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REPORTS OF CASES

DECIDED BETWEEN
NOVEMBER 29, 1947 AND JUNE 29, 1948

IN THE

Supreme Court of Nebraska

SEPTEMBER TERM 1947, AND
JANUARY TERM, 1948

VOLUME CXLIX

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By WALTER D. JAMES, REPORTER OF THE SUPREME COURT

For the benefit of the State of Nebraska

SUPREME COURT

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IN MEMORIAM

JESSE L. ROOT

At the session of the Supreme Court of the State of Nebraska, held on January 5, 1948, 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 Victor Westermark, District Judge, the following proceedings were had:

Honorable Max V. Beghtol.

May it Please the Court:

The man whose memory we honor today, Jesse L. Root, was a practicing lawyer of Nebraska for sixty years. He was born in 1861 and died in 1947. He was County Attorney of Cass County, a member of the Nebraska Senate, served as one of the Commissioners of this Court, and was Associate Justice of this Court from 1908 to 1912. He left the Bar to become a great Judge and left the bench to become a great Advocate. When he started to practice, the judicial precedent of Nebraska was encompassed in twenty-seven volumes of reports. While he was a lawyer the opinions of this Court grew to 145 volumes. He, therefore, actually lived almost the entire judicial history of Nebraska.

He was an Associate Justice of the Court with those giants of the bench: Reese, Barnes, Rose, Letton, and Sedgwick. Before that court appeared such men as John L. Webster, John J. Sullivan, John Stout, Edgar Morsman, T. J. Mahoney, A. M. Post, Allen Field, Chas. O. Whedon, and Francis G. Hamer. It was no time for weaklings. The Justices of the Court and the lawyers

who practiced before the Court were pioneers who had to be strong to survive.

Judge Root stood unafraid in this company, both as a judge and a lawyer. He possessed great mental and physical strength. He had a dignity of carriage and personal appearance which inspired confidence. His memory was accurate and retentive. He was a scholar, constantly seeking new friends of learning in which exploration was an engrossing adventure for him.

Thirty-seven years ago Judge Root sat with the other members of the court to hear the memorial services for the second Chief Justice of Nebraska, George B. Lake. Whatever his thoughts were on the occasion, he could not have imagined that the best and most useful part of his life was then ahead of him, that he would survive all of his associates on the bench and all of the lawyers who appeared before him on that occasion. Nor could he have dreamed that the members of the committee appointed to do him honor thirty-seven years later would be men then barely admitted to the bar or yet to be admitted. Fate gave Judge Root a long, varied and honorable career in which he held his own as a Judge, a Legislator and an Advocate with the best men our State produced during his time. Judge Root never did an ignoble thing. Honor to him was not a decoration to be assumed on occasion. It was so woven into his character that it was a definite tangible part of him. If we could speak for Judge Root we well could say "much have I traveled in the realms of gold and many goodly states and kingdoms seen."

The committee appointed by the court to conduct this memorial respectfully moves the adoption of the following resolution:

RESOLVED, that the bench and bar of the State of Nebraska does honor to the memory of Jesse L. Root late an Associate Justice of the Supreme Court of Nebraska and for many years an able and honorable member of the bar of this and other states. BE IT FURTHER RESOLVED that the life of this man was a constant

incentive to the bar of Nebraska to industrious and honorable pursuit of the practice of law and a guide to the judiciary for just and unbiased judgments. BE IT FURTHER RESOLVED that these proceedings be preserved upon the records of this court and copies thereof be transmitted to the members of the family of Judge Root.

MAX V. BEGHTOL
WILLIAM R. PATRICK
J. A. C. KENNEDY
JULIUS D. CRONIN
J. W. WEINGARTEN

Mr. Beghtol continued:

I respectfully ask permission for myself and other members of the bar briefly to address the Court concerning Jesse L. Root. In the early days of my practice I was intimately associated with him. I have never met a more cultured honorable gentleman. Of the many sides of his character I desire to mention but two, although I could prolong this memorial for many hours by referring to other notable characteristics. Those two are his subtle sense of humor and his stern and unyielding conscience.

When Judge Root left the bench to engage in practice he became a member of a firm by which with other young lawyers I was employed. He soon became our kind and considerate preceptor. He required us to give him a written memorandum citing authorities justifying every step we took. We thought this irksome because just having completed law school we knew what the law was without research. In 1911 Judge Root had delivered the opinion of the Court in an insurance case. A Doctor named Walden being in domestic trouble had bought cyanide potassium in the morning and that afternoon was found dead in his office. Beside him was a solution of the cyanide and a note in which he said "Dear Wife and All. I am

going to leave this earth. * * * I am using cyanide of potassium * * * Pray for me and may God forgive me." Judge Root's opinion held it to be a question for the jury as to whether or not Walden had committed suicide. Of course, we young lawyers discovering this opinion thought that it shook the very foundations of the temple of justice. So it came about that in almost every memorandum we were required to write for Judge Root we would slyly cite the Walden case as authority for something. We had no communication from the Judge about it until he posed a question concerning conflict of laws. At the bottom of his note he stated "it will be interesting to see what bearing the Walden case has on this question."

Of Judge Root's honor and conscience there is nothing more to say except that he guided his conduct as a Judge, a lawyer, and a man by the strictest rules of morality and honor. When he first became a railroad attorney the general policy of all industry was to litigate with every person, employee or otherwise, who was injured in the course of railroad operation. The late Byron Clark, who was Judge Root's Chief, with the full cooperation of Judge Root, worked out a reversal of this system. Both of them believed that industry should recognize meritorious claims, deciding that merit with consideration not alone of negligence but adding to the scale the length of service of an employee, the circumstance of hardship surrounding the situation, and other moral values. In consequence, the railroad which Mr. Clark and Judge Root represented was far in advance in reaching the present attitude of industry that it must treat injured employees and others with full fairness whatever actual technical or legal rights might arise from the situation. This practice is now so universal that it seems strange that thirty years ago an injured employee could usually look forward to a long battle at the end of which both parties lost. This attitude pleased and exhilarated Judge Root

and enabled him to render great service to his client and to the public interest.

Those who did not know Judge Root but who read his opinions whether in the records of this court or in the files of long forgotten cases, will know from that reading that Root was a great man. Those who knew him will never forget him.

Honorable William R. Patrick.

May it Please the Court:

An acquaintance with the late Jesse L. Root that had its beginning over a half century ago, when we were young attorneys in adjoining counties, ripened into a delightful and enduring friendship. As county attorneys for several terms in our respective counties we had considerable contact, and it was also my happy privilege to serve with him in the Senate in the memorable 1907 Legislature. As a member of the judiciary committee, composed entirely of lawyers, his untiring labors and ever wise counsel contributed materially to the stability of every law passed during that session. He knew the daily status of every pending bill, and his wholehearted support could always be counted upon for every right measure, likewise for the defeat of every unworthy trick or scheme, none of which escaped his vigilance.

Senator Root's appointment as a Justice of this Court was a just recognition of his ability and high character, and his splendid record as a judge is the highest testimonial which a just and upright jurist could desire.

Returning to the practice, of the numerous attractive opportunities offered, that of joining his long-time friend, Byron Clark, as a member of the legal department of the Burlington railroad, was the most acceptable, where he remained until the time of his retirement.

Judge Root's sterling qualities and kindly personality commanded the esteem of all who knew him. He was slow to judgment, but had the courage of his convictions,

which he had the happy faculty of maintaining without offense to opponents, or those who disagreed. He was an implacable foe to wrong, but where consistent, preferred to excuse rather than condemn. To him honor was priceless, his given word was sacred, and his religion was manifest in his daily life and conduct. He demanded nothing of others that he was unwilling to concede.

As a lawyer he would not compromise with his convictions.

The following incidents were characteristic: In the trial of an appeal from an award of damages by appraisers in a condemnation proceeding, discovering that the provable facts would not sustain the company contentions respecting damages, he promptly dismissed the appeal.

An only daughter and sole support of an aged mother was killed on a railroad crossing. Clear, convincing evidence relative to the proximate cause of the accident was not available, but instead of rejecting the claim, Judge Root proposed a settlement that brought tears of gratitude to the eyes of the bereaved mother.

No prouder epitaph could be dedicated to the memory of our departed brother, than that he carried his splendid character into every relation of life. A true friend, good neighbor, fine citizen, a kind and affectionate husband, a kind and indulgent parent, whose philosophy of life was firmly based upon the inseparable relation of creed to deed.

Bowing in humble submission to the will of Him who doeth all things well, I feel an abiding assurance that our departed friend is safely within the portals of eternity, in the enjoyment of the full reward of the just.

Associate Justice Ellwood B. Chappell.

As a friend of Judge Jesse L. Root and his family, it is my honor to pay him tribute for the Court.

Such memorial services are not held to mourn the loss of the physical temples of great administrators of

justice, but to extol their virtues and rewrite them upon the pages of judicial history.

In doing so, however, we realize full well that not one whit can be added to their record already lived, written, and spoken.

When Judge Jesse L. Root assumed his duties as a Commissioner of this Court in January 1908, there was important work to be done and much of it. However, he was in the prime of life, strong of body and learned of mind, fit for the grinding, meticulous task confronting him.

He was above all intellectually honest and trustworthy, the first and foremost requirement of a great judge fit to preserve liberty. People generally knew about that quality. He inspired confidence by his modesty and quiet dignity. Justice to him was more important than himself, more important than his own petty desires.

He had many legal friends. By that we mean that he was a friend of the fundamentals of legal lore. He knew about them, and recognized a proposition of law when he saw it. He knew how to apply it, and did apply it with an artistic touch, making the solution appear to be sure and certain, unalterable under the facts and the law.

His opinions reflected Lord Herschel's admonition that: "Important as it is that men should get justice, it is far more important that they see and believe that they are getting it."

In recognition of his great character and judicial ability, he was made an Associate Justice of this Court in December 1908 and served as such until January 1912.

Confronted as he was with almost every conceivable proposition of law, it is interesting to note that from January 1908 to January 1912 he wrote 288 opinions, an average of 6 per month for 48 months. They appear in the Nebraska reports, volumes 80 to 90 respectively.

He was a tireless, patient, sincere laborer, worthy of his hire in the vineyard of justice. He was one who

respected other men's opinions, but had good opinions of his own.

He lived a long and useful life, where Christian ideals marked the eternal quality of his work.

In speaking of his own life, Emerson once wrote: "That which I cannot as yet declare has been my angel from childhood until now. It has separated me from men. It has watered my pillow. It has inspired me with hope. It cannot be defeated by my defeats."

As we affectionately ponder the judicial life and labors of Judge Jesse L. Root, those words seem to reflect one measure of it, because justice is the angel of great judges, and it cannot be defeated by their defeats.

We revere the memory of Judge Jesse L. Root as an honest, fearless, courteous, sincere man, who made the world in which he lived, and the field of law in which he labored, a happier and better domain.

He is another one of those who live on as a judicial example to be emulated by judges who have a passion to live on even after the Great Reaper has taken his harvest.

We have honored ourselves by honoring him.

Chief Justice Robert G. Simmons.

The statements made concerning the life and public service of Judge Jesse L. Root meet the full concurrence of the Court.

We are honored this morning with the presence of 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.

TABLE OF CASES REPORTED

Abbas, Demont v. 765
Abrahamson v. Brown 267
Allen v. Department of Roads and Irrigation 837
Allen, Keyser v. 449
Allen v. Massachusetts Mutual Life Ins. Co. 233
Anderson, In re Estates of 551
Anderson v. Stewart 660
Anson v. Murphy 716
Auker, Roby v. 734
Aurora, City of, Garner v. 295

Backus, County of Sarpy v. 56
Ballantyne, State ex rel. v. Leeman 847
Barry v. Kirkland 839
Bartels, Tesar v. 889
Bartling, State ex rel. Bottcher v. 491
Bauermeister, Glissmann v. 131
Bendfeldt v. Lewis 107
Best & Co., Inc. v. City of Omaha 868
Bleck, Herlan v. 197
Board of Regents v. Gillette 56
Bode v. Prettyman 179, 469
Bollman, Torres v. 762
Bonner v. City of Imperial 721
Boomer, Neff v. 361
Boone County Old Age Assistance Board v. Myhre 669
Bottcher, State ex rel. v. Bartling 491
Brown, Abrahamson v. 267
Buffalo County, Schmehl v. 277, 897
Buffalo, County of, Schmehl v. 277, 897
Buresh v. George 340
Burkhardt v. Cihlar 712

Callaway v. Vance 220
Cattin v. City of Omaha 434
Certain Parcel of Land, Curren v. 477
Charf, Kiihne v. 271
Christensen, Newman v. 471
Cihlar, Burkhardt v. 712
City of Aurora, Garner v. 295
City of Imperial, Bonner v. 721

City of Omaha, Best & Co., Inc. v. 868
City of Omaha, Cattin v. 434
City of Omaha, Frank Bros. Footwear, Inc. v. 888
City of Sutton, Gee v. 603
City of Wayne, Oman v. 303
Colbert v. Miller 749
Cooper v. Marr 211
Co-Operative Refinery Assn., Fentress v. 355
County of Douglas, Dorrance v. 685
County of Douglas, Watson Bros. Realty Co. v. 799
County of Red Willow, Hartford Fire Ins. Co. v. 10
County of Richardson v. Stalder 599
County of Sarpy v. Backus 56
County of Sarpy v. Gasper 51
County of Sarpy v. Prucka 55
Cover, Schwartzkopf v. 460
Cozad v. McKeone 833
Curren v. Certain Parcel of Land 477

Demont v. Abbas 765
Department of Roads and Irrigation, Allen v. 837
Dickman v. Hackney 367
Dorrance v. County of Douglas 685
Douglas, County of, Dorrance v. 685
Douglas, County of, Watson Bros. Realty Co. v. 799
Dowell, In re Estate of 599

Egbert v. Egbert 227
Elliott v. Oakley 556
Employers Mutual Casualty Co., Witthauer v. 728
Engineering Contracting Co., Starr v. 390

Falkner v. Sacks Bros. 121
Fentress v. Co-Operative Refinery Assn. 355
Frank Bros. Footwear, Inc. v. City of Omaha 888

Garner v. City of Aurora 295
Gasper, County of Sarpy v. 51
Gee v. City of Sutton 603
George, Buresh v. 340
Gergen v. Western Union Life Ins. Co. 203
Gillette, Board of Regents v. 56
Glissmann v. Bauermeister 131
Goehner, Pavel v. 384
Goodsell, O'Dell v. 261
Gruber v. Stickelman 627

Hackney, Dickman v. 367
Haffke v. State 83
Hallgren, Williams v. 621
Hansen v. Lawrence 26
Hartford Fire Ins. Co. v. County of Red Willow 10
Hengel v. Nebraska Conference Claimants Society 551
Herlan v. Bleck 197
Hewitt, Rawls v. 160
Holbein v. Holbein 281
Horrigan v. Quinlan 538

Imperial, City of, Bonner v. 721
In re Application of Schwartzkopf 460
In re Application of Union P. R. R. Co. 575
In re Estate of Dowell 599
In re Estate of Johnsen 34
In re Estate of Large 783
In re Estate of Oakley 556
In re Estate of Scoville 415
In re Estate of Simon 382
In re Estate of Vance 220
In re Estates of Anderson 551
Iron Bear v. Jones 651
Iron Bear v. State 634

Jessup v. Wensky 415
Johnsen, In re Estate of 34
Johnsen v. Petersen 34
Johnson, Rein v. 67
Johnson, Sommerville v. 167
Johnson, State ex rel. v. Marsh 1
Joiner v. Pound 321
Jones, Iron Bear v. 651
Jones, McAvoy v. 613
Jones, National City Bank of Cleveland v. 844

Keyser v. Allen 449
Kiihne v. Charf 271
Kirkland, Barry v. 839
Kowalski, Linville v. 402
Kula v. Kula 347

Large, In re Estate of 783
Larson, Sullivan Co. v. 97
Lawrence, Hansen v. 26
Leeman, State ex rel. Ballantyne v. 847

Leeman v. Vocelka 702
Lefferdink v. Schmutte 695
Lewis, Bendfeldt v. 107
Lincoln Federal Labor Union v. Northwestern Iron and Metal Co. 507
Linville v. Kowalski 402
Lisco, Olson v. 314
Little v. Simon 382
Loup River Public Power District, Middle Loup Public Power and Irrigation District v. 810
Loup River Public Power District, North Loup River Public Power and Irrigation District v. 823
Lukovsky, Severin v. 113

Madgett v. Madgett 41
Marr, Cooper v. 211
Marsh, State ex rel. Johnson v. 1
Massachusetts Mutual Life Ins. Co., Allen v. 233
McAvoy v. Jones 613
McKeone, Cozad v. 833
McNeel, Shipley v. 790
McNeel, Shipley v. 793
Melcher v. Murphy 541
Middle Loup Public Power and Irrigation District v. Loup River Public Power District 810
Miller, Colbert v. 749
Miller v. Stolinski 679
Murphy, Anson v. 716
Murphy, Melcher v. 541
Myhre, Boone County Old Age Assistance Board v. 669

National City Bank of Cleveland v. Jones 844
Nebraska Conference Claimants Society, Hengel v. 551
Nebraska Power Co., Werner v. 408
Nebraska State Bar Assn., State ex rel. v. Niklaus 859
Nebraska State Railway Commission, Union P. R. R. Co. v. 575
Neff v. Boomer 361
Newman v. Christensen 471
Niklaus, State ex rel. Nebraska State Bar Assn. v. 859
North Loup River Public Power and Irrigation District v. Loup River Public Power District 823
Northwestern Iron and Metal Co., Lincoln Federal Labor Union v. 507

Oakley, Elliott v. 556
Oakley, In re Estate of 556
O'Dell v. Goodsell 261
Olson v. Lisco 314

Olson v. Roscoe 189
Omaha, City of, Best & Co., Inc. v. 868
Omaha, City of, Cattin v. 434
Omaha, City of, Frank Bros. Footwear, Inc. v. 888
Oman v. City of Wayne 303
Osborn, Stubblefield v. 566

Pavel v. Goehner 384
Penrod, Whitney v. 636
Petersen, Johnsen v. 34
Poulson, Thomas v. 44
Pound, Joiner v. 321
Prettyman, Bode v. 179, 469
Price v. Shiels 330
Prucka, County of Sarpy v. 55

Quinlan, Horrigan v. 538

Rawls v. Hewitt 160
Red Willow, County of v. Hartford Fire Ins. Co. 10
Rein v. Johnson 67
Richardson, County of v. Stalder 599
Roby v. Auker 734
Roscoe, Olson v. 189

Sacks Bros., Falkner v. 121
Sarpy, County of v. Backus 56
Sarpy, County of v. Gasper 51
Sarpy, County of v. Prucka 55
Schmehl v. Buffalo County 277, 897
Schmutte, Lefferdink v. 695
Schwartzkopf v. Cover 460
Schwartzkopf, In re Application of 460
Scoville, In re Estate of 415
Severin v. Lukovsky 113
Shiels, Price v. 330
Shipley v. McNeel 790
Shipley v. McNeel 793
Simon, In re Estate of 382
Simon, Little v. 382
Sommerville v. Johnson 167
Sporcic v. Swift & Co. 246, 489
Stalder, County of Richardson v. 599
Starr v. Engineering Contracting Co. 390
State ex rel. Ballantyne v. Leeman 847
State ex rel. Bottcher v. Bartling 491

State ex rel. Johnson v. Marsh 1
State ex rel. Nebraska State Bar Assn. v. Niklaus 859
State, Haffke v. 83
State, Iron Bear v. 634
State, Wilshusen v. 594
State, Yost v. 584
Stewart, Anderson v. 660
Stickelman, Gruber v. 627
Stolinski, Miller v. 679
Stubblefield v. Osborn 566
Sullivan Co. v. Larson 97
Sutton, City of, Gee v. 603
Swift & Co., Sporcic v. 246, 489

Tesar v. Bartels 889
Thomas v. Poulson 44
Torres v. Bollman 762
Tuttle v. Wyman 769
Tuttle v. Wyman 783

Union P. R. R. Co., In re Application of 575
Union P. R. R. Co. v. Nebraska State Railway Commission 575
Urban v. Urban 757

Vance, Callaway v. 220
Vance, In re Estate of 220
Vocelka, Leeman v. 702

Wade v. Wade 502
Watson Bros. Realty Co. v. County of Douglas 799
Watters, Wilderman v. 102
Wayne, City of, Oman v. 303
Wensky, Jessup v. 415
Werner v. Nebraska Power Co. 408
Western Union Life Ins. Co., Gergen v. 203
Whitney v. Penrod 636
Wilderman v. Watters 102
Williams v. Hallgren 621
Wilshusen v. State 594
Witthauer v. Employers Mutual Casualty Co. 728
Wray v. Wray 376
Wyman, Tuttle v. 769
Wyman, Tuttle v. 783

Yost v. State 584

CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

SEPTEMBER TERM, 1947

STATE OF NEBRASKA EX REL. WALTER R. JOHNSON, ATTORNEY GENERAL, PLAINTIFF, V. FRANK MARSH ET AL., DEFENDANTS.
29 N. W. 2d 799

Filed December 2, 1947. No. 32364.

1. **Constitutional Law.** In the interpretation of a constitution, its terms must be taken in their ordinary and common acceptation in such manner as to express the intent of its framers and of the people who adopted it.
2. ———. In the interpretation of a constitution, a specific clause will be made effective as against a general clause in such manner as to give meaning to both, and the language of the specific clause will not be restricted by the general language, unless thereby the plain intent of the framers of such clauses and of the people who adopted them is thereby thwarted.
3. ———. Section 3 of article XVII of the Constitution of Nebraska is a specific clause, restricting, to the extent therein expressed, the scope of section 19, article III, and, together with other provisions of the Constitution, allows the Legislature to fix the salary of any officer named therein in the first instance to begin at any time.
4. **Statutes.** If a statute is ambiguous or susceptible of more than one meaning, it is to be given that meaning that will best effect its purpose, and which will, if reasonable, render it valid.

Original proceeding by the State on the relation of the Attorney General against Frank Marsh et al. *Judgment for defendants.*

Walter R. Johnson, Attorney General, and *Clarence S. Beck,* for plaintiff.

Clarence A. Davis, for defendant Judges, and *Guy C. Chambers,* for defendant Governor.

Heard before TEWELL, LIGHTNER, LANDIS, KROGER, FALLOON, POLK, and ENGLISH, District Judges.

TEWELL, District Judge.

This action was begun in this court. State of Nebraska ex rel. Attorney General, is the only plaintiff, and the Secretary of State, the Auditor of Public Accounts, the State Treasurer, the Governor, and each of the seven members of the Supreme Court are the only defendants. The plaintiff asks for a declaratory judgment that will determine the duties of the first three defendants above named, and the rights and duties, if any, of the other eight defendants under chapter 345 of Session Laws of Nebraska, 1947. This act purports to raise the annual salary of the Governor and of each member of the Supreme Court, and to cause the change in salary to become operative immediately upon the act becoming effective. Due to the allegations and admissions in the pleadings, together with facts of which we may take judicial notice, there is no conflict upon any question of fact. The question presented is purely one of law. Since each of the seven members of the Supreme Court has a pecuniary interest in the result of this action, seven district judges were called, under a provision of the state Constitution, to constitute the court.

To make clear the issue presented, we deem it advisable to quote from certain sections of the state Constitution, as well as the first two sections of the act above mentioned. Such sections of the Constitution are as follows:

Article III, section 19. "The Legislature shall never grant any extra compensation to any public officer,

agent or servant after the services have been rendered nor to any contractor after the contract has been entered into, nor shall the compensation of any public officer, including any officer whose compensation is fixed by the Legislature subsequent to the adoption hereof be increased or diminished during his term of office."

Article V, section 13. "The chief justice, the judges of the Supreme Court and the judges of the district court shall receive such salaries as may be provided by law."

Article XVII, section 3. "Until otherwise provided by law the following salaries shall be paid: Chief Justice, Judges of the Supreme Court and Governor, each $7,500 per annum * * *."

The first two sections of the act above mentioned read as follows: Section 1. "The Legislature hereby exercises the right conferred upon it by Section 3, Article XVII, of the Constitution of Nebraska, to provide for the salaries to be paid to certain constitutional officers. Such salaries from and after the effective date of this act shall be as follows: Chief Justice and Judges of the Supreme Court each eight thousand five hundred dollars per annum and Governor ten Thousand dollars per annum. Such salaries shall be payable in equal monthly installments."

Section 2. "Section 1 of this act shall be so interpreted as to effectuate its general purpose to provide, in the public interest, adequate compensation as therein provided for the several public officers therein named, and to give effect thereto as soon as such section may become operative under the Constitution of the State of Nebraska."

The Legislature in its regular session in the year 1933 purported to pass its Senate File No. 52. The purported act that resulted from such passage appears as chapter 63, Session Laws 1933. By this bill the Legislature attempted to decrease the salaries of the Governor, members of the Supreme Court, district judges,

the Attorney General, Secretary of State, and many other state officers, and to make the decrease operative immediately upon the passage of the bill. At the time of the passage of this bill, some of the officers whose salary it sought to decrease were drawing a salary fixed by section 3, article XVII, of the Constitution, hereinbefore partly quoted, and some were drawing a salary theretofore fixed by statute subsequent to the adoption of said constitutional provisions. This purported act was declared null and void for the reason that its passage was prohibited by certain inhibitions of the Constitution. State ex rel. Randall v. Hall, 125 Neb. 236, 249 N. W. 756; State ex rel. Taylor v. Hall, 129 Neb. 669, 262 N. W. 835; State ex rel. Day v. Hall, 129 Neb. 699, 262 N. W. 850. These cases will hereinafter be briefly mentioned. Aside from the attempted passage of said Senate File No. 52 the Legislature has never attempted to fix the salary of the Governor or members of the Supreme Court until its enactment of said chapter 345, in the year 1947. Due, perhaps, to some unnecessary language used in the opinions in the three cases last above cited, uncertainty as to the duties and rights of the various defendants herein has been brought about. From such uncertainty the controversy involved in this action has arisen. From what date shall the Governor and members of the Supreme Court begin to receive the increase in salary provided by the above-mentioned chapter 345? That is the sole question presented for our determination.

It is not necessary to devote much space herein to a discussion of rules relating to the interpretation of the provisions of a constitution. The portions of such rules as are here involved are too well-settled to justify such action. In the interpretation of a constitution, its terms must be taken in their ordinary and common acceptation in such manner as to express the intent of its framers and of the people who adopted it. 12 C. J., § 43, p. 700; Hamilton Nat. Bank v. Amer-

ican Loan and Trust Co., 66 Neb. 67, 92 N. W. 189; Elmen v. State Board of Equalization and Assessment, 120 Neb. 141, 231 N. W. 772; Mekota v. State Board of Equalization and Assessment, 146 Neb. 370, 19 N. W. 2d 633.

As a necessary and logical corollary to the general rule of construction above set forth, it follows that in the interpretation of a constitution, a specific clause will be made effective as against a general clause in such manner as to give meaning to both, and the language of the specific clause will not be restricted by general language, unless thereby the plain intent of the framers of such clauses and of the people who adopted them is thwarted. 12 C. J., § 57, p. 709; Elmen v. State Board of Equalization and Assessment, *supra.*

Applying the above rules of construction to the clauses of our state Constitution, that are above quoted, it seems clear that section 3, article XVII, is a specific clause restricting, to the extent therein expressed, the scope of section 19, article III. If otherwise, what logical meaning can be given to the words "Until otherwise provided by law" in said section 3, article XVII? By section 13, article V, above quoted, the power to fix the salaries of members of the Supreme Court is granted to the Legislature. If the words "Until otherwise provided by law" are not construed to restrict the scope of section 19, article III, in such manner as to allow the Legislature, at its first session after the adoption of such constitutional provisions, or at any other time, in the first instance, and for its first time, to fix the salary of the Governor and of the Supreme Court, then it must necessarily follow that the Legislature could not change the salary of such officers during the term of office that was existing when such provisions of the Constitution were adopted. Such a construction would place a restriction upon the power granted by section 13, article V, *supra,* when no such restriction is even implied therein, and none made

necessary to give full force and effect to the intent of the other constitutional provisions above quoted. The main intent and purpose of the restrictions contained within section 19, article III, *supra,* are of course, to aid in maintaining a separation of the executive, legislative, and judicial branches of our government. Such a provision is one of the oldest of the "checks and balances" provided in the federal Constitution and in the Constitutions of most, if not all, of the states. If the Legislature can control the salary of the Governor and members of the judiciary, at will and at any time, then it has a great power toward controlling their will. To place the construction upon the constitutional provisions above quoted for which the plaintiff contends, would not aid in preserving the benefits that section 19, article III, was intended to bestow, and would violate section 13, article V, *supra.*

We are aided in construing the above-quoted provisions of the Constitution by matters extrinsic the instrument itself. It has been held that this court may take judicial notice of the proceedings of the Constitutional Convention at which the sections of the Constitution above quoted were framed. Elmen v. State Board of Equalization and Assessment, *supra.* The reports of committees, debates and colloquys between the members, all relative to the phraseology of the provisions of the Constitution above quoted are too voluminous to quote to any great extent here. None of these do other than to show an intent to allow the Legislature to fix the salary of the officers named in section 3, article XVII, *supra,* in the first instance at any time it saw fit after the provisions above quoted were adopted. We refer the reader to the proceedings of the Constitutional Convention, 1919-1920. We quote a statement of Mr. Louis J. TePoel, who for many years was Dean of the Law College of Creighton University, and who as a member of the Constitutional Convention spoke upon a motion that dealt with the coordination

of the constitutional provisions above quoted as follows: "I have but a word or two to say on this question and that is to remove a possible false impression or mistake that might be gathered from the remarks of the gentleman who just spoke, who said that we are going before the people with a proposition that would fix the salary for a long time. If you will observe Section 13, a section of only five lines, and the first five words of that section are these 'until otherwise provided by law.' That proposal left this open for the legislature to fix the salary at what the legislature thinks it should be at any time that it may see fit to change." Proceedings of the Constitutional Convention, 1919-1920, p. 1598. The ballot that was submitted to the people in the election in which all of the above-quoted provisions of the Constitution were adopted contained the following with reference to section 3, article XVII: "Fixes salaries of State officers including Judges of the Supreme and District Courts, effective until changed by the legislature." Proceedings of the Constitutional Convention, 1919-1920, p. 2835.

Problems quite similar to the one before us have been before courts of states other than Nebraska. We do not consume the space in this opinion that would be required to discuss the cases in which these problems have been handled by other courts. We merely cite some of these cases as follows: Stone, Auditor of Public Accounts v. Pryor et al., 103 Ky. 645, 45 S. W. 1053; State ex rel. Wells v. Tingey, State Auditor, 24 Utah 225, 67 P. 33; Boyce, State Auditor v. Hunt, 20 Ariz. 412, 181 P. 184; Henry, County Treasurer v. State ex rel. Hartsfield, 218 Ala. 71, 117 So. 626; State ex rel. Dwyer v. Nolte, Comptroller, 351 Mo. 271, 172 S. W. 2d 854; Almon v. Morgan County, 245 Ala. 241, 16 So. 2d 511. The holdings in these cases support the conclusion herein reached. We have not found any case holding otherwise.

Another contention of the plaintiff is to the effect that the provisions of section 1 of chapter 345, Laws

1947, above quoted is inconsistent with section 2 thereof, in that section 1 states "from and after the effective date of this Act" while section 2 states "as soon as such section may become operative." This act did not contain an emergency clause. Under the Constitution it became effective three months after the Legislature adjourned. Such adjournment was on June 6, 1947. The act, therefore, became effective on September 7, 1947. We cannot see any inconsistency in these two provisions. It is no doubt true that "effective" and "operative" may have different meanings, but even so, section 2 does not limit or restrict section 1. Section 2 can logically be interpreted as being a legislative declaration of its interpretation of the provisions of the Constitution above quoted, or it can logically be interpreted as a savings clause to the effect that if it be held that the increased salaries could not be paid during then existing terms of office, that then section 1 would not be declared void but should become operative upon the beginning of the first future term of office. If a statute is ambiguous or susceptible of more than one meaning, it is to be given that meaning that will best effect its purpose, and which will, if reasonable, render it valid. 59 C. J., § 571, p. 963. Either of the meanings of section 2 above suggested does not modify the plain intent of section 1. In this connection it is of interest to note that sections 3 and 4 of said chapter 345 make provision for an increase in salary for district judges, but expressly provide that the increase shall not become effective until after the expiration of the present terms of such judges. The Legislature in the year 1945 had once before fixed the salary of district judges. Laws 1945, c. 58, § 1, p. 251.

While the subjects treated in the three cases of State ex rel. Randall v. Hall, State ex rel. Taylor v. Hall, and State ex rel. Day v. Hall, *supra,* are not within the scope of our inquiry, we deem it advisable to make some remarks with reference thereto. We have no quarrel

with the final result reached in any of these cases. In the opinion in the Taylor case, and also in the Day case, the members of the Supreme Court are designated as a class. Contention was made to the effect that if chapter 63, Laws 1933, could not become effective at once, it should otherwise be declared valid and allowed to affect the salaries of Supreme Court judges elected for future terms. To answer this contention it was held that such a holding would violate the constitutional provision prohibiting class legislation. We do not desire to have this opinion ever regarded as approving any such reasoning. Said chapter 63 was plainly void for other reasons given in those opinions, even as to the salaries of members of the Supreme Court, and the holding relative to class legislation was wholly unnecessary to support the final result. Such reasoning was unfortunate, because of the future uncertainty thereby given birth. It would render future changes in the salary of many state officers impossible for all useful or practicable purposes. It is not within the scope of the issue presented in this case to disapprove such reason for declaring said chapter 63 void, but in approving the final result in the three cases last above mentioned we expressly do not approve such reasoning as to class legislation. In the briefs submitted in the three cases last above mentioned the proceedings of the Constitutional Convention, 1919-1920, were not mentioned.

For reasons above given it is declared that the increase in salary of the Governor and of the members of the Supreme Court became both effective and operative as of September 7, 1947; that it is the duty of those defendants herein upon whom the statutes place the burden of paying the salary of the Governor and members of the Supreme Court to pay such increased salary from and after September 7, 1947; and that it is both the duty and the right of the Governor and members of the Supreme Court to receive such increased salary. The costs of this action are taxed to the plaintiff.

JUDGMENT FOR DEFENDANTS.

HARTFORD FIRE INSURANCE COMPANY, APPELLEE, V. COUNTY OF RED WILLOW, NEBRASKA, APPELLANT.
30 N. W. 2d 51

Filed December 5, 1947. No. 32265.

1. **Negligence.** Contributory negligence, in its legal signification, is such an act or omission on the part of a plaintiff, amounting to a want of ordinary care, as, concurring or cooperating with the negligent act of the defendant, is a proximate cause or occasion of the injury complained of.
2. ———. The mere fact that contributory negligence may be pleaded as a defense does not justify the submission of that issue to the jury where there is no evidence to support it.
3. ———. Ordinarily, contributory negligence is a question for the jury; but, where there is no basis in the evidence for a finding of contributory negligence, it is error to instruct on the subject and thereby to submit to the jury an issue which is outside the evidence.

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

Charles E. McCarl, for appellant.

Colfer, Russell & Colfer, for appellee.

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

PAINE, J.

Plaintiff brought suit against Red Willow County for $576.74, damages to an automobile, which were caused by its falling into a hole in a public road, plaintiff being compelled to pay said sum by reason of being the insurance carrier. At the close of all the evidence, the plaintiff moved to discharge the jury and direct a verdict for the plaintiff, which motion was sustained, and defendant appealed.

The plaintiff alleged that the defendant, Red Willow County, is duly organized under the laws of Nebraska, and is not under township organization; that there is a public road running east and west between Sections

4 and 9, all in Township 1, Range 28, Red Willow County, Nebraska, which public road had been worked and maintained by the defendant county, which is liable to keep said road in repair.

It is further alleged that one Wilson Coghill was driving his 1940 Chrysler sedan, on September 10, 1946, about 6:30 p. m., between Sections 4 and 9, and at the southwest corner of Section 4 he turned to the right, which was to the north, on the public road, and the automobile was precipitated into a hole or depression, about 8 feet deep and 30 feet in diameter, which hole or depression was completely hidden from sight and view of travelers on said road, which wrecked and damaged the automobile; that the defendant county through its employees had notice and knowledge of the defect in the highway, but willfully and negligently permitted said road to remain in a state of bad repair, and negligently omitted to fill it up, or provide barricades to warn travelers of the danger; that the plaintiff is engaged in the business of insuring automobiles against such damage and loss, and was compelled to pay the owner of said automobile the sum of $576.74, whereupon the owner executed a certain subrogation receipt, attached to and made a part of the petition, thus making the plaintiff the owner and holder of a claim against the defendant county for said sum, no part of which has been paid, and judgment was demanded.

The answer of the defendant county is a denial of many of the allegations in the petition, followed by an allegation that whatever injury, damage, or loss Wilson Coghill sustained by driving his automobile into the hole in the road was occasioned by his gross negligence, which was the proximate cause thereof; that he failed to keep a proper lookout ahead for defects in the highway, that his automobile was not under proper control so that he was able to stop within the

area of his vision, and that he failed to maintain proper brakes. The reply was a general denial.

The defendant assigned as error the refusal of the court to submit the issues to a jury, and the entering of a judgment for the plaintiff.

The evidence disclosed that Wilson Coghill lived in defendant county about one mile west of the town of Marion, which is a mile north of the Kansas line, and that the place of the accident is about four miles north of Marion and fifteen miles southeast of McCook, the county seat of defendant county. Coghill, with his wife and son, was driving west on this county road at about ten miles an hour, and turned toward the north on a public road which was very little used, and within a few feet after turning to the north his left front wheel slipped or dropped into a hole in the highway, causing the car to turn over on its top. The automobile was badly damaged, the itemized exhibit A showing the largest item being $125 for a new top, the total of all the damages amounting to $626.74, but the policy had a $50 deductible clause attached to it, so that the plaintiff insurance company was compelled to pay the owner of the car but $576.74, and thereupon became subrogated to his claim against the county.

The driver of the car testified that there were no barriers shutting off the road; that the weeds grew very high on the west side of this hole, casting a shadow over the road at that time of day; that he had no knowledge that there was a hole there until his left front wheel dropped into it. He testified that the sun did not interfere with his vision.

George Whisler, a witness for the plaintiff, testified that he lives some 300 yards east of the hole, and was watching out of his window and saw the car fall over into the hole, and went right out to see if somebody was caught under the car. He had lived there about eight or ten years, and there had been a hole there for several years, but there was a track around it. He

testified that the pictures introduced in evidence, showing the growth of weeds, tall sunflowers, etc., on both sides of the road, correctly represented the condition at the time of the accident. He further testified that one Bob Puelz had fallen into the hole some three months before.

The quarter of land, adjoining this hole, where Mr. Whisler lived was farmed to wheat by Rudolph Schultz, who testified that at harvest time he had had a talk with L. E. Nokes, in which he told him they were going to harvest the wheat and they wanted to haul it over that road; that it had a high center, and he wanted him to come out and drag the ridges down, and probably three days later, which would have been early in July 1946, they came out and worked the road some. He testified as to the washout in the road in the corner; that while the hole was seven to ten feet deep there was still room for a car to squeeze by; that after they had hauled out wheat, there were rains. He testified that there was no barricade, flag, or warning sign to indicate that there was a hole in the road.

The county called but two witnesses, Myron Bennett, who ran the road maintainer, and L. E. Nokes, in whose commissioner district the place of the accident is located. Myron Bennett, who lives at Danbury, which is five miles east and two miles south of the hole in question, testified that he recalled smoothing up the road at the place of the accident during harvest time in July. His machine is a 74-horsepower motor, and has a 12-foot blade on it, and he was at this place twice about a week apart in July. On cross-examination he testified that he noticed this washout, about 15 or 16 feet from a cornerpost, and he attempted to push some dirt off into it with his blade, but did not fill it up. He was just taking out the high center.

L. E. Nokes, one of the three county commissioners, testified that there are about 570 miles of road in his commissioner district to maintain and supervise. He

testified that he could not recall whether anyone had ever given him notice that any part of the road in question was dangerous to travel.

Frederick Schultz, son of Rudolph Schultz, testified for plaintiff that he had lived in the neighborhood all his life and that this hole had been there five or six years; that there was considerable drainage from the north and northeast running down into that hole, and every time it rained "it would wash out a little bit bigger."

Sheriff Emmett L. Trosper, called by plaintiff, testified that he went out the next morning and took pictures of the hole and of the car on its top down in the hole. He testified that the hole was eight to ten feet deep and fifteen feet wide.

The trial court sustained the motion of the plaintiff for a directed verdict, and thereupon gave the jury one instruction, reading as follows: "Gentlemen of the jury, a motion has been made by the plaintiff that this matter be taken away from the jury and that a directed verdict be given to the plaintiff. On consideration of that motion, the court finds that the evidence here is conclusive that there existed a defect in the road at the south end of the road there between sections four and five in township one, range 28; that that defect was known to have existed at least during the middle of July, 1946, by reason of the fact that one of the county's employees came there to work the road. The county employee said that he tried to make the road safe for the Schultz's, but he placed no barriers or no warning signs to the general public of the defect. The road was open to travel. There were no barriers in any way at either end of the road. There were no barriers placed at the particular hole. The evidence shows that Mr. Coghill entered upon this road driving slowly, or as we say in legal language, was taking due care. There was no contributory negligence on his part. It is true that there is some evidence that Mr. Coghill

made the statement that he might have been blinded by the sun, but, as you know, he stated that he turned his car to the northwest and as he drove, he was driving about ten miles an hour. From that evidence, it is very clear that he was driving as any ordinary, prudent person would have done under the circumstances, and he dropped into the hole. Further, we find that there is no question whether the county had notice. There is no question as to whether or not Mr. Coghill was guilty of any contributory negligence. There is no question but what he was using due care, and further, there is no conflicting testimony as to the reasonable value of repairing Mr. Coghill's car. There is no testimony offered against the testimony that was offered by the plaintiff. Therefore, it leaves no question for the jury to determine, no question of fact, and under the circumstances, the court has directed a verdict in favor of the plaintiff and entered judgment in the sum of $576.74. Therefore, at this time you are excused from further service."

The answer of the defendant county charges that the damages sustained by Coghill were occasioned by his gross negligence, in that he failed to keep a proper lookout for defects in the highway, and did not have his automobile under proper control so that he was able to stop within the area of his vision. The assignment of error rests upon the single fact that, the driver of the car being negligent, it was error for the court to fail to submit the question of negligence and contributory negligence to the jury.

Although the defendant charged negligence in its answer, it produced no witness who testified to any negligence whatever on the part of the driver of the car.

The evidence of plaintiff shows that Mr. Coghill was driving his car along the public road slowly, at a speed he testified as not to exceed ten miles an hour; that at that time in the afternoon, as he was driving west, the sun was about an hour high, but the defend-

ant's attorney on cross-examination could not bring out that it interfered in any way with his vision; however, that would be immaterial, for at the time of the accident he had turned his car toward the north. The rays of the sun struck the rank growth of sunflowers and tall weeds along the west side of this little-used road and shaded the east edge of the washout, which the pictures indicate just barely took out the left track of the road, not reaching to the center of the road, and the sunflowers hid the great hole, eight to ten feet deep and 15 to 20 feet across, out where the ditch at the side of the road would ordinarily be. Would this not constitute a trap to the driver of the car? The evidence shows that he was not familiar with this road and knew nothing whatever of this great washout behind the rank growth of weeds at the side of the road at this place, and there is no evidence to show that he was not driving with the ordinary care required of him at the time.

Exhibit No. 1 is a picture taken by the sheriff the next day from about 25 feet south and east of the hole, and it does show a small hole in the left side of the road, reaching over the left track, but we must consider that when this picture was taken the sun was shining directly on the hole, while at about 6:30 the evening before the tall weeds along the west side would have cast a shadow, which doubtless would entirely conceal the hole from casual observation of an ordinary driver.

It is argued that the sun blinded the driver of the car, and this requires an examination of his testimony, as follows: Wilson Coghill, on direct examination: "Q- Where was the sun about that time, if you remember? A- Oh, I would say about an hour high, if that is an answer. Something like that." On cross-examination: "Q- And you say the sun was about an hour high? A- I'd imagine. Q- Now, was that sun directly in front of you or not? Q- (sic) Well, when do you mean? As long as I was driving straight west, it was. I don't know whether

it quite was. I imagine it was a little south at that time of the year. Q- Did it interfere with your vision at all? A- Not any more than the sun would any time during that time of the afternoon. Q- It was pretty much straight ahead of you before you made the turn? A- Before I turned, I think it was pretty well straight in front of me."

George Whisler saw the top of the car disappear into the hole and went right out; then Coghill was still in the car, which was upside down. On cross-examination Whisler was asked: "Q- Did he say anything about the sun blinding him at about that time? A- I don't know that he did. He said something about the sun sort of blinded him or affected his seeing the road or something. I don't just recall the words."

Do such statements, found only in the cross-examination of these two witnesses, constitute competent evidence of any negligence on the part of the driver of the car? In the opinion of the trial court, it was not sufficient to require the submission of the issue of contributory negligence to the jury, and with that we agree.

However, as the defendant county argues as its first proposition of law that there was some evidence of contributory negligence, and the failure to submit that issue was reversible error, we will discuss that question.

"Contributory negligence, in its legal signification, is such an act or omission on the part of a plaintiff, amounting to a want of ordinary care, as, concurring or cooperating with the negligent act of the defendant, is a proximate cause or occasion of the injury complained of. To constitute contributory negligence there must be a want of ordinary care on the part of the plaintiff, and a proximate connection between that and the injury." Beach, Contributory Negligence (3d ed. rev.), § 7, p. 7.

The law relating to this question is found in section 25-1151, R. S. 1943, which, after providing that contributory negligence shall not bar a recovery in all cases, ends with the statement, "and all questions of negli-

gence and contributory negligence shall be for the jury." But, notwithstanding the provisions of this statute, the first question is one for the court to determine, i. e., whether or not the evidence as a matter of law is sufficient to warrant the submission of that issue to the jury.

In Cotten v. Stolley, 124 Neb. 855, 248 N. W. 384, this court said: "Is the evidence in this case, which establishes that Alta Cotten was walking either upon the right-hand side of the pavement or upon the graveled shoulder to said pavement, proof of contributory negligence on her part? There is no presumption of contributory negligence in this case."

"*Held,* That there was no proof of contributory negligence on the part of the plaintiff to submit to the jury." City of Wahoo v. Reeder, 27 Neb. 770, 43 N. W. 1145.

In Andersen v. Omaha & C. B. Street Ry. Co., 116 Neb. 487, 218 N. W. 135, this court said: "It follows that, where there is evidence of defendant's negligence but no evidence of plaintiff's contributory negligence, no instruction on comparative negligence should be given to the jury."

"The mere fact that contributory negligence may be pleaded as a defense does not justify the submission of that issue to the jury where there is no evidence to support it. Koehn v. City of Hastings, 114 Neb. 106, 206 N. W. 19." Stephenson v. De Luxe Parts Co., 133 Neb. 749, 277 N. W. 44.

"In every case, before the evidence is submitted to the jury, there is a preliminary question for the court to decide, when properly raised, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the burden of proof is imposed." Fairmont Creamery Co. v. Thompson, 139 Neb. 677, 298 N. W. 551.

In Allen v. Clark, 148 Neb. 627, 28 N. W. 2d 439, in which plaintiff was a guest in an automobile and was injured by being struck by another automobile, the

answer charged that the plaintiff, who was in the back seat, was negligent in remaining in the stalled car, when he had ample time to get out of the car. This court held that there was no evidence to support a defense of contributory negligence, and therefore it was reversible error to have submitted that question to the jury in instruction No. 11.

"In determining whether a plaintiff has been guilty of contributory negligence as a matter of law, * * * where the evidence in a case fails to disclose negligence on the part of the plaintiff, it is entirely proper for the trial court to refuse to submit to the jury the issue of contributory negligence." 38 Am. Jur., Negligence, § 348, p. 1054.

The true rule should be, for it is supported by a long line of opinions, that, ordinarily, contributory negligence is a question for the jury; but, where there is no basis in the evidence for a finding of contributory negligence, it is error to instruct on the subject and thereby to submit to the jury an issue which is outside the evidence. See Koehn v. City of Hastings, *supra;* Andersen v. Omaha & C. B. Street Ry. Co., *supra;* Guile v. Greenberg, 192 Minn. 548, 257 N. W. 649; Hammond v. Monmouth County, 117 N. J. Law 11, 186 A. 452; Hague v. Valentine, 182 Va. 256, 28 S. E. 2d 720; Adkins v. Raleigh Transit Co., 127 W. Va. 131, 31 S. E. 2d 775.

In conclusion, all that the law required of plaintiff was that he exercise ordinary and reasonable care for his own safety under the circumstances surrounding him.

"The test always is, was he at the time of the accident using such care as a prudent man in such an occupation ordinarily uses, considering the time, place, condition of the highway, the weather, the vehicle used, and the presence of other persons?" 5 Blashfield, Cyclopedia of Automobile Law and Practice (Perm. ed.), § 3312, p. 441.

The accident in this case is one which could happen without any fault or negligence on the part of the driver

of the car. There is nothing about the facts shown in the evidence which raises any presumption of negligence, or want of care, on the part of the driver of the car, and the judgment is hereby affirmed.

AFFIRMED.

SIMMONS, C. J., dissenting.

I dissent. The defendant presents and argues three questions. These must be answered contrary to defendant's contentions if the judgment of the trial court is to be affirmed. The majority neither mentions nor answers two of the questions. The answer given to one is erroneous in my opinion.

Plaintiff alleged that the car involved in this accident was being driven with due care and under proper control when it was "thrown and precipitated" into a hole in the road which was "completely hidden" from the sight and view; that the defendant county had notice or with the exercise of reasonable diligence could have known of the want of repair of the road; and that it negligently failed to render the road safe for travelers or to provide barricades.

The defendant answered, admitting its corporate capacity, denying generally, and pleading that whatever damages occurred to the automobile were caused by the gross negligence of the driver which contributed directly thereto and was the proximate cause of the accident. The reply was a denial of allegations in the answer which were not admissions of allegations of the petition.

Plaintiff in its motion for a directed verdict contended first that the evidence showed conclusively negligence of the defendant county in maintaining the road and notice to the county, and that there was lack of evidence of contributory negligence of the driver of the car.

The trial court held that there was no issue of fact to be submitted to the jury and directed a verdict in plaintiff's favor.

By motion for a new trial the defendant contended, among other things, that the court erred in not sub-

mitting these three issues to the jury: (a) The contributory negligence of the driver of the car; (b) the negligence of the defendant in failing to use reasonable and ordinary care in the maintenance of the road; and (c) the knowledge or lack of knowledge of the defendant as to the defective or dangerous condition of the road.

By its brief here the appellant states the above as the three questions involved, and assigns as error the refusal of the court to submit the issues to the jury and in directing a verdict for the plaintiff. Defendant by its brief argues the three propositions. The plaintiff in its brief states that the above questions are involved and argues them. In the face of this record, the majority opinion states that "The assignment of error rests upon the single fact that, the driver of the car being negligent, it was error for the court to fail to submit the question of negligence and contributory negligence to the jury." I submit that the assignment is not so limited.

The majority decides that there was no evidence of negligence on the part of the driver of the car sufficient to take the case to the jury, and affirms the judgment without stating or answering the other two questions involved. These two undetermined contentions become important in view of the evidence offered by plaintiff that in July 1946, preceding this accident in September 1946, there was a small hole in this roadway; that the road was worked and made passable at that time; that rains subsequent thereto caused the much larger washout. I find no evidence as to the time when the washout occurred which produced the hole into which the car was driven. I find no evidence of notice to any county official, or knowledge by anyone of the condition of the road that arose subsequent to the July operations, and which existed at the time of the accident. An answer to these questions is required if this judgment is to be affirmed.

But, as I see it, the judgment must be reversed for

failure to submit the issue of contributory negligence to the jury.

The majority states that the defendant produced no evidence of negligence on the part of the driver of the car. The rule is: "If contributory negligence is relied upon by defendant as an affirmative defense, the burden is upon him to prove it by a preponderance of the evidence pertinent to that issue contained in the whole record, except insofar as the same may appear in evidence adduced for plaintiff." Meyer v. Platte Valley Construction Co., 147 Neb. 860, 25 N. W. 2d 412.

What, then, is the evidence as adduced for the plaintiff, bearing on the question of contributory negligence?

There was a "main-traveled" road, a "good traveled road" running east and west. The pictures show it to be graded and without distinct tracks from shoulder to shoulder. Branching off this road in a northwest direction is a road described in the evidence as "slightly-used," a "trail," "just two tracks." The pictures show it to be two tracks with low weeds between the tracks and at points across them as the tracks lead to the hole from the main-traveled highway. The hole was from 30 to 50 feet north of the turn from the main-traveled highway.

Now, what about the hole which the majority describes as a "small hole in the left side of the road, reaching over the left track" and which "just barely took out the left track of the road, not reaching to the center of the road." The evidence shows the hole to be from eight to ten feet deep and from 15 to 20 feet wide. From the direction in which the car was traveling, plaintiff's pictures show that the "small hole" took out the entire left track for a distance of several feet. Another picture shows that it extended across and up to, if not actually into, the right track. The sheriff testifying for the plaintiff on direct examination said that "it didn't quite take in that right-hand track."

Now, as to whether or not the hole could be seen,

the sheriff testified that the "edge," "the farther bank of the washout" could be seen at a distance of 50 yards, which would be at least 100 feet down the main highway before coming to the turn. It was "clearly visible" from 25 feet away. The picture at that distance shows it to be a great gap in the left track and into the weeds between the two tracks. With that situation existing, the driver of the car, when the sun was about an hour high, drove west along the main-traveled road and made the turn at a speed of not over ten miles an hour, and drove his car into the hole. He said he could not see any evidence that the hole was there as he approached it. He did not see the hole when the farther bank was visible 150 feet away; he did not see the hole when it was "clearly visible" 25 feet ahead of him; he did not see it when he was one foot from it. He was not conscious that the hole was there until he hit the bottom of it with his car bottom-side-up. The condition of the road itself was notice that would cause a prudent driver to proceed with caution. The hole was there to be seen by anyone using his eyes. So far as the use of his eyes is concerned, the driver just as well might have been driving blindfolded.

The majority holds that this is not evidence of contributory negligence sufficient to go to a jury. I disagree. What excuse did the driver of the car give for not seeing what could be seen? He gave two. He testified that the next day he visited the scene and admitted that the hole was visible but "not very far." He testified that sitting in the car with "the long nose of the car out in front" it would interfere with his vision "a little" going directly toward the hole. The majority does not give credence to that statement. The driver makes no mention of shadows in his reconstruction of the event the day following the accident. Much later at the trial "shadows" come into the picture in the way now to be mentioned. The majority excuses his failure to see what was there to be seen because the weeds at the side of

the road hid the hole and the low sun behind the weeds "shaded the east edge of the washout." But the driver of the car testified on cross-examination that the weeds on the road did not interfere with his vision "between me and the hole." That ought to take care of the matter of the weeds. But plaintiff's counsel on redirect in a leading question had him affirm that the weeds on the east side of the hole did not interfere with his vision. He then was asked if he saw any weeds on the "west side of the excavation." He answered (and here is the only evidence I find as to shadows): "I'd tell you how I'd have to describe that. I couldn't describe it as actually seeing weeds, because it was a shadow. The weeds were there and the sun was low enough that it cast a shadow right there; you might say, in the shadow of the weeds. There was weeds there, but I couldn't describe them as weeds because there was a shadow." I submit that he did not testify that he could not see the hole because of a shadow; that he did not testify that the shadow covered the hole, and most certainly it is not evidence that the "east edge of the washout" was shaded. I submit also that the statement of the majority that "* * * the tall weeds along the west side would have cast a shadow, which doubtless would entirely conceal the hole from casual observation of an ordinary driver" is a mere argumentative supposition, not supported by the evidence. Further, if it is an inference that can be properly drawn from the evidence, then it is an inference for a jury to make and not for a court to make. The question as to whether there was a shadow there that interfered with the vision of the hole is at best a jury question. If, however, there was a shadow there which materially impaired or wholly destroyed the driver's visibility, then that shadow constituted a condition on the highway which imposed on the driver of the automobile a duty to exercise a degree of care commensurate with that circumstance. Fairman v. Cook, 142 Neb. 893, 8 N. W. 2d 315. In Dickenson v. County

of Cheyenne, 146 Neb. 36, 18 N. W. 2d 559, we held that fog which made it more difficult to see imposed an additional reason for the exercise of care commensurate with the surrounding circumstances. The shadow, if it existed, imposed an added duty rather than furnishing an excuse for the negligent driving here involved.

In Sharp v. Chicago, B. & Q. R. R. Co., 110 Neb. 34, 193 N. W. 150, a motorist driving down a highway on a dark, windy, dusty night ran into a pillar located in the center of a highway. He testified he was looking. We held that the issue of contributory negligence was for the jury.

In Tutsch v. Omaha Structural Steel Works, 110 Neb. 585, 194 N. W. 731, we had a driver who testified that he was proceeding at night at a reasonable speed with his lights on, and looking saw a ditch across a road. He tried but was unable to stop. We held that the question of contributory negligence was for the jury.

In Pratt v. Western Bridge & Construction Co., 116 Neb. 553, 218 N. W. 397, a driver going down a highway at night turned to avoid hitting a pedestrian, and ran into a hole in the side of a roadbed which was so filled with weeds that the lights of the car did not reveal its condition. We held that the matter of contributory negligence was for the jury.

In Cromwell v. Fillmore County, 122 Neb. 114, 239 N. W. 735, there were holes washed in the road. The driver testified that his lights were on; he was looking; he used his brakes; he was unable to see the ruts in time to stop. There were no barriers nor warnings. We held that the evidence was sufficient to go to the jury on the question of contributory negligence.

In Dickenson v. County of Cheyenne, *supra,* a driver on a foggy night ran into a dead-end road. We held there was contributory negligence as a matter of law.

Admittedly, these are night cases where darkness required care commensurate with the circumstances, but here we have a driver who had the advantage of

daylight and did not use it. He did not look; he did not see what was to be seen.

We have held that want of ordinary care and not knowledge of the danger is the test of contributory negligence. Welsh v. City of South Omaha, 98 Neb. 148, 152 N. W. 302; Klement v. Lindell, 139 Neb. 540, 298 N. W. 137; Grantham v. Watson Bros. Transportation Co., 142 Neb. 362, 6 N. W. 2d 372, on rehearing 142 Neb. 367, 9 N. W. 2d 157; Frazier v. Anderson, 143 Neb. 905, 11 N. W. 2d 764; Tite v. Omaha Coliseum Corporation, 144 Neb. 22, 12 N. W. 2d 90. Accordingly, the lack of familiarity with the road and the lack of knowledge of the "great washout" which the majority stresses are not the tests and do not excuse.

We are not here required to determine whether or not this driver was guilty of contributory negligence as a matter of law. We are asked to determine that this is a jury question. I hold that it is that at least, and would reverse and remand the cause.

YEAGER and CHAPPELL, JJ., concur in this dissent.

MARIANE HANSEN, APPELLANT, V. CHARLES LAWRENCE, APPELLEE.

30 N. W. 2d 63

Filed December 5, 1947. No. 32305.

1. **Trial.** Where there is competent evidence which sustains the theory of the plaintiff as presented by the pleadings, it is prejudicial error for the trial court to fail to instruct the jury on such theory.
2. ———. Instructions to a jury which are inapplicable to the proved facts, and which thereby mislead the jury, will ordinarily constitute reversible error.

APPEAL from the district court for Holt County: DAYTON R. MOUNTS, JUDGE. *Reversed and remanded.*

J. J. Harrington, for appellant.

Julius D. Cronin, for appellee.

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

PAINE, J.

This is an action for damages for personal injuries suffered by plaintiff in the overturning of defendant's cattle truck at about 1 a. m., on March 23, 1945. The jury returned a verdict for defendant, and plaintiff appealed. The case was tried in the district court on the same pleadings used in the county court.

The plaintiff assigns as error that the evidence and the law do not sustain the verdict and judgment, and assigns as error on the part of the court the giving to the jury of instructions Nos. 5, 6, 7, 10, 14, 15, and 16 on its own motion. Plaintiff finally assigns as error the refusal of the court to give the jury the plaintiff's requested instructions Nos. 1 to 7 inclusive.

The facts in regard to this accident, as they appear in the evidence, are about as follows: Mariane Hansen, the plaintiff, lives on a farm about four miles southeast of O'Neill, Holt County. She was about 68 years old at the time of the accident, and was a widow. On March 22, 1945, she went to Ewing, Nebraska, in the morning with her daughter Luella in Bill Sparks' automobile. Bill had been keeping company with her daughter, and Bill and the plaintiff were both planning to buy cattle at a sale held that day in Ewing. At the sale pavilion plaintiff bought five head of cattle, giving her check for $277.46. Immediately after the sale she employed the defendant, who was 40 years old at the time of the trial and had been a regular trucker since 1934, to haul these cattle from Ewing to her home in his Ford truck.

The defendant also planned to haul in the same load that night two head of cattle bought by Bill Sparks and three head owned by George Coleman.

The defendant first hauled a load of cattle to Creigh-

ton, northeast of Ewing, after the sale, and did not return from this trip until around 11 o'clock that night, and then loaded up the cattle belonging to the three different parties.

The plaintiff testified that she wanted to ride home with her daughter in Bill Sparks' car, as she did not like to ride in a truck. Late at night the defendant came to the tavern where the plaintiff and many others were present, and she testified that the defendant told her if she did not ride back with him and show him where to put them he would not take her cattle, but would put them back in the sales pavilion.

The evidence of the defendant is that the plaintiff gave him the sales ticket for the five cattle she had purchased about sundown, told him to get the cattle, and asked if she could ride home with him. Defendant positively denied that he told her that she would have to go with him to show him where to unload the cattle or he would not take them.

On the trip to her farm, defendant dozed off to sleep; the truck ran across the road and tipped over on the left side of the road, with wheels in the air; and plaintiff suffered some injuries.

The plaintiff in her cross-examination was asked: "Q You were sitting there looking at the road? A Maybe I was sleeping too, I don't remember; that was a long time ago. Q If you were asleep you would remember that, wouldn't you? A He was supposed to drive the truck."

As it is very important how plaintiff came to be in the truck at the time of the accident, we will outline what some of the other witnesses said.

John Hawk, a farmer and rancher, who lived in that vicinity for about 35 years, heard the plaintiff and defendant talking, and in reply to a question answered as follows: "He said he had the cattle loaded and was ready to go; if some of them didn't go with him to show him where to put them he was going to unload them."

Lynn S. Flakus had known defendant for about a year and was present in a tavern between 10 and 12 on the night of the accident, and said there were a number of people there, and that the defendant "said that he wanted one of the Hansens to ride with him to show him where to unload the cattle; if they didn't he was going to unload them back in the stockyard."

The plaintiff's daughter, Luella Hansen, testified that she lived on the farm with her mother; that she had been going with William Sparks for some time and that morning Sparks had taken her and her mother to Ewing to the sale in his car; that her mother went down to buy some cattle. She testified that defendant made the statement that night that "he was going to take mama's cattle to the sale barn and unload if she didn't ride with him."

Although there were a number of people in the tavern, others of whom may have heard this conversation, the defendant called no witness to support his denial of the plaintiff's evidence as to why she was riding in his truck.

It appears from the instructions that the trial judge kept in mind the guest statute, section 39-740, R. S. 1943, and from these instructions appears to have instructed the jury on the theory that the evidence indicated that the facts clearly brought this case within the rule of the guest statute. On such theory he instructed the jury in instruction No. 5 that the defendant would not be liable for any damages to such guest riding by his invitation unless the damage was caused by the gross negligence of the owner or operator of the motor vehicle.

Instruction No. 6 set out that the standard of duty of an invited guest is the same as that of the driver; that a guest is under the duty to warn the driver of dangers which would be apparent; and that if by ordinary care and observation the plaintiff could have seen the danger in time to have given warning and failed to do so, the jury would be warranted in finding the plaintiff negligent. Instruction No. 7 set out the com-

parative negligence law. Instruction No. 14 defined gross negligence.

The guest statute, section 39-740, R. S. 1943, exempts from its provisions passengers for hire, and in the case at bar, where the plaintiff paid for transporting her five cattle to her home and was then, by her statement, if believed, compelled to go with them to show where the driver should put them, there appears to be consideration for her transportation.

" 'Compensation' means that which constitutes or is regarded as an equivalent or recompense; that which makes good the lack or variation of something else; that which compensates for loss or privation; amends; remuneration; recompense. The phrase 'without giving compensation therefor' in the statute indicates an intention not to limit compensation to persons specifically paying for transportation in cash or equivalent, or to require that it pass exclusively from the passenger to the driver. 8 Words and Phrases (Perm. ed.) 197; Crawford v. Foster, 110 Cal. App. 81, 293 Pac. 841; Haney v. Takakura, 2 Cal. App. (2d) 1, 37 Pac. (2d) 170; 5 Am. Jur. 634, sec. 239." Van Auker v. Steckley's Hybrid Seed Corn Co., 143 Neb. 24, 8 N. W. 2d 451.

The answer alleged that the plaintiff and defendant were pursuing a common purpose and enterprise and that the operation and management of the truck were under their joint control; that plaintiff failed and neglected to warn the driver that the truck was leaving the highway, and failed to keep a lookout ahead; and that her own carelessness and acts of omission contributed to the accident.

This question of joint enterprise, alleged in the answer, was thus in the case, if supported by competent evidence. Instruction No. 3 offered by plaintiff and refused by the court set up certain facts and then said that the question of joint enterprise is not in the case and the defendant was simply a hired man, doing hauling with his truck, and the plaintiff was a passenger, and not

a guest, under the meaning of the guest statute of Nebraska.

This court said, when two traveling men canvassed the same territory, one furnishing the car and the other paying the expenses, that if the one paying expenses also had control over the car they would be engaged in a joint enterprise, and that this question was one the jury should determine. Judge v. Wallen, 98 Neb. 154, 152 N. W. 318.

"The test of a joint enterprise between the driver of an automobile and another occupant is whether they were jointly operating and controlling the movements of the vehicle or had an equal right to do so." Illingworth v. Madden, 135 Me. 159, 192 A. 273, 110 A. L. R. 1090. See, also, Hofrichter v. Kiewit-Condon-Cunningham, 147 Neb. 224, 22 N. W. 2d 703, 164 A. L. R. 1256; 5 Am. Jur., Automobiles, § 501, p. 786.

"* * * in order to have a joint enterprise there must be a community of interest in the object and purposes of the undertaking and an equal right to direct and govern the movements and conduct of each other in respect thereto. Each must have some voice and right to be heard in its control or management. * * * The record in the case before us discloses no community of interest between the defendant and the plaintiff in relation to the automobile, and fails to show the essential element of right of control or management." Trumpfeller v. Crandall, 130 Me. 279, 155 A. 646.

"The question of whether a person riding in a motor vehicle is a guest, or engaged in a joint enterprise, or other relationship, is generally one for determination in the individual case. It must be ascertained from facts establishing the identity of the persons advantaged by the carriage, the relationship between the parties, and the purposes to which the transportation is incident. * * *

"A person riding in a motor vehicle is a guest if his carriage confers only a benefit upon himself and no

benefit upon the owner or operator except such as is incidental to hospitality, social relations, companionship, or the like, as a mere gratuity. However, if his carriage contributes such tangible and substantial benefits as to promote the mutual interests of both the passenger and the owner or operator, * * * he is not a guest." Van Auker v. Steckley's Hybrid Seed Corn Co., *supra.*

In the case at bar, the evidence does not show that it was a joint enterprise, for it lacks the requirement that the plaintiff had any control whatever over the car. It appears that the only duty that she was to perform was to tell the defendant where to back the truck to get her cattle into the corral when they reached her farm.

This court, in a case where, from the evidence, the driver of a car fell asleep, said: "Falling asleep while driving an automobile constitutes evidence of negligence sufficient to require the question of the driver's negligence to be submitted to a jury." Sutton v. Inland Construction Co., 144 Neb. 721, 14 N. W. 2d 387. In the above case, the driver drove his car onto the left side of the road without any justification whatever, and thereby caused the accident.

A few cases may be found which hold that the dangers of running a car while asleep are so obvious as to need no comment, and a failure of the driver to keep awake is prima facie evidence of negligence. The burden passes to defendant to show some unusual cause of his falling asleep which reasonable diligence could not forestall. Whiddon v. Malone, 220 Ala. 220, 124 So. 516; Barmann v. McConachie, 289 Ill. App. 196, 6 N. E. 2d 918.

"The negligence of the driver of an automobile for hire is not attributable to a passenger having no control over the driver further than to indicate the route to be followed or the place to which the car is to be driven." Hofrichter v. Kiewit-Condon-Cunningham, *supra.*

The plaintiff's evidence supported her claim that she was neither a guest in this cattle truck, at the time of

the accident, nor a mere invitee. This was the plaintiff's theory of her case which she presented in her petition, and it was prejudicial error for the trial court to fail to instruct the jury on her theory in this matter. Swengil v. Martin, 125 Neb. 745, 252 N. W. 207.

As far as the record in this case discloses, the plaintiff had absolutely nothing to do with the driving or control of this cattle truck, and nothing to do on the trip until they reached her farm, and the defendant cannot escape liability for his negligence, if any, on the ground of its being a joint enterprise, for "Parties cannot be said to be engaged in a joint enterprise, within the meaning of the law of negligence, unless there be a community of interest in the objects and purposes of the undertaking, and an equal right to direct and govern the movements and conduct of each other in respect thereto." Jessup v. Davis, 115 Neb. 1, 211 N. W. 190.

The giving of instructions Nos. 5 and 6 was prejudicial error, and the refusal to give proper instructions offered by plaintiff and not covered by the court's own instructions was also error.

"Instructions to a jury that are inapplicable to the proved facts, and which are calculated to, and probably do, mislead the jury, will, ordinarily, constitute reversible error." Jessup v. Davis, *supra*.

There are other questions involved in this appeal, but since there will be a new trial in any event it becomes unnecessary to discuss other assignments of error in this opinion.

For reasons stated herein, the judgment is hereby reversed and remanded for a new trial.

REVERSED AND REMANDED.

IN RE ESTATE OF JOHN H. JOHNSEN, DECEASED. FRANCES JOHNSEN, APPELLEE, V. HARRY PETERSEN, EXECUTOR OF THE ESTATE OF JOHN H. JOHNSEN, DECEASED, APPELLANT.
30 N. W. 2d 70

Filed December 5, 1947. No. 32288.

1. Wills. In a will contest based on objection that the testator was mentally incompetent to make a will the burden devolves on the proponent to make a prima facie case that the testator was mentally competent. The burden then devolves on the contestant to produce sufficient evidence to support a contrary finding by a jury.
2. ———. The essential qualities of mental capacity to make a will are that the testator knew the extent of his property, that he understood the nature of his act in making the will, that he understood the disposition he was making of his property, and that he knew the natural objects of his bounty.
3. ———. A nonexpert witness who is shown to have had a more or less extended and intimate acquaintance with a person may be permitted to state his opinion as to the mental condition of that person, if that condition becomes a subject of inquiry, by giving the facts and circumstances upon which the opinion is based.
4. ———. Before a lay witness will be permitted to give an opinion as to the mental capacity of a person to make a will it must appear that the facts and circumstances testified to by the witness were sufficient upon which to base an opinion or draw an inference that the deceased lacked such mental capacity.

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

Frank V. Lawson and *Gray & Brumbaugh*, for appellant.

Wear, Boland & Nye, Edward F. Leary, and *T. P. Leary*, for appellee.

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

YEAGER, J.

This is an appeal from a verdict and judgment of the district court for Douglas County, Nebraska, denying

the probate of the last will and testament of John H. Johnsen, deceased. The appeal was taken by Harry Petersen, proponent and executor named in the will. The appellee herein is Frances Johnsen, contestant, and daughter of the deceased John H. Johnsen.

The pertinent facts upon which the proceeding depends are that on February 8, 1946, John H. Johnsen, now deceased, made and executed in due form a last will and testament whereby he purported to make final disposition of his estate in case of death, which estate consisted of real estate of about the value of $20,000 and personal property of about the value of $1,000. By the will, after making provisions for funeral expenses, administration expense, the payment of debts of deceased, for gravestone, and burial place upkeep, the estate was bequeathed, $5 to Frances Johnsen, appellee, and the balance share and share alike to Christian Schnor, Anna Jacobsen, Johanne Jensen, and Severine Ulstrup. Frances Johnsen is the daughter of deceased and the other four named persons are a brother and three sisters of deceased. Frances Johnsen is a resident of Omaha, Nebraska. The brother and sisters are residents of Denmark. The deceased left surviving him no wife and no other children.

On February 27, 1946, John H. Johnsen died in Omaha, Nebraska. The next day a petition for probate of the will was filed in the county court of Douglas County, Nebraska, with Harry Petersen, the executor named in the will, as proponent.

Frances Johnsen filed objections to the probate of the will on the ground, among others, that John H. Johnsen did not have sufficient mental capacity to make or execute the instrument as his last will and testament. The other grounds do not require mention herein.

The will was admitted to probate by the county court. Thereafter the contestant took an appeal to the district court where the issue of whether or not deceased had sufficient mental capacity to make the will was tried to a jury. The cause was tried in the district

court, by stipulation, on the pleadings which were filed in the county court.

The jury returned a verdict in favor of contestant, that is, by the verdict of the jury, probate of the will was denied. Judgment was entered by the court on the verdict. Thereafter the proponent filed a motion for a new trial which motion was overruled.

From the verdict, the judgment, and the order overruling the motion for a new trial the proponent has taken an appeal.

The assignments of error urged by appellant as grounds for reversal are numerous but in the view taken of the record as it comes here for review it is deemed necessary to discuss only those the purport of which are to challenge the propriety of the trial court in submitting to a jury the issue of the testator's mental competency to make a will. The competency of John H. Johnsen to make a will was the only issue at the trial on appeal to the district court.

In this connection appellant urges that the court erred in submitting the issue of competency to make a will since the evidence was not sufficient to sustain a verdict in favor of the contestant.

In a contest of a will based on objection that the testator was mentally incompetent to make a will the burden devolves upon the proponent to make a prima facie case that the testator was mentally competent to make a will. The burden then devolves on the contestant to produce sufficient evidence to support a contrary finding by a jury. If the contestant fails in this respect there is no question to submit to a jury. In re Estate of Bayer, 119 Neb. 191, 227 N. W. 928; In re Estate of Slattery, 125 Neb. 194, 249 N. W. 597; In re Estate of Frazier, 131 Neb. 61, 267 N. W. 181; In re Estate of Thomason, 144 Neb. 300, 13 N. W. 2d 141; In re Estate of Witte, 145 Neb. 295, 16 N. W. 2d 203.

Specifically in this case the original burden was upon the proponent to show prima facie that the deceased

herein executed the will in due form according to law, that he knew the extent of his property, that he understood the nature of his act in making the will, that he understood the disposition he was making of his property, and that he knew the natural objects of his bounty. Spier v. Spier, 99 Neb. 853, 157 N. W. 1014; In re Estate of Kubat, 109 Neb. 671, 192 N. W. 202; In re Estate of Kajewski, 134 Neb. 485, 279 N. W. 185; In re Estate of Bose, 136 Neb. 156, 285 N. W. 319; In re Estate of Hagan, 143 Neb. 459, 9 N. W. 2d 794; In re Estate of Witte, *supra.*

That the proponent herein sustained this burden there can be no question. The appellee does not contend otherwise.

The burden then devolved upon the contestant to adduce sufficient competent evidence to negative one or more of the elements essential to mental competency to make a valid will. In re Estate of Witte, *supra.*

The effort of the contestant to negative these essential elements of mental competency to make a valid will was made by the introduction of lay witnesses and of having such witnesses express their respective opinions as to mental competency in this respect.

This was done agreeable to well-established rules of law. This court has said: "It is a settled rule of law in this state that a nonexpert witness who is shown to have had a more or less extended and intimate acquaintance with a person may be permitted to state his opinion as to the mental condition of that person, if said condition becomes a material subject of inquiry, by giving the facts and circumstances upon which the opinion is based." Bankers Life Ins. Co. v. Aron, 133 Neb. 187, 273 N. W. 280. See, also, In re Estate of Wilson, 78 Neb. 758, 111 N. W. 788; Torske v. State, 123 Neb. 161, 242 N. W. 408; Kehl v. Omaha Nat. Bank, 126 Neb. 695, 254 N. W. 397; In re Estate of Witte, *supra.*

Another rule which must also be observed in such cases is that the facts and circumstances testified to by

the witness must be sufficient upon which to base an opinion, that is, the facts testified to must be sufficient upon which to base an opinion or to draw an inference that the deceased person lacked mental capacity to make a valid will. In re Estate of Witte, *supra.*

Bearing in mind these rules it becomes necessary to examine and evaluate the evidence adduced by the appellee. The only evidence so adduced was the testimony of three lay witnesses. The witnesses were the appellee, Laurence Fredricksen, an attorney, and Julia Decker, a former employee of the deceased. Two of these witnesses gave it as his or her opinion that the deceased was mentally incompetent to make a will.

