d 513.

We conclude therefore that as between the plaintiffs and the Congregation, subject to the force and effect of the plat, the rights of others who had purchased lots or plots in the cemetery with reference to the plat, and the notice with which plaintiffs were charged on account of knowledge of the existence of the walk, the contract in question was a valid, binding, and enforceable contract.

That plaintiffs knew that this was a cemetery which was platted or at least subdivided into burial lots and plots there can be no question. This they observed, but their word that they saw no plat and did not contract with reference to one must be accepted. They observed the arrangement in the vicinity of their plot. They observed plots already used and occupied for burial purposes and were informed at the time that the defendants Goldsten were the owners of adjacent lots and that the Goldstens had constructed the cement walk in question. They were therefore, by what they observed and were told, put on notice as to others having rights or apparent rights in the cemetery.

Having had this notice they became bound in their dealings with the Congregation by the legal principle which prevented the Congregation from conveying to them any vested rights that other parties and particu-

larly the defendants Goldsten had in plots, appurtenances, and passageways in the cemtery. They took their plot subject to the rights of others of which they had actual or constructive knowledge. Lyon v. Gombert, 63 Neb. 630, 88 N. W. 774; McDonough v. Meany, 108 Neb. 496, 188 N. W. 187; De Conly v. Winter Creek Canal Co., 110 Neb. 102, 193 N. W. 157; Polyzois v. Resnick, 123 Neb. 663, 243 N. W. 864.

Whether or not the defendants Goldsten had rights in the passageway which could not be taken away by a contract depends upon the question of whether or not there was such a dedication of the plat as would give them a right of use of the strip as a passageway and the further question of whether or not they purchased their plot with reference to the plat as in this respect dedicated.

The evidence clearly indicates that they did purchase their lots with reference to and reliance on the representation of the plat that the 18-inch strip was dedicated to use as a passageway and with knowledge that at the time it was being so used.

We think that the question of whether or not there was a dedication of the plot with this strip as a passageway must be answered in the affirmative.

That there was no statutory dedication or recording of the plat appears clear, but these formalities are not essential to a dedication from which could flow the rights which the defendants Goldsten insist that they are entitled to have protected by a decree of a court of equity.

We conclude that there was a common-law dedication of the plat recognizable under the laws of this state. It is a well-settled principle that the survey and platting of real estate and the sale of plots therein with reference to the plat constitutes a common-law dedication of the passageways notwithstanding the plat and survey has not been recorded. Gregory v. Lincoln, 13 Neb. 352, 14 N. W. 423; Likes v. Kellogg, 37 Neb.

259, 55 N. W. 878; Pillsbury v. Alexander, 40 Neb. 242, 58 N. W. 859; City of Omaha v. Douglas County, 125 Neb. 640, 251 N. W. 262.

In Dunbar v. Oconomowoc Cemetery Asso., 189 Wis. 164, 207 N. W. 265, a case very much like the one here, the court in the opinion gave an expression which we think it well to adopt as determinative of the rights and liabilities of the parties to this action. It is: "While the *Cemetery Association* retains the fee in the alleyway, the lotowner obtains an easement for the free and unobstructed use of the same for passage purposes. The use of a lot for burial purposes is inconsistent with a public use for passage purposes; and the use of an alleyway for passage purposes is inconsistent with its use for burial purposes. When a lot adjoining an alleyway has once been sold for burial purposes, such lot and alley being designated on the plat, each serves a distinct and definite purpose, and such purpose cannot be interfered with or modified by the owners of the cemetery, or by any other person or persons, without affecting the vested rights of the lotowner."

It follows then that the plaintiffs may not have specific performance as prayed since the relief prayed would be an illegal invasion of the vested rights of the defendants Goldsten.

The decree of the district court is affirmed.

AFFIRMED.

CARL FAHRENBRUCH, APPELLEE, V. PETER KIEWIT SONS' COMPANY, A CORPORATION, ET AL., APPELLANTS.

27 N. W. 2d 680

Filed May 29, 1947. No. 32236.