Taking the witnesses in the reverse of the order named, a résumé of the testimony of Julia Decker shows that she had known the deceased for about 30 years; that she went to work for him in about 1942; that she worked for him intermittently for about two years; that deceased was sick but could work; that he was badly crippled but could get around, at some times better than at other times; that she did not know how he took care of his business; that he could not talk sense; that he wanted her to keep house for him; that he was a man not very pleasant to be around; that he was very careless about himself. This witness gave no opinion as to the mental competency of deceased to make a will. There are other details of fact relating to the relationship of the witness with the deceased but they are of no value on the question of mental competency.

A résumé of the pertinent part of the testimony of Laurence Fredricksen is that he is an attorney at law practicing in Omaha, Nebraska; he had known deceased since about 1909; he had some social contacts with deceased over the years since; John Berger, now deceased, was attorney for John H. Johnsen; Berger became ill and the witness became associate attorney for Johnsen; these attorneys brought suit against the appellee herein on behalf of the deceased for $6,000; the witness saw

deceased frequently, about once each week, in his office for quite some time before his death; they discussed legal matters; deceased was in ill health and told the witness that he had progressive arthritis and Bright's disease; he walked in a stooped or forward position with a cane; his memory was bad and he could not collect his ideas and had difficulties in understanding lawsuits and proceedings. However, nothing in point of fact was recited in this connection except that the witness repeatedly explained matters and deceased asked personally and by telephone for further explanation. He further testified in substance that deceased was nearsighted and partly blind in one eye; that deceased asked the witness to draw a will for him like the one before this court in this proceeding; that he wanted to give his daughter $5 and the balance to his brother and sisters in Denmark; that deceased did not know if the brother and sisters were alive or not since he had not heard from them for about 35 years; that the witness did not draw a will but told deceased that his frame of mind should be altered because it had been poisoned and polluted against the family for a long time by others. A résumé of all details pertaining to the relations of this witness with the deceased has not been set forth but we think all that is pertinent in determining whether or not the foundation was sufficient to permit the witness to give an opinion as to the mental competency of deceased to make a will has been stated. The witness was permitted to and did testify that in his opinion the deceased was mentally incapable of making a will.

The appellee testified in her own behalf and was permitted to give her opinion as to the mental competency of her father to make a will.

No useful purpose would be served by repainting here the picture this witness has painted in her testimony of the sordid relationship existing between her and her father attributable as she testified to an unreasoning and unreasonable attitude which obtained in him from

the time she was about 16 years of age. Suffice it to say that, though she gave it as her opinion that he was mentally incompetent to make a valid will, no fact was testified to by her from which an inference could be drawn that he did not understand the nature of his act in making the will, that he did not know the extent of his property, that he did not understand the proposed disposition of his estate, or that he did not know the natural objects of his bounty.

Weighed by the rules applied to the testimony of the appellee we are required to come to the same conclusion with regard to the opinion expressed by the witness Fredricksen as we have arrived at with regard to the opinion of the appellee.

The evidence of the appellee in its entirety, weighed in the light of the burden which rests on a contestant to overcome the presumption arising out of the prima facie case made by the proponents of a will, we conclude was insufficient to justify a submission to the jury of the question of the mental capacity of John H. Johnsen, deceased, to make a valid will.

The facts as testified to by the witnesses for the appellant are of no aid to appellee. The facts as testified to by these witnesses disclose that John H. Johnsen was badly crippled, that he was diseased in body but not in mind, that he was a constant sufferer from his ailments, but nothing is therein contained from which a reasonable inference could flow that he lacked, within the meaning of the legal principles herein announced, the mental capacity to make a valid will.

We therefore conclude that the district court erred in submitting the mental competency of the deceased to a jury. A verdict should have been directed in favor of appellant.

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

REVERSED AND REMANDED.

DONALD M. MADGETT, APPELLEE, V. MARVIENA MADGETT, APPELLANT.
29 N. W. 2d 875

Filed December 5, 1947. No. 32289.

1. **Parent and Child.** Husband who obtained divorce has no legal duty to maintain and support son, not adopted, of divorced wife by a former marriage.
2. **Divorce.** On petition to modify original divorce decree, award of custody of two minor boys to father, who obtained divorce, was for the best interest and welfare of the children where mother remarried and failed to show intelligent and proper regard as a mother should have for sons. § 42-312, R. S. 1943.
3. ———. Divorce decree requiring property to be conveyed to grandparents of minor children, and grandparents forthwith to convey to minors, was modified where custody of children on petition to modify decree was awarded to father. One of grandparents has since died. Property was never conveyed pursuant to property agreement and there is no further need for security for support and maintenance of children. § 42-312, R. S. 1943.

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

Edward J. Baburek and *Richard A. O'Connor,* for appellant.

William E. Lovely, for appellee.

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

LANDIS, District Judge.

This is a suit in equity to modify a decree of divorce. On July 20, 1945, a default divorce decree was entered in favor of the husband plaintiff and against the wife defendant, incorporating therein a property settlement. More than six months after the divorce decree appellee filed a petition and later an amended petition to modify the original divorce decree as to care, custody, and maintenance of the children. On April 9, 1947, the trial court

entered an amended decree. From this decree the divorced wife appeals.

Appellant has a 15-year-old son, William Noel Barrett, by her first husband, who was not adopted by appellee. Appellant, as next friend for her son, filed a demurrer and separate answer. Intervention and consideration of the answer was denied and no appeal was taken therefrom. Appellee has no legal duty to maintain and support this son of the appellant.

The original divorce decree provided alimony for appellant, all of which has been fully paid and satisfied. The parties hereto have two minor sons, Donald and Paul, and the amended modified decree principally affects their custody, control, and maintenance. The statute applicable is section 42-312, R. S. 1943: "If the circumstances of the parties shall change, or it shall be to the best interests of the children, the court may afterwards from time to time on its own motion or on the petition of either parent revise or alter, to any extent, the decree so far as it concerns the care, custody and maintenance of the children or any of them."

Appellant by cross-petition seeks to modify the original divorce decree in several particulars, one of which is that her mother, Kathryn F. Hart, for the best interest of the children should be granted a life estate in appellee's property referred to as the Pine Street property. This property was originally classified and intended to be used as security for child support and maintenance.

Appellant's counsel stated in open court: "So far as the modification of the decree as to the children is concerned, there is no objection to it, but I do question whether or not the decree, at this late date, can be modified so far as the property is concerned." The record reflects changed circumstances of the parties and both appellant and appellee tried the case on that theory.

What is for the best interest of the children, Donald aged ten and Paul aged five, is the controlling question. The father has a responsible position as an executive in

an insurance company, with a very substantial salary. His mother, a suitable person, has agreed to come and live with him and help maintain his home. The appellant has remarried, moved to Denver, Colorado, and the record reflects she has failed to show such intelligent and proper regard as a mother should have for her sons. The award of the custody of Donald and Paul to their father appellee was for their best interests and welfare. Hobza v. Hobza, 128 Neb. 598, 259 N. W. 516.

To insure the maintenance of a home for the minors it was provided in the property agreement, in the original divorce decree, that the Pine Street property be deeded to the stepfather and the mother of appellant and they forthwith in turn to convey to the minors. The stepfather has since died. No deed was delivered to them nor any deed made or delivered to the minors. This property was subject to two mortgages totaling $6,000, and had an equity of $500. It was also provided that appellee make the minors beneficiaries to certain life and accident insurance policies.

From the testimony of appellant, the property settlement, and circumstances, it is clear that the intent of these provisions was to secure only support and maintenance for the children. Under the amended decree the father has custody of the children. He is abundantly able and has the legal duty to care for them. With the changed circumstances the need for security provided in the original decree no longer exists.

Appellant charges error where the court in several instances excluded testimony. However, no offer was made as to what the witness would testify to. Error is charged because of two remarks of the trial court. "You had better call your next witness." This was made in response to attorney stating: "I will get at that after while, with my next witness." The court asked the question, "He is tubercular is he not?" This was an inquiry regarding a party about whom appellant was testifying. Both were proper remarks by the court.

There is no merit in the claim that these remarks were irregularities in the proceedings of the trial court and prevented appellant from having a fair trial. The amended decree is equitable and is affirmed.

Costs in this court, including attorney's fee of $150 for appellant's counsel, are taxed to appellee.

AFFIRMED.

MELVIN THOMAS, APPELLANT, V. ORA E. POULSON ET AL., APPELLEES.

30 N. W. 2d 59

Filed December 12, 1947. No. 32235.

1. **Trial.** A motion for a directed verdict must, for the purpose of a decision thereon, be treated as an admission of the truth of all material and relevant evidence submitted on behalf of the party against whom the motion is directed, and said party is entitled to have every controverted fact resolved in his favor, and to have the benefit of every inference that can reasonably be deduced from the facts in evidence.
2. **Negligence.** Where different minds may draw different conclusions from the evidence in regard to negligence, the question should be submitted to the jury.
3. ———. Where evidence is in conflict and such that reasonable minds may draw different conclusions therefrom, the questions of negligence and comparative and contributory negligence are for the determination of the jury.

APPEAL from the district court for Cass County: THOMAS A. DUNBAR, JUDGE. *Reversed and remanded.*

Van Pelt, Marti & O'Gara, Sam C. Zimmerman and *Perry & Perry,* for appellant.

Rosewater, Mecham, Shackelford & Stoehr and *Alfred D. Raun,* for appellees.

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

WENKE, J.

Melvin Thomas, as plaintiff, brought this action in the district court for Cass County against Ora E. Poulson and Lowell E. Stubbs, as defendants. The purpose of the action is to recover damages arising out of an accident that happened on June 30, 1945, on Highway No. 6 at a point about one and one-half miles northeast of Greenwood in Cass County. From an order sustaining the defendants' motion for a directed verdict, motion for new trial having been overruled, the plaintiff appeals.

In view of the manner in which the action was disposed of we apply the following rule in reviewing the record: "A motion for a directed verdict must, for the purpose of a decision thereon, be treated as an admission of the truth of all material and relevant evidence submitted on behalf of the party against whom the motion is directed, and said party is entitled to have every controverted fact resolved in his favor, and to have the benefit of every inference that can reasonably be deduced from the facts in evidence." Moncrief v. Interstate Transit Lines, 129 Neb. 168, 261 N. W. 163. See, also, Grantham v. Watson Bros. Transportation Co., 142 Neb. 362, 6 N. W. 2d 372; Kline v. Metcalfe Construction Co., 146 Neb. 389, 19 N. W. 2d 693; Halliday v. Raymond, 147 Neb. 179, 22 N. W. 2d 614.

And, from the application of the foregoing rule, determine which part of the following rule is applicable: "* * * where different minds may draw different conclusions from the evidence in regard to negligence, the question should be submitted to the jury, but where the evidence shows beyond reasonable dispute that the plaintiff's negligence is more than slight as compared with the defendant's negligence, then it is proper for the trial court to instruct the jury to return a verdict for the defendant. Sindelar v. Hord Grain Co., 116 Neb. 776, 219 N. W. 145." Whittaker v. Hanifin, 138 Neb. 18, 291 N. W. 723. See, also, Finegold v. Union Outfit-

ting Co., 110 Neb. 202, 193 N. W. 331; Halliday v. Raymond, *supra.*

As stated in Gutoski v. Herman, 147 Neb. 1001, 25 N. W. 2d 902:

" 'In a law action it is error for the trial court to direct a verdict for either of the parties on an issue of fact on which the evidence is conflicting. Such issue should be submitted to the jury for their determination.' Stoffel v. Metcalfe Construction Co., 145 Neb. 450, 17 N. W. 2d 3.

" ' "Where evidence is in conflict and such that reasonable minds may draw different conclusions therefrom, the questions of negligence and comparative and contributory negligence are for the determination of the jury." Parks v. Metz, 140 Neb. 235, 299 N. W. 643.' Grantham v. Watson Brothers Transportation Co., *supra.*"

The following facts are either stipulated or established by undisputed evidence: That appellant, who lives at Ashland and engaged in the gravel business, was the owner of the 1941 Ford one and one-half ton truck which was involved in the accident; that at the time of the accident the truck was being driven by his employee, Hubert Felkie, who was instantly killed in the accident; that the truck was used in appellant's business to haul gravel and at the time had been loaded with gravel at appellant's gravel pit some five miles north of Ashland; that appellee Poulson, who lives at Elm Creek and engaged in the business of transporting gasoline, was the owner of the transport which was involved in the accident; that the transport consisted of a 1945 White tractor and a 1940 Freuhauf trailer, the latter having a capacity of 4,440 gallons and empty at the time; that appellee Stubbs was driving it from Kearney to Omaha to get a load of gasoline; and that Stubbs was an employee of Poulson.

The accident occurred on the morning of June 30, 1945, sometime between 7:30 and 8 a. m. on the east end or just east of a bridge on Highway No. 6 at a point

approximately one and one-half miles northeast of Greenwood. At the time of the accident it was foggy and raining. Felkie was driving appellant's truck in a southwesterly direction on the highway, that is, toward Lincoln, when the accident occurred. Stubbs, at the time, was driving the transport in a northeasterly direction toward Omaha. The truck was loaded with gravel and had an over-all weight of about 39,000 pounds, while the transport was empty and the empty trailer, exclusive of the tractor, had a weight of about 6,400 pounds.

It will be observed from what has already been said that the highway, at the place of the accident, follows a northeasterly and southwesterly course but, for convenience in stating the facts and possibly a better understanding thereof, it will be considered and referred to as if it ran east and west, that is, the east being toward Omaha and the west toward Lincoln.

After the accident the truck was on the bridge facing in a southwesterly direction with its front end against the south curb and guardrail. The front end was some 16 to 25 feet from the east end of the bridge. The back of the truck extended out as far as and a little across the center line of the bridge. The left front of the motor and cab were severely smashed, including the left front of the bumper and left fender. Likewise the left front of the steel body had been hit. The driver was found in the cab. Apparently he was instantly killed.

The tractor unit of the transport stopped about 100 to 125 feet east of the east end of the bridge. It was in the ditch and close to the highway fence and approximately parallel thereto. This fence is about 25 feet from the highway. The tractor was facing east and its tracks show that it left the pavement at an angle and continued until it was stopped by Stubbs, the driver. Stubbs had not been severely injured by the accident. The outer tire and flange of the rear left dual wheel of the tractor had been hit. Parts of the fifth wheel,

the means by which the trailer is attached to the tractor, were still on the frame thereof.

The trailer and tractor were separated by the impact and part of the fifth wheel remained on the tractor, part on the trailer, and part was found on or near the highway where the accident occurred.

After the accident the trailer was in the ditch just south of the paved highway and east of the cement abutment at the east approach to the bridge. It was approximately at right angles to the highway with its front end resting on the shoulder and its rear in the ditch just east of the cement abutment. Witnesses estimated the front end thereof to be from 2 to 8 feet from the pavement and 15 to 24 feet from the east end of the bridge. The trailer was severely damaged in the left front part of the tank. It was torn loose from the tractor, to which it had been attached by a fifth wheel. Parts of this damaged fifth wheel were still attached to the trailer. The tank part of the trailer had buckled up about a third of the way down from the front. The only evidence of tracks made by the rear wheels of the trailer are for a distance of some two or three feet just before it came to a stop.

Immediately following and shortly after the accident debris from the truck and transport was observed by several witnesses. It was located on the north half of the highway as far as 75 feet east of the bridge. The principal items thereof were located in the area from 30 to 75 feet east thereof. These items consisted of gravel, a booster of a vacuum tank brake, part of a rear view mirror, parts of a battery, pieces of chain, part of a bumper, pieces of glass, parts of a vacuum tank, parts of a fender, part of a headlight, flares, part of a door handle and latch, and parts of a grill. The shaft from the fifth wheel, a piece of metal between two and one-half and three feet long and one and one-half inches in diameter was observed just north of the highway and about 85 feet east of the bridge.

Further detailed facts could be set out but would serve no useful purpose for from the facts already set forth, and the fair and reasonable inferences to be drawn therefrom, the jury could properly find that the collision occurred on the north half of the surfaced highway just east of the bridge at a time when the tractor part of the transport was turning to the right leaving the left rear thereof and the left front of the tank part of the trailer in an exposed position on its, the transport's, wrong side of the road.

Appellees, in their brief, after discussing the facts make the following statement: "From these facts, and the further fact that the bridge railing for a distance approximately equal to the length of the trailer was bent outward and the posts broken, only one conclusion is possible, namely, that the front portion of the gravel truck (left wheel and motor) struck the trailer at an angle near the point where the tank buckled, went under it and lifted it almost high enough to clear the bridge railing, and that the projecting corner of the dump box of the truck struck the end of the tank and threw the whole trailer around to the right, against and over the bridge railing, wrenching it loose from the tractor."

In view of appellee Stubbs' statement that the collision occurred before the tractor was off the bridge it is difficult for the writer of this opinion to understand how, after the transport got up in the air and then south over the guardrail, the top of which is 40 inches above the surface of the bridge, it could then change its direction and travel east for its full length of 26 feet and then across the cement abutment to the east approach of the bridge, a total distance of approximately 40 feet. Neither does it seem possible that after it had traveled this distance and then landed upright in the ditch that it could do so without leaving some evidence that it had landed in the ditch sideways. Nor

does the nature of the injuries to the trailer and truck seem to support this theory.

But whether or not the accident happened in that manner we are not here called upon to decide as that is a question for the jury.

Appellees often refer to the testimony of appellee Stubbs as undisputed and unimpeached. We do not find that the record will sustain the first and the second is true only because the trial court, by erroneous rulings, prevented appellant from impeaching this witness. There is evidence introduced by appellant of admissions by Stubbs immediately after the accident and later in his deposition which are in conflict with the evidence he gave at the time of trial. While the trial court, in admitting this evidence, properly limited it to the appellee Stubbs it nevertheless is in conflict with some of his evidence at the time of trial. As to impeachment the record shows that the appellant attempted to do so when Stubbs testified. However, the trial court erroneously prevented appellant from doing so. It is proper to impeach a witness who is testifying by showing that he has made previous statements which are contradictory to what he is presently testifying to as the facts.

We find that the fact situation in this case brings it within our recent holdings in Halliday v. Raymond, *supra,* and Gutoski v. Herman, *supra.* It presents a jury question.

Appellant makes complaint of the trial court's rulings whereby admissible evidence was excluded. Also that he was unduly limited in his cross-examination of appellees' witnesses to the extent that there was an abuse of the court's discretion. Both of these contentions are meritorious. But, in view of our reversing the case for retrial, they will not be discussed because they may not recur on the next trial.

REVERSED AND REMANDED.

THE COUNTY OF SARPY, APPELLEE, V. JOHN GASPER ET AL., APPELLEES, JOSEPH E. STRAWN ET AL., INTERVENERS AND APPELLANTS. SCHOOL DISTRICT NO. 1 OF SARPY COUNTY, NEBRASKA ET AL., INTERVENERS AND APPELLEES.

30 N. W. 2d 67

Filed December 12, 1947. No. 32271.

1. **Costs: Attorney and Client.** Only when provided for by statute can an attorney's fee be allowed and taxed as costs.
2. **Attorney and Client.** When provided for by statute the fee is payable to the party the statute designates.
3. **Counties.** The county board has exclusive original jurisdiction in the examination and allowance of claims against the county arising ex contractu.
4. **Courts: Counties.** The jurisdiction of the district court as to claims against a county arising on contract is appellate only.
5. **Judgments: Counties.** A judgment of the district court entered in an original action in that court as to claims against a county for legal services rendered the county is void for want of jurisdiction.
6. **Case overruled in part.** Solomon v. A. W. Farney, Inc., 136 Neb. 338, 286 N. W. 254, overruled in part.

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

Brown, Crossman, West, Barton & Quinlan, for appellants.

Orville Entenman, William R. Patrick, and *Bernard A. Martin,* for appellees.

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

KROGER, District Judge.

Appellants, Joseph E. Strawn and Christine S. Marth, executrix of the will of Ralph J. Nickerson, deceased, filed a petition of intervention in the above entitled action, to which demurrers of the County of Sarpy, plaintiff and appellee, and School District No. 1 of Sarpy County, Nebraska, and City of Bellevue, Nebraska,

interveners and appellees, were sustained. Interveners Strawn and Marth elected to stand on their petition and the trial court dismissed the same. From this ruling this appeal was taken.

The facts are not in dispute. In May 1940 a petition by more than ten resident freeholders of Sarpy County, Nebraska, was filed with the county clerk of said county, requesting the board of county commissioners to employ Joseph E. Strawn and Ralph J. Nickerson, special attorneys, to file and prosecute to final determination all actions to foreclose certain tax liens and tax sale certificates.

Pursuant to this petition, and on the same date, the board of county commissioners passed a resolution employing Ralph J. Nickerson and Joseph E. Strawn, special attorneys, and in said resolution directed them "to proceed immediately to bring such actions for the foreclosure of taxes as this Board may direct, and their compensation to be the statutory fee of 10%, to be added in each and every case." As such special attorneys, Strawn and Nickerson prepared and filed 12 separate actions, each containing a number of causes of action, for the foreclosure of tax liens. In all causes of action that went to decree, the court, after finding the amount due on the tax lien, with some variation in wording, found that the actions had been authorized by the board of county commissioners and that Nickerson and Strawn had been appointed by the board of county commissioners to prosecute said action for the plaintiff county, under an agreement between the board and said attorneys that they be paid the ten percent attorney's fee authorized by statute, and found that the fee should be allowed the plaintiffs and made a part of the judgment entered in each cause of action. And again, with some variation in wording, adjudged and decreed that there was due the plaintiff county the amounts set forth for general taxes and special assessments, "and an attorney fee to Ralph J. Nickerson and

Jos. E. Strawn as attorneys for plaintiff in the sum of ten per cent thereof to be taxed as costs * * *."

Sales were had and confirmed, and the ten percent attorney's fees that were taxed as costs are held by the clerk of the district court for Sarpy County, or by the county treasurer of said county, in a special fund.

Appellants filed their petition of intervention in each of the 12 foreclosure actions, seeking payment to them of the attorney's fees that had been taxed as costs. The ruling of the trial court in three of these actions has been brought here for review and the cases were consolidated for briefing and argument.

It is the contention of the appellants that by reason of the contract with the board of county commissioners and the finding and judgment of the trial court, the ten percent charged in each cause of action as attorney's fees became the property of the appellants and should be paid them by the clerk of the district court; that costs are no part of the judgment and are subject to the order of the court; and that the judgment awarding the statutory attorney's fee is res judicata. The position of appellees is that since plaintiff is a body politic and corporate it could exercise only such powers as are granted by statute, and could act only in such manner as by statute provided; that section 23-135, R. S. 1943, provides the exclusive method for the payment of appellants for their services in the tax foreclosure actions and that appellants should have filed their claim for compensation with the county clerk for audit and allowance by the board of county commissioners; that the district court had no jurisdiction to determine and allow the fees to be paid the special attorneys and that, lacking jurisdiction, the judgment allowing such fees was a nullity.

The statute in force when these foreclosure actions went to decree, section 77-2043, Comp. St. 1929, provided that in such actions the court should award the plain-

tiff an attorney's fee of ten percent of the amount found due on the tax lien, to be taxed as costs.

In this state attorney's fees are allowed only in such cases as are provided for by statute. Higgins v. Case Threshing Machine Co., 95 Neb. 3, 144 N. W. 1037. When they are allowed they can be awarded only as provided by statute; in this case that is to the plaintiff, Sarpy County. The statements in the case of Solomon v. A. W. Farney, Inc., 136 Neb. 338, 286 N. W. 254, "While attorney fees are allowed and awarded to the client, they actually belong to the attorney" and "The conclusion is, therefore, that the sum of $350 originally allowed by court orders as attorneys' fees for plaintiff's attorneys, and as such taxed as costs, was at all times the property of the latter," are disapproved, and to that extent the holding in Solomon v. A. W. Farney, Inc., *supra,* is overruled.

Where the attorney's fee is awarded to a county, any claimed right thereto, based on a contract with the county, can only be determined by the filing of a claim with the county clerk for audit and approval by the county board, as provided by section 23-135, R. S. 1943.

This court has consistently held that, on claims arising ex contractu, the board of county commissioners has exclusive original jurisdiction in the examination and allowance of claims against the county. Brown v. Otoe County, 6 Neb. 111; Verges v. Morrill County, 143 Neb. 173, 9 N. W. 2d 221. Likewise it has repeatedly been held that the jurisdiction of the district court on claims arising ex contractu is derivative, and not original. Brown v. Otoe County, *supra;* Shepard v. Easterling, 61 Neb. 882, 86 N. W. 941; Verges v. Morrill County, *supra.*

It cannot be successfully denied that appellants' fees in the instant matter arose ex contractu. The decree of foreclosure on which they base their claim so finds. That no claim was ever filed with the county clerk for

audit, and payment by the board of county commissioners of Sarpy County, is admitted.

Since the services rendered by the appellants were contractual, the district court could obtain jurisdiction only upon appeal from the action of the board of county commissioners and did not have original jurisdiction; consequently its finding and decree that the attorney's fees should be paid to the plaintiffs were a nullity.

For the reasons given, the judgment appealed from is affirmed.

AFFIRMED.

THE COUNTY OF SARPY, APPELLEE, V. FRANK H. PRUCKA ET AL., APPELLEES, JOSEPH E. STRAWN ET AL., INTERVENERS AND APPELLANTS. SCHOOL DISTRICT NO. 1 OF SARPY COUNTY, NEBRASKA ET AL., INTERVENERS AND APPELLEES.
30 N. W. 2d 69

Filed December 12, 1947. No. 32272.

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

Brown, Crossman, West, Barton & Quinlan, for appellants.

Orville Entenman, William R. Patrick, and *Bernard A. Martin,* for appellees.

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

KROGER, District Judge.

For the reasons given in The County of Sarpy v. Gasper, *ante* p. 51, 30 N. W. 2d 67, the judgment appealed from is affirmed.

AFFIRMED.

THE COUNTY OF SARPY, APPELLEE, V. LESTER BACKUS ET AL., APPELLEES, JOSEPH E. STRAWN ET AL., INTERVENERS AND APPELLANTS. SCHOOL DISTRICT NO. 1 OF SARPY COUNTY, NEBRASKA ET AL., INTERVENERS AND APPELLEES.
30 N. W. 2d 70

Filed December 12, 1947. No. 32273.

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

Brown, Crossman, West, Barton & Quinlan, for appellants.

Orville Entenman, William R. Patrick, and *Bernard A. Martin,* for appellees.

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

KROGER, District Judge.

For the reasons given in The County of Sarpy v. Gasper, *ante* p. 51, 30 N. W. 2d 67, the judgment appealed from is affirmed.

AFFIRMED.

THE BOARD OF REGENTS OF THE UNIVERSITY OF NEBRASKA ET AL., PLAINTIFFS, V. EDWARD GILLETTE ET AL., DEFENDANTS.
30 N. W. 2d 296

Filed December 26, 1947. No. 32386

Statutes. Words may be supplied by the courts in construing a statute where that is necessary to complete the sense thereof and give effect to the intention of the Legislature manifested therein. This rule is especially applicable where it is necessary to do so to prevent the law from becoming a nullity.

Original proceedings for declaratory judgment. *Judgment for plaintiffs.*

Cline, Williams & Wright, Everett L. Randall, Robert

M. Armstrong, Bernard Stone, and *Charles Ledwith,* for plaintiffs.

Walter R. Johnson, Attorney General, and *Leslie Boslaugh,* for defendants.

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

SIMMONS, C. J.

The plaintiffs seek here a declaratory judgment giving an answer to this question: "Did the Sixtieth Session of the Nebraska State Legislature, 1947, by the enactment of Legislative Bill No. 2, approved June 11, 1947, particularly sections 51 and 58 thereof, * * * appropriate or not appropriate the proceeds arising by reason of the enactment of Legislative Bill No. 209, for use during the biennium ending June 30, 1949?"

Section 51, chapter 321, Laws 1947, page 1023, is:

"STATE INSTITUTIONAL AND MILITARY DEPARTMENT BUILDING FUND

"Appropriate all money from the General Fund that may be raised during the biennium by the special levy authorized by Legislative Bill 209, Sixtieth Session of the Nebraska State Legislature, 1947, and all interest thereon, for the erection, equipping, repairing or remodeling of buildings and plants, and for the purchase of land for buildings to be used as provided by said act."

The question arises because of an opinion by the Attorney General given to the State Treasurer that the money to be collected under LB 209 (Laws 1947, c. 236, p. 751) has not been appropriated by the above provision and will not be available for expenditure until it has been appropriated.

The position of the Attorney General is that LB 209 created a special fund as distinguished from the general fund; that section 51 appropriates money from the gen-

eral fund; that the special fund is not a part of the general fund; and that there is no appropriation of the special fund, and hence the section accomplishes nothing.

The position of the plaintiffs is that the words "from the General Fund" should be disregarded in the construction of section 51.

For reasons appearing hereafter, we are not in accord with either position.

That an appropriation by the Legislature is necessary in order to permit the expenditure of the money is not disputed.

In his budget message to the Legislature, Governor Griswold referred to the special levy that had been enacted four years prior thereto to make up a deficit in the permanent school fund. The pattern thus referred to undoubtedly suggested the basis for LB 209. He further stated that requests had come to him for appropriations for the construction of new buildings and for the repair of existing buildings at state institutions under the Board of Control and at the four State Teachers' Colleges, and referred to a study that he had caused to be made of the condition of these buildings, which study was to be filed with the Appropriations Committee. Legislative Journal 1947, p. 28.

Governor Peterson in his budget message on January 29, 1947, advised the Legislature that he was submitting a budget which was substantially reduced in amount from that submitted by Governor Griswold. He stated: "It should be explained that the major portion of these reductions represent buildings and repairs requested which, I feel, should be provided for through the creation of a special building fund on a long range basis." Legislative Journal 1947, p. 210. He followed this with a statement that for several years the state had been unable to give the funds required to the maintenance and expansion of state institutions; that it was neither logical nor economical to attempt to provide for repair and new building costs, session by session, nor to erect

new buildings all at one time; that it was wise to provide for a long-range building and repair program; that a bill providing for such plan had already been introduced by Senator Mueller; that he recommended its careful consideration; and that "If some such plan is not adopted, then it would be incumbent upon the Legislature to make provision in the appropriation bill for the items for buildings and repairs which I have eliminated." Legislative Journal 1947, pp. 211, 212. Later in discussing the Board of Control needs and Normal School needs he referred to the long-range program furnishing funds for buildings and repairs, and cautioned that "* * * appropriation must be made for urgently needed repairs and replacements * * *" if the long-range program was not adopted. Legislative Journal 1947, p. 212. This message indicates an executive view, transmitted to the Legislature, that needed funds for buildings and repairs should be made available presently as a result of the enactment of a bill, such as Senator Mueller had introduced, and, if not by such a bill, then by special appropriation, but available in any event.

LB 209 was introduced by Senator Mueller on January 27, 1947. As passed and approved by the Governor, it became chapter 236, Laws 1947, page 751.

Section 1 provided: "There is hereby created, for the use of the Board of Regents of the University of Nebraska, the Board of Control, the Board of Education of State Normal Schools and the Military Department, a fund, to be known as the 'State Institutional and Military Department Building Fund', to consist of the proceeds of a tax of one and one-tenth of a mill on the dollar valuation of the grand assessment roll of the state, which tax shall be levied in the year 1947 and annually thereafter for ten years, to and including the year 1956, which shall be supplemented by the addition thereto of one-third of the state's share of intangible taxes for each year."

Section 2 provided: "The proceeds of the tax herein authorized to be levied shall be expended by said boards, respectively, in the proportions hereinafter provided, as and when appropriated by the Legislature, for the erection, equipping, repairing or remodeling of buildings and plants, and for the purchase of land for buildings to be used in the administration, operation and maintenance of the institutions under the control or operation of said boards, respectively, and for the purchase of land and construction thereon of armories by the Military Department."

Section 3 provided: "The proceeds of one mill of said tax herein authorized to be levied shall be set aside as collected and credited to said respective boards, in the following proportions, to-wit: (1) Forty per cent thereof for expenditure by the Board of Regents of the University of Nebraska; (2) forty-five per cent thereof for expenditure by the Board of Control; and (3) fifteen per cent thereof for expenditure by the Board of Education of State Normal Schools. The proceeds of one-tenth of a mill of said tax shall be set aside as collected and credited to the Military Department for the purchase of land and construction thereon of armories. The proceeds of the share of the intangible tax, referred to in section 1 of this act, shall be set aside as collected and credited to said boards and the Military Department in the same proportion as the proceeds of said levy of one and one-tenth of a mill."

Section 4 provided: "Since an emergency exists, this act shall be in full force and take effect, from and after its passage and approval, according to law."

The act was approved April 12, 1947.

Section 27, article III, of the Constitution provides in part: "No act shall take effect until three calendar months after the adjournment of the session at which it passed, unless in case of emergency, to be expressed in the preamble or body of the act, the Legislature shall, by a vote of two thirds of all the members elected

to each House otherwise direct." The Legislative Journal shows that LB 209 was enacted by a vote of 37 to 2. Legislative Journal 1947, p. 1009.

By the enactment of LB 209, the Legislature clearly stated its purpose to initiate the program of betterment therein authorized. The vote shows that the intent was entertained by an overwhelming majority of the members. By the inclusion of the emergency clause, the Legislature evidenced its intent that the program be initiated immediately.

The next and logical step was for the Legislature to appropriate the funds with which to make that intent effective. The history of section 51 is that it first appeared as section 50 in LB 2, when the Committee on the Budget reported out its committee substitute for the original LB 2. It then was in the following language:

"Sec. 50. STATE INSTITUTIONAL AND MILITARY DEPARTMENT BUILDING FUND All money that may be raised during the biennium by the special levy authorized by Legislative Bill 209 of the Sixtieth Session of the 1947 Legislature, and all interest thereon, for the erection, equipping, repairing or remodeling of buildings and plants, and for the purchase of land for buildings to be used as provided by said act."

In that language it was adopted by the Legislature on May 19, 1947. Legislative Journal 1947, p. 1564. On May 20, 1947, the Committee on the Budget adopted an amendment to this language which in turn was adopted by the Legislature on May 21, 1947. The amendment is as follows: "Amend page 52 of the bill, section 50, line 3 by striking the words 'All money' and inserting in lieu thereof the words 'Appropriate all money from the General Fund'." Legislative Journal 1947, p. 1638.

The section as amended (then Section 51) was enacted on final passage on June 6, 1947.

Disregarding for the moment the effect of the amendment, it is clear the Legislature intended to make funds available for the beneficial purposes of LB 209. Obviously, the Legislature did not intend by the amendment to nullify the purpose expressed in the original proposal. To accomplish that purpose the customary parliamentary method would be to strike the section. The question comes: What was the effect of the amendment?

Before going to that question we refer to Legislative Resolution No. 24, which was introduced in the Legislature on June 5, 1947, and adopted June 6, 1947, with 33 ayes, 0 nays, and 10 not voting. Legislative Journal 1947, pp. 1875, 1877. By whereas provisions that resolution referred to LB 209, stated that it merely provided the general policy to be followed and did not provide the details for carrying out the provisions of the act, and then resolved that the agencies named cause detailed plans and specifications to be prepared to carry out the building program authorized and the estimated cost thereof, and that such plans, specifications, and estimate of costs be filed with the clerk of the Legislature before the next regular session. The resolving part of the resolution refers only to the building program. The resolution clearly indicates a continuance of the legislative intent that this program be immediately undertaken, and an intent and understanding that funds for that purpose were to be available during the present biennium. Obviously, the cost of preparing plans and specifications are a part of the cost of the betterments involved. Obviously, that cost would naturally come from funds appropriated for that purpose. It may or may not be that the agencies involved could comply with the resolution by the use of other funds appropriated to them, but the resolution does not indicate any such requirement or intent. It cannot be successfully argued that on the very day the Legislature adopted the appropriation provision here involved, those

who voted for LB 209 unanimously had a change of mind and (by a resolution which had been before them one day) expressed an intent to retract their legislative determination that an emergency existed and to limit the present benefits of the act to the preparation of plans, specifications, and estimated costs. Accordingly, we need not determine the extent to which a resolution may be used to amend or nullify a legislative act.

One further indication of legislative intent is manifest. Without referring to items in detail, a study of LB 2, as originally introduced and finally enacted, shows that approximately one and three-quarter million dollars in the budget recommended by Governor Griswold was specifically omitted from the budget recommended by Governor Peterson, and was not restored by the Legislature. Thus again, a legislative intent to have the money levied and authorized by LB 209 made immediately available is shown. It also appears that certain unexpended balances of funds appropriated to the Board of Control and the Board of Education of State Normal Schools for buildings and repairs were reappropriated to those institutions, but no additional funds were granted unless appropriated in section 51. It likewise appears that an appropriation was made for automatic sprinklers and fire escapes to be installed in buildings under the jurisdiction of the Board of Control —an appropriation made necessary by a report of the State Fire Marshal. This item was not included in either Governor Griswold's or Governor Peterson's budget messages and was obviously an emergency matter which the Legislature did not desire should be delayed until funds levied and authorized under LB 209 would be available.

We now return to the question of the effect of the amendment hereinbefore recited and the construction of section 51. There is an ambiguity and uncertainty in the language used in section 51 arising from the wording of the amendment. That ambiguity and un-

certainty are removed when the amendment is considered in the light of an analysis of LB 209 and one statute which is the key to the answer of the problem here presented. The key is section 77-704, R. S. 1943.

The Attorney General argues that LB 209 created a special fund as distinguished from the general fund. We are in fact here dealing with three funds: The "State Institutional and Military Department Building Fund" is created by LB 209. That fund, however, is made up of two other funds specifically referred to in section 1 of the act: (1) The proceeds derived from the special tax; and (2) one-third of the state's share of the intangible tax for each year. LB 209 authorized the one-and-one-tenth-mill tax levy. The intangible tax levy had already been authorized. §§ 77-701 to 77-703, inclusive, R. S. 1943.

Section 2 of LB 209 directs the expenditure of the proceeds of the tax authorized to be levied by LB 209, when appropriated by the Legislature, for the purposes therein expressed. The section makes no reference to the intangible tax funds.

Section 3 of LB 209 directs that the tax authorized therein shall be set aside and credited to the agencies named. It likewise directs that the proceeds of the share of the intangible tax shall be set aside and credited to the agencies named.

By section 77-704, R. S. 1943, one-sixth of the total intangible tax collected in the various taxing districts of the state shall be apportioned to the "state general fund." It obviously is that share that is referred to in LB 209. So far as LB 209 is concerned, the one-third of the state's share of the intangible tax there set aside and credited remains in the general fund. It follows that the Attorney General's premise that there is no money in the general fund involved in LB 209 is not sustained.

We have not overlooked the language in section 1 that the proceeds of the one-and-one-tenth-mill tax

"shall be supplemented by the addition thereto" of a part of the state's share of the intangible tax fund. We recognize that standing alone it might rationally be argued that the Legislature thereby intended to merge the two funds into the one fund. But the words do not stand alone. As just pointed out in section 3, the proceeds of the one-and-one-tenth-mill tax fund are treated as separate and distinct from the proceeds of the share of the intangible tax. The intangible tax fund remains a separate fund. It follows that, to fully appropriate the "State Institutional and Military Department Building Fund" for the biennium 1947-1949, the Legislature was required to appropriate the designated part of the state's share of the intangible tax from the general fund as well as to appropriate the fund raised by the one-and-one-tenth-mill levy.

We now return to the proposal originally adopted by the Legislature and the amendment adopted resulting in section 51.

The original provision was: "All money that may be raised during the biennium by the special levy authorized by Legislative Bill 209 * * *." Obviously, this language purports to appropriate only that fund raised by the special levy. The intangible tax money in the general fund referred to in LB 209 is not included by that language.

By the amendment "all money" was stricken out and "appropriate all money from the General Fund" was inserted. As the Attorney General argues, this appropriates money "from the General Fund." However, the amendment does not limit the appropriation to money in the general fund. Had the Legislature so intended they naturally would have stricken out the reference to the money raised by the special levy. By leaving that language in the section, the Legislature clearly demonstrated an intent to appropriate both funds rather than substitute one fund for the other. The Legislature also designated the uses for which the in-

tangible tax money was to be used—uses not defined by specific language in LB 209, but defined in section 51. In the light of this analysis then, section 51 may be construed in this wise, "appropriate all money from the general fund * * * authorized by Legislative Bill 209" for the purposes therein stated, and "appropriate all money * * * that may be raised during the biennium by the special levy authorized by Legislative Bill 209" for the purposes therein stated.

Now, putting the two separate appropriations into one, we have "appropriate all money from the General Fund *and all money* that may be raised during the biennium by the special levy authorized by Legislative Bill 209" etc. Thus, by the addition of the word "and" and by repeating "all money" the legislative purpose expressed in LB 209 and the legislative intent in section 51 are clearly expressed and determined. The entire legislation from beginning to end thus follows a common pattern and purpose. The inclusion of section 51 under the title in the bill of "Specific Funds" is consistent with this analysis.

May the emphasized words "and all money" be supplied? The rule is that words may be supplied by the courts in construing a statute where that is necessary to complete the sense thereof and give effect to the intention of the Legislature manifested therein. This rule is especially applicable where it is necessary to do so to prevent the law from becoming a nullity. 50 Am. Jur., Statutes, § 234, p. 222; 59 C. J., Statutes, § 593, p. 992; Annotations, 3 A. L. R. 404, and 126 A. L. R. 1325.

It, accordingly, is our judgment that the Legislature by the enactment of section 51 of LB 2 (Laws 1947, chapter 321, pages 963, 1023) appropriated all the money that may be raised during the biennium by the special levy authorized by LB 209, and also the one-third of the state's share of the intangible taxes for each year for the purposes expressed in said section 51.

JUDGMENT ACCORDINGLY.

CLIFFORD L. REIN, ON BEHALF OF HIMSELF AND OTHER PERSONS SIMILARLY SITUATED, APPELLANT, V. RAY C. JOHNSON ET AL., APPELLEES.

30 N. W. 2d 548

Filed December 26, 1947. No. 32275.

1. **States.** An action against state officers attacking the constitutionality of a statute and seeking to enjoin its enforcement or otherwise obtain relief from an alleged invalid act or abuse of authority by such officers is not ordinarily a suit against the state.
2. **Injunction.** Resident taxpayers of the state may maintain an action in any court having jurisdiction to enjoin an alleged unlawful transfer, diversion, or expenditure of public funds by public boards or officers, without showing any interest or injury peculiar to themselves.
3. **Constitutional Law: States.** Section 25, article III, Constitution of Nebraska, prohibits the drawing of any money from the state treasury except in pursuance of a specific appropriation made by law and on the presentation of a warrant issued by the Auditor of Public Accounts thereon, and prevents the diversion of money from any appropriation made for any purpose or the taking thereof from any fund whatever by legislative resolution as distinguished from legislative law enacted by bill in conformity with constitutional requirements.
4. ———. A constitutional provision requiring the existence of specific appropriations made by law is conservative, and, except as limited by the Constitution, secures to the Legislature plenary power to constitutionally enact laws prescribing how, when, and for what purposes public revenue derived from taxation shall be applied in carrying on the government of the state.
5. **Statutes.** The purpose or design of an appropriation bill is to make provision for lawfully taking money out of the state treasury as distinguished from lawfully putting money into the state treasury, there to be allocated to a particular fund.
6. **Constitutional Law: States.** Section 22, article III, Constitution of Nebraska, is prohibitive of continuing legislative appropriations, and, unless reappropriated, all unexpended balances of appropriations of public revenue derived or to be derived from taxation and paid into the state treasury, automatically lapse into the general fund at the end of the fiscal quarter after adjournment of the next regular session of the Legislature.
7. **Taxation: States.** Public revenue derived from taxation and lawfully allocated to a special fund, or appropriated for any purpose, cannot be administratively or by legislative resolution

diverted or taken therefrom, but otherwise all such public revenue in the state treasury is under the plenary control of the Legislature and subject to its constitutionally enacted laws.

8. **Constitutional Law.** Chapter 242, Laws 1945, page 723, relating to appropriations for state government during the biennium ending June 30, 1947, is not unconstitutional as in violation of section 14, article III, section 22, article III, and section 3, article I, Constitution of Nebraska, or section 1, article XIV, of the Amendments to the Constitution of the United States.

9. **Cases overruled.** The opinions in State ex rel. Ridgell v. Hall, 99 Neb. 89, 155 N. W. 228, and 99 Neb. 95, 156 N. W. 16, are overruled insofar as they are in conflict with this opinion.

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

William Niklaus and *Herbert W. Baird,* for appellant.

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

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

CHAPPELL, J.

This action in equity was prosecuted by plaintiff for himself and others similarly situated, who, as taxpayers, allegedly contributed to the State Assistance Fund. Plaintiff sought thereby to enjoin the State Auditor and the State Treasurer from paying out any of such funds except for assistance purposes, have an accounting of the fund, and obtain ancillary relief.

The trial court, after hearing upon the merits, entered its decree, finding generally for defendants and dismissing plaintiff's action. Motion for new trial was overruled, and plaintiff appealed. His assignments of error were substantially that: (1) The trial court erred in failing to adjudge that the State Assistance Fund was a special fund impressed with a trust for assistance purposes which could not be diverted in whole or in part to other uses or purposes of the state government; and,

(2) erred in finding and adjudging that chapter 242, Laws 1945, page 723, was enacted in compliance with constitutional requirements. We conclude that plaintiff's assignments cannot be sustained.

This court is confronted at the outset with two alleged jurisdictional questions, appropriately raised and preserved by defendants. The first such question is whether or not the action was one against the state, which could not be maintained in the absence of appropriate legislative authority. We conclude that the case at bar was not one against the state.

In that regard, plaintiff first contended that section 68-301, R. S. 1943, created and established in the treasury of the state a fund known as the "State Assistance Fund" which thereby specifically, absolutely, and continuously appropriated for the purposes of section 68-301 to 68-325, R. S. 1943, all moneys available from certain tax sources legislatively described and defined. A fortiori, plaintiff contended that chapter 242, Laws 1945, page 723, which reappropriated for assistance purposes only a portion of the unexpended balance remaining in the State Assistance Fund as of June 30, 1945, and lapsed or transferred the residue to the general fund, was unconstitutional and of no force and effect whatever. It was obedience to such act by defendants which plaintiff sought to enjoin.

Generally, the applicable rule is that an action against state officers, attacking the constitutionality of a statute of the state and seeking to enjoin its enforcement by such officers, or otherwise obtain relief from an alleged invalid act or abuse of authority by them is not ordinarily a suit against the state, and is not prohibited as such under the general principles governing the immunity of the state from suit. That is true because acts of state officers not legally authorized, or which exceed or abuse the authority conferred upon them, are judicially regarded as their own acts and not acts of the state. 49 Am. Jur., States, Territories, and Dependencies, § 94, p. 307,

§ 95, p. 310; 59 C. J., States, § 465, p. 310; 43 C. J. S., Injunctions, § 109, p. 626; 32 C. J., Injunctions, § 389, p. 247.

As stated in Burke v. Snively, 208 Ill. 328, 70 N. E. 327: "In equity the money in the State treasury is the money of the people of the State, and suits by a tax-payer to restrain the misappropriation by public officers of such money to an unauthorized purpose are not suits against the State."

Also, as stated in White Eagle Oil & Refining Co. v. Gunderson, 48 S. D. 608, 205 N. W. 614, quoting with approval from Mullen v. Dwight, et al., Regents of Education, 42 S. D. 171, 173 N. W. 645: "Likewise, state officials may be restrained or prohibited by appropriate action or procedure, in any court having jurisdiction, from performing unlawful acts as such officials, without the consent of the state, as such procedure is not deemed a suit against the state." See, also, 59 C. J., States, § 466, p. 312.

The court is also required to decide whether or not plaintiff had the right as a taxpayer to maintain the action. We conclude that he did have that right.

Plaintiff contended substantially that defendants, without lawful authority, transferred money from the State Assistance Fund to the general fund and threatened unlawfully to expend it for other than assistance purposes.

In that regard, resident taxpayers of the state have an equitable interest in the public funds of the state and in their proper application. As such, they may enjoin unlawful expenditures thereof by public boards or officers, without showing any interest or injury peculiar to themselves. Woodruff v. Welton, 70 Neb. 665, 97 N. W. 1037; Fischer v. Marsh, 113 Neb. 153, 202 N. W. 422; 59 C. J., States, § 426, p. 280.

As early as Union P. R. R. Co. v. Dawson County, 12 Neb. 254, 11 N. W. 307, it was concluded that a taxpayer could maintain an action to enjoin the unlawful trans-

fer or diversion as well as the unlawful expenditure of public funds raised by taxation.

Actions brought to enjoin an alleged illegal expenditure, misappropriation, transfer, or diversion of public funds by public boards or officers, are in their nature public proceedings to test the constitutional or statutory validity of official acts, and courts in passing upon the taxpayer's right to maintain such actions will be guided by applicable legal principles and not by the factual question of whether or not the particular taxpayer or the public will actually gain or lose by the relief sought to be awarded.

We turn then to the primary questions involved. Decision depends upon legal principles applicable to undisputed facts. The legislative history of the State Assistance Fund, together with appropriations therefor, becomes important as a foundation for a discussion of plaintiff's contentions.

Chapter 20, Laws 1935 (Special), section 1, page 134, provided: "A Fund to be known as the 'State Assistance Fund' is hereby created and established in the treasury of the state of Nebraska. There is hereby appropriated for said fund and the purposes of this Act for the period ending June 30, 1937, the following sums: (a) From the state general fund $2,083,000.00; (b) From the one-cent gasoline tax to be collected, as provided in House Roll No. 6, Fifty-first (Special) Session, Legislature of Nebraska, $2,430,000.00; Total $4,513,000.00. Any unexpended balance remaining in said fund on June 30, 1937, shall be transferred and credited to the general fund of the state."

Chapter 22, Laws 1935 (Special), page 150, specifically appropriated $2,083,000 from the general fund, and $2,430,000 to be derived from described taxes, or a total of $4,513,000 for the uses and purposes of the State Assistance Fund.

In 1937, at its regular session, the Legislature enacted chapter 188, Laws 1937, section 1, page 747, thereby

amending chapter 20, Laws 1935 (Special), section 1, page 134, as follows: "A Fund to be known as the 'State Assistance Fund' is hereby created and established in the treasury of the State of Nebraska. There is hereby specifically and absolutely appropriated for said fund and the purposes of this Act for the period ending June 30, 1939, from any moneys available therefor from motor fuels taxes, alcoholic liquor taxes, head taxes and such other taxes as may be provided by law, the sum of $7,500,000.00. Any unexpended balance remaining on June 30, 1939, shall be transferred and credited to the general fund of the state."

Chapter 193, Laws 1937, section 49, page 783, specifically appropriated for assistance purposes the above described taxes, as allocated by law, together with any unexpended balances for the biennium ending June 30, 1937, in the fund or any other fund inuring to the State Assistance Fund, not to exceed $7,500,000. Also, for the remainder of the then existing biennium, it transferred from the general fund to the State Assistance Fund $860,835, and appropriated that amount, making it immediately available for assistance purposes.

On February 7, 1939, the then Governor delivered a special message to the Legislature, requesting an emergency appropriation of an additional $300,000 for the State Assistance Fund and its purposes, during the balance of the biennium ending June 30, 1939. In conformity with that request, Legislative Bill No. 494, an emergency measure, was introduced March 6, 1939, and enacted as chapter 121, Laws 1939, section 1, page 509, effective April 28, 1939. See Legislative Journal, 1939, pages 321 and 514. That act amended chapter 188, Laws 1937, section 1, page 747, and was a duplicate thereof, except as amended, the sum specifically appropriated therein for the biennium was made $7,800,000, i. e., $300,000 more than that provided in the 1937 act. It will be noted that the latter act also provided: "Any unexpended balance remaining on June 30, 1939, shall

be transferred and credited to the general fund of the state." The act thereafter appeared as section 68-317, C. S. Supp., 1939.

Chapter 133, Laws 1939, section 50, page 571, then appropriated for assistance purposes during the ensuing biennium certain described allocated taxes, and reappropriated any unexpended balances for the biennium ending June 30, 1939, in said fund or in any other fund inuring to the State Assistance Fund, not to exceed $8,400,000.

We discover also that chapter 122, Laws 1939, page 511, appropriated $400,000 out of the general fund, making such sum immediately available as a revolving fund to supplement the State Assistance Fund and thereby effect a more punctual administration of assistance laws. The act provided that the Board of Control of State Institutions, as directed by the Legislature from time to time, should reimburse the general fund for the amount thus appropriated, and provided that the entire amount should be repaid to the general fund within ten years from May 18, 1939, the effective date of the act. It further provided: "* * * no unexpended balance in the State Assistance Fund shall ever lapse or shall ever be reappropriated to the general fund until said revolving fund shall have repaid the general fund as herein provided."

Whether the above-quoted provision was constitutionally operative is now unimportant, because chapter 171, Laws 1941, page 673, repealed the above act in toto, effective May 5, 1941, and appropriated $400,000 out of the general fund to establish a "state surplus agricultural revolving fund."

Chapter 174, Laws 1941, section 1, page 681, was then enacted. It amended section 68-317, C. S. Supp., 1939, and provided: "A fund to be known as the *'state assistance fund'* is hereby created and established in the treasury of the State of Nebraska. There is hereby specifically and absolutely appropriated for said fund

and the purposes of this act all moneys available therefor from motor fuel taxes, alcoholic liquor taxes, head taxes and such other taxes as may be provided by law." That act now appears as section 68-301, R. S. 1943.

It will be noted that for the first time since 1935, an act creating the State Assistance Fund and providing sources from which its moneys were to be derived, was given the character of permanency as distinguished from one of emergency. Also, for the first time, the Legislature omitted therefrom any attempt to specifically appropriate a definite sum to said fund for the biennium and doubtless being fully cognizant of the application and operation of constitutional provisions, omitted therefrom any provision for lapse or transfer to the general fund of any unexpended balance remaining in the fund at the expiration of the first fiscal quarter after the adjournment of the next regular session.

Chapter 183, Laws 1941, section 48, page 742, appropriated for assistance purposes described allocated taxes, and reappropriated any unexpended balances for the biennium ending June 30, 1941, in said fund or any other fund inuring to the State Assistance Fund, estimated $10,196,000.

Likewise, chapter 220, Laws 1943, section 24, page 744, appropriated for assistance purposes described allocated taxes, and reappropriated any unexpended balances for the biennium ending June 30, 1943, in said fund or any other fund inuring to the State Assistance Fund, estimated $11,031,000.

Thereafter, chapter 242, Laws 1945, section 25, page 751, appropriated for assistance purposes described allocated taxes, and reappropriated $1,000,000 of the unexpended balance on hand in said fund as of June 30, 1945, in Auditor account No. 352, and all other unexpended balances in any other fund inuring to the State Assistance Fund, including any unexpended balances on hand in Auditor accounts Nos. 351, 357, and 358, as of June 30, 1945, estimated $10,000,000. Section 50, page

772, of that act provided that any unexpended balances as of June 30, 1945, not reappropriated, shall lapse to the state general fund. Also, section 55, page 773, provided that: "Any unexpended balances, not otherwise appropriated, in the hands of the State Treasurer on June 30, 1945, are hereby transferred to the state general fund."

On June 30, 1945, there was an unexpended balance of $2,137,257.57 in Auditor account No. 352, and, by virtue of section 22, article III, Constitution of Nebraska, and chapter 242, Laws 1945, section 25, page 751, section 50, page 772, and section 55, page 773, the sum of $1,137,257.57 lapsed into the general fund and was transferred thereto, the validity of which was questioned by plaintiff in this action.

It should be stated that section 25, *supra,* reappropriated all unexpended balances of federal assistance funds on hand as of June 30, 1945, in Auditor accounts Nos. 351a and 352a, and then appropriated all receipts thereof during the biennium, estimated $10,000,000. In addition, it reappropriated any unexpended balances of federal funds on hand as of June 30, 1945, and all receipts thereof for the biennium for crippled children and child welfare, estimated $120,000 and $60,000 respectively.

It is clear, therefore, that federal funds are not involved in the case at bar. They have no relation either factual or legal to the question involved, and will not be further discussed.

Two undisputed facts are here recalled. Since 1935, the Legislature has appropriated out of and transferred from the general fund to the State Assistance Fund the sum of $2,943,835. At the time of the lapse or transfer of $1,137,257.57 here involved, to the general fund, it is clear that the general fund had been depleted in the amount of $1,806,577.43 for the benefit of the State Assistance Fund. Further, the evidence shows, without dispute or denial, that at the time of the trial of this

action, the State Assistance Fund had at all times been adequate to meet all lawful claims upon it and that failure to reappropriate the entire unexpended balance as of June 30, 1945, in no manner whatever had ever affected the lawful rights or claims of either applicants for or recipients of state assistance.

Having heretofore recited the legislative history of the State Assistance Fund at length, we will discuss plaintiff's contentions in the light of applicable constitutional provisions.

Section 25, article III, Constitution of Nebraska, provides in part: "No money shall be drawn from the Treasury except in pursuance of a specific appropriation made by law, and on the presentation of a warrant issued by the Auditor thereon, and no money shall be diverted from any appropriation made for any purpose or taken from any fund whatever, either by joint or separate resolution." Confronted at the outset with that provision, plaintiff argued compliance therewith by contending that section 68-301, R. S. 1943, constituted a continuing appropriation of a special fund.

However, in the light thereof we are required to give force and effect to section 22, article III, Constitution of Nebraska, which provides: "Each Legislature shall make appropriations for the expenses of the Government until the expiration of the first fiscal quarter after the adjournment of the next regular session, and all appropriations shall end with such fiscal quarter."

In State ex rel. Norfolk Beet-Sugar Co. v. Moore, 50 Neb. 88, 69 N. W. 373, this court construed the above section and held: "Appropriations can only extend to the end of the next fiscal quarter succeeding the adjournment of the next regular session of the legislature. Therefore an act by its express terms enduring for a longer period cannot be construed as carrying an appropriation without making it void as in conflict with the constitution."

It is obvious that the very purpose and effect of that

constitutional provision was to prohibit all continuing legislative appropriations of public revenue raised by taxation for the expenses of government, whether they be ordinary or extraordinary expenses. 59 C. J., States, § 397, p. 258. It is not and could not be effectively argued that assistance funds did not come within the prohibited classification as expenses of government. 42 Am. Jur., Public Funds, § 73, p. 771.

The object and purpose of such a constitutional provision was to render all departments of the state government dependent upon the will of the people as expressed by their duly elected representatives, and to require such departments of government, except as otherwise provided in the Constitution, to return to that source at regular stated intervals for the necessary means of existence, because the people have learned and will continue to learn that the very preservation of their liberty depends largely upon control of the purse by their periodically elected representatives. State ex rel. Norfolk Beet-Sugar Co. v. Moore, *supra.*

It is true that within the limitations of the Constitution, the general authority of the Legislature over the state's public revenue derived from taxation is paramount. However, this court has heretofore unequivocally concluded that all unexpended balances of appropriations of public revenue derived from taxation and paid into the state treasury automatically lapse into the general fund at the end of the fiscal quarter after adjournment of the next regular session of the Legislature, and that any legislative act attempting to extend an appropriation beyond the biennium is void. State ex rel. Norfolk Beet-Sugar Co. v. Moore, *supra;* Power Oil Co. v. Cochran, 138 Neb. 827, 295 N. W. 805. In that connection, insofar as the opinions in State ex rel. Ridgell v. Hall, 99 Neb. 89, 155 N. W. 228, and 99 Neb. 95, 156 N. W. 16, are in conflict with this opinion, they are hereby overruled.

It is apparent then that even if the Legislature had

intended that section 68-301, R. S. 1943, should be a continuing appropriation, it could not so operate in violation of section 22, article III, Constitution of Nebraska. It is equally as apparent, however, from the legislative history heretofore recited, that the Legislature never intended that it should operate as an appropriation in the constitutionally prescribed sense. Rather, the word "appropriated" as used therein was of constitutional necessity as well as legislative intent, used only to indicate that certain public revenue derived or to be derived from certain described tax revenue sources should be paid into the state treasury, there to be administratively credited, assigned, or allocated to the State Assistance Fund for assistance purposes as distinguished from other public funds of a different nomenclature.

Chapter 20, Laws 1935 (Special), section 14, page 138, now section 68-321, R. S. 1943, specifically provided that: "Expenditures from the state assistance fund shall be made by the State Treasurer in the manner and form provided by law."

The purpose or design of an appropriation bill is to make provision for lawfully taking money out of the state treasury as distinguished from lawfully putting money into the state treasury, there to be allocated to a particular fund as provided in section 68-301, R. S. 1943. People ex rel. Colorado State Hospital v. Armstrong, 104 Colo. 238, 90 P. 2d 522.

Viewed in that light, it appears that the Legislature did not intend that section 68-301, R. S. 1943, should be an appropriation, much less a specific appropriation, as they are ordinarily defined. It could not constitutionally be a continuing appropriation.

Plaintiff argued that the State Assistance Fund was a special fund created for a particular purpose and could not be legislatively diverted to other purposes. It is true that public revenue derived from taxation and lawfully allocated to a special fund such as the State

Assistance Fund, or specifically appropriated thereto for its purposes, could not administratively or by legislative resolution, as distinguished from legislative law enacted by bill, be diverted or taken therefrom for other purposes. Nevertheless, any such allocation or specific appropriation, or any unexpended balance of such an appropriation remaining therein at the expiration of the first fiscal quarter after adjournment of the next regular session, would be under the plenary control of the Legislature and subject to its constitutionally enacted laws. That conclusion is inevitable, or section 22, article III, Constitution of Nebraska, would be of no force and effect as a prohibition of continuing appropriations.

Plaintiff also argued that the State Assistance Fund was a trust fund created for the benefit of recipients of assistance, which fund could not be legislatively diverted therefrom. Doubtless the public revenue derived from taxation and lawfully allocated to the State Assistance Fund or specifically appropriated for state assistance purposes, would be a trust fund in the hands of those state officials who are required to administer it. However, the State Assistance Fund could not be and was not intended to be a trust fund in the technical sense claimed by plaintiff.

Chapter 28, Laws 1935 (Special), section 8, page 171, now section 68-211, R. S. 1943, specifically provided that: "No person shall have any vested right to any claim against the state or county for assistance of any kind by virtue of being the recipient of old age assistance." Chapter 21, Laws 1935 (Special), section 8, page 144, now section 68-408, R. S. 1943, contained a like provision regarding recipients of "blind assistance." Such provisions are entirely inconsistent with plaintiff's contention.

Cases relied upon by plaintiff, except the opinions in State ex rel. Ridgell v. Hall, *supra,* heretofore overruled insofar as in conflict with this opinion, are clearly distinguishable from the case at bar both upon the law

and the facts. They involved special funds created by contributions from sources other than public revenue raised by taxation, over which our Legislature has plenary control except as limited by the Constitution. Fischer v. Marsh, *supra.*

As aptly stated in 59 C. J., States, § 382, p. 238: "The legislative power is supreme in matters relating to appropriations as to which no constitutional restrictions exist. Constitutional provisions requiring the existence of appropriations made by law secure to the legislature this exclusive power of deciding how, when, and for what purposes the public funds shall be applied in carrying on the government, and are conservative, not restrictive or prohibitory of the legislative power over the public revenue."

Plaintiff contended that chapter 242, Laws 1945, page 723, hereinafter called "the act" was unconstitutional as in violation of that part of section 14, article III, Constitution of Nebraska, which provides that: "No bill shall contain more than one subject, and the same shall be clearly expressed in the title."

The title of the act read: "AN ACT making appropriations for the state government of the State of Nebraska for the biennium beginning July 1, 1945, and ending June 30, 1947; prescribing conditions for the determination of the levy of the state taxes for the state general fund; reciting limits and conditions on the expenditure of funds from the appropriations so made; and to declare an emergency."

Because of applicable rules well established in this jurisdiction, plaintiff's contention cannot be sustained.

This court has held that: "If an act has but one general object, no matter how broad that object may be, and contains no matter not germane thereto, and the title fairly expresses the subject of the bill, it does not violate section 14, art. III of the Constitution, providing that no bill shall contain more than one subject and

the same shall be clearly expressed in the title." Beisner v. Cochran, 138 Neb. 445, 293 N. W. 289.

That provision does not require that the title to an act should be a synopsis of a law. Its purpose was to prevent surreptitious legislation by advising legislators of the nature of the measures they are called upon to support or oppose. If, by a fair and reasonable construction, the title calls their attention to the subject matter of the proposed act, it may be said that the object is clearly expressed in the title. Lennox v. Housing Authority of the City of Omaha, 137 Neb. 582, 290 N. W. 451.

The above rule was reaffirmed and applied in Maher v. State, 144 Neb. 463, 13 N. W. 2d 641. Therein, this court also reiterated an applicable rule stated in Pandolfo v. State, 120 Neb. 616, 234 N. W. 483, to the effect that: "The provisions of the Constitution relating to titles are to be 'liberally construed, and so construed as to admit of the insertion in a legislative act of all provisions which, though not specifically expressed in the titles, are comprehended within the objects and purposes of the act as expressed in its title; and to admit all provisions which are germane, and not foreign, to the provisions of the act as expressed in its title.' "

Plaintiff contended that the act was unconstitutional as in violation of section 14, article III, Constitution of Nebraska, which provides that: "* * * no law shall be amended unless the new act contain the section or sections as amended and the section or sections so amended shall be repealed." The contention cannot be sustained because the act did not either amend or repeal section 68-301, R. S. 1943, as argued by plaintiff, but was simply in pari materia therewith. We so construe it.

Plaintiff also argued that the act was unconstitutional as in violation of that part of section 22, article III, Constitution of Nebraska, which requires that: "Bills making appropriations * * * for the salaries of the officers of the Government, shall contain no provision on any

other subject." The answer is obvious. The only subject of the act was appropriations for state government. It contained no other subjects or objects. The purpose of the constitutional provision above noted was to prevent designing legislators from including in bills appropriating money to carry on the government of the state, measures and objects foreign to that purpose, and thus, taking advantage of the necessities of the state, force the Legislature to adopt them, or defeat the appropriation and thereby stop the entire machinery of government for want of funds to carry it on. That purpose was not contravened by the act.

Finally, plaintiff argued that the act violated section 3, article I, Constitution of Nebraska, and section 1, article XIV, of the Amendments to the Constitution of the United States, which provide that: "No person shall be deprived of life, liberty, or property, without due process of law."

The primary purpose of that constitutional guaranty is security of the individual from the arbitrary exercise of the powers of government unrestrained by the established principles of private rights and distributive justice. 12 Am. Jur., Constitutional Law, § 575, p. 271.

As related to legislation, it is generally held that due process is satisfied if the Legislature had the power to act on the subject matter, if that power was not exercised in an arbitrary, capricious, or unreasonably discriminatory manner, and if the act, being definite, had a reasonable relationship to a proper legislative purpose. In other words, if an act of the Legislature is authorized and promulgated by the inherent and reserved constitutional powers of the state, and is enforced with due regard to and observance of the rules established by our system of jurisprudence for the security of life, liberty, and property, it is not in conflict with due process of law. 16 C. J. S., Constitutional Law, § 569, p. 1156.

Further, the general rule is that the power of the

state to control its own governmental agencies in their governmental capacities, is not ordinarily restrained by the requirement of due process. 16 C. J. S., Constitutional Law, § 570, p. 1158.

From previous discussion herein, it will be observed that the act involved meets every requirement of due process, and we conclude that plaintiff's contention has no merit.

For the reasons heretofore given, the judgment of the trial court should be and hereby is affirmed.

AFFIRMED.

MESSMORE, J., participating on briefs.

FRED HAFFKE, PLAINTIFF IN ERROR, V. STATE OF NEBRASKA, DEFENDANT IN ERROR.

30 N. W. 2d 462

Filed January 2, 1948. No. 32304.

1. **Appeal and Error.** The presumption is in favor of the validity of the service of a bill of exceptions. It is sufficient to sustain the bill that it does not appear that the service was not within the time allowed.
2. **Criminal Law.** This court will not interfere with a verdict of guilty in a criminal case which is based upon conflicting evidence unless it is so lacking in probative force that we can say as a matter of law that it is insufficient to support a finding of guilt beyond a reasonable doubt.
3. ———. When a proper record of a previous conviction has been produced, it becomes a matter of law for the court to determine whether or not that record establishes a previous conviction for the violation of a statute.
4. ———. In the absence of a statute placing upon the jury a duty with reference to the penalty (such as section 28-401, R. S. 1943), the penalty to be imposed after conviction of a criminal offense is not for the jury but for the court to determine within the limits fixed by the statute.
5. **Courts.** Under section 25, article V, of the Constitution, we promulgate the following rule of practice and procedure in criminal cases hereafter tried in all courts. In the absence of a provision placing upon the jury a duty with reference to the

penalty, where punishment is sought under any statute defining one crime and providing for an enhanced penalty upon conviction of a second or subsequent offense: (1) The facts with reference thereto must be alleged in the complaint, indictment or information upon which the accused is prosecuted; (2) the fact that the accused is charged with having committed a second or subsequent offense should not be an issue upon the trial and should not in any manner be disclosed to the jury; (3) if the accused is convicted, before sentence is imposed a hearing should be had before the court without a jury as to whether or not there have been any prior convictions of the accused under the same statute; (4) the accused should be given notice of the time of hearing at least three days prior thereto; and (5) at the hearing, if the court finds from the evidence submitted that the accused has been convicted prior thereto under the same statute, the court should sentence the accused according to the enhanced penalty applicable to the facts found.

6. **Cases distinguished.** For purposes of clarity we hold that the opinions in Wozniak v. State, 103 Neb. 749, 174 N. W. 298; Osborne v. State, 115 Neb. 65, 211 N. W. 179; Burnham v. State, 127 Neb. 370, 255 N. W. 48; and Wiese v. State, 138 Neb. 685, 294 N. W. 482, to the extent in conflict herewith are no longer applicable.

ERROR to the district court for Sarpy County: THOMAS E. DUNBAR, JUDGE. *Reversed.*

Francis M. Casey, for plaintiff in error.

Walter R. Johnson, Attorney General, and *Bert L. Overcash,* for defendant in error.

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

SIMMONS, C. J.

The defendant by information was charged with the offense of operating a motor vehicle upon the public highways while under the influence of alcoholic liquors; two prior convictions were alleged. He was tried, found guilty, and sentenced to confinement for two years in the penitentiary. He appeals. We reverse the judgment of the trial court.

We first are confronted with the contention of the

State that the bill of exceptions was not settled within the time required by section 25-1140, R. S. 1943. This contention is based on the proposition that the term of court at which the case was tried adjourned sine die June 9, 1947, and that the bill was served on the county attorney September 5, 1947, 87 days after the adjournment of the court. However, the bill shows the receipt of the county attorney for examination and amendment dated "5th, 1947" and that it was returned dated "8th, 1947" and settled the "8th day of September, 1947 * * * subject to objections made herein by the County attorney that the same was submitted within 80 days from the adjournment sine die June 9 1947." The State asks that we assume that the bill was served on the 5th day of September, hence was not served within 80 days, and accordingly the State contends the only question before us is the sufficiency of the pleadings to sustain the judgment.

Two facts appear: First, that the date of service is indefinite; and, second, that the county attorney when served did not object that the service was without time. The presumption is in favor of the validity of the service. It is sufficient to sustain the bill that it does not appear that the service was not within the time allowed. 4 C. J. S., Appeal and Error, § 881, p. 1385; Bank of Orland v. Finnell, 133 Cal. 475, 65 P. 976.

The evidence of the State briefly summarized is this: Late the afternoon of March 4, 1947, two members of the State Highway Patrol noticed a car being driven north on the highway; it did not maintain its position on the right side of the road, but moved over to the left side and back to the right side several times; they stopped the car; defendant was driving it; they smelled intoxicating liquor on defendant's breath; defendant was at first happy, jovial, and friendly, and later, after having been arrested, was silent and crying; when defendant got out of the car he was unsteady on his feet, and did not walk in a straight line; defendant told them he had

had "two shots" to drink—large ones; and in their opinion he was under the influence of intoxicating liquors.

One of the State's witnesses, who drove the defendant's car from the scene, testified that the car had a "play" in the steering wheel, and "You had to be very careful to allow for that play, or you would drift from one side of the road to the other."

The State offered the records of two previous convictions, and they were received in evidence.

The defendant's evidence is that on the day in question, he had been at home, had gone downtown in the afternoon to buy some bread, had had a glass of beer, driven home, and was on his way to get his son at a sand pit when he was arrested. Witnesses who saw him a short time before the event testified that he was not then under the influence of intoxicating liquors. The evidence also discloses that he was under a doctor's care and had been taking medicine the day in question. A qualified physician testified that on March 12, 1947, he examined defendant; that he had high blood pressure; that it would produce symptoms of dizziness and lack of coordination. Defendant testified that as a result of an old fracture of both legs he wobbled when starting to walk after sitting awhile.

Defendant also offered evidence as to the operation of the car. Defendant offered a witness who testified that he was acquainted with the mechanical apparatus of cars and had worked on them; that on the Sunday following the incident he took the steering apparatus apart. He then was asked if he made "any discoveries." Objection was made that the time was too remote. The court sustained the objection. He then testified that the car was in the same shape as it was on the day of the arrest; and that there had been no mechanical work done on the car between March 4th and the following Sunday, when he did the work on the car. He next was asked what he discovered when he took the apparatus apart. The court on its own motion inter-

posed: "I already ruled on that * * *." The defendant then offered to prove that it was discovered that the bushings were worn and that it was impossible for the automobile to be operated in a straight line. The county attorney interposed an additional objection that it called for an opinion of the witness and that no foundation had been laid. The court sustained the objection on the ground that it was too remote and no foundation had been laid.

The defendant's first assignment of error argued is that the evidence is insufficient to sustain a conviction. We think the evidence sufficient to go to the jury, and, if believed, sufficient to sustain a conviction as to the offense charged on the day in question. The rule is: "This court will not interfere with a verdict of guilty in a criminal case which is based upon conflicting evidence unless it is so lacking in probative force that we can say as a matter of law that it is insufficient to support a finding of guilt beyond a reasonable doubt." Severin v. State, 146 Neb. 506, 20 N. W. 2d 377.

The question then comes: Was prejudicial error committed in the trial of the cause?

It is to be noted that one of the circumstances relied upon by the State to assist in establishing guilt is the evidence that the car driven by defendant was going from one side of the road to the other as it moved forward. It was that circumstance that first directed the attention of the patrolmen to the car. It is the theory of the State that the movement of the car was the result of the claimed drunken condition of the driver. It is the theory of the defense that it was caused by the mechanical condition of the car. Evidence was admitted tending to show that the car "shimmied," and that there was play in the steering wheel which required a driver to be "very careful" or the car would drift from one side of the road to the other. With the evidence in this situation, defendant offered to prove that the bushings in the steering apparatus were worn and that the defective bushings were the cause of the operating con-

dition of the car. The court, in part on its own motion, refused admission of the evidence. Defendant assigns this as prejudicial error.

The State's position is that the evidence was collateral. We do not agree. The evidence before the jury was to the effect that the car drifted from side to side on the highway. The evidence offered by the defendant went to the question of the cause. To deny the defendant the right to show a cause of the operating condition contrary to the theory as to the cause advanced by the State was prejudicial error.

The defendant complains of the giving of instruction No. 4 as to reasonable doubt. This is substantially the instruction which, in Bennett v. State, 111 Neb. 552, 196 N. W. 905, was held not to be prejudicially erroneous. That decision disposes of this assignment.

The defendant in various ways complains of the giving of instruction No. 3. It is as follows: "If the State has proven by the evidence beyond a reasonable doubt that Fred Haffke, the defendant herein, did willfully and unlawfully operate a motor vehicle upon the public highway of Sarpy County, Nebraska, while under the influence of alcoholic liquor, and you further find from the evidence that he has twice previously convicted for operating a motor vehicle while under the influence of alcoholic liquor, to-wit:

> In the District Court of Cass County, Nebraska, on the 13th day of December, 1934; affirmed by the Supreme Court of Nebraska in 1935,
> and, in the County Court of Cass County, Nebraska, on the 22nd day of July, 1940,

then you should find the defendant guilty as charged in the information.

"However, if the State has failed to prove each and all of the above elements as above stated beyond a reasonable doubt, then it would be your duty to find the defendant not guilty."

The defendant charges that it is erroneous in that

it does not set out the date of the offense. However, instruction No. 1 set out the date of the alleged offense. The evidence all related to that date. We see no prejudicial error in the omission.

The statute involved is section 39-727, R. S. 1943. It provides: "It shall be unlawful for any person to operate any motor vehicle while under the influence of alcoholic liquor or of any drug. Any person who shall operate any motor vehicle while under the influence of alcoholic liquor or of any drug shall be deemed guilty of a crime, and, upon conviction thereof, shall be punished as follows: * * *." Following this language the statute specifies the penalties to be assessed for a first, a second, and a third or subsequent offense. The penalties increase in severity in each instance. It is noted that the statute defines one crime. It provides different penalties within limits upon conviction depending upon whether the person found guilty had previously been convicted of one or more offenses under the statute. Nowhere in the statute is the jury given any function to perform with reference to the penalty. The penalties are in effect habitual criminal penalties limited to the one "crime" defined in the statute. The defendant contends that the instruction gave the jury no choice, and that the jury should have been allowed to decide whether or not the defendant was guilty of "a lesser crime." The obvious answer is that the statute defines but one crime, that of operating a motor vehicle while under the influence of alcoholic liquor or of any drug.