Appeal and Error. In a law action, where a jury has been waived by the parties, the findings of the district court on issues tried have the effect of a verdict, and if the evidence supports

the findings and judgment thereon, and there is no error in the proceedings, the judgment will be affirmed on appeal.

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

Carl H. Swanson, for appellants.

J. F. Ratcliff, for appellee.

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

CHAPPELL, J.

This action was to recover damages because defendant company's tractor and heavy road-roller, alleged to have been negligently operated by the other defendant as its employee, collided with plaintiff's combine on a highway then under construction and repair. By agreement, the issues were tried on the merits to the district court without a jury. At conclusion thereof, the court found in part as follows: "On consideration whereof, the court finds generally in favor of the plaintiff and against the defendants; that the proximate cause of the accident was the defendants' negligence, and that the plaintiff is entitled to recover damages; that the reasonable value of the plaintiff's combine prior to the accident was the sum of $1116.00 and the reasonable value of said combine after the accident was $350.00, and that plaintiff's damage amounts to $766.00. That the plaintiff is entitled to recover damages from the defendants in the sum of $766.00, with interest thereon at 6% per annum from August 12th, 1945, until paid."

A judgment accordingly was awarded plaintiff. Defendants' motion for new trial was overruled and they appealed to this court, assigning as error substantially that the judgment was contrary to law and not sustained by the evidence. We conclude that defendants' assignments cannot be sustained.

This court has recently reaffirmed the rule that in a law action, where a jury has been waived by the parties,

the findings of the district court on issues tried have the effect of a verdict, and if the evidence supports the findings and judgment thereon, and there is no error in the proceedings, the judgment will be affirmed on appeal. Schnell v. United Hail Ins. Co., 145 Neb. 768, 18 N. W. 2d 112.

The primary issue in the case at bar was alleged negligence. In Fulcher v. Ike, 142 Neb. 418, 6 N. W. 2d 610, it was held that: "The gist of negligence is failure to exercise the care of a reasonable and prudent person under a given set of circumstances." In that connection we call attention to the fact that, contrary to defendants' contentions, the violation of a statutory duty is not a necessary prerequisite in order to establish actionable negligence. It may be established by evidence showing a breach of duty which one owes to another by reason of the relationship existing or the circumstances presented. 45 C. J., Negligence, § 18, p. 643; 38 Am. Jur., Negligence, § 14, p. 655.

We must bear in mind also that in negligence cases the standard of the duty to exercise the care of a reasonable and prudent person is ordinarily the same, but that the conduct required to fulfill that duty is different, dependent upon the facts and circumstances of each particular case.

The questions involved here are primarily factual but governed generally by the rule that where a highway under construction or repair is being used permissively in a limited manner by adjacent residents, it must be kept and maintained by the contractor in a reasonably safe condition for the use of those driving thereon, who are at the same time required to exercise reasonable care under the peculiar circumstances and conditions confronting them by keeping a constant lookout and vigilant caution for obstructions incident to the progress and completion of the work. Miller v. Abel Construction Co., 140 Neb. 482, 300 N. W. 405.

In the light of the foregoing rules we have examined

the evidence, which is brief but conflicting upon some material matters. Substantially, the evidence adduced in plaintiff's behalf is as follows: He lived about a quarter of a mile north of the highway involved which had been in construction and repair for several months. To reach his farm home with his tractor and combine, it was necessary to drive it over the highway. For that reason and with permission of a traffic-directing highway engineer, plaintiff's son was driving it westward thereon. Plaintiff himself drove a car ahead to see that the highway was clear, but at the time of the accident, was approximately one-fourth mile away.

The so-called paved portion of the highway was 26 feet wide, with a dirt shoulder extending out therefrom for a distance of about eight feet. Plaintiff's tractor was attached to his combine, which extended out to the left several feet. When plaintiff's driver had reached the top of a slope, the view was clear to the west for about one-half mile, where defendants' tractor, with road-roller attached, was seen approaching from the west.