However, we are not unmindful of our decisions in Wozniak v. State, 103 Neb. 749, 174 N. W. 298, and Osborne v. State, 115 Neb. 65, 211 N. W. 179, wherein under a somewhat similar statute as to penalties, we in effect treated the penalties as elements of the offense, and stated that in the absence of a statute regulating the procedure the fact of a prior conviction must be set forth in the information and established by proper evidence, its sufficiency passed on by the jury, and the

jury should be so instructed that they could determine whether the defendant was guilty of a first, a second or a third offense. Under those decisions the giving of the instruction here was erroneous. The State on the theory of lesser included offenses relies upon the rule stated in Guerin v. State, 138 Neb. 724, 295 N. W. 274: "In absence of instruction requested to that end, it is not error on part of trial court to fail to instruct as to a lesser crime involved in and incident to a greater, as, for instance, assault and battery or simple assault, in connection with forcible rape." There does not appear to have been a request for such an instruction here. However, the Wozniak and Osborne cases were not written on the theory of a lesser included offense, but on the proposition of three separate offenses being charged.

We have also the decision in Burnham v. State, 127 Neb. 370, 255 N. W. 48, wherein section 53-103, Comp. St. 1929, was involved. The effect of the decision is that evidence of the prior conviction was properly to be admitted in evidence and presented a fact for the jury to decide as to whether or not there had been a prior conviction. See, also, Wiese v. State, 138 Neb. 685, 294 N. W. 482.

It now seems to us that as a matter of reasoning the Wozniak and Osborne cases are not applicable here. While it may be argued that section 3288, Comp. St. 1922, and section 53-103, Comp. St. 1929, actually concerned separate offenses, yet there is no doubt but that the statute here involved defines only one crime. It also appears clear to us that when a proper record of a previous conviction has been produced, it then becomes a matter of law for the court to determine, whether or not that record establishes a previous conviction for a violation of a statute. The instruction here involved submits that question of law to the jury.

There is a diversity of opinion respecting the province of court and jury where a charge is made of a

second or subsequent offense. 25 Am. Jur., Habitual Criminals, § 33, p. 279; Annotations, 58 A. L. R. 59, 82 A. L. R. 365, 116 A. L. R. 228.

In the absence of a statute placing upon the jury a duty with reference to the penalty (such as section 28-401, R. S. 1943), the penalty to be imposed after conviction of a criminal offense is not for the jury but for the court to determine within the limits fixed by the statute. Ford v. State, 46 Neb. 390, 64 N. W. 1082; Edwards v. State, 69 Neb. 386, 95 N. W. 1038; Ayres v. State, 138 Neb. 604, 294 N. W. 392. "Except as to crimes having an element of motive, criminal intent, or guilty knowledge, evidence of separate and distinct offenses committed by accused is not admissible." Swogger v. State, 116 Neb. 563, 218 N. W. 416; Henry v. State, 136 Neb. 454, 286 N. W. 338. The reason for these rules and the rules themselves are in conflict with the conclusions announced in the Wozniak, Osborne, Burnham, and Wiese cases.

We accept as sound the reasoning of other courts as herein stated.

"It seems to be the settled law everywhere that the charge and proof of the prior convictions can have nothing to do with the proof and conviction of the offense for which the defendant may be upon trial; that a statement of previous convictions does not change the offense. The jury does not find the person guilty of the previous offenses; they are matters of history and are alleged and proved for the sole purpose of placing the defendant in a class of habitual criminals, and affect the punishment or term of imprisonment to be meted out. * * * Doubtless, the better practice would be to have proof of the previous convictions made to the court, out of the presence of the jury, but the statute of this state does not so provide." (The opinion recites that the statute required the jury to find the fact of the previous convictions.) Sammons v. State, 210 Ind. 40, 199 N. E. 555.

" 'Our statute of 1927 does not create a new offense. It merely prescribes a greater penalty for one who is convicted a second time of the commission of a felony and a still greater penalty for one who is convicted of a felony for the third time. To make his defense to a criminal charge all the accused needs to know is the nature of the crime charged against him and the names of the witnesses with whom he will be confronted in a prosecution therefor. In this state it is no concern of the jury what the penalty for a crime may be, and it is just as well that the jurors' minds should not be diverted from the question of defendant's innocence or guilt by facts concerning defendant's prior convictions of other felonies. It is also fairer to defendant to keep such matters entirely away from the jury.' " Levell v. Simpson, 142 Kan. 892, 52 P. 2d 372.

"This court has recognized that there is a conflict of authority upon the question in other jurisdictions but has adopted the rule that the prisoner's rights are better protected if evidence of prior convictions is not introduced in connection with the trial of the crime with which he is charged. Under our practice when he is charged and tried for a crime, his previous record may not be used to influence the jury to convict him of the charged crime. The rule may have some exceptions but we are not concerned with such exceptions in this case. It follows, under our procedure, that an accused is not entitled to a trial on the question of whether he has been convicted of other felonies on other occasions. The question whether a man is a habitual criminal involves only the severity of the penalty." Hill v. Hudspeth, 161 Kan. 376, 168 P. 2d 922.

"Previous convictions need not be alleged in the indictment, nor proved upon the trial of the new charge. This to me seems eminently fair to any prisoner. When he is charged and tried for a crime, his previous record may not be used to influence the jury to convict him of that crime. The proof against him is to be the same

as if he were a first offender, unless possibly he takes the stand. But when he is convicted, then comes the question of his sentence, and he is no longer to be treated as a first offender. He may then for the first time be confronted with his record, and sentenced to a severer punishment, as he should be, if it turns out that he has previously transgressed the law. The old practice is still permissible; the indictment, as formerly, may plead the prior convictions, and proof of them may be given at the trial under such pleading, but it is no longer necessary. The indictment may charge only the new offense for which the prisoner is to be tried; on the trial the People will not and cannot offer as part of their case previous convictions. When, however, the trial is over, and the defendant stands convicted, then the previous record must be considered in determining the sentence. Prior convictions logically and in fact have little or nothing to do with proof of the defendant's guilt of a new crime; a man is not guilty of breaking the law merely because he has broken it before; but when the proof shows him to be guilty, then his past acts have much to do with the way he should be treated. The punishment for the second offense is increased because of his apparent persistence in the perpetration of crime and his indifference to the laws which keep society together; he needs to be restrained by severer penalties than if it were his first offense." People v. Gowasky, 244 N. Y. 451, 155 N. E. 737.

"While it is familiar practice to set forth in the indictment the fact of prior conviction of another offense, and to submit to the jury the evidence upon that issue together with that relating to the commission of the crime which the indictment charges, still in its nature it is a distinct issue, and it may appropriately be the subject of separate determination. Provision for a separate, and subsequent, determination of his identity with the former convict has not been regarded as a deprivation of any fundamental right. It was established by statute

in England that, although the fact was alleged in the indictment, the evidence of the former conviction should not be given to the jury until they had found their verdict on the charge of crime. * * * To repeat, the inquiry is not into the commission of an offense; as to this, indictment has already been found and the accused convicted. There remains simply the question as to the fact of previous conviction. And it cannot be contended, that in proceeding by information instead of by indictment there is any violation of the requirement of due process of law. * * * Although the State may properly provide for the allegation of the former conviction in the indictment, for a finding by the jury on this point in connection with its verdict as to guilt and thereupon for the imposition of the full sentence prescribed, there is no constitutional mandate which requires the State to adopt this course even where the former conviction is known. It may be convenient practice, but it is not obligatory. This conclusion necessarily follows from the distinct nature of the issue and from the fact, so frequently stated, that it does not relate to the commission of the offense, but goes to the punishment only, and therefore it may be subsequently decided." Graham v. West Virginia, 224 U. S. 616, 32 S. Ct. 583, 56 L. Ed. 917.

Section 23, article IV, of the Constitution, provides for reports to the Legislature of the judges of the Supreme Court of defects in the Constitution and laws. In 1945, the Legislature created the office of Revisor of Statutes, section 49-701, R. S. Supp., 1945, and provided that it shall be his duty "To prepare, prior to each regular session of the Legislature, under the supervision and direction of the Supreme Court, the report of the judges of the Supreme Court as to defects in the Constitution and laws of Nebraska, and to draft in the form of bills proposed legislation to carry out the recommendations contained in the report; * * *." § 49-702, R. S. Supp., 1945.

As a result of the situation shown to exist by the opinion in Jones v. State, 147 Neb. 219, 22 N. W. 2d 710, a recommendation was submitted to the Legislature as to changes in the Habitual Criminal Act. Legislative Journal 1947, p. 169. A bill prepared by the Revisor of Statutes was enacted. In that act the Legislature provided: "Where punishment of an accused as an habitual criminal is sought, the facts with reference thereto must be charged in the indictment or information which contains the charge of the felony upon which the accused is prosecuted, but the fact that the accused is charged with being an habitual criminal shall not be an issue upon the trial of the felony charged and shall not in any manner be disclosed to the jury. If the accused is convicted of a felony and before sentence is imposed, a hearing shall be had before the court alone as to whether such person has been previously convicted of prior felonies. The court shall fix a time for the hearing and notice thereof shall be given to the accused at least three days prior thereto. At the hearing, if the court shall find from the evidence submitted that the accused has been convicted two or more times of felonies and sentences imposed therefor by the courts of this or any other state, or by the United States, the court shall sentence such person so convicted as an habitual criminal." Laws 1947, c. 105, § 1, p. 293.

While the above statute by its terms applies only to the Habitual Criminal Act, yet it announces rules of practice and procedure that, as a matter of sound public policy, should apply to any statute which imposes the duty upon a court to inflict a greater punishment upon the repetition of an offense.

Accordingly, under section 25, article V, of the Constitution, we promulgate the following rule of practice and procedure in criminal cases hereafter tried in all courts. In the absence of a provision placing upon the jury a duty with reference to the penalty, where punishment is sought under any statute defining one crime

and providing for an enhanced penalty upon conviction of a second or subsequent offense: (1) The facts with reference thereto must be alleged in the complaint, indictment or information upon which the accused is prosecuted; (2) the fact that the accused is charged with having committed a second or subsequent offense should not be an issue upon the trial and should not in any manner be disclosed to the jury; (3) if the accused is convicted, before sentence is imposed a hearing should be had before the court without a jury as to whether or not there have been any prior convictions of the accused under the same statute; (4) the accused should be given notice of the time of hearing at least three days prior thereto; and (5) at the hearing, if the court finds from the evidence submitted that the accused has been convicted prior thereto under the same statute, the court should sentence the accused according to the enhanced penalty applicable to the facts found. This rule, of course, does not in any manner limit the application in a proper case of the provisions of section 25-1214, R. S. 1943.

For purposes of clarity we hold that the opinions in Wozniak v. State, *supra;* Osborne v. State, *supra;* Burnham v. State, *supra;* and Wiese v. State, *supra,* to the extent in conflict herewith are no longer applicable.

We do not deem it necessary to determine the assignments of error as to the failure of the court to give a cautionary instruction; permitting the state to withdraw its rest and in receiving additional evidence for the state; and in permitting the state to endorse additional names of witnesses on the information.

The judgment of the trial court is reversed.

REVERSED.

CHAPPELL, J., participating on briefs.

SULLIVAN COMPANY, APPELLANT, v. HANS LARSON, APPELLEE.
30 N. W. 2d 460

Filed January 2, 1948. No. 32341.

Fraud: Sales. When property is sold and delivered to a fraudulent vendee an innocent purchaser of the property from the fraudulent vendee will take good title.

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

Sidner, Lee & Gunderson, for appellant.

Spear & Lamme and *Robert L. Flory,* for appellee.

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

PAINE, J.

This was an action to replevin 28 head of cattle. The sheriff only found 27 head which he delivered to plaintiff under its replevin bond. Defendant filed a general denial. Trial was had to the court without a jury. Judgment was for the defendant ordering a return of the cattle or $2,887.16 in damages. Plaintiff appeals.

The facts are not in dispute and may be briefly set out as follows:

A man who claimed that his name was O. W. Wade and that he was from Beemer, Nebraska, wanted to buy some cattle at the Sioux City Stockyards and bought 30 steers of E. G. Downing, a salesman for Sullivan Company, plaintiff, and paid for the steers by giving a check on a West Point bank, which check was later dishonored and returned to plaintiff.

The check was accepted and no inquiry made of the bank as to whether it was good.

A "Truck Billing" as the instrument is described on its top line was thereupon given to Wade by Downing shipping the cattle to Beemer, Nebraska, consigning

them to Sullivan Co., care of O. W. Wade, although Sullivan Co. has no yard or agent at Beemer.

Downing then had the cattle weighed, a clearance was obtained from the Bureau of Animal Industry, they were placed in a pen, and Wade hired a truck from the Sioux City Motor Express and paid for it with his own check. Wade got in the truck with its driver, Stokes. When they were on their way to Beemer Wade said to the driver that he had changed his mind and did not want to take the cattle to Beemer but wanted to take the cattle to Fremont. There they were unloaded at the Wells Commission Company. There 28 head of the cattle were bought at public auction by the defendant Larson who paid O. W. Wade in full for these cattle. One steer later died and the plaintiff replevined the remaining 27 head from the defendant. Two of the original 30 head of steers sold Wade were bought at Fremont by a Mr. Peterson.

Plaintiff assigns two errors for reversal: (1) That the court erred in finding that defendant had title to the 27 head of cattle; and (2) that the court erred in finding that plaintiff should return the cattle or pay the defendant the sum of $2,886.16.

With this statement of the undisputed facts the case resolves itself into a question of law. Generally, plaintiff claims this was a cash transaction, that the title never left plaintiff, and that the unlawful diversion of the cattle en route by Wade constituted a theft of the cattle.

On the other hand the defendant admits there are two lines of reasoning. One line of authorities insists that the title never passes until the check is paid and in such cases an innocent purchaser is without remedy.

But defendant says the majority rule is that while the title is defeasible and voidable as between the seller and buyer, it is absolute as far as an innocent purchaser is concerned.

The question is, can a party by fraudulently giving

a bad check, where a cash sale is intended, obtain such possession and title to personal property as will enable him to pass good title to his sub-vendee?

The exact question, except a check was not used, was answered in the affirmative by our court in Homan v. Laboo, 2 Neb. 291, in litigation over a span of mules and a replevin bond signed by Homan, a proprietor of a livery stable in Omaha.

The next case in point in this court was Oleson v. Albers, 130 Neb. 823, 266 N. W. 632, 105 A. L. R. 714. Here a trucker, employed by plaintiff, delivered corn to defendant and collected the full price but failed to pay the money to plaintiff. This court said: "In the case at bar the plaintiff gave the trucker possession of the corn knowing that it was being sold and delivered by the trucker to the defendant. Plaintiff made no inquiry of the defendant as to what the transaction was, although both parties had telephones on the same system. It was clearly the plaintiff who placed Worrell, the trucker, in a position such that an innocent purchaser of this corn had a right to assume that the trucker was authorized to sell and collect the purchase price of the corn, and while it is unfortunate that the plaintiff was deceived in the confidence that he placed in the trucker, yet the law has many times been laid down: 'Whenever one of two innocent persons must suffer by the acts of a third, he who has enabled such third person to occasion the loss must sustain it.' Broom's Legal Maxims (9th ed.) 463."

As applied to the case at bar, the plaintiff intentionally or negligently allowed Wade to hold himself out as the owner of the property, having possession of this load of steers in a truck Wade had hired to haul them and thereby he appeared to have unlimited authority to convey title to these steers. If an innocent third party in good faith acquires title to the property upon the strength of all these facts, does not justice demand that the innocent party should be protected from de-

mands of plaintiff, although the plaintiff could have seized and taken them from Wade who had come into fraudulent possession of them? See the provisions of our criminal law against frauds by consignors as found in section 28-1202, R. S. 1943.

There is still a third Nebraska case of Parr v. Helfrich, 108 Neb. 801, 189 N. W. 281, in which an automobile was bought with a forged check and sold to an innocent third party from whom plaintiff replevined it and verdict for plaintiff was appealed to this court and reversed. This court quoted from a Massachusetts (12 Pick. 307) case as follows: " 'The difference between the case of property thus obtained, and property obtained by felony, is obvious. In the latter case, no right either of property or possession is acquired and the felon can convey none. We take the rule to be well settled that where there is a contract of sale, and an actual delivery pursuant to it, a title to the property passes, but voidable and defeasible as between the vendor and vendee, if obtained by false and fraudulent representations. The vendor therefore can reclaim his property as against the vendee, or any other person claiming under him and standing upon his title, but not against a *bona fide* purchaser without notice of the fraud. The ground of exception in favor of the latter is that he purchased of one having a possession under a contract of sale, and with a title to the property, though defeasible and voidable on the ground of fraud; but as the second purchaser takes without fraud and without notice of the fraud of the first purchaser, he takes a title freed from the taint of fraud.' "

This case at bar brings before us several paragraphs of the Uniform Sales Act.

The first paragraph of section 69-423, R. S. 1943, reads: "(1) Subject to the provisions of this act, where goods are sold by a person who is not the owner thereof, and who does not sell them under the authority or with

the consent of the owner, the buyer acquires no better title to the goods than the seller had, unless the owner of the goods is by his conduct precluded from denying the seller's authority to sell."

In our opinion the plaintiff's conduct precluded him from denying Wade's authority to sell under the facts in the case at bar.

Section 69-427, R. S. 1943, refers to documents of title, that is, to bills of sale and bills of lading.

The plaintiff claims that a party who ships goods consigned in the bill of lading to himself, his agent, or order will be presumed to have retained title in himself and cites many authorities to sustain this contention.

However, no authorities were necessary on that proposition. But in the case at bar the defendant claims this "Truck Billing," Exhibit 1, was not a real bill of lading but an "artificial device" on which "Consignor" was Sullivan Co. On the next line Sullivan Co. was shown to be "Consignee" by only two check marks and the third line "Care of" was followed by "O W Wade" in handwriting, with destination Beemer, Nebraska. The plaintiff consigns the cattle to a place where it had no agent and no one to receive the load, and on the same instrument in the next line put them in "Care of O W Wade," thus designating him as agent to receive them.

This is quite different legally from consigning them to themselves on shipper's order and sending the order to the bank with sight draft attached and only when draft is paid does the title change hands.

In the case at bar, when these cattle were delivered to Wade, he could have taken them in his own truck, and there was no act still to be done by plaintiff to transfer the title to Wade.

The plaintiff cites cases from Oregon, Georgia, Tennessee, New Jersey, and Minnesota. In each case he claims a bad check was given and the property was recovered from an innocent purchaser. In our opinion

the great weight of authority is on the other side.

However, we have reached the conclusion that our Nebraska holdings, both before and after the adoption of the Uniform Sales Act, are all to the effect that the rights of an innocent purchaser from one who has obtained the property by fraud will take a good title which must be protected. We believe the judgment was right and it is hereby affirmed.

AFFIRMED.

CHARLES L. WILDERMAN ET AL., APPELLEES, V. JOHN J. WATTERS, APPELLANT.
30 N. W. 2d 301

Filed January 2, 1948. No. 32315.

1. **Contracts.** The interpretation of a contract is the determination of the meaning attached to the words "written or spoken" which make the contract.
2. ———. The cardinal rule in the interpretation of a contract is to ascertain the intention of the parties, and to give effect to such intention if it can be done consistently with legal principles.
3. ———. In construing contracts, the court's sole duty is to ascertain what was meant by the language of the instrument.
4. ———. It is well established, in the interpretation of a writing which is intended to state the entire agreement, preliminary negotiations between the parties may be considered in order to determine their meaning and intention, but not to vary or contradict the plain terms of the instrument.
5. **Vendor and Purchaser.** In the ordinary contract for the sale of land, equity does not regard time as of the essence, though it may be made such where so expressly stipulated or an intention that it shall be such is clearly manifested by the agreement as a whole, construed in the light of the surrounding circumstances.
6. ———. If it appears that it was the intention to make time of the essence, it will be so regarded.
7. ———. If time becomes material to the rights and interests of the parties to any substantial degree, it will be regarded as of the essence.
8. **Contracts.** Parol evidence is admissible to show that at the

time of making a contract time was considered as of the essence, at least when such evidence does not tend to vary or impeach the written agreement. This rule is at least applicable when and insofar as extrinsic aids to construction of that general character may be resorted to.

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

Carl F. Benjamin, for appellant.

Cranny & Moore, for appellees.

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

MESSMORE, J.

This is an action in equity, brought by the plaintiffs to require the defendant to specifically perform a contract for the sale of certain real property by executing and delivering to the plaintiffs a warranty deed to the same.

It appears from the record that the plaintiffs had been tenants of the defendant, paying a monthly rental of $22.50, for a period from June 5, 1942, until about October 2, 1944, when the plaintiffs entered into a written contract for the purchase of the property. The provisions of the contract, insofar as the same need be considered here, are as follows: The defendant, party of the first part, agreed to sell and convey to the plaintiffs, parties of the second part, Lot 2, Reinhart's First Addition to the City of Omaha. The plaintiffs agreed to purchase the real estate and to pay the defendant $2,500, $22.50 on the first day of October, 1944, and $22.50 on the first day of each month thereafter until the full sum of $2,500, and interest, had been fully paid. We omit certain printed parts of the contract, and quote therefrom as follows: "As soon as said purchase money and the interest thereon shall be fully paid, time being of the essence of this contract, said party of the first part agree to make, execute and deliver to said

parties of the second part, a good and sufficient warranty deed conveying said real estate to them in fee simple, * * *."

Endorsed on the contract prior to the time of its delivery by the defendant to the plaintiffs is the following: "Buyer takes house in its present condition and subject to O.P.A. Regulations. Interest is 6/10ths per month. This means that the interest the first month will be $15.00. This interest will lower 60 cents each time you pay in enough to get credit for $100.00 on the principal. Watters (defendant) will furnish abstract when house is ⅓ paid for if you want abstract at this time bringing it to date will be at your expense. Watters will furnish deed and take back mortgage at same interest rate when house is ½ paid for."

It appears from the record that the plaintiffs procured a loan to make certain repairs on the house, and paid nothing down on the contract here being considered. Further, the plaintiffs endeavored to, and were able to, procure a loan to pay off the full amount of the contract and to tender to the defendant the full amount plaintiffs claim due under the contract, and demanded that the defendant give the plaintiffs a good and sufficient warranty deed to the property. The defendant refused to accept the tender.

The defendant's testimony is to the effect that he sold the property in question to the plaintiffs at a lesser price than the property was worth, and that the terms of the contract were thoroughly explained to the plaintiffs prior to the time they signed the contract.

The trial court decreed and adjudged that the plaintiffs were entitled to specific performance of the written agreement commonly called a land contract, and directed the defendant to execute and deliver to the plaintiffs a warranty deed in compliance with the terms of the written agreement, upon the payment of the balance due and owing to the defendant; and further directed that the defendant furnish a written statement

to the plaintiffs as to the amount due on any date which the plaintiffs desire to pay the balance due on the written agreement; and retained jurisdiction to determine the amount due on the land contract. From this decree and judgment the defendant appeals.

For convenience, the appellant will be referred to as the defendant and the appellees as the plaintiffs.

The sole question for determination is whether or not the terms of the land contract here being considered give the plaintiffs (vendees) the right to pay the purchase price in full at any time.

"The interpretation of a contract is the determination of the meaning attached to the words 'written or spoken' which make the contract." 12 Am. Jur., § 226, p. 745.

The cardinal rule in the interpretation of a contract is to ascertain the intention of the parties, and to give effect to such intention if it can be done consistently with legal principles. In construing contracts the court's sole duty is to ascertain what was meant by the language of the instrument. See Shepard v. Shepard, 145 Neb. 12, 15 N. W. 2d 195.

It is well established, "In the interpretation of a writing which is intended to state the entire agreement, preliminary negotiations between the parties may, however, be considered in order to determine their meaning and intention, but not to vary or contradict the plain terms of the instrument." 12 Am. Jur., § 234, p. 757.

With the foregoing legal principles in mind, we analyze the contract to mean that the plaintiffs are to pay $22.50 per month, starting at a certain time, and to continue to pay such amount per month until the full amount has finally been paid; that there is no acceleration clause in the contract that would permit the plaintiffs to pay under any different conditions. The clause in the contract, "As soon as said purchase money and the interest thereon shall be fully paid, time being of the essence of this contract, said party of the first

part agree to make, execute and deliver to said parties of the second part, a good and sufficient warranty deed", means nothing more than it states. It is true, in an ordinary contract for the sale of land, equity does not regard time as of the essence, though it may be made such where so expressly stipulated or an intention that it shall be such is clearly manifested by the agreement as a whole, construed in the light of the surrounding circumstances. See Wimer v. Wagner, 323 Mo. 1156, 20 S. W. 2d 650, 79 A. L. R. 1231.

"If it appears that it was the intention to make time of the essence, it will be so regarded. If time becomes material to the rights and interests of the parties to any substantial degree, it will be regarded as of the essence." 12 Am. Jur., § 308, p. 864.

Parol evidence is admissible to show that at the time of making a contract time was considered as of the essence, at least when such evidence does not tend to vary or impeach the written agreement. See Waterman on the Specific Performance of Contracts, § 459, p. 630; King v. Ruckman, 20 N. J. Eq. 316, 354. The rule is at least applicable when and insofar as extrinsic aids to construction of that general character may be resorted to. See Wimer v. Wagner, *supra*.

We find no ambiguity in the contract in question, with reference to the payments and when the same are to be made, that would warrant this court in construing the contract other than has been construed in this opinion.

For the reasons given in this opinion, the judgment of the district court is reversed, and the case dismissed.

REVERSED AND DISMISSED.

CHAPPELL, J., participating on briefs.

ARTHUR W. BENDFELDT, APPELLANT, V. DELBERT LEWIS ET AL., APPELLEES.
30 N. W. 2d 293

Filed January 2, 1948. No. 32285.

1. **Animals.** A brand on livestock is only prima facie evidence of ownership which may be rebutted.
2. **Contracts.** The manifestation of mutual assent may be made wholly or partly by written or spoken words, or by other acts or conduct.
3. **Appeal and Error.** Evidence examined and held to sustain the verdict.

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

Dryden & Jensen, for appellant.

Blackledge & Sidner, for appellees.

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

LIGHTNER, District Judge.

Replevin for one red-necked roan steer calf yearling, weight approximately 1,000 pounds, carrying a brand on the left hip designated as IC over a bar. The jury found for the defendants and the plaintiff appeals.

There are three errors assigned as follows: (1) The trial court erred in overruling plaintiff's motion for a directed verdict at the close of defendants' evidence and at the close of all the evidence in said cause. (2) The court erred in giving instruction No. 9 on its own motion. (3) The verdict and judgment of the court are contrary to law. A consideration of these assignments requires a review of the evidence.

There is no doubt but that the steer in question was purchased by plaintiff on December 8, 1945. It was a branded animal and was never transferred by plaintiff pursuant to sections 54-106 and 54-118, R. S. 1943, of the brand law. Defendants claim, however, that the

facts testified to by them resulted in a trade of the calf in question for one of their own calves and that at the time the writ was issued they were the owners of the red-necked roan steer calf. The jury took their view of the facts.

The facts in defendants' favor which the evidence tends to establish and which they contend required submission of the case to the jury and justified its verdict are as follows: The plaintiff and defendants are near neighbors. All of these parties attended the stock show in Denver in early January 1946 and were away from home for several days or longer. The plaintiff, at that time an unmarried man living with his mother, hired Robert J. Randall, who lived about a mile away, to come to his place to look after his stock. Mr. Randall did not stay on plaintiff's place, but came there mornings to release the cattle from the pens, turned them into a cornstalk field for the day, and returned in the evenings to put them back in the pens. Sometime after the Lewises left home their cattle got loose and were often scattered along the same road over which Mr. Randall drove the plaintiff's cattle. Defendants had about 56 head of cattle, all white-faced, and plaintiff had 63 head of cattle, mixed, with some whitefaces among them. The defendant Delbert Lewis was the first of the three to return from Denver. He returned on Sunday evening, January 12, 1946, and found that their cattle had estrayed while he was away. He began hunting them up "right now," and found them all but one. In searching for this one he went to the plaintiff's place. Plaintiff was not yet home, so he talked to Mr. Randall. During the course of the conversation Delbert Lewis told Mr. Randall that they had a roan steer which did not belong to them. Mr. Randall said he thought such roan steer belonged to plaintiff because he (plaintiff) had two of them and now he has only one. He also said that he thought a white-faced steer in plaintiff's herd belonged to the Lewises because the Lewis cattle

were larger than plaintiff's and this steer was larger than plaintiff's. The steer was pointed out to Delbert and he identified it as theirs. However, no exchange of animals was made then because plaintiff was not at home and they were afraid that plaintiff's mother, who was there alone, would object. Delbert then left, but went back several times, and on some of these occasions he saw their steer at plaintiff's place. They did not find plaintiff at home to talk with until some time later. Four or five days later plaintiff came to the Lewis place and it was then they told him that this roan steer belonged to him. He went out to the lot where the cattle were, looked at the animal carefully, and finally said that it was not his. Defendants suggested they have a brand inspection to get the matter straightened out before any of the cattle were sold, but plaintiff insisted that they both had their right count and asked defendants: "What in the hell are you squawking about?" This conversation on the Lewis place was a little past the middle of January 1946. Nothing more was done about the matter until the plaintiff came over about the middle of May 1946 and demanded the steer.

It seems the immediate occasion for plaintiff's trip at that time was that he was about to sell the 26 head of cattle he still had left and he phoned for the brand inspector, a Mr. Clark, to come out and give him the proper clearance papers. When Mr. Clark got there he discovered that plaintiff had in his lot one less steer carrying a brand on the left hip designated as IC over a bar than he said he had. Plaintiff at that time, although he expressly stated he had not counted his cattle from the time he returned from Denver, computed, from the 26 he had left and from the number he had sold or butchered, that he was one short. When he got to Lewis' place he asked about his steer and Lewis replied: "You cough mine up and you can have this one." Further conversation took place between them in which

they called his attention to the fact that in the spring he had said he had his right count. However, he insisted that he had the brand release on this steer and that it was his. It further developed from the testimony of Delbert Lewis that the Lewis steer weighed about 300 pounds more than their own steer and was worth probably $50 more, but that they were willing to lose the $50 in order to get along with their neighbor.

Defendants' theory of the transaction is summed up in the final answer of Delbert Lewis at the close of his testimony as follows: "When he came over there and said he had his right count and knew his right cattle, and we told him no, that he had one of ours and this one we had was his, and he said, 'You've got your right count and I've got my right count, so what in the hell are you squawking about', - I figured that we had made a trade." The evidence of Dwayne Lewis was substantially the same as that of his father, Delbert Lewis.

We are of the opinion that the testimony of defendants is sufficient to justify the jury, if they believed it, in finding that a trade had been made of the animals and that the defendants at the time of the trial were the owners and entitled to possession of the steer in question. A contract may be made in various ways, including the conversation of the parties, or their conduct, or both. When the plaintiff said to the defendants that they had their right count and he had his, so what were they squawking about, and left without taking his own steer which was offered to him, and for over three months did nothing further, while in the meantime each party fed and cared for the steer in his possession, he indicated an intention to keep the animal of the Lewises which he had and let them have the red-necked roan, which indubitably was his and which he could have had when he went to the Lewis place shortly after the middle of January 1946.

It is scarcely necessary, we think, to state again the often repeated rule that the verdict of a jury based on

conflicting evidence will not be disturbed on appeal, nor cite authorities on that proposition. A brand on livestock is only prima facie evidence of ownership which may be rebutted. § 54-109, R. S. 1943; 1 R. C. L., Animals, § 24, p. 1083; 3 C. J. S., Animals, § 26, p. 1131. "The manifestation of mutual assent may be made wholly or partly by written or spoken words or by other acts or conduct." Restatement, Contracts, § 21, p. 27. An exchange of branded steers, without the formality of a bill of sale, is not unenforceable or void per se, especially under the circumstances in this case.

We do not believe that the statute was intended to prohibit transactions of this kind, and if it was so intended the fault was that of the plaintiff, rather than defendants. There was little that defendants could do about the matter, except perhaps to return the roan steer to plaintiff, demand their own white-faced steer in return, and bring a replevin action if plaintiff refused to let them have it. The statute was enacted for the protection of the owners of the brands and was not intended to prohibit private sales or trades between individuals. Mr. E. E. Clark, who is the chief investigator and assistant chief brand inspector for the Nebraska Brand Committee, testified that the department never even inspects private sales between farmers unless they request it.

There was, therefore, in our opinion sufficient evidence to go to the jury on the question of ownership and the verdict of the jury should stand, unless there was prejudicial error during the trial. Appellant assigns as error the giving of instruction No. 9. Said instruction is as follows: "The jury having deliberated for *14/00* hours without having arrived at a verdict, the Court gives you the following Instruction.

"You are instructed that it is the law of this state that the brand upon a steer is prima facie evidence of title, but this presumption may be rebutted by proof that the possession is fair and legal.

"And in this case, you are instructed that if you find from a preponderance of the evidence that the defendant became the owner of the steer in question by reason of a trade with the plaintiff for a steer belonging to defendant, and that such trade was fully consummated by a meeting of the minds and agreement of the plaintiff and defendant, then your verdict should be for the defendant and against the plaintiff.

"If you do not so find, your verdict should be for the plaintiff."

One objection to this instruction is evidently based upon appellant's claim that the evidence is insufficient to go to the jury on the question of ownership. This has already been discussed. Appellant further objects to that part of the instruction which tells the jury that the brand upon a steer is prima facie evidence of title, but that such presumption may be rebutted by proof that the possession is fair and legal. What has been said answers this contention.

It is not the function of this court to pass upon the evidence, but only to determine whether or not there was sufficient evidence to sustain the verdict. We find that the evidence was sufficient and that no error was committed. The verdict and judgment of the district court are affirmed.

AFFIRMED.

E. G. SEVERIN ET AL., APPELLANTS, V. DR. C. C. LUKOVSKY, APPELLEE.

30 N. W. 2d 568

Filed January 9, 1948. No. 32327.

Fraud. To maintain an action for damages for false representation, the plaintiff must allege and prove (1) what representation was made; (2) that it was false; (3) that plaintiff believed the representation to be true; (4) relied on and acted upon it; and (5) was thereby injured.

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

Carl F. Benjamin, for appellants.

Kennedy, Holland, DeLacy & Svoboda and *L. J. Tierney,* for appellee.

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

PAINE, J.

In an equity action for fraud, and asking for a temporary restraining order, the trial court sustained a motion of defendant to dismiss the petition at the close of the plaintiffs' evidence, and plaintiffs appealed.

The plaintiffs charged that the court erred in sustaining defendant's motion to dismiss at the close of plaintiffs' evidence. The second and last assignment of error re-

lates to the ruling of the court in sustaining an objection of defendant to a question asked the plaintiff Severin, but as this error was not discussed in the brief it will not be noted further, under Revised Rules of Court, No. 8 (4).

We will first set out the evidence relating to the two transactions in which plaintiff E. G. Severin secured money of Dr. C. C. Lukovsky, the defendant.

The first deal was on May 27, 1941, when Severin sold defendant a note and mortgage of $600. Exhibit No. 2 is a real estate mortgage for $600, given to plaintiff Severin by Joseph A. Nelson, dated May 10, 1941, secured as a second mortgage on a portion of two lots in the town of Dodge, Dodge County, Nebraska, and subject to a first mortgage to the Madison County Building & Loan Association for $4,250. Exhibit No. 1 is an assignment of said mortgage by plaintiff to the defendant, bearing date May 27, 1941. Exhibit No. 3 is the note for $600, dated May 10, 1941, signed by Joseph A. Nelson, and payable to E. G. Severin, plaintiff.

It appears that Dr. Lukovsky was not anxious to buy the note, and would not pay face value for it, or $550, which Severin wanted, but finally the defendant bought it of Severin for $500, and the mortgage was transferred by written assignment, but no endorsement or assignment appears on the back of the note, which is still payable to E. G. Severin.

Several years later they had another deal, and plaintiff testified that he asked Dr. C. C. Lukovsky, the defendant, for a loan of $350 about December 5, 1944. Dr. Lukovsky agreed to meet him at the office of Paul Palmquist, and when they met there he said he would loan him the $350 provided plaintiff would take back the Nelson second mortgage and note that he had sold him in 1941.

Claude H. Reed, a real estate man, testified that plaintiff had asked him to go with him to the Palmquist office and look over the papers, and said he asked why

the new note and chattel mortgage were for over $900 if he was only borrowing $350, and Dr. Lukovsky said the other money was to reimburse him on a second mortgage he had purchased of plaintiff.

The evidence of plaintiff Severin in regard to the conversation is as follows: "Q- Now tell what the Doctor said in relation to that second real estate mortgage. A- Oh, he said that he had had Paul Palmquist draw up a note and mortgage, in the total of nine hundred and some dollars, whatever it was, because he had purchased this second mortgage at a discount of $500, and they arrived at that amount, I don't know how, and he said he was handling it all in one note and mortgage, and that's when Mr. Reed questioned him a little bit. And I told him (Reed) that as far as I was concerned the note to Nelson was collectible, and he said, 'If that's the case, that's all right, we can go ahead and collect that and we can pay him off.' And Mr. Reed asked him, Doc, for the note and mortgage, I did not, and he said he didn't have it with him, and that's when Mr. Reed asked him if it was in the same condition it was when he received it from me, and the Doctor answered it was."

At the first transaction, the defendant had paid $500 for the note and second mortgage signed by Joseph A. Nelson, a single man, who is a railway mail clerk in Omaha, and nothing having been paid on it in the three years, $99 was added as the interest, and that, with the $350 paid Severin in cash, made $949 as the face amount of the note and of the chattel mortgage given December 5, 1944.

Severin testified: "Q- So you agreed when you signed the new note and the new mortgage that the $599 would be a part of that, and you did sign the note and the mortgage for $949 and signed the chattel mortgage that was involved in this case? A- I did, provided he surrendered them papers to me where I could collect it, yes, because that was part of the deal. Q- That was part

of the deal? A- Yes. I was to get it so I could go and collect it. Q- So you did ultimately get them back? A- A year and a half afterwards. * * * When he kept it a year and a half I think he should still keep it, and if it is valid then he can collect it, because he told me definitely that he was sending an attorney up there to protect himself in that foreclosure action, therefore I had no more interest in it."

Plaintiff Severin admitted there was nothing in writing that Dr. Lukovsky was to give back the note and mortgage, but on his verbal promise. Severin on cross-examination admitted that he knew before their deal on December 5, 1944, that the Nelson second mortgage was in litigation because of the foreclosure of the first mortgage.

When the $600 note, mortgage, and original assignment were finally returned to Severin in September 1946, with a reassignment of the second mortgage back to Severin from Dr. Lukovsky, the original note, mortgage, and assignment bore an endorsement across them in ink, reading: "Cancelled by Supplemental Decree Nov. 27, 1943 Leonard L. Larsen Clerk Dist Court By Pauline Kendrick Deputy."

With the facts now before us, we can better understand the allegations of the pleadings filed in the case at bar. The petition alleged that plaintiff E. G. Severin borrowed $350 from the defendant on December 5, 1944, and that he and his wife executed a promissory note and a chattel mortgage to the defendant for $949, of which $599 represented a note of Joseph A. Nelson, secured by a mortgage. Paragraph 2 reads as follows: "That, at said time, defendant stated and represented to plaintiffs that said note and real estate mortgage was in the same condition as when he had received them and that he would so deliver them to plaintiffs."

It was further alleged that the note and mortgage had been canceled by decree of the district court for Dodge County on November 27, 1943; that the representations

on the part of the defendant that the note and mortgage were in the same condition as when he received them were false, untrue, and fraudulent, and the defendant knew of such falsity, but that the plaintiffs believed the false representations of the defendant and relied upon such untrue statements, and by reason thereof executed the note and mortgage, and that the plaintiffs received only $350 in cash as a consideration for the $949 note and chattel mortgage executed by them, the balance of the consideration having no value; that the plaintiffs have repaid Dr. Lukovsky all of the $350 borrowed, except $102.19, which amount they tendered to the defendant's attorney by the check of the Reed Realty Company, which tender was refused for reasons other than not being in lawful money of the United States; that the defendant has threatened to take possession of the chattel property by writ of replevin, and will do so unless restrained; that the plaintiffs hereby tender into court $102.19, and pray that the note of $949 and chattel mortgage securing the same be canceled, and that a temporary restraining order issue to restrain defendant from taking possession of the property described in the chattel mortgage. Thereafter such temporary restraining order was issued by the district court.

For answer to the petition, the defendant alleged that plaintiffs executed the note for $949 and chattel mortgage, which was duly placed of record in Douglas County, Nebraska, which note covered a cash amount of $350 and a note and mortgage which the plaintiff had assigned to him prior thereto, but that the defendant did not on December 5, 1944, agree or promise to reassign to plaintiffs the second mortgage and note, but held same as security for the indebtedness theretofore owing, and made no representations or promises.

The defendant admitted that the second mortgage became involved in litigation when the first mortgage was foreclosed in Dodge County; that the sale of the real estate did not more than pay off the first mortgage,

and nothing was paid on the second mortgage; "that through inadvertence, mistake, or error on the part of either the Judge of the District Court of Dodge County, Nebraska, or the Clerk of said Court, the word 'cancelled' was written across the face of the note secured by said second mortgage, and in this connection the defendant alleges that said notation is a mere nullity and is without force and effect, and that the holder of said note has a cause of action against the maker thereof. That the plaintiffs' attorney, handling the matter for the plaintiffs during the month of September, 1946, so advised the plaintiffs."

The answer further alleged that plaintiffs' attorney stated to defendant's attorney, prior to September 1946, that the defendant had sufficient other security in the chattel mortgage, and asked if the defendant would reassign to the plaintiffs the second mortgage and note, and plaintiffs received the second mortgage and note by good and valid assignment, and which was accepted by the plaintiffs, and that plaintiffs handed said note to their counsel for collection and were advised by their attorney that said note constituted a good cause of action against the maker thereof, and were advised that the statute of limitations would not run against the note until five years after the time it became due.

The answer charged that, although the plaintiffs have been the owners and holders of the note since September 1946, they have not adjudicated the question of the validity of said note, and that said note today constitutes a good cause of action against the maker thereof, at least to the extent of the validity of said note at its inception. Wherefore, defendant prayed that plaintiffs' petition be dismissed, that the restraining order be released and dissolved, and the court award the defendant such damages as he has sustained by reason of the temporary restraining order, and for further relief.

On March 11, 1947, there was filed in the district court an amendment to the petition, setting out an

additional paragraph, No. 8, in which the plaintiffs tendered to the defendant the promissory note of $600 of Joseph A. Nelson and the real estate mortgage securing said note. The reply was a general denial.

At the trial on March 3, 1947, the plaintiff E. G. Severin and his two witnesses, Claude H. Reed and Allen H. Reed, testified, the exhibits heretofore described were introduced in evidence, and plaintiffs rested. Thereupon, the following motion was made: "MR. TIERNEY: I am going to move for the dismissal of this case, on the grounds that there is, in the first place, no showing of any fraud whatsoever. The fact is that Dr. Lukovsky and Mr. Severin entered into a deal on December 5, 1944 where a note was signed for the sum of $949.00, and a chattel mortgage was signed. They tried to set that aside on the grounds or on the basis that the Doctor promised to give back to Mr. Severin that Nelson second mortgage and note in the same condition as it was before. Mr. Severin knew that the first mortgage was being foreclosed on that property, necessarily involving that second mortgage. At the time he entered into the deal and the note and chattel mortgage was executed, Dr. Lukovsky, according to their contention, was to deliver back the second note and mortgage sometime later in the same condition as it was before. (Argument to the Court by both counsel.) THE COURT: I will sustain the motion to dismiss. To which ruling of the Court plaintiffs except."

Plaintiff Severin knew that the first mortgage of $4,250 was in process of foreclosure in Dodge County. In that action, Dr. Lukovsky had employed counsel and attempted to protect himself, but nothing was left for his second mortgage, and he finally got back his note and mortgage from the Dodge County district court. The instruments were accepted back by Severin, but there is no showing made of any attempt on his part to collect the note, but he has retained the instruments.

This court has said: "After exhausting the remedy

by foreclosure, the equity proceeding is no longer pending and there is no further purpose or right of the court to control the beginning of an action at law. Where that situation occurs, if remedies at law exist, an action at law may be had without the requirement of securing permission of the equity court." Federal Farm Mtg. Corporation v. Claussen, 138 Neb. 518, 293 N. W. 424.

This court more than fifty years ago announced the foundation elements on which fraud actions must be based to recover: "To maintain an action for damages for false representation, the plaintiff must allege and prove (1) what representation was made; (2) that it was false; (3) that plaintiff believed the representation to be true, (4) relied on and acted upon it, (5) and was thereby injured." Stetson v. Riggs, 37 Neb. 797, 56 N. W. 628. See, also, 23 Am. Jur., Fraud and Deceit, § 172, p. 985.

"In alleging fraud, it is essential that the pleading show injury to plaintiff as a result of the fraud charged." 37 C. J. S., Fraud, § 87, p. 385.

In Dyck v. Snygg, 138 Neb. 121, 292 N. W. 119, this court said, in brief, that to maintain an action for fraudulent representations it is not only necessary to establish the telling of the untruth, knowing it to be such, but to prove that plaintiff had a right to rely on it, and did so rely, and suffered damages.

"To maintain an action for damages for false representation the plaintiff must allege and must prove what representation was made; that it was false and so known to be by the defendant charged with making it, or else was made without knowledge as a positive statement of known fact; that the plaintiff believed the representation to be true; and that he relied on and acted upon it, and was thereby injured." Campbell v. C & C Motor Co., 146 Neb. 721, 21 N. W. 2d 427.

"It is a general rule of law that, in order to obtain redress or relief from the injurious consequences of

deceit, it is necessary for the complaining party to prove that his adversary has made a false representation of material facts; that the complaining party was ignorant of its falsity, and believed it to be true; that it was made with intent that it should be acted upon; and that it was acted upon by the complaining party to his damage." Omaha Electric Light & Power Co. v. Union Fuel Co., 88 Neb. 423, 129 N. W. 989. See, also, Welch v. Reeves, 142 Neb. 171, 5 N. W. 2d 275.

In the case at bar, we have reached the conclusion that the plaintiffs failed to prove that any false representations were made, or, if made, that they relied thereon, and that they suffered any injury or damages growing out of the transaction. We therefore find that the trial court was right in sustaining the motion to dismiss the petition at the close of the plaintiffs' evidence.

AFFIRMED.

CHAPPELL, J., participating on briefs.

EMIL FALKNER, APPELLEE, V. SACKS BROTHERS, A COPARTNERSHIP, ET AL., APPELLANTS.
30 N. W. 2d 572

Filed January 9, 1948. No. 32213.

1. **Fraud.** To maintain an action for damages for false representation the plaintiff must allege and prove what representation was made; that it was false and so known to be by the defendant charged with making it, or else was made without knowledge as a positive statement of known fact; that the plaintiff believed the representation to be true; and that he relied and acted upon it, and was thereby injured.
2. ———. A person is justified in relying upon a representation made to him in all cases where the representation is a positive statement of fact, and where an investigation would be required to discover the truth.
3. ———. The general rule that fraud is not presumed, but must be proved by the party who alleges it, does not mean that it cannot be otherwise proved than by direct and positive evidence. Fraud in a transaction may be proved by inferences which may

reasonably be drawn from intrinsic evidence respecting the transaction itself, such as inadequacy of consideration, or extrinsic circumstances surrounding the transaction.

4. ———. The measure of general damages for fraud in inducing the purchase of property is the difference between the actual value of the property at the time of purchase and the value it would have had if seller's representations had been true.

APPEAL from the district court for Douglas County: HENRY J. BEAL, JUDGE. *Reversed and remanded.*

Abrahams, Kaslow & Carnazzo, for appellants.

Gross & Welch, for appellee.

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

MESSMORE, J.

This is an action at law for damages for alleged fraudulent misrepresentations made by the defendants to the plaintiff upon which he relied and was thereby induced to purchase the tractor portion of a tractor-trailer combination.

The plaintiff's amended petition, insofar as need be considered in this appeal, alleged in substance: That the defendants fraudulently represented to the plaintiff that the tractor which they offered for sale and which was purchased by the plaintiff was a White, model No. 718, 1938 tractor, when in fact it was a White, model 1936 tractor; further alleged that the defendants represented orally to the plaintiff that the tractor had been overhauled and placed in good mechanical condition and was in good and proper working order, when in fact the tractor was not in good mechanical working condition for the reason that the transmission was worn and defective and caused the tractor to break down on its first trip, the motor was defective in that the sleeves would not work and had to be replaced, and the motor was cracked and would not develop compressed power

thereby rendering the tractor incapable of developing adequate pulling power; and that by virtue of the false and fraudulent representations so made by the defendants, the plaintiff had been damaged in the amount of $1,513 and costs.

The defendants' amended answer alleged, in substance: That the motor tractor was acquired in the course of trade or business from a prior owner and, by an error appearing in the certificate of title, the defendants were led to believe that it was a 1938 tractor instead of a 1936 tractor; that the plaintiff purchased the tractor on June 26, 1944, in the course of trade or business and for use by him in his business; that upon discovery of the mistake in the year the tractor was manufactured, defendants tendered the difference in the ceiling price between a 1938 tractor of the same make, and a 1936 tractor, which at the time of the purchase by the plaintiff was governed by federal regulations, in the amount of $233.20, which was refused. Defendants further alleged that subsequent to the purchase of the tractor by the plaintiff it was returned to them for service and repairs which defendants made voluntarily, at their expense; further, that if there was an overcharge for the tractor it was not willful nor the result of failure to take practicable precautions against the occurrence thereof; and denied generally the affirmative allegations of the plaintiff's amended petition with reference to alleged false and fraudulent representations alleged to have been made by the defendants.

The case was submitted to a jury, resulting in a verdict for the plaintiff in the amount of $1,513. Upon the overruling of the motion for new trial and judgment entered on the verdict, defendants appeal.

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

The defendants contend that the evidence was insufficient to warrant submission of the case to the jury

on the question of false and fraudulent representations alleged to have been made by the defendants, as pleaded in plaintiff's amended petition. This assignment of error necessitates a review of the competent and relevant evidence as disclosed by the record.

The plaintiff testified, in substance, that by virtue of a newspaper advertisement he learned the defendants were offering for sale a 1938 White truck. In June 1944, pursuant to the advertisement, he contacted the defendants. One of the defendants informed him that they had such a tractor for sale, and that it was being worked on by the White Motor Company, the manufacturers of White trucks; that the price would be $1,850, which included a spare, and fixing the cab and the glass contained in the tractor; that the plaintiff would have to wait for approximately three weeks, or until the tractor was properly repaired, at which time it would be in A-1 mechanical condition. The plaintiff contacted this same defendant on two occasions and finally purchased the tractor as a 1938 tractor, paid the amount of $1,850 for it, and it was then represented to him that the tractor was ready to go, and was in A-1 mechanical condition. The plaintiff had engaged in driving a truck for a period of five years, but entered this tractor in a business new to him, that of hauling gasoline. The tractor was unable to develop power, and later the transmission and clutch went out. The clutch was replaced, the work being done by the plaintiff. On other occasions the tractor would not develop power and the plaintiff was obligated to replace the worn-out universal joints. He, on occasions, informed the defendants of such facts with reference to the failure of the tractor to develop power, the parts that he was obliged to replace, and the work and expense that he was put to. The tractor had developed three cracks in the motor block. The defendant offered $800 for the tractor. Finally, when it broke down in Kewanee, Illinois, in the latter part of November 1944, its value was placed at $500.

It appears from the evidence that in March 1944, the defendants sold the same tractor to another party under a guarantee that it would be satisfactory, and sold it as a 1938 model which was the only way that such party could purchase it. The tractor developed mechanical trouble in that it did not have sufficient power to pull the load it should for the size of the tractor. The purchaser was losing money on it and contacted the defendants with reference to taking the tractor back. He told the defendants that he thought it was an older model than a 1938, and they said that was all right, they would sell it as a 1938, and that is what it was. He was offered $450, and later induced the defendants to return the full purchase price of $1,850 and take the tractor back. He found papers in the tractor to show that it was a 1936 model.

There is evidence of a mechanic who fixed the cracked motor block in the tractor in August of 1944, for the plaintiff.

Another mechanic testified that in 1944, he had occasion to inspect the tractor and to work on the motor for the plaintiff in the latter part of October or the fore part of November. The motor had thrown a rod, and he installed one sleeve into it. The motor block was cracked.

A driver for the plaintiff testified that he made a trip to Chicago to pick up the tractor where it was stranded, and was directed to bring the tractor back. He was hauling a load of tires, 23,000 pounds gross weight. The tractor lost power and completely broke down in Brooklyn, Iowa. The head gasket went out, and the motor would not run, and filled up with water which got into the number three and four pistons. He told of other trouble with the tractor, and that he was with the plaintiff when the plaintiff endeavored to make a deal with the defendants by trading for another tractor.

The plaintiff purchased the tractor on June 26, 1944. The certificate shows the make to be a White, 1938,

model 718 tractor, the price $1,850. It developed that the tractor was in fact a 1936 White model tractor. There was a mistake made on the certificate of title in the county clerk's office, with reference to the year in which the tractor was manufactured. This matter was called to the defendants' attention and they thereafter endeavored to make up the difference in the ceiling price as governed by federal regulations at the time, of a 1936 model White tractor and a 1938 model White tractor.

The defendants' testimony is to the effect that the plaintiff talked to the master mechanic for the Watson Brothers Transportation Company who owned the tractor and sold it to the defendants, seeking information with reference to the tractor, as he had in mind the purchase of it. He informed the plaintiff of his knowledge of the tractor. He further testified that he supervised the last repair of the vehicle, putting a sleeve in the motor block, and reboring the motor to 20 oversize. The motor block was not cracked at that time.

It also appears from the testimony of the service manager of the White Motor Company that the tractor was a White model 718. The company had manufactured this particular model for a period of six years, and the model 718 manufactured in 1936 was of the same construction as the one manufactured in 1938, and that one could not tell in what year the tractor was manufactured by just examining or looking at it, but had to go entirely by the motor and serial number. He further testified that repairs were put on the tractor for the purpose of placing it in mechanical condition for successful operation. We deem it unnecessary to set forth the repairs so made, except to say that they were not of the kind or nature that the plaintiff testified that he made subsequent to taking possession of the tractor. The plaintiff was in and around the tractor on several occasions, talked to the mechanics, and informed the witness there were additional things that he wanted done, such as tightening the steering bracket. He

checked on the brake lining, and the steering bracket was tightened after the White Motor Company got permission to do so from the defendants. The plaintiff then took possession of the tractor. The motor block was not cracked; the tractor had been worked on on two occasions and the charge was made to the defendants. The last work included the installation of an air compressor, the renewal of oil lines, the repair of some light wiring, and the installation of a taillight, a horn, and a starting motor.. This witness also testified that it is impossible to tell the year a truck is manufactured by looking at it. This testimony is corroborated by the parts man employed by the White Motor Company who observed the plaintiff visiting the White Motor Company on several occasions.

One of the defendants testified that the partnership engaged in selling trucks, busses, and used parts; that the tractor in question was obtained from the Watson Brothers Transportation Company and was in good condition; that at the time of purchase, the title read "1938" and that was the basis of their purchase; that the plaintiff came to their place of business on numerous occasions and was fully advised with reference to the tractor, and was told to check on it for his own information; that at no time was a statement made by the defendant to the plaintiff that the tractor was in A-1 working condition.

Another partner of the defendants testified that the tractor had been returned by a prior owner; that he was present with the plaintiff at the White Motor Company once or twice; that the plaintiff went up to the tractor, was privileged to make any inspection he wanted to of it and in fact did inspect it, and no representation was made by this witness that the tractor was in A-1 mechanical condition.

A witness acquainted with tractors of the model of the one in question, and with the tractor in question,

testified that its value, without considering the ceiling price, would be $1,600 at the time it was sold.

The plaintiff denies that he ever inspected the tractor or ever saw the tractor with the head off of the motor, as claimed by the defendants, and did not know that the motor block was cracked.

Having in mind the first assignment of error as heretofore set out, the question presented is whether or not the plaintiff met the burden of proof by a preponderance of the evidence with respect to the essential elements constituting fraud and deceit.

This court, in Campbell v. C & C Motor Co., 146 Neb. 721, 21 N. W. 2d 427, announced the following rule: "To maintain an action for damages for false representation the plaintiff must allege and must prove what representation was made; that it was false and so known to be by the defendant charged with making it, or else was made without knowledge as a positive statement of known fact; that the plaintiff believed the representation to be true; and that he relied on and acted upon it, and was thereby injured."

In this connection, the evidence shows that the defendants represented the tractor to be a White 1938 model, while in fact it was a 1936 model. This representation was made to the plaintiff, and was also made to a previous purchaser of the tractor. The representation so made is a positive statement of fact which would require an investigation to discover the truth. Unquestionably the plaintiff had a right to rely upon the representation that this vehicle was a 1938 model White tractor.

As stated in Sic v. Loup River Power District, 136 Neb. 506, 286 N. W. 700: "A person is justified in relying upon a representation made to him in all cases where the representation is a positive statement of fact, and where an investigation would be required to discover the truth." See, also, Martin v. Hutton, 90 Neb. 34, 132 N. W. 727; Brucker v. Kairn, 89 Neb. 274, 131 N. W. 382;

Wineberg v. Baker, 123 Neb. 411, 243 N. W. 122.

The evidence shows that the tractor proved to be defective in a number of ways which has previously been outlined, and obviously there were latent defects which could not be discovered with ordinary prudence. The evidence fails to disclose that the plaintiff could have discovered that the transmission was defective, the clutch was worn out, or that the universal joints and drive shaft needed to be replaced, and that the air line was bad.

The defendants contend that, as set forth in Dyck v. Snygg, 138 Neb. 121, 292 N. W. 119, following Osborne v. Missouri P. Ry. Co., 71 Neb. 180, 98 N. W. 685, and as set forth in the body of the opinion in Welch v. Reeves, 142 Neb. 171, 5 N. W. 2d 275, the general rule is that, where ordinary prudence would have prevented the deception, an action for the fraud perpetrated by such deception will not lie. This rule has no application, for the defects were latent, as shown by the evidence in the case at bar.

There is a conflict in the evidence as to whether or not the cracked motor block and the defective sleeves, which are two specific defects, could only be seen or discovered when the head was off the motor. Defendants introduced evidence to the effect that the head had been removed. The plaintiff denies that he saw the cracked motor block or defective sleeves, or that the head was off the motor at any time; admits that he gave the tractor a casual examination.

"The general rule that fraud is not presumed, but must be proved by the party who alleges it, does not mean that it cannot be otherwise proved than by direct and positive evidence. Fraud in a transaction may be proved by inferences which may reasonably be drawn from intrinsic evidence respecting the transaction itself, such as inadequacy of consideration, or extrinsic circumstances surrounding the transaction. In fact, many of the elements of fraud are such as not to be susceptible

of proof by direct testimony. Fraud in its nature is not a thing susceptible of ocular observation or readily demonstrable physically; it must, of necessity, be proved in many cases by inferences from the circumstances shown to have been involved in the transaction in question." 24 Am. Jur., § 257, p. 89. See, also, Patton v. Rapp, 133 Neb. 308, 275 N. W. 315; Johnson v. Radio Station WOW, 144 Neb. 406, 13 N. W. 2d 556; Rettinger v. Pierpont, 145 Neb. 161, 15 N. W. 2d 393.

The defendants contend that the court erred in giving instruction number four to the jury. This instruction set forth the general rule as to the measure of damages in cases of false and fraudulent representations which in this jurisdiction is as follows: In a purchaser's action to recover damages for fraud in the sale he has the burden of proving the amount of his damages, and the measure thereof is the difference between the actual value of the property and its represented value at the time of the sale. See Young v. Filley, 19 Neb. 543, 26 N. W. 256; Smith v. Leu, 110 Neb. 297, 193 N. W. 703; Rankin v. Bigger, 128 Neb. 800, 260 N. W. 202. See, also, Welch v. Reeves, *supra.*

The principal objection raised by the defendants in support of their contention is that there is no competent evidence as to either the value of the tractor at the time of the sale or what its value would have been at the time if the tractor had been as represented. From an examination of the record, it is void of competent evidence sufficient to meet the requirement of the general rule in cases of this kind, as announced in instruction number four. The record discloses that there is some evidence of the value of the tractor approximately five months after the purchase and after the plaintiff had taken possession of it. This is too remote, in period of time, to meet the requirements of the general rule as hereinbefore announced.

The instruction contains the following language: "plus any reasonable expenses paid by the plaintiff in attempt-

ing to put said tractor in working condition." This language indicates that in a case of this nature special damages may be recoverable. We are not confronted with that question in this appeal, for the reason hereinbefore given in this assignment of error.

We conclude that under the evidence, instruction number four, given by the trial court, was prejudicially erroneous. We therefore reverse and remand the case for further proceedings.

REVERSED AND REMANDED.

HAROLD W. GLISSMANN, APPELLEE, V. F. H. BAUERMEISTER ET AL., APPELLEES. IMPLEADED WITH EDMOND H. ORCHARD, APPELLANT, CONSOLIDATED WITH HAROLD W. GLISSMANN, APPELLEE, V. F. H. BAUERMEISTER ET AL., APPELLEES. IMPLEADED WITH SERENA E. GRABOW, APPELLANT.
30 N. W. 2d 649

Filed January 9, 1948. Nos. 32261, 32280.

1. **Judgments.** Any right, fact, or matter in issue, directly adjudicated or necessarily involved in the determination of an action before a competent court in which a judgment or decree is rendered upon the merits is conclusively settled by the judgment therein and cannot again be litigated between the parties and privies whether the claim or demand, purpose, or subject matter of the two suits is the same or not.
2. ———. If the district court attempts to render judgment on a subject within its general jurisdiction but which is not properly before it such judgment is a nullity.
3. ———. If this court attempts on an appeal from the district court to render judgment on a subject within the general jurisdiction of the district court but which was not properly before that court such judgment is likewise a nullity.
4. ———. Where the district court over objection assumes to readjudicate matters upon which there was already a valid, binding, and conclusive judgment or decree such attempted readjudication is a nullity.
5. ———. Action of the Supreme Court confirming the action of the district court where the district court over objection assumes

to readjudicate matters upon which there was already a valid, binding, and conclusive judgment or decree is a nullity.

6. ———. New matter brought into an action not germane to the original subject matter may not over objection be litigated in that action.
7. ———. Where the record discloses that litigants tried an issue as though it were joined by the pleadings, though not so joined, a decree which responds to the issues thus tried has the same binding force and effect as one which responds to pleadings.
8. **Pleading.** A prayer for general relief in an equitable action is sufficient to authorize any judgment to which the party is entitled under the pleadings and evidence adduced in support thereof.
9. **Forcible Entry and Detainer.** An action in forcible entry and detainer lies in favor of a purchaser at judicial sale to recover possession of premises purchased, when the judgment debtor was in possession at the time the judgment or decree was rendered whereunder the sale was made. The remedies by forcible entry and detainer and by writ of assistance are in such circumstances concurrent.
10. ———. A court is not ousted of jurisdiction in a forcible entry and detainer action by mere averment in a case that a question of title is involved, but it has jurisdiction to proceed until the evidence discloses such fact.
11. **Appeal and Error.** 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 rests upon the party making the claim.
12. ———. This rule with reference to findings of fact has the same force and effect where the remand is for the performance of a detail or details as in the case of remand for a retrial of issues.

APPEAL from the district court for Douglas County: FRANK M. DINEEN, JUDGE. *Affirmed in part and in part reversed.*

Gray & Brumbaugh, for appellant Serena E. Grabow.

S. L. Winters and *Oscar T. Doerr,* for appellees.

Edmond H. Orchard, pro se.

Henry C. Glissmann, pro se.

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

YEAGER, J.

The subject matter of the appeals herein and the parties to this action have been before this court on several previous occasions. A detailed history of the litigation appears in the opinion in Glissmann v. Bauermeister, 146 Neb. 197, 19 N. W. 2d 43. This history will not be repeated herein except to the extent that it is necessary in the ascertainment and determination of the issues properly presented and the disposition of matters, as will appear herein, already litigated and disposed of in this court and in the district and county courts of Douglas County, Nebraska.

On March 28, 1929, a lease and option agreement was entered into by and between Edmond H. Orchard who held title to certain land with improvements thereon in Douglas County, Nebraska, and Serena E. Grabow and John J. Grabow, her husband, whereby Orchard leased the lands to Serena E. Grabow. The lease granted to Serena E. Grabow an option to purchase. A statement of the other terms of the lease is unnecessary here. These parties are some of the parties to this proceeding. Orchard was referred to as Edmond H. Orchard in the agreement. The signature is E. H. Orchard. Harriet C. Orchard is named in the agreement but her signature was not appended thereto.

So that confusion may not arise attention is called to the fact that Orchard has spelled his Christian name E-d-m-o-n-d. Other parties have spelled it E-d-m-u-n-d. For the purposes of this opinion we will spell it in all instances E-d-m-o-n-d.

It was decreed by the district court for Douglas County, Nebraska, on June 6, 1930, that the lease and option was taken for the benefit of Tena E. Glissmann

and that she was entitled to the benefits thereunder and was charged with its obligations.

As an incident of the lease and option Serena E. Grabow made a written pledge to Edmond H. Orchard of an interest in the estate of Hans C. Glissmann, deceased, to insure performance of the lease and option. Her declaration of the pledge is the following: "Whereas, said contract provides that I am to put up as additional security for the faithful performance on my part of all the terms, conditions and stipulations in said contract $5500.00, the same being a part of my interest in the estate of my deceased father, Hans C. Glissman; * * *." This declaration of the pledge and its purpose appears not to be questioned and we think it is not vulnerable to question.

The agreement which provided originally for the pledge had no relation to Edmond H. Orchard but was an agreement made in furtherance of a plan of Henry C. Glissmann to float a bond issue the purpose of which was to finance the operation of the Valley View Golf Course on the lands herein involved. That deal failed of consummation and thereafter the agreement for the pledge became a pledge available to Edmond H. Orchard in case of default under the lease and option agreement.

The pledge, to the extent that exaction was made upon it by Edmond H. Orchard, inured to the benefit of Tena E. Glissmann, that is to say, if there was a default under the lease and option agreement and Edmond H. Orchard resorted to the pledge in whole or in part for payment wherein Tena E. Glissmann had defaulted then to that extent and in that amount the obligation of Tena E. Glissmann under the lease and option agreement would be reduced.

As an incident of the lease and option transaction Henry C. Glissmann, in order to cause Serena E. Grabow to pledge $5,500 of her interest in the estate of Hans C. Glissmann, assigned to Serena E. Grabow all of his interest in the estate of Hans C. Glissmann. Henry C.

Glissmann and Serena E. Grabow are son and daughter respectively of Hans C. Glissmann and their interests in the estate were equal. The assignment is the following: "In consideration of first party so pledging her said share in said estate, and by these presents said first party hereby agrees to so pledge, second party hereby sells, assigns and sets-over unto said Serena E. Grabow, her heirs or assigns, all right title and interest in and to estate or any share therein of the late Hans C. Glissmann, which he, Henry C. Glissmann, second party herein, may now have or hereafter may accrue to him as heir or creditor of the late Hans C. Glissmann, his father now deceased. And the said second party hereby grants to first party, her heirs or assigns, full right and authority to receive, receipt for or acknowledge any or all necessary papers or matters in connection with or rights accruing in and to said share of said second party in said estate of Hans C. Glissmann, deceased, which share is by these presents assigned herein to said first party, and that said first party in the settlement of said estate or receiving of said share may do the same as seond (sic) party may have don (sic) in the premises, all of which said second party hereby acknowledges and confirms."

At some time, the exact date of which is not made clear, Henry C. Glissmann appears to have transferred his interest in the lease to Tena E. Glissmann, his wife. Also in the assignment from Henry C. Glissmann to Serena E. Grabow it is provided that the lease and option agreement obtained by Serena E. Grabow should be assigned to Tena E. Glissmann. Therefore the litigation with regard to the lease and option was carried in her name and Henry C. Glissmann, her husband. Apparently on October 15, 1928, Henry C. Glissmann assigned his interest in the estate of his father to Tena E. Glissmann. This was prior to the assignment to Serena E. Grabow, but Tena E. Glissmann joined in this one so therefore the one to Serena E. Grabow took priority

over the one to Tena E. Glissmann. It is not contended otherwise. Apparently on November 3, 1930, Tena E. Glissmann assigned this interest to Harold W. Glissmann. Harold W. Glissmann's rights were likewise inferior to those of Serena E. Grabow.

During all of the period from the date of the lease and option until shortly after January 23, 1942, Tena E. Glissmann and Henry C. Glissmann remained in possession of the property. At about this time they were dispossessed.

In March 1938 Tena E. Glissmann instituted an action in equity whereto Edmond H. Orchard and Harriet C. Orchard, his wife, Serena E. Grabow and John J. Grabow, her husband, Henry C. Glissmann, Harold W. Glissmann, and Hans Glissmann became parties. The action as originally instituted was against Edmond H. Orchard and Harriet C. Orchard as parties defendant. The other parties were brought in later.

The action as originally instituted was for an accounting of the amount due Edmond H. Orchard from Tena E. Glissmann under the lease and option agreement hereinbefore referred to.

On being brought into the case Serena E. Grabow and John J. Grabow filed an answer and cross-petition. The only matter therein contained which it is needful to mention here is that these parties sought to have the court decree that the rights of Tena E. Glissmann under the lease and option had been forfeited, to have title quieted in Edmond H. Orchard and Harriet C. Orchard, and to have the unused portion of the pledge of Serena E. Grabow to Orchard returned to her.

Edmond H. Orchard and Harriet C. Orchard filed an answer and cross-petition. In this, among other things not necessary to be mentioned here, they asked that title to the property in the lease and option be quieted in them and that the plaintiff be forever barred and foreclosed of all right, title, and interest in and to or equity of redemption in and to the premises involved;

and that the court give directions as to the remainder of the $5,500 interest of Serena E. Grabow in the estate of Hans C. Glissmann being the unused portion of the balance of her pledge.

There was a trial had of the issues made by these pleadings and decree was entered October 31, 1939.

On the trial the court took an accounting of the amount due on the lease and option and found it to be $18,299.82, and in relation thereto the court decreed as follows: "IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED By the Court that the plaintiff's indebtedness on said lease and option agreement, which is also an equitable real estate mortgage on said premises, be, and hereby is, found to be the sum of Eighteen Thousand Two Hundred Ninety-nine and 82/100 Dollars ($18,299.82), and the Court hereby determines that this is the amount which the plaintiff must pay to the defendants, Edmund H. Orchard and Harriet C. Orchard, in order to retain said premises under said equitable mortgage; that the date of redemption shall be nine months from the date of this decree." The decree in this connection further provided that on payment of the amount named, Edmond H. Orchard and Harriet C. Orchard should execute a warranty deed to the premises to Tena E. Glissmann.

As to the pledge the decree provided: "IT IS FURTHER ORDERED that said defendants, Edmund H. Orchard and Harriet C. Orchard, return to and pay to the defendants, Serena E. Grabow and John J. Grabow, any property or moneys which they are now holding as collateral security, in connection with said lease and option agreement, which have not already been paid to Serena E. Grabow and John J. Grabow."

The decree further provided: "IT IS FURTHER ORDERED that the cross-petition of Serena E. Grabow and John J. Grabow, and the cross-petition of the defendants, Edmund H. Orchard and Harriet C. Orchard, be, and they hereby are, dismissed."

From the decree in this case the defendants Orchard took an appeal to the Supreme Court. There was no cross-appeal. The case on appeal is reported as Glissmann v. Orchard, 139 Neb. 344, 297 N. W. 612. The decree was not disturbed on appeal except as to the amount required for redemption, the time for redemption, and the taxing of costs. The determining portion of the opinion in this respect is the following: "The court finds that the indebtedness on the lease and option of Orchard is in the amount stated therein, of $26,000, and that, in order to retain said premises under the theory that said lease and option are an equitable mortgage, Orchards should be paid $26,000, as provided therein. The date of redemption, fixed in the decree of the district court, having expired nine months from October 31, 1939, said redemption date is fixed at three months from the date of the mandate herein. Costs are taxed to plaintiff." The mandate was issued July 8, 1941.

Tena E. Glissmann has never paid any portion of the amount found to be due by the opinion of this court.

After the issuance of the mandate Edmond H. Orchard and Harriet C. Orchard instituted in the county court of Douglas County, Nebraska, an action in forcible entry and detainer the purpose of which was to obtain possession of and to oust Tena E. Glissmann and Henry C. Glissmann from the premises. Judgment was rendered in favor of plaintiffs in that action for possession and by authority of a writ of restitution in that case the defendants were ousted of possession on February 4, 1942. No appeal was taken from that judgment. This is the dispossession which was referred to earlier in this opinion.

On July 1, 1938, Harold W. Glissmann filed a petition in equity wherein he sought to recover by virtue of assignments the interest of Henry C. Glissmann in the estate of Hans C. Glissmann, which was the same as that assigned to Serena E. Grabow as hereinbefore set out.

He sought to recover it from parties who had it in possession and control, namely F. H. Bauermeister, Henry J. Moeller, and Happy Hollow Club, Inc., a corporation. None of these parties claimed an interest in the res. They were withholding payment because they had notice that Serena E. Grabow claimed that the interest belonged to her.

Serena E. Grabow was made a party to the action. Harold W. Glissmann sought to have her assignment declared a nullity. He also prayed for damages in the amount of $2,000 on account of the fact that she claimed this interest in the estate of Hans C. Glissmann as her own and prevented Harold W. Glissmann from obtaining it.

The three defendants first named, by answer, asked directions with regard to disposition of the interest in the estate.

Serena E. Grabow, by answer and cross-petition, claimed this interest as her own by virtue of her assignment.

A trial was had on the issues thus presented and no other issue pertinent to the inquiry here was presented for consideration and determination. These issues and no others were decided by the decree.

By the decree it was determined that Harold W. Glissmann was entitled to this interest in the estate of Hans C. Glissmann and that he was entitled to receive from F. H. Bauermeister, former trustee, Henry J. Moeller, present trustee, and Happy Hollow Club, Inc., such parts of the interest in the estate as they or either of them had in possession or under control. It was further determined that Serena E. Grabow had no interest therein by virtue of her assignment which was declared to be null and void. Title was quieted in Harold W. Glissmann. Damages were denied by the decree. F. H. Bauermeister was directed to pay to plaintiff $204.23 less $2.50 advance costs and a $25 fee for his attorney. The amounts required to be paid by Henry

J. Moeller and Happy Hollow Club, Inc., were not determined by the decree.

This is the case out of which the appeal which is now before us flows.

From the decree in the case Serena E. Grabow appealed to the Supreme Court. The case on appeal appears as Glissmann v. Bauermeister, 139 Neb. 354, 297 N. W. 617. An opinion was rendered therein and also a supplemental opinion. The supplemental opinion immediately follows the original opinion in the report.

The decree of the district court was by the original opinion reversed and the action dismissed. The effect of this, in the light of the observations of the opinion, was to properly dismiss the petition of Harold W. Glissmann and to improperly dismiss the cross-petition of Serena E. Grabow. This court clearly intended to deny to Harold W. Glissmann any interest in the estate of Hans C. Glissmann and to confirm this interest in Serena E. Grabow on her cross-petition. In the opinion it was said: "To now allow his son to secure the payments due on his father's share which were pledged to his aunt would violate all equitable principles."

The situation thus presented having been called to the attention of the court by motion for clarification of opinion within the time provided for filing motions for rehearing the supplemental opinion expressing the true purpose and intent of the court was adopted. The pertinent portion of this opinion is the following:

"This court had jurisdiction of the parties, and reversed the decree of the district court and dismissed the plaintiff's petition. However, our opinion, in addition thereto, should have disposed of all of the issues between the parties which were set out in the pleadings and supported by the evidence, and in following the approved practice of courts of equity this court has decided to enter this supplemental opinion, and thereby more completely adjust the rights of the parties litigant, to the

end that future litigation in regard to the same issues may be avoided.

"Therefore, in addition to the entry of the judgment heretofore rendered, and supplemental thereto, judgment is hereby entered in favor of Serena E. Grabow on her counterclaim and cross-petition against the plaintiff and defendants Henry C. Glissmann and Tena E. Glissmann for all moneys due from defendant Happy Hollow Club, Inc., or from defendant Daniel C. Cary, and representing the one-eighth interest of Henry C. Glissmann in the estate of Hans C. Glissmann, whether said moneys are in the hands of F. H. Bauermeister, former trustee, Henry J. Moeller, present trustee, or are still in the hands of Happy Hollow Club, Inc., or Daniel C. Cary; and the district court is further directed to enter judgment in favor of Serena E. Grabow and against defendants Henry C. Glissmann and Tena E. Glissmann for such sums as that court finds have been received by Henry C. Glissmann, Tena E. Glissmann and Harold W. Glissmann from and after March 28, 1929, together with interest thereon from date so received, and which said sums represent payments on the aforesaid share of Henry C. Glissmann in the estate of Hans C. Glissmann."