Plaintiff's driver traveled to the bottom of the slope and crossed a culvert where it was necessary for him to stay on the pavement, but immediately thereafter proceeded to pull off the pavement to the north. Prior to the collision, he observed defendants' tractor-roller approaching about 100 feet or more away, pretty close over on the north side of the road, at a speed of 11 or 12 miles an hour. Immediately prior to the collision, plaintiff's tractor was traveling about one mile an hour, and had proceeded to a point off the pavement, away over to the north on the shoulder, with the protruding south end of the combine about seven feet north of the center of the pavement. In other words, six feet of it was still on the north side of the pavement, leaving a clearance of 20 feet thereon to the south. In that situation, defendant company's tractor and road-roller, driven by a 17-year-old boy, who seemed to be talking

to some children in a car to the right and a little behind him, kept coming right on in a straight line, without slowing down, turning, signaling, or indicating what he was going to do, until he was right up to and almost against plaintiff's combine. At that point he swung sharply to the right, but defendants' tractor wheel first collided with plaintiff's combine, and thereafter the road-roller hit clear into its platform, swinging it around to the north, breaking the hitch, breaking, shearing, and springing the main parts and heavy frame of the combine, thereby damaging it beyond repair except for salvage of parts. Thereafter, defendants' driver went on up the road, refusing to stop.

Defendants offered no evidence relating to the value of plaintiff's combine either before or after the accident. It was undisputed that before the accident its reasonable value was $1,116, and thereafter its reasonable value was not more than $200 to $350. It will be observed also that defendants were given the benefit of the larger sum, since the difference between $1,116 and $350 is $766, the exact amount of the judgment awarded plaintiff.

Otherwise defendants' evidence was substantially in conflict with that adduced by plaintiff regarding the position of the machines and their manner of travel as they proceeded on the highway, as well as the exact point of collision and the speed of the vehicles. However, defendants' driver admitted that he did not slow down before the collision. He also admitted that he saw plaintiff's driver when about 100 feet from him, and testified that when 20 or 25 feet from plaintiff's driver, he motioned with his hand for him to move over, but, seeing that he was not going to do so, defendants' driver, at a point where the front of his tractor was about even with the combine, turned right as fast as possible, and thus collided with it. He admitted also that he did not stop, but claimed the nature of his work required that he not do so.

Without question the evidence amply supported the

finding and judgment of the trial court, and since no error appears in the proceedings, the judgment should be and hereby is affirmed.

AFFIRMED.

CLAIR OLIVER, APPELLANT, v. MELVIN ERNST, APPELLEE.
27 N. W. 2d 622

Filed May 29, 1947 No. 32249.

Workmen's Compensation. A workman is not a farm laborer simply because at the moment he is doing work on a farm, nor because the task on which he is engaged happens to be what is ordinarily considered farm labor; but the whole character of his employment must be looked to to determine whether he is a farm laborer within the provisions of section 48-106, R. S. 1943.

APPEAL from the district court for Richardson County: VIRGIL FALLOON, JUDGE. *Reversed and remanded with directions.*

Harold L. Gurske and *Van Pelt, Marti & O'Gara,* for appellant.

Archibald J. Weaver, for appellee.

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

WENKE, J.

This is a workmen's compensation case and the appeal presents the question of whether or not the defendant, Melvin Ernst, is an employer of a farm laborer within the provisions of section 48-106, R. S. 1943, and thereby exempt from liability under the provisions of the Workmen's Compensation Act.

Section 48-106, R. S. 1943, provides in part as follows: "The following are declared not to be hazardous occupations and not within the provisions of this act: * * * employers of farm laborers, * * *."

The district court found in favor of the defendant and plaintiff appeals. Herein the parties will be referred to as they appeared in the court below.

The record discloses that defendant had retired from the farm in 1934 and at the time of the accident was living in Falls City, Nebraska. He was then engaged in the business of contracting to move dirt by means of a bulldozer. He performed this work for anyone with whom he had an opportunity to contract for such service. He was familiar with the rules and regulations of the United States Department of Agriculture as to soil conservation and reclamation work and some of the work he contracted to do was in this class.