It will be observed from an examination of this quoted portion of the opinion (1) that the decree was reversed, (2) that plaintiff's petition was dismissed, (3) that judgment was entered against Henry C. Glissmann and Tena E. Glissmann in favor of Serena E. Grabow on her counterclaim and cross-petition for all moneys due from the Happy Hollow Club, Inc., or from defendant Daniel C. Cary, and representing the one-eighth interest of Henry C. Glissmann in the estate of Hans C. Glissmann, whether said moneys are in the hands of F. H. Bauermeister, former trustee, Henry J. Moeller, present trustee, or still in the hands of Happy Hollow Club, Inc., or Daniel C. Cary, and (4) that the district court was directed to enter judgment in favor of Serena E. Gra-

bow and against Henry C. Glissmann and Tena E. Glissmann for such sums as that court found had been received by Henry C. Glissmann, Tena E. Glissmann, and Harold W. Glissmann from and after March 28, 1929, with interest from the date of receipt, as a part of the interest of Henry C. Glissmann in the estate of Hans C. Glissmann.

The effect of this at this time is to say that Serena E. Grabow's assignment was adjudicated to be and was an absolute conveyance to her of the interest of Henry C. Glissmann in the estate of his deceased father which adjudication is final and conclusive; that Serena E. Grabow obtained a judgment for the unpaid portion of this interest which judgment is final and conclusive; and that Serena E. Grabow also obtained an adjudication that the portion of the interest paid to the three Glissmanns after March 28, 1929, belonged to her which adjudication was also conclusive and final. The opinion left nothing for later determination except the determination of the amount or amounts which had been received by the three Glissmanns and directed that judgment be rendered for this or these amounts.

With regard to the effect of an adjudication this court in Wheeler v. Brady, 126 Neb. 297, 253 N. W. 338, adopted the following from 34 C. J., Judgments, § 1154, p. 743: "Any right, fact, or matter in issue, and directly adjudicated upon, or necessarily involved in, the determination of an action before a competent court in which a judgment or decree is rendered upon the merits is conclusively settled by the judgment therein and cannot again be litigated between the parties and privies whether the claim or demand, purpose, or subject matter of the two suits is the same or not." See, also, Dutch v. Welpton, 121 Neb. 480, 237 N. W. 579; In re Estate of Gifford, 133 Neb. 331, 275 N. W. 273; Shepard v. City of Friend, 141 Neb. 866, 5 N. W. 2d 108; Hanks v. Northwestern State Bank, 143 Neb. 204, 9 N. W. 2d 175; Wightman v. City of Wayne, 144 Neb. 871, 15 N. W.

2d 78; Wightman v. City of Wayne, 148 Neb. 700, 28 N. W. 2d 575.

Notwithstanding this limited direction the district court on remand allowed the filing of new pleadings the effect of which was to allow relitigation and readjudication of all matters which had been litigated in Glissmann v. Orchard, *supra,* and the forcible entry and detainer action which has been mentioned herein and all matters which had been finally adjudicated in the action out of which this appeal flows, together with new matter certainly not germane to this action.

Following the filing of the new pleadings a master was appointed to take evidence and make findings and report to the district court. The master performed the function and made his findings and report which were presented to the court. The court rendered a decree thereon. The details of the report and of the decree are not important here. Suffice it to say that Serena E. Grabow and John J. Grabow took an appeal from the decree.

In their brief appellants urged that the court erred in not limiting the inquiry to the requirements of the mandate and further erred in approving the report of the master except to the extent of fixing dates when sums were received by the three Glissmanns from the estate of Hans C. Glissmann.

An opinion was rendered by this court and from an examination of it we are now convinced that in the opinion we were in error, not necessarily on the basis of the matters which were considered therein, but clearly because the pronouncements were made upon matters not properly before the district court or this court since there had been adjudications thereon which were final and conclusive in Glissmann v. Orchard, *supra,* Glissmann v. Bauermeister, 139 Neb. 354, 297 N. W. 617, and the forcible entry and detainer action, and for other reasons. We are now convinced that the contention of the appellants in the respects mentioned

should have been sustained and that in the opinion which remanded the case for further proceedings and mandate the district court should have been so informed.

As to the matter of the accounting on the lease and option agreement as between Tena E. Glissmann and Edmond Orchard that matter was finally adjudicated in Glissmann v. Orchard, *supra*. There Tena E. Glissmann asked for an accounting. That issue was tried and this court fixed the amount due thereunder at $26,000. Tena E. Glissmann never filed a motion for rehearing.

As to the right of Serena E. Grabow to the interest of Henry C. Glissmann in the estate of Hans C. Glissmann this court said in the original opinion in Glissmann v. Bauermeister, 139 Neb. 354, 297 N. W. 617: "To now allow his son to secure the payments due on his father's share which were pledged to his aunt would violate all equitable principles." Attention in this connection is called to the quoted portion of the supplemental opinion. No one to date has sought modification of this adjudication except as it was sought in the pleadings after remand in Glissmann v. Bauermeister, 139 Neb. 354, 297 N. W. 617. That matter stands adjudicated by the opinion and judgment of this court. The remarks in relation to that subject in Glissmann v. Bauermeister, 146 Neb. 197, 19 N. W. 2d 43, must be treated as not determining any rights in relation thereto but as remarks upon a subject contained in pleadings erroneously permitted to be filed by the district court and on a subject over which that court had no further jurisdiction because of previous binding adjudication thereon.

We must say therefore that Serena E. Grabow is, by valid and now conclusive judgment of this court, entitled to the entire Henry C. Glissmann interest in the estate of Hans C. Glissmann and, as provided by the original and supplemental opinions relating to this matter, to her judgment against F. H. Bauermeister, Happy Hollow Club, Inc., Daniel C. Cary, and Henry J. Moeller, and

she is entitled to her judgment against Henry C. Glissmann for such sums as Henry C. Glissmann, Tena E. Glissmann, and Harold W. Glissmann have received since March 28, 1929, with interest, and is entitled to an accounting of the amounts so received.

The Glissmanns contend that Harold C. Glissmann is entitled to have the unused portion of the pledge of Serena E. Grabow which was given as security for performance of Henry C. Glissmann and Tena E. Glissmann under the lease and option agreement set off in favor of Harold W. Glissmann against the Henry C. Glissmann interest in the estate of Hans C. Glissmann.

This contention in the first place cannot be sustained for the reason that such matter is not germane to this action.

This action in inception was a contest between Serena E. Grabow and Harold W. Glissmann to determine which of these two was entitled to the share of Henry C. Glissmann in the estate of Hans C. Glissmann. It was tried and went to final judgment on that issue. Serena E. Grabow claimed by assignment from Henry C. Glissmann approved by Tena E. Glissmann. Harold W. Glissmann claimed by assignment from Tena E. Glissmann and assignment from a judgment creditor of Henry C. Glissmann. The obligation of Serena E. Grabow on the pledge was to Edmond H. Orchard through agreement between Serena E. Grabow and Henry C. Glissmann. While it was shown that Harold W. Glissmann had an assignment of the interest of Henry C. Glissmann in the estate of Hans C. Glissmann, it is not shown that Harold W. Glissmann ever acquired any interest whatever in or flowing out of the lease and option agreement or the agreement whereby Serena E. Grabow executed her pledge. Such rights as remained, if any, belonged not to Harold W. Glissmann, but to Tena E. Glissmann and Henry C. Glissmann. This being true how can it be said that this claim of offset was germane to the proper issues in this case?

Even if it were assumed that Harold W. Glissmann succeeded to the rights of Tena E. Glissmann and Henry C. Glissmann under the lease and option agreement and the pledge agreement still there would be no right of set-off.

Let us see just what the substance of the pledge was. It was simply this. She agreed with Edmond H. Orchard that if Tena E. Glissmann and Henry C. Glissmann did not perform under the lease and option agreement Orchard was privileged to exact out of her interest in Hans C. Glissmann's estate any amount or amounts up to $5,500 in performance. She agreed to recompense the Glissmanns for nothing. Orchard was not required by any agreement to exact anything of her and she was not required by any agreement to pay anything except on exaction by Orchard. Orchard had the right to look to the Glissmanns alone for performance and if he did so and chose not to call upon Serena E. Grabow to respond under the terms of her pledge, and if he refrained, to the extent that he refrained, the pledge was left unburdened. No rights could flow to Harold W. Glissmann or Tena E. Glissmann and Henry C. Glissmann on account of his choice in this respect. It follows that under these circumstances in no event could any of the Glissmanns have had a right of set-off of the one interest in the Hans C. Glissmann estate against the other.

By their pleadings Tena E. Glissmann and Henry C. Glissmann sought to and the district court permitted them to relitigate the questions of whether or not their interest in the lease and option agreement had been foreclosed and whether or not they had been properly ousted from possession.

Perhaps it would be well to say, for reasons already stated, these are matters not germane to the proper issues in this case, which is of a certainty true, and dismiss the matter, but in the light of the protracted litigation and with a hope that this opinion will be its

end we feel constrained to discuss these matters and their implication.

We have no question about the foreclosure. There was a foreclosure in the case of Glissmann v. Orchard, *supra*. In the cross-petition of Edmond H. Orchard therein on proper pleadings foreclosure was prayed. The contention to the contrary notwithstanding, the district court decreed foreclosure and this court sustained the decree in that respect.

The contention of the Glissmanns that there was no foreclosure is based upon a recital in the decree that the cross-petition is dismissed. Investigation of the record and other portions of the decree discloses, however, that the cross-petition was not in fact dismissed. The decree on its face discloses that the district court decreed in favor of Edmond H. Orchard, after full trial on the issue of foreclosure made by the pleadings, foreclosure of the interest of Tena E. Glissmann and Henry C. Glissmann under the lease and option agreement which lease and option agreement, in conformity with a decree of the district court, was denominated an equitable mortgage.

It is too much of a stress on technicality to expect this court to say that where a trial court on issues which were joined and where trial was had and where by decree the issues presented were specifically decided which specific decision was followed by a general statement of dismissal of the pleading presenting the issue that the specific decision in the decree amounted to a decree on issues which were not before the court, the effect of which would be to permit of collateral attack of the decree for lack of jurisdiction to render it and to permit the relitigation of the same issues in an entirely different action.

No case cited goes so far. The case of Martin v. Abbott, 1 Neb. (Unoff.) 59, 95 N. W. 356, has been cited in support of the contention but it fails to go that far.

This court holds to the theory that where the record

discloses that the litigants tried an issue as though it were joined by the pleadings, though not so joined, a decree which responds to the issues thus tried has the same binding force and effect as one which responds to pleadings. Bennett v. Baum, 90 Neb. 320, 133 N. W. 439.

Also it is the holding of this court that a prayer for general relief in an equitable action is sufficient to authorize any judgment to which the party is entitled under the pleadings and evidence adduced in support thereof. Johnson v. Radio Station WOW, on rehearing, 144 Neb. 432, 14 N. W. 2d 666; Van Steenberg v. Nelson, 147 Neb. 88, 22 N. W. 2d 414.

Under these rules, even if it be said that the recital in the decree amounted to a dismissal of the cross-petition still it would avail the Glissmanns nothing on this contention since the case wherein the lease and option agreement were foreclosed was tried by the parties on the theory of accounting, foreclosure, and redemption and decree was entered in response thereto from which the Glissmanns never appealed.

Tena E. Glissmann and Henry C. Glissmann by their new pleadings say that they have never had litigated their right of redemption from the equitable mortgage. The decree and the opinion in Glissmann v. Orchard, *supra,* show that the exact opposite of this contention is true. The decree allowed redemption and granted nine months within which to redeem. The opinion extended that period three months beyond the date of issuance of mandate. They did not redeem and their rights have long since been extinguished.

Tena E. Glissmann and Henry C. Glissmann contended in their pleadings that they have at all times been entitled to possession of the premises and that they were wrongfully ousted under the terms of the writ of restitution hereinbefore referred to. In view of the position taken with regard to foreclosure and redemption and the general view of the pleadings which the court permitted

to be filed, it appears that this matter was not only not germane, but has become moot since in the foreclosure their rights became finally adjudicated, yet, again in the interest of final disposition of this litigation, we have concluded that it would be wise to examine into the merit of the contention.

By pleading, these parties contend that they could have been properly ousted only by a writ of assistance issuing out of the district court. This position and contention are untenable.

This court has held that an action in forcible entry and detainer lies in favor of a purchaser at judicial sale to recover possession of premises purchased, when the judgment debtor was in possession at the time the judgment or decree was rendered whereunder the sale was made; that the remedies by forcible entry and detainer and by writ of assistance in the original case are concurrent; and that a court is not ousted of jurisdiction in a forcible entry and detainer case by the mere averment in that case or elsewhere that it involves the question of title, but that it has jurisdiction to proceed until the evidence discloses such fact. Green v. Morse, 57 Neb. 391, 77 N. W. 925.

The forcible entry action here was instituted after decree was rendered, after right of redemption had expired and these parties had no further interest in the premises but were in possession. Under this authority it becomes clear that Orchard was entitled to his action in forcible entry and detainer.

On the basis of the observations and conclusions of this opinion it becomes necessary to say that the Glissmanns were entitled to none of the relief claimed by them in any of the pleadings filed by them after issuance of mandate by this court in Glissmann v. Bauermeister, 139 Neb. 354, 297 N. W. 617, and from that point on the only function that the district court had to perform was to take an accounting of such sums as Henry C. Glissmann, Tena E. Glissmann, and Harold W. Glissmann

had received of the Henry C. Glissmann share in the estate of Hans C. Glissmann after March 28, 1929, and render judgment therefor with interest in favor of Serena E. Grabow and against Tena E. Glissmann and Henry C. Glissmann.

This court has said: "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." Callahan v. Prewitt, on rehearing, 143 Neb. 793, 13 N. W. 2d 660.

This rule with reference to findings of fact must be as binding where the remand is for the performance of a detail or details as if for a retrial of issues. This being true the findings of fact in Glissmann v. Bauermeister, 139 Neb. 354, 297 N. W. 617, and Glissmann v. Orchard, *supra,* were and are binding on all parties respectively thereto, the district court, and this court.

The application of this rule attaches as well to that portion of the opinion in Glissmann v. Bauermeister, 146 Neb. 197, 19 N. W. 2d 43, which purported to disturb the rights established by the opinions in Glissmann v. Bauermeister, 139 Neb. 354, 297 N. W. 617, and Glissmann v. Orchard, *supra,* that is to say that the part of the opinion in Glissmann v. Bauermeister, 146 Neb. 197, 19 N. W. 2d 43, which purports to readjudicate matters adjudicated in Glissmann v. Bauermeister, 139 Neb. 354, 297 N. W. 617, and Glissmann v. Orchard, *supra,* is ineffective for that purpose.

Under the well-defined principle of law that if this court attempts to render judgment on appeal from a judgment of the district court which judgment is rendered 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, such judgment is a nullity, it becomes necessary also to say that the portion of the opinion in Glissmann v. Bauermeister, 146 Neb. 197, 19 N. W. 2d 43, which purports to make a determination upon the matters presented by the supplemental pleadings or anything else except the accounting and judgment directed by the supplemental opinion in Glissmann v. Bauermeister, 139 Neb. 354, 297 N. W. 617, was of no force and effect. The district court was without power to deal therewith and of course this court on the appeal was restricted in the same manner as the district court. For the rule, see Drieth v. Dormer, 148 Neb. 422, 27 N. W. 2d 843.

It is therefore the conclusion of this court that all matters which have come to this court on this appeal growing out of the pleadings allowed to Tena E. Glissmann, Henry C. Glissmann, and Harold W. Glissmann and the pleadings counter thereto and all other matters except those in furtherance of the opinion in Glissmann v. Bauermeister, 139 Neb. 354, 297 N. W. 617, and the opinion supplementing it, should be, and the same are dismissed, which is to say that all matters are dismissed except the matter of accounting and judgment directed by that supplemental opinion.

By that supplemental opinion Serena E. Grabow was given judgment against Henry C. Glissmann and Tena E. Glissmann for all moneys due from defendant Happy Hollow Club, Inc., a corporation, or defendant Daniel C. Cary and representing the one-eighth interest of Henry C. Glissmann in the estate of Hans C. Glissmann, whether said moneys were in the hands of F. H. Bauermeister, former trustee, Henry J. Moeller, present trustee, or still in the hands of Happy Hollow Club, Inc., or Daniel C. Cary. This is a final judgment and not subject to disturbance by this court. Therefore nothing further need be said in this connection except that Serena E. Grabow is entitled to the avails of this judgment out of

the hands of those who are now in possession of those portions of the said interest of the Hans C. Glissmann estate.

This court now has the information, obtained through the original master's report, to enable it to make disposition of that portion of the interest of the Hans C. Glissmann estate whereof the district court was directed to take an accounting and to render judgment. The master made an accounting and computed interest to June 10, 1943, but the court failed to render judgment thereon. The accounting and computation are approved.

The accounting disclosed that Harold W. Glissmann received $1,324.43 and that interest thereon to June 10, 1943, was $831.37. It showed that Tena E. Glissmann received $2,322.83 and that the interest thereon was $1,828.95. This was all that was received by these three parties.

Therefore judgment is rendered in favor of Serena E. Grabow and against Tena E. Glissmann and Henry C. Glissmann for the principal sum of $3,647.26 with interest to January 9, 1948, amounting to $3,662.64, or a total of $7,309.90. This is an acceptance of the computation of interest to June 10, 1943, and a computation of interest at the rate of six percent per annum from June 10, 1943, to the date named. This judgment shall bear interest at the rate of six percent per annum from January 9, 1948.

To the extent indicated in the opinion, therefore, the decree of the district court is reversed, to the extent indicated it is affirmed, and on the subject matter indicated judgment is rendered herein.

REVERSED IN PART,
AFFIRMED IN PART,
JUDGMENT RENDERED HEREIN.

MESSMORE, J., dissenting.

I respectfully dissent from that part of the majority opinion which holds the opinion in Glissmann v. Bauermeister, 146 Neb. 197, 19 N. W. 2d 43, to be a nullity and

of no force and effect insofar as such opinion purports to make a determination upon the matters presented by supplemental pleadings or anything else except the accounting and judgment directed by the supplemental opinion in Glissmann v. Bauermeister, 139 Neb. 354, 297 N. W. 617.

The majority opinion recites the district court was without power to deal therewith and of course this court, on the appeal, was restricted in the same manner as the district court, citing Drieth v. Dormer, 148 Neb. 422, 27 N. W. 2d 843.

The writer has no quarrel with the rule in the cited case when it applies. However, as will be shown later, the principle is not applicable to Glissmann v. Bauermeister, 146 Neb. 197, 19 N. W. 2d 43.

As stated in the majority opinion, detailed history of the litigation appears in Glissmann v. Bauermeister, 146 Neb. 197, 19 N. W. 2d 43, and it is deemed unnecessary to again set it out. Reference will be made to the facts as occasion requires. Likewise, reference will be made to the cases of Glissmann v. Orchard, 139 Neb. 344, 297 N. W. 612, and more especially to the case of Glissmann v. Bauermeister, 139 Neb. 354, 297 N. W. 617, on rehearing 139 Neb. 362, 299 N. W. 225, from which this appeal originates.

There is no question but that in the case of Glissmann v. Orchard, *supra*, which was an action in equity brought by Tena E. Glissmann v. Edmond H. Orchard and his wife, defendants, for a declaratory judgment to settle the amount of her indebtedness under a lease and option agreement, this court entered judgment finding that the indebtedness on the lease and option of Orchard was in the amount stated, $26,000, and that in order to retain said premises under the theory that said lease and option were an equitable mortgage, Orchard should be paid $26,000, as provided therein. The date of redemption, fixed in the decree of the district court, having expired nine months from October

31, 1939, said redemption date was fixed at three months from the date of the mandate therein. No motion for rehearing was filed.

It is true that Tena E. Glissmann having the right to redeem failed to do so. This court, in Glissmann v. Bauermeister, 146 Neb. 197, 19 N. W. 2d 43, called attention to the fact that she had not redeemed. There was no attempt to relitigate this phase of the case for the reason that Glissmann v. Orchard, *supra,* adjudicated the matter. There was, as stated in the majority opinion, a proper foreclosure of the mortgage. Likewise, in Glissmann v. Bauermeister, 146 Neb. 197, 19 N. W. 2d 43, it is recognized that the Glissmanns had parted with possession of the premises under date of March 1, 1942. There was no attempt to relitigate this phase of the case in Glissmann v. Bauermeister, 146 Neb. 197, 19 N. W. 2d 43. This matter had been terminated in the county court, as disclosed by the record, from which no appeal was taken, and the judgment was final. And, as stated in the majority opinion, any contention to the contrary would be untenable.

In the case of Glissmann v. Bauermeister, 139 Neb. 354, 297 N. W. 617, this action in equity was brought by Harold W. Glissmann. His mother assigned to him the interest she received from her husband in his father's estate. This action was predicated by him against his aunt on this assignment. Other defendants were also brought into the action, the purpose being to obtain certain money held by the Happy Hollow Club, Inc., and trustees thereof, payment of which to plaintiff was refused because Serena E. Grabow had served notice that her interests in said fund were prior and superior to the interests of the plaintiff. The plaintiff asked for $2,000 damages.

Briefly referring to the factual situation as developed in this litigation, it is true, Serena E. Grabow pledged $5,500 of her share in her father's (Hans C. Glissmann) estate to Edmond H. Orchard in connection with the

lease and option agreement here involved. By exhibit No. 33 appearing in the record in this litigation and as set out in Glissmann v. Orchard, *supra,* Henry C. Glissmann is purported to have sold and assigned to Serena E. Grabow and her heirs, all his right, title, and interest in his father's estate. This court held that to allow Harold W. Glissmann, the son of Henry C. Glissmann, to secure the payments due on his father's share in the Hans C. Glissmann estate which was pledged to his aunt, Serena E. Grabow, would violate all equitable principles and in Glissmann v. Bauermeister, 139 Neb. 354, 297 N. W. 617, referring to exhibit No. 33 heretofore mentioned, this court stated as follows: "By exhibit No. 33, entered into by the two parties, Serena E. Grabow and Henry C. Glissmann, he pledged to her all his rights and share in the estate of his father if she would enter into the contract with Orchard, which she has been compelled to carry out by Orchard, * * *." The court reversed and dismissed the decree of the district court, which means that Harold W. Glissmann had no cause of action and his rights were inferior to those of Serena E. Grabow.

As stated in the majority opinion, just prior to the date of expiration for motion for rehearing, Serena E. Grabow and other appellants filed a motion to clarify the court's opinion. This court in response thereto held that having obtained jurisdiction in equity of a cause for any purpose it will retain it for all, and will proceed to a final determination of the case, and adjudicate all matters in issue, and thus avoid unnecessary litigation. See Buchanan v. Griggs, 20 Neb. 165, 29 N. W. 297.

This court then entered an additional judgment which appears in the supplemental opinion, 139 Neb. 362, 299 N. W. 225, as follows: "judgment is hereby entered in favor of Serena E. Grabow on her counterclaim and cross-petition against the plaintiff and defendants Henry C. Glissmann and Tena E. Glissmann for all moneys due

from defendant Happy Hollow Club, Inc., or from defendant Daniel C. Cary, and representing the one-eighth interest of Henry C. Glissmann in the estate of Hans C. Glissmann, whether said moneys are in the hands of F. H. Bauermeister, former trustee, Henry J. Moeller, present trustee, or are still in the hands of Happy Hollow Club, Inc., or Daniel C. Cary; and the district court is further directed to enter judgment in favor of Serena E. Grabow and against defendants Henry C. Glissmann and Tena E. Glissmann for such sums as that court finds have been received by Henry C. Glissmann, Tena E. Glissmann and Harold W. Glissmann from and after March 28, 1929, together with interest thereon from date so received, and which said sums represent payments on the aforesaid share of Henry C. Glissmann in the estate of Hans C. Glissmann."

The majority opinion holds that Henry C. Glissmann assigned to Serena E. Grabow all of his right, title, and interest in his father's estate which is an absolute conveyance to her of such interest, and constitutes a complete, final and conclusive adjudication.

A mandate was entered by this court on October 6, 1941, and Serena E. Grabow filed a motion for judgment on the mandate. The district court did not enter judgment on the mandate in conformity with the motion, instead it permitted the filing of further pleadings for and in behalf of the parties at interest; appointed a master commissioner who held a hearing, took further evidence, and made findings from which it entered a judgment different from the judgment directed by this court as set forth in the mandate, which resulted in an appeal by Serena E. Grabow to this court, Glissmann v. Bauermeister, 146 Neb. 197, 19 N. W. 2d 43. This court, after a recitation of the facts, made the following observation as constituting the crux of the appeal before the court: "We set forth only that part of the subsequent proceedings to the filing of the motion for judgment on the mandate as may be pertinent to a determina-

tion of this appeal." We then set forth the evidence before the master commissioner with reference to the accounting which we deem unnecessary to restate, however we make reference to the opinion, pages 201, 202, where the evidence may be found.

In this connection we cited State ex rel. Johnson v. Hash, 145 Neb. 405, 16 N. W. 2d 734, wherein this court held: "Where a mandate of the Supreme Court makes the opinion of the court a part thereof by reference, the opinion should be examined in conjunction with the mandate to determine the nature and terms of the judgment to be entered or the action to be taken thereon."

In Glissmann v. Bauermeister, 146 Neb. 197, 19 N. W. 2d 43, we said: "In the opinion in State ex rel. Johnson v. Hash, *supra,* it is said: 'It will be noted that the mandate makes the opinion of the court a part thereof by reference. Under such circumstances, the opinion of the court can properly be examined in determining the nature and terms of the judgment to be entered or action to be taken. This seems to be the rule when the opinion is made a part of the mandate * * *.' See cases cited therein."

As we held in Glissmann v. Bauermeister, 146 Neb. 197, 19 N. W. 2d 43, in view of the foregoing: "Where the action to be taken * * * necessitates the taking of additional evidence to ascertain the status of the amounts due from an estate to parties who have pledged their interest therein, the lower court may proceed, if desirable, to appoint a master to take evidence, make findings therefrom, from which the court may enter a proper judgment to conform to the original opinion attached to and made a part of the mandate by reference."

" 'Where the mandate is ambiguous or uncertain the lower court may apply the usual rules of interpretation in its construction and may examine the opinion of the appellate court to ascertain the true intent and purpose of the mandate.' 5 C. J. S., sec. 1963, p. 1494." Glissmann v. Bauermeister, 146 Neb. 197, 19 N. W. 2d 43.

The opinion and the supplemental opinion in the case of Glissmann v. Bauermeister, 139 Neb. 354, 297 N. W. 617, were attached to and made a part of the mandate. The district court, considering the opinion and supplemental opinion attached to the mandate and in accordance with the authorities on the subject, found that by exhibit No. 33, the contract set out in the opinion entered into by both parties, Serena E. Grabow and Henry C. Glissmann, he pledged to her all of his right and share in the estate of his father if she would enter into the contract with Edmond H. Orchard.

This court said, in Glissmann v. Bauermeister, 146 Neb. 197, 19 N. W. 2d 43: "The debt or liability secured by Henry C. Glissmann's pledge is the liability of Serena E. Grabow to Edmond H. Orchard on a lease option agreement, and when the extent of that liability has been determined in dollars and cents and Serena E. Grabow has been restored her security pledged to Edmond H. Orchard intact or with any diminution made good by Henry C. Glissmann and his assigns, Henry C. Glissmann or his assigns are entitled to a return of such of the remaining part constituting his interest in his father's estate held in accordance with his pledge." This was necessary, because it is apparent from a careful reading of the opinion in Glissmann v. Bauermeister, 139 Neb. 354, 297 N. W. 617, and the supplemental opinion appearing at 139 Neb. 362, 299 N. W. 225, that an ambiguity exists between the opinion and the supplemental opinion. It is apparent from the opinion, 139 Neb. 354, 297 N. W. 617, that this court did not find that Serena E. Grabow should receive both shares, but that each party had pledged his or her share in their father's estate.

We refer again to the language appearing in Glissmann v. Bauermeister, 139 Neb. 354, 297 N. W. 617: "To now allow his son to secure the payments due on his father's share which were pledged to his aunt would violate all equitable principles." And the further lan-

guage: "By exhibit No. 33, entered into by the two parties, Serena E. Grabow and Henry C. Glissmann, he pledged to her all his rights and share in the estate of his father if she would enter into the contract with Orchard, which she has been compelled to carry out by Orchard, * * *."

The foregoing language is explicit and definite, and constitutes the holding of this court that Henry C. Glissmann pledged to Serena E. Grabow his interest in his father's estate. We have set forth the law that applies under such circumstances.

In the opinion in Glissmann v. Bauermeister, 146 Neb. 197, 19 N. W. 2d 43, we remanded the case for further proceedings, as follows: "We conclude that any money up to the amount that Serena E. Grabow is entitled to receive as her share of her father's estate and now in her hands should be credited to her; that any remaining liability chargeable to Serena E. Grabow by Edmond H. Orchard by reason of the lease option agreement be finally determined, and such amount as the court may find be paid from the share of Henry C. Glissmann and his assigns that they have in the estate of Hans Glissmann, and the remaining pledged property, if any, under the control of Edmond H. Orchard be released by him; that Henry C. Glissmann and his assigns pay all costs in the district court and in the supreme court, including the fees awarded the master and the attorney for Serena E. Grabow in the district court. Any moneys thereafter remaining in the hands and under the control of Serena E. Grabow, the trustees, or the court, constituting the share of Henry C. Glissmann and his assigns in the Hans Glissmann estate, should be paid to Henry C. Glissmann or his assigns as the court may order."

It will be observed that the remand was in accordance with the pledge of Henry C. Glissmann in his father's estate to Serena E. Grabow and the pledge of Serena E. Grabow to Edmond H. Orchard. By the majority

opinion we are now relitigating the subject matter contained in Glissmann v. Bauermeister, 139 Neb. 354, 297 N. W. 617, changing the holding therein where we determined a pledge existed, which is a final adjudication, to a holding now that there was an absolute assignment by Henry C. Glissmann to Serena E. Grabow of his interest in his father's estate. I submit that that is not what this court said in the original opinion in Glissmann v. Bauermeister, 139 Neb. 354, 297 N. W. 617.

The writer can well agree that there should be an end to litigation, and there has been an end to this litigation as pointed out in Glissmann v. Bauermeister, 146 Neb. 197, 19 N. W. 2d 43, and the remand pointed out specifically the manner in which the litigation should terminate. There is no occasion to endeavor to relitigate matters in the manner and form as determined in the majority opinion, and I am not in accord with this type of procedure.

WENKE, J., and KROGER, District Judge, join in this dissent.

HELEN K. RAWLS, APPELLANT, V. GLEN D. HEWITT ET AL., APPELLEES.
30 N. W. 2d 623

Filed January 9, 1948. No. 32347.

Wills. Provision at the end of a will just after appointment of the executrices as follows: "I do hereby further request that no proceedings be taken on the mortgage held by me on the home of my sister Louise Klein of 2546 Chicago Street, Omaha," held in view of other provisions of the will to be neither a gift of said mortgage to said sister, nor a cancellation of it, nor to preclude its foreclosure after the death of the sister.

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

Hotz & Hotz, William J. Hotz, William J. Hotz, Jr., and *William F. Dalton,* for appellant.

Wear, Boland & Nye and *Harold W. Kauffman,* for appellees.

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

LIGHTNER, District Judge.

Plaintiff, the daughter of Mrs. Kline hereinafter referred to, and the present owner of the real estate, brought this suit in the district court for Douglas County and, after reciting certain facts, asks in the prayer of her petition that the court construe the will of Teresa Hempel, deceased, to mean that the defendants as residuary legatees, or otherwise, have no right, title, or interest in a certain mortgage on the real estate of Mrs. Louise Kline, now also deceased, sister of Teresa Hempel, and that such mortgage be canceled. Defendants in their answer and cross-petition allege that the will gave them the mortgage in question, and ask for a foreclosure thereof. The district court found against plaintiff and in favor of defendants and decreed foreclosure of the mortgage. Plaintiff appeals.

This case presents for decision the meaning of the following sentence found in the will of Miss Teresa Hempel, viz: "I do hereby further request that no proceedings be taken on the mortgage held by me on the home of my sister Louise Klein of 2546 Chicago Street, Omaha." (Mrs. Kline is referred to throughout the will as Louise Klein.)

The will of Miss Hempel was made on November 8, 1940, and she died on November 28, 1940. Her will was duly probated and allowed.

Plaintiff and appellant contends that the sentence in question canceled the mortgage referred to therein, or constituted a gift thereof to the testatrix's sister. Defendants and appellees, who are the residuary legatees of

Miss Hempel, and the owners of the mortgage, unless it was given to the sister or canceled, contend that the provision in question simply prevented the mortgage from being enforced during the lifetime of Mrs. Kline and that inasmuch as Mrs. Kline has now died the mortgage may be foreclosed by the residuary legatees.

The plaintiff and appellant is a daughter of Mrs. Kline, to whom Mrs. Kline deeded the real estate covered by the mortgage. Appellant complains because the district court admitted evidence by the scrivener of the will to the effect that the sentence in the will was written by reason of a direction by the testatrix that she did not want her sister bothered with this mortgage as long as she lived. Later and at the close of all the evidence the district court sustained the objections which had been made to this testimony. It apparently was not considered by the district court and we feel that it should not be considered by this court. Therefore, the case must be decided entirely upon the language used in the will itself.

The will of Miss Hempel is quite long, but must be considered in its entirety to determine the testatrix's meaning and the basis for the holding of the district court. Such will, after providing for the payment of debts, the saying of masses, and the up-keep of her family lot in the cemetery, is as follows: "2. I do hereby direct my executrixes to invest in good security the cash remaining after the satisfaction of paragraph one and I do hereby request the Court to appoint said executrix's as trustees or in someother capacity, if deemed necessary and advisable by said Court to carry out my intention herein expressed, of said securitie's with authority to use and dispose said securities and the income thereof for the care, support and maintenance of my sister, Louise Klein, during her lifetime, such support, care and maintenance to be such as is suitable for persons of her age, and I do hereby direct the balance thereof, if any, remaining at the death of my sister,

Louise Klein, be disposed to satisfy the following bequests: (a) $500.00 to Mary Dalton, niece, for her use; it is my desire, but not express command, that she use same for her education; (b) $500.00 to John Dalton, nephew, for his use; it is my desire, but not express command that he use same for his education; (c) $300.00 to Helen Klein Rawls of Butte Montana; (d) $1000.00 to Lorine Dalton of Lincoln Nebraska; (e) $1000.00 to Mrs. Mary Hempel of Lincoln Nebraska;

"3. I do hereby direct my executrixes to sell my real estate property at 403 So. 48th Ave., Omaha Nebraska, and to invest the net proceeds thereof in good securities and in the same manner and for the same purpose as expressed in paragraph 2, to-wit: for the care, support and maintenance of my sister, Louise Klein, during her lifetime, such support, care and maintenance to be such as is suitable for persons of her age, and in this regard, I likewise request the Court to appoint said executrixes as trustees or in some other capacity, if deemed necessary and advisable by said Court to carry out my intention herein expressed; I do hereby further direct that the balance thereof remaining at the death of my sister, Louise Klein, and after the full satisfaction of the bequests mentioned in paragraph two and the proceeds of the sale of the bonds hereinafter mentioned and any other property not herein mentioned and any devise or bequest which may fail for any cause whatsoever, be paid to and divided equally between William P. Hewitt and Glen D. Hewitt, share and share alike.

"4. I do hereby request that other bonds in my possession in the Safety Deposit Box be kept intact and that the income thereof is to be used exclusively for the purpose of Louise Klein, my sister, who resides at 2546 Chicago St., Omaha, during her lifetime, and at her death, to be disposed of at the best market price available and the proceeds thereof to be used to satisfy the aforementioned bequests contained in paragraphs 2 and 3 of this my last will and testament;

"5. I do hereby bequeath my fur coat to Esther Hewitt and the rest and remainder of my clothing I bequeath to Esther Hewitt and Louise Hewitt, share and share, alike;

"I do hereby constitute and appoint Mrs. Esther Hewitt and Minnie Guthmann as executrixs of this my last will and testament and request that they give bond for the execution of their office. I do hereby further request that no proceedings be taken on the mortgage held by me on the home of my sister Louise Klein of 2546 Chicago Street, Omaha.

"Dated at Plattsmouth Nebraska this 8th day of November 1940. Teresa Hempel."

This was virtually a deathbed will. It was written in longhand by the scrivener in the room where Miss Hempel was propped up in bed. The scrivener, who had not transacted legal business for Miss Hempel before he was called in to make her will, got the information from her piecemeal and then went to a table in the same room and wrote down what she told him. While the mortgage in question was dated July 14, 1934, due in five years, interest payable annually, Miss Hempel had not during the five years it had been in effect collected any interest or principal thereon at any time. She retained possession of the note and mortgage after the will was made.

Calling attention to well-established canons of construction, this court as recently as March 1947 in In re Estate of Zents, 148 Neb. 104, 26 N. W. 2d 793, laid down the following rules: "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.

"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."

"The cardinal rule in the construction of wills and codicils is that the intention of the testator must be ascertained if possible." 69 C. J., Wills, § 1118, p. 52.

"The intention which controls in the construction of a will is that which is manifest, either expressly or by necessary implication, from the language of the will, or, as is sometimes said, the testator's intention must be ascertained from the four corners of the will." 69 C. J., Wills, § 1119, p. 59.

"As the full extent of the testator's bounty is supposed to be disclosed by the will, a legacy to a debtor does not operate as a release of the debt unless the will clearly manifests the intent that it shall so operate, which intent may be manifested by express words or by necessary implication." 69 C. J., Wills, § 2152, p. 963.

Applying now the rules of construction above referred to it will be noticed that Miss Hempel in paragraph two of her will provided that the executrices use and dispose of all of her securities and the income thereof "for the care, support and maintenance of my sister, Louise Klein, during her lifetime, such support, care and maintenance to be such as is suitable for persons of her age," and then provides that the balance after Mrs. Kline's death be disposed of to satisfy certain bequests amounting to $3,300, including a bequest of $300 to the plaintiff in this case.

Miss Hempel then in paragraph three of her will directed her executrices to sell her real estate situated at 403 So. 48th Avenue, Omaha, Nebraska, and to invest the net proceeds thereof in good securities "for the care, support and maintenance of my sister, Louise Klein, during her lifetime, such support, care and maintenance to be such as is suitable for persons of her age, and in this regard, I likewise request the Court to appoint said executrixes as trustees or in some other capacity, if deemed necessary and advisable by said

Court to carry out my intention herein expressed."

The balance of paragraph three provides that the balance thereof remaining "at the death of my sister, Louise Klein," and after the full satisfaction of the bequests mentioned in paragraph two "and the proceeds of the sale of the bonds hereinafter mentioned and any other property not herein mentioned and any devise or bequest which may fail for any cause whatsoever, be paid to and divided equally between William P. Hewitt and Glen D. Hewitt, share and share alike."

The fourth paragraph of Miss Hempel's will requests "that other bonds in my possession in the Safety Deposit Box be kept intact and that the income thereof is to be used exclusively for the purpose of Louise Klein, my sister, who resides at 2546 Chicago St., Omaha, during her lifetime, and at her death, to be disposed of," as provided in said paragraph.

Paragraph five of the will provides for the disposition of certain clothing.

The final paragraph of the will, which is an unnumbered paragraph, appoints Mrs. Esther Hewitt and Minnie Guthmann as executrices of her last will and testament, and then follows immediately the disputed provision: "I do hereby further request that no proceedings be taken on the mortgage held by me on the home of my sister Louise Klein of 2546 Chicago Street, Omaha." It seems to us that to have permitted the foreclosure of the mortgage in question during the lifetime of Mrs. Kline would have defeated the evident purpose of the testatrix as shown in the various provisions of her will above referred to, and that the provision in question was simply further evidence of Miss Hempel's love and solicitude for her sister. It does not show, in our opinion, a wish to give this mortgage to her sister, but it does show a wish on her part that the provisions for Mrs. Kline's benefit should not be thwarted by a foreclosure of the mortgage and an ouster of Mrs. Kline from her home. It is our opinion that it was the home

of Mrs. Kline which Miss Hempel wanted to protect, and having made the provision in question for its protection, such provision had in our judgment no further meaning or purpose.

The will indicates that Miss Hempel had her sister very much in mind during the whole time it was being drawn, which, according to the scrivener, was about an hour and a half. If she had wanted to cancel the mortgage or to have given it to her sister she could have done so in apt language. The scrivener was a lawyer who would have used the right language to have effected her purpose. That no such language is found in the will indicates that it was not her intention to give the mortgage to her sister or to cancel it.

It is therefore our judgment that the finding and decree of the district court is correct and the same is hereby in all things affirmed.

AFFIRMED.

CHAPPELL, J., participating on briefs.

NEWTON M. SOMMERVILLE, APPELLEE, V. RAY C. JOHNSON ET AL., APPELLANTS.
30 N. W. 2d 577

Filed January 16, 1948. No. 32296.

1. Statutes. In construing an act of the Legislature all reasonable doubts must be resolved in favor of its constitutionality.
2. Constitutional Law. It is not within the province of the courts to annul a legislative act unless its provisions so clearly contravene a provision of the fundamental law, or it is so clearly against public policy, that no other resort remains.
3. ———. The Constitution of this state is not a grant but a restriction on legislative power, and the Legislature may legislate upon any subject not inhibited by the Constitution.
4. ———. By the adoption of article IV, section 1, of the Constitution, the people removed the prohibition against the creation of new executive departments previously in the Constitution, and did not restrict the power that the Legislature

previously had to create boards, commissions, and agencies that are not executive departments.

5. ———. The terms "executive officers," "heads of such other executive departments," and "executive state office" used in article IV, sections 1 and 27, of the Constitution, mean such officers, departments, and offices as have comparable scope, functions, and purposes with the officers, departments, and offices specifically named in the Constitution.

6. ———. Article IV, section 27, of the Constitution, does not restrict the power of the Legislature to create boards, commissions, and agencies that are not executive officers, heads of executive departments, or executive state offices within the constitutional meaning.

7. **Statutes: Constitutional Law.** LB 143, Laws 1945, chapter 238, the Nebraska Merit System Act, does not create an executive department nor an executive state office within the terms of article IV, sections 1 and 27, of the Constitution, and is not unconstitutional because it did not receive a two-thirds majority of all members elected to the Legislature.

APPEAL from the district court for Lancaster County: JOHN L. POLK, JUDGE. *Reversed and dismissed.*

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

William Niklaus and *Herbert W. Baird*, for appellee.

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

SIMMONS, C. J.

This action presents the question of the constitutionality of LB 143, Fifty-eighth Session of the Nebraska Legislature. Laws 1945, c. 238, p. 707; §§ 81-888 to 81-8,105, R. S. Supp., 1945. The trial court held the act void. Defendants appeal. Plaintiff cross-appeals. We reverse the judgment of the trial court and dismiss the cause.

Plaintiff brought this action as a taxpayer and citizen as a representative suit. The defendants are the Auditor of Public Accounts and the Treasurer of the State.

Plaintiff alleged that LB 143, the Nebraska Merit

System Act, creates new executive state offices, to wit, a council and director; was passed without the vote of a two-thirds majority of all members elected to the Legislature; and hence is unconstitutional and void under article IV, section 27, of the Constitution. Plaintiff sought a decree requiring the defendants to account for the moneys of the general fund set over to the purposes and expenses of the act; to have them enjoined from paying out moneys for the purposes and expenses of the act; to have the amount appropriated to the expenses of the act restored to the general fund; and to have costs, expenses, and attorneys' fees paid from said restored fund.

The defendants demurred to the petition on the ground that it did not state facts sufficient to constitute a cause of action. The demurrer was overruled. The defendants, reserving and reaffirming their demurrer, answered. Trial was had.

The trial court found that LB 143 was passed on final reading by the vote of 27 ayes, 14 nays, and 2 not voting; that that was less in number than two-thirds of the elected membership; that the bill creates an executive state office and is unconstitutional and void. The court enjoined the defendants from paying out any money for the purposes of the act and ordered restored to the general fund any unexpended sums.

Defendants appeal. They concede that the bill received an affirmative vote of less than two-thirds of all the members elected to the Legislature. They present the question: Does LB 143 create an executive state office?

Plaintiff urges affirmance of the trial court's decision, and by cross-appeal requests the allowance of an attorney's fee.

There are two rules of constitutional construction long followed in this state. "In construing an act of the legislature all reasonable doubts must be resolved in favor of its constitutionality." State v. Standard Oil Co., 61

Neb. 28, 84 N. W. 413. "It is elementary that it is not within the province of the courts to annul a legislative act unless its provisions so clearly contravene a provision of the fundamental law, or it is so clearly against public policy, that no other resort remains." Abie State Bank v. Weaver, 119 Neb. 153, 227 N. W. 922. There is also the mandate of the Constitution applicable to this court that "No legislative act shall be held unconstitutional except by the concurrence of five judges." Constitution, art. V, sec. 2.

The doctrine likewise is established that the Constitution of this state is not a grant but a restriction on legislative power, and the Legislature may legislate upon any subject not inhibited by the Constitution. State ex rel. Quinn v. Marsh, 141 Neb. 436, 3 N. W. 2d 892. Accordingly, to sustain plaintiff's cause there must be found not a grant of power but a denial of power.

The constitutional provision here directly appealed to is article IV, section 27. It is directly related to article IV, section 1. The two provisions are:

"The executive officers of the state shall be the Governor, Lieutenant Governor, Secretary of the State, Auditor of Public Accounts, Treasurer, Attorney General, Superintendent of Public Instruction and the heads of such other executive departments as may be established by law. The Legislature may provide for the placing of the above named officers as heads over such departments of government as it may by law create." Constitution, art. IV, sec. 1.

"No executive state office other than herein provided shall be created except by a two-thirds majority of all members elected to the senate and house of representatives respectively." Constitution, art. IV, sec. 27.

We heretofore have considered these sections in Swanson v. State, 132 Neb. 82, 271 N. W. 264; Mekota v. State Board of Equalization and Assessment, 146 Neb. 370, 19 N. W. 2d 633; State ex rel. Howard v. Marsh, 146 Neb. 750, 21 N. W. 2d 503; and State ex rel. Johnson v. Chase,

147 Neb. 758, 25 N. W. 2d 1. We do not deem it necessary to review here the various decisions and provisions there discussed.

Prior to the adoption of the present amendments in 1920, the constitutional provisions were:

"The executive department shall consist of a Governor, Lieutenant Governor, Secretary of State, Auditor of Public Accounts, Treasurer, Superintendent of Public Instruction, Attorney General, and Commissioner of Public Lands and Buildings, * * *." Constitution, art. V, sec. 1.

"No other executive state office shall be continued or created, and the duties now devolving upon officers not provided for by this constitution shall be performed by the officers herein created." Constitution, art. V, sec. 26.

As we pointed out in the Swanson opinion, *supra*, prior to the amendments involved the executive department was strictly defined and the officers composing it limited to those enumerated in article V, section 1, of the Constitution of 1875. We further pointed out that the public policy there involved was substantially and radically modified by the 1920 amendments, and that the attempt to constitutionally define the executive department of the state and definitely enumerate those who constituted it was abandoned by the inclusion of the language "and the heads of such other executive departments as may be established by law."

Toward the conclusion of its labors, the Constitutional Convention prepared an Address to the People "In order that the people may have full information of the nature and purposes of the proposed amendments * * *." Proceedings of the Constitutional Convention 1919-1920, p. 2839. It was adopted without a negative vote. In the address the Convention said as to the proposed change in section 1: "Amended Section 1, provides that the executive authority of the state shall be vested in the executive officers enumerated in the present Constitution, and in the heads of such other executive depart-

ments as may be established by law. The authority given the Legislature was deemed advisable, in view of the increasing business in the banking, public works, insurance, blue sky and other branches of the public service. In order, however, to prevent the creation of any unecessary (sic) executive departments, the Legislature is authorized to utilize any of the elective state officers as the heads of such departments." Proceedings of the Constitutional Convention 1919-1920, p. 2842. The clear purpose to lessen the restricted power of the Legislature was demonstrated.

In the Chase opinion, *supra,* we said: "The Legislature, over a long period of years, interpreted the Constitution as permitting the creation of boards, commissions, and agencies that are not executive departments within the constitutional definition." The debates of the Constitutional Convention indicate that its members recognized the Legislature had that power under the restriction that existed in article V, section 26, of the Constitution of 1875. We find nothing in the record to indicate that the Convention intended to restrict that power.

It follows that by the adoption of article IV, section 1, of the Constitution, the people removed the prohibition against the creation of new executive departments previously in the Constitution, and did not restrict the power that the Legislature previously had to create boards, commissions, and agencies that are not executive departments.

Although article IV, section 27, of the Constitution, uses the language "executive state office," the Convention in its Address to the People said: "Amended Section 26, provides for a modification of the present provision which prohibits the creation of additional executive offices. The Legislature may, by a two-thirds majority of all members elected to both houses, establish needed executive departments." Proceedings of the Constitutional Convention 1919-1920, p. 2844. In accord

therewith in the Mekota opinion, *supra,* we said: "Both provisions employ the term 'executive state office.' The earlier provision prohibited the creation of new executive state offices. The later permits their creation but imposes a restriction thereon." In the Howard opinion, *supra,* we said: "The only restriction upon the right of the Legislature in creation of such new executive department with a new executive head or for attachment to an already constitutionally declared officer is that the act of creation prior to 1934 should be adopted by a two-thirds majority of all members elected to the Senate and House of Representatives respectively (Const., art. IV, sec. 27) and since 1934 by a two-thirds majority of all members elected to the Legislature of one chamber. Const., art. III, sec. 1."

What did the Constitutional Convention intend when they used the words "executive officers," "heads of such other executive departments," and "executive state office" in the amendments which the people adopted? Throughout most of the consideration of section 1, the Convention considered a proposal beginning with "The executive department shall consist" etc. It was not until well toward the close of their deliberations that "department" was stricken and "officers" inserted. Proceedings of the Constitutional Convention 1919-1920, p. 2727. From what is recited herein it appears that the Constitutional Convention, when using the terms above quoted, did so with the meaning that they were referring to officers and departments and offices that had the comparable scope, functions, and purposes of the officers, departments, and offices specifically named in the amendment. That meaning is reinforced by the language used in the Address to the People above quoted to the "increasing business in the banking, public works, insurance, blue sky and other branches of the public service." Again, as we said in the Chase opinion, *supra,* it does not indicate an intent to restrict the "power of the Legis-

lature to create boards, or bureaus or departments that deal singly with independent legislation."

In the Chase opinion, *supra,* we quoted from Burnap v. United States, 252 U. S. 512, 40 S. Ct. 374, 64 L. Ed. 692, to the effect that head of a department meant the secretary in charge of a great division of the executive branch and did not include heads of bureaus of lesser divisions. The distinction above made is recognized in the Mekota opinion, *supra.*

There remains then one question to determine. Does the act here under attack and the offices it creates reasonably compare with the scope, powers, and functions of the established executive officers and departments, within the executive department of government named in the Constitution, or do they properly classify in the group of administrative officers and activities that have always been recognized as within the power of the Legislature to create?

Section 1 of the act states: "The purpose of this act shall be to aid in the efficient and economical administration of the state government through the impartial selection of qualified employees." Laws 1945, c. 238, § 1, p. 708.

Sections 2 to 5 authorize the organization to administer the act. They provide for a council of three members to be appointed by the Governor with the advice and consent of the Legislature, and state qualifications, the term of office, and compensation of the members. They provide for a chairman, the adoption of rules, for meetings of the council, and that state departments shall have the right to be represented at all meetings, but shall have no right to vote. They provide for the appointment of a director who shall also be secretary to the council, and the employment of necessary help to administer the act. They state the qualifications of the director.

Section 6 includes under the provisions of the act 17 departments, boards, and commissions therein (not in-

cluding by name the constitutional offices named in article IV, section 1, of the Constitution), in the act called agencies, and "such other departments, boards or commissions as may hereafter be created." It exempts any agency or division thereof receiving funds from the United States under certain conditions, but provides that the council shall administer any merit system or personnel plan established by such agency or division.

Section 7 provides that the director shall analyze all positions of the included agencies, and on the basis of the duties and responsibilities classify "the stenographic, clerical, secretarial" and related positions, and to include in the classification a class, title, description of the duties and responsibilities, and minimum requirements of training, experience, and other qualifications. Determination of whether or not a position is within the scope and intent of the act is to be made by the council "with the advice of the agencies concerned." A private secretary for the head of each agency may be exempt.

Section 8 provides that the director, after the adoption of the classification plan, shall prepare a salary or wage schedule for each class, grade or group of positions; for a public hearing thereon; and, when approved by the council and Tax Commissioner, shall be adhered to in the payment of salaries and wages. It provides for the revision of the schedules in like manner.

Section 9 provides that the director shall hold examinations to determine the qualifications of applicants for the classified positions; that personnel shall be appointed on the basis of efficiency and fitness as determined in such examination; and that employees holding a classified position at the time the act takes effect, who take and pass the examination, shall be regarded as having been appointed in accordance with the act.

Section 10 provides for military veteran preference credit under certain conditions.

Section 11 provides that all vacancies in any classified position shall be filled "by the head of any agency" by

promotion, by appointment from a register established for the position, or by transfer from some other agency under conditions specified in the section. Provision is made for emergency, temporary, or provisional appointments.

Section 12 provides that all appointments in the classes covered shall be made on the basis of merit and fitness to be determined by competitive examination, and that no person shall be disqualified because of political or religious affiliation or opinion.

Section 13 provides that the director shall examine the pay rolls of all agencies employing persons in classified positions to determine if such persons are qualified under the act. It further provides that no salary warrant shall be issued to a holder of a classified position if an objection or exception is filed by the director with the Auditor of Public Accounts to the effect that the person is not qualified, has not been appointed under the terms of the act or the salary is not within the range of the wage schedule, unless the objection or exception is withdrawn or the council finds that the same should not be sustained.

Section 14 provides that the council shall establish rules and regulations for efficient administration, but that, before adoption, copies of the proposed rules shall be delivered to the heads of the agencies and a public hearing held.

Section 15 authorizes the director to conduct examinations for positions not covered by the act, at the request of the head of any agency and with the approval of the Governor.

Section 16 provides for an annual report to the Governor as to the administration of the act, and for recommendations as to amendments.

Section 17 provides for an appropriation to pay for initial expenses of installation and operation, and for reimbursement to the council for their share of the expense of administration by the participating agencies

according to a formula prepared by the council with the advice of the agencies.

Section 18 provides that the act may be cited as the "Nebraska Merit System Act."

Sections 19 to 27 contain amendments to various sections of the statutes with reference to employment, and make the employment subject to the provisions of the Nebraska Merit System Act.

Section 28 provides that if any part of the act is held unconstitutional, such decision shall not affect the validity of the remaining portions.

Section 29 repeals the sections amended by sections 19 to 27.

We have made the above summary of the act for the purpose of showing the scope, powers, and purposes of the act. Other than that the language used in this summary is in no way a construction of the various sections of the act, or any part thereof.

It is evident that the Legislature here established an agency in the nature of a civil service commission. It created a council to guide and direct the administration of the act. Its purpose is to assure qualified employees, so far as the act provides, to the designated agencies. The act applies to a limited number of positions in those classes of service that can readily be rated as to qualifications, service, and salary. It is intended to promote efficiency, economy, and equality as to salaries for comparable work in the participating agencies. It depends in part upon cooperative effort between the council, the director, and the participating agencies. It administers no law save the law by which it was created. It deals only with state officials and those who are or desire to be employees of the state in the limited classifications. It executes none of the laws of the state so far as they relate to the people generally. We think it quite clear that it does not create an executive department nor an executive state office within the meaning of the constitutional provisions herein discussed.

Acordingly, we hold that LB 143, Laws 1945, chapter 238, appearing as sections 81-888 to 81-8,105, R. S. Supp., 1945, the "Nebraska Merit System Act," is not unconstitutional under the provisions of article IV, section 27, of the Constitution.

This conclusion renders it unnecessary to determine plaintiff's cross-appeal.

The judgment of the district court is reversed, and the cause dismissed.

REVERSED AND DISMISSED.

YEAGER, J., dissenting.

I cannot bring myself into agreement with the majority opinion in this case.

As it appears to me this court by its opinion has in the particular instance nullified the will of the people constitutionally and specifically expressed and reserved and has authorized the usurpation of the popular will by a bare majority vote of the Legislature, the Constitution to the contrary notwithstanding.

I am unable to find in the opinion a reasonable basis for saying that the Nebraska Merit System is not an executive state office within the meaning of the constitutional provision under consideration in this case.

In Mekota v. State Board of Equalization and Assessment, 146 Neb. 370, 19 N. W. 2d 633, this same provision of the Constitution was before this court for interpretation and application to another Act of the 1945 Legislature and we did interpret and apply it. The interpretation and application here, I submit, is the exact opposite of the interpretation and application there.

This court in that case, by the employment of earlier precedents referred to and quoted from in the opinion, arrived at a meaning and interpretation of the provision.

I submit that the Nebraska Merit System falls clearly within the definition therein contained of an executive state office.

Notwithstanding the opinion in Mekota v. State Board of Equalization and Assessment, *supra*, and the prece-

dents on which it rests, the purport of the majority opinion herein is to say that though the Nebraska Merit System is designed to operate without and out from under control of any department of the State and in an executive capacity, it is not an executive state office. I am unable to either comprehend or accept the reasoning upon which the conclusion of the majority is based.

CLETUS BODE, APPELLANT, V. WILLIAM F. PRETTYMAN, APPELLEE.
30 N. W. 2d 627

Filed January 16, 1948. No. 32333.

1. Partnership. In a given case, the chief criterion for determining whether certain property is or is not that of the firm is the intent of the partners to devote it to partnership purposes. In the absence of clear intent, the courts have recognized certain facts as indicia of such intent.
2. ———. Every partner must account to the partnership for any benefit, and hold as trustee for it, any profits derived by him without the consent of the other partners from any transaction connected with the formation, conduct, or liquidation of the partnership or from any use by him of its property.
3. ———. The law requires the utmost frankness and absolute honesty in the dealings of one partner with another. As trustees, they cannot derive a secret profit from partnership transactions unknown to the other.
4. ———. A partner, subject to any agreement between the partners, has an equal right with his partners to possess specific partnership property for partnership purposes; but he has no right to possess such property for any other purpose without the consent of his partners.
5. ———. Law will not permit those associated in relationships in which mutual confidence and trust are ingredients to put themselves into a position where their individual interests may tend to cause them to relax in their vigilance for the common good or to make secret individual profits out of common activities.

APPEAL from the district court for Lincoln County: ISAAC J. NISLEY, JUDGE. *Affirmed.*

William S. Padley, for appellant.

Dent & Plummer, for appellee.

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

PAINE, J.

This is an equity action to dissolve a partnership in the business of dirt moving and land leveling, and the partners joined in asking for the appointment of a receiver and for an accounting. The court entered findings, which were generally for defendant, and accepted the final report of a certified public accountant as to the accounting. Plaintiff appealed.

The petition, filed July 18, 1946, alleged that the parties on May 1, 1945, entered into an oral agreement to engage as a partnership in the dirt-moving and land-leveling business, and did purchase a D-7 Caterpillar tractor, a power control unit, and a used trailer, which equipment was to be used with other rented equipment as might be necessary.

The plaintiff was to have the management, supervision, and control of the equipment, and the accounting of the business, and was to receive $1 for each $8.50 of income for this service, and the profits or losses were to be shared equally between the parties, and the property of said joint venture should be owned equally.

The petition alleges that this arrangement continued during the year 1945 until December of that year, when the defendant, without authority, collected $1,725 from one Latschar, which plaintiff claimed belonged to the partnership for equipment rental, and which the defendant refused to pay into the partnership; that up to April 26, 1946, under the terms of said partnership agreement, the receipts of said venture amounted to $22,616.07, and, in addition, there were that day accounts receivable of $2,649.95, which included the $1,725 collected

by defendant; that the expenditures up to that date amounted to $23,433.78; that to keep in operation during said time the plaintiff was required to advance $1,817.71 of his own money to pay on the expenses of the partnership; that payments had been made on the mortgage indebtedness up to April 26, 1946, on which date there was a balance due the North Platte Loan and Finance Company of $2,500. Plaintiff asked that a receiver be appointed and proper accounting made of all business transactions, and that the assets be sold and divided, and for other relief.

The defendant in his answer admitted formation of the partnership by oral agreement, as alleged, but denied the terms and conditions thereof; set forth that defendant had previously been engaged in the land-leveling business, and was the owner of certain heavy-duty equipment; that he agreed to furnish the equipment described in plaintiff's petition, the balance of the indebtedness against the three pieces of equipment to be paid out of partnership earnings, and to become the property of the partnership.

The answer further alleged that plaintiff Bode had secured a contract at Provo, South Dakota, and the defendant agreed to furnish three pieces of equipment, a D-7 Caterpillar tractor, a power control unit, and a used fuel and grease wagon, called also a trailer; that Bode was to devote his full time and energies to the partnership business, and was to receive $1 for each $8.50 earned by the equipment for his personal services, and that after paying Bode and the other operating expenses, the profit was to be divided equally.

The answer alleged that the defendant owned considerable other heavy equipment, consisting of a 75 Caterpillar tractor, Austin-Weston scraper, Allis-Chalmers tractor and power unit, and a LaPlante-Choate scraper; that while this additional equipment was taken to South Dakota and then returned to Nebraska, said equipment never became partnership property; that the

$1,725 referred to in plaintiff's petition represented earnings from the Allis-Chalmers tractor, earned for work done by defendant Prettyman in a private contract with Paul Latschar, and was the absolute property of the defendant, and had nothing to do with the partnership venture; that the equipment above referred to was at all times the separate property of the defendant; that when said equipment was sold all proceeds were turned over to the defendant; that he permitted $650, which was received from the old tilt dozer used with the 75 Caterpillar tractor, to be applied on the lease purchase of additional equipment to be used in the partnership venture; that in order to carry out the operations a scraper and tilt dozer were necessary, and the same were purchased on a "lease purchase" plan from the Fuchs Machinery Company; that said two pieces of equipment are assets of the partnership of great value; that plaintiff refused to properly account for the partnership operations; that all of said property used and utilized in the venture belongs to the partnership.

Defendant joined in the request that a receiver be appointed and that an accounting be had, covering all business transactions of the partnership, and that all equipment of the partnership be sold and the money divided equally, and for further relief.

The reply denied the allegations of new matter as to purchase of additional equipment, and alleged the $1,725 Latschar rental was a partnership asset.

The trial began on September 11, 1946. It was continued from time to time as witnesses were available and to take depositions. At the conclusion of the evidence, the case was taken under advisement and briefs were submitted.

Decree was entered by the court on March 25, 1947, finding generally in favor of defendant and against the plaintiff; that the parties had been associated together under their oral agreement of May 1, 1945, but that the business had been conducted in the name of

the plaintiff, who had kept all of the books and records; that plaintiff had on hand at the time of the trial $2,361.29 of partnership funds, including cash and accounts receivable; that in addition thereto he had wrongfully taken from said partnership funds $100 to pay his attorney a retainer fee in the case at bar, and also wrongfully taken $445.83 for the purpose of paying his personal obligations to the North Platte Loan & Finance Company, so that the plaintiff should account to the partnership for $2,907.12.

The court further found that the Allis-Chalmers tractor was not partnership property, and that the defendant should not be required to account to the partnership for $1,725; that the parties agreed that three implements, the D-7 Caterpillar tractor, power unit, and grease wagon, are partnership assets, and both parties had asked the court to appoint a receiver to take charge of and sell the same, and the court appointed L. E. Gundersen, of North Platte, as such receiver and fixed his bond at $5,000. He was directed to take possession of all personal records and assets and make a detailed inventory and file same with the court, and to advertise and sell all partnership assets.

The court further found that the partnership was the owner of an A-7 tilt dozer and a carryall scraper, with tools, etc., which implements were purchased with partnership assets from the Fuchs Machinery Company and were at all times partnership property, each partner having an undivided one-half interest therein, and that these items the receiver should hold until further order of the court.

Thereafter, upon the confirmation of the receiver's report of sale, the court approved the sale of the D-7 Caterpillar tractor, power take-off unit, tank wagon, etc., to plaintiff for $7,200.

In a journal entry of June 4, 1947, the court found that, through inadvertence, an error was made in the accounting, and that plaintiff was entitled to a credit of

$802, paid Fuchs Machinery Company on the scraper, and $237, paid on the tilt dozer out of his own funds, which reduced the balance due from plaintiff to the partnership account to $1,868.12 as the correct sum. The court ordered the receiver to sell the balance of all chattel property of the partnership. Thereupon, motion for new trial was overruled, and supersedeas bond was given by plaintiff for $1,000.

The plaintiff's assignments of error are as follows: (1) The trial court erred in not making accounting between the parties under the pleadings and evidence, and the accounting made does not conform to the evidence; (2) the court erred in its finding that the defendant was not indebted to the partnership in the amount of $1,725; (3) the court erred in finding that the tilt dozer Le-Tourneau Model A-7 and the LS carryall scraper were partnership property; (4) the court erred in finding generally for the defendant and against the plaintiff for the reason that said finding is contrary to the evidence; and (5) the court erred in refusing to find that the partnership had an outstanding indebtedness of $500 in favor of North Platte Loan & Finance Company.

The plaintiff alleged error in finding that the item of $1,725 for rental work done by the Allis-Chalmers tractor was not a partnership item. Plaintiff testified that the Allis-Chalmers tractor and power take-off were unprofitable, although he had taken them to Provo, South Dakota, and upon returning to North Platte he did not want to use them in the partnership. The defendant rented the equipment to Latschar and received $1,725 for the use of it. Plaintiff testified that, when they met at defendant's home south of Maxwell one night, defendant agreed to pay the $1,725 into the partnership, but never did. The evidence shows that the plaintiff sold this Allis-Chalmers tractor for the defendant, turned the proceeds of the sale over to defendant, and made no claim to the proceeds.

The Uniform Partnership Act, section 67-308, R. S.

1943, provides in part: "All property originally brought into the partnership stock or subsequently acquired by purchase or otherwise, on account of the partnership, is partnership property."

The evidence disclosed that defendant had been for a long time engaged in the land-leveling business and had a large amount of expensive machinery for such work; that plaintiff took all this machinery to the first job the partnership had in South Dakota to try it out; and that when he finished the job he decided that only three pieces were practical or useful, turned back to defendant several pieces, including the Allis-Chalmers tractor, and never used them again in partnership work. Therefore, the item was temporarily, or tentatively, accepted by plaintiff and taken into the partnership stock, but immediately on return from South Dakota was rejected and turned back as the sole property of defendant.

Defendant testified that after plaintiff came back from South Dakota they reached a new agreement, and all that plaintiff wanted to take was "the D-7 and the grease wagon and the 75-cat and power-control unit and bulldozer, and operate them."

"Q Now, after that equipment came back here from South Dakota, did you make contracts and used it yourself? A When it was brought back it was taken over to the Nebraska Machinery Lot and Paul Latscher had gotten in touch with me and told me or asked me if we had any available equipment for he would like to rent one for the Railroad, and I told him I had this Allis-Chalemrs Tractor, and he said, he would like to use it, which he did. Q And what did he pay you for the use of that tractor? A $1725. Q Did you receive that money? A Yes. Q And have had it at all times, have you? A Yes."

The court held this $1,725 to be the money of the defendant, not the partnership. The fact that the plaintiff later on sold this Allis-Chalmers tractor and turned the entire proceeds thereof over to defendant tends to

confirm the validity of the court's holding in this matter.

This is a question where it is difficult, but necessary and important, to distinguish exactly who owned the Allis-Chalmers tractor when it earned the $1,725.

In 40 Am. Jur., Partnership, § 89, p. 191, it is said: "In a given case, the chief criterion for determining whether certain property is or is not that of the firm is the intent of the partners to devote it to partnership purposes. In the absence of clear intent, the courts have recognized certain facts as indicia of such intent."

In the case at bar, the declaration of plaintiff that he could not use the Allis-Chalmers tractor profitably in partnership business, and his act in turning it back to defendant, we believe, are factors which, under the law and the evidence, support the trial court in its holding in this matter.

The next error assigned for reversal is that the court erred in finding that the tilt dozer and the scraper were partnership property. It appears that Cletus Bode, the plaintiff, purchased these two pieces of machinery in his own name. The LS carryall scraper was purchased on a contract, exhibit 6, dated August 22, 1945, from the Fuchs Machinery & Supply Company, of Omaha. This rental purchase agreement provided that $350 a month should be paid monthly in advance, and an option to purchase was given, at the total price of $4,278 plus 6 percent interest, and if purchased the rental payment would apply on the purchase price, but the option to purchase must be taken up within ten months or the option was to be void.

The Le-Tourneau Model A-7 tilt dozer was purchased on a similar rental purchase agreement, being exhibit A, on December 15, 1945, between the same parties. Payment was to be made at the rate of $100 a month for the first three months and $120 a month for the next five months, and the rental payments to apply on the purchase price of $1,000 and interest. The option to

purchase was to be exercised within eight months or it would be void.

The trial court held that all of the monthly payments on these two implements were made from partnership funds, except the final payments, which were made by the plaintiff from his own funds, to wit, $802 on the scraper and $237 on the tilt dozer. The court further held that these two machines belonged to the partnership, but that the plaintiff was entitled to credit for the two final payments above set out, which he had made out of his own funds. The plaintiff claimed that he purchased these two items in his own name, and that therefore his credit was pledged for the payment of the contract to the Fuchs Machinery Company, and they belonged to him personally.

The plaintiff claimed that from the time he purchased the carryall scraper in August 1945 he rented it out to the partnership for $350 a month, and from the time he purchased the tilt dozer in December 1945 he rented this machine out to the partnership for $120 a month, and that these rental prices were less than he could have received had he rented out these two machines, which belonged to him, to other parties.

On cross-examination the plaintiff admitted that for two months when the scraper was not being used he still charged the partnership $350 rental for it, and justified this charge on the theory that such equipment was hard to acquire, and it was worth the payment of the rental by the partnership to hold it over for another year's work, even when not being used. During one month the scraper was rented to Mr. Hood, who paid $350 for its use, and this $350 was entered by the plaintiff as a partnership income.

Plaintiff testified that he never talked to his partner, Prettyman, about his buying these two pieces of equipment as his own individual property and making no use of them except in the partnership business.

The Uniform Partnership Act, as found in our Ne-

braska law, declares that each partner is accountable as a fiduciary. Section 67-321, R. S. 1943, reads in part as follows: "Every partner must account to the partnership for any benefit, and hold as trustee for it any profits derived by him without the consent of the other partners from any transaction connected with the formation, conduct, or liquidation of the partnership or from any use by him of its property."

The explanation made by plaintiff of the purchase of these two items, which have become valuable, and which he attempts to own as his own individual property, would, if accepted, resolve all doubts in plaintiff's favor, except for the fact that he failed to disclose to his partner anything about these two deals. It is barely possible that the partner might have consented to the deal, but now that the evidence has brought out the entire transaction, the defendant objects to it all, as he has a right to do.

The law requires the utmost frankness and absolute honesty in the dealings of one partner with another. As trustees, they cannot derive a secret profit from partnership transactions unknown to the other. See Smith v. Jones, 18 Neb. 481, 25 N. W. 624; Hughes v. Swartz, 33 Neb. 276, 50 N. W. 5.

"'* * * a partner, subject to the provisions of this chapter and to any agreement between the partners, has an equal right with his partners to possess specific partnership property for partnership purposes; but he has no right to possess such property for any other purpose without the consent of his partners.'" Kraus v. Kraus, 250 N. Y. 63, 164 N. E. 743.

Partners must exercise the utmost good faith in all their dealings with the members of the firm. A partner must at all times act for the common benefit of all. He must not take advantage of a partner by the slightest concealment or misrepresentation of any kind. See 40 Am. Jur., Partnership, § 128, p. 217.

"Law will not permit those associated in relationships

in which mutual confidence and trust are ingredients to put themselves in position where their individual interests may have tendency to cause them to relax in their vigilance for the common good, or to make secret individual profits out of common activities." Johnson v. Ironside, 249 Mich. 35, 227 N. W. 732.

The trial court having heard all the testimony of each of these partners, and having reached the conclusion that, under the evidence and the law, the tilt dozer and scraper were partnership property, we find that he was right and such assignment of error is without merit.

As to the assignment of error that the accounting made does not conform to the evidence, it must be noted that all of the partnership books of account were kept by plaintiff, and that, in addition thereto, he mingled his own personal accounts of receipts and expenditures with those of the partnership, keeping only one set of books for both. This made it a difficult task for the certified public accountants to work out the final figures. However, the final accounting was presented to the court, and in the argument each counsel called the court's attention to any discrepancy in making charges or giving credits, and after a careful consideration of the whole matter the court approved the final figures worked out by the certified public accountants. We therefore find that the trial court was correct in its approval thereof. We have reached the conclusion that the decree of the trial court arrived at in the case at bar was in accordance with the evidence and the law, and should be affirmed.

AFFIRMED.

CLYDE OLSON ET AL., APPELLEES AND CROSS-APPELLANTS, V. ALVA W. ROSCOE, APPELLANT AND CROSS-APPELLEE.
30 N. W. 2d 664

Filed January 16, 1948. No. 32336.

1. **Waters.** The owners or proprietors of lands bordering upon either the normal or flood channels of a natural watercourse are

entitled to have its water, whether within its banks or in its flood channel, run as it is wont to run according to natural drainage, and no one has the lawful right by diversions or obstructions to interfere with its accustomed flow to the damage of another.

2. **Injunction.** Injunction is a proper remedy to prevent recurring damages to crops or continuing injury to lands by water unlawfully diverted from a natural watercourse over or upon lands of adjacent or adjoining proprietors.
3. **Equity: Judgments.** Equity courts have a broad discretion in formulating decrees, but they cannot ordinarily determine the rights or control the actions of persons who are not parties to the suit, and no decree should be entered which is dependent for its fulfillment on the will of a stranger to the litigation or on that of a person not subject to its jurisdiction.

APPEAL from the district court for Burt County: JAMES T. ENGLISH, JUDGE. *Affirmed.*

Moodie & Burke, for appellant and cross-appellee.

Sidner, Lee & Gunderson, for appellees and cross-appellants.

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

CHAPPELL, J.

Plaintiffs, landowners in the vicinity of the place in Burt County where Cuming Creek empties into Old Logan Creek, both of which are natural watercourses, brought this action to enjoin defendant from diverting the flow of waters in Cuming Creek, to require the removal by defendant of construction which he had placed in and obstructions which resulted therefrom in said creeks, and to obtain general equitable relief.

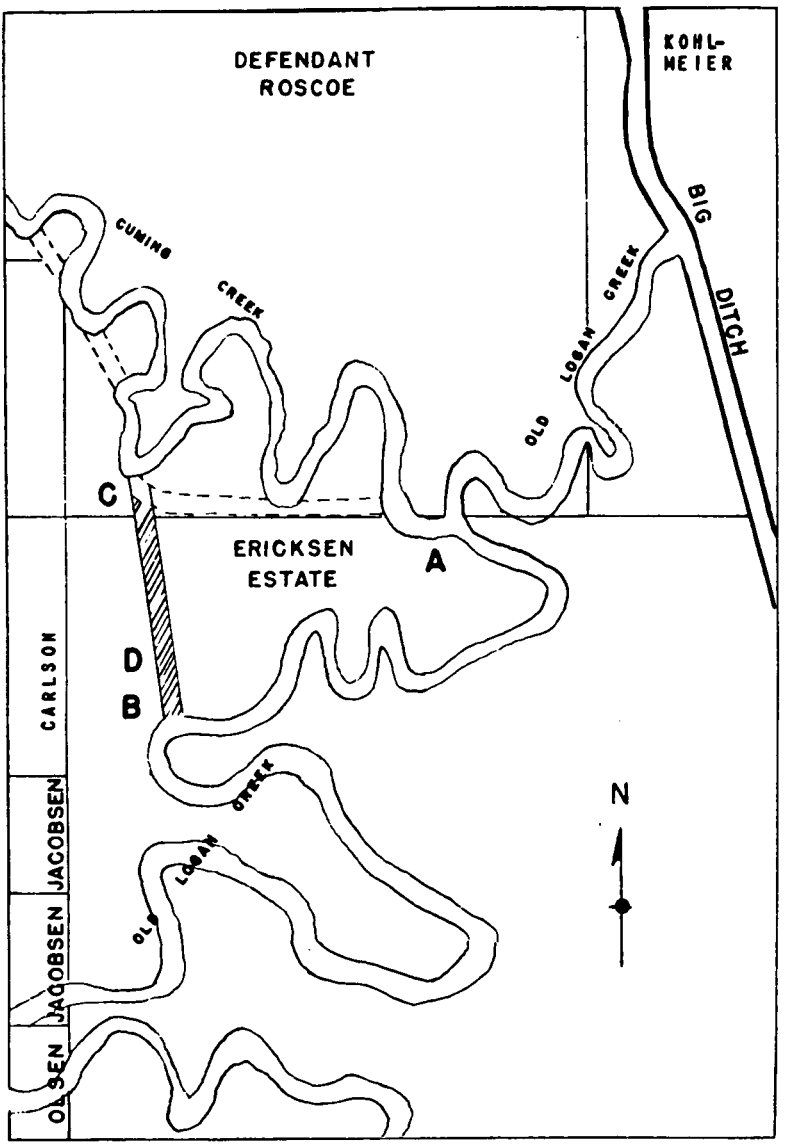
The issues were perfected by appropriate pleadings, and tried upon the merits. Thereupon, the trial court entered its decree, finding and adjudging the cause generally in favor of plaintiffs and against defendant. It was found in substance that defendant had diverted

the waters of Cuming Creek out of its regular channel from a point near the southwest corner of his land, so that the waters thereof, instead of entering Old Logan Creek as formerly, entered the same at a point several hundred feet southwest thereof, which resulted in throwing the waters of Cuming Creek upon the lands of plaintiffs.

Defendant was enjoined from diverting the water of Cuming Creek from its original channel so as to throw the same upon plaintiffs' lands. He was ordered to remove his construction and obstructions from Cuming Creek as it crossed his land, so that the stream would be returned to its original channel; provided, however, if defendant wished to appropriately straighten or alter the course of Cuming Creek across his own premises, and still leave the outlet of Cuming Creek into Old Logan Creek at the same place as and where it originally existed prior to the diversions, he might do so.

Defendant's motion for new trial was overruled, and he appealed. Plaintiffs cross-appealed. Defendant assigned as error substantially that the decree was not sustained by the evidence and was contrary to law. Plaintiffs, in their cross-appeal, contended that the trial court erred in refusing to require defendant to clean out that portion of the original channel of Old Logan Creek across the lands of strangers to the action, claiming that the diversions of Cuming Creek by defendant had caused its obstruction. We conclude that neither plaintiffs' nor defendant's contentions can be sustained.

For reference and clarity, a plat, fairly showing the immediate area involved and certain facts appearing in the evidence, is hereinafter shown:


DEFENDANT
ROSCOE
KOHL-
MEIER
BIG DITCH
CUMING
CREEK
OLD LOGAN CREEK
C
ERICKSEN
ESTATE
A
D
B
CARLSON
JACOBSEN
JACOBSEN
OLSEN
OLD LOGAN CREEK
N

As will be observed from an examination of the plat, Cuming Creek, a meandering stream, originally crossed defendant's land from northwest to southeast, emptying into Old Logan Creek at point "A" on the land of the Ericksen Estate. None of the parties in interest therein were made parties to this action.

Old Logan Creek, the banks of which were generally somewhat higher than the adjoining lands on either side, meandered in a southwesterly direction from a drainage ditch called Big Ditch, constructed in 1914 or 1915. From Big Ditch, the creek meandered across a part of plaintiff Kohlmeier's land, thence across the southeast corner of defendant's adjoining land, then southwest across the land of the Ericksen Estate to point "B" adjacent to plaintiffs' lands, thence southeast for some distance and back northwest again to a point adjacent to plaintiffs' lands, thence south for some distance, then west and south across the lands of some of the plaintiffs, thence generally in a southeasterly direction.

There is competent evidence in the record that for many years prior to 1935 and the defendant's first alleged diversion of Cuming Creek, plaintiffs and their predecessors in title had generally enjoyed the use of their respective lands free and clear of waters coming from Cuming Creek which emptied into Old Logan Creek at point "A" and flowed to the southwest therein.

On the other hand, there is also competent evidence that when Cuming Creek was high and Old Logan Creek was low, waters flowing therein at point "A" could escape back up to the northeast through its channel into Big Ditch, or at floodtide could go over its banks to the east into Big Ditch.

Without dispute, in 1935 defendant constructed a ditch with banks or dikes on both sides from Cuming Creek at point "C" south a short distance, thence east along the south boundary of his land into Cuming Creek, where it crossed his land a short distance northwest of point "A". He thereby straightened the channel and

emptied the flow of Cuming Creek into Old Logan Creek at its original outlet, point "A". There is competent evidence that defendant then obstructed Cuming Creek northeast of point "C" to force the flow thereof into the east and west diversion ditch which was inadequate to carry such flow.

In 1936 high waters washed out the south bank of that ditch, permitting the water to flow thereover south and southwest across the land of the Ericksen Estate, and upon plaintiffs' lands. Thereupon, defendant cleaned out the ditch, made it deeper, and built a dike, planting trees thereon along the south side. Thereafter, in 1937, the south bank of the ditch again washed out and admittedly never was replaced by defendant. The original meandering channel of Cuming Creek on defendant's land from point "C" east thereafter gradually dried up until at the time of the trial defendant was able to and did farm over most of it.

There is competent evidence that from 1937 until 1943 floodwaters from Cuming Creek continued to escape over the south side of defendant's east and west diversion channel and flow over the land of the Ericksen Estate upon plaintiffs' lands, thereby damaging their crops and lands. In 1943 a tenant of the Ericksen Estate, in an effort to stem the flow and capture such floodwaters, constructed a small ditch diked on the west side, from a point a short distance south of defendant's south line south of point "C". That ditch extended for approximately 700 feet south to a swale or draw at about point "D", which in turn emptied into Old Logan Creek at point "B". The ditch was not originally designed to carry the flow of Cuming Creek, and without dispute it was at all times inadequate to do so.

Defendant admitted that in the fall of 1943 he excavated that ditch north across the land of the Ericksen Estate and his south line, connecting it with Cuming Creek at point "C", thereby diverting almost the entire flow of Cuming Creek south into the ditch constructed

by the tenant of the Ericksen Estate, thence almost at right angles into Old Logan Creek at a new outlet, point "B". Whether or not such tenant authorized him to do so, as claimed by defendant, and denied by the tenant, is of no importance. There is no claim that any of the plaintiffs authorized or consented to the diversion.

After the diversion of 1943, there is competent evidence in the record that floodwaters from Cuming Creek escaped from such diversion channel, particularly at or near point "D" and flooded west and southwest directly upon and over plaintiffs' lands after every sizable rain during the years 1944, 1945, and 1946, thereby almost completely destroying their crops and injuring their lands.

Defendant, in effect, admitted that the diversions of Cuming Creek from his land were made by him for his own benefit, but claimed that such diversions did not cause the flooding of plaintiffs' lands because they have been and would be naturally flooded in any event, therefore the remedy of injunction would give them no relief. The trial court properly found otherwise, and we sustain that conclusion.

The law applicable to such a situation is well established in this jurisdiction. It was said in Murphy v. Chicago, B. & Q. R. R. Co., 101 Neb. 73, 161 N. W. 1048: "Water runs and ought to run as it has used to run. Each owner of lands bordering upon either the normal or flood channels of a running stream is entitled to have its waters, whether within its banks or in its flood channels, run as it has used to run, and no one has the right to interfere with its accustomed flow to the damage of another."

It was held in Kane v. Bowden, 85 Neb. 347, 123 N. W. 94: "Water flowing in a well-defined watercourse, whether swale or creek in its primitive condition, may not, except in the exercise of the power of eminent domain, lawfully be diverted and cast upon lands of an

adjoining proprietor where it was not wont to run according to natural drainage."

In Born v. Keil, 146 Neb. 912, 22 N. W. 2d 175, it was said: "Water flowing in a well-defined watercourse may not lawfully be diverted and cast upon the lands of an adjoining landowner where it was not wont to run according to natural drainage." See, also, Kane v. Bowden, *supra,* and Keifer v. Stanley, 111 Neb. 822, 198 N. W. 144.

Where an obstruction in a natural watercourse constitutes a continuing and permanent injury to an adjoining landowner, such landowner may, on a proper showing, obtain a decree ordering the removal of the obstruction. Leaders v. Sarpy County, 134 Neb. 817, 279 N. W. 809.

It is also the rule that injunction, mandatory or prohibitory, or both, as the equities may require, is the proper remedy to prevent recurring injuries to crops or continuing injury to lands by water unlawfully diverted from a natural watercourse over or upon the lands of adjacent or adjoining landowners. Born v. Keil, *supra;* Frese v. Michalec, 148 Neb. 567, 28 N. W. 2d 197; Faught v. Platte Valley Public Power & Irrigation District, 147 Neb. 1032, 25 N. W. 2d 889; Leaders v. Sarpy County, *supra.*

Plaintiffs claimed, both at the trial on the merits and on their cross-appeal, that by reason of defendant's diversions in 1935 and 1943 Old Logan Creek from point "A" to point "B" had filled up with vegetation and debris, so that it was doubtful whether or not it could handle the waters of Cuming Creek if returned to its original channel, and contended that defendant should be required to go upon the land of the Ericksen Estate, land of a stranger to the litigation, and clean out the channel thereon.

We believe that the evidence sustained the trial court's refusal to enter such an order, but conclude

that the refusal of the trial court to do so was correct as a matter of law under the circumstances presented.

It will be noted that the parties in interest, or the owners of the Ericksen Estate over which Old Logan Creek flows from point "A" to point "B", were strangers to the litigation. They were neither made parties plaintiff nor defendant therein.

The applicable rule is that equity courts are given a broad discretion in formulating their decrees, but they must be confined to an adjudication of the rights of the parties to the suit. Equity cannot ordinarily determine the rights or control the actions of persons who are not parties to the suit, and no decree should be entered which is dependent for its fulfillment on the will of a stranger to the litigation or on that of a person not subject to the court's jurisdiction. 30 C. J. S., Equity, § 601, p. 991.

We conclude that the judgment of the trial court was proper in every respect, and that defendant should, in conformity with good engineering practices, proceed to obey the same without unnecessary delay.

Other propositions of law are presented in brief of counsel for defendant, but we deem it unnecessary to discuss them.

For the reasons heretofore stated, the judgment of the trial court should be and hereby is affirmed.

AFFIRMED.

LAURA I. HERLAN, APPELLEE AND CROSS-APPELLANT, V. FRANK J. BLECK, APPELLANT AND CROSS-APPELLEE.
30 N. W. 2d 620

Filed January 16, 1948. No. 32320.

1. **Appeal and Error.** Upon appeal of an action in equity, when the testimony of witnesses orally examined before the court on the vital issues is conflicting, this court will, while trying the case de novo, consider the fact that the trial court observed the

witnesses and their manner of testifying, and must have accepted one version of facts rather than the opposite.

2. ———. Record examined and held sufficient to sustain judgment of the trial court and warrant recovery on plaintiff's cross-appeal.

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

Blackledge & Sidner, for appellant and cross-appellee.

Dryden & Jensen, for appellee and cross-appellant.

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

MESSMORE, J.

This is an action in equity to require the defendant to account for certain funds in the amount of $1,500, advanced by the appellee to the appellant. For convenience, the appellant will hereafter be referred to as defendant, and the appellee as plaintiff.

The record discloses that the plaintiff, age about 70, is the widow of Henry R. Herlan who died testate February 8, 1944. Under the terms of his last will and testament, she became the owner of all of his property, real and personal, for and during the period of her natural life. She was named executrix in the will, declined to serve, and the defendant, her son-in-law, was appointed administrator with the will annexed. The will was admitted to probate March 8, 1944. In the afternoon of February 8, 1944, the defendant inquired of the plaintiff if she had on hand any funds, stating that he had made a check and there were insufficient funds to pay the funeral expenses and the expenses of the last illness of her husband. On February 9, 1944, she advanced him $1,500 of her own money for such expenses, and this amount was deposited in his account. While there is some controversy as to whether or not this money was given by the plaintiff to her daughter who in turn

gave it to the defendant, such fact, if true, is not material. The defendant did receive $1,500 of the plaintiff's money and placed it in his own account.

There was previous litigation between the parties, Herlan v. Bleck, 148 Neb. 816, 29 N. W. 2d 636. While this case is referred to in the instant case, it is not material to be considered in a determination of the same.

Final decree was entered in the estate of Henry R. Herlan, deceased, and the administrator discharged on July 13, 1944.

In the estate matter the administrator filed a claim April 2, 1944, showing, in account with him, amounts paid for cemetery lot, funeral, funeral services, telephone calls, obituary notice, and cards of thanks totaling $774.30, less credits; ceiling price for 1941 tractor, $662.20; 5,200 lbs. prairie hay, $12.50 per ton, $32.50, total $694.70, leaving a total of $79.60, the latter figure constituting the amount the estate owed him. This money he received.

The defendant testified to expenditures in the amount of $1,226.24 out of the $1,500 he obtained from the plaintiff, itemizing the account in the record and in part by certain exhibits appearing therein, all of which were considered by the trial court in arriving at the accounting. We deem it unnecessary to set forth the separate items constituting the amount claimed to have been spent by the defendant out of the $1,500. However, from a review of the record we conclude that the trial court made a proper accounting.

The plaintiff, on April 19, 1946, filed a petition in the estate matter to vacate the final decree and to charge the defendant herein, in his representative capacity as administrator, with the sum of $1,500. The issues were joined, and on August 3, 1946, the county court entered judgment, finding generally for the defendant, Frank J. Bleck, as administrator, and against the petitioner; further finding from the evidence that Frank J. Bleck had fully accounted for all assets of this estate coming into

his possession as administrator; that no fraud had been committed by him in the administration of this estate, and dismissed the plaintiff's petition. Thereafter the plaintiff brought the instant action against the defendant individually as distinguished from his representative capacity as administrator, praying for an accounting of the $1,500. The defendant, by his pleadings, sought to show that he had made a full and complete accounting, and in addition thereto, had performed services and labor for the plaintiff of the reasonable and fair value of $275. The district court found that the defendant had accounted for, and was entitled to receive credit for, expenditures in the amount of $451.86, and was further entitled to the amount of $273.84 for services and labor furnished the plaintiff, making a total amount for which defendant had accounted to plaintiff of the said sum of $1,500 in the amount of $725.70; that by virtue of said accounting, there was due from the defendant to the plaintiff on said accounting, the sum of $774.30 for which sum the plaintiff was entitled to judgment, and judgment was entered accordingly.

The defendant filed a motion for new trial which was overruled, and the plaintiff filed a motion for new trial, moving the court to vacate that portion of the judgment entered allowing the defendant the sum of $273.76 credit for services performed by the defendant at plaintiff's instance. This motion was likewise overruled. The defendant appeals, and the plaintiff cross-appeals from that portion of the judgment as indicated in her motion for new trial.

The defendant assigns as error that the findings and judgment of the trial court are contrary to the law and the evidence; that the trial court erred in admitting and considering evidence of the final account of the defendant in his representative capacity as administrator of the estate of the plaintiff's husband; that the trial court erred in charging the defendant with debit items of a claim filed against the estate of the plaintiff's husband without

considering or determining the credit items of the same claim, or the actual amount received from such claim; and that the trial court committed prejudicial error in permitting evidence of items of the estate to be placed in evidence and to enter judgment based solely on such evidence.

It is clear that the only items with which we are concerned are the items that amount to $774.30, as heretofore appears in the claim filed in the estate matter by the defendant. The defendant took the plaintiff's money to pay the funeral expenses and bills of the estate, filed a claim in the estate in which he was administrator, and had the sum returned to him upon the final accounting. The defense that the defendant should not be required to account to the plaintiff because the county court approved his account with reference to the estate, is not tenable. All the plaintiff is showing is that the defendant paid the funeral bill and expenses out of the funds advanced by the plaintiff, and then received them back in the accounting in the estate. There is no prejudicial error in permitting evidence to show the above relevant and material facts.

While the defendant's pleadings indicate that the plaintiff's instant action is barred for the reason that she filed an action against the defendant in his representative capacity in the county court to set aside and vacate the final decree, the defendant does not assign or predicate error in such respect and does not challenge the right of the plaintiff to pursue two separate actions, but contends the attempt of the plaintiff to interlock these separate actions was evident as indicated by the plaintiff's pleadings.

The judgment entered in the county court was in favor of the defendant as administrator and that he fully accounted for all of the assets of this estate coming into his possession as administrator. There was no determination of the funds that had been advanced to the defendant by the plaintiff prior to his appointment as admin-

istrator. The funds sought to be accounted for in the instant action are the funds that were advanced to the defendant prior to his appointment as administrator.

Under the circumstances, the question of res judicata is not here for determination.

As stated by the defendant, this appeal primarily presents questions of fact, and is a trial de novo in this court.

Upon appeal, when the testimony of witnesses orally examined by the court on the vital issues is conflicting, the Supreme Court will, while trying the case de novo, consider the fact that the trial court observed the witnesses and their manner of testifying, and must have accepted one version of facts rather than the opposite. See Watkins v. Waits, 148 Neb. 543, 28 N. W. 2d 206; Green v. Green, 148 Neb. 19, 26 N. W. 2d 299.

From an examination of the record with reference to the defendant's claim for services and labor furnished the plaintiff and for which the trial court rendered judgment in defendant's favor for $273.84, there was no agreement made between the plaintiff and defendant with reference to payment to be made to the defendant for services rendered. According to the defendant's testimony, he had decided to charge for the services and labor depending upon the attitude of his wife's sister, an heir, or upon the plaintiff's death, as a claim against her estate. The services performed by the defendant were purely an incident to family relationship that ordinarily occurs in such situations, and the record affirmatively shows that the defendant intended to perform such services gratis to his mother-in-law. The plaintiff is entitled to receive a further credit in the accounting, in the sum of $273.84, as contended for in her cross-appeal.

The case is remanded to the district court with directions to enter judgment in conformity with this opinion.

AFFIRMED AS MODIFIED.

MIKE A. GERGEN, APPELLEE, V. THE WESTERN UNION LIFE INSURANCE COMPANY, A CORPORATION, APPELLEE, IMPLEADED WITH WALTER H. JURGENSEN, APPELLANT.
30 N. W. 2d 558

Filed January 16, 1948. No. 32299.

1. **Abatement and Revival.** The only defenses available against an application to revive are that there is no judgment to revive, that the judgment is absolutely void, or that the judgment was paid or otherwise discharged.
2. **Judgments: Pleading.** If a defaulting defendant has been served with process upon plaintiff's original petition, then failure to give notice to such defendant of an amendment thereto, or the filing of an amended petition after answer is due, which did not change plaintiff's cause of action or enhance the relief sought by him, would not preclude the entry of a valid judgment thereon.
3. **Statutes.** Section 25-409, R. S. 1943, approved March 27, 1937, relates wholly to procedure, and, being remedial in character, should be liberally construed and not restricted in its operation to causes of action thereafter arising.
4. **Torts: Venue.** Section 25-409, R. S. 1943, authorizes the commencement of a tort action in any court of competent jurisdiction in any county in this state wherein the cause of action arose, though neither plaintiff nor defendant were residents thereof, and authorizes the issuance of process by such court for any defendant to the county of his residence in this state, and for the due service thereof upon him therein.

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

F. C. Radke, for appellant.

Max Kier, for appellee Gergen.

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

CHAPPELL, J.

Plaintiff filed motion with supporting affidavit, praying revivor of a judgment entered in the district court for Lancaster County against defendant Walter H.

Jurgensen, on February 25, 1939, for $3,320.58, with interest at six percent from that date. The trial court entered conditional order of revivor, ordering the judgment revived unless cause was shown by defendant on or before 9 o'clock a. m., September 17, 1945. The order was duly served upon defendant, who filed objections claiming substantially that the judgment was void for want of jurisdiction over his person. After hearing upon the merits, the trial court entered an order overruling defendant's objections, and reviving the judgment. Defendant's motion for new trial was overruled, and he appealed to this court, assigning as error in substance that the order of revivor was not sustained by the evidence and was contrary to law.

The salient facts are not in dispute. The record discloses that on July 18, 1938, plaintiff filed his original petition and praecipe for service on defendant, The Western Union Life Insurance Company, a corporation, in Lancaster County, and upon defendant, Walter H. Jurgensen, in Douglas County. Separate summons issued, designating August 22, 1938, as answer day. One summons was duly served on The Western Union Life Insurance Company July 18, 1938, in Lancaster County. The other was personally served on defendant Walter H. Jurgensen July 25, 1938, in Douglas County, the county of his residence.

Thereafter, he never made any appearance whatever in the case and never attacked the judgment involved in any manner until after plaintiff's application for revivor was filed. Hereafter, for convenience, The Western Union Life Insurance Company will be referred to as the insurance company, and Walter H. Jurgensen as defendant.

On September 10, 1938, plaintiff filed an amended petition making more definite and certain facts theretofore pleaded in his original petition, and including therein additional related facts which supported but did not in any manner either change plaintiff's cause of

action or the relief sought by him. The record does not affirmatively disclose that defendant did not have notice of the filing thereof, as would ordinarily be required. However, under the circumstances presented, that fact, if true, would be of no consequence.

The gravamen of plaintiff's cause of action, as disclosed by both his petition and amended petition, was in substance to wit: That the insurance company, a domestic life insurance corporation, authorized to engage in business in this state with its principal place of business in Lincoln, Lancaster County, together with certain of its officers, of whom defendant Walter H. Jurgensen was one, entered into a scheme, combination, or conspiracy to cheat and defraud plaintiff out of a certain promissory note for $6,000, secured by a first real estate mortgage on described lands in Fillmore County. That defendants, by divers and sundry-described false and fraudulent representations, promises, and acts, believed and relied upon by plaintiff, did cheat and defraud him out of the possession and ownership of said note and mortgage, secretly and fraudulently collected and appropriated the proceeds therefrom, and unlawfully and fraudulently converted the same to their own use and profit, for the benefit of the insurance company, which still wrongfully retained the same, by reason of which defendants jointly and severally defrauded plaintiff out of securities of the value of $6,000 with interest at six percent from January 4, 1934. Wherefore, plaintiff prayed judgment against defendants, and each of them, for the sum of $7,627.50, with interest at six percent from date of filing his petition, together with costs.

On September 26, 1938, by stipulation in writing between plaintiff and the insurance company, the action was dismissed with prejudice as against it. However, plaintiff therein specifically reserved all his rights and claims against defendant.

On February 25, 1939, the cause came on for hearing

upon the merits, whereat evidence was adduced and the trial court entered its judgment. It is recited therein, after finding that due and legal service of process had been had upon all defendants and that the action had been dismissed as against the insurance company, that defendant's default was entered. The court further found that the allegations of plaintiff's amended petition were true and adjudged that, after allowing defendant all credits to which he was entitled, plaintiff should have and recover of and from defendant the sum of $3,320.58, with interest at six percent from that date, together with costs.

It is well established in this jurisdiction that: "The only defenses available against an application to revive are that there is no judgment to revive or that the purported judgment is absolutely void, and that the judgment was paid or otherwise discharged." Baker Steel & Machinery Co. v. Ferguson, 137 Neb. 578, 290 N. W. 449, 131 A. L. R. 798. Defendant did not contend that the judgment here involved had ever been paid or discharged.

Defendant contended that the judgment was void because it was entered in conformity with plaintiff's amended petition filed after answer day, of which defendant had no notice. We conclude that under the circumstances, defendant's contention has no merit.

In that regard, defendant relied upon section 25-849, R. S. 1943. However, that section must be construed in the light of sections 25-852 and 25-853, R. S. 1943. Among other things, those sections respectively permit the amendment of pleadings either before or after judgment "when the amendment does not change substantially the claim or defense," direct the court at every stage of an action to "disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the adverse party," and provide that "no judgment shall be reversed or affected by reason of such error or defect."

It has been held by this court that: "An amendment to a pleading may be made, which does not change the issues, nor affect the quantum of proof as to a material fact, at any stage of the proceeding." Robinson Outdoor Advertising Co. v. Wendelin Baking Co., 145 Neb. 112, 15 N. W. 2d 388.

In Lincoln Joint Stock Land Bank v. Barnes, 143 Neb. 58, 8 N. W. 2d 545, it was held that: "So long as the court can see that the identity of the cause of action is preserved, the particular allegations of the petition may be changed and others added in order to cure imperfections and mistakes in the manner of stating the plaintiff's case."

"'By the phrase "cause of action," (as above used) * * * is meant, not the formal statement of facts set forth in the petition, but the subject-matter upon which the plaintiff grounds his right of recovery.'" Zelen v. Domestic Industries, 131 Neb. 123, 267 N. W. 352.

In Henkel v. Boudreau, 88 Neb. 784, 130 N. W. 753, it was held: "One of the principal defendants duly served with summons made default, filing no answer or other pleading. The cause was tried on an amended petition filed after answer day. (No notice of the filing thereof was given such defendant.) Subsequently a default was entered against the unanswering defendant. The original petition is not presented in the transcript, and the record does not show any change in the averments which could affect the rights or liability of the defaulting defendant. All presumptions being in favor of the regularity of the proceedings in the trial court, and no error being made to appear, the action of that court in entering the default cannot be reviewed."

It will be observed in the case at bar that both plaintiff's original petition and his amended petition are a part of the bill of exceptions. They affirmatively disclose no substantial change in the claims of plaintiff and no change whatever in his prayers for relief against defendant.

In Schultz v. Loomis, 40 Neb. 152, 58 N. W. 693, it was held: "An amended petition, filed after an answer was due from defendants, who had made no appearance and who never had notice of the filing of such amended petition, formed no basis for a valid judgment or decree against said defendants. Under such circumstances a decree could only be entered conformably to the averments and prayer of the original petition."

In that case judgment was entered by the trial court on the amended petition, which sought a lesser form of relief than the original, yet this court reversed the cause and directed the trial court to enter a decree conformably with the prayer of the original petition.

By analogy, it would have been perfectly proper for the trial court to have entered the judgment here involved upon the averments and prayer of the original petition, without affecting defendant's rights in any manner. Since the cause of action and prayers for relief were the same in plaintiff's original petition and his amended petition, the substantial rights of defendant could not have been affected by the trial court's judgment reciting that it was entered upon the amended petition.

In the light of the foregoing, we conclude that if a defaulting defendant has been served with process upon plaintiff's original petition, then failure to give notice to such defendant of an amendment thereto, or the filing of an amended petition after answer due, which did not change plaintiff's cause of action or enhance the relief sought by him, would not preclude the entry of a valid judgment thereon.

Defendant also contended that the judgment was void because he could be personally served in Douglas County, the county of his residence, only by reason of the existence of a joint cause of action and the establishment of a joint liability, and that plaintiff's dismissal of the insurance company out of the case thereby deprived the court of jurisdiction to enter the judgment.

It is elementary that plaintiff's cause of action was ex delicto, a tort, as distinguished from one ex contractu, the venue of which the opinions in Wistrom v. Forsling, 143 Neb. 294, 9 N. W. 2d 294, and 144 Neb. 638, 14 N. W. 2d 217, discussed and defined.

As applicable to the case at bar, section 25-409, R. S. 1943, provides: "Except as may be otherwise more specifically provided by law, every action for tort brought against a resident or residents of this state must be brought in the county where the cause of action arose, or in the county where the defendant, or some one of the defendants, resides, or in the county where the plaintiff resides and the defendant, or some one of the defendants, may be summoned. Every other action must be brought in the county in which the defendant, or some one of the defendants, resides or may be summoned." The plaintiff's action did not come within any exception otherwise specifically provided by law.

The above section was construed and applied to a tort action in Grosc v. Bredthauer, 136 Neb. 43, 284 N. W. 869, wherein it was specifically held: "Section 20-409, Comp. St. 1929, (now section 25-409, R. S. 1943) as amended by chapter 44, Laws of Nebraska for 1937, construed, and held, to authorize the commencement of a tort action in any court of competent jurisdiction in any county in this state wherein the cause of action arose, though neither plaintiff nor defendant were residents thereof; and also to authorize the issuance of process by such court for any defendant to the county of his residence in this state, and for the due service thereof upon him therein." That opinion is directly in point and has application in the case at bar.

The following applicable statement also appears in the opinion: "The fact that the amendment of section 20-409 (now section 25-409, R. S. 1943) was enacted in 1937 does not prevent its application to a cause of action arising in 1935. It relates wholly to procedure, is remedial in its nature, is to be liberally construed, and is

not restricted in its operation to causes of action thereafter arising."

It has long been the rule in this jurisdiction that: "An act wrongfully done by the joint agency or co-operation of several persons, or done contemporaneously by them without concert, renders them liable jointly and severally." Schweppe v. Uhl, 97 Neb. 328, 149 N. W. 789; Olson v. Hansen, 122 Neb. 492, 240 N. W. 551.

This court adheres to the rule that if a court is one competent to decide whether or not the facts in any given proceeding confer jurisdiction, decides that it has jurisdiction, then its judgments entered within the scope of the subject matter over which its authority extends in proceedings following the lawful allegation of circumstances requiring the exercise of its jurisdiction, are not subject to collateral attack but conclusive against all the world unless reversed on appeal or avoided for error or fraud in a direct proceeding. Brandeen v. Lau, 113 Neb. 34, 201 N. W. 665; County of Douglas v. Feenan, 146 Neb. 156, 18 N. W. 2d 740, 159 A. L. R. 569.

Plaintiff's cause of action, beyond per adventure of a doubt, arose in and the venue thereof was properly in Lancaster County, whether defendant was jointly liable with the insurance company or otherwise. If that be true, the district court was authorized to issue process for service upon defendant in Douglas County, the county of his residence, where, admittedly, he was personally served with summons in the action. Concededly, the trial court had jurisdiction of the subject matter, and, after hearing, on consideration of the pleadings, process, and evidence, found that it had jurisdiction and entered judgment against defendant, which was not subject to collateral attack as attempted in the proceedings at bar.

Other propositions of law were presented in briefs of counsel, but we deem it unnecessary to discuss them.

For the reasons heretofore stated, the judgment of the trial court should be and hereby is affirmed.

AFFIRMED.

ALICE M. COOPER, APPELLEE, V. MARIE MARR ET AL., APPELLANTS.
30 N. W. 2d 563

Filed January 16, 1948. No. 32252.

1. **Vendor and Purchaser.** A purchaser of real or personal property is entitled to the benefit of his bargain, in other words, to receive the identical property purchased; and where the vendor by fraud or false representations has conveyed to him or induced him to accept something not contemplated by his contract, he may rescind the sale and recover what he has paid, without showing that he has sustained any pecuniary injury or damage thereby.
2. ———. Where, however, a purchaser receives what he actually purchased, and bases his right to rescind on some false representation as to its quality, condition, or matter affecting its value, he must show that such representation was material, and that he was misled thereby to his injury and damage.

APPEAL from the district court for Douglas County: WILLIS G. SEARS, JUDGE. *Reversed and dismissed.*

Hotz & Hotz and *William J. Hotz,* for appellants.

Donovan & Frohm, for appellee.

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

WENKE, J.

This action was commenced in the district court for Douglas County by Alice M. Cooper, as plaintiff. The purpose of the action is to rescind a contract of purchase of a "Rooming House Business, together with the furniture, household goods and furnishings" and to recover the purchase price. From a verdict in favor of the plaintiff, their motions for new trial and for judgment notwithstanding the verdict having been overruled, the defendants Marie Marr and E. Ray Marr have appealed.

For convenience and clarity the parties will be referred to as they appeared in the lower court. The evidence discloses that the defendants, Marie Marr and E. Ray

Marr, are husband and wife and the same persons as Marie O. Marovish and Eugene Ray Marovish. They will be referred to as defendants except where referred to individually, then their proper names will be used.

The property purchased by plaintiff consisted of a rooming house business together with the furniture, household goods, and furnishings, a detailed inventory of which was attached to the bill of sale. It will be herein referred to as the rooming house business.

There is no serious controversy in the testimony except as to the representations of the sellers' cost. On that conflict the jury decided in favor of the plaintiff and we are controlled on that question thereby.

The record discloses the following: Plaintiff, a widow 68 years of age, lived at Alliance, Nebraska, where she had her home before coming to Omaha to live May 24, 1945. She had been in business for a number of years which, at the time, was a restaurant located at Overton, Nebraska. Due to the condition of her health she had been advised to move to a lower altitude and decided to move to Omaha for that purpose. In order to make a living she decided to buy a small rooming house business. She noticed an advertisement of Mr. Gangestad in the Omaha World Herald advising that he had several rooming house businesses for sale. On April 23, 1945, she came to Omaha and went to his office. She advised him of her purpose and that she had between four and five thousand dollars to put into the business.

Mr. Gangestad was an Omaha realtor who had been in that business for over 40 years. He had listed the rooming house business of the defendants, which was located at 2224 Howard Street in Omaha, at a price of $4,250. He took the plaintiff to that address and there she met the defendant Marie Marr. Plaintiff, in conjunction with Marie Marr and Mr. Gangestad, or one of them, fully inspected the rooming house and discussed its operation with Marie Marr. It was while examining the property that the plaintiff testifies Marie Marr told

her what the business had cost. As to these representations the plaintiff testified as follows: " 'You are getting a good buy, but you look over things. We paid $6,000 for the property and business,' but * * * due to the cafe and other work that she would sacrifice the place for $4,250." She said they paid $6,000 a year ago.

Plaintiff and Mr. Gangestad then returned to Mr. Gangestad's office where she entered into a contract for the purchase of the business for the sum of $4,250. She paid $750 of the purchase price at that time. The contract provided it was to be fully closed within 31 days. Plaintiff immediately returned to Alliance and then proceeded to sell her home, her business, and some of her personal property. On May 24, 1945, she returned to Omaha and went immediately to 2224 Howard Street and stayed there. The next day she closed the deal and paid the balance of $3,500 and received a bill of sale, with a detailed inventory attached. She did not take possession, for the purpose of running the business, until June 1, 1945, although she lived in the house. The defendants also continued to live there until about June 14, 1945, when they were able to find another place to live. On June 1, 1945, the plaintiff's daughter, Ethel Cooper, who was about 35 years of age, came to live with plaintiff. She helped her mother run the business as her mother was not very well. There is no evidence to show that plaintiff did not get the business she thought she was getting. The evidence shows she had been given ample opportunity to examine it and that she did so; that she got exactly what she bargained for and she makes no complaint in regard thereto. When plaintiff was asked: "Did you say anything to the Marrs at any time that you were dissatisfied with the purchase?" She replied: "No, it was not that I was dissatisfied with it, it was on account of my health, I got sick." The evidence, without dispute, shows the plaintiff received the identical business and property that she inspected and purchased.

About October 31, 1945, the plaintiff was informed

that Marie Marr had not paid $6,000 for the rooming house business but in fact had paid only $1,650. The evidence shows that when Marie Marr purchased the business from Mrs. Pierce, taking possession thereof on February 1, 1944, she paid $1,650. However, Mrs. Pierce reserved the right to and did remove therefrom sufficient of the furnishings and furniture to furnish a five-room house. Defendants offered evidence to prove that they spent over $2,000 to replace the furniture and furnishings thus removed. This offer, upon objection thereto by plaintiff, the court rejected. We find the court erred in so ruling but, in view of our holding as to the plaintiff's rights, this ruling becomes immaterial.

After discovering that Marie Marr had misinformed her of what the business had cost, the plaintiff served the defendants with a notice, dated November 6, 1945, of her election to rescind. This notice contains the following: "You are further notified that said fraud, deceit and misrepresentations included a representation that you purchased said property for the sum of $6000.00 whereas, in truth and in fact, you purchased said property included in said contract of purchase entered into with the undersigned, for the sum of $1650.00. Said false representations further consisted of representations by your agent, E. G. Gangestad, to the effect that the sum of $4250.00 was a fair and reasonable price for said property and represented the fair market value of said property."

Thereafter, on November 14, 1945, this action was commenced. Plaintiff alleges, as a basis for her action to rescind, as follows:

"V. Plaintiff further alleges that on the 23rd day of April, 1945, said defendant, Marie Marr, accompanied by the said E. G. Gangestad, took the plaintiff to 2224 Howard Street, Omaha, Nebraska, and showed the plaintiff the said furniture, household goods and furnishings to be included in said Rooming House Business which was at said time and place offered to the plaintiff for

the sum of Four Thousand Two Hundred Fifty Dollars ($4250.) That at said time, and on the third floor of said frame building in which said furniture, household goods and furnishings were located, being No. 2224 Howard Street, Omaha, Nebraska, the said defendant, Marie Marr, represented to and told the plaintiff that she and her husband, defendant, E. Ray Marr, paid Six Thousand Dollars ($6000.) in cash for the said Rooming House Business, which included the furniture and household goods and furnishings then in said rooms at 2224 Howard Street, but that they were required to sell said property at a loss for the reason that they were engaged in the Restaurant Business and were unable to find help to operate the said Rooming House Business. Said defendant, Marie Marr, at said time told the plaintiff that other parties were waiting to purchase said property for said Rooming House Business at said price, and that the plaintiff would have to decide immediately if she wanted to get in the Rooming House Business; that it was an opportunity that she could not afford to miss, as she was getting the property at a bargain price. Immediately after these representations were made to the plaintiff by the said Marie Marr, and after the plaintiff went down to the main floor of the building, she asked the said Gangestad if he thought that $4250 was a fair and reasonable price for said Rooming House Business, and the said Gangestad assured the plaintiff that she was getting a good buy and that the business being offered her was well worth the price asked.

"VI. Plaintiff further states that on the 23rd day of April, 1945, she was a non-resident of the City of Omaha, being a resident of Alliance, Nebraska, at said time; that plaintiff had no knowledge of any kind whatsoever as to the value of a Rooming House Business in the City of Omaha and the value of furniture, household goods and furnishings used in connection therewith, all of which was known to the said defendants and to the said Gangstead at said time. Plaintiff further states that she relied

solely upon the representations and statements of the said Marie Marr and the said Gangestad with reference to the value of said Rooming House Business before entering into said purchase agreement above referred to, marked Exhibit A, and attached hereto. Plaintiff also states that she believed implicitly in the statements made to her by the defendant, Marie Marr, that she and her husband had paid $6000 cash for said Rooming House Business and the furniture, household goods and furnishings which they were then offering to sell to this plaintiff for the sum of $4250.

"VII. Plaintiff further alleges that the said representation made to this plaintiff by the said Marie Marr, that she and her husband had paid $6000 cash for the same identical Rooming House Business, including the furniture, household goods and furnishings which said defendants were offering to sell to the plaintiff for the sum of $4250, was false and untrue and were known to be false and untrue by the said defendants and each of them at the time that said representation was made to the plaintiff by the said Marie Marr, as aforestated. That the said representations and statements made to the plaintiff by the said E. G. Gangestad, as aforestated, were false and untrue and were known by the said Gangestad to have been false and untrue at the time same were made to this plaintiff.

"VIII. That plaintiff relied upon each and all of said representations and statements made to the plaintiff by the said defendants and the said Gangestad, and believed each and all of said representations to be true at the time they were made. Plaintiff further states that had she known that any of said representations were untrue, that she would not have entered into said purchase agreement."

Plaintiff testified as follows: "Q- Well, what was wrong, when you discovered what was wrong? A- I did not say anything about there being anything wrong. Q- Well, as far as your complaint is, the only complaint that you

have, is that you say that Mrs. Marr told you that she paid $6,000 for the rooming house sometime previous when she bought it, is that right? A- Yes."

As to the question of the value of the rooming house business which plaintiff received, the record discloses she offered no testimony with reference thereto and her counsel stated her position with reference thereto as follows: "I might say to your Honor, we are getting into something here that is similar to value and certainly the question of value is not involved here at all. We are not complaining about the value, it isn't a question of value. That goes right square to the question of value; it isn't material what the value was."

In accordance with the plaintiff's position, as indicated by her evidence, her counsel's statement of her position and her requested instruction, the court instructed the jury on the issues of the case as follows:

"Before the plaintiff will be entitled to recover a verdict at your hands, she must establish by a preponderance of the evidence relating thereto, that the defendant, Marie Marr, told her during the negotiations and before she concluded to buy the business, furnishings and fixtures which she afterwards bought of the Marrs, as follows:

"(1) That sometimes previously they, themselves, had paid $6000 for what they were now willing to take $4250 for because of their business exigencies; and must further prove and likewise establish.

"(2) That the plaintiff believed the statements so made to be true, and by reason of that being so believed, she concluded to buy and did buy the said business, furnishings and fixtures in question, paying the sum of $4250.00 therefor, and that if said statements had not been so made, she would not have concluded to buy or pay the money she did for the property then purchased; and

"(3) And further she must likewise establish that at the time said statements were made by Marie Marr that

the defendants had sometime before bought the property in question for $6000, that said statements were false and known by the said Marie Marr to be false and made for the purpose of inducing the plaintiff to make the purchase in question, and she must further likewise establish that on the discovery of the fact that Defendants had not paid the $6000.00 for the property she had bought of them she denounced the sale and demanded back what she had paid."

It will be observed, from what has been said and quoted, that the plaintiff received the identical property and business which she inspected and purchased and that she was in no way dissatisfied with it and that she made no complaint as to its value. Her sole complaint is that the sellers misrepresented their cost although the plaintiff was not injured or damaged thereby.

We have announced the principles here controlling in our opinion on rehearing in the case of Jakway v. Proudfit, 76 Neb. 67, 109 N. W. 388. There we said:

"A purchaser of real or personal property is entitled to the benefit of his bargain, in other words, to receive the identical property purchased; and where the vendor by fraud or false representations has conveyed to him or induced him to accept something not contemplated by his contract, he may rescind the sale and recover what he has paid, without showing that he has sustained any pecuniary injury or damage thereby.

"Where, however, a purchaser receives what he actually purchased, and bases his right to rescind on some false representation as to its quality, condition, or matter affecting its value, he must show that such representation was material, and that he was misled thereby to his injury and damage."

Since that opinion the Legislature, in 1921, adopted the Uniform Sales Act which contained what is now section 69-412, R. S. 1943. This section reads as follows: "Any affirmation of fact or any promise by the seller relating to the goods is an express warranty if

the natural tendency of such affirmation or promise is to induce the buyer to purchase the goods, and if the buyer purchases the goods relying thereon. No affirmation of the value of the goods, nor any statement purporting to be a statement of the seller's opinion only, shall be construed as a warranty."

We do not think this statutory enactment changes the principles of law as announced in Jakway v. Proudfit, *supra,* and which are here applicable, but affirms them. We have examined the authorities cited by plaintiff and have come to the same conclusion as reached in Jakway v. Proudfit, *supra.* We not only find that Jakway v. Proudfit, *supra,* correctly states the principles here applicable but that it is in accord with most of the holdings cited by plaintiff when the factual situations, as found therein, are considered.

From what has been said it is apparent that the court not only erred in the instruction given but that it erred in overruling the defendants' motion for a directed verdict, both at the end of the plaintiff's case and again at the end of all the evidence.

From an examination of the plaintiff's petition, which we have already set forth in sufficient length, it is apparent that it is subject to the same deficiency as the proof and fails to state a cause of action. We have come to the conclusion that the motion of the defendant for a judgment notwithstanding the verdict should have been sustained and that the verdict and judgment should be reversed and the action dismissed. It is so ordered.

REVERSED AND DISMISSED.

YEAGER, J., dissenting.

I do not disagree with the conclusion of the majority opinion that the verdict and judgment of the district court should be reversed.

It is my opinion, however, that the cause should not be dismissed but should be remanded for a new trial. It appears to me that the issues made by the pleadings which were never redefined either by amendment, trial

order, or by the instructions of the court require a remand rather than dismissal.

IN RE ESTATE OF ROSIE ELLEN VANCE, DECEASED. JAMES CALLAWAY ET AL., APPELLANTS, V. ROBERT L. VANCE ET AL., APPELLEES.

30 N. W. 2d 677

Filed January 23, 1948. No. 32328.

1. **Appeal and Error.** In an error proceeding from the county court to the district court, that court must look to the transcript of the proceedings of the county court filed with the petition in error, to ascertain what happened there.
2. ———. Such a proceeding is ordinarily tried on the appropriate and relevant questions of law set out in the petition in error and appearing in the transcript.
3. ———. Error cannot be predicated on the insufficiency of the evidence as a matter of law to support the findings and judgment of the county court from which error proceedings were prosecuted, where all the material and relevant evidence was not preserved in a bill of exceptions.
4. ———. In such a situation, it will be presumed by the district court and by this court that the evidence adduced in the county court was sufficient to sustain the findings of fact made in its decree and the judgment will be affirmed where the transcript fails to disclose error prejudicial to the party prosecuting error proceedings therefrom.
5. **Joint Tenancy.** The relation of and estate of joint tenancies may be created in any kind of personal property that is subject to be held in severalty.
6. ———. While as between joint tenancies and tenancies in common the law prefers the latter, yet if the purpose to create a joint tenancy is clearly expressed in an instrument of conveyance or ownership, the law will permit the intention of the parties to control, and a joint tenancy with right of survivorship will be created.
7. **Executors and Administrators.** An ancillary administrator is governed by the laws of this state and the orders and decrees of the court appointing him, and all questions arising in regard to his rights, powers, and liabilities must be determined according to the laws of this state and the courts thereof.

8. ———. If personal property has come into the possession of an administrator, the lawful possession and ownership of which are in dispute, it is the right and duty of such administrator to make application to the county court for directions relating to its lawful disposition, and such court has the power and authority to give and enforce its directions with reference thereto.

APPEAL from the district court for Otoe County: THOMAS E. DUNBAR, JUDGE. *Affirmed.*

A. A. Rezac, for appellants.

Tyler & Frerichs, for appellees.

T. Simpson Morton, pro se.

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

CHAPPELL, J.

This action, prosecuted by proceedings in error from final decree of the county court to the district court and from an affirmation thereof appealed by plaintiffs in error to this court, involved the ownership and lawful disposition of 20 shares of American Telephone and Telegraph Company stock in the ancillary administration of the estate of Rosie Ellen Vance, deceased.

Plaintiffs in error, brothers and sisters of deceased, and defendant in error, Robert L. Vance, her husband, the qualified domiciliary administrator of her estate in the Superior Court of King County, Washington, were her heirs at law. Defendant in error, T. Simpson Morton, was the qualified ancillary administrator. Defendant in error, Varro E. Tyler, was attorney in fact for Robert L. Vance. For convenience hereinafter, wherever possible, plaintiffs in error will be designated as plaintiffs, and defendants in error as defendants.

In conformity with appropriate pleadings filed by the parties in the ancillary proceedings, and after various hearings on the merits of the issues presented thereby, whereat evidence was adduced, the county court ulti-

mately entered its final decree finding generally in favor of defendants and against plaintiffs.

Therein, among other things, the final report of the ancillary administrator was approved and allowed. The decree also found in substance that one share of stock, inscribed in the name of decedent only, was an asset of her estate and subject to distribution under the laws of Nebraska for payment of costs and expenses of administration, there being no state or federal inheritance taxes due, or claims filed in the proceeding. The ownership and disposition of that share were not questioned by plaintiffs. The decree found that the shares of stock were personal property and that the disposition thereof was governed by the laws of the State of Washington under the orders of the domiciliary court therein. It also found that the remaining 19 shares of stock primarily involved in this proceeding were owned by Rosie E. Vance, deceased, and her husband, Robert L. Vance, as joint tenants with right of survivorship and not as tenants in common, as claimed by plaintiffs. In conformity with its findings, the county court ordered and decreed that the ancillary administrator should deliver the 19 shares of stock inscribed in the names of the joint tenants to the attorney in fact for Robert L. Vance, administrator of the estate of the deceased, under the jurisdiction of the Superior Court of King County, Washington.

The administrator did not appeal or prosecute error therefrom, but plaintiffs filed in the district court a petition in error, together with a transcript of the proceedings in the county court. Answers of defendants perfected the issues. After a hearing on the merits, the district court found generally in favor of defendants, found that the transcript disclosed no error prejudicial to plaintiffs, and entered its decree affirming the county court. Plaintiffs' motion for new trial was overruled, and they appealed to this court. The bill of exceptions filed in this court consists solely of the transcript of

the pleadings and proceedings in the county court, together with relevant stipulations of counsel therein.

Plaintiffs, in their brief, assigned 12 alleged errors of the trial court. However, some of them were not discussed in the brief, and in conformity with Rules, Supreme Court, § 8a (4), consideration will be limited to only those discussed.

As summarized, they were: (1) The trial court erred in affirming the county court's appointment of a disinterested ancillary administrator, rather than one of the heirs, as petitioned by the plaintiffs; (2) erred in affirming the county court's holding that the 19 shares of stock were owned by Rosie E. Vance and Robert L. Vance as joint tenants, with right of survivorship, and not as tenants in common; (3) erred in affirming the overruling of plaintiffs' demurrer to the reply of Robert L. Vance and holding on the merits that the laws of Washington, domicile of the deceased, governed the descent and distribution of the shares as personal property; and (4) that the decree affirming the county court was contrary to the evidence and the transcript of the proceedings. We conclude that plaintiffs' assignments cannot be sustained.

As stated in In re Estate of Berg, 139 Neb. 99, 296 N. W. 460: "In an error proceeding in the district court, that court must look to the transcript of the proceedings of the county court filed with the petition in error to ascertain what happened there." Such a proceeding is ordinarily tried on the appropriate and relevant questions of law, set out in the petition in error and appearing in the transcript. 4 C. J. S., Appeal and Error, § 12, p. 74; 3 C. J., Appeal and Error, § 14, p. 305; Dame, Probate and Administration (2d ed.), § 488, p. 815.

It is elementary that in error proceedings from the county court to the district court, and upon appeal from the district court to this court, error cannot be predicated on the insufficiency of the evidence as a matter

of law to support the findings and judgment of the court from which error was prosecuted, unless all the material relevant evidence was preserved in a bill of exceptions. In such a situation, it will be presumed by the district court and this court, that the evidence adduced in the county court was sufficient to sustain the findings of fact made in its decree. In other words, when a question of the sufficiency of the evidence to sustain the decree upon any finding or adjudication therein is involved in error proceedings, the findings and judgment of the lower court should be affirmed by the district court and by this court upon appeal therefrom, when all of the material relevant evidence with reference thereto is not contained in the bill of exceptions, and the transcript fails to disclose any error prejudicial to the party prosecuting error proceedings therefrom. 4 C. J. S., Appeal and Error, § 12, p. 75; 3 C. J., Appeal and Error, § 15, p. 307; Patterson v. Kerr, 127 Neb. 73, 254 N. W. 704; Gilmore v. State, 148 Neb. 10, 26 N. W. 2d 296.

Viewing the record in that light, we conclude that the first and second assignments of error, above set forth, have no merit. The first does not require further discussion. The second requires elaboration.

In that connection, plaintiffs argued that the question whether the 19 shares were held as joint tenants or as tenants in common, should have been governed by the laws of Hawaii, where the order therefor was executed by Rosie E. Vance. The answer thereto is that in the absence of pleadings and proof to the contrary, the statutes and laws of a sister state or territory are presumed to be the same as those of this state. First State Bank of Herrick v. Conant, 117 Neb. 562, 221 N. W. 691; Stark v. Olsen, 44 Neb. 646, 63 N. W. 37.

Further, we have examined the Hawaiian authorities relied upon by plaintiffs, which disclose that they were based upon a statute not affirmatively shown to have been either pleaded or proved in the county court. As

a matter of fact, however, such authorities in effect adhere to the same rule as that followed in this jurisdiction. This court has held that: "While as between joint tenancies and tenancies in common the law prefers the latter, yet, if the purpose to create a joint tenancy is clearly expressed in a deed of conveyance of real estate, the law will permit the intention of the parties to control, and a joint tenancy with right of survivorship will be created." Sanderson v. Everson, 93 Neb. 606, 141 N. W. 1025; Olander v. City of Omaha, 142 Neb. 340, 6 N. W. 2d 62.

It is now generally recognized also that: "Joint tenancy originally applied only to interests in lands, but, subject to statutory modification, it is now generally applied, with all its rights and incidents, to personalty as well, whether a chose in possession or merely in action." 33 C. J., Joint Tenancy, § 8, p. 906. This court has specifically held that: "The relation of and estate of joint tenancies may be created in any kind of personal property that is subject to be held in severalty." In re Estate of Johnson, 116 Neb. 686, 218 N. W. 739.

It was affirmatively alleged in the pleadings of all the parties that the two certificates for the 19 shares each had inscribed on their face that they were owned by Rosie E. Vance and Robert L. Vance, as joint tenants with right of survivorship. There is a stipulation in the record with reference to the authenticity of a written order for the issuance and delivery to one of the plaintiffs at Unadilla, Nebraska, of the certificate representing 17 shares, which order plaintiffs argued conclusively established that they were held as tenants in common. The stipulation was that the order "may be introduced and received by the court in evidence" but the record does not affirmatively disclose that it ever was so introduced and received.

However, we have examined the stipulation and the order, and deem it sufficient to say in any event that

in the absence of any other material relevant evidence in the bill of exceptions, it would be insufficient to establish that the court's findings were erroneous. We conclude that the decree of the trial court affirming the judgment of the county court, finding that the 19 shares were held as joint tenants with right of survivorship, should be sustained.

Plaintiffs, in conformity with the third assignment of error, argued that the laws of Nebraska rather than the laws of Washington should govern the descent and distribution of the shares within the State of Nebraska, and that the county court and district court erroneously held otherwise. Under the circumstances presented, as will be hereinafter observed, that contention ultimately became simply an abstract question of law, which this court should not discuss or decide.

The authority of an ancillary administrator is complete and distinct over all the assets of the estate within the confines of this state. He is governed by the laws of this state, and the orders and decrees of the court appointing him, and all questions arising in regard to his rights, powers, and liabilities must be determined according to the laws of this state and the courts thereof. Dame, Probate and Administration (2d ed.), § 267, p. 411.

The shares involved, having come into the possession of the ancillary administrator with their ownership in dispute, it was his right and duty, as was done by him, to make application for directions from the county court concerning the lawful possession and ownership thereof, and the county court had the power and authority to give and enforce its directions with reference thereto. In re Estate of Nilson, 126 Neb. 541, 253 N. W. 675. Therefore, the decree of the county court with reference to that matter was a final adjudication.

We call attention to the fact that the one share, held in the name of the deceased and a part of her estate, was ordered sold, and as affirmatively disclosed by the record, the proceeds therefrom, $162.22, were lawfully

used and consumed by order of the county court in payment of costs and expenses of administration. It is not contended otherwise.

That left in the proceedings only the 19 shares rightly held to have been owned as joint tenants with right of survivorship. They were appropriately ordered delivered to the attorney-in-fact for the survivor. Therefore, there were no remaining or residual assets in the estate within the State of Nebraska subject to descent and distribution under the laws of either Nebraska or Washington.

The question of whether the laws of Nebraska or Washington controlled the descent and distribution of the shares or the income therefrom could only have arisen had there been a surplus or residue remaining in the estate from the proceeds of the one share, or if the other 19 shares had been owned as tenants in common.

Neither of such alternatives having occurred, the finding of the county court that the laws of the domicile of the deceased controlled the descent and distribution of the shares could not have been prejudicial in any manner to plaintiffs, and even if erroneous, would not require reversal. Rider v. Lawritson, 65 Neb. 1, 90 N. W. 951.

For the reasons heretofore stated, we conclude that the judgment of the district court was not contrary to the evidence and transcript of the proceedings. It should be and hereby is affirmed.

AFFIRMED.

LLOYD M. EGBERT, APPELLEE, V. BEULAH L. EGBERT, APPELLANT.
30 N. W. 2d 669

Filed January 23, 1948. No. 32266.

1. **Domicile.** Residence in a community is determined by the intention of the party. Whether change of legal residence is

effected by removal from one place to another depends on the intention of the party.

2. Divorce. Any unjustifiable conduct on the part of either the husband or wife which so grievously wounds the mental feelings of the other, or so utterly destroys the peace of mind of the other as to seriously impair the bodily health and endanger the life of the other, or such as utterly destroys the legitimate ends and objects of matrimony, constitutes extreme cruelty.

3. ———. Upon an application for a divorce where both parties are found guilty of any of the enumerated offenses for which a divorce may be granted, the court should dismiss the bill.

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

Ginsburg & Ginsburg, for appellant.

Dryden & Jensen, for appellee.

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

WENKE, J.

Lloyd M. Egbert, as plaintiff, brought this action in the district court for Buffalo County against Beulah L. Egbert, as defendant. The purpose of the action was to obtain an absolute divorce based on the ground that the defendant had been guilty of conduct which constituted extreme cruelty. From a decree awarding the plaintiff an absolute divorce, her motion for new trial having been overruled, the defendant has appealed.

For the purpose of clarity and convenience the parties will be referred to as they appeared in the trial court.

The first question presented by the appeal is that of jurisdiction. Section 42-301, R. S. 1943, provides in part: "A divorce from the bonds of matrimony may be decreed by the district court of the county where the parties, or one of them, reside, * * *." There is no question about the residence of the defendant. It is in Lancaster County. However, the defendant contends

that plaintiff, at the time he filed his petition on December 27, 1946, was likewise a resident of Lancaster County and not of Buffalo County.

In applying this provision of the foregoing statute we said, in Burns v. Burns, 145 Neb. 213, 15 N. W. 2d 753, that: "* * * residence in a community is determined by the intention of the parties." More recently, in Pierson v. Jensen, 148 Neb. 849, 29 N. W. 2d 625, we said: "Whether change of legal residence is effected by removal from one place to another depends on the intention of the party."

The record discloses that in January 1946 the Egbert family moved to Lincoln and there established their home. The family, in addition to the plaintiff and defendant, includes two children, a girl and a boy about fifteen and fourteen years of age. About the middle of May 1946, the plaintiff left the home. First he lived for a few days in a hotel. Then he rented a room in a private home in Lincoln. He has continued to rent this room ever since. He keeps some of his personal effects in this room and occupies it whenever he is in Lincoln. At about the same time that he rented this room he took part of his personal effects to the home of his parents in Kearney. This city is in Buffalo County. He particularly took personal effects which he used only on occasion but also took some of his wearing apparel. His folks live in Kearney and rent an apartment there which they occupy as their home. It is to this apartment that he took his personal property and where he returns whenever he comes to Kearney. He testified that thereafter he intended to make Kearney his residence. There is some evidence that he communicated this information to others. He thereafter returned to Kearney whenever possible, spending his vacation there in November 1946. He helps his folks by paying for staying with them. As further evidence of his intention to make Kearney his residence he registered there as a voter on December 26, 1946, and also opened a bank account there on that day. While

no single act can be said to conclusively establish his change of residence, however, applying the foregoing rules to all of the evidence in the record we come to the conclusion that plaintiff had established his residence in Buffalo County at the time he commenced his suit. See Burns v. Burns, *supra.*

Was the trial court right in granting the plaintiff a divorce? This matter is here for trial de novo. However, when applicable, we apply the rule that: "When the evidence on material questions of fact is in irreconcilable conflict, this court will, in determining the weight of the evidence, consider the fact that the trial court observed the witnesses and their manner of testifying, and must have accepted one version of the facts rather than the opposite." Brown v. Brown, 146 Neb. 908, 22 N. W. 2d 148.

In Meredith v. Meredith, 148 Neb. 845, 29 N. W. 2d 643, we approved the following from Ellison v. Ellison, 65 Neb. 412, 91 N. W. 403: "Any unjustifiable conduct on the part of either the husband or wife, which so grievously wounds the mental feelings of the other, or so utterly destroys the peace of mind of the other, as to seriously impair the bodily health and endanger the life of the other, or such as utterly destroys the legitimate ends and objects of matrimony, constitutes 'extreme cruelty' as defined in section 7, chapter 25, Compiled Statutes (now sec. 42-302, R. S. 1943), * * *."

Section 42-304, R. S. 1943, provides: "No divorce shall be decreed in any case when it shall appear that * * * the party complaining shall be guilty of the same * * * misconduct charged against the respondent."

The plaintiff charged, and the trial court found, that the defendant was guilty of extreme cruelty. It based its decree of divorce thereon. We have already set out what may constitute extreme cruelty under the provisions of our statute. For the purpose of considering this issue we shall assume, but not decide, that the record will sustain a finding that the defendant was

guilty of conduct constituting extreme cruelty.

In applying the foregoing statute we have said in Wilson v. Wilson, 89 Neb. 749, 132 N. W. 401, that: "'Upon an application for a divorce, where both parties are found guilty of any of the enumerated offenses for which a divorce may be granted, the court should dismiss the bill.' Nagel v. Nagel, 12 Mo. 53." And in Peyton v. Peyton, 97 Neb. 663, 151 N. W. 150, we said: "A court of equity will not grant a divorce to one whose conduct has been such as to furnish sufficient grounds for divorce, even if the conduct of the other party has been grossly more culpable." See, also, Studley v. Studley, 129 Neb. 784, 263 N. W. 139.

The evidence discloses that commencing in October 1945, while they were still living in North Platte, the parties commenced having arguments and quarrels. These quarrels became more frequent and violent after they moved to Lincoln in January 1946. As a result thereof the plaintiff left his home sometime about the middle of May 1946.

The evidence establishes that the plaintiff was not without fault in creating the causes from which the arguments usually started. They were occasionally about his drinking but usually resulted from his activities in connection with a lady employee in the district office of his employer. Plaintiff's conduct in regard to the latter was not such as to foster the legitimate ends and objects of matrimony.

After such quarrels started the plaintiff was an active participant therein, using rough, profane, and abusive language. The evidence shows that on two occasions these quarrels resulted in physical violence. In April 1946, when a quarrel took place in their apartment and while the family was present, the plaintiff slapped the defendant and caused a black and blue spot to develop on her face. Again in June 1946, while riding in the plaintiff's car, he hit her several different times and caused a discoloration of her face.

This furnishes a sufficient statement of plaintiff's conduct to decide this issue. To further detail the facts would serve no useful purpose. From all the evidence in the record we find that the plaintiff was guilty of such conduct that he is not entitled to a divorce and his prayer for a divorce should have been denied and his action dismissed.

This action was commenced on December 27, 1946, and summons served on the defendant on December 31, 1946. Thereafter, on January 3, 1947, the defendant commenced an action against the plaintiff in the district court for Lancaster County. The nature of this action was one for separate maintenance. After defendant commenced this latter action the plaintiff made application to and obtained from the district court for Buffalo County an order temporarily restraining the defendant from proceeding further therewith. Upon trial of the cause the court decreed: "* * * that the defendant is permanently enjoined and restrained from proceeding further in an action now pending in the District Court of Lancaster County entitled: 'Beulah L. Egbert vs Lloyd M. Egbert', the object and prayer of said action being to secure on behalf of Beulah L. Egbert a divorce from bed and board of Lloyd M. Egbert; * * *." With the determination that the plaintiff is not entitled to relief and that his action should be dismissed it necessarily follows, as a matter of fact, that he is not entitled to the injunctive relief which was granted. It is therefore ordered that all injunctive relief granted by the trial court be dissolved.

With the finding that the plaintiff is not entitled to a divorce and that his action should be dismissed, it follows that all provisions as to permanent alimony must be vacated and set aside. With the defendant's action pending in Lancaster County, and she having actual custody of the children, we find that under these circumstances the court's order as to custody and support of the children should be vacated and set aside.

The trial court taxed the costs of the action to the plaintiff but did not allow the defendant anything for expenses, including attorney fees. Section 42-308, R. S. 1943, provides: "In every suit brought * * * for a divorce * * *, the court may, in its discretion, require the husband to pay any sum necessary to enable the wife to * * * defend the suit during its pendency; * * *."

The defendant is a resident of Lancaster County and was required to defend this action in Buffalo County; she took some depositions in preparing for trial; she had substantial expenses in connection with the foregoing; and, in addition thereto, she was required to employ counsel to represent her both in the trial and on appeal. The defendant should be allowed a reasonable amount to cover these items. We therefore allow her the sum of $400 for this purpose and direct that the same be taxed as costs.

The decree of the trial court is therefore reversed and the cause is remanded with directions to enter a decree dissolving all injunctive relief that has been granted, dismissing the plaintiff's action, and taxing all costs to plaintiff, including the allowance made by this court.

REVERSED AND REMANDED WITH DIRECTIONS.

KROGER, District Judge, dissents.

JOSEPHINE H. ALLEN, GUARDIAN OF ROBERT JOHN ALLEN AND MARGARET A. ALLEN, MINORS, APPELLEE, V. MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY, A CORPORATION, APPELLANT.

30 N. W. 2d 885

Filed February 6, 1948. No. 32290.

1. **Witnesses.** The effect of a clause in an insurance policy authorizing a physician to disclose knowledge or information acquired while attending or examining an insured is to remove the prohibition of section 25-1206, R. S. 1943, and to permit the

physician to testify subject to the same rules that apply to any other witness.

2. **Evidence.** A party may not successfully complain of the introduction of evidence of a like character to that which it has introduced.
3. **Insurance.** In an action upon a policy of life insurance the burden of proof is upon the defendant to prove by a preponderance of the evidence a controverted defense that the insured died as a result of poison self-administered with suicidal intent.
4. **Appeal and Error.** A judgment will not ordinarily be reversed for refusal to give tendered instructions where other instructions given by the court fairly and correctly covered the issues involved in the tendered instructions.
5. **Trial.** 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.

APPEAL from the district court for Douglas County: FRANK M. DINEEN, JUDGE. *Affirmed.*

Brown, Crossman, West, Barton & Quinlan and *John R. Cockle*, for appellant.

Spier, Ramsey & Ellick, for appellee.

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

SIMMONS, C. J.

This is an action by a legally-appointed guardian to recover on a life insurance policy. The policy was issued September 1, 1944, on the life of Leo J. Allen, with the wards named as beneficiaries. The insured died December 22, 1945. The company defended on the ground that the policy contained the following provision: "If within two years following the date of issue of this policy and while it is in full force, the insured, whether sane or insane, shall die by his own hand or act, the Company will be liable only for the amount of the premiums paid hereon, which amount shall be paid in one sum to the beneficiary herein." The com-

pany alleged that the insured died by his own act; and that its liability was to pay the amount of the premiums paid, which amount it tendered to the plaintiff. Trial was had resulting in a verdict and judgment for the plaintiff for the full amount of the insurance. Defendant appeals. We affirm the judgment of the trial court.

Plaintiff is the mother of the beneficiaries. Plaintiff and the insured were married in 1933 and divorced in 1944. Insured remarried. The policy, introduced by plaintiff, contained the clause upon which defendant relied. The proof of death, signed by a physician and admitted in evidence without objection on cross-examination of plaintiff, recited that the immediate cause of death was "Muriatic Acid Poisoning Self administered"; that contributing causes were "Toximia, and errosion of the stomach mucosa." The form then included this question: "(a) Was there a post mortem examination? (b) If so, by whom and what did it disclose?" The answer to (a) was "Yes." The answer to (b) was "Self - Muriatic Acid Poisoning." It was stipulated that the policy was in full force and effect at the date of the death of the insured. With the evidence as above, plaintiff rested.

Defendant's evidence, in a somewhat chronological order, was as follows. On December 21, 1945, a man of medium height and dressed in working clothes bought a bottle of muriatic acid at a pharmacy. The acid was delivered in a round bottle about seven or eight inches high and three inches in diameter. It was labeled "Muriatic Acid" "Poison" with skull and crossbones on the pharmacy label. Generally a brown bottle was used as a container in selling this acid. It is a common article of merchandise and often sold by druggists for cleaning purposes and used by plumbers in soldering. The salesman viewed the insured's body after death. He was unable positively to identify the insured as the purchaser of the acid.

The next events rest largely upon the testimony of the insured's stepson. At times it is confusing and conflicting. On direct examination he told of going home about six in the evening of December 21. His mother was away caring for an aunt. He testified that he found his stepfather lying on a davenport in a room adjoining the kitchen, coughing up blood into a pan. On the kitchen cabinet he found a white glass bottle about six inches high and about two and one-half inches in diameter, marked "Poison" with skull and crossbones. He took it outside and broke it against the house. He later described the bottle as having a "short neck" and the liquid as being up into the neck when he found it. He got some clothes for his mother and went to his aunt's and told his mother what had happened. He then returned about 10 or 10:30 with an uncle, found his stepfather still on the davenport, and still vomiting into the pan. The witness took jewelry and money of his mother and went to his uncle's home. On cross-examination the witness testified that before the evening in question insured appeared to have been drinking. His deposition had been taken previously, and he admitted he had testified by deposition that when he came home at 6 the insured "walked in the door as I came out." He testified that insured was "humped over" and did not walk very well, and "You could tell from his eyes he had been drinking; he glared." He further testified that he returned to the home about 8:30 or 9 p. m., and that insured was then on the couch and he had no conversation with him at the time. It was on this trip that he said he found and broke the bottle.

The evidence also is that during the night the insured's wife made complaint to the police, and two policemen and the stepson again went to the home about 6 a. m. on December 22. They found insured upstairs and in bed. They had him dress and took him to the police station. One of the policemen went outside and found

a part of a broken bottle. It is in evidence. It is of clear rounded glass; the torn label remaining has in typing "atic acid," and then in red printing "nts" "son" "buted by" "Ph."

The defendant on direct examination of the stepson asked him if he talked to the insured when he was lying on the davenport coughing up blood. He answered, "No—I asked him what was the matter with him." The parties allowed the answer to stand. He was not then asked what the insured answered, if anything. On cross-examination he was asked if he had any conversation with insured when he was on the couch. He answered, "No." He answered that insured made no statements to him when he returned the third time with his uncle. He further testified that the insured made no statement to him at the time he returned with the police officers, but did to the police officers. He was asked what that statement was, and on objection of the defendant was not permitted to answer. The witness then stepped aside temporarily.

The police surgeon was called as a witness and testified that he first saw the insured at the city jail; that the insured was not intoxicated at that time; that he examined him; that he asked him what his trouble was and insured said, " 'I tried to kill myself.' * * * 'I have been drinking and quarreled with my wife. I wanted to die' "; that he had taken muriatic acid; and that there were no burns in insured's mouth and he doubted insured's story of taking the acid. The surgeon further testified that he made a post mortem and found in the esophagus and stomach the evidence of a severe burn; that the acid was "probably gulped down"; that muriatic acid is a slow-acting poison; that a teaspoonful would kill a man and that vomiting is an important symptom; and that he signed the proof of death to which reference has been made, and a death certificate was filed.

After the police surgeon had testified the stepson was

recalled and was asked on cross-examination about the time he was there with the police officers and if the insured made any statement to him about poison. He answered, "No." He then was asked as to his deposition and as to whether or not he had been asked this question and given this answer: " 'Q. That he had taken poison? A. That he accidentally, oh, well, he said that he - well, he didn't come out and say it, but he told me that he got ahold of the wrong bottle, that is the very words he said.' " Over objection that it was hearsay, improper method of impeachment, not part of the res gestae, and not proper cross-examination, he was permitted to answer. He said, "Well, yes."

The plaintiff in rebuttal produced as a witness one of the police officers who testified to going to the home on the morning of December 22 and asking the insured what the trouble was. He then was asked to state what the insured said. The defendant objected to the question because "it is now shown this witness made an inquiry * * * as to what the trouble was," and further that it was no part of the res gestae, too remote, hearsay, and not binding upon the defendant. The court permitted the witness to answer. The witness stated the insured said he had been drinking and drank something by mistake and that on the way to the station the insured said he "drank this stuff by mistake" and wanted a doctor. A motion to strike was made and overruled.

The defendant moved for a directed verdict. The motion was overruled.

As to the evidence, defendant assigns as error (1) the overruling of its motion for a directed verdict, and (2) "The Court erred in receiving in evidence testimony of witnesses, Walter Wilson and Jack Tinsman, over the objection of the defendant. (Such testimony was hearsay, not res gestae, narrative of a past event, obtained as a result of inquiries directed to Leo J. Allen, and not spontaneous. The continuity was broken.)" Walter

Wilson is the police officer; Jack Tinsman is the stepson whose evidence has been recited.

The determination of the first assignment requires first a determination of the second.

Defendant argues that the evidence of the two witnesses named relating statements made by insured was inadmissible for the reasons given, and at the same time argues that the evidence of the police surgeon relating statements made by the insured was admissible. Defendant's contention as to the admissibility of the police surgeon's testimony is based on the following provision in the Application for Insurance: "I expressly waive, to such extent as may be lawful, on behalf of myself and of any person who shall have or claim to have any interest in any policy issued hereunder, all provisions of law forbidding any physician or other person who has attended me or examined me, or who may hereafter attend or examine me, from disclosing any knowledge or information acquired thereby, and I expressly authorize such physician or other person to make such disclosures."

The effect of the waiver is to remove the prohibition of section 25-1206, R. S. 1943, and to permit the physician to testify. Falkinburg v. Prudential Ins. Co., 132 Neb. 831, 273 N. W. 478. It places the witness on a parity with any other witness. It unlocks the lips of the witness and makes him competent to testify. The evidence of the physician, when the waiver is made, is subject to the same rules that apply to any other witness. It would be a manifest injustice to construe the waiver clause so as to permit the insurer to offer evidence through the lips of a physician and at the same time bar all other evidence of like character by other witnesses.

The trial court did not permit the introduction of the evidence here questioned until after the defendant had introduced the testimony of the physician as to statements made by the insured. The statements made to

the physician were the last in time of those attributed to the insured.

The cross-examination was proper unless there inhered in the statement made matter which was not admissible as evidence. Either one of two situations must be true. If the evidence of the physician as to the statements made to him by insured was competent and admissible, then the evidence of the statements made to the stepson and policeman likewise was competent and admissible, and that ends the matter. If the evidence of the stepson and policeman was incompetent and inadmissible, then likewise and for the same reasons the evidence of the physician was incompetent and inadmissible. The defendant in that event is confronted with the rule that a party may not successfully complain of the introduction of evidence of a like character to that which it has introduced. Serratore v. Miller, 130 Neb. 908, 267 N. W. 159; Hoagland & Co. v. Scottish Union & Nat. Ins. Co., 131 Neb. 112, 267 N. W. 242. See, also, Modern Woodman Accident Ass'n v. Shryock, 54 Neb. 250, 74 N. W. 607. The fact that the evidence of defendant was received without objection by plaintiff does not affect the application of the rule. The material fact is that defendant offered the evidence and it was received.

Under the circumstances here the assignment of error is not sustained.

This brings us back to defendant's first assignment that the trial court erred in overruling defendant's motion for a directed verdict. Defendant contends that the undisputed facts and circumstances lead naturally, rationally, and unmistakably to but one conclusion, and that is that insured came to his death by suicide.

In an action upon a policy of life insurance the burden of proof is upon the defendant to prove by a preponderance of the evidence a controverted defense that the insured died as a result of poison self-administered with suicidal intent. Schrader v. Modern Brotherhood

of America, 90 Neb. 683, 134 N. W. 267; Falkinburg v. Prudential Ins. Co., *supra*. See, also, Modern Woodmen of America v. Kozak, 63 Neb. 146, 88 N. W. 248; Scherar v. Prudential Ins. Co., 63 Neb. 530, 88 N. W. 687; Sovereign Camp of the Woodmen of the World v. Hruby, 70 Neb. 5, 96 N. W. 998; Hardinger v. Modern Brotherhood of America, 72 Neb. 860, 101 N. W. 983, on rehearing, 72 Neb. 869, 103 N. W. 74; Walden v. Bankers Life Ass'n, 89 Neb. 546, 131 N. W. 962. The trial court instructed the jury in accord with these decisions in the following language: "You are instructed that the burden of proof is upon the defendant insurance company in this case to prove by a preponderance of the evidence that the insured, Leo J. Allen, died as the result of poison, self-administered, with suicidal intent. In this connection you are instructed that suicidal intent means a voluntary self-killing with the intention on the part of said Leo J. Allen to produce death. Death by accident or mistake or even as the result of some act done intentionally, but without the intention to produce death, is not suicide for the purposes of this case. Accordingly, if the defendant has proved by a preponderance of the evidence that the insured, Leo J. Allen, did take poison with the intent of taking his own life, and as a result thereof he died, then your verdict will be in favor of the defendant. However, if the defendant has failed to prove the foregoing proposition by a preponderance of the evidence, then your verdict will be for the plaintiff." The defendant makes no objection to this instruction here.

The statement made by the doctor, contained in the proof of death, that death was caused by self-administered poison obviously was based on what the insured allegedly told the physician and does not go to the extent of admitting suicide. In the second answer in the statement by the physician, "Self - Muriatic Acid Poisoning," the "Self" obviously refers to the "by whom" in the question and is that the physician making the

statement performed the post mortem. Such statements are not conclusive of the fact. Modern Woodmen of America v. Kozak, *supra.*

To hold that the court should have directed a verdict for the defendant would be to decide that important fact question that this evidence presents as to whether the insured took the poison intending to commit suicide or by mistake. The trial court did not err in denying the motion for a directed verdict.

Defendant further assigns as error the refusal of the court to give certain tendered instructions. These will be reviewed in the light of the rule that "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." Blanchard v. Lawson, 148 Neb. 299, 27 N. W. 2d 217.

Defendant requested the giving of these instructions and assigns the refusal to do so as error:

"You are instructed that the presumption against suicide is only a rule of evidence concerning which party shall first go forward with the evidence to sustain the matter, but this presumption disappears when evidence to the contrary is introduced."

"You are instructed that the presumption against suicide prevails when the cause of death is unknown, but disappears when evidence is introduced tending to show the cause of death."

It is noted that these tendered instructions made no reference to the burden of proof.