Defendant had in his employ the plaintiff, Clair Oliver, who also lived in Falls City. Plaintiff operated the defendant's bulldozer. On July 18, 1945, he was operating it on the farm of Ed Buchholz located some 10 miles northeast of Falls City. Defendant had contracted with Buchholz to fill a ditch and build a dam in one of Buchholz's fields in order to prevent further washing. Buchholz agreed to pay defendant at the rate of $10 per hour for this job. While operating the bulldozer the plaintiff received an injury which necessitated the amputation of his left leg at a point just above the knee and requires him to use an artificial limb.

At the time of his injury plaintiff was engaged in filling a ditch and building a dam in order to prevent further erosion and thereby conserve the soil. To thus conserve the soil has always been good farming practice although formerly done on a much smaller scale. It has received considerable impetus in recent years. This is probably due to the fact that the value thereof has received considerable publicity and also because of the fact that if done in accordance with the rules and regulations of the United States Department of Agriculture the owner is entitled to certain payments.

The record shows that defendant purchased the bulldozer on or about July 9 or 10, 1945. After acquiring it

and prior to the Buchholz job he had contracted and performed similar work on the farms of Walter Kruse and Walter Finch. He had also contracted with and constructed for the Skelly Oil Company a salt water pond and had done some work for the B & T Drilling Company. The plaintiff had operated the bulldozer in doing all of this work and it had been contracted on the regular basis of $10 per hour.

In discussing this statute in Guse v. Wessels, 132 Neb. 41, 270 N. W. 665, we approved the following from the case of Peterson v. Farmers State Bank, 180 Minn. 40, 230 N. W. 124: "A workman is not a farm laborer simply because at the moment he is doing work on a farm; nor because the task on which he is engaged happens to be what is ordinarily considered farm labor. The employe of an implement dealer does not become a farm laborer while engaged in correcting the behavior of a self-binder in the grain field of the owner, a farmer and customer of the dealer. Nor would the employe of a well digger become a farm laborer while stabling horses used on the drilling outfit. But a farmer's hired man would not cease to be a farm laborer while adjusting harvesting machinery or stabling the horses of a contractor drilling a well on the place. The modern farm laborer doubtless does much work on the rapidly increasing electrical equipment on farms. He continues a farm laborer while he does it. But an electrician sent out from town to do the same thing would not become a farm laborer for the occasion. So also a farm laborer does not step out of his own part while doing carpenter work for his farmer employer in the repair of farm buildings. Neither does the carpenter who comes onto the farm for the job of carpentry and nothing more. One continues a farm laborer and the other does not become one." See, also, Trullinger v. Fremont County, 223 Iowa 677, 273 N. W. 124, and Makeever v. Marlin, 92 Ind. App. 158, 174 N. E. 517.

The Minnesota court went on to say: "Inasmuch as

farm laborers are not subject to the compensation law and most others are, two men, for example a farm laborer and the expert mechanic employed by the implement dealer, may be engaged on the same task and be injured, both of them, by the same accident, and yet only one be entitled to workmen's compensation. Neither the pending task nor the place where it is being performed is the test. The whole character of the employment must be looked to to determine whether he is a farm laborer." Peterson v. Farmers State Bank, *supra.*

The record in this case shows that the plaintiff was employed to operate a bulldozer and perform whatever work defendant contracted for in the way of moving dirt. Although part of the work he was required to do was in fact farm work, that fact alone would not make him a farm laborer within the meaning of the compensation law; nor would the fact that the work being done at the time happened to be on a farm and in the nature of what is ordinarily considered farm labor necessarily change this relation. Taking into consideration the entire relationship of the parties we find that plaintiff was employed to operate a bulldozer and perform whatever work defendant contracted for in the way of moving dirt and not as a farm laborer within the meaning of the compensation law.

We find this holding to be in accord with Keefover v. Vasey, 112 Neb. 424, 199 N. W. 799, for therein Keefover was employed to help do threshing, which concededly is a farming operation and consequently he was employed as a farm laborer.

For the reasons stated the judgment of the district court is reversed with directions for it to enter an order in favor of the plaintiff approving the award allowed him by the full compensation court, from which award the defendant had appealed to the district court.

REVERSED WITH DIRECTIONS.

YEAGER, J., participating on briefs.