The trial court instructed the jury that "* * * in the absence of evidence to the contrary, the legal presumption is always against suicide, * * *." See instruction No. 5 hereinafter quoted. This seems fairly and clearly to state the substance of the requested instructions. The error assigned is without merit. See Falkinburg v. Prudential Ins. Co., *supra.*

The defendant assigns as error the refusal to give

requested instruction No. 4. It is:. "You are instructed that the suiside (sic) clause in the policy in suit, in the following language: (clause copied) is valid and enforceable." Defendant contends that the trial court should have advised the jury definitely as to this clause and that the beneficiaries were bound by the insured's contract with the company in this regard. As we read the instructions, the trial court in effect did so. The trial court in instruction No. 2 outlining defendant's answer set out the clause and that defendant alleged that by reason of the death of the insured by his own act within two years of the date of issue of the policy, it became liable for only the amount of the premiums, which it tendered. This was followed by instruction No. 4 above set out. Obviously, the defense was based on the clause in the policy and certainly no construction could be put on the instructions other than that the clause was a valid and enforceable contractual provision. The assignment is without merit.

The defendant assigns as error the refusal to give tendered instruction No. 7, which is as follows: "You are instructed that where the suicide clause is in the language as set forth above in Instruction No. 4, that such is a contractual stipulation between the insured and the insurance company and the condition of the mind of the insured at the time the act was committed is immaterial, nor is it material whether or not the insured, Leo J. Allen, was unconscious of the moral and physical consequences of the act which caused his death." That part which refers to the contractual stipulation has just been answered. There is some evidence that the insured had been drinking before the event in question, but we find no evidence that required the giving of an instruction bearing upon the condition of the mind of the insured. The trial court did not err in refusing to give the tendered instruction.

Defendant assigns as error the giving of instruction No. 5. It is as follows: "You are instructed that, in

the absence of evidence to the contrary, the legal presumption is always against suicide, and, consequently, the burden of proving self-destruction is upon the party pleading it, who, in this case is the defendant insurance company. In other words, the plaintiff in this case, Josephine H. Allen, Guardian, is not required to prove that Leo J. Allen did not commit suicide, but, rather, the defendant insurance Company is required to prove to your satisfaction by a preponderance of the evidence that he did commit suicide. If the defendant insurance company fails to establish this defense by a preponderance of the evidence, or if the evidence is evenly balanced, or if it preponderates in favor of the plaintiff, then and in all of such cases your verdict shall be for the plaintiff."

Defendant's first criticism of the instruction is that by the use of "prove to your satisfaction by a preponderance of the evidence," the court placed a greater burden upon it than the law requires. Defendant relies upon Hyndshaw v. Mills, 108 Neb. 250, 187 N. W. 780, where the instruction was that the defendant was required to prove to the jury's "satisfaction" that false representations were made, and upon McCord-Brady Co. v. Moneyhan, 59 Neb. 593, 81 N. W. 608, where the instruction was that a waiver "must be clear and unequivocal, and must be established by a preponderance of the evidence." We held that the instructions in the above case required more than a preponderance of the evidence and were prejudicially erroneous.

The rule is: "Instructions should be considered together in order that they may be properly understood, and when, as an entire charge, they properly submit the issues to the jury, the verdict will not be set aside for harmless error in one of them." Blanchard v. Lawson, *supra.*

The use of the language objected to is at most a harmless error under the instructions that were given. It is noted that in instruction No. 4 the court used the words

"preponderance of the evidence" twice in that instruction, and in instruction No. 5, after the criticized language, "the preponderance of the evidence" again was made the test. By instruction No. 7, the court defined "preponderance" as follows: "By a preponderance of the evidence is meant, not necessarily the greater number of witnesses, but a preponderance means that amount of the evidence which on the whole produces the stronger impression upon you and convinces you of its truth when weighed against the evidence in opposition thereto." The defendant does not criticize this instruction. Under these circumstances it appears that the jury would not have been misled as to the proof required. See Blackburn v. Martin & Mueller, 174 Okla. 394, 50 P. 2d 627.

Defendant further complains that the instruction was complete in itself and by unduly emphasizing the defendant's burden, it authorized a verdict only for the plaintiff and made it impossible for the jury to find for the defendant. Instruction No. 5 must be read in connection with instruction No. 4, which it amplifies. By instruction No. 4, the jury was told that if the defendant had proved by a preponderance of the evidence its defense of suicide, then the verdict was to be for the defendant. By instruction No. 5, the jury was told that the burden was on defendant to prove suicide and not on the plaintiff to disprove suicide, and that the jury should find for the plaintiff if defendant had failed to prove its defense. The instruction, in a sense, was repetitious of instruction No. 4, but was not prejudicially erroneous.

The judgment of the trial court is affirmed.

AFFIRMED.

PAINE, J., dissents.

ANTON SPORCIC, APPELLEE, V. SWIFT & COMPANY, A CORPORATION, APPELLANT.
30 N. W. 2d 891

Filed February 6, 1948. No. 32381.

1. **Workmen's Compensation.** In making a case for compensation under the workmen's compensation law, more than a preponderance of evidence is not required.
2. ———. 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.
3. **Evidence.** Persons engaged in performing services of the same character as those to be valued, and persons who have knowledge of the business in and for which the services have been rendered and of their value, may give their opinion as to the value of the services.
4. **Workmen's Compensation.** An employee may be totally disabled for all practical purposes and yet be able to obtain trivial occasional employment under rare conditions at small remuneration. The claimant's status in such respect remains unaffected thereby unless the claimant is able to get, hold, or do any substantial amount of remunerative work either in his previous occupation or any other established field of employment for which he is fitted.
5. ———: **Attorney and Client.** The Supreme Court may allow an employee a reasonable sum as attorney's fees for proceedings in such court when the employer appeals from the district court to the Supreme Court and fails to obtain any reduction in the amount of the award.

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

Rosewater, Mecham, Shackelford & Stoehr, for appellant.

Eugene D. O'Sullivan, Arthur J. Whalen, and *Eugene D. O'Sullivan, Jr.,* for appellee.

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

MESSMORE, J.

This is an appeal from a judgment of the district

court for Douglas County granting compensation to the plaintiff under the Workmen's Compensation Act. The cause was originally tried before a judge of the Nebraska Workmen's Compensation Court and dismissed September 19, 1945, for want of sufficient evidence to sustain the finding that the plaintiff's disability was caused by or due to an accident while in the course of his employment. On October 2, 1945, or within 14 days from the date of the dismissal of the cause, the plaintiff filed a petition in the district court setting forth his employment; the factual situation with reference to the accident; the disabilities received therefrom; the wages he was earning at that time; and praying for compensation, medical and hospital expenses and other and further relief. The petition further alleged that the judge of the Workmen's Compensation Court erred in dismissing the plaintiff's cause, and in due time the plaintiff waived a rehearing before the Nebraska Workmen's Compensation Court and gave notice of appeal to the district court.

The defendant filed a special appearance objecting to the jurisdiction of the district court over the subject matter for the reason that no lawful, proper, or sufficient petition was filed by the plaintiff in the district court within 14 days after the order of dismissal made by the Workmen's Compensation Court.

The defendant argues that plaintiff's petition in the instant case failed to have attached to it the pleadings and orders of the Workmen's Compensation Court as required by law, citing Hansen v. Paxton & Vierling Iron Works, 135 Neb. 867, 284 N. W. 352, to the effect that the petition on appeal in the cited case, from the compensation court, included a copy of the pleadings before the Workmen's Compensation Court, setting forth the issues, and also the order of dismissal of the Workmen's Compensation Court.

In the instant case the petition was amended by interlineation to include the petition, answer and order

as exhibits to be attached to the petition, which was apparently after the 14-day period.

In the cited case, followed by Bell v. Denton, 136 Neb. 23, 284 N. W. 751, there was no specific requirement that the pleadings, orders and findings of the Workmen's Compensation Court be attached to the petition on appeal. Section 48-181, R. S. Supp., 1945, which provides for direct appeal when rehearing is waived before the Nebraska Workmen's Compensation Court to the district court, makes no such requirement that such pleadings, orders or findings be attached to the petition on appeal to perfect such appeal where the petition sets out the errors of the compensation court and alleges that rehearing was waived and notice of appeal given in due time.

The trial court did not err in overruling the special appearance.

After trial de novo in the district court, the court decreed that on October 10, 1944, the plaintiff, while in the employ of the defendant, earning wages in excess of $40 per week, received personal injuries caused by an accident arising out of and in the course of his employment; that as a result of the accidental injuries plaintiff was temporarily, totally disabled from October 10, 1944, to November 22, 1944, and had been paid all compensation due him from the defendant for said period of time; that the plaintiff, as a result of the accidental injuries, "has been totally and permanently disabled from the 22nd day of May, 1945, until the present time, and will be totally and permanently disabled for the remainder of his life and is entitled to receive the sum of $15.00 per week from the defendant beginning May 22nd, 1945, for a period of 300 weeks from said date and thereafter the sum of $12.00 per week for the remainder of his life, as and for total permanent disability"; and, further, that defendant pay to Dr. Willard H. Quigley the sum of $200 and to Dr. Fred J. Schwertley the sum of $25, and pay to plaintiff the

additional sum of $86.40 paid by him as necessary hospital and medical expense.

Upon the overruling of a motion for new trial, the defendant appeals.

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

The defendant contends that the plaintiff has failed to prove by a preponderance of the evidence that he has an ailment caused by accidental injury sustained in the course of and out of his employment.

It appears from the record that the plaintiff, 36 years of age, was employed by the defendant intermittently from 1933 to 1936, and more steadily from 1939 until about May 27, 1945. He worked as a bacon slicer, using a machine to do the slicing. The bacon was kept in a cooler about 15 feet distant from where he worked. On October 10, 1944, at approximately 2:45 in the afternoon, he was going to the cooler to get some more bacon to slice. He opened the cooler door, which was five or six inches thick and weighing between 250 and 300 pounds, by pulling the door toward him. At the same time his immediate supervisor opened a door in close proximity to the cooler door, and pushed it, the result being that the plaintiff was caught between the two doors, the cooler door striking him in the chest and the other door in the back, placing the plaintiff in what has been called a "squeezing" position. He received injuries to his back, causing severe pain. About 3:30 p.m. he went to see the nurse employed by the defendant. She told him to return the next morning. He was then sent to Dr. Hansen who applied heat treatments, and then to Dr. Hill who gave no treatments but took some X-ray pictures. The casualty representative of the defendant then sent him to Dr. Johnson, where he received some heat treatments. The doctor later taped his back and then subsequently removed the tape and applied more heat treatments.

The plaintiff received compensation for a period of

six weeks for total, permanent disability. Thereafter Dr. Johnson taped his back and fitted him with a brace which apparently helped him. He returned to work and was assigned to a different type of work, that is, nailing box lids and stamping the boxes with a machine. He testified that he suffered pain in the left side and lower ribs, which bothered him when he did any bending. On account of the pain, he left his employment on or about May 27, 1945. On May 26, 1945, he went to see his family doctor, for the reason that the casualty representative of the defendant informed him there was nothing wrong with him and the doctor had released him. The family doctor sent him to a hospital where he was given penicillin treatments, and also applied a cast from his hip joints up to and under the shoulder blades. He wore the cast for three months, when it was removed. He was then fitted with a canvas belt with steel braces. The belt was 14 to 16 inches in width. He wears the belt most of the time, and is unable to do any lifting.

It further appears from the record that the plaintiff was injured in an automobile accident about December 22, 1941. As a result of such injuries, he filed a petition for damages in the district court. This petition was introduced in evidence by the defendant. It alleged in part, in substance, that the plaintiff received a severe sprain of the sacroiliac joint and of the lumbosacral joint, causing permanent disability which could not be determined at that time. This case has not been tried. On October 11, 1944, the plaintiff signed a statement wherein he said, in part, that about two and a half years previously he suffered a back injury in an automobile accident for which he took treatments, the last one being four or five months previous to the present accident, and that the X-rays showed nothing except strains at that time.

Plaintiff further testified that when he returned to work he received 73½ cents per hour, which constituted

his basic pay for 40 working hours per week; that previous to the accident, doing piece work, he averaged $45 per week; that he wore an elastic belt about seven inches in width after the automobile accident, but was not wearing it in October 1944.

The plaintiff's wife testified, in substance, with reference to the automobile accident in which the plaintiff was involved in December 1941, that he complained of pain and she would massage him in the evening, and did so for about five or six months; thereafter he did not complain of pain very much; and that he did wear an elastic belt for awhile. She testified that after the accident in October 1944, the plaintiff complained of severe pain, and would walk stiffly back and forth through the rooms; that he was unable to sit down for long periods of time, and felt better walking; that he did very little around the house; that he slept badly at night and it was hard for him to get out of bed; and that he sat more on the edge of a chair with his legs stretched out, to enable him to have comfort.

Since the plaintiff quit the employment of the defendant, he has been assisting some relatives, keeping books, cashing checks, and occasionally serving drinks in a bar, for which he receives $25 per week. He works three or four hours a day, at different times of the day, when he feels like it, and the relative testified that the employment and the pay therefor is a donation, for the benefit of his family. There is also evidence that previous to his employment with the defendant, he, at times, tended bar for other persons.

Dr. Willard H. Quigley, the family doctor, testified that he had known the plaintiff for years, and that he suffered an injury to his sacroiliac joint from an automobile accident in 1941. With reference to the accident which occurred on October 10, 1944, the doctor testified he examined the plaintiff May 26, 1945. He took into consideration the history of the case, the details of the accident, and the medical treatment of doctors

who had treated him for the injuries sustained in the accident, and saw the brace that had been prescribed for the plaintiff by Dr. Johnson. He further testified that the plaintiff complained about aggravating pain in the upper back at the tenth, eleventh, and twelfth thoracic vertebrae located where the lower ribs are attached, high up in the back, and near the sacroiliac joint which is down near the sacrum, in the lower part of the back where the sacral joins with the fifth lumbar vertebrae, near the hips. One of the exhibits, an X-ray, the doctor testified, shows a very destructive process between the tenth and eleventh thoracic vertebrae where the bone of the lower portion of the tenth thoracic vertebrae is plainly destroyed. There is also a narrowing between the intervertebral spaces which may and of course probably does involve the intervertebral discs. There is also some destructive process in the eleventh and twelfth thoracic and first lumbar vertebrae. The principal injury is between the tenth and eleventh thoracic vertebrae. He pointed to a marked place on the exhibit to show an irregular and jagged outline, compared with the other vertebrae. He testified to a destructive process to the lower portion of the tenth thoracic vertebrae and irregular destructive process in the eleventh and twelfth thoracic vertebrae, by another X-ray exhibit. By examination of the plaintiff he found that plaintiff's motion was limited, painful, and incapacitating pain and tenderness over the lower thoracic vertebrae, hurting him on bending forward and backward and sitting up. His diagnosis was that there existed an aggravating traumatic back condition with probable osteoarthritis. He informed the plaintiff that he did not think the plaintiff had any hope of getting results without an ankylosis of the spine, which means stiffening or destroying the movability of the joint and making it stiff. The plaintiff was sent to a hospital, given penicillin, and put in a body cast. He was there from July 1 to July 5, and again from July

22 to July 29. He wore the body cast for about three months. The results were not gratifying. The purpose of the body cast was to give the plaintiff rest and probably help to cure an existing inflammatory condition, if there was one, and to cause an ankylosis of the spine. The doctor recommended a belt in the nature of a rigid leather or metal corset. The diagnosis the doctor made at the time of the examination was that the plaintiff was suffering with a traumatic arthritis, traumatic injury to the tenth, eleventh, and twelfth dorsal vertebrae and the first lumbar. The best treatment would be a bone splint which would probably enable him to do some work at gainful occupation. At that time he could do light work, but he complained that his back tired after two or three hours, and he had trouble sitting down; that the pain in his back was enough to incapacitate him; that he could not do any heavy lifting for any length of time; that he had very little range of motion in his back; and his ability to bend forward was practically nil. The doctor also testified that in raising his legs a certain height there would be a definite pull on the lumbar muscles and nerves, causing pain; and that he was totally disabled to do heavy work.

On cross-examination this doctor testified that the plaintiff had influenza and a streptococcic throat, which were infectious; that he presumed he remembered when the plaintiff slipped at home and wrenched his back on May 23, 1943; that he filled out a report on October 16, 1943, for the plaintiff on account of a sprained lower back, cold, and complications such as influenza, pain in the joints and back; that plaintiff was laid off from October 16 to November 1, 1943; that the plaintiff wore a belt prescribed by the doctor after the automobile accident, and that the doctor mentioned a sprained lower back as constituting his diagnosis on October 16, 1943; that on February 22, 1944, the doctor made a diagnosis of a streptococcic infection in the plaintiff's

throat; that the plaintiff had a preexisting arthritis before October 10, 1944; that the pain in the plaintiff's back was constant and aggravated by lifting and bending, and plaintiff was, in fact, physically unable to work from February 28, to April 18, 1944; and that he was afflicted with a streptococcic throat and acute rheumatism. On June 2, 1944, this doctor attended the plaintiff for migrating infection following pneumonia, and the plaintiff was unable to work due to quinsy and arthritis until about July 10, 1944.

Dr. F. J. Schwertly testified for the plaintiff that he examined him on or about July 23, 1945, and found tenderness in his back and pain on motion. He related the history of the accident, and testified that the plaintiff had been wearing a brace which he felt was too loose and if the plaintiff was immobilized by a snug-fitting cast it would give him relief from constant pain, so they applied a snug-fitting cast and gave him penicillin. He further testified that the X-ray showed a narrowing between the ninth and tenth dorsal vertebrae and at the bottom of the eleventh, caused by trauma connected with the accident of October 10, 1944. The doctor gave his opinion that the plaintiff was 100 percent disabled from performing the duties of his former occupation.

Dr. George M. Hansen testified for the defendant, that he examined the plaintiff October 11, 1944, and found no indication of ecchymosis or bruising or swelling to either the chest or the back.

Dr. Herman F. Johnson testified that on October 23, 1944, he examined the plaintiff and at that time there was no evidence of bruises, swelling or ecchymosis; and that there was no evidence of fracture or dislocation. He, the plaintiff, had a congenital abnormality of the lumbar spine and claimed a low back pain, but there was no positive evidence of trauma. A brace to give support to the lower back was recommended. The doctor was informed of the history of the automobile

accident; and that according to the record and history of the mechanism of the injury of October 10, 1944, it was to the mid-chest and mid-back region, while pain complained of was with reference to the low back, especially where he had a congenital condition. He testified that the compression which the plaintiff claimed was sustained on October 10, 1944, had nothing to do with the symptoms in the plaintiff's lower back; and that the pain complained of, as shown by the plaintiff's petition in the automobile damage case, would account for the low back symptoms, and the congenital condition would aggravate such symptoms. This doctor saw the plaintiff for the last time on May 9, 1945, and gave as his opinion that at that time he had completely recovered.

On cross-examination this doctor testified he prescribed a low back brace and recommended a plaster cast at one time, but there is no record that this was applied; and that the plaintiff was totally disabled at the time. On May 9, 1945, the plaintiff was still complaining, and the doctor recommended discontinuing the physiotherapy, heat, and massage. There was evidence of arthritis in the upper lumbar spine. From an exhibit, the doctor testified that the condition as described by him showed a congenital abnormality in the lumbosacral spine, and some lipping or growth of new bone along the margins of the first lumbar. The doctor further testified that certain types of trauma localize arthritis, but not the type the plaintiff had, because this was more a compression of his trunk, a squeezing, rather than an actual injury to the spine, which in that region is pretty well protected from a squeezing injury or a compression type injury; and that the condition would not be aggravated or localized by trauma, but would be more apt to be aggravated by a twisting type of injury, or pulling type of injury.

This doctor testified that from the description of the compression injury received from the plaintiff, appar-

ently he was caught between flat surfaces which would be more apt to produce major pressure on the chest and muscles of the back, than on the spine. His spinal symptoms were independent of that type of injury, and he did not see how they could produce the spinal symptoms.

In examining an exhibit upon which a mark was placed identifying the plaintiff's complaint of pain which was between the eleventh and twelfth dorsal vertebrae, the doctor said there was productive change or overgrowth of bone, and some narrowing of the space between the eleventh and twelfth dorsal vertebrae; that it was a part of this arthritic change which had produced some narrowing and degeneration of the disc between the two vertebrae; that there was no destruction of the bone between the eleventh and twelfth dorsal vertebrae; and there were productive changes along the margins.

Dr. J. E. Courtney testified for the defendant that after getting the plaintiff's history and examining the X-rays, he concluded that the plaintiff was not suffering from a compression injury occurring October 10, 1944; that plaintiff could work as a bartender without difficulty, and as a cashier, but would have distress with his back at the end of the day because of his congenital conformation; he detected no evidence of any serious injury, of a compression injury between the chest and the back; that the plaintiff could do average lifting; that there is an absence of any definite findings of bone injury; that the accident itself entailed a squeezing in an upright position, whereas spinal injuries come from a twisting or sudden bending, not from a compression; and the finding of the congenital abnormality as outlined, led to the conclusion that the present backache and the present disability were due to that condition. The trauma in the chest squeezing incident had no part in producing plaintiff's present physical condition as to his back or chest. This doctor concluded that the congenital condition was

the cause of the disability, and that arthritis was incidental to it.

On cross-examination this doctor was asked to explain the fact that the plaintiff worked at heavy work from 1939 to 1944, steadily, except for short periods of illness due to colds or influenza or something like that, and then apparently could not work for a period of seven weeks immediately following the accident. His answer was: "Then it would be only logical to conclude that it was due to his back being sore and painful from his accident." He was then asked, "And if he was then partly disabled following that, and went back to work and did light work, would your conclusion still be the same, that it was due to the accident?" The answer was "Yes, sir."

We have set forth in considerable detail the testimony of the medical experts which is in direct conflict and, as far as the record stands at this time, such opposing medical experts have testified on the one hand that the plaintiff is totally disabled from the accident involved, and will continue so indefinitely; on the other, that he has absolutely no existing disability from the accident.

It is apparent from the record that on October 10, 1944, the plaintiff suffered an injury due to an accident arising out of and in the course of his employment. We are here concerned with the degree of disability suffered, and its extent.

According to the defendant's medical experts, the injuries about which the plaintiff complains could not have occurred by virtue of the accident of October 10, 1944, for the reason that the accident entailed a "squeezing" when the plaintiff was in an upright position, and spinal injuries of the nature and kind about which the plaintiff complains come from a twisting or sudden bending of the body, and not from a compression; and that the congenital abnormality existing in the plaintiff's back is the cause of the present disability. While the evidence

is not clear as to whether or not the plaintiff, when he was caught in a trap between two doors, twisted his body or suddenly bent in some direction, it seems only reasonable and natural that a person so trapped would endeavor to extricate himself, which the plaintiff obviously did, and in doing so, the very position in which he was caught, as shown by the testimony, would indicate that he would twist his body, or bend it, to escape.

It appears from the evidence that the plaintiff at various times had infectious diseases and had suffered injury from a prior accident; also that he had an arthritic condition to his spinal column prior to the occurrence of the accident of October 10, 1944, which created no noticeable impairment of the strength or use of his back during the course of his employment. After the accident and injury complained of, an impairment commenced, and the injuries received were ample cause of the same, irrespective of the preexisting arthritic condition. The disability of the plaintiff at least amounts to a traumatic arthritis which, under the facts in this case, must be deemed to have arisen out of and in the course of the employment of the plaintiff, and therefore is compensable.

The following authorities are applicable in principle to the case at bar.

"In making a case for compensation under the workmen's compensation law, more than a preponderance of evidence is not required." Chatt v. Massman Construction Co., 138 Neb. 288, 293 N. W. 105.

"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." Yakal v. Henkle & Joyce Hardware Co., 145 Neb. 365, 16 N. W. 2d 531. See, also, Gilcrest Lumber Co. v. Rengler, 109 Neb. 246, 190 N. W. 578; Skelly Oil Co. v. Gaugenbaugh, 119 Neb. 698, 230 N. W. 688; Chatt v. Massman Construction Co., *supra;* City of Omaha v. Casaubon, 138 Neb. 608, 294 N. W. 389; Palmer v. Sample,

141 Neb. 36, 2 N. W. 2d 583; Maul v. Iowa-Nebraska Light & Power Co., 137 Neb. 128, 288 N. W. 532, on rehearing, 137 Neb. 137, 289 N. W. 767; Dymak v. Haskins Bros. & Co., 132 Neb. 308, 271 N. W. 860.

It is obvious that the evidence in the instant case is irreconcilable and in direct conflict. This being true, this court will consider the trial court's observation of the witnesses and their manner of testifying, and also that the trial court must have accepted one version rather than the opposite. See Peterson v. Winkelmann, 114 Neb. 714, 209 N. W. 499; Graham Ice Cream Co. v. Petros, 127 Neb. 172, 254 N. W. 869.

The defendant predicates error on the ground that no proper or sufficient foundation was laid as to the services, or reasonable value of the services, of Dr. Willard H. Quigley, Dr. James Kelly, or the hospital and medical services. Dr. Quigley gave his opinion as to the reasonable value of such services. He was familiar with the services, as he rendered services himself, and the hospital items were under his direction. He also knew about the charge made by Dr. Kelly, as being reasonable.

Persons engaged in performing services of the character performed by the plaintiff's physician and who have knowledge of the business in and for which the services have been rendered, and of their value, may give their opinion as to the value of the services. See 32 C. J. S., Evidence, § 545, p. 320; 20 Am. Jur., Evidence, § 901, p. 757; In re Estate of Baker, 144 Neb. 797, 14 N. W. 2d 585.

The defendant contends that if there is any liability in this case the basis of allowance would be as determined in Micek v. Omaha Steel Works, 136 Neb. 843, 287 N. W. 645, that is, on a basis of payment of compensation for partial disability in the amount of 66⅔ percent of the difference between the basic wages received at the time of the alleged injury of $29.40 per week, and the basic wages and earning power of the plaintiff there-

after wherein he earned $25 per week as heretofore indicated by the evidence.

There were two questions determined in the Micek case, *supra*: First, was Micek partially or totally disabled? Second, what rate of compensation should he receive? On the first question it was determined that Micek was not totally disabled, and in reaching that conclusion his then ability to earn in another field of employment was considered. Here, there has been a final determination that the plaintiff was totally and permanently disabled, and there is no evidence to show that he is able to get, hold, or do any substantial amount of remunerative work either in his previous occupation or in any other established field of employment for which he is fitted. Until such facts are established or shown by competent evidence, the Micek case does not apply. See Yakal v. Henkle & Joyce Hardware Co., *supra*.

The fact that the plaintiff has been doing light work does not bar him from recovering compensation. In Elliott v. Gooch Feed Mill Co., on rehearing, 147 Neb. 612, 24 N. W. 2d 561, this court held: "An employee may be totally disabled for all practical purposes and yet be able to obtain trivial occasional employment under rare conditions at small remuneration. The claimant's status in such respect remains unaffected thereby unless the claimant is able to get, hold, or do any substantial amount of remunerative work either in his previous occupation or any other established field of employment for which he is fitted."

Section 48-125, R. S. 1943, provides, in substance, that in the event an employer appeals an award from the district court, which is in favor of an employee, to the Supreme Court and fails to obtain any reduction in the amount of such award, the Supreme Court may allow the employee a reasonable sum for attorney's fees for proceedings in such court. We fix the attorney's fees in the sum of $250 for services rendered by plaintiff's attorneys in this court.

According to the record, the total permanent disability of the plaintiff was ascertained on May 26, 1945. We modify the court's decree to read May 26, 1945, instead of May 22, 1945.

Other errors raised by the defendant are without merit. The decree of the district court is affirmed as modified.

AFFIRMED AS MODIFIED.

LUCILLE O'DELL, ADMINISTRATRIX OF THE ESTATE OF JUDD MARION O'DELL, DECEASED, APPELLANT, V. TILDEN A. GOODSELL ET AL., APPELLEES.

30 N. W. 2d 906

Filed February 6, 1948. No. 32306.

1. **Negligence.** If one comes to his death because of the failure of another owing due care to exercise care for his safety, that other is bound to respond in damages for his failure.
2. **Sheriffs and Constables: Prisons.** The sheriff is by statute given charge and custody of the county jail and it is his duty to receive and keep until discharged all prisoners lawfully committed.
3. ———: **Bonds.** The sheriff is obligated to faithfully discharge all duties required of him by law and he and the surety on his official bond are required to respond in damages to any person for a breach of this duty.
4. ———: **Prisons.** Beyond statutory requirements a sheriff is bound to exercise in the control and management of the jail the degree of care requisite to the reasonably adequate protection of the prisoners or inmates.
5. **Negligence.** The general rule in negligence cases is that if reasonable minds may honestly find that acts or omissions constitute negligence the question of negligence is for the jury.
6. **Sheriffs and Constables: Prisons.** The rule in the case of a charge that a sheriff as jailer has failed in the duty he owes a prisoner in his custody in consequence of which the prisoner is injured or suffers death is not different from the one obtaining generally in negligence cases.

APPEAL from the district court for Dakota County: LYLE E. JACKSON, JUDGE. *Reversed and remanded.*

George W. Leamer and *Carlos W. Goltz*, for appellant.

Warner & Warner, *John E. Newton*, *Mark J. Ryan*, and *Cook & Cook*, for appellees.

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

YEAGER, J.

This is an action by Lucille O'Dell, administratrix of the estate of Judd Marion O'Dell, deceased, plaintiff and appellant, against Tilden A. Goodsell, Sheriff of Dakota County, Nebraska, and Sun Indemnity Company of New York, a corporation, surety on the official bond of the sheriff, defendants and appellees, to recover damages for the death of the plaintiff's decedent on account of alleged negligence of the defendant sheriff.

On a trial of the cause to a jury on motion of defendants made at the conclusion of the evidence for plaintiff, the cause was dismissed on the ground that the evidence failed to sustain a cause of action in favor of plaintiff and against the defendants.

A motion for new trial was filed by plaintiff. This motion was overruled. From the judgment of dismissal and the ruling on the motion for new trial plaintiff has prosecuted this appeal.

The errors assigned are that the court erred in sustaining the motion of defendants to dismiss plaintiff's cause of action and erred in overruling plaintiff's motion for new trial.

The only question therefore for determination here is that of whether or not the charges of negligence or some of them were sustained by sufficient evidence to require submission of the issue of negligence to a jury. No evidentiary aid may be had in determining this question from any declarations of a pleading since all declarations of fact bearing upon the question of negligence made by plaintiff have been denied by defendants

and likewise all such declarations made by the defendants have been denied by the plaintiff.

It becomes necessary to ascertain what plaintiff charges to be negligence and then to ascertain whether or not the acts charged could amount to negligence, and if they could amount to negligence, then were they supported by sufficient evidence for submission to a jury. As indicated, for the purpose of ascertaining whether or not there was sufficient evidence for submission to a jury resort may properly be had only to the bill of exceptions.

On the night of December 20, 1943, the plaintiff's decedent and Ted Summers, also deceased, were locked in the county jail of Dakota County, Nebraska. At what time or for what reason or in what condition the bill of exceptions does not disclose. Apparently the sheriff and no one in his behalf remained in close proximity to the jail during the remainder of the night. In any event no one was there the following morning at about 7:15 a. m. when the caretaker of the courthouse arrived. Soon after his arrival the caretaker smelled smoke and on investigation found that the smoke was coming from the jail. He then went to the sheriff's office where he procured a key which he used to open the door of the jail. On opening the jail he found it filled with dense smoke. He entered and found plaintiff's decedent and Ted Summers on the floor of the jail, both dead.

An accurate description of the jail is not found in the bill of exceptions but this much is clear, that there was a hall or corridor and two cells. Each cell had two bunks. The jail had a cement floor, an outer door, an inner door, and two windows having clouded glass. The inner door was not closed but the outer was and plaintiff's decedent had no means of call or communication through this door. The windows apparently were hinged on the bottom and latched at the top and opened inward. The latches were about seven feet from the

floor. These windows were closed but could have been opened by the plaintiff's decedent. There was no means provided for communication from the jail through the windows or otherwise. Plaintiff's decedent was not confined to or excluded from any portion of the jail.

When found neither the body of Ted Summers nor anything in his immediate proximity was burned. The outer clothing of plaintiff's decedent which apparently had been removed and what appeared to have been mattresses or bed clothing and equipment on which he had lain had been destroyed by fire and his body was badly burned. There was no evidence of struggle on the part of either of the deceased persons.

A doctor who had examined the plaintiff's decedent after his death was called and testified that he died from suffocation.

It is on these facts that plaintiff predicates her charge of negligence against the defendant sheriff. She asserts that his negligence consisted of the following: (1) That the defendant sheriff failed to have a guard or custodian in charge of the jail, (2) that the defendant sheriff failed to provide fire protection on the night in question, and (3) that the defendant sheriff failed to provide proper ventilation for the jail, which failure was responsible for the death of the plaintiff's decedent.

Negligence is also predicated upon the proposition that the sheriff permitted Ted Summers, an intoxicated person, to be at large in the jail and to have and use matches therein, but this must be disregarded since there is no evidence that Ted Summers was intoxicated or that he or any one else had or used any matches in the jail. Also no error is predicated on this charge.

We think it is a sound statement of legal principle to say that if plaintiff's decedent came to his death because of the failure of the defendant to exercise due care for his safety then the defendant is bound to respond in damages for his failure.

The sheriff is by statute given charge and custody of the county jail and it is his duty to receive and keep until discharged all prisoners lawfully committed. § 23-1703, R. S. 1943.

The sheriff is obligated to faithfully discharge all duties required of him by law and he and the surety on his official bond are required to respond in damages to any person for a breach of this duty. § 11-112, R. S. 1943.

Beyond statutory requirements a sheriff is bound to exercise in the control and management of the jail the degree of care requisite to the reasonably adequate protection of the prisoners or inmates. Ratliff v. Stanley, 224 Ky. 819, 7 S. W. 2d 230, 61 A. L. R. 566; 57 C. J., Sheriffs and Constables, § 512, p. 899; Kusah v. McCorkle, 100 Wash. 318, 170 P. 1023; Eberhart v. Murphy, 110 Wash. 158, 188 P. 17, on rehearing, 113 Wash. 449, 194 P. 415; State of Indiana v. Gobin, 94 F. 48.

The general rule in negligence cases is that if reasonable minds may honestly find that acts or omissions constitute negligence the question of negligence is for the jury. Johnson v. Mallory, 123 Neb. 706, 243 N. W. 872. See, also, Patterson v. Kerr, 127 Neb. 73, 254 N. W. 704; Markussen v. Mengedoht, 132 Neb. 472, 272 N. W. 241.

The rule in the case of a charge that a sheriff as jailer has failed in the duty he owes a prisoner in his custody in consequence of which the prisoner is injured or suffers death is not different from the one obtaining generally in negligence cases. Eberhart v. Murphy, *supra.*

Under the decisions cited we are of the opinion that the facts charged could amount to negligence. These decisions also point to a conclusion that the question of the existence of negligence under the circumstances outlined in the bill of exceptions was one of fact and not one of law.

We think it was error for the trial court to refuse to submit to a jury the failure of the sheriff to provide a

guard for the jail in its described condition and the proper inferences to be drawn from such failure. We also think it was error for the court to refuse to submit to a jury the question of the adequacy of ventilation under the circumstances and the failure to make outside communication available and the proper inferences to be drawn from these circumstances.

We think that the question of whether or not the sheriff under the circumstances failed to respond to his duty to the plaintiff's decedent, in the light of the potential for danger of which he knew or in the ordinary exercise of his faculties for observation and understanding should have known, was a question for determination by a jury.

Accordingly it must be said that there was sufficient evidence upon which to submit the issue of negligence of the defendant sheriff to a jury and the court erred in dismissing plaintiff's action.

The judgment of the district court is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

LANDIS, District Judge, dissenting.

Regretfully, I find myself in disagreement with the majority opinion.

Time was when absolute liability was the rule. Absolute liability for one's acts is today the exception; there must be some tinge of fault, whether willful or negligent. We must inject into ancient formalism and conjectures a common sense more appropriate to our time.

The determination of the dismissal should under all circumstances be in harmony with what a rational and fair person would do. In weighing conflicting interests, the interest that is better founded and more worthy of protection should prevail. It is not what I believe is right. It is what I may reasonably believe some other man of normal intellect and conscience might reasonably look upon as right.

Appellant pleads seven acts of negligence. The evidence in support thereof completely fails to show any

causal relationship between these and any acts or omissions of the sheriff. On the other hand, it shows that the sheriff at all times acted as an ordinary and reasonably prudent officer should act.

The record amply sustains what appellant states in her brief: "We believe that the fair inferences from the facts are that the deceased pulled out the four small mattresses from the bunks in the jail, put them in the southeast corner of the bull pen, laid down on them with a lighted cigarette that set fire to the edge of the mattresses and the mattresses smoldered there until all of the oxygen in the room was gone and both of the men suffocated to death therefrom. The deceased man's body evidently was burned after his death because there was no evidence of a struggle whatsoever."

The deceased came to his death by his own carelessness. For this tragic death the sheriff is in no way legally or morally responsible. The experienced trial judge properly entered an order of dismissal, which should be affirmed by this court.

W. B. ABRAHAMSON, APPELLANT, V. LESTER M. BROWN ET AL., APPELLEES.
30 N. W. 2d 675

Filed February 6, 1948. No. 32316.

Payment: Accord and Satisfaction. Payment or other performance by a third person, accepted by a creditor as full or partial satisfaction of his claim, discharges the debtor's duty in accordance with the terms on which the third person offered it.

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

J. F. Ratcliff, for appellant.

Leon L. Hines and *Fred T. Hanson*, for appellees.

Heard before SIMMONS, C. J., PAINE, MESSMORE,

YEAGER, CHAPPELL, and WENKE, JJ., and LIGHTNER, District Judge.

YEAGER, J.

This is an action by W. B. Abrahamson, plaintiff and appellant, against Lester M. Brown and others, defendants, to foreclose a real estate mortgage on 342.93 acres of land in Sections 28, 29, and 32, Township 3 North, Range 32 West, of the Sixth Principal Meridian, in Hitchcock County, Nebraska, given to secure the payment of a promissory note for $18,000. A trial was had whereupon a decree was entered dismissing plaintiff's petition. Motion for new trial was filed which was overruled. Plaintiff has appealed from the decree and the order overruling the motion for a new trial. All named defendants except Lester M. Brown defaulted and default was duly entered against them. Lilly Brown, though not named as a defendant in the petition, as wife of Lester M. Brown and defendant, joined in an answer to the petition of plaintiff.

The pertinent facts as disclosed by the record are that the defendant Lester M. Brown, who will be hereinafter referred to as Brown, on or about May 22, 1930, purchased a part of the real estate in question on written contract from one J. P. Allen for $47,625. The further terms of the contract are not important to a determination of this case. Later title to all of the land involved in the foreclosure appears to have come to Brown by deed. The indebtedness remaining from Brown to J. P. Allen under the contract continued after title had come to Brown with the land described in the contract as security. Apparently Brown never paid anything on the principal of the obligation except $3,625. He paid interest to March 1, 1931.

Brown, being in default under his contract, with the consent and assistance of J. P. Allen, made application to the Federal Land Bank and Land Bank Commissioner for a loan. On November 7, 1934, loans were approved. The

loan from the Federal Land Bank was $5,000 and the one from the Land Bank Commissioner $2,500. The loans were approved on condition that they would satisfy all of Brown's indebtedness except chattel mortgages on personal property and that J. P. Allen would sign the note or notes as co-maker. The conditions imposed were accepted and complied with and the loans were made. On November 15, 1934, the Citizens State Bank of Trenton by J. P. Allen agreed to accept the bonds of the Federal Land Bank in payment and satisfaction of the indebtedness under the real estate contract between J. P. Allen and Brown.

Although the acceptance was nominally that of the Citizens State Bank of Trenton there is no question but that what was done in this respect was for and on behalf of J. P. Allen. He was at all times the contracting party with Brown and does not contend otherwise.

On December 7, 1934, after agreeing to accept the bonds of the Federal Land Bank in full settlement of the indebtedness under the real estate contract J. P. Allen obtained from Brown two promissory notes each for $18,000 or a total of $36,000. This was the amount he claimed to be due under the real estate contract after receipt of the bonds from the Federal Land Bank. There can be no question but that these notes were exacted for payment of that difference. Whether these notes were secured by mortgage is not certain. In any event no mortgage was recorded.

Later, the date not being certain, J. P. Allen surrendered the two notes and on February 24, 1942, in lieu thereof, obtained a note for $18,000 secured by a mortgage on the real estate described herein. This note and mortgage were intended to represent a part of the indebtedness under the original real estate contract. This note and mortgage were transferred to the plaintiff herein on November 3, 1945. It is this mortgage that plaintiff seeks to foreclose in this action.

There is no contention in this case that any defense

against action by J. P. Allen would not be and is not available against plaintiff herein.

As a defense against the foreclosure of the mortgage and judgment on the note the defendants Lester M. and Lilly Brown say that J. P. Allen, as a condition of the Federal Land Bank and the Land Bank Commissioner making loans on the real estate, agreed to accept the avails of such loans in satisfaction of all claims against Brown except chattel mortgages on personal property and that in pursuance of that agreement he executed and delivered to the Federal Land Bank and the Land Bank Commissioner certificates disclaiming any right, title, or interest in and to, or lien upon, the real estate.

The record discloses that J. P. Allen did execute and deliver the claimed agreement and also that he executed the disclaimers mentioned. In fact there is no denial in this respect by J. P. Allen. Plaintiff's contention is substantially that notwithstanding the agreement and the disclaimers they do not effect the destruction of the validity of the note and mortgage.

On the question of the validity and effect of such agreements and releases as are in question here this court has spoken on several occasions.

The general rule followed conforms to the general rule stated in Restatement, Contracts, § 421, p. 793, as follows: "A payment or other performance by a third person, accepted by a creditor as full or partial satisfaction of his claim, discharges the debtor's duty in accordance with the terms on which the third person offered it." See Tarascio v. Mancuso, 141 Neb. 225, 3 N. W. 2d 400; Murphy v. Omaha Loan & Bldg. Ass'n, 141 Neb. 230, 3 N. W. 2d 403; Krause v. Swanson, 141 Neb. 256, 3 N. W. 2d 407; Fender v. McCain, 144 Neb. 58, 12 N. W. 2d 541; Gordon v. Young, 146 Neb. 578, 20 N. W. 2d 616; Watters v. Harris, 147 Neb. 1081, 26 N. W. 2d 182.

In Krause v. Swanson, *supra,* an exception to the general rule was announced and it was there held that a moral obligation to pay a preexisting debt such as is

being considered here was a good consideration for the execution of a note and mortgage in its payment. This exception however was repudiated in Fender v. McCain, *supra*. Thus the general rule obtains and is applicable to the facts in this case.

The district court correctly sustained the contention of the defendants that the plaintiff had no right of foreclosure of the mortgage or right of recovery on the note in question in view of the agreement of J. P. Allen with the Federal Land Bank and Land Bank Commissioner whereby he released the indebtedness of Lester M. Brown. This was the only substantial question presented by the appeal.

It therefore follows that the decree of the district court should be and it is affirmed.

AFFIRMED.

ADELE KIIHNE, ADMINISTRATRIX OF THE ESTATE OF ADOLPH MILLION, DECEASED, APPELLANT, V. MILLARD E. CHARF, APPELLEE.

30 N. W. 2d 914

Filed February 6, 1948. No. 32292.

Cancellation of Instruments: Deeds. Where it is sought in equity to cancel and set aside a deed or other instrument of conveyance or ownership for want of mental capacity of the grantor to make the instrument, the burden of proof is on the party alleging the mental incapacity to clearly establish that the mind of the grantor was so weak or impaired at the time of the execution of the instrument that he did not understand and comprehend the purport and effect of what he was then doing.

APPEAL from the district court for Antelope County: LYLE E. JACKSON, JUDGE. *Reversed and remanded with directions.*

Ralph M. Kryger, for appellant.

Roscoe L. Rice and *Frederick M. Deutsch*, for appellee.

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

CHAPPELL, J.

This suit in equity was originally prosecuted by plaintiff as guardian of Adolph Million, incompetent. Upon his death, it was revived in the name of plaintiff as administratrix. The purpose of the action was to cancel and set aside an assignment of a school-land lease executed April 25, 1946, upon the alleged grounds that Adolph Million, hereinafter called grantor, was mentally incompetent at the time of its execution, and that the contract was unenforceable, because the duty to perform it was dependent upon an act of a third person over whom neither party had any control. On the other hand, defendant sought specific performance of the contract and the quieting of title to the land in himself.

After hearing on the merits, the trial court entered its decree finding and adjudging the issues generally in favor of defendant and dismissing plaintiff's petition.

Motion for new trial was overruled, and plaintiff appealed, assigning as error generally that the decree was not sustained by the evidence and was contrary to law. We sustain those assignments because the record clearly establishes that the grantor was mentally incompetent when he executed the assignment. Viewed in that light, it will not be necessary to discuss plaintiff's second alleged ground for relief.

In this jurisdiction it is the rule that where it is sought in equity to cancel and set aside a deed or other instrument of conveyance or ownership for want of mental capacity on the part of the grantor to make the instrument, the burden of proof is on the party alleging the mental incompetency to clearly establish that the mind of the grantor was so weak or impaired at the time of the execution of the instrument that he

did not understand and comprehend the purport and effect of what he was then doing. Smith v. Black, 143 Neb. 244, 9 N. W. 2d 193; Kucaba v. Kucaba, 146 Neb. 116, 18 N. W. 2d 645.

Bearing in mind the foregoing rule, we have examined the record. There is little if any dispute in the evidence upon the primary question of mental competency.

The grantor had, during his lifetime, been a good, substantial citizen, and had accumulated some property, part of which was the school land involved. The consideration for the assignment was $3,000. Defendant's check for that amount had never been delivered to the grantor or the plaintiff, but at the time of trial it was still in the possession of the lawyer who prepared the assignment. Without dispute, improvements upon the property were worth $1,200, and the rentals for 1946, claimed by defendant as belonging to him, amounted to at least $1,200. At the time of the alleged assignment, April 25, 1946, the grantor was 71 years of age, and afflicted with senile dementia. Concededly, on May 3, 1946, just eight days after the transaction involved, he was positively incompetent to transact any business; "his mind just simply was gone." On May 24, 1946, he was placed under guardianship as incompetent by the county court, and on July 5, 1946, he was dead.

His physician, a practitioner of 47 years, who had personally known him and attended the family for 20 years, testified as a witness for plaintiff. His evidence, not disputed by medical testimony or otherwise, was substantially as follows: He examined grantor in June 1943, May 1944, October 1945, and on May 3, 1946. In 1943 and 1944, he was found to be afflicted with senile dementia, his mind growing progressively weaker. In October 1945, he had a different personality, having changed from jolly to morose, from talkative to quiet, from bright to forgetful and dull of mind.

Three or four months prior to May 3, 1946, the physician had suggested to the family that the grantor should be put under guardianship because he was not capable of looking after himself.

On May 3, 1946, he was found to be pretty much demented; in bad shape mentally. His answers were very poor; real bad; all out of line; not logical. He was then positively incompetent to transact any business, his mind just simply was gone, and it was recommended that he be looked after, committed, or something. The physician could not say positively whether or not the grantor was capable of transacting business on April 25, 1946, because he did not know his exact condition on that date, but gave as his opinion that the grantor had not been very competent for some time prior to May 3, 1946.

The record discloses that on April 24, 1946, the grantor called upon a tenant in one of his own houses and said to her: "You don't want to sell the house do you, Mrs. Dempster?" She replied: "The house isn't mine to sell, Mr. Million, it belongs to you." Thereupon he sat head down, "acted dazed," "seemed mixed up," "confused," shook his head "yes" and then shook his head "no." They went downtown where he was asked whether he would consider giving a written lease for a year with payment of rent in advance. He answered, "Yes, he would," and they went to a lawyer's office. There Mrs. Dempster said to the lawyer, "I want to make out a lease from this fellow. He is such a funny old duck and acts so funny I think I better have a lease." As stated by the lawyer, "He sat beside her and it didn't seem to be registering." However, such a lease was executed, and she paid him a year's rent in advance.

There is evidence that on April 25, 1946, the defendant and the grantor drove out to his son-in-law's farm north of Clearwater to get some papers, including the lease involved. On the way, they drove into a filling

station at Clearwater, where the grantor asked the way out to his son-in-law's farm, although he had been there many times in the last seven years. Defendant's version of that circumstance differed as to form but not substance. In any event, after a few moments the son-in-law came to the station and they followed him out to the farm.

There they got the papers, drove back to Neligh, and went to a lawyer's office. The lawyer testified for plaintiff that as they came in the grantor tossed a package on the lawyer's desk and said, "It's all in there, radio and all." His tongue seemed very thick. He did not form sentences. The lawyer thought he had been drinking. Defendant said he had noticed his condition but that he had not been drinking.

Defendant then explained the details of the transaction and, upon inquiry as to the particulars, the grantor would shake his head "yes." The lawyer prepared the assignment involved, and it was executed in his office. Some time later, the lawyer wrote a letter to counsel for defendant, which was offered in evidence by defendant's counsel as a part of defendant's case. That letter, speaking of the grantor and the transaction involved, read in part: "I talked with him on different occasions from that day on and am definitely of the opinion that he knew very little of what he was doing and as a matter of fact a few days after the deal was made he was unable to carry on a conversation. * * * I am certain in my own mind that he was far from competent at the time we made out the lease, * * * I don't think that he was competent to legally transact the business that was done, but I acted in good faith and I am sure that Bus (defendant) did likewise."

Other witnesses testified for plaintiff with relation to the mental condition of the assignor between March 1, 1946, and May 3, 1946. They detailed at length and with particularity, facts, circumstances, and conditions, together with acts and conduct of grantor not only

different in character but also corroborative of those heretofore recited, all supporting plaintiff's contention that the grantor was mentally incompetent at the time of execution of the instrument. To repeat them would but unduly prolong this opinion.

On the other hand, the evidence adduced by defendant directly controverted but little of the evidence offered by plaintiff.

A physician who saw the grantor for the first time a week or ten days prior to his death on July 5, 1946, testified for defendant. His testimony in effect was that the grantor was very ill at that time and he advised hospitalization as the only way to care for him. The witness, never having previously met the grantor, refused to give an opinion concerning his mental condition prior to that time, because he did not know just how serious the forerunner of his condition was.

Two witnesses testified for defendant that they saw the grantor in their places of business several times between March 1 and May 3, 1946, and did not notice anything unusual, different, or peculiar in his conduct. One such witness, it will be observed, said the grantor appeared to him just as competent in May, when admittedly he was positively incompetent, as he did in March.

Defendant himself, who had known the grantor for many years, testified that he saw no difference in the grantor prior to or on the day of the transaction. He admitted, however, that he told the lawyer "what he wanted, what we was in there for" at the time of the transaction, but testified that he never heard or knew anything about the grantor being incompetent until the lawyer told him about it a few days later.

In our view, the evidence clearly established that the mind of the grantor was so weak and impaired at the time of the execution of the assignment of the school-land lease that he did not understand and com-

prehend the purport and effect of what he was then doing.

Therefore, we conclude that the cause should be and hereby is reversed and remanded, with directions that the trial court enter a decree finding against defendant and in favor of plaintiff, as prayed in her petition.

REVERSED AND REMANDED WITH DIRECTIONS.

WILLIAM G. SCHMEHL, APPELLANT, V. BUFFALO COUNTY, NEBRASKA, ET AL., APPELLEES.
30 N. W. 2d 882

Filed February 6, 1948. No. 32361.

1. **Appearances.** A party in a foreclosure action, upon whom service is defective, and who objects to confirmation on the ground of jurisdiction and for other reasons, suggesting a resale, makes a general appearance for all purposes and is in no position thereafter to complain for want of jurisdiction.
2. **Taxation.** This court, affirming an order dismissing a petition brought to set aside an order for confirmation in a foreclosure action, cannot consider an application to redeem made in this court for the reason that title in the purchaser became absolute upon confirmation, no appeal having been taken therefrom.

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

S. E. Torgeson, L. Verne Halcomb, and *Bernard F. O'Brien,* for appellant.

O. A. Drake, for appellees.

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

WESTERMARK, District Judge.

In an action commenced September 13, 1939, wherein Buffalo County had foreclosed several tax sale certificates, the district court for Buffalo County denied ap-

pellant's petition to vacate the order of confirmation and to redeem, filed about three months after the order for confirmation had been entered. The appellant will hereinafter be designated as petitioner.

The petitioner was the owner of Lot 14, and the south four feet of Lot 15, Block 29, Original Town of Ravenna, Nebraska, which was described and involved in Cause of Action No. 729.

The petitioner urges that no service of summons was had upon him; that the attempted service by publication did not confer jurisdiction upon him or his property; that the decree and order of confirmation are void for want of jurisdiction; that he was not given an opportunity to be heard on objections to confirmation; and that if this court should find that the court did have jurisdiction in the foreclosure action, he should be given a reasonable time to redeem after the mandate is issued.

It appears that at the time the foreclosure action was commenced and at all times thereafter the petitioner was and is a resident of Nebraska, residing in Cheyenne County, Nebraska, which could have been ascertained by inquiry. The attempted service was by publication supported by an affidavit that defendant was a nonresident of Nebraska, or such defendant's whereabouts, if in this state, were unknown to plaintiff and its attorney. Upon this affidavit an order for publication was made by the court.

It is obvious, if jurisdiction rested on constructive service alone, that the court would not have had jurisdiction of defendant or his property, and the decree of foreclosure and order of confirmation would have been void. See Armstrong v. Griffith, 94 Neb. 515, 143 N. W. 461; Hayes County v. Wileman, 82 Neb. 669, 118 N. W. 478; Hassett v. Durbin, 132 Neb. 315, 271 N. W. 867; Jackman v. Miller, 119 Neb. 463, 229 N. W. 778.

Was jurisdiction acquired over petitioner and the property during the pendency of the action before confirmation? The court must answer this in the affirmative.

The petitioner, having learned of the sale, filed written objections to confirmation on December 6, 1940. These set forth that petitioner had not been served with summons; the bid was grossly inadequate; a resale would bring a larger amount; and prayed that the sale be set aside and confirmation be refused.

The petitioner by his objections not only objected to jurisdiction, but stated that the price was grossly inadequate and a resale would bring a larger amount. Certainly, by implication he suggested to the court that the court enter an order directing another sale. 3 Am. Jur., Appearance, § 3, p. 783, states the rule as follows: "A general appearance may rise by implication from the defendant's seeking, taking, or agreeing to take some step or proceeding in the cause, beneficial to himself or detrimental to the plaintiff, other than one to contest the jurisdiction only." The opinion in Nelson v. Nebraska Loan & Trust Co., 62 Neb. 549, 87 N. W. 320, is in point. The appellant therein, not a party, asked leave to be made a party and file objections to confirmation. The court said: "He has invoked the power of the court regarding other matters than that of challenging its jurisdiction over him; has made a general appearance and waived all objections as to the manner in which he was brought into court. The appearance made was a general one, and comes entirely within the rule stated in Welch v. Ayres, 43 Nebr., 326." This case was followed in Nebraska Loan & Trust Co. v. Kroener, 63 Neb. 289, 88 N. W. 499. See, also, Lincoln Joint Stock Land Bank v. Fuller, 132 Neb. 677, 273 N. W. 14.

It is not alleged in the petition that the plaintiff practiced any fraud, or misled the petitioner's attorneys relating to the time of the hearing on objections to confirmation. The petitioner bases his right to have the order of confirmation set aside on the ground of improper service. Therefore the district court could not consider the matter of notice as to the hearing on objections to confirmation.

However, since the petitioner complains in this court that he did not have the opportunity to be heard on his objections which denied him his right to his day in court, we deem it proper to make the following observations.

The record shows that on December 14, 1940, the court entered the order, confirming the sale, and ordered the sheriff to execute and deliver sheriff's deed to Albert O. Skochdopole, the purchaser.

At the trial on the petition to vacate the order of confirmation and right to redeem, the petitioner presented the affidavit of one of his attorneys, admitted by stipulation, setting out the correspondence relative to the date set by the court for the hearing on confirmation between one of the attorneys for the petitioner, the clerk of the district court, and the attorney for the plaintiff. The affidavit recites that the affiant received a communication from the clerk of the district court, advising him that the court gave all objectors until Saturday, December 14, 1940, to show cause why confirmation should not be had, and that on or about December 12, 1940, affiant received a letter from the attorney for plaintiff, which advised him that objections to confirmation would be taken up "next Saturday morning at 9 o'clock."

The affidavit further states that on December 10, 1940, the affiant sent a letter to the attorney for plaintiff, advising him that "It is going to be impossible for the writer to be in your city December 14, and we should appreciate it very much if the matter of presenting evidence can be postponed * * *."

There is nothing in the exchange of letters as presented by the affidavit which suggests that plaintiff would continue the hearing for confirmation, and petitioner and his attorneys are not in a position to complain. Before a party can complain because a hearing was had without his presence, it must appear that the representation not to proceed was in writing, or made in open court. See Drake v. Ralston, 137 Neb. 72, 288 N. W. 377.

The petitioner urges that this court should grant him the right to redeem if it sustains the findings of the district court. He cites Prudential Ins. Co. v. Norall, 140 Neb. 431, 300 N. W. 349, a mortgage foreclosure case, and Madison County v. Crippen, 143 Neb. 474, 10 N. W. 2d 260, a tax foreclosure case, wherein this court established the precedent of permitting redemption after the issuance of the mandate. In those cases the controversial issues were tried de novo in this court on appeal from orders made on confirmation, which authorized the court to permit redemption. The rights of the purchaser in those cases depended upon the findings of this court and were not absolute until such findings were made.

The petitioner did not appeal from the order for confirmation. He filed a petition to set aside the order of confirmation. This is a proceeding wherein it is sought to attack the jurisdiction of the court over the petitioner and the property involved, and have the order of confirmation vacated and set aside. This court, having concluded that the order of confirmation is valid, has no authority to permit redemption. The rights of the purchaser became absolute upon confirmation. Therefore, the application is denied.

AFFIRMED.

CHARLES HOLBEIN ET AL., APPELLANTS, V. WILLIAM HOLBEIN ET AL., APPELLEES.
30 N. W. 2d 899

Filed February 13, 1948. No. 32291.

1. **Trusts.** The law is well established in this state that when one person buys real estate and pays the purchase price thereof, and the title is taken for convenience in the name of another, the person taking the title will hold the property in trust for the person paying the purchase price.
2. ———. A resulting trust has been defined to be one raised by implication of law and presumed always to have been contem-

plated by the parties, the intention as to which is to be found in the nature of their transaction, but not expressed in the deed or instrument of conveyance.

3. ———. So reluctant are the courts to engraft a trust by parol on the legal title to real estate, that there is perhaps no better established doctrine than the one which requires a high degree of proof in order to establish the trust by parol evidence.

4. ———. A resulting trust will not be declared upon doubtful and uncertain grounds; and the burden is upon the one claiming the existence of the trust to establish the facts upon which it is based by clear and satisfactory evidence.

Appeal from the district court for Dawson County: ISAAC J. NISLEY, JUDGE. *Affirmed.*

Smith Bros., for appellants.

W. A. Stewart, Jr., for appellees.

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

PAINE, J.

This is an action to quiet title to 80 acres of land, brought by two sons and the heirs of two deceased sons of Christian Holbein, deceased, against William Holbein, the eldest son of Christian Holbein, the respective spouses being also made parties. The trial court quieted title to the land in the defendants and dismissed the petition of the plaintiffs, who have appealed.

It is alleged that Christian Holbein died December 17, 1910, intestate, and at the time of his death was the owner of an equitable title in the west half of the northwest quarter of Section 32, Township 9 North, Range 23 West, of the Sixth Principal Meridian, in Dawson County; that his widow, Barbara Holbein, died intestate November 17, 1917; that their estates were administered except as to the 80 acres above set out; that the above described land was purchased March 23, 1906, from Adaline Hitchcock, a widow, the deed being made to William Holbein, but it is alleged that the money was

paid by Christian Holbein. It is further alleged that it was the intention of William and his father, Christian, that William should have no interest in said land, but should convey said land to the heirs of Christian Holbein upon his death, and it should be held in trust for that purpose; that William recognized the existence of the trust by asking three of his brothers on March 2, 1922, for a few years' extension of time before dividing up the land; that during the lifetime of his father, Christian, and after his death during the lifetime of his mother, Barbara, and up to and including 1922, William paid rent upon said land, first to his father, then to his mother, then to the heirs-at-law of his father and mother; that the first knowledge the plaintiffs had that William held himself out to be the owner of the land was on February 20, 1936, when he and his wife conveyed the premises to themselves as joint tenants with the right of survivorship, and that said deed, made without consideration, was for the purpose of depriving the plaintiffs of their interest in said land; that at various times William promised his brothers to divide the land at some future date; that originally the heirs of Christian and Barbara Holbein were their five sons, William, Robert, Gottlieb, Gottlob, and Charles; and that at the time of the filing of this petition William, Charles, and Robert each owned an undivided one-fifth interest in the land, another one-fifth interest was owned by the heirs of Gottlieb Holbein, and the last one-fifth interest was owned by the heirs of Gottlob Holbein, deceased, all of such heirs being made parties plaintiff. The plaintiffs prayed for a judgment quieting the title in the owners described in the petition and that an accounting be had for the rents and profits.

The defendants, William Holbein and his wife, Louise, in their answer denied specifically the allegations of the petition not admitted, and alleged that on March 23, 1906, defendant William Holbein purchased the land described in the petition from Adaline Hitchcock for

$5,460, received a warranty deed on said date, and filed the same; that William Holbein paid $1,000 cash, for which he received a seller's receipt, and executed a mortgage for the premises, securing several notes payable annually; and that all of said mortgage notes were paid in full, with interest, by him, and on May 18, 1908, said mortgage was released. Defendants further alleged that they have resided upon the premises since its purchase, claiming to own it, enclosing it with fences, placing valuable improvements thereon, have farmed and cultivated it, and paid all taxes thereon since the purchase thereof.

The defendants denied that their father, Christian, and their mother, Barbara, ever had any right, title, or interest to said premises, and specifically denied that the plaintiffs, or any of them, had any right, title, or interest therein, either legal or equitable. The defendants further alleged that the plaintiffs and each of them have been guilty of laches; that their right and claim to the premises have become stale; and their right, if any they had, has been barred by the lapse of time.

For a reply the plaintiffs alleged that they relied upon the promises of the defendant that he would perform his trust and divide the land between them. They further alleged that an attempt was made to settle the matter by filing an action on February 13, 1939, to partition the land, and that the petition herein was filed March 18, 1941, and because of this record the plaintiffs are not guilty of laches.

The court entered a decree in favor of the defendants, found that there was insufficient evidence to sustain plaintiffs' petition, that the defendants are the owners of a fee title to the 80 acres described in the petition, and quieted the same in the defendants.

The plaintiffs assigned as errors for reversal that the findings and judgment are contrary to the evidence and to the law, and that the court erred in admitting certain testimony of the defendants in evidence, which was

duly excepted to at the time by the plaintiffs. The plaintiffs relied entirely for reversal on the question whether the evidence sustained and justified the trial court in quieting the title to the 80 acres in dispute in the defendants.

The plaintiffs insist that Christian Holbein had an interest in the land from the day it was purchased, and while the title was taken in the name of his oldest son, William, yet he was simply to hold it in trust, and when the old man died the eighty was to be divided equally between the five sons. Plaintiffs insist that William always paid rent on this 80 acres and promised on several occasions to divide it.

Charles Holbein, a plaintiff, testified that from the time this 80-acre tract was purchased in 1906 the one-third rent portion was always taken across the road and put in the granary north of the road on the father's land; that this continued not only until the mother died in 1917, but continued until 1922; and out of this each brother received his one-fifth share.

Charles Holbein also testified that there was no time at which his father, Christian, talked to him about the 80 acres when William Holbein was also present. He testified that a meeting was held at his father's place about a week after his father's death, when all of his brothers were there, and he was asked these questions: "Q Was there any talk, among your brothers, with reference to what you were to do about the northwest quarter of section 32, Township 9, Range 23? A No, there wasnt anything mentioned. * * * Q What was said and who said it, with regard to whether this quarter section, or any part of it, would be included in your Father's Estate? * * * A They didnt say much about the other, the other eighty in there, why he didnt put that in, he said, we will settle later on, on that; and that was Bill Holbein said that."

Charles testified that his brother William was appointed administrator of their father's estate; that upon the

closing of that estate he was given a power of attorney by the others; and that he opened a special "P. A. Account" in the Pioneer Bank, made deposits in it and payments out of it, and gave some to the mother and the balance to the brothers. He further testified that rent was always paid by William on the west 80 acres in suit here, but never on the east eighty, which was admittedly William's own land, and that was where all of his buildings were erected; that this rent account was settled in 1922, at G. C. Hueftle's office in Eustis one evening, and William stopped in at Charles' home on his way down, and said: "I will settle all the rest of the land, but I will hold this 80 acres back because until I have the money in a few years and then I will pay each of you out in full; but he said, Bob wont get a damned cent of me, because he sued me." Charles testified that he repeated the same statement that evening in G. C. Hueftle's office, when his brothers Gottlieb and Gottlob, and Mr. Hueftle were there. Mr. Hueftle also testified to the same statement. Charles said that, in the administration proceedings instituted by Robert on his mother's estate, the 80 acres in dispute were included, and were also included in a partition suit that Robert started.

An examination of exhibit No. 2 shows that the petition filed by Robert in the estate of Barbara Holbein did include this 80 acres, by the statement, "the said Christ Holbein having died intestate, December 17th, 1910, owner of all of the above described real estate except the NW¼ of Sec 32, Twp 9, Range 23, of which he died the owner of an undivided half interest; * * *." However, the decree in said estate proceedings omits all reference to this 80 acres.

An examination of the petition in the partition suit which was filed in Frontier County in February 1922 by Robert Holbein, one of the five sons, against his four brothers, shows that he alleged that his father, Christian, died intestate, the owner of the following tracts of

land: The north half of the southeast quarter of Section 1, Township 8, Range 24, in Frontier County; the southeast quarter of Section 29, and the southwest quarter of Section 32, all in Township 9, Range 23, in Dawson County; and also an undivided one-half interest in the northwest quarter of Section 32, Township 9, Range 23, in Dawson County. The west eighty of the last described quarter is the land in dispute. In this partition suit the plaintiff, Robert Holbein, alleged that the five brothers owned these lands in equal shares.

On April 18, 1922, Robert Holbein filed a dismissal of the partition case, in which he set out that the action had been settled by the heirs agreeing upon a division of the lands and executing and delivering deeds therefor, and said action was dismissed.

Robert's deposition was taken at Long Beach, California, January 3, 1947. He testified that the west 80 acres were not included in his partition suit, for he was asked this question: "Q In that settlement was the west 80 involved? A No." However, it appears that the west eighty was included in the partition petition as an undivided one-half interest in the northwest quarter of Section 32.

It is clear from the record that, whatever deeds may have been exchanged between the heirs on the balance of the property described in the petition of this partition suit, no deeds were exchanged on the 80 acres in dispute in the settlement of this partition suit.

Robert testified that, shortly after his father's death, in a talk among the brothers, "William said, we would leave it that way, and later on when we had a final settlement, he would straighten it out with the rest of the brothers."

Mrs. Ida Holbein, widow of Gottlieb Holbein, testified that when her husband was on his deathbed in a Holdrege hospital, William was there and several other men were present, "I asked him (William) about the

80 that we shared in, * * *. A Well, he said, that was all settled; * * *."

Many references are made to a statement of Christian Holbein back in 1906, and as the plaintiffs place much stress on this evidence we will set it out in some detail. The statement was reported by Charles Hausler, who may have been an unwilling witness in the case at bar.

During the trial of this case, on January 21, 1947, a motion was filed in which the plaintiffs moved the court to keep their case open, without resting, until the deposition of Charles Hausler of Eustis could be taken. Said motion recited that Charles Hausler was a material witness; that since the action was filed said Hausler had attended a conference with Charles Holbein and attorney Elbert H. Smith; that they had understood that he was willing to appear in court and testify on behalf of the plaintiffs, but that they had just learned that Charles Hausler had indicated that he would not leave Frontier County to appear and testify; that the plaintiffs could not safely try their case without his evidence; and they asked that they be permitted to take the deposition of Charles Hausler at Eustis at the earliest possible time.

In the bill of exceptions appears a stipulation that the counsel and the court reporter would go to Eustis to take the deposition of Charles Hausler, whose signature was waived and the signature of the notary was waived; and that the making of objections would be reserved until the reading of the deposition in court. "THE COURT: We will adjourn until tomorrow morning at nine oclock in order that Attorneys and the Reporter may go to Eustis and take the testimony of one of the Plaintiffs' Witnesses."

This witness, Charles Hausler, testified in his deposition that he was born in Germany in 1892. Christian Holbein had been over to Germany to visit and when he came back in January 1906 he brought Charles Hausler with him, who was distantly related to the family.

The evidence he gave was that different members of the family often gathered at the home of Christian Holbein on Sundays for a visit. On this particular Sunday afternoon in March 1906 a neighbor, William Keugler, was in the house visiting, and Christian sent Charles Hausler, who had been living with him, downstairs to bring up a pitcher of wine. Mr. Hausler was at that time a boy of 14 years of age, and he remembered this much of a statement by Christian Holbein: "All the Old Man says: If I buy that land we would take it together, but you would have to give me rent, but I dont know what they done afterwards."

Eight or nine times in his examination, the attorney for plaintiffs asked Mr. Hausler in different ways whether William Holbein was there on that Sunday afternoon. Each time witness Hausler definitely stated that William was not there, and finally the attorney asked the witness a question about a time when the witness was brought to his office by Charlie Holbein to talk over the case. "Q And at that time did you tell me that Mr. Bill Holbein was present at this talk? A No, I dont believe so, or I didnt suggest that, I know that Bill was not there. I am sure he was not there. Just Mr. Keugler and Mr. Holbein, and his wife was there, too."

Witness Hausler said that Bill Holbein never talked to him anything about this, but he believed that William and his father bought the land together. Hausler said he worked for Christian until 1908 and later on worked for William. Mr. Hausler testified that in March of 1906 he and Christian Holbein drove up in a spring wagon to William Keugler's to get $1,500 in gold; that Christian Holbein stayed there over night, but that he told the witness he should go home, and the 14-year-old boy walked home; that he does not know what the money was for; and that he never talked to Christian Holbein about the money after that.

This witness at the time of the conversation was only 14 years old, had been in the United States less than

three months, and was out of the room part of the time, so he did not hear all of the conversation, which was all in German, but he is positive that William was not present, and therefore on this occasion there could have been no agreement about a trust relationship on this land between the father and William. We cannot overlook the exact language that the father told his neighbor, "*If* I buy that land," and the proof is beyond dispute that the father did not buy it.

Defendant William Holbein testified in his own behalf that he rented the northwest quarter of Section 32, including the 80 acres in controversy, for one year before he bought it; that he had known Mrs. Hitchcock for some time before he bought this land of her, and had done a lot of work for her; that her daughter came out to visit her from Gresham, Nebraska; and that she wanted some money and urged her mother to sell the place for $5,600. William said he went down and told his father about it, but he hesitated about buying it, for it was all run down, and the place was full of cockleburrs, sunflowers, and timber. His father urged him to buy it. He said that William could buy the place; that he would help him and give him $500, and for him to go over to the bank at Eustis and borrow another $500; and that he would go his security on that $500 if he did. So on March 23, 1906, he bought the land, his father gave him $500, and Mrs. Hitchcock acknowledged the deed before W. A. Stewart, a notary public at Lexington, on that day. He testified that he paid her $1,000 the day he bought it, gave back a first mortgage securing four notes, earned the money and paid them all off, and on May 18, 1908, secured a release of the mortgage from Mrs. Hitchcock. He further testified that he paid off the $500 borrowed from the bank at Eustis. He moved on this quarter in March 1906, built valuable improvements, lived there some 40 years, and paid all the taxes on it during all those years.

Defendant William Holbein was examined in detail

as to why he paid one-third of the rent crop raised on this place from the time he bought it in 1906 until the settlement in 1922. We will set out here some of this evidence, as follows: On his direct examination, he was asked: "Q What is the fact as to paying rent on part of the land to your Mother? A I did, pay rent from the northwest corner, a strip on the east side. Q About how big a piece? A Right around 35 acres."

Again, on his cross-examination he was asked: "Q When did you pay your Father back the five hundred dollars? A I paid it back by giving him rent on the piece of ground on the west side; that is what he told me to do. Q By when did you have it paid back? A It took me a long while. I gave rent all the time for that, just off of that piece of ground, not on the 80. Q You mean, that you paid rent sixteen years? A Yes. Q In order to pay that five hundred dollars back? A Yes, it was up to me. I could pay more if I wanted to, nobody stopped me. What he gave me, I wanted to be sure to pay back. You understand, there was a lot of dry years in there, and I got hailed out; it was not all profit. * * * Q When your Father passed away in 1910, you kept on paying the rent? A Yes, I hadnt paid back the five hundred- not yet. Q And when your Mother passed away in 1917, you still kept on paying that? A Yes, I wanted the thing straightened up that is the reason I kept on."

It appears from the evidence that each of the sons received 80 acres when the father died, and an eighty apiece when the mother died; that the wheat from various tracts of land owned by each of the sons was mingled and sold together; and that the wheat from the 35 acres being tilled on the disputed 80 acres was put in with the rest.

William, the oldest son, with his power of attorney from the others, placed all funds from the sales in the Pioneer Bank, and signed all the checks in his name with "P. A." after it. Exhibit No. 4, introduced by plaintiffs,

consists of 15 typewritten pages and sets forth an itemized account of all the receipts and expenditures in this "P. A." account, prepared by the cashier of the bank. The first deposit was $28 on December 24, 1912, and the last deposit was $77.66 on February 21, 1922. Total deposits during those ten years were $26,875.36; total checks drawn, $26,105.04, leaving balance on hand, $770.32. It appears that William Holbein submitted this account and made a settlement thereof in a meeting in G. C. Heuftle's office in 1922.

In the evidence there are many reported statements by William and one statement was to the effect that in 1922 he said, in substance, I will settle with you boys on that eighty as soon as I can, but Bob won't get a cent for he brought that suit against me.

It is possible, of course, that William always had in mind the small balance due on the $500 he borrowed of his father and was slowly paying back out of rents on the small part of the eighty that was farmed, and that other relatives understood the whole eighty was to be divided. But other reported statements cannot be so resolved. So there is left this question to be decided from the conflicting evidence, which the trial court met by finding that there was not sufficient proof of any trustee relationship of any kind and by entering a decree quieting the title to the eighty in the defendants.

As to the law of the case, both parties in their briefs cite the court to the case of Reetz v. Olson, 146 Neb. 621, 20 N. W. 2d 687, in which it is said: "The law is well established in this state that when one person buys real estate and pays the purchase price thereof, and the title is taken for convenience in the name of another, the person taking the title will hold the property in trust for the person paying the purchase price."

"A resulting trust arises where a person makes or causes to be made a disposition of property under circumstances which raise an inference that he does not intend that the person taking or holding the property

should have the beneficial interest therein, unless the inference is rebutted or the beneficial interest is otherwise effectively disposed of." Restatement, Trusts, § 404, p. 1250.

"Although the term has been broadly defined as a trust which is raised or created by the act or construction of law, in its more restricted sense and contradistinguished from constructive trusts a resulting trust has been defined to be one raised by implication of law and presumed always to have been contemplated by the parties, the intention as to which is to be found in the nature of their transaction, but not expressed in the deed or instrument of conveyance. Such trusts are also called 'presumptive' trusts, and are frequently defined in terms of or in connection with the character of the transaction out of which they most frequently arise, namely, where one person pays the consideration for a purchase and the title is taken in the name of another, * * *." 65 C. J., Trusts, § 13, p. 222. See Bailey v. Dobbins, 67 Neb. 548, 93 N. W. 687; Doll v. Doll, 96 Neb. 185, 147 N. W. 471; Doll v. Doll, 99 Neb. 82, 155 N. W. 226.

"So reluctant are the courts to ingraft a trust by parol on the legal title to real estate, * * * that there is perhaps no better established doctrine than the one which requires a high degree of proof in order to establish the trust by parol evidence." Annotation, 23 A. L. R. 1502.

As early as 1873, our court held in Roddy v. Roddy, 3 Neb. 96, that in order to fasten a trust on property the words employed must be clear and explicit. In Falsken v. Harkendorf, 11 Neb. 82, 7 N. W. 749, this court quoted: " 'Loose and equivocal facts ought not to control the evidence of deeds.' 1 Perry on Trusts, sec. 137."

In Klamp v. Klamp, 51 Neb. 17, 70 N. W. 525, we said: "The evidence in the case at bar was not only not satisfactory and conclusive in establishing such a

trust in favor of appellant, but was amply sufficient to warrant the conclusion of the trial court that all the property in controversy was the separate and individual property of appellee."

A little later this court made a full statement as to the proof required, and said: "It is obvious that what would ordinarily suffice may fall far short of the requisite *quantum* of proof in such a case, without in any degree infringing the general rule that only a preponderance of the evidence is demanded. In consequence, while we *we* may not admit the statements often to be seen in the books, that more than a preponderance of the evidence is required to establish a trust, contrary to the purport of a written instrument, by parol, and that the trust in such cases must be proved beyond doubt, there is no occasion to repudiate or to qualify what has become a commonplace of the books, that the proof in such cases must be clear, unequivocal and convincing." Doane v. Dunham, 64 Neb. 135, 89 N. W. 640.

"A resulting trust will not be declared upon doubtful and uncertain grounds; and the burden is upon the one claiming the existence of the trust to establish the facts upon which it is based by clear and satisfactory evidence." Veeder v. McKinley-Lanning Loan & Trust Co., 61 Neb. 892, 86 N. W. 882. See, also, Drake v. McDonald, 91 Neb. 775, 137 N. W. 863.

In the case at bar, we realize that two of the witnesses testified by deposition, and this court has the same record before it that the trial court had, but as to evidence of all the other witnesses we will quote from a recent opinion of this court: "The instant case is one of that class of cases in which an opportunity to both hear and see the witnesses as they testify places the trial court in a much better position to know the weight and credibility that should be given to the testimony than a reviewing court can possibly be from reading the transcript and bill of exceptions. This court tries

the case de novo, and yet we have said that, where the testimony of witnesses upon the vital questions involved is conflicting, this court will consider the fact that an experienced trial judge observed the witnesses and their manner of testifying and accepted one version of the facts rather than the other. * * * See Clough v. Clough, 132 Neb. 748, 273 N. W. 31; Sutherland v. Sutherland, 132 Neb. 558, 272 N. W. 549; Hild v. Hild, 135 Neb. 896, 284 N. W. 730." Sell v. Sell, 148 Neb. 859, 29 N. W. 2d 877. See, also, Southern Surety Co. v. Parmely, 121 Neb. 146, 236 N. W. 178.

An examination of all of the evidence fails to prove that a trust of any kind arose when the defendant purchased this 80 acres in 1906.

We find that the decree of the trial court is supported by the evidence and the law, and the same is hereby affirmed.

AFFIRMED.

ELMER I. GARNER ET AL., APPELLANTS, V. THE CITY OF AURORA, A MUNICIPAL CORPORATION, ET AL., APPELLEES.
30 N. W. 2d 917

Filed February 13, 1948. No. 32298.

Public Utilities: Municipal Corporations. A public service corporation cannot refuse to furnish its public service because the patron is in arrears with it on account of some collateral or independent transaction, not strictly connected with the particular physical service.

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

Kirkpatrick & Dougherty, for appellants.

F. E. Edgerton, Charles F. Adams, and *E. H. Powell,* for appellees.

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

PAINE, J.

In an action for an injunction by taxpayers to prevent a city from cutting off their water supply for a violation of a garbage ordinance, the trial judge dismissed the petition after learning, outside of court, that the ordinance had been repealed. The petitioners appealed.

The plaintiffs brought an action for injunction against the City of Aurora, its mayor, councilmen, water commissioner, and chief of police, on behalf of themselves and all others similarly situated, and alleged in their petition that they were residents, freeholders, electors, and taxpayers in the defendant city, and received their sole supply of water from the city municipal water system. They further alleged that the city of Aurora had no Home Rule Charter, that it was governed by the provisions of the statutes of Nebraska, and that on December 10, 1946, said city enacted, passed, and approved Ordinance No. 217, as shown by exhibit A, attached to said petition.

Ordinance No. 217 may be briefly summarized as follows: Section 1 provided that through its street department the city should thereafter collect and remove all garbage, trash, and refuse from its streets and alleys. Section 2 provided that the city itself should act as a licensed garbage collector, but might contract to others the right to collect, hold, and dispose of said garbage; and that for such service the city should collect from each tenant, occupant, or owner the sum of 50 cents a month from each person, firm, or corporation having a water meter, and a larger sum from business and apartment houses. Section 3 provided that the water commissioner should make statements for such garbage collections on the water bills and render same each three months, should keep a separate ledger account of such garbage collections, and that such fees were

payable to the office of the water commissioner. Section 4 provided that the first quarterly payment of $1.50 for garbage disposal should be due and collected January 1, 1947, for three months in advance, and such garbage charge should become delinquent at the same time that bills for water become delinquent; it was made mandatory on the water commissioner to collect the entire bill when the same became delinquent; and in case of failure to pay the same, it was made his duty to shut off and disconnect the water service of such person, and to charge $2 as a fee for the resumption of garbage service and turning on the water. Section 5 provided that the water commissioner should turn all funds collected to the city treasurer, and said funds, after payment of operating and maintenance expenses, should be paid into the general fund of the city. Section 6 provided that the ordinance should be enforced under the rules and regulations of the sanitation and health committee of said city.

Plaintiffs' petition further alleged that on January 1, 1947, plaintiffs tendered to the water commissioner the regular rates charged for the city water service, which he refused to accept because of their failure to tender him at the same time the sum of $1.50 for garbage disposal service; that the water commissioner notified plaintiffs that unless said garbage disposal charges were paid for the three months beginning January 1, 1947, he would on January 15 cut off the water supply at their residences; and that plaintiffs tendered said water rates into court. They also alleged that they had no other source of water supply than that furnished through the municipal water system, and that they would be irreparably injured in a substantial amount, for which injury they had no legal remedy or redress.

Plaintiffs further alleged that said Ordinance No. 217 was ultra vires and void, not within the power granted to the city, is in conflict with the statutes of Nebraska, is unreasonable, not impartial in its operation, and un-

duly oppressive; that water supply and garbage disposal are not related to each other; that the enforcement of the ordinance would be unequal and not uniform in its operation, and would lay a tax on certain individuals for the purpose of defraying the general expenses of city government; and that the ordinance confers an unlawful discretion and arbitrary power upon the officers of the city which it is not within the power of the city to grant.

The prayer of plaintiffs' petition was that the city and its officers and agents be enjoined from cutting off plaintiffs' water supply and be enjoined from demanding the payment of garbage disposal charges as a condition of their right to have public water service; that the ordinance may be decreed to be void; and that defendants be enjoined from collecting any charges for garbage disposal under the ordinance, and for other equitable relief.

On the same day the petition was filed, January 9, 1947, a temporary restraining order was issued by the county judge and a bond for $200 approved by the clerk of the district court.

On January 18, 1947, a hearing was had before the district judge. It was admitted that the defendants had failed to file an affidavit showing the absence of both district judges from Hamilton county prior to the issuance of the restraining order by the county judge (section 25-1064, R. S. 1943), and the defendants moved the district judge, upon the positively verified petition, to issue a restraining order, which was done upon the plaintiffs furnishing a bond for $100.

On February 3, 1947, the defendants filed their answer, in which they denied every allegation not specifically admitted; admitted the allegations as to the parties and the passage of the ordinance; denied that plaintiffs had no legal remedy at law or that the said ordinance was ultra vires and void; alleged that plaintiffs had a full and adequate remedy at law; and prayed that the

petition be dismissed. Plaintiffs' reply denied all new matter in the answer.

On March 12, 1947, the matter came on for trial. The plaintiffs called as their first witness the water commissioner. He was examined with regard to more than a dozen men who with their families resided in the city of Aurora, secured their water supply from their own wells or pumps, were not patrons of the municipal water system, and had no meters which could be shut off to enforce the charges for collection of garbage from their homes.

The water commissioner was examined in regard to six men whose places of residence were outside the city limits, but who each had a separate meter and got their water supply from the city water system. Thereupon the plaintiffs rested.

The defendants made a motion for judgment for failure to produce evidence which would entitle plaintiffs to an injunction, on which motion the court reserved its ruling. Thereupon, the defendants called the mayor as their first witness. He testified as to the deplorable condition that the alleys were in, that numerous complaints had been made, and that the situation required the passage of the ordinance in question.

The water commissioner testified that on January 1, 1947, the city had 809 customers using water meters, and 24 of them had not paid their garbage fees. He testified that the city owned the equipment with which the garbage was collected under the ordinance, and paid $150 a month to the man who operates it. Thereupon the defendants rested and the case was taken under advisement by the court.

The bill of exceptions discloses that on March 31, 1947, the case came on for further proceedings, as follows: The plaintiffs offered in evidence exhibit No. 1, being the affidavit of W. L. Kirkpatrick and John E. Dougherty, sole members of the firm of attorneys representing the plaintiffs. The affidavit set out that neither

of them had any notice or knowledge of a session of said court being held on March 25, 1947, in which an order was entered dismissing the case at bar and waiving a complete record therein; that they first learned of it March 28, and they did not consent to such order as made by the court. Plaintiffs' attorneys also introduced in evidence exhibit No. 2, being a copy of the new ordinance, No. 218.

On the same day, March 31, they filed in the office of the clerk of the district court a motion and petition to vacate the dismissal entered and to reinstate the cause for further proceedings. Attached to said supplemental petition to reinstate said case was exhibit A, being a copy of Ordinance No. 218, passed and approved by the city on March 19, 1947, one section of which reads as follows: "Section VII. That Ordinance No. 217 be, and the same hereby is, repealed." The prayer of said supplemental petition read as follows:

"Plaintiffs therefore pray as in their petition; that said order herein entered dismissing this case and denying a record thereon to plaintiffs may be vacated and set aside and this cause reinstated for adjudication upon its merits; that the restraining order heretofore in effect as against said ordinance No. 217 may be continued in effect and may be extended to restrain the defendants from enforcing said ordinance No. 218 until an adjudication herein upon the merits and without further evasion upon the part of defendants; that this pleading may be permitted to stand not only as plaintiffs motion to vacate said order of dismissal, but as their supplemental petition herein and that defendants may be enjoined from enforcing, or attempting to enforce, said ordinance No. 218 also:

"Plaintiffs pray for costs and for all such other, further and different relief as may be just and equitable."

On said March 31, 1947, counsel for all parties were in open court. The trial judge stated that the case had been tried and taken under consideration on March 12,

but, having seen a newspaper containing a publication of the new ordinance, No. 218, in which it was stated that Ordinance No. 217 was repealed, he had, in the absence of counsel, and without notice to them, and without their knowledge, entered a dismissal of this action on his own motion on March 25, and thereafter notified counsel of such action.

Thereupon, the court signed a journal entry setting out that on March 31, 1947, plaintiffs' motion to vacate the order of dismissal, which had been entered on March 25, was overruled, and that the petition for a reinstatement of the cause was also disallowed.

On April 4, 1947, a journal entry was entered, overruling the motion for a new trial, which had been filed March 28, 1947.

In the assignments of error, it is charged that the court erred in dismissing the action and in not deciding the case upon its merits; that the court erred in not granting to plaintiffs the injunctive relief for which they prayed, and in not decreeing that Ordinances No. 217 and No. 218 were void; that the court erred in overruling plaintiffs' motion to vacate the order of dismissal and permit the plaintiffs to controvert the assumption that the issues had been rendered moot by reason of said Ordinance No. 218; that the court erred in refusing to permit plaintiffs to plead and bring into the record Ordinance No. 218, in order that the threat therein perpetuated, to cut off plaintiffs' water supply, might likewise be enjoined; and that the court erred in overruling plaintiffs' motion and petition to vacate the order of dismissal, and in overruling plaintiffs' supplemental motion.

This case was tried to the lower court, evidence taken and submitted, the case taken under advisement, and then dismissed. Having the record before us, we deem it our duty not simply to reverse the action of the trial court, but to proceed in accordance with section 25-1925, R. S. 1943, which holds, in substance, that it shall be the duty of the Supreme Court to retry the issues of

fact, without reference to the conclusion reached in the district court. See Otto v. L. L. Coryell & Son, 141 Neb. 498, 3 N. W. 2d 915; Dundee Realty Co. v. City of Omaha, 144 Neb. 448, 13 N. W. 2d 634; Nitzel and Co. v. Nelson, 144 Neb. 662, 14 N. W. 2d 197.

Ordinance No. 217 was properly before the court, while Ordinance No. 218 was not.

"The authorities are uniform to the effect that a public service corporation cannot refuse to furnish its public service because the patron is in arrears with it on account of some collateral or independent transaction, not strictly connected with the particular physical service. For instance, electric companies frequently sell electric stoves, refrigerators, and the like. Such a company cannot cut off electric service because the patron is in default in the payment of a bill of that description. State v. Butte E. & P. Co., 43 Mont. 118, 115 P. 44, Miller v. Roswell, G. & El. Co., 22 N. M. 595, 166 P. 1177, and authorities and annotations therein cited." Thomas v. Mississippi Power & Light Co., 170 Miss. 811, 152 So. 269. See, also, 43 Am. Jur., Public Utilities and Services, § 23, p. 588; 4 McQuillin, Municipal Corporations (2d ed.), § 1919, p. 1023; Carmichael v. Southern Bell Telephone & Telegraph Co., 157 N. C. 21, 72 S. E. 619, 39 L. R. A. n. s. 651, 654, Ann. Cas. 1913B 1117; Southwestern Gas & Electric Co. v. Stanley, 123 Tex. 157, 70 S. W. 2d 413.

In view of the foregoing we think the district court erred in denying the plaintiffs injunctive relief, and reverse its holding with directions that it enter an order enjoining the City of Aurora from collecting, or attempting to collect, any bill accumulated and delinquent under the provisions of Ordinance 217 by the means therein provided, that is, by shutting off and disconnecting the water service of such patron.

REVERSED AND REMANDED WITH DIRECTIONS TO ENTER INJUNCTIVE RELIEF IN ACCORDANCE HEREWITH.

YEAGER and CHAPPELL, JJ., concur in the result.

CLYDE OMAN, APPELLEE, v. THE CITY OF WAYNE, APPELLANT, IMPLEADED WITH THE STATE OF NEBRASKA ET AL., APPELLEES.

30 N. W. 2d 921

Filed February 13, 1948. No. 32274.

1. **Taxation.** Where a deed is issued pursuant to sale under a tax foreclosure decree to a nominal purchaser and such sale and deed are void a purchaser from the nominal purchaser at the sale with actual or constructive notice of the impairment of title takes nothing by his purchase.
2. ———. Where a city, in a tax foreclosure in its own name, pursuant to a scheme to evade statutory requirements for sale of real estate, purchases at foreclosure sale in the name of a third person with the intent and purpose of having resale made in the name of the third person for the city without formal action by it, any such sale is void.
3. **Equity.** A court of equity, in dealing with legal rights, adopts and follows rules of law, in all cases to which those rules are applicable, and whenever there is a direct rule of law governing the case in all its circumstances, the court is bound to follow it.
4. **Courts.** A court may not depart from settled rules of law in order to do what may in the particular instance appear to be substantial justice.
5. **Equity.** Equity has never been an instrument of law violation and an equity court will not by its decree set aside legislative enactments or render for naught their mandates.
6. **Estoppel.** Estoppel may not be asserted to uphold fraud or misdoing.

Appeal from the district court for Wayne County: LYLE E. JACKSON and FAY H. POLLOCK, JUDGES. *Reversed and dismissed.*

Fred S. Berry, H. D. Addison, and *Burr R. Davis,* for appellant.

William A. Crossland, Ginsburg & Ginsburg, and *H. E. Siman,* for appellees.

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

YEAGER, J.

This is an action in equity by Clyde Oman, plaintiff and appellee, against the City of Wayne, Nebraska, and others, defendants, the declared purpose of which is to fix, determine, and adjudge the respective rights, titles, liens, claims, and interests of all the parties in certain real estate. The claimed grounds for relief, the identity of the parties interested and their relationships to the real estate, and transactions connected therewith and to each other will be made to appear later herein.

Following a trial in the district court a decree was entered favorable to plaintiff. From this decree the defendant City of Wayne has appealed.

The cause comes here without a bill of exceptions, therefore only the transcript and its contents may be considered in the determination of this appeal. With that in mind it appears proper to say here that the facts hereinafter considered are only such as are shown to exist by the content of the transcript. The facts considered are not in substantial dispute. To the extent necessary to a determination of this case they are:

On June 25, 1931, a county treasurer's certificate of tax sale was issued to the city of Wayne selling to it Lot 30, Taylor and Wachob's Addition to the City of Wayne, Nebraska, for delinquent taxes. The taxes involved were $1,682.28 for paving assessments and $443.05 for general real-estate taxes. The city made no payment of the taxes involved in the certificate.

On August 11, 1931, the city instituted an action in the district court to foreclose the certificate. The matter went to decree on September 25, 1931, in the sum of $2,190.60. On February 29, 1932, the property was sold to J. E. Brittain who bid the amount of the decree. No part of the amount of the bid was paid. A return of the order of sale was made by the sheriff.

Brittain was city attorney at the time of the foreclosure and represented the city therein. It appears

that at informal meetings of the city council, of which no records were made, a plan was formulated and adopted whereby in tax foreclosure proceedings the city attorney or city clerk would bid for said properties which bids would be made for and on behalf of the city, that no money would be paid on said bids, and that on confirmation sheriff's deeds would be issued to the clerk or attorney but that the title so acquired would be held for the city. In furtherance of the plan it was agreed that negotiations for the sale of said properties would thereafter be made by the city officials and that any consideration received therefor would belong to the city. The bid of Brittain was made pursuant to that plan.

The records of the city council show that on September 26, 1933, a motion was made, seconded, and carried to take an option on two lots owned by plaintiff for the sum of $5,000. The motion makes no reference to the city conveying the property involved herein to plaintiff. There is no record of an aye and nay vote on the adoption of the motion.

On September 27, 1933, an option agreement was entered into, signed by the city of Wayne by its mayor and attested by its city clerk, and by Clyde Oman, plaintiff herein. By this agreement Oman agreed to sell two lots to the city for the agreed consideration of $5,000. Of this amount $4,500 was to be paid in cash and $500 to be paid by the city deeding to Oman a part of Lot 30 involved in the tax foreclosure proceedings. It was agreed that all paving assessments and real-estate taxes were to be paid up to and including the 1933 tax. On April 5, 1934, the sale in the tax foreclosure case was confirmed by the court and sheriff's deed issued to Brittain, which deed was duly recorded.

Subsequent to the confirmation of the sale Oman and wife conveyed the two lots to the city. The $4,500 in cash was paid. Brittain and wife conveyed the property here involved, being a part of said Lot 30,

to Oman by quitclaim deed for a recited consideration of $500. The deed was delivered and recorded.

On October 27, 1936, a resolution was adopted by the city of Wayne reciting that it became the owner of said Lot 30 by virtue of the foreclosure action; that as a matter of convenience title was taken in the name of Brittain, its city attorney; that pursuant to said arrangement, sheriff's deed issued to Brittain; that the city had subsequently sold the portion of the lot here involved to Oman, and had directed Brittain to convey said premises to him; that he did so on December 7, 1934, by quitclaim deed; and that under the agreement the city was to warrant and defend the title. It was resolved that the city grant to Oman the same protection under the quitclaim deed that he would be entitled to by warranty deed. The resolution contained a pretended covenant to warrant and defend the title. It was further recited that the resolution was approved, adopted, and passed at a regular meeting of the council. The resolution was signed by the city by the mayor and attested by the clerk. There was no record made of aye or nay votes on the adoption of this resolution.

Plaintiff entered into possession of the property involved in this action, placed valuable improvements thereon, and paid general taxes and special assessments in the sum of $890.66. The city entered into possession of the property conveyed to it by Oman and erected an auditorium thereon. It retains possession of the property.

On September 21, 1942, plaintiff entered into a written contract to sell the premises involved herein to defendant Stoltenberg for $2,500. He has received $2,250 of the purchase price, the balance to be paid when title is accepted and approved.

It appears that Brittain died subsequent to the issuance of the deed by him to Oman and prior to the bringing of this action.

Plaintiff brought this action alleging substantially

that the sale to Brittain was regular and valid on its face and disclosed no defect or omission that would indicate invalidity or put a prudent person on inquiry; that Brittain was a trustee for the city and had authority to convey the property; that in purchasing from the city it was understood and agreed that plaintiff would receive title with general warranty; that he took title in good faith for a valuable consideration and without knowledge of any defect or fact that would put him on inquiry; that he was the owner of the premises; that he relied upon the contract and warranty, entered into possession, and placed valuable improvements on the premises; that he had contracted to sell the same to Stoltenberg and had received payment of a substantial part of the consideration; that the city is estopped to claim its equities are superior to those of the plaintiff; and that he is entitled to a first and prior lien for the consideration paid, for the improvements placed on the property, and for taxes and special assessments paid. Plaintiff prayed that the court fix and determine the rights, liens, and claims of the parties; that he be decreed to have a prior lien thereon; that defendant city be required to account for the consideration received by it and be barred from asserting any lien on the premises; and that in the event it be determined the parties have liens on the premises, that the premises be ordered sold to satisfy the liens, and further prayed for equitable relief.

Plaintiff joined as parties defendant the city of Wayne, the county of Wayne, the State, the school district, the widow and heirs of Brittain and the administratrix of his estate, Stoltenberg and wife and tenant, all other persons interested in the estate of Brittain, and those having or claiming any interest in the property.

The city of Wayne demurred to the petition; the demurrer was overruled. The city answered; renewed its demurrer; alleged that it paid nothing for the tax certificate save an issuing fee; denied that on the face

the sale to Brittain and confirmation were regular; alleged that the record fully disclosed the bid of Brittain was not paid nor the decree satisfied and that the county treasurer's records showed the taxes and assessments involved had not been paid; denied that Brittain had legal authority to sell on behalf of the city; denied that the city had authority to sell, except as authorized by law; alleged the absence of a record of aye and nay votes as hereinbefore set out, and that the option and resolution were illegal and of no effect, specifically denying that the city had the authority to warrant title; admitted that it went into possession of the premises conveyed to it by Oman and had built an auditorium thereon, and that it retained possession as owner; admitted the possession and placing of improvements by plaintiff on the premises here involved; alleged that plaintiff voluntarily paid taxes and assessments on the property; admitted that Brittain never paid the bid and that the political subdivisions entitled to receive the proceeds had received nothing; alleged that the sale to Brittain and the sheriff's deed to him and the deed from Brittain and his wife to plaintiff were void and that plaintiff had no interest in the property; and alleged that the decree of foreclosure was a presently valid first lien on the premises. The city prayed for a dismissal of plaintiff's petition; that the decree be declared a first lien on the premises superior to the claims of the plaintiff and of any of the defendants, except the claim of the county for general taxes included in the tax certificate; and for an order of sale based on the decree.

The county and the State demurred, answered, and prayed substantially the same as the city.

By reply to these answers the plaintiff pleaded an estoppel based upon the plaintiff's reliance upon the option and resolution; his change of position by conveyance to the city of the two lots; his possession of, his placement of improvements and payment of taxes

and assessments on the property involved here; and the receipt by the city of the full benefits of his contract with it, and its retention of the same.

Defendant Stoltenberg answered and by cross-petition against the plaintiff alleged his contract of purchase with plaintiff, the payments made thereon, his possession of the property, the payment of general and special taxes thereon, the making of improvements, and a readiness to perform his contract. He prayed for specific performance or in the alternative for damages.

Because of the court's decree we do not deem it necessary here to set out the allegations of plaintiff's answer to the cross-petition.

The trial court by decree entered a default against all defendants served but not answering and found generally for plaintiff and for the cross-petitioner. The court found as to the facts hereinbefore recited; that the deed from Brittain to plaintiff conveyed no title; that the officials of defendant city acted in good faith; that it was intended plaintiff should receive a merchantable title; that the city had retained the fruits of the transaction; that the city had irregularly exercised its power and was estopped to retain the benefits; that the rights of all parties could be protected and complete equity done by requiring the city to comply with the bid of Brittain; and that the cross-petitioner was entitled to specific performance if merchantable title could be given and, if not, to damages. The trial court ordered the city to pay the bid made by Brittain; that the sale thereupon be confirmed and sheriff's deed issued conveying to plaintiff the property here involved; that the title to the premises be quieted in plaintiff as against all claims, except that of the cross-petitioner. As to the cross-petitioner, it was decreed that he was entitled to specific performance or damages and jurisdiction was retained for the purpose of ascertaining and granting the appropriate relief.

The city appeals.

The pertinent assignments of error are:

"1. The court erred in overruling defendant's demurrer to plaintiff's petition.

"2. The decree is not sustained by the facts and the findings of the lower learned court.

"3. The decree is contrary to law.

"4. The court erred in holding and directing the defendant City of Wayne to pay to the clerk of the district court the bid made by J. E. Brittain, city attorney, at the sheriff's sale under the decree of foreclosure entered in the case of the City of Wayne, Nebraska v. Arthur G. Adams, et al., Case No. 4268.

"5. The court erred in holding and deciding that the defendant City was estopped from enforcing its lien against the real estate by reason of the alleged transaction with plaintiff."

The validity of the decree for the foreclosure of the taxes is not questioned.

Insofar as the foreclosure proceedings and the sale and confirmation and the transaction of plaintiff with the city in negotiating the purported purchase with the city are concerned, we see no controlling difference between this case and that of Taxpayers' League v. Wightman, 139 Neb. 212, 296 N. W. 886. The bid and the sale in the foreclosure proceedings there were made under almost identical circumstances with the bid and the sale here. We there held that the entire transaction beyond the decree of foreclosure was a constructive fraud; that the sale and sheriff's deed were void; and that they could not be sanctioned on the theory that confirmation cured irregularities and defects. We have so construed that opinion in Wightman v. City of Wayne, 146 Neb. 944, 22 N. W. 2d 294, and Wightman v. City of Wayne, 148 Neb. 700, 28 N. W. 2d 575.

We think it should be pointed out that the decision in Taxpayers' League v. Wightman, *supra,* did not hold the deed to Bressler, the city clerk, void solely because the city did not intend to pay the bid when made and

did not pay it. We held that the evidence showed a constructive fraud. We said in the opinion: "The making of bid for the property in the name of the city clerk was doubtless an effort to circumvent the provisions of said section 17-401 relating to sales of real estate owned by such a city." It was that effort and what was done pursuant to it which, together with the other circumstances shown by the record, we held were more than irregularities and rendered the transaction void. We further held in Taxpayers' League v. Wightman, *supra*, that it was not a case where some innocent third party had bought property in good faith from a record owner on the strength of a record showing good title. Although the record title was in Bressler at the time Wightman negotiated for the property he knew in fact that the city claimed ownership and he dealt with the city on that basis. Neither Wightman in the one instance nor Oman in the other was an innocent purchaser for value without notice of impairment of the title of the nominal grantor. The same factual situation exists here as there and it must receive the same treatment as was accorded there.

We now turn to the decree of the trial court, which plaintiff asks that we affirm. It orders the city to pay the void bid of Brittain. It does not purport to require compliance with the statutory proceedings for a sale under foreclosure; it does not permit of competitive bidding for the property but rather shuts out all such bids, other than the void bid made by Brittain; it orders confirmation of the sale, without compliance with the requirements of the statutes as to confirmation; it orders the sheriff to convey the property, not to the bidder nor to the city for which the bid was made and which is required to pay the bid, but to the plaintiff who was not a bidder and who is not paying the bid; and it requires the city to buy property at a tax sale, a part of which is not involved in this action. The obvious purpose and effect of the decree is to require the city to buy the prop-

erty involved in this action and then to sell it to plaintiff without compliance with the statutory provisions by which a city may sell real estate. See Laws 1933, c. 29, § 1, p. 206; C. S. Supp., 1933, § 17-401; R. S. 1943, § 17-503. The provisions of these sections are mandatory. Wightman v. City of Wayne, 144 Neb. 871, 15 N. W. 2d 78. The effect of the decree in this respect is to direct not compliance with but violation of mandatory statutory provisions. This a court cannot properly do.

In State ex rel. Sorensen v. State Bank of Omaha, 128 Neb. 148, 258 N. W. 260, we cited with approval and adopted these rules:

"'A court of equity, in dealing with legal rights, adopts and follows the rules of law, in all cases to which those rules are applicable; and whenever there is a direct rule of law governing the case in all its circumstances, the court is as much bound by it as would be a court of law, if the controversy was there pending.'"

"'However manifest and strong the natural equities in the specific instance may be, the court may not depart from the settled rule of law in order to do what may be deemed substantial justice in the particular case.'"

In Warren v. County of Stanton, 147 Neb. 32, 22 N. W. 2d 287, we said that equity has never been an instrument of law violation and that an equity court cannot set aside and render for naught the will of the people as expressed in its solemn legislative enactments.

In Dawson County Irrigation Co. v. Stuart, 142 Neb. 428, 6 N. W. 2d 602, we cited with approval these statements in explanation of the maxim "Equity follows the law" taken from 30 C. J. S., Equity, § 103, p. 503: "In a broad sense the maxim means that equity follows the law to the extent of obeying it and conforming to its general rules and policies whether contained in the common or statute law. * * * The maxim is strictly applicable whenever the rights of the parties are clearly defined and established by law, especially when defined

and established by constitutional or statutory provisions."

It necessarily follows that the decree of the trial court may not be affirmed.

We now come to plaintiff's plea of estoppel.

The rule is that the doctrine of estoppel may never be asserted to uphold crime, fraud, or misdoing of any character. 3 Pomeroy, Equity Jurisprudence (5th ed.), § 813, p. 236; 19 Am. Jur., Estoppel, § 39, p. 638; 31 C. J. S., Estoppel, § 148, p. 437. To sustain the estoppel here would be to sustain and make effective the fraud that voids this transaction from the beginning. It may not properly be done. See Warren v. County of Stanton, 145 Neb. 220, 15 N. W. 2d 757.

We are not attempting to say here that if appellee had, without notice of impairment of title, actual or constructive, purchased the real estate in question relying upon the record title of Brittain, the city of Wayne would not be estopped to assert the invalidity of such sale. That question is not before us and accordingly we do not pass upon it.

One other matter in this case requires attention. In the plaintiff's brief filed herein, he suggested that, if the decree of the trial court could not be sustained, he was entitled to relief under the provisions of section 3, chapter 197, Laws 1945, appearing as section 77-1931, R. S. Supp., 1945. We then requested briefs and additional argument on the applicability of chapter 190, Laws 1943, and chapter 197, Laws 1945. Briefs were furnished and argument had. We have examined these statutes generally and with particular regard to our holding that the sale and the sheriff's deed to Brittain are void.

We need but point out that under the provisions of section 1 of the 1943 act, and likewise of the 1945 act, the first requirement is that the tax foreclosure proceeding shall be one wherein the title to the real estate was acquired by a municipality, or other governmental subdivision, or agent or trustee thereof. The party authorized to bring the action by section 2 of the 1943 act

is the present owner or purported owner of the property, and by section 1 of the 1945 act the present owner. We think it is quite apparent that the city never acquired title to this property. The decree herein finds that neither Oman nor the city of Wayne obtained any title and of this finding Oman is not here complaining. This plaintiff cannot therefore be permitted to say that he is the present or purported owner. This plaintiff accordingly does not bring himself within the provisions of the acts as to their first requirements as to a cause of action; neither does he qualify as a party authorized to bring the action. The acts clearly are not applicable here. We need not and do not determine other questions presented as to the acts.

The judgment of the district court is reversed and the plaintiff's petition dismissed. This judgment does not disturb the decree of the trial court as to the cross-petition of the defendant Stoltenberg.

REVERSED AND DISMISSED.

WENKE, J., concurs in the result.

HAROLD B. OLSON, APPELLEE, V. ROBERT LISCO ET AL., APPELLANTS, IMPLEADED WITH MARY L. BROWN ET AL., APPELLEES.

30 N. W. 2d 910

Filed February 13, 1948. No. 32355.

1. **Wills.** It is the court's duty in the construction of a will to give effect to the true intent of the testator so far as it can be collected from the whole instrument, if such intent is consistent with the rules of law.
2. ———. In determining a testator's intention, the court must examine a will in its entirety, giving consideration to its every provision, giving words used their commonly and generally accepted meaning, and indulge the presumption that testator understood the meaning of the words used.
3. **Estates: Wills.** Where real estate is devised to executors, to be held by them in trust until a child attains a certain age, when the same shall be conveyed to him in fee, with a devise

over, in the event of the child's death prior to attaining such age, such a provision confers on the child a vested interest in fee simple, subject to the prior chattel interest given the executors and also subject to defeasance in the event of his death before attaining such age.

4. ———: ———. Where an absolute fee has been given in one clause of a will and a subsequent provision provides for a different distribution upon the happening of a contingency, such contingency must take effect before the period of distribution.

Appeal from the district court for Morrill County: CLAIBOURNE G. PERRY, JUDGE. *Affirmed as modified.*

Porter & Porter, for appellants.

Bern R. Coulter and *Robert J. Bulger,* for appellees.

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

WESTERMARK, District Judge.

Plaintiff, appellee herein, the executor of the will of Gladys J. Lisco, deceased, brought this action in the district court for Morrill County for a declaratory judgment to interpret certain provisions in the will of William W. Lisco, deceased. By her will Gladys J. Lisco, daughter and only child of William W. Lisco, had devised the lands in Nebraska to charitable institutions to be selected by the plaintiff and two other parties. The land involved is approximately 440 acres in Morrill County. It is the contention of plaintiff that by the terms of the will of William W. Lisco, deceased, Gladys J. Lisco had obtained title in fee simple. The nephews and nieces, appellants herein, surviving descendants and heirs of said William W. Lisco, deceased, maintain that the daughter took only a life estate.

The father executed the will on October 9, 1902, when the daughter was about four or five years old. The father died on November 6, 1924, and the will was admitted to probate on December 19, 1924, in Morrill County. Gladys J. Lisco died in California on March 25, 1944,

leaving a holographic will which was admitted to probate as a foreign will in Morrill County.

Appellants and appellee make their respective claims under the second and third paragraphs of the father's will which are as follows:

"Second: I give and bequeath to my beloved daughter, Gladys J. Lisco all my personal property, money, stock in ditches and all other personal property and chattels of any and all description and all the real estate, wherever situated, I may die possessed of under the following conditions: Said Gladys J. Lisco to receive the net proceeds of all my estate real and personal, until she becomes thirty years of age. After said Gladys J. Lisco shall become thirty years of age she is to have entire control and right to possession of all my real estate, same to be hers in fee simple and she said Gladys J. Lisco is to have at said time right to use, sell and dispose of my entire personal property as she may see fit.

"Third: In case of death of my beloved daughter Gladys J. Lisco, should she die possessed of any personal property or real estate, devised her by this will, being part of my estate, said personal property and real estate is to descend, share and share alike to my brothers and sisters, or their descendants."

The district court, in substance, found and decreed that by the terms of said will the daughter was given a life estate in said land until she was 30 years of age, and upon attaining the age of 30 years she was given and devised a fee simple title; that the third paragraph provided that in the event she died before she had attained the age of 30, then and in that event the land should descend to his brothers and sisters or their descendants; that the daughter was of the age of more than 30 years at the time of her death and the owner in fee simple. Under the terms of the father's will did Gladys J. Lisco obtain a fee simple title, subject to defeasance within a certain period, or was she devised a life estate with power of sale?

"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. See, also, In re Estate of Zents, 148 Neb. 104, 26 N. W. 2d 793.

"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, In re Estate of Zents, *supra*.

The second paragraph of the will provides: "* * * After said Gladys J. Lisco shall become thirty years of age she is to have entire control and right to possession of all my real estate, same to be hers in fee simple * * *." The fourth clause of the will provides that the executors should take entire charge of the property and pay the yearly net income to his daughter, with power to sell the personal property at any time they saw fit.

In the court's opinion this gave the daughter a fee simple title upon the death of the father subject to defeasance in case of her death before she arrived at the age of 30 years, as provided in the third paragraph of the will which is explained subsequently in this opinion.

The case of Shackley v. Homer, 87 Neb. 146, 127 N. W. 145, appears applicable. In that case the real estate was devised to executors to be held by them in trust until Cedric E. Cremer attained the age of 25 years, when the real estate was to be conveyed to him in fee, with a devise over, in the event of Cremer's death prior to attaining such age, to Cremer's widow and children, if any, and, if none, then to Cremer's mother. It was held that Cremer obtained a vested estate in fee simple, on his father's death, subject to the prior chattel interest given to the

executors, and also subject to defeasance in the event of his death before attaining such age.

Appellants contend that when the daughter attained 30 years of age she became possessed of all the property, both personal and real, of the father; that she had no right of disposition by will; and at her death said property descended to the appellants as descendants of the father. In support of this contention they cite Krause v. Krause, 113 Neb. 22, 201 N. W. 670; Merrill v. Pardun, 125 Neb. 701, 251 N. W. 834. The wills in those cases provided that on the death of the first taker the property remaining was devised to others. There was no uncertainty as to the time of death. They did not involve the interpretation of the significant phrase, "In case of death" as a contingency either before or after the death of the testator or some other contingency, and therefore cannot be said to be applicable. Avoiding the technical meaning of the provisions of the will for the moment, his concern about his daughter is manifested by providing for the supervision of the property until she should arrive at the age of mature discretion, and for her ownership and enjoyment thereafter. Until she arrived at 30 years of age the property was to be under the control of the executors, as provided in the fourth paragraph of the will. Thereafter she was to have the full control and enjoyment. Clearly, the testator had two periods of her life in mind when he wrote the will; first, before she arrived at 30 years, and second, after she attained such age.

Accordingly, it is natural to presume that he considered the contingency of her death during the first period, the period when she had not come to the full control and enjoyment of the property. This presents then the intention of the testator in using the words, "In case of death." Should it mean "at her death" as contended for by appellants, or does it refer to a contingency?

The general rule is that when the expression, "in case she dies," is used without any reference to time, it means

in case the first taker dies before the testator does. In the case of Johnston v. Reyes, (Tex. Civ. App.) 183 S. W. 7, it was held: "It would be unreasonable to hold that the testator would use the words, 'in case she dies,' to mean when she dies. He knew she would die at some time, and he did not desire to prepare for that; but in case she died before he did, then he desired to dispose of his property."

"The reason assigned for the rule is that as death is the certain event and time only is contingent, the words of contingency can only be satisfied by referring them to a death before some particular period, and none being mentioned, the time referred to must be presumed to be the testator's own death. (Matter N. Y., L. & W. R. R. Co., 105 N. Y. 89; Vanderzee v. Slingerland, 103 id. 47." Fowler v. Ingersoll, 127 N. Y. 472, 28 N. E. 471.

The contingency of death as expressed in the phrase, "in case of death" was discussed in the case of In re Estate of Willits, 88 Neb. 805, 130 N. W. 757. In that case the testator bequeathed and devised all his personal and real estate to his two grandsons and further provided, "In case of the death of either of the above named grandsons, his share of my estate to revert to the other." The will further provided that the executor was empowered to sell all the property and turn over the proceeds to the guardians of the grandsons to be held in trust until each attained his majority. One grandson having died after reaching the age of majority, the other grandson claimed all the proceeds. The court held that the other grandson was not entitled to the share of the deceased grandson. The court in its opinion said: "The general rule is that, where there is a legacy to a person absolutely, and a provision that in case of his death the estate shall revert to another, the contingency referred to is the death of the first taker before the death of the testator; but special circumstances will prevent the application of this general rule. In Schnitter v. McManaman, 85 Neb. 337, it is said: 'The rule that the words of

limitation shall be applied to the death of the first taker without issue during the life of the testator is said to be extremely technical in its character, and does not apply where there are indications, however slight, that the testator referred to death subsequent to his own demise.' "

In this case the contingency is not the time of the death of the testator but rather the time of distribution; that is, the time when the daughter would obtain the full enjoyment of her father's estate. It being apparent that the testator had two periods of her life in mind while making his will, it becomes obvious that the contingency relative to her death referred to the first period of her life, until she became 30 years of age, and in case of her death before that time the fee simple estate given her in the first paragraph was subject to defeasance; that is, subject to a gift over to the brothers and sisters of the father.

The citation In re Estate of Willits, *supra,* is directly in point. "Mr. Hawkins in his treatise on Wills (2d ed.) 254, deduces the following rule from the cases: 'Where there is a bequest to one person, and "in case of his death" to another, the gift over is construed to take effect only in the event of the death of the prior legatee before the period of payment or distribution, unless an intention appear to the contrary. Cambridge v. Rous, 8 Ves. Jr. (Eng.) 12; Ommaney v. Bevan, 18 Ves. Jr. (Eng.) 291; Home v. Pillans, 2 Myl. & K. (Eng. Ch.) 15.' See also 2 Jarman, Wills (6th ed.) 1602, 1609, 1610; Theobald, Wills (Can. ed.) 681, 685; Lewis' Estate, 203 Pa. St. 219."

We are of the opinion that Gladys J. Lisco took a fee simple title, subject to defeasance or gift over to the brothers and sisters of William W. Lisco or their descendants, upon a contingency terminable on her reaching the age of 30 years. Having reached the foregoing conclusions, the decree of the district court is affirmed as herein modified.

AFFIRMED AS MODIFIED.

GEORGE JOINER, APPELLEE, v. J. A. POUND, JR., APPELLANT.
31 N. W. 2d 100

Filed February 25, 1948. No. 32281.

1. **Accession: Real Estate.** Ordinarily the owner of the fee, by his annexation of personal property, renders it an accession to the land.
2. **Improvements.** Where the owner puts in improvements, the law at once raises a presumption of intention to make them a part of the land.
3. **Fixtures.** Rules for determining what is a fixture are construed strongly against the vendor and in favor of the purchaser.
4. **Real Estate: Pleading.** Where articles attached to the freehold are of such a class that a prospective purchaser has a right to assume they are a part of the freehold and are not such as to put a prospective purchaser upon inquiry in reference thereto, and the freehold is sold, and no reservation of the articles is made in the instrument of conveyance, and the articles are removed by the vendor, and the purchaser sues for damages to the freehold, the burden rests upon the vendor to plead a right to remove, if that be the vendor's defense.
5. **Pleading.** If from the facts stated in the petition it appears that the plaintiff is entitled to any relief, a general demurrer will not lie.
6. ———. A single paragraph of a statement of a cause of action is not subject to demurrer on the ground that it does not state a cause of action if the pleading as a whole states a cause of action.
7. **Appeal and Error.** In order that assignments of error as to the admission or rejection of evidence may be considered, the rules of court require that appropriate reference be made to the specific evidence against which objection is urged.
8. **Damages.** The rule that the measure of damages is the difference in value of the real property before and after the removal of the articles is not an exclusive rule.
9. **Fixtures: Damages.** Fixtures ordinarily have a value separate and apart from the realty to which they are attached. That value may properly be submitted to the jury to enable it to more accurately determine the loss suffered by the purchaser.
10. **New Trial: Appeal and Error.** An assignment of error in a motion for a new trial to the effect that the trial court erred in refusing to give a group of tendered instructions does not require a consideration of such assignment further than to ascertain that any one of the tendered instructions was properly refused.
11. ———: ———. An assignment of error in a motion for a

new trial to the effect that the trial court erred in giving a group of instructions does not require a consideration of such assignment further than to ascertain that one of the instructions was properly given.

12. ———: ———. Error alleged in an instruction to the jury must be called to the attention of the trial court in the motion for a new trial before it will be considered by this court.

APPEAL from the district court for Douglas County: HENRY J. BEAL, JUDGE. *Affirmed.*

W. A. Ehlers, for appellant.

Pilcher & Haney, for appellee.

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

SIMMONS, C. J.

This is an action by a purchaser against a vendor for damages to real estate resulting from the removal of fixtures. Issues were made and trial had resulting in a verdict for the plaintiff. A motion for a new trial was made and overruled, and judgment entered on the verdict. Defendant appeals. We affirm the judgment of the trial court.

Plaintiff in his petition alleged that he had purchased certain real estate from the defendant and had paid the purchase price; that during the negotiations with defendant and defendant's agent, he was assured by the defendant and the defendant's agent that certain carpeting and padding located in the premises and attached to the real estate were to pass to the purchaser with the real estate, and that the representations, statements, and assurances were an inducement to the purchase; that when he took possession of the premises certain bathroom fixtures, light fixtures, curtain rods, light switch shields, closet hooks and rods, and the carpeting and padding (all of which had been attached to the premises) had been removed by the defendant; that the premises with the articles attached thereto

were worth $7,500, and with the articles removed were worth $6,832.50; that because of removing the light switch shields, the walls showed clean around the switches and were noticeably dirty elsewhere, and that plaintiff was required to wash the walls and to expend $15 per room therefor, in all to his damage in the sum of $742.50, for which he prayed judgment.

Defendant demurred to this petition in this wise. He demurred separately to all the allegations with reference to carpeting and padding for the reason that the petition failed to state a cause of action with reference to the same; to the allegations with reference to the several articles named for the same reason; and to the allegation with reference to washing the walls for the same reason. The trial court overruled the demurrer. Defendant answered. Plaintiff replied. Trial was had resulting in a judgment for the plaintiff based on the jury's verdict for $627.50.

Defendant assigns error, first contending that the trial court erred in overruling his demurrer.

Defendant's contention appears to be that the petition failed to contain allegations that the agent was authorized to make the statements. Defendant overlooks the fact that plaintiff alleged the assurances were made "by the defendant and by the defendant's agent."

The rule is that ordinarily the owner of the fee, by his annexation of personal property, renders it an accession to the land. 36 C. J. S., Fixtures, § 26, p. 964. We said in Frost v. Schinkel, 121 Neb. 784, 238 N. W. 659, 77 A. L. R. 1381, that where the owner puts in improvements, the law at once raises a presumption of intention to make them a part of the land. Rules for determining what is a fixture are construed strongly against the vendor and in favor of the purchaser. 36 C. J. S., Fixtures, § 43, p. 985; 22 Am. Jur., Fixtures, § 36, p. 744.

Where articles attached to the freehold are of such a class that a prospective purchaser has a right to as-

sume they are a part of the freehold and are not such as to put a prospective purchaser upon inquiry in reference thereto, and the freehold is sold, and no reservation of the articles is made in the instrument of conveyance, and the articles are removed by the vendor, and the purchaser sues for damages to the freehold, the burden rests upon the vendor to plead a right to remove, if that be the vendor's defense. Arlington Mill & Elevator Co. v. Yates, 57 Neb. 286, 77 N. W. 677; Roden v. Williams, 100 Neb. 46, 158 N. W. 360; Swift Lumber & Fuel Co. v. Elwanger, 127 Neb. 740, 256 N. W. 875; Runner v. Pierson, 144 Neb. 847, 14 N. W. 2d 847.

We add that we see no reason for applying the rule differently between carpets and the other items alleged to be fixtures in the petition. We are cognizant that in Oliver v. Lansing, 59 Neb. 219, 80 N. W. 829, we said: "But we can conceive of no rule of the common law which would justify a court in holding that a piano, a desk and its chair, carpets, curtains, a baggage-truck, a step-ladder, a centre-table or a settee, under the evidence, were real property, although they may have been bought by the parties with the intention that they should remain permanently in this building, and be used in connection with it, until worn out and unfitted for service." The case was reversed and remanded with directions to the trial court "* * * to determine from the evidence already of record and such as may hereafter be adduced, if any, what articles in controversy are fixtures and what are personal property, according to the principles laid down by this court in said case of Freeman v. Lynch, supra, and to adjust the rights of the parties according to their interest." Freeman v. Lynch, 8 Neb. 192, is the basic case relied upon in Swift Lumber & Fuel Co. v. Elwanger, *supra*. In the latter case we held that whether an article annexed to the real estate has become a part thereof is a mixed question of law and fact. In the Oliver case, *supra*, the

court was directed to determine the fact as to whether the carpet and other articles mentioned were fixtures.

The rule is: " 'If from the facts stated in the petition it appears that the plaintiff is entitled to any relief, a general demurrer will not lie.' " Central Nebraska Public Power and Irrigation District v. Walston, 140 Neb. 190, 299 N. W. 609. A single paragraph of a statement of a cause of action is not subject to demurrer on the ground that it does not state a cause of action if the pleading as a whole states a cause of action. 41 Am. Jur., Pleading, § 231, p. 454; 49 C. J., Pleading, § 538, p. 426; § 25-806, R. S. 1943. We think it clear that the demurrer was properly overruled.

The evidence is that the premises involved was a residence property, owned jointly (without further definition) by the defendant and his wife. They had purchased it some three or four years before the events in question. At the time of their purchase there was a runner carpet in the front hall, from the entrance door to a door into the kitchen, also on and up the stairway and the full length of an upstairs hallway. This carpet was attached to the floor and steps by tacks. Under it was a padding. The carpet and padding are part of the articles involved in this action. Apparently after the defendant and his wife purchased the property, they installed in the dining room an elaborate crystal teardrop chandelier. This was screwed into a plate attached to the ceiling and electric connections made. The kitchen light fixture was screwed into an outlet socket; the bathroom and closet fixtures, and curtain rods were attached to the building either by screws or nails. There is no dispute but that defendant removed the principal articles involved, although there is dispute as to the number and quality of some of the articles removed.

The defendant assigns as error the overruling of objections to the admission of testimony offered by plaintiff and in refusing to admit testimony offered by defendant. Defendant argues the two assignments together.

Rule 8 a 2 (6) of this court relating to briefs provides: "The statement of facts shall be made in narrative form and shall consist of the substance of so much of the record, with appropriate references, as is necessary to present the case." Rule 8 a 3 provides in part as follows: "In the preparation of the brief, the following general rules shall be observed: * * * (2) References to interrogatories in the bill of exceptions shall be made by setting forth in parenthesis the page and question number in the bill of exceptions, as for example, (165:926), the number preceding the colon representing the page of the bill of exceptions and the number following representing the number of the interrogatory."

Defendant's brief under "Statement of Facts" contains statements as to the evidence—summarizing some 220 pages of testimony and over 1300 questions and answers—in which there is no reference to page and question in compliance with the above rule, and five references to questions and answers by question number alone. These references to evidence do not go to the evidence here assailed. In his argument on these two assignments there is no compliance whatever with the rule as to argument that "A party may, in connection therewith, make such further statement of facts, or quotation from the record, as he deems necessary properly to present the question, supporting such facts by appropriate reference to the record." Rules of the Supreme Court, Rule 8 a 2 (7). We have repeatedly held that attention must be called to the specific evidence against which the objection is urged. Chicago, St. P., M. & O. Ry. Co. v. Lagerkrans, 65 Neb. 566, 91 N. W. 358, on rehearing, 65 Neb. 580, 95 N. W. 2; Williams v. Fuller, 68 Neb. 354, 94 N. W. 118, on rehearing, 68 Neb. 362, 97 N. W. 246; Tarpenning v. Knapp, 79 Neb. 62, 112 N. W. 290.

The rules of court are not arbitrary. They are made to enable the parties to present their cause in a clear manner, so that the court may have before it the par-

ticular question that the parties desire to present and the proper relation to the record, in order that parties and court working together may arrive at a more exact answer to questions presented, and better administer justice. We have searched the record, without being certain that we have found all the evidence about which defendant complains.

Defendant having so elected to treat the evidence, we shall so treat it.

The record discloses that plaintiff's witnesses were permitted to testify as to the articles which it is claimed defendant removed from the premises and as to the fair and reasonable market value of like or similar articles, based in some instances on replacement costs of new articles. Defendant's contention is that the measure of damages is the difference in value between the thing contracted for and the thing received, and that the cost of some other article either new or old is not competent evidence in arriving at the amount of damages to real estate.

The rule that the measure of damages is the difference in value of the real property before and after the removal of the articles is not an exclusive rule. The primary object is to determine the amount of the loss. Whatever rule is best suited to that determination should be followed. The recovery must be reasonable having its basis in a proper consideration of all relevant facts.

Fixtures ordinarily have a value separate and apart from the realty to which they are attached. That value may properly be submitted to the jury to enable it to more accurately determine the loss suffered by the purchaser. The replacement cost may more accurately reflect the loss than opinion evidence as to the difference in value of the real estate before and after the removal. Koyen v. Citizens Nat. Bank, 107 Neb. 274, 185 N. W. 413; Slane v. Curtis, 41 Wyo. 402, 286 P. 372, on rehearing, 41 Wyo. 417, 288 P. 12; Annotations, 69 A. L. R. 914;

15 Am. Jur., Damages, § 116, p. 526; 25 C. J. S., Damages, § 85, p. 608, and § 88, p. 627.

The trial court did not err in the admission of the testimony.

Defendant also complains that plaintiff was permitted to testify as to the cost or value of the washing of the walls. The evidence is not cited. We find testimony of plaintiff as to the time spent in washing the walls. We find no testimony as to the cost or value of the labor involved. Accordingly, we find no merit in the contention.

The real-estate agent who negotiated the sale of the premises to the plaintiff for the defendant testified as to his knowledge of the premises and, over objection, that the fair and reasonable market value of the premises with the removed articles therein was $7,500, and with the articles removed, $6,750 to $6,850. Defendant contends this evidence was incompetent because it was not based on independent knowledge of values, but on testimony heard during the trial. Defendant did not base his objection to the testimony on that ground but on the ground that the contract of sale did not include the articles removed. The record shows that the testimony was based on expert knowledge of values. We do not find where it was based upon testimony heard during the trial. The assignment is without merit.

The evidence shows that the defendant placed a chandelier in the dining room in the place of the one removed. Defendant complains that he was not permitted to show the difference in value and the amount of damage, if any, to the real estate as to the chandelier removed and the one placed in the premises. Defendant does not cite the record. We have not found it. Under the rule heretofore stated, this assignment is overruled.

Defendant at the close of plaintiff's case-in-chief and at the close of the case moved for a directed verdict on the grounds that the petition did not state a cause of

action; that there was not sufficient testimony to support or prove the allegations as to damage; that the petition did not allege the purchase and sale of personal property; and that the evidence failed to show any such agreement. The trial court overruled the motions. Defendant assigns the overruling of these motions as error. For reasons heretofore given, the claimed error is not sustained.

Defendant assigns as error the refusal of the trial court to give defendant's requested instructions numbered 1, 2, and 3. A like assignment of error appears in the motion for a new trial. As to this assignment the rule is: "An assignment of error in a motion for a new trial to the effect that the trial court erred in refusing to give a group of tendered instructions does not require a consideration of such assignment further than to ascertain that any one of the tendered instructions was properly refused." Anderson v. Nebraska Defense Corporation, 146 Neb. 466, 20 N. W. 2d 322. As we said there, so we say here: "* * * we have examined the instructions refused and without setting them out we find that some of them do not correctly state the law." For instance, requested instruction numbered 1 would have required the jury to find for the defendant if it found that any one of the articles involved in this litigation was not a fixture.

Defendant assigns as error the giving by the trial court of instructions numbered 4, 5, and 7 on its own motion. In his motion for a new trial defendant said "* * * the court erred in given (sic) instructions numbers 1, 2, 3, 4, 5 and 6 on its motion to the jury." "It has long been the rule of this court that an assignment of error in a motion for a new trial to the effect that the trial court erred in giving a group of instructions does not require a consideration of such assignment further than to ascertain that one of the instructions was properly given." Morrow v. State, 146 Neb. 601, 20 N. W. 2d 602. Defendant does not contend here that instructions

numbered 1, 2, 3, and 6 are erroneous. Applying the above rule, further consideration is not given to this assignment so far as it relates to instructions numbered 4 and 5. Defendant's assignment of error as to instruction numbered 7 is subject to the rule that "* * * error alleged in an instruction to the jury must be called to the attention of the trial court in the motion for a new trial before it will be considered by this court." Muller v. Jensen, 144 Neb. 1, 12 N. W. 2d 80.

Defendant's next assignments of error, stated separately, are that the verdict and judgment are contrary to the competent evidence; are contrary to the rules of law applicable to the case; are the result of prejudice induced by the presentation and admission of improper testimony; are not sustained by competent evidence and the rules of law applicable thereto; are unreasonable, unjust, and excessive; and that the trial court erred in overruling defendant's motion for a new trial. Defendant argues these assignments jointly. They are answered by what has been recited and held heretofore in this opinion.

The judgment of the trial court is affirmed.

AFFIRMED.

IRENE M. PRICE ET AL., APPELLANTS, V. GAY MARSHALL SHIELS ET AL., APPELLEES.
31 N. W. 2d 91

Filed February 25, 1948. No. 32313.

1. **Pleading.** A demurrer to a pleading admits the truth of the facts well pleaded for the purpose of determining their sufficiency as a cause of action or defense, but it does not admit the correctness of the conclusions of law drawn therefrom by the pleader.
2. **Equity.** A court of equity will not entertain a suit to give a construction or declare the rights of parties upon a state of facts which has not yet arisen, nor upon a matter which is future, contingent, and uncertain.

3. ———. The jurisdiction invoked is limited to such matters as are practical and call for present action in the premises, and upon which the court may properly pronounce a present decree.

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

Atkins & Lyman, for appellants.

Neighbors & Danielson, for appellees.

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

MESSMORE, J.

This action is brought by the plaintiffs, remaindermen and the heirs of a deceased remainderman, against the testamentary trustee, the life tenant and remaindermen who do not join as parties plaintiff, the purpose of the suit being to construe the last will and testament of Thomas Shiels, deceased.

From the pleadings, demurrers, and the will there is an apparent confusion as to the name Shiels. In some instances it is spelled S-h-i-e-l-s, and in others, S-h-e-i-l-s. We use the spelling S-h-i-e-l-s because the action names the parties interested in the will in such manner although in the will the name is spelled S-h-e-i-l-s.

The defendants demur to the plaintiffs' petition. For the purpose of this appeal, the demurrers may be considered sustained on the ground that the petition failed to state a cause of action. The defendants urge that the action was prematurely brought.

For convenience the appellants will hereinafter be referred to as plaintiffs, and the appellees as defendants.

We deem it advisable to set forth the relationship of the parties as the same appears from the plaintiffs' petition and the will attached thereto and made a part thereof.

Thomas Shiels made and executed the will in question

January 3, 1925. He departed this life June 8, 1933. The will was admitted to probate July 6, 1933. He left surviving him Sarah Elizabeth Shiels, widow; Gay Marshall Shiels, son; Max Marshall Shiels, grandson; Evelyn Shiels Tucker, granddaughter; Katherine Shiels Bullock, granddaughter; and Dorothy Shiels Laursen, granddaughter, children of testator's son Gay Marshall Shiels; Thomas J. Shiels, grandson; Thea June Shiels, now Thea June Shiels Berning, granddaughter; Vanice Shiels, now Vanice Shiels Banta, granddaughter, children of the testator's son Iloa Jay Shiels who departed this life intestate on December 21, 1921, prior to the time of the making and execution of the will of Thomas Shiels, and prior to his death.

Sarah Elizabeth Shiels departed this life testate August 4, 1946.

The plaintiff, Irene M. Price, is the widow of Iloa Jay Shiels, son of the testator, and the mother of Thomas J. Shiels, a grandson of the testator. Thomas J. Shiels departed this life November 20, 1944, at the age of 24 years, leaving no children, and his only surviving heirs are his mother, Irene M. Price, and his wife, Shirley Louise Shiels.

The plaintiffs alleged in their petition that they were unable to ascertain whether or not any children have been born to Max Marshall Shiels, Evelyn Shiels Tucker, Katherine Shiels Bullock, and Dorothy Shiels Laursen, who are the children of testator's son Gay Marshall Shiels, and for that reason alleged that no children have been born to the foregoing named children of Gay Marshall Shiels. One child has been born to Vanice Shiels Banta, who is now a widow. No children have been born to Thea June Berning.

We set forth in substance certain provisions of the will insofar as the same need be considered on this appeal. The wife, Sarah Elizabeth Shiels, received a life estate with power to sell, mortgage or lease for terms within or beyond the period of the trust, and the right

to invest and reinvest under certain conditions, she to receive the net income from the trust estate during her life. The fifth paragraph of the will provides that upon her death the property is devised and bequeathed to a named trustee, with power to sell, mortgage or lease, invest and reinvest under certain conditions; the trustee to pay to Gay Marshall Shiels, the testator's son, all of the income received from the trust fund during his life.

Paragraph 6 (a) of the will provides that upon the death of Gay Marshall Shiels the trustee shall divide the trust into two equal parts and set aside one part in trust for the children of Gay Marshall Shiels, namely: Max Marshall Shiels, Evelyn Shiels, Katherine Shiels, and Dorothy Shiels. It provides further that the trustee set aside three-fifths of this half share, accumulate the income, and hold the three-fifths and income in trust for Max Marshall Shiels. It then provides, in substance, that if Max Marshall Shiels could make a showing that by his own efforts he had accumulated $3,000 at age 35, the trustee is obligated to pay him one-half of the sum set aside for him, together with one-half of the accumulated income. If Max Marshall Shiels fails to accumulate such amount, then no part of such sum would be paid until he was 40 years of age; then, if he made a proper showing that he had accumulated $3,000, the full amount set aside for him is to be paid to him. If he fails to do so, the whole sum is to be held in trust during his life, and the income therefrom to be paid to him semi-annually. It is provided further, in the event of the death of Gay Marshall Shiels before his son Max Marshall Shiels had completed his education, then, in that event, the trustee is authorized to advance any reasonable amount to help complete the education of Max Marshall Shiels. The balance of the half, as hereinbefore mentioned, is to be held in trust for Katherine, Dorothy, and Evelyn Shiels and paid to them semi-annually during their lifetime from and after the date upon which each of them became 25 years of age, and upon the

death of either, her share of the principal to be paid to her children, free from trust.

The will then provides that upon the death of Gay Marshall Shiels, the trustee is to hold the other half of the trust estate for the grandchildren Thomas J. Shiels, Thea June Shiels, and Vanice Shiels. Three-fifths of the half of the testator's estate is then charged with the same obligations and conditions that are imposed with reference to Max Marshall Shiels, as appears in paragraph 6 (a) of the will heretofore mentioned, for the benefit of Thomas J. Shiels and, as provided in paragraph 6 (a) with reference to Max Marshall Shiels, in the event of the death of Gay Marshall Shiels before Thomas J. Shiels had completed his education, then the trustee is authorized to advance any reasonable amount to help Thomas J. Shiels to complete his education. The balance of this half is to be held in trust for Vanice and Thea June Shiels and be paid to them in the same manner as provided for with reference to Evelyn, Katherine, and Dorothy Shiels.

Other parts of the will necessary to a determination of this appeal will be set forth later in the opinion, as will the allegations of the plaintiffs' petition upon which plaintiffs claim a cause of action has been stated.

The scope and effect of a demurrer to a pleading admits the truth of facts well pleaded for purposes of determining their sufficiency as a cause of action or defense, but does not admit the correctness of the conclusions of law drawn therefrom by the pleader. See Kozina v. Watkins Lumber Co., 146 Neb. 594, 20 N. W. 2d 606; American Water-Works Co. v. State, 46 Neb. 194, 64 N. W. 711, 30 L. R. A. 447, 50 Am. St. Rep. 610.

The plaintiffs contend that the trial court was in error in sustaining the defendants' demurrers, and that the petition states a cause of action that warrants construction of the will in question.

Paragraph 11 of the petition alleged, in substance, that the trust attempted to be created by the will of

Thomas Shiels failed or is inoperative in that the testator did not provide as to the disposition of his property in the event of the death of certain grandchildren, or either of them, prior to his death, and did not provide for the disposition of his property in the event either of the persons named in that paragraph of the petition died before or after him, leaving no children.

There would be no purpose in determining the question with reference to such grandchildren predeceasing the testator, for the reason none of them did. If such grandchildren die after the testator, leaving no children, what occurs in such event depends upon an analysis of the will in its entirety. Likewise, in connection with the following paragraph, No. 12, of the plaintiffs' petition: "That the second paragraph of Paragraph No. Seven (7) of said will provided: 'If Max Marshall Shiels or Thomas J. Shiels shall die before his share shall be paid to him, then the same shall be paid to his children, free from trust.' "

The contention is that the foregoing paragraph should be reasonably construed to mean that in the event of the death of Max Marshall Shiels or Thomas J. Shiels before their share shall be paid to them, and in the event they leave no children, then their share shall be paid to the heirs of the deceased immediately and free from trust; that Thomas J. Shiels received no part of his share of the trust estate prior to his death.

In this connection, the plaintiffs also point to the paragraph in the will affecting the two grandsons previously mentioned, as follows: "Provided, Further, in the event of the death of my son, Gay Marshall Shiels, before his son Max Marshall Shiels, has completed his education, then, in that event, the trustee is authorized to advance any reasonable amount to help him complete his education." The same provision is made with reference to Thomas J. Shiels, the deceased grandson. The theory is that this provision provided for depletion of the trust estate in the event further education was to be had by

either of the grandsons before the death of the present holder of the life estate. This contingency did not arise, and need not be determined. Thomas J. Shiels died at the age of 24 years. Max Marshall Shiels is now past 30 years of age and obviously will require nothing further to complete his education, nor is there any allegation to the effect he would.

We are cognizant of the cited case of Nitz v. Widman, 106 Neb. 736, 184 N. W. 172, dealing with remainders to a class which are not necessarily determined until the termination of a life estate, and the rule with reference to those not in being at the testator's death taking a vested remainder subject to open and let in after-born grandchildren. The factual situation in such case disclosed there was an immediate reason for construction of the will, which is not true in the instant case.

We are also cognizant that, as stated in substance in Wilkins v. Rowan, 107 Neb. 180, 185 N. W. 437, the law favors that construction of a will which conforms more generally to the general law of inheritance, and that the law favors the vesting of titles rather than holding them in abeyance so that the remainder will always be held vested rather than contingent. Of course, the propositions therein announced refer to a present or immediate reason for the construction of the will involved. The facts and circumstances in Wilkins v. Rowan, *supra*, are distinctively different than the facts and circumstances in the instant appeal.

This brings us to the will in the present case and the analysis thereof with respect to the contentions raised by the plaintiffs as hereinbefore stated.

It will be remembered that the holder of the first life estate, the widow of the testator, had the power to sell, mortgage, or lease for terms beyond the period of the trust, and to convey all or any part of the property at such times and upon such conditions as she might deem best. The will then provided that she have the right to invest, reinvest and keep invested said property, and

collect and recover rents. At her death the same rights accrued to the testamentary trustee named in the will where, by the fifth paragraph thereof the testator devised and bequeathed all of his real and personal estate to the trustee, with the same power to sell, mortgage, or lease, to invest, reinvest and keep invested, the trust property as the first holder of the life estate had; the trustee to pay to Gay Marshall Shiels, the present holder of the valid, outstanding life estate, all of the income from the trust fund during his life. The will then made the provision with reference to the beneficiaries to the trust as hereinbefore outlined, and the conditions upon which such beneficiaries would receive their shares of the trust fund, subject to the life estate of Gay Marshall Shiels.

Significantly, in the seventh paragraph of the will the testator uses the following language: "Neither of the beneficiaries herein shall acquire any vested interest in said trust estate until the same becomes payable under the terms hereof, and neither the principal nor the income of the trust estate shall be liable for debts of any beneficiary hereof, nor shall the same be subject to seizure by any creditor of any beneficiary under any writ or proceeding at law or in equity, and no beneficiary hereunder shall have any power to sell, assign, transfer, incumber or in any other manner to anticipate or dispose of his or her interest in the trust estate or the income produced thereby."

It will be noted by the provisions of the will heretofore set forth that the first life holder could have entirely depleted the trust estate; likewise, the testamentary trustee with the powers granted it might, by virtue of some act, lose the benefit of trust for the beneficiaries thereunder.

It will further be noted in the first sentence of paragraph 7 it is provided that "Neither of the beneficiaries herein shall acquire any vested interest in said trust estate until the same becomes payable under the terms hereof, * * *." This language is specific and definite.

The language used in the second sentence of paragraph 7 of the will obviously refers to what shall happen in the event of the death of Max Marshall Shiels or Thomas J. Shiels after they have acquired a vested interest. Not "until the same becomes payable under the terms" of the will could they acquire any interest, and not until that time occurs does the second sentence of this paragraph become operative.

We have no question presented here of an immediate vested interest under the terms of the will being analyzed. So then, if, under the provisions of the will, the plaintiffs, the mother and widow of the deceased grandson, could acquire no vested interest if they have any until the same becomes payable under the terms of the will which has not occurred and can in no event occur until the holder of the life estate dies, there is no reason for immediate construction.

With the foregoing analysis we come to the question involved and raised by the defendants as to whether or not, under the allegations of the plaintiffs' petition, the plaintiffs have prematurely instituted this action.

The defendants present the legal proposition as follows: Remaindermen may not invoke the power of the court for definition of their future interests, if any, when a valid and unassailed life estate is outstanding and immediate definition is not required to make a decree, provide guidance for the trustee, or protect equitable interests. The testamentary trustee is not seeking guidance with reference to this trust estate.

"Equity will not construe a will, ordinarily, to determine the nature of future rights during the existence of the particular estate, and before a dispute has arisen affecting the immediate conduct, * * *." 4 Page on Wills, § 1603, p. 575. See, also, In re Stumpenhousen's Estate, 108 Iowa 555, 79 N. W. 376.

"If there is no matter in dispute, and the application is to do nothing more than to declare future rights, in such cases Courts will not entertain jurisdiction."

Heald v. Heald, 56 Md. 300. See, also, Cousins v. Cousins (Tex. Civ. App.) 42 S. W. 2d 1043.

In 4 Pomeroy's Equity Jurisprudence (5th ed.) § 1157, p. 466, the rule is stated as follows: "It is well settled that a court will never entertain a suit to give a construction or declare the rights of parties upon a state of facts which has not yet arisen, nor upon a matter which is future, contingent, and uncertain; * * *."

In May v. May, 167 U. S. 310, 323, 17 S. Ct. 824, 829, 42 L. Ed. 179, wherein a trustee had asked for instructions relative to a trust under a will, the court in its opinion said: "Upon a bill in equity by a trustee for instructions in the execution of his trust, the court will not decide questions depending upon future events, and affecting the rights of persons not in being, and unnecessary to be decided for the present guidance of the trustee." See, also, Walker v. First Trust & Savings Bank, 12 F. 2d 896 and cases cited therein; cases cited in Cousins v. Cousins, *supra;* Ward v. Ward, 95 Ala. 331, 10 So. 832; Traphagen v. Levy, 45 N. J. Eq. 448, 18 A. 222; Montignani v. Blade, 145 N. Y. 111, 39 N. E. 719; Wahl v. Brewer, 80 Md. 237, 30 A. 654; Minot v. Taylor, 129 Mass. 160; Powell v. Demming, 22 Hun (N. Y.) 235; Nashville Trust Co. v. Dake, 162 Tenn. 356, 36 S. W. 2d 905.

"There must be some contest or controversy of which equity will take jurisdiction, which necessitates a construction of a will, before the interpretation will be made. Pritchard v. Pritchard, 83 W. Va. 652; Buskirk v. Ragland, 65 W. Va. 749; Martin v. Martin, 52 W. Va. 381." Nicklin v. Downey, 101 W. Va. 320, 132 S. E. 735. See, also, Messer v. Reitz, 81 W. Va. 483, 94 S. E. 952.

"The jurisdiction invoked is limited to such matters as are practical and call for present action in the premises, and upon which the court may properly pronounce a present decree." Messer v. Reitz, *supra.* See, also, Morse v. Lyman, 64 Vt. 167, 24 A. 763.

"The fact that a question may arise in the future is ordinarily not enough. Such question should not be decided until the anticipated contingency arises, or at least until it is about to arise; until it is imminent." McCarthy v. McCarthy, 121 Me. 398, 117 A. 313.

We conclude the foregoing authorities are applicable to this appeal. We have refrained from unnecessarily analyzing further authorities, but have called attention to them, which involve the same legal proposition.

For the reasons given herein, we conclude the trial court properly sustained the defendants' demurrers to the plaintiffs' petition.

AFFIRMED.

CHARLES BURESH, APPELLEE, V. KING GEORGE, DOING BUSINESS AS BLUE LINE EXPRESS & TRANSFER COMPANY, APPELLANT.
31 N. W. 2d 106

Filed February 25, 1948. No. 32263.

1. **Trial.** A motion for a directed verdict must, for the purpose of a decision thereon, be treated as an admission of the truth of all material and relevant evidence submitted on behalf of the party against whom the motion is directed, and said party is entitled to have every controverted fact resolved in his favor, and to have the benefit of every inference that can reasonably be deduced from the facts in evidence.
2. **Negligence.** Where different minds may reasonably draw different conclusions from the same facts as to whether or not they establish negligence or contributory negligence, those issues must be submitted to the jury.
3. **Automobiles.** As a general rule it is negligence, as a matter of law, for a motorist to drive an automobile so fast on a highway at night that he cannot stop in time to avoid a collision with an object within the area lighted by his lamps.
4. **Negligence: Trial.** When the court can say, as a matter of law, that the plaintiff is guilty of negligence that is more than slight as compared with that of the defendant and that such negligence is a proximate cause of the accident then the court should direct a verdict for the defendant and dismiss the action.

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

Joseph H. McGroarty, for appellant.

Fitzgerald, Tesar & Welch, for appellee.

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

WENKE, J.

The plaintiff, Charles Buresh, brought this action in the district court for Douglas County against the defendant, King George, doing business as Blue Line Express & Transfer Company. The nature of the action is in tort to recover for damages alleged to have been caused by negligent conduct imputable to the defendant. From a verdict and judgment for the plaintiff, his motion for new trial having been overruled, the defendant appeals.

For convenience and clarity the parties will be herein referred to as they appeared in the lower court, that is, the appellant will be referred to as the defendant and the appellee as the plaintiff.

Defendant raises the question as to the sufficiency of the evidence to support the verdict and the judgment entered thereon. In considering this issue we apply the following rules as approved in Moncrief v. Interstate Transit Lines, 129 Neb. 168, 261 N. W. 163:

"A motion for a directed verdict must, for the purpose of a decision thereon, be treated as an admission of the truth of all material and relevant evidence submitted on behalf of the party against whom the motion is directed, and said party is entitled to have every controverted fact resolved in his favor, and to have the benefit of every inference that can reasonably be deduced from the facts in evidence."

" 'Where different minds may reasonably draw diverse conclusions from the same facts as to whether or not

they establish negligence or contributory negligence, those issues must be submitted to the jury.' Casey v. Ford Motor Co., 108 Neb. 352."

The accident here involved happened on December 28, 1945, at about 6:25 to 6:30 p. m. in the city of Omaha at about 4200 south on Thirteenth Street. It occurred when the plaintiff's Dodge sedan, being driven by his son Raymond, ran into the defendant's truck which was standing on the east driving lane of the street facing north.

The cause for defendant's truck being parked on the driving lane was occasioned by its running out of gasoline. The truck was of two and a half ton capacity and used by the defendant in the operation of his business. At the time it was being driven by his employee whose name was Gardner. That morning Gardner had put in 7 or 8 gallons of gasoline in order to fill the tank. The truck had a tank of about 10-gallon capacity and that was ordinarily enough for the average day's work. However, on this day, while they were delivering some crated furniture in South Omaha, it became stuck in some snow in an alley. It took them about 45 minutes to an hour to get out, during which time they were using the motor. They then proceeded toward downtown Omaha by way of Thirteenth Street. The only gasoline gauge on the truck was on the tank and located under the seat but the driver, after getting out of the alley, did not look to see if he had sufficient gasoline to get downtown. Nor did he stop on the way for that purpose, although he passed three filling stations on his way down Thirteenth Street. After the truck stalled the driver spent a few minutes parking it with his starter. He parked it against the snow piled in the east parking. Without looking to the rear he then switched off his lights and was proceeding to get out of the cab to go get some gasoline when the accident occurred.

Thirteenth Street is a 56-foot four-lane arterial high-

way with parking on each side. It runs in a north and south direction. The outer 7 feet on each side is for parking and surfaced with concrete; the next 11 feet on each side is surfaced with brick and constitutes the driving lanes; and the 10 feet on each side of the center are the passing lanes and made of concrete. At the point of the accident the street slopes at about a 2 or 3 percent grade in each direction, sloping uphill to the north and downhill to the south.

At the time of the accident darkness had fallen but the weather was clear, although very cold. Previous to the day of the accident there had been a heavy snow but this had all been removed from the traveling surface of the street which was clear. The snow was piled up in the parking area on each side.

Raymond Buresh was driving his father's car. He was traveling north on Thirteenth Street when, at a point just east of the street light in front of the German Home, he ran into the stalled truck of the defendant. At the place of the accident he was traveling upgrade toward the north. He testified he was driving with his city driving lights. These lights extended out for a distance of about 50 or 60 feet. He further testified he was going about 15 to 20 miles an hour and traveling in the east driving lane. He noticed the truck some 40 or 45 feet in front of him and at first did not know just what it was but immediately applied his brakes and turned to the left, but not in time to avoid the collision. The right front side of the car struck the left rear of the truck body and damaged the car and injured the plaintiff. The son further testified that his windshield was clear and that there was no oncoming traffic or lights. In fact, the record shows there was no traffic on the street at the time and that there was over 31 feet of open traveling surface to the left or west of the stalled truck. He further testified that the truck had a lattice body that was painted blue and that it was dirty, that the truck

was empty and had no endgate, that it had no reflectors or taillight, and that no flares had been put out.

From the evidence of the son, and other witnesses, there is evidence from which the jury could have found that the truck had a stake body in which there was no endgate; that it was of a dark color, dirty, and parked on a brick paving surface; that it had neither reflectors nor taillight; and that no flares had been put out.

From this summary there is no question but what there was sufficient evidence upon which the jury could base its finding that the defendant was guilty of negligence. See Miers v. McMaken, 147 Neb. 133, 22 N. W. 2d 422; Giles v. Welsh, 122 Neb. 164, 239 N. W. 813.

As to the question of the negligence of the driver of the plaintiff's car we said in Roth v. Blomquist, 117 Neb. 444, 220 N. W. 572: "As a general rule it is negligence as a matter of law for a motorist to drive an automobile so fast on a highway at night that he cannot stop in time to avoid a collision with an object within the area lighted by his lamps."

We therein approved from Serfas v. Lehigh & N. E. R. R. Co., 270 Pa. 306, 113 A. 370, as quoted in Berry, Automobiles (5th ed.), § 177, p. 142: "It is the duty of a chauffeur traveling by night to have such a headlight as will enable him to see in advance the face of the highway and to discover grade crossings, or other obstacles in his path, in time for his own safety, and to keep such control of his car as will enable him to stop and avoid obstructions that fall within his vision."

The basis of this rule is that a driver of an automobile is legally obligated to keep such a lookout that he can see what is plainly visible before him and that he cannot relieve himself of that duty. And, in conjunction therewith, he must so drive his automobile that when he sees the object he can stop his automobile in time to avoid it.

However, on unlighted streets and highways, and

those lighted but where the light is obstructed, we have made exceptions to this general rule when the nature of the object or its condition, such as color, dirt, et cetera, in relation to the highway or road, affected its immediate visibility or when, because of the lights of oncoming traffic, the driver's attention is distracted or his vision impaired and his opportunity for immediate discernment thereby affected. In such cases we have held that the issue of the driver's negligence, if any, and the degree thereof is for the jury.

As stated in Roth v. Blomquist, *supra*: "There are recognized exceptions to the general rule or instances to which it does not apply, among them an unbarricaded, unknown, open, unlighted ditch across a highway that could only be seen at close range and not anticipated (Tutsch v. Omaha Structural Steel Works, 110 Neb. 585); corner of a platform with a narrow edge extending from a drag line over a street car track and discernible only in close proximity to the obstruction (Day v. Metropolitan Utilities District, 115 Neb. 711); an obstruction consisting of a pile of gravel similar in color to the surface of the highway (Frickel v. Lancaster County, 115 Neb. 506)."

Since Roth v. Blomquist, *supra,* we have applied this exception to many situations. As examples of its application are the cases of Swinford v. Finck, 139 Neb. 886, 299 N. W. 227, where a dark colored endgate was lying on the highway; Miers v. McMaken, *supra,* where the corner of the truck body extended out over the traveled portion of the highway; and Adamek v. Tilford, 125 Neb. 139, 249 N. W. 300, where the object was the same color as the street and the light from the street light was obstructed. See, also, Giles v. Welsh, *supra;* Monasmith v. Cosden Oil Co., 124 Neb. 327, 246 N. W. 623.

Here the evidence shows that the accident took place east of or opposite to a street light located in front of the south edge of the German Home. It should be

said that the German Home is located on the west side of Thirteenth Street opposite of where the accident happened and that it was lighted. The evidence shows that Thirteenth Street is lighted with a staggered system of street lights, that is, every other light is placed on the opposite side of the street. These lights are 280 feet apart on each side or 140 feet apart on opposite sides. Each light is 20 feet high and extends out over the surfaced part of the street 5 feet, thus making the light to the west some 33 feet west of the east driving lane. This is the lane in which the plaintiff and his son testified the truck was stalled. There was also a light on the east side about 140 feet to the north and one on the east side about 140 feet to the south. These lights were all burning. The lights used in this system are General Electric 79 Luminaire.

Each Luminaire is hermetically sealed and contains a 600 candlepower incandescent globe and a glass reflector. The reflector diffuses the light and throws it down onto, across, and up and down the highway thus avoiding any waste of light on areas off the highway. The light produced is called a diffused light so that as the light from one joins that of the other they diffuse into each other, thus completely lighting the entire highway. While there is a little more light immediately below each Luminaire it generally covers the entire highway with an even distribution thereof and a parked car or truck could be seen at a distance of a block or more.

As the truck was stalled in the east driving lane there was 31 feet of clear driving surface to the west, if the west parking was filled with snow, in which the driver of the car could have turned to the left in order to pass. At the time of the accident the evidence shows there was no oncoming traffic. In fact there was neither traffic to divert the driver's attention nor anything to obstruct or affect his view; nor was there anything that interfered with the light from the street lights.

Under this situation we think the factual situation

brings this case within the general rule as announced in Roth v. Blomquist, *supra,* and not within any of the exceptions thereto for here the truck was clearly visible even without the aid of the driver's lights and his opportunity to see was in noway impaired or interfered with. There is nothing that will excuse his failure to see what was plainly in sight if he had maintained a proper lookout. We think the facts of this case are in effect the same as those in Redwelski v. Omaha & C. B. Street Ry. Co., 137 Neb. 681, 290 N. W. 904, where we applied the general rule as herein already referred to.

When the court can say, as a matter of law, that the plaintiff is guilty of negligence that is more than slight as compared with that of the defendant and that such negligence is clearly the proximate cause of the accident then the court should direct a verdict for the defendant and dismiss the action. Dickenson v. County of Cheyenne, 146 Neb. 36, 18 N. W. 2d 559.

In view of the above we hold that the action should have been dismissed.

REVERSED AND DISMISSED.

JOSEPH KULA ET AL., APPELLEES, V. RICHARD KULA ET AL., APPELLANTS.
31 N. W. 2d 96

Filed February 25, 1948. No. 32297.

1. **Wills.** The fact that a will expresses the intention of the testator to disinherit certain persons does not prevent such persons from sharing as heirs at law or next of kin in property as to which the testator died intestate.
2. **Deeds.** An instrument is not delivered until it has passed beyond the dominion, control, and authority of the maker and is no longer capable of being recalled.
3. **Equity: Reformation of Instruments.** A court of equity has the power to reform an instrument to conform with the intention of the grantor and to correct a mistake of the scrivener.
4. **Reformation of Instruments.** However, in order to warrant the

reformation of a written instrument in any material respect, the evidence must be clear, convincing, and satisfactory and until overcome by such proof, the terms of the instrument must stand as evidencing the intention of the parties.

APPEAL from the district court for Platte County: LOUIS LIGHTNER, JUDGE. *Affirmed.*

Walter & Flory, for appellants.

Wagner & Wagner, for appellees.

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

WENKE, J.

This action was brought in the district court for Platte County for the purpose of having three deeds declared void; title to the lands therein described quieted and confirmed in the heirs of Stanislaus Kula, deceased, the grantor; and a partition thereof. It also asks that an accounting of the rents and profits therefrom be made to the legal representative of the grantor's estate.

The trial court found that the three deeds had never been delivered by the grantor and were therefore void; that the will of grantor, Stanislaus Kula, made no disposition of his real estate and that he died intestate with reference thereto; and that the executrix of the estate of Stanislaus Kula, deceased, had a lien on said real estate for costs of administration and the claims filed and allowed against the estate.

It decreed the deeds to be void; determined the interests of the parties in the real estate and quieted and confirmed their title therein, except as to the rights of the executrix of the estate of Stanislaus Kula, deceased; and decreed partition of the real estate. The court deferred the question of an accounting of the rentals until the issue as to the ownership of the real estate had been finally determined.

After the entry of this decree the defendants Richard

Kula and Eleanor Kula filed a motion for new trial and from the overruling thereof they appeal.

The three deeds involved in this litigation are as follows:

The first, executed on December 24, 1943, is from Stanislaus Kula, unmarried, to his son Richard Kula and covers the south half of the southeast quarter, the northwest quarter of the southeast quarter, and the southwest quarter of the northeast quarter, less the road now thereon, of Section 8, Township 17 North, Range 1 West, of the 6th P. M., in Platte County, Nebraska. It was recorded in the office of the Register of Deeds of Platte County on the 19th day of February, 1944, in Book 85 of Deeds at page 670.

The second, executed on April 24, 1940, is from Stanislaus Kula, unmarried, to his daughter Caroline Kula and covers the east 10 acres of the west 20 acres of the north half of the northeast quarter, less the railroad right-of-way, of Section 8, Township 17 North, Range 1 West, of the 6th P. M., in Platte County, Nebraska. This deed was recorded in the office of the Register of Deeds of Platte County on the 23rd day of February, 1944, and recorded in Book 85 of Deeds at page 693.

The third, executed on April 24, 1940, is from Stanislaus Kula, unmarried, to his daughter Eleanore Kula and covers the west 10 acres, less the railroad right-of-way, of the north half of the northeast quarter of Section 8, Township 17 North, Range 1 West, of the 6th P. M., in Platte County, Nebraska. This deed was recorded in the office of the Register of Deeds of Platte County on the 23rd day of February, 1944, in Book 85 of Deeds at page 694.

All three of these deeds were either delivered to the grantees and recorded or recorded after the death of the grantor. Before this action was tried Caroline Kula La Porte conveyed to Eleanor Kula whatever interest she had in the 10 acres described in the deed to her

and the court decreed the interests of these parties accordingly.

The record shows that Stanislaus Kula was an elderly man and, during the period of time herein involved, unmarried. He had been married twice. To the first marriage two children were born. They are Joseph Kula, a son, age 56, and Thomas Kula, a son, age 61. To the second marriage the following children were born who survived him, to wit: Stanley A. Kula, a son, age 37; Eleanor Kula, a daughter, age 35; Caroline La Porte (nee Kula), a daughter, age 33; Wallace T. Kula, a son, age 28; and Richard Kula, a son, age 25. It appears that one son had died prior to the death of the father but left no heirs surviving. The above are all the heirs at law of Stanislaus Kula.

On December 24, 1943, Stanislaus Kula executed the deed, already referred to, to Richard and then placed it, and the other two deeds herein referred to and which he had executed on April 24, 1940, in an envelope and deposited it with the firm of Becher, Hockenberger & Chambers Company in their offices in Columbus, Nebraska.

This envelope had endorsed thereon, over the signature of the grantor, the following:

"Columbus, Nebraska
December 24, 1943.

I hereby direct Becher, Hockenberger and Chambers Company to deliver the within deeds to my children, viz: Richard Kula, Eleanore Kula and Caroline Kula, and to my grand-daughter Lorene Kula, at the date of my death.

I hereby reserve the right to withdraw any and all of within deeds at any time during my lifetime."

This envelope contained four deeds covering all of the real property of the grantor, being 180 acres of land described in the three deeds as hereinbefore set forth and a small residence covered by a deed to a grand-daughter, Lorene Kula. However, Lorene Kula has not

been made a party to this suit and the deed to her is not involved in this litigation.

Thereafter, on December 26, 1943, the grantor made his last will and testament. It was allowed and admitted to probate by the county court of Platte County on April 6, 1944, the testator having died in February 1944. This will made no disposition of the testator's real estate and with reference thereto he died intestate.

It does contain the following provision: "THIRD: It is my sincere wish, desire and intention that my sons, namely, Thomas Kula, Joseph Kula and Richard Kula, receive nothing under this my Last Will and Testament, for the reason that they have received their proportionate share of my property during my life time."

However, this provision does not prevent these three sons from inheriting for, as stated in 18 C. J., Descent and Distribution, § 76, p. 843: "The fact that a will expresses the intention of the testator to disinherit certain persons does not prevent such persons from sharing as heirs at law or next of kin in property as to which the testator died intestate." See, also, 69 C. J., Wills, § 1149, p. 101, and Zimmerman v. Hafer, 81 Md. 347, 32 A. 316.

With reference to the effect of the endorsement placed upon the envelope containing these deeds we approved in Huenink v. Heitbrink, 104 Neb. 520, 177 N. W. 796, the following from Paxton v. State, 59 Neb. 460, 81 N. W. 383: "An instrument is not delivered until it has passed beyond the dominion, control and authority of the maker, and is no longer capable of being recalled." See, also, Wheeler v. Brady, 126 Neb. 297, 253 N. W. 338; 10 R. C. L., Escrow, § 8, p. 626.

As stated in 16 Am. Jur., Deeds, § 110, p. 499: "In other words, the delivery of a deed in the law of conveyancing is a transfer of it from the grantor to the grantee or his agent or to some third person for the grantee's use in such manner as to deprive the grantor of the right to recall it at his option and with intent to convey title." Then going on to say in section 130, page

512: "* * * and if the deed remains within the grantor's control and liable to be recalled, there is, according to almost unanimous authority, no delivery, notwithstanding he has parted with its immediate possession."

However, the defendants Richard Kula and Eleanor Kula and appellants herein, asked that the endorsement placed on the envelope as of December 24, 1943, be reformed to express the true intent and instructions of the grantor by striking therefrom the words: "I hereby reserve the right to withdraw any and all of the within deeds at any time during my lifetime." It is the appellants' contention that the court, based upon the evidence in the record, erred in failing to do so.

It is, of course, true that a court of equity has the power to reform an instrument to conform with the intention of the grantor and to correct a mistake of the scrivener. Pinkham v. Pinkham, 60 Neb. 600, 83 N. W. 837.

However, as stated in Sutherland State Bank v. Dial, 103 Neb. 136, 170 N. W. 666, and approved in Wheeler v. Brady, *supra*: "In order to warrant the reformation of a written instrument in any material respect, the evidence must be clear, convincing and satisfactory, and until overcome by such proof, the terms of the instrument must stand as evidencing the intention of the parties."

From the evidence of George Rambour, Jr., vice president of Becher, Hockenberger & Chambers Company, who had been with the company for 18 years, and that of Mable Swift, an employee thereof for 31 years, it appears that the company had for many years, up until shortly after the death of Stanislaus Kula, placed the same or similar endorsements on many envelopes used for the same purpose. They testified it had become a habit or custom for them to do so. It appears that shortly after the death of Stanislaus Kula they quit doing so and, at that time, advised all of their customers, who had deposited deeds under like endorse-

ments, of the effect thereof. This was done in order to give their customers an opportunity to make a change therein if they so desired.

While Rambour, who handled this transaction with the grantor and who caused the endorsement to be typed on the envelope, did testify that the grantor gave him no directions or instructions with reference to his right to withdraw the deeds and that he caused the endorsement relating thereto to be placed thereon, however, as a whole, his evidence relating to what took place at that time is neither very convincing nor satisfying. He seems very uncertain and at times quite without memory as to just what was said or done at that time.

Appellants call attention to paragraph "Third" of the testator's will, which has hereinbefore been set forth, as indicative of the grantor's intent. Also they call attention to the testimony of the son, Wallace T. Kula, who had visited the father sometime during January or the fore part of February 1944. He testified that at that time the father told him that he had deeded the farm to Richard, that is, the main part of it; that he had deeded 10 acres to Caroline and 10 acres to Eleanor; that the deeds were at Becher, Hockenberger & Chambers Company and that all he had to do was tell the boys and for him to write Richard; and that in case he passed away to take them down to the courthouse and have them registered but that he did not want them registered while he was alive.

It may be that the grantor thought he could give these children his real estate in this manner, that is, by retaining control of the deeds during his lifetime and that he had in fact done so. But if such is true, and he was of that impression, a court of equity cannot now correct his error and give legal effect to deeds that were never delivered during his lifetime for the record fully establishes that he intended to keep control

thereof and retain the right to withdraw them at any time.

That the grantor so intended and understood the endorsement is fully evidenced by a similar deposit of six deeds covering this property made with the same company on April 24, 1940. At that time the envelope in which the deeds were deposited had endorsed thereon the following:

"Columbus, Nebraska.
April 24, 1940.

Becher, Hockenberger & Chambers Co.,
Columbus, Nebraska:

You are hereby directed and authorized to deliver the six within deeds to my children, viz: Stanley, Wallace, Michael, Richard, Eleanore and Caroline, at the date of my death.

I reserve the right to withdraw any or all of the within deeds at any time during my lifetime.

Stanislaus Kula"

It will be observed that the paragraph in question is the same in both endorsements.

Thereafter, on March 4, 1943, the grantor withdrew all six deeds as evidenced by the following endorsement thereon: "Received the within papers March 4, 1943 Stanislaus Kula."

Thus it clearly shows that the grantor not only understood he retained this right but fully exercised it for only two of these deeds, the ones to Eleanor and Caroline, were redeposited on December 24, 1943. What happened to the other four, that is, the deeds to Stanley, Wallace, Michael, and Richard, the record does not disclose.

From what has been said we have come to the conclusion that these deeds were never delivered in the lifetime of the grantor, were testamentary in character, and void. Consequently, the decree of the trial court is affirmed.

AFFIRMED.

CHARLES R. FENTRESS, APPELLANT, V. THE CO-OPERATIVE REFINERY ASSOCIATION ET AL., APPELLEES.
31 N. W. 2d 225

Filed March 3, 1948. No. 32319.

Negligence. The rule is that in the absence of any statute or ordinance prescribing a duty on the part of the owner of premises to members of a public fire department, the owner is not liable for injuries to such a fireman except those proximately resulting from willful or wanton negligence or a designed injury.

APPEAL from the district court for Box Butte County: EARL L. MEYER, JUDGE. *Affirmed.*

S. L. O'Brien and *Charles A. Fisher,* for appellant.

E. D. Crites and *W. R. Metz,* for appellees.

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

SIMMONS, C. J.

In this action plaintiff, a volunteer fireman, sought a recovery in damages for personal injuries received as a result of an explosion of a motor fuel tank on a burning gasoline and fuel oil transport. Trial was had. At the close of plaintiff's case-in-chief the trial court on motion of defendant dismissed the cause with prejudice. The plaintiff appeals. We affirm the judgment of the trial court.

The evidence will be reviewed in the light of the rule that a motion for a directed verdict or to dismiss is to be treated as an admission of the truth of all material and relevant evidence submitted on behalf of the party against whom the motion is directed and such party is entitled to have every controverted fact resolved in his favor, and to have the benefit of all proper and logical inferences which may be drawn from such evidence. Hollenbeck v. Guardian Nat. Life Ins. Co., 144 Neb. 684,

14 N. W. 2d 330; Gutoski v. Herman, 147 Neb. 1001, 25 N. W. 2d 902.

On July 30, 1943, during the noon hour the defendant undertook to make a delivery of gasoline and fuel oil to the Farmers Union Co-Operative Oil Association at its plant at Hemingford. The Farmers Association had bulk receiving tanks. The fuel oil tanks were above ground and delivery into those tanks was made by pumping. The gasoline tank was below ground and delivery into it was by gravity. The gasoline tank was equipped with an inlet pipe and a smaller outlet pipe situated about a foot apart.

The defendant's equipment consisted of a trailer tank of 4000-gallon capacity divided into three compartments. There were large vents in the top of these compartments and outlet valves on the right side. The trailer tank contained 2500 gallons of fuel oil and 1500 gallons of gasoline. The trailer tank had on it a "ground chain," the evidence being that after the fire the chain was not long enough to reach the ground. The trailer tank was moved by a tractor unit which carried three tanks of 30 gallons each for fuel for the tractor.

The combined unit was so placed that delivery could be made of both gasoline and fuel oil at one time. The large vents in the top of the compartments were ordinarily opened to permit air to displace fuel during the delivery. The vents were opened in this delivery. A hose from the fuel oil compartment was connected with the pump and receiving tank, fuel oil being delivered in that manner. A standard hose for gasoline delivery was connected with the gasoline compartment and placed in the intake pipe of the gasoline receiving tank. The hose at its outer end was equipped with a brass end, smaller than the intake opening. A gasket was not used in making the connection at the valve on the compartment. When gasoline was turned into the hose, a leak occurred and the leaking gasoline was caught in a bucket under the hose. Delivery had started and had proceeded from

one and one-half to three minutes when an employee of the Farmers Association stumbled over one of the hose. The hose was crossed in making the delivery. Immediately thereafter fire was discovered at the inlet and outlet pipes of the gasoline tank.

The employees involved were unable to state the cause of the fire. Plaintiff offered an expert witness who testified that if the truck had no ground chain and if the metal end of the hose were placed loosely in the intake opening, there would not be a proper ground of the truck; and that if the connection were made loosely so that the static had not escaped and if something caused a sudden contact, a spark could have been created at that instant that would ignite vaporized gas. The employee of the Farmers Association testified that if the contact between the nozzle of the hose and the intake pipe were severed, there would be a possibility of a spark. He testified, however, that he did not think the stumbling over the hose caused the fire, and that he did not know what caused it.

An unsuccessful effort was made to put out the fire. The employee of the Farmers Association told the defendant's employee to drive the transport unit away. Before doing so, the employee of the Farmers Association closed the valve to the gasoline compartment. He did not succeed in getting the valve to the fuel oil compartment closed because of fire around the valves and in the hose. The fuel oil hose was pulled apart as the transport unit pulled away so that it spread fuel oil which immediately ignited as the unit moved out.

The unit was driven down a roadway a distance fixed at 150 to 275 feet, where the driver abandoned it near some grain elevators and an empty grain storage tank owned in part by plaintiff. At that time the trailer unit was afire, i. e., the vapors coming out of the vents were blazing. Terrific heat and much smoke came from the fire.

Someone turned in a fire alarm; the siren sounded,

and some 20 members of the volunteer fire department responded, including the chief and the plaintiff.

For some 13 years prior to this day, the plaintiff had been engaged in the business of selling gasoline and fuel oil, and operated a garage and repair shop. For seven years prior thereto he had been an employee in the oil industry. He knew of the dangers of oil fires and of explosions when fires of that kind were involved. He had taken training as a volunteer fireman.

The events now to be described occurred in about five minutes after the firemen, including the plaintiff, arrived at the fire. The fire hose was connected and the water turned on under directions of the chief. Five firemen, including the plaintiff, manned the nozzle of a hose, and had moved into a position directly in front of the burning transport and at a distance fixed at 40 to possibly 130 feet from it. From that position they were directing water on the elevator and the grain tank, both of which were afire. The tires on the transport unit deflated from the heat. Some of the witnesses say they exploded with quite a bit of noise; the fire chief said he could hear them—"kind of a spewing out," a "sudden rush of air," "no explosion." The three fuel tanks on the tractor unit exploded. The direction of the explosion of one is not shown. The direction of the explosion of the second is shown. The evidence is that it threw gasoline for some distance to the side of the transport. At least one of these tanks exploded while plaintiff and the others were in front of the transport. After these two explosions had occurred, the fire chief was warned that there was a third tank that had not exploded. He was on his way to order the plaintiff and other firemen to move farther away when that tank exploded, the front end giving way. The tank was so located that the fire hit a fender which caused the flame to shoot up and out in front of the tractor. The flame struck the firemen and the plaintiff. The plaintiff was seriously burned. His injuries need not be set out here.

Witnesses testified that because of the density of the smoke they could not see the fuel oil tanks that exploded. However, sideview pictures taken of the burning transport show that the tractor and its tanks could be seen beneath the dense smoke. Whether these pictures were taken before or after the explosion is not disclosed. An examination of the exploded tanks after the fire disclosed no evidence of vents in the tanks. There is no evidence that proper construction would have required vents in these motor fuel tanks.

It is undisputed in the evidence that plaintiff responded to the fire alarm and attended the fire as a volunteer fireman; when he reached the scene he, as one of the firemen, responded to and obeyed the orders of the chief in the placing of the hose and in fighting the spread of the fire; he became one of five firemen who operated as a unit in the use of department equipment, and when the explosion occurred, he was one of five members actually handling one of the two hose nozzles in operation. It is also in evidence that the chief did not permit just any citizen to be so engaged, but limited the force to members of the department and men who were experienced fire fighters—although we find no evidence that anyone other than members of the department were handling the equipment.

Paintiff in his petition pleaded in detail the alleged negligence of the defendant in the use of defective equipment, in making delivery at the Farmers Association plant, in failing to extinguish the fire, in driving the transport away from the scene and spreading fire, in stopping the truck where it did, in permitting the fire to spread, in failing to provide proper fire protection equipment, in operating the tractor without properly constructed fuel tanks, and in operating the truck without a proper ground. He further pleaded that he attended the fire in the performance of his duties as a fireman and citizen; that he acted to protect his own as well as other property with due care and caution; and that because

of the negligence of defendant he was injured.

The defendant made admissions not important here, denied generally, and alleged that plaintiff was not its agent, servant or invitee; that plaintiff attended the fire in his capacity as a fireman; that the risks and dangers of the fire were patent and assumed by plaintiff; that plaintiff's injuries were caused by his own negligence; and that defendant did not willfully or intentionally injure the plaintiff. By reply plaintiff denied new matter alleged in the answer.

The plaintiff makes a number of assignments of error. The first assignment is that the court erred in sustaining the motion to dismiss. The answer to this assignment is determinative of this appeal.

The rule is that in the absence of any statute or ordinance prescribing a duty on the part of the owner of premises to members of a public fire department, the owner is not liable for injuries to such a fireman except those proximately resulting from willful or wanton negligence or a designed injury. New Omaha Thomson-Houston Electric Light Co. v. Anderson, 73 Neb. 84, 102 N. W. 89. 38 Am. Jur., Negligence, § 125, p. 785; Annotations, 13 A. L. R. 637, 141 A. L. R. 584; 45 C. J., Negligence, § 200, p. 794.

We are not here dealing with a hidden danger or peril. The condition of the burning transport was an obvious one. The danger was a patent one and one which the plaintiff realized as his own testimony discloses. He discounted the danger of explosion from the trailer tanks because the tanks were vented and the vents open. The same danger existed from the smaller tanks about which he had no knowledge as to vents that would cause him to feel secure. One of the tanks exploded while the firemen were in position in front of the transport fighting the fire. They remained there in the face of that warning.

Plaintiff argues that he was there as a citizen in an effort to protect his own property from destruction.

The evidence sustains no such a conclusion. Plaintiff was there in his capacity as a fireman performing a duty he owed the public as a result of his being a fireman. As an incident to that, he was protecting his own property, not as owner, but as a fireman in the performance of a public duty. It likewise is clear from the evidence that no effort was being made, and no effective effort could be made to protect the defendant's property from the destruction of the fire. There was neither willful or wanton negligence here nor a designed injury caused by anything the defendant did or failed to do.

The above rule applies. The judgment of the district court dismissing the cause is affirmed.

AFFIRMED.

HOMER NEFF, APPELLEE, V. RALPH E. BOOMER, APPELLANT, IMPLEADED WITH EDWIN SCHULTZ ET AL., APPELLEES.
31 N. W. 2d 222

Filed March 3, 1948. No. 32358.

Injunction. As a general rule injunction will not issue upon mere apprehension of the possibility of an invasion of rights.

APPEAL from the district court for Lancaster County: JOHN L. POLK, JUDGE. *Reversed and dismissed.*

Walter R. Johnson, Attorney General, *Clarence S. Beck,* and *Robert A. Nelson,* for appellant.

Merril R. Reller, John McArthur, Gerald W. Davis, and *Chambers & Holland,* for appellees.

Kennedy, Holland, DeLacy & Svoboda and *Moyer & Moyer,* amici curiae.

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

SIMMONS, C. J.

Plaintiff sought an injunction preventing the named defendants from denying him admission to the horse races at the fair grounds in 1946. The writ was issued. The race meet closed. Amended pleadings were filed. Trial was had resulting in a dismissal as to four of the defendants, and an injunction issued as to defendant Boomer. Defendant appeals. On trial de novo here we reverse the judgment and dismiss the cause.

This action was commenced on August 16, 1946, against five named individuals as defendants, being Ralph E. Boomer, Edwin Schultz, Charles E. Royce, P. J. Janning, and H. J. Boink. The petition alleged that the defendant Boomer was a member of the State Racing Commission, and that the other defendants were employees of the Commission and Boomer, and acting under the authority and direction of the defendant Boomer. Plaintiff alleged that he had been denied admission to and had been ejected from the racing meets then being held at the Nebraska State Fair grounds.

Plaintiff sought an injunction preventing the defendants from refusing him admission to the grounds and races. On motion of plaintiff on the same day the court enjoined the defendants as prayed, the order to remain in effect until further order of the court. Motions to dissolve and vacate the injunction were made and sustained on August 28, 1946. Plaintiff then filed a motion to fix the amount of a supersedeas bond. Thereafter demurrers were filed. No action appears to have been taken on the motion or demurrers. Thereafter answers were filed in October 1946. Motions to dismiss were filed by defendants on the ground that the action had become moot. Plaintiff then filed an amended petition; answers and a reply were filed.

The affidavit of plaintiff previously made in the action was offered in evidence by stipulation that it was to be considered as evidence, with the same force and effect as though the plaintiff had given said evidence

in the usual manner at a trial of actions of this kind. His amended petition was offered and received, to be considered with like force and effect. The defendants Schultz and Royce offered the affidavit of Schultz, and their answer to the amended petition, to be considered with like force and effect. The defendants Boomer, Janning, and Boink offered the affidavit of the clerk of the municipal court of the City of Lincoln, likewise their answer to the amended petition was offered and received, subject to being considered with the same force and effect as though the parties had so testified in open court. The above constitutes the evidence at the trial.

The trial court found generally for the plaintiff and against the defendant Boomer. The court dismissed the action as against the defendants Schultz, Royce, Janning, and Boink. The court permanently enjoined the defendant Boomer as an individual and as a member of the State Racing Commission from denying plaintiff admission to horse races and race meetings held under the pari-mutuel wagering statutes of the State of Nebraska, or molesting or interfering with plaintiff at such meetings and races, so long as he shall abide by the rules and regulations governing said horse races and race meetings. From that order the defendant Boomer appeals.

No question is presented here as to the dismissal of the four defendants. The cause is here for trial de novo. We have then a case of plaintiff Neff against defendant Boomer.

First, as to the status of the defendant Boomer. Plaintiff alleges that Boomer is a member of the State Racing Commission of Nebraska. The trial court so found. By answer Boomer admits that he is "connected" with the Commission. There is in an affidavit a showing of a letter dated July 6, 1946, and signed by "Ralph E. Boomer, Sec'y." to the defendant Schultz referring to a rule of the Commission. Accordingly, we find that

defendant Boomer is secretary of the Commission. Supporting that conclusion is a statement in plaintiff's brief here that Boomer "as secretary of the racing commission" was doing certain things.

It appears that the defendant Schultz is secretary of the Nebraska State Board of Agriculture, and defendant Royce an employee of that Board, his employment having been terminated before the trial of this cause. Defendants Janning and Boink were employees of the State Racing Commission and their employment likewise terminated.

It appears that the Nebraska State Board of Agriculture conducts the State Fair on the grounds located near Lincoln; that said Board is licensed by the Nebraska State Racing Commission to conduct race meets, subject to the law and the rules and regulations of the Commission adopted pursuant thereto. One of the rules of the Commission is that "Two men, who will be selected by and act as police officers under the direction of the Nebraska State Racing Commission, shall be employed by Racing Associations conducting meeting within the State of Nebraska." Two officers were so selected to police the racing meet held at the fair grounds in August 1946.

Plaintiff Neff is a resident, citizen, taxpayer, and inhabitant of Lancaster County, Nebraska. It appears from the records of the municipal court of Lincoln, Lancaster County, Nebraska, that in the period from December 20, 1933, to June 16, 1943, he was charged in that court on three occasions with being "Inmate Dis. House" (one of the charges is shown to have been appealed and its disposition not shown); one finding of "Keep Gambling Room"; two findings of "Operate betting place"; one finding of "Operate place bet on horseraces"; and one of "Operate betting service." In each instance a fine and costs were assessed.

On August 13, 1946, races were being held at the fair grounds. It appears that plaintiff had secured

entrance to the fair grounds without difficulty, at least he swears he presented himself at the entrance of the stadium where races were being held, after having purchased a ticket of admission, and that Janning and Boink forcibly removed him from the entrance and told him he could not enter the stadium to view the horse races.

On August 15, 1946, plaintiff states he again purchased an admission ticket and again Janning and Boink informed him they would not let him enter the stadium to view the races; that Royce told him he could not enter, at the direction and order of defendant Boomer, who was standing within several feet of Royce; that Royce refused him admission; and that Schultz told him to go to the ticket window and get his money refunded. The above recital is gleaned from plaintiff's affidavit made August 26, 1946. In his amended petition executed some months later, plaintiff states that on August 13 he was taken by the arms and body and forcibly taken from the entrance gate and violently ejected from the racing grounds by defendant Boomer; that on August 15, he was forcibly prevented from entering the stadium by the defendants, and the defendant Boomer announced that he was an undesirable character and would be ejected if he attempted further to gain entrance; and that thereafter defendant Boomer refused him entrance. These statements stand denied by defendant Boomer through his general denial and a specific affirmative statement that at no time did he talk with the plaintiff, and at no time stated that the plaintiff would be barred from any racing meets. Supporting defendant Boomer is the statement in the affidavit of Schultz that the two officers selected by and acting under the directions of the Commission, as per the resolution above quoted, excluded the plaintiff from the grounds.

Our conclusion on the fact question then is that acts done on August 13 and 15, about which plaintiff com-

plains, were done by the officers Janning and Boink, who were employees of the Board of Agriculture, under direction of the Nebraska State Racing Commission.

Plaintiff by his amended petition alleges that similar races and entertainment will hereafter be held at the fair grounds and that defendants (now defendant), unless restrained, will prevent plaintiff from attending said races and entertainment in the future. He prays that defendant, as an individual and an officer, be enjoined from refusing him admission to the fair grounds and races, from molesting him, from discriminating against him, from denying him the same privileges accorded to other citizens, and from repeating any of the acts therein alleged.

The secretary of the Commission is an employee of the Commission subject to the performance of certain statutory duties and such other duties as the Commission prescribes. § 2-1202, R. S. 1943.

We find no showing in this record that defendant Boomer as an individual proposes to do any of the acts in the future about which plaintiff complains. Likewise, there is no showing whatever that the Commission has prescribed that he do any acts in his official capacity that in anywise would be violative of plaintiff's alleged rights.

Plaintiff contends that the events that occurred in 1946 were an invasion of his civil rights as provided by section 20-101, R. S. 1943. It is obvious that the events that occurred in 1946 cannot now be prevented by injunction. Plaintiff alleges that unless restrained these defendants (now defendant) will further violate his alleged rights. However, it is not shown that the defendant has either the purpose or the power to do the things about which plaintiff is apprehensive. As a general rule injunction will not issue upon mere apprehension of the possibility of an invasion of rights. 43 C. J. S., Injunctions, § 21, p. 436; 28 Am. Jur., Injunctions,

§ 30, p. 223. We see no basis for granting the injunctive order which plaintiff seeks.

Accordingly, the judgment of the district court is reversed and the cause dismissed.

REVERSED AND DISMISSED.

OLGA DICKMAN, APPELLANT, V. JOSIAH R. HACKNEY ET AL., APPELLEES.

31 N. W. 2d 232

Filed March 3, 1948. No. 32278.

1. **Trial.** A motion for a directed verdict must for the purpose of decision thereon be treated as an admission of the truth of all material and relevant evidence submitted on behalf of the party against whom the motion is directed. Such party is entitled to have every controverted fact resolved in his favor, and to have the benefit of every inference that can reasonably be deduced from the evidence.
2. **Negligence.** A violation of statutes regulating the use and operation of motor vehicles upon the highways is not negligence per se, but evidence of negligence which may be taken into consideration with all the other facts and circumstances in determining whether or not negligence is established thereby.
3. ———. Where different minds may reasonably draw different conclusions from the same facts as to whether or not they establish negligence or contributory negligence, those issues must be submitted to the jury.
4. **Automobiles: Negligence.** It is the general rule that it is negligence as a matter of law for a motorist to drive an automobile so fast on a highway at night that he cannot stop in time to avoid a collision with an object within the area lighted by his lamps.
5. ———: ———. This general rule has no application in those cases where reasonable minds may differ on the question of whether or not the operator of an automobile exercised the care, caution, and prudence required of him under the circumstances of the particular situation.

APPEAL from the district court for Douglas County: HENRY J. BEAL, JUDGE. *Reversed and remanded.*

Pilcher & Haney, for appellant.

Kennedy, Holland, DeLacy & Svoboda, for appellees.

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

MESSMORE, J.

This is a law action brought by the plaintiff against the defendants to recover damages for injuries received by the plaintiff, and damage to her automobile as the result of a collision between the plaintiff's automobile and the automobile being driven by the defendant William F. Hackney. At the conclusion of all the evidence the defendants moved for a directed verdict. This motion was sustained by the trial court. Upon the overruling of the motion for new trial, plaintiff appealed.

For convenience, the appellant will hereinafter be referred to as the plaintiff, the appellee Josiah R. Hackney will be referred to by name as occasion requires; and the appellee William F. Hackney will be referred to as the defendant.

The plaintiff contends that the trial court erred in refusing to submit the case to the jury. This requires an examination of the evidence to determine whether or not the same makes a case to be submitted to the jury. We set forth in substance as much of the pleadings and the evidence disclosed by the record as we deem necessary to a determination of this appeal.

The plaintiff's petition alleged negligence on the part of the defendant driver, in substance, as follows: In operating an automobile on the highway in the nighttime at a high, excessive, careless, and unlawful rate of speed; driving said automobile at a speed greater than that which would permit him to bring it to a stop within the assured clear distance ahead, or within the range of the headlights; operating the automobile without lights; failing to keep a proper lookout for other vehicles on the highway; failing to sound horn or give any other signal to plaintiff of intention to pass; failing

to change or swerve or divert the course of the automobile to either the right or the left, or make any other attempt to avoid an accident; and failing to have the automobile under proper and complete control.

The defendants' answer admitted an accident occurred and that the plaintiff received slight injuries; denied generally the allegations of the plaintiff's petition; charged the plaintiff with contributory negligence; counterclaimed for damages to the car of defendant Josiah R. Hackney, charging the plaintiff was guilty of negligence which proximately caused the accident in executing a left turn from the outside lane of the highway instead of from the inner lane, as required by law; failing to signal for a left turn; failing to look to the rear for approaching vehicles before attempting a left turn; failing to have her automobile equipped with a taillight in operating condition sufficient to reveal the presence of her car on the highway to travelers approaching from the rear; and in first stopping and then starting her automobile up again directly across the path of the defendant's car.

The reply denied any acts of negligence on the part of the plaintiff.

A brief description of the vicinity where the accident occurred shows a four-lane highway running approximately north and south usually serving heavy traffic, from 45 to 50 feet in width, the two inside lanes being brick, the two outside lanes concrete, with dividing lines for the traffic north and south, and formerly known as highway No. 75, or the Fort Crook highway. The plaintiff lives at No. 7013 on this highway, which is about four blocks south of Harrison Street. Her house faces west, and the driveway into the yard runs east and west. North on the highway, as shown in exhibits, is Harrison Street, where there is a turn into the Fort Crook highway.

The plaintiff is the owner of a black, 1933 two-door Ford car. Josiah R. Hackney, the father of the defendant, is the owner of a 1940 Pontiac. At the time of the

collision, the defendant was driving his father's car, with his permission. For convenience, we will refer to the father's car as the defendant's car.

The record discloses that the plaintiff and her daughter were, at the time of the accident which occurred at about 11 p. m., April 1, 1946, employed at a factory. They checked out from work at 10:30 p. m. Before starting for home the daughter examined the taillights on the plaintiff's car. Apparently it was the custom of the plaintiff and her daughter to examine the taillights before leaving their place of work. The night was clear, stars were out, plaintiff's car was clean, and the streets were dry. The plaintiff was driving, and her daughter was seated in the front seat to the plaintiff's right. When the plaintiff angled off Harrison Street to proceed south on the highway, her speed was 20 miles an hour. Midway between her home and Harrison Street she met a car proceeding north in the outer lane of the northbound highway. She dimmed her lights in meeting this car, and then put them on bright again. She was driving in the lane designated as No. 1, which is the outside lane closest to the west curb. After meeting the car, she requested her daughter to look back and see if any cars were coming. The daughter turned completely around, looked, and reported no cars were coming. The plaintiff also looked in the rear-vision mirror and saw no cars coming. She then drove her car into the second lane, about 100 feet distant from her driveway, slowing her car down due to the sharp turn into the driveway. After driving approximately 100 feet in the inner lane, which is designated as lane No. 2, the plaintiff started to angle her automobile to the left, or east, toward the driveway, at a speed of five to ten miles an hour. She observed no cars on the highway, either moving or parked, and had looked into the rear-vision mirror before she started to angle across the center of the highway. She heard a screeching of brakes and saw a flash of light, and her car was hit immediately. She was then approximately 30

feet north of the driveway. She heard no horn. Her left window was down. She made no signal to turn to the left, nor a signal that she was going to slow down. When the impact occurred, plaintiff's car made a complete turn and came to rest with the front end five feet south of the driveway, facing north. The left rear fender of the plaintiff's car was bent in; the spare tire, which is attached to the back part of the car, was jammed into the body; the gas tank had sprung a leak; the fenders and tires were damaged, the impact being on the left rear fender; and the left taillight was smashed. The bumper on the front of the defendant's car was jammed into the motor, both headlights were hanging, the radiator and grille were pushed back, and the fenders damaged.

The defendant's version of the accident is, in substance, as follows: As he was proceeding south on the Fort Crook highway straddling the center line between the two southbound lanes, all of a sudden he saw what proved to be the plaintiff's car straddling what has been designated as lane No. 2, making a turn. It looked to him like the plaintiff's car was stopped, and he started to apply his brakes and turn to the left. Then it seemed to him as if the plaintiff's car started to move again. He then applied the brakes hard and started to slide. His automobile struck the plaintiff's automobile on the left back part thereof. The accident occurred at a point about where the center line separates the northbound and southbound lanes. He saw no taillights or anything on the back part of the plaintiff's car, and the first thing he noticed was the reflection of her headlights on the highway. No signal was given by the plaintiff for a left turn. The defendant had dimmed the lights on the car he was driving when he met a car near Harrison Street, and had not put them back up; they were on for city driving. He testified that the plaintiff's car was muddy. The mud had dried, making the back of the car look light brown. He testified to slight damage to the plaintiff's car, that the left taillight was smashed in a little, the

right one being in perfect condition, but not burning. Two or three minutes after the accident the plaintiff turned her car a little to the left, straightened it up, and drove it right straight into the driveway. The car the defendant was driving came to rest a little north of the driveway. There were tire marks which started in the inner lane going south, or what has been designated as the No. 2 lane, and continued in the inner lane going north, 40 to 50 feet in length. The lights on the defendant's car shone 40 to 50 feet in front of his car, and he was 50 to 60 feet north of the plaintiff's car when he first saw it. His headlights did not shine on it. He further testified that he could stop his car in from about 40 to 50 feet at 35 miles an hour; that the glass and taillights on the plaintiff's car were muddy; that the plaintiff told him that she was in the wrong and did not see them; and her daughter told him she had seen the defendant's lights.

The testimony of the passengers in the car driven by the defendant substantially corroborated the defendant's testimony.

There is the evidence of a patrolman who arrived at the scene of the accident about 11:55 p. m., that the night was clear and there was no dampness on the streets, they were dry. He observed skid marks 69 feet in length which started a few feet west of the center line of the highway and thence across the center line into the northbound lane on the east side of the highway, in a southeasterly direction in close proximity to the plaintiff's driveway. The headlights and grille on the front of the defendant's car were pretty well demolished. The left rear corner of the plaintiff's car was damaged. The left taillight was damaged, and the lights were off on the plaintiff's car. The plaintiff turned the lights on, and the right taillight was out. The officer tapped it and it came on.

The plaintiff's husband arrived at the scene of the accident about 12:30 a. m. He testified to the damage to the plaintiff's car substantially as heretofore set out. The

taillights were not burning. He testified that the wire was crushed when the left rear fender was smashed tight against the metal, and no electricity could get into the taillights; that when he lifted the left rear fender it released the metal and that is when the right taillight came on.

The evidence is in controversy as to whether or not this witness' testimony is correct in that the wire could be crushed so tight against the metal, as described by him, to such an extent that it would eliminate electricity going into the taillights.

The daughter testified that the taillights on the plaintiff's car were burning. She observed them before she got in the car when they left the factory. She looked back through the back window and could see the cafe sign, but observed nothing in the way of cars approaching. The plaintiff pulled into the inside lane after this daughter had looked to the rear, about half a block from the driveway. The car had slightly angled at the time of the impact, from lane No. 2 across the center line of the highway. She observed the car lights just before the impact, heard the screeching of the brakes, and then the impact.

The general rule in this jurisdiction when a motion for directed verdict is made, follows: " 'A motion for a directed verdict must for the purpose of decision thereon be treated as an admission of the truth of all material and relevant evidence submitted on behalf of the party against whom the motion is directed. Such party is entitled to have every controverted fact resolved in his favor, and to have the benefit of every inference that can reasonably be deduced from the evidence.' " Gutoski v. Herman, 147 Neb. 1001, 25 N. W. 2d 902.

Having in mind the foregoing rule and the application of the same to the evidence in the instant case, we conclude that the evidence of the respective parties is in controversy in several respects.

The evidence is in controversy as to whether or not

the defendant was keeping a proper lookout for automobiles which were ahead of him on the highway; whether or not he had his automobile under control at the time the accident occurred; whether or not the lights on his car were on; and the rate of speed that he might have been traveling at the time of the accident as shown by the physical facts such as the skid marks on the pavement; the damage to the front of the defendant's car immediately after the impact; the damage to plaintiff's car; the debris and position thereof; and the position of the cars after the impact.

In addition, the plaintiff contends that the general rule is controlling as announced in Roth v. Blomquist, 117 Neb. 444, 220 N. W. 572, 58 A. L. R. 1473: "As a general rule it is negligence as a matter of law for a motorist to drive an automobile so fast on a highway at night that he cannot stop in time to avoid a collision with an object within the area lighted by his lamps."

The evidence discloses that the highway at the point of impact was not lighted, and the defendant's evidence is to the effect that the taillights on plaintiff's car were not burning; that the back part of her car was of a light brown color due to mud having dried on it; that the taillights and headlights on her car were covered with dried mud; that the lights on his car, by which he could see an object 50 to 60 feet in front of him when set for city driving, did not reflect or shine upon the plaintiff's car; and that he saw first the reflection of her lights when the plaintiff was attempting to negotiate the turn into her driveway.

We are not in accord with the plaintiff's contention as to the applicability of the rule as announced in Roth v. Blomquist, *supra,* to the facts in the instant case. As this court said in Buresh v. George, *ante* p. 340, 31 N. W. 2d 106, in discussing the rule as set forth in Roth v. Blomquist, *supra,* which recognizes exceptions to the rule: "However, on unlighted streets and highways, * * * we have made exceptions to this general rule when

the nature of the object or its condition, such as color, dirt, et cetera, in relation to the highway or road, affected its immediate visibility * * *. In such cases we have held that the issue of the driver's negligence, if any, and the degree thereof is for the jury." Citing cases.

The general rule as set forth in Roth v. Blomquist, *supra,* has no application in those cases where reasonable minds may differ on the question of whether or not the operator of an automobile exercised the care, caution, and prudence required of him under the circumstances of the particular situation. See Miers v. McMaken, 147 Neb. 133, 22 N. W. 2d 422.

The defendants contend that the plaintiff violated the following statutory provisions, and by doing so was guilty of negligence more than slight, while the defendants' negligence was less than gross, citing section 39-7,115, R. S. 1943, which provides: "(a) No person shall turn a vehicle from the direct course upon a highway unless such movement can be made with reasonable safety, and then only * * * after giving an appropriate signal in the manner hereinafter provided in the event any other vehicle may be affected by such movement. (b) A signal of intention to turn right or left shall be given continuously during not less than the last fifty feet traveled by the vehicle before turning."

The defendant also cites section 39-7,117, R. S. 1943, which provides: "All signals required by sections 39-7,111 and 39-7,115 to be given by hand and arm shall be given from the left side of the vehicle in the following manner and such signal indicated as follows: (1) Left turn, arm and hand extended horizontally; * * * (3) stop or decreased speed, hand and arm extended downward."

Admittedly, the plaintiff violated the statute by failing to signal for a left turn into her driveway. However, "A violation of statutes regulating the use and operation of motor vehicles upon the highways is not negligence per se, but evidence of negligence which may be taken into consideration with all the other facts and circumstances

in determining whether or not negligence is established thereby." Landrum v. Roddy, 143 Neb. 934, 12 N. W. 2d 82; Gleason v. Baack, 137 Neb. 272, 289 N. W. 349.

The degree of negligence, if any, of plaintiff's failure to give a signal in accordance with the foregoing statutes of her intention to turn into her driveway and the effect the failure to do so would have upon the operation of defendant's car, are questions for the jury. Also, the other charges of negligence against the plaintiff, as set forth in defendant's answer and counterclaim, are questions for the jury.

"Where different minds may reasonably draw different conclusions from the same facts as to whether or not they establish negligence or contributory negligence, those issues must be submitted to the jury." Buresh v. George, *supra*. See, also, Gutoski v. Herman, *supra*.

Upon a consideration of all the facts as disclosed by the record and under the authorities heretofore set out, this case presents a factual situation upon which reasonable minds might draw different conclusions, and therefore presents a jury question as to the plaintiff's negligence and the defendant's negligence under the comparative negligence statute. The defendant's motion for directed verdict should have been overruled.

For the reason given in this opinion, the judgment of the district court is reversed and the case remanded for further proceedings.

REVERSED AND REMANDED.

MARJORIE WRAY, APPELLANT, V. ELMORE WRAY, APPELLEE.
31 N. W. 2d 228

Filed March 3, 1948. No. 32359.

1. **Domicile: Husband and Wife.** As a general rule the domicile of a wife follows that of her husband.
2. ———. The residence of a person is where he or she has established a home, the place where he or she is habitually

present, and to which, having departed therefrom, he or she intends to return.

3. ———: **Husband and Wife.** A wife is not prevented from having a residence separate and apart from that maintained by her husband.

4. ———. The residence of a party in a community is determined by the intention of such party.

APPEAL from the district court for Hall County: ERNEST G. KROGER, JUDGE. *Reversed and remanded with directions.*

John F. McCarthy, for appellant.

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

YEAGER, J.

This is an action by Marjorie Wray, plaintiff and appellant, against Elmore Wray, defendant and appellee, wherein plaintiff seeks a decree of divorce from the defendant. The action was instituted in the district court for Hall County, Nebraska.

In the petition plaintiff claimed that her residence was and had been in said county and state for more than two years last past before the filing of the petition.

On showing by affidavit of the plaintiff that the address of defendant was unknown, service of process upon him was ordered made by publication. Service was had accordingly and thereafter in accordance with law, the defendant having failed to appear within the time provided by law, default was entered against him and a hearing was had on the petition.

On the hearing, after plaintiff had adduced her evidence, divorce was denied on the ground that the court did not have jurisdiction for the reason that plaintiff had not established a legal residence in Nebraska prior to the filing of her action. From this adjudication plaintiff has appealed. No question is presented by the appeal except that of whether or not the court had juris-

diction. No finding was made as to whether or not the evidence would sustain a decree of divorce if the court had jurisdiction.

From the record it is apparent that the district court concluded the question of jurisdiction against the plaintiff on the theory that at the time of the marriage defendant was not a resident of the State of Nebraska and did not thereafter become a resident; that by the marriage the residence of defendant became the residence of plaintiff; and that her residence continued thus until a separation of the parties took place and plaintiff returned to Nebraska which date was too recent to permit the court to obtain jurisdiction for the purpose of entering a decree of divorce.

The factual situation to the extent necessary to a determination of the question presented by the appeal is the following: Plaintiff and defendant were married in Grand Island on July 11, 1945. At the time she was and for many years had been a resident of that city. The defendant was at the time in the armed services of the United States. His home was at Richmond or Mosley, Virginia. The parties stayed at the home of plaintiff's mother for two days after the marriage when the defendant left for foreign service. Following his discharge the defendant returned to Richmond or Mosley, Virginia, but never returned to Nebraska. After the defendant returned plaintiff purchased a round-trip ticket to Virginia. Her purpose was to take up life with defendant as his wife. She remained there from January 21, 1946, to February 14, 1946, when she returned to Grand Island, Nebraska, where she has since remained.

The record of plaintiff's testimony in regard to the trip to Virginia is the following: "Q When you bought the ticket to Virginia did you buy a round trip ticket? A Thats right. Q And what was your intention at that time? A I was to buy a round trip ticket so my husband and I could be here, he was going to be here.

Q Was you going to make Grand Island your home? A Not especially Grand Island, but in Nebraska. Q You didn't go back to establish a residence in Virginia? A No, I was coming back."

The other facts as to residence of plaintiff outlined herein and this testimony stand without contradiction or dispute.

At the conclusion of the evidence the following statement, which appears in the bill of exceptions, was made by the court: "BY THE COURT: From the evidence in this case the court finds that at the time the parties were married that the defendant, plaintiff's husband, was a resident of the State of Virginia, and that plaintiff when she married him, acquired the residence of her husband, that plaintiff did not establish a separate residence from her husband until after the separation of February 12th or 14th, of 1946. That this action was filed on September 19th, 1946, which is less than one year after plaintiff had established her separate residence in the State of Nebraska, and the court finds that it has no jurisdiction to act in this case."

Section 42-303, R. S. 1943, as follows, contains the jurisdictional requirements as to the time when divorce actions may be maintained: "No person shall be entitled to a divorce for any cause arising in this state who has not had actual residence in this state for at least one year next before bringing suit for divorce with a bona fide intention of making this state his or her permanent home, unless the marriage was solemnized in this state and the applicant shall have resided therein from the time of the marriage to filing the petition. No person shall be entitled to a divorce for any cause arising out of this state unless the petitioner or defendant shall have resided within this state for at least two years next before bringing suit for divorce, with a bona fide intention of making this state his or her permanent home."

It is of course true that if the legal residence of plaintiff was the State of Virginia until after her separation from defendant and return to Nebraska then the court correctly decided that it had no jurisdiction to grant a decree of divorce since the period of residence computed on that basis was less than one year.

We are not however in accord with the conclusion of the trial court that this period constitutes the residence of plaintiff after the marriage. We hold that within the meaning of the law and under the evidence plaintiff was continuously a resident of the State of Nebraska from and for a long time before the marriage down to and including the date of hearing on the petition for divorce.

The general rule in this jurisdiction is that the domicile of a wife follows that of a husband. Smith v. Smith, 19 Neb. 706, 28 N. W. 296; Isaacs v. Isaacs, 71 Neb. 537, 99 N. W. 268.

These cited cases use the word domicile while the statute relating to jurisdictional requirements in divorce actions uses the word residence. While it is true that lexicographers recognize some difference in the two terms it is clear from an examination of the statute and the decisions of this court that the two terms are used interchangeably and have substantially the same meaning.

While it is true that the domicile or residence of a wife generally follows that of the husband it has never been said by any decision of this court that a wife may not have a residence other than and separate from that of her husband, and neither has it ever been said that by marriage a woman by that fact alone, if the husband's residence is other and different from her own, loses her residence.

This court has defined residence as follows: "One's residence is where he has his established home, the place where he is habitually present, and to which, when he departs, he intends to return." Berry v. Wilcox, 44 Neb. 82, 62 N. W. 249. See State ex rel. Brazda v.

Marsh, 141 Neb. 817, 5 N. W. 2d 206; Burns v. Burns, 145 Neb. 213, 15 N. W. 2d 753.

Nothing appears in any of the decisions to indicate that this definition does not apply to married women as well as to all other persons or classes of persons. On the other hand it has been specifically recognized that a wife may have a residence separate and apart from that of her husband. In Williams v. Williams, 101 Neb. 369, 163 N. W. 147, it was said: "Defendant's argument that a wife cannot have a residence separate and apart from that maintained by her husband is not supported by statute nor by the authorities." This statement was quoted with approval in Burns v. Burns, *supra.*

That intention is the controlling element in the determination of residence is the rule in this jurisdiction there can be little question. In Williams v. Williams, *supra,* it was said: "It is elementary and it is the universal rule that residence in a community is determined by the intention of the parties."

Applying these rules to the facts in this case it cannot be said that the plaintiff surrendered her residence in the State of Nebraska at the time of her marriage to defendant or at any time between that time and the date of trial in the district court.

It follows therefore that the district court erred in denying plaintiff a divorce on the ground that it was without jurisdiction.

This case is of course heard here de novo on the record. An examination of the record discloses evidence on the merits of the pleaded cause of action sufficient to sustain a decree of divorce in favor of plaintiff.

The order of the district court dismissing the action is reversed and the cause remanded with directions to render a decree of divorce in favor of plaintiff.

REVERSED AND REMANDED WITH DIRECTIONS.

IN RE ESTATE OF LEONARD E. SIMON, DECEASED.
J. O. LITTLE, APPELLEE, V. CLARENCE A. SIMON, ADMINISTRATOR, ET AL., APPELLANTS.
31 N. W. 2d 231

Filed March 3, 1948. No. 32357.

Appeal and Error: Costs. If an appellant seeks reversal and dismissal of an action, and the appellee consenting thereto prays for the same result, this court will ordinarily reverse and dismiss the cause and tax costs in conformity with section 25-1933, R. S. 1943.

APPEAL from the district court for Richardson County: VIRGIL FALLOON, JUDGE. *Reversed and dismissed.*

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

John C. Mullen and *Gerald M. Mullen*, for appellee.

Heard before SIMMONS, C. J., MESSMORE, YEAGER, CHAPPELL, and WENKE, JJ., and BARTOS and JACKSON, District Judges.

CHAPPELL, J.

On October 14, 1944, James O. Little, hereinafter called plaintiff, filed a claim in the county court of Richardson County against the estate of Leonard E. Simon, deceased, to recover for services rendered. On October 16, 1944, the administrator refused to honor the claim, writing across the face thereof "DISALLOWED:". However, on May 28, 1946, the claim was heard on the merits and allowed by the county court.

The administrator and heirs at law of deceased perfected an appeal therefrom to the district court within the time provided by law. Thereafter, plaintiff did not file his petition in the district court until August 19, 1946, some 83 days after judgment was rendered in the county court. In other words, his petition was filed out of time without prior permission of the court upon good cause shown. See §§ 24-544 and 27-1306, R. S. 1943.

On the same day, August 19, 1946, the administrator filed a motion in the district court to strike plaintiff's petition from the files and enter an order of non-suit. On August 27, 1946, a hearing was had on that motion, whereat the administrator adduced evidence showing laches and neglect on the part of plaintiff, who adduced no evidence in reply thereto. On that same day the motion was overruled, and on September 17, 1946, the administrator filed an amended answer in conformity with permission of the court granted September 10, 1946, denying generally and preserving therein the substance of his prior motion. On December 6, 1946, plaintiff filed a motion to strike that portion of the answer, which was overruled by the trial court.

Plaintiff filed a reply in the nature of a general denial, and on July 30, 1947, the issues were heard on the merits. On August 12, 1947, the trial court entered its decree finding generally in favor of plaintiff and allowing the claim.

Motions for new trial were overruled, whereupon the administrator and heirs at law, hereinafter called defendants, appealed to this court, assigning as error, among other things, the trial court's refusal to non-suit plaintiff.

On November 6, 1947, after defendants' appeal was perfected, counsel for plaintiff filed a motion in this court, in which plaintiff disclaimed "any interest he has or may have in this action and moves the Court to enter an order or opinion reversing and dismissing this action at the cost of the Estate of Leonard E. Simon, Deceased." That motion was "supported by certified copy of a Release and Cancellation of said judgment rendered in the District Court of Richardson County, Nebraska on August 6, 1947, which release and cancellation of judgment is on file in the District Court of Richardson County, Nebraska, and the County Court of Richardson County, Nebraska," which, together with

verifying affidavit of plaintiff, was attached to and made a part of the motion.

The motion was submitted to this court without argument, by stipulation, which provided that if overruled, defendants should have 20 days thereafter to file brief. The motion was overruled and defendants served and filed briefs in conformity with the stipulation and the rules of this court. On the other hand, plaintiff filed no brief, and when the action came regularly on the call for hearing, defendants presented argument but plaintiff did not appear.

Since defendants seek reversal and dismissal, and plaintiff consenting thereto prays for the same result, we have presented only the question of costs.

Section 25-1933, R. S. 1943, as applicable here, provides that when a judgment, decree, or final order is reversed, this court may render judgment for all costs against appellee, or may direct that each party pay his own costs, or apportion the costs among the parties as in its discretion the equities of the cause may require.

In conformity therewith, and in the light of the situation heretofore presented, this action should be and hereby is reversed and dismissed, costs taxed to appellee.

REVERSED AND DISMISSED.

MARY PAVEL, APPELLANT, V. WINIFRED GOEHNER ET AL., APPELLEES.
31 N. W. 2d 219

Filed March 3, 1948. No. 32337.

Appeal and Error. While the law requires this court, in determining an appeal in an equity action involving questions of fact, to reach an independent conclusion without reference to the findings of the district court, this court will, in determining the weight of the evidence, where there is an irreconcilable

conflict therein on a material issue, consider the fact that the trial court observed the witnesses and their manner of testifying.

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

McKillip, Barth & Blevens, for appellant.

Harry L. Norval, for appellees.

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

WENKE, J.

Mary Pavel brought this action in the district court for Seward County against Winifred Goehner and Fred W. Goehner. The purpose of the action is to permit plaintiff to redeem the lands described in her petition in accordance with the terms of an alleged oral agreement which she claims was entered into at the time she and her husband executed and delivered a deed for the premises to T. L. Norval in consideration of their mortgage debt thereon to him. From a decree in favor of the defendants, her motion for new trial having been overruled, the plaintiff appeals.

The action being in its nature equitable is reviewed here de novo. Such an agreement may be enforced, if established (see Morrow v. Jones, 41 Neb. 867, 60 N. W. 369, and Johnson v. Shuler, 134 Neb. 25, 277 N. W. 807), but it must be established by clear, satisfactory, and convincing evidence (see Butler v. Peterson, on rehearing, 79 Neb. 715, 116 N. W. 515; O'Hanlon v. Barry, 87 Neb. 522, 127 N. W. 860; Cox v. Young, 109 Neb. 472, 191 N. W. 647; Anderson v. Lincoln Joint Stock Land Bank, 131 Neb. 150, 267 N. W. 355; and Lintz v. Apking, 145 Neb. 714, 18 N. W. 2d 55).

In order to clarify the discussion and simplify the reference to them in the opinion, it will be best to set out the relationship of the parties to this action and those referred to in the record and the manner of refer-

ring to them herein. Mary Pavel, who will be referred to as the plaintiff, is a widow, her husband, John A. Pavel, having died in 1943. They will be referred to as the Pavels. Joseph L. Pavel is their son and will be referred to as such. T. L. Norval and Ben F. Norval, who is the same person as Ben Norval or B. F. Norval, are brothers. T. L. Norval died intestate on February 9, 1942, and his daughter, the defendant Winifred Goehner, was his sole and only heir at law. She is the wife of the defendant Fred W. Goehner.

The Pavels were farmers living in Seward County and in 1905 they became the owners of the east half of Section 22, Township 12 North, Range 3 East, of the 6th P. M., in Seward County, Nebraska, and occupied it as their home. This is the land which is here involved. Commencing in 1915 there began a series of mortgages on said premises to T. L. Norval which ultimately resulted in there being an indebtedness on said premises, as of December 23, 1939, in the sum of $14,000 delinquent principal, over $2,200 delinquent interest, and unpaid delinquent taxes for the years 1936, 1937, and 1938. In consideration thereof, although the deed recites only $15,000, the Pavels deeded this land to T. L. Norval by warranty deed dated December 23, 1939. Subsequently, on December 29, 1939, and in accordance with the desires of the Pavels, the son was permitted to farm the place and a one-year lease was entered into by T. L. Norval, through his agent Ben F. Norval, with the son, being from March 1, 1940, to March 1, 1941. This lease provided for rent as follows: $60 cash, one-third of the small grain, and two-fifths of the corn. No new written lease was ever entered into but the son was permitted to occupy the premises on the basis of a tenancy from year to year. He paid the rent for the first two years to Ben F. Norval, who was the agent of T. L. Norval, and after T. L. Norval's death it was paid to Fred W. Goehner, who became the administrator of the T. L. Norval estate. The administrator of the T. L.

Norval estate released the mortgages on this land by marginal releases as of March 2, 1945. The defendant Winifred Goehner is the owner of said premises by reason of being the sole and only heir at law of T. L. Norval, deceased, who died intestate.

Plaintiff testified that she went with her husband to the office of the Norvals in Seward and there Ben F. Norval said they would have to foreclose the place; that they then executed and delivered the deed for the premises to T. L. Norval in full satisfaction of their mortgage indebtedness to him. However, although she is not certain of the exact terms thereof, plaintiff testified that before she signed the deed she demanded that they, the Pavels, have the right to take back the land at any time within 10 years and that she would not sign the deed unless such rights were granted; that Ben F. Norval agreed thereto; and that she would not have signed the deed had he not done so. She also testified that the notes and mortgages were not returned to them at the time the deed was given, nor at any time since.

Ben F. Norval, who handled the matter for his brother, in testifying for the defendants admitted that he had previously told John A. Pavel that if he could not pay the delinquencies on the mortgages that they would have to foreclose. However, he further testified that on the occasion here involved that the Pavels came in on their own account and said they wanted to get rid of their indebtedness. He further testified that the deed, although reciting only a consideration of $15,000 which he thought was probably the value of the land at that time, was in full satisfaction of the mortgage debt and the delinquencies thereon; that the Pavels, particularly the plaintiff, mentioned something about wanting to be able to redeem the property but that he refused to consider such a proposition and that he told them he would not make such an agreement and would not take the deed unless it was in full settlement without any

further rights in the Pavels; that the Pavels agreed thereto and that the deed was then executed and delivered in full satisfaction of the indebtedness; and that he thereupon canceled the mortgage notes and gave them, and the mortgages, to the Pavels.

After the deed was given the Pavels, including the son, continued to live on the land pursuant to the lease hereinbefore referred to, the son farming the land. The plaintiff testified that it was her thought that under the terms of the agreement to redeem that she was entitled to have the rents applied thereto. In this regard it is significant that neither she, nor her son, kept any accounting thereof.

The son testified that he talked to the defendant Fred W. Goehner about his mother wanting to redeem the place; that he did so the first time shortly before the first of March 1945; and that the conversation took place in the office of Goehner in the latter's store in Seward. This would be shortly before Goehner, as administrator, released the mortgages. He testified Goehner told him he would let him know when he could redeem it. He said he talked to him again about a year later at the same place and that Goehner gave him the same answer. This later conversation was about two weeks before he was served with notice that he would have to vacate the premises on March 1, 1947. This notice was served on May 25, 1946.

The defendant Fred W. Goehner testified that the son talked to him in the latter part of March 1945, and also at a later date, about wanting to buy the place but that he never talked of redeeming it but said that his folks wanted him to buy it back, but that he never agreed that the son could have it.

The son further testified that shortly after he was served with notice to vacate the place he talked with Ben F. Norval about redeeming the premises and that Norval asked him if he had the money. Joe Divis testified that he was with the son on that occasion and over-

heard the conversation. He testified that the son told Ben F. Norval that he had a right to redeem and that his mother was ready to do so and that Norval did not say whether there was or was not any such agreement but just asked him if he had the money.

Ben F. Norval testified that he talked with the son on two occasions and that the son spoke of his mother's right to redeem the land, admitted that he did ask the son where he could get that much money, and that the son told him he could get it but said he told the son that his mother had no such right as there never was such an agreement.

From what has been said it is apparent that as to the issues of whether or not there was, in fact, such an agreement as plaintiff claims the evidence is in conflict and the rule stated in Fisher v. Standard Investment Co., 145 Neb. 80, 15 N. W. 2d 355, is applicable. The rule therein stated is as follows: "While the law requires this court, in determining an appeal in an equity action involving questions of fact, to reach an independent conclusion without reference to the findings of the district court, this court will, in determining the weight of the evidence, where there is an irreconcilable conflict therein on a material issue, consider the fact that the trial court observed the witnesses and their manner of testifying." From the record we come to the same conclusion as the trial court, that is, that no such agreement was ever made. In fact, it is evident from the record that the idea of redeeming the property never occurred to these parties until after the son was served with notice to vacate.

We have come to the conclusion that the decree of the trial court should be and is affirmed.

AFFIRMED.

CHARLES E. STARR ET AL., APPELLEES, V. ENGINEERING CONTRACTING COMPANY ET AL., APPELLANTS.
31 N. W. 2d 213

Filed March 3, 1948. No. 32323.

Corporations. A majority of the stockholders of a corporation cannot, by amending the articles of incorporation, deprive the minority, without their consent, of their contractual rights to dividends under the articles as originally adopted.

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

Fitzgerald & Smith, Seymour L. Smith, James W. R. Brown, and *Robert L. Smith,* for appellants.

Fraser, Connolly, Crofoot & Wenstrand, for appellees.

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

LIGHTNER, District Judge.

The finding in the district court was for the plaintiffs, and defendants appeal. There seems to be some question in the minds of the attorneys, at least in the minds of defendants' attorneys, as to the kind of a lawsuit this is. They claim that it is a suit for specific performance. We will discuss this claim later in this opinion. That which precipitated the lawsuit was the attempt by the defendant White, owner of 90 shares of the preferred stock and six of the ten shares of the common stock that had been issued, and therefore the owner and controller of a majority of the voting stock of the corporation, to amend the articles of the corporation so as to permit him to convert his 90 shares of preferred stock into 90 shares of the common stock, and to increase the amount of authorized common stock from 50 to 150 shares. The effect of this conversion, as will be explained later, would result in a large loss to plaintiff Starr. He brought this suit to protect his interests as a minority stockholder.

The defendant corporation was organized as the result of negotiations carried on between plaintiff Starr and defendant White in January and February 1946 and before. The articles were signed and acknowledged on February 18, 1946, and filed on February 21, 1946. The incorporators were the plaintiff Charles E. Starr and the defendant Joseph F. White, Sr., but Mr. White's wife, the defendant O. K. White, was the named incorporator instead of Mr. White.

The events which lead up to the formation of the corporation occurred in the late fall and winter of 1945 and in January and February 1946, and the agreement between Mr. Starr and Mr. White with respect thereto are the subject of the conflicting claims of the parties.

Mr. White, who was a United States government employee, civilian chief of the Utilities Branch, Seventh Service Command, had in the fall of 1945 drawn the plans and specifications for "Removing Two (2) complete B&W steam generating units, plant boilers No. 2 and 3, including all auxiliaries, from building III, St. Louis Administration Center, St. Louis, Missouri and complete reinstallation at Fitzsimmons General Hospital, Denver, Colorado." This was a large job and Mr. White wanted to bid on it. He felt sure that he could underbid any of his competitors. He states that it was legal for him to bid on it personally, even though he had drawn the plans and specifications as an employee of the government for that very work. However, he felt that there would be criticism if he did so, and he therefore decided to organize a corporation to make the bid. To answer the question which naturally arises here we quote from Mr. White's testimony: "Q- Before you formed this corporation and bid on this job, did you make some inquiry as to whether you could be interested in a corporation that contracted with the Federal Government? A- The usual members of the War and Navy Department, under W. D. 2, Article 14, provided that anybody can be with the government and still bid a job, as long as

it is a corporation. Q- Even though you are interested in it? A- Oh, absolutely." Neither the legality of Mr. White's right to bid nor the morality of it are raised in the pleadings or briefs, and we will not further advert to that phase of the case.

The plaintiff Starr worked under Mr. White. They were well acquainted with each other and their families visited back and forth. The contentions of Mr. Starr are that the original plan was that he and White would organize the defendant corporation, Engineering Contracting Company, Inc., with an authorized capital stock of $10,000, of which White would pay in $6,000 and receive 60 shares of the common stock, and Starr would pay in $4,000 and receive 40 shares of the common stock, and that the proceeds and assets of said corporation would be divided in the same way, that is 60 percent to White and 40 percent to Starr. This was while Starr believed that he could raise $4,000 to put into the corporation. It turned out later that Starr could not raise $4,000, nor any considerable part of it; in fact he could only raise $400. Therefore the original plan had to be changed. Mr. Starr's account of what happened is that there was to be an entire change in the set-up of the corporation from a straight common stock company to one that would authorize 100 shares of preferred stock at $100 per share and 50 shares of common stock at $100 per share. However, of the common stock only $1,000 was to be actually issued, of which preferred and common stock Mr. White would buy 90 shares of the preferred stock of the value of $9,000 and six shares of the common stock of the value of $600, a total of $9,600; that Mr. Starr would buy $400 of the common stock, but that in spite of the disparity in the investment by the incorporators, Starr's interest in the corporation would still be 40 percent and he would receive 40 percent of the profits and own 40 percent of the assets, that Mr. White would receive 60 percent of the profits and own 60 percent of the assets, subject, of course, to

the superior claim of White against all of the assets and dividends of the corporation for the $9,000 in preferred stock which he was to purchase.

The corporation was then organized and the articles of incorporation authorized the issuance of 100 shares of preferred stock of the par value of $100 per share, and 50 shares of common stock of the par value of $100 per share. There was then issued immediately after the incorporation of the defendant corporation, 90 shares of preferred stock and six shares of common stock to Mr. White, for which he paid $9,600, and there was issued to Mr. Starr, four shares of common stock of the corporation for which he paid $400. The corporation then bid and, being the lowest bidder, obtained the contract for the removing of the boilers on its bid of $190,432.

The corporation did very little of the work under the plans and specifications, but sublet almost the entire job for a total of $126,487.48, which resulted as can be seen in an enormous profit. Mr. L. G. May, a public accountant, computed the gross profit to be $54,968.19, the net profit, after payment of Federal income taxes, to be $34,180.28, and the book value of each share of the ten shares of common stock to be $3,482.03 as of November 30, 1946. Therefore, the conversion by Mr. White of his 90 shares of preferred stock to 90 shares of common stock would have the effect of giving him 96 percent of the profits and property of the corporation instead of 60 percent which he had or appeared to have theretofore, and would reduce plaintiffs' holdings from 40 percent to 4 percent, or in values would reduce plaintiffs' interest in the corporation from a total value of about $14,000 to a total value of about $1,750. The defendant White's interest would be increased accordingly.

Defendant White denies the claims of plaintiffs that they were to have a 40 percent interest in the corporation as it was finally organized and after it was determined that Starr had only $400 to invest. He admits that, when the organization of the corporation was first talked

about, the division of profits was to be on a 40-60 basis, but that was when plaintiffs contemplated putting in $4,000. He says that when it finally developed that plaintiffs could put in only $400, the plan and interests of the parties were completely changed. Defendant White's account of the final agreement is fully set forth in his testimony as follows: "Q- After the first draft of the articles were submitted there was a change suggested that instead of 100 shares of common stock, there would be ten shares of common stock and ninety shares of preferred stock; was there any particular reason? A- Yes. He came over to my house, and I told him I needed to get down to business, because I wanted to bid, and this job would be let in three weeks. I says, 'I got to go ahead,' He said, 'I cannot get $4,000; all I could put up is $400.00.' Well, I said, 'If you can only put up $400.00, I am not going to give you a 40 percent interest.' He said, 'I would like to get in on $400.00.' I says, 'All right, this is genuine, I will set this up on a $10,000.00 corporation, but I am going to keep 90 shares of the preferred stock for my money, and I will give you four shares for your $400.00. And then I will take six.' 'I am going to take preferred stock to protect myself, and later we will convert this preferred stock to common stock, and we will each share in proportion to our investment. That we would convert this preferred stock into common stock as soon as we got going, and knew that we were going to make a go of it. Q- Did you ever at any time to Mr. Starr, or to anybody else make any statement, after it became evident that he could put only $400.00 in the corporation, that for $400.00 invested in this $10,000 corporation he would have forty per cent of the profits? A- No, I never made a statement like that."

These conflicting claims of Starr and White present, in our opinion, the principal question to be determined here. All other matters in the case are, we think, subsidiary thereto. The evidence which covers nearly

600 pages is directed directly or indirectly to a solution of this problem.

The principal witnesses were Starr and White, and each accuses the other of perjury and asks that the rule falsus in uno, falsus in omnibus, be applied.

The basis of the claim that Starr committed perjury is the fact that he testified that he secured four of the five subcontracts by contacting the officers of the subcontracting companies and that he knew the officers of several of such companies and introduced Mr. White to them; whereas the officers of two of said companies testified that it was not Starr who introduced them to White but that White introduced them to Starr, and that White was responsible for securing the contracts.

The basis for Starr's claim that White committed perjury is the testimony that White presented a fictitious expense account on May 30, 1946, for $1,546.80 for seven out-of-town trips to line up the subcontractors, whereas the evidence of Mrs. Love, chief of the Civilian Personnel Branch of the government at Fort Omaha, who keeps the records pertaining to civilian employees including the records pertaining to Mr. White, shows beyond any question by the official records of her office that Mr. White during the time he claims to have been traveling in behalf of the defendant corporation incurring these large expenses was actually working for and getting paid by the government, and was getting his expenses from the government on such out-of-town trips as he took. The actual days of the month that Mr. White was working in his office in Omaha are shown by these records which Mrs. Love produced. On some of these same days that he claims in his expense account that he was hundreds of miles away procuring these contracts for the corporation which was later organized Mrs. Love's records show that he was in Omaha, drawing pay from the government, in his official capacity.

There is apparently, therefore, some basis for the

claims that both Starr and White were guilty of perjury. Assuming that they were equally guilty in this respect we turn to a consideration of the evidence. The district court found in favor of the plaintiffs and we believe that the preponderance of the evidence supports the finding of the district court.

Four considerations force us to this conclusion. First, there is the evidence of Herbert T. White (not related to the defendant White), a lawyer in Omaha who drew the articles. The substance of his evidence is that on February 13, 1946, Starr and White brought the articles back to his office and suggested that certain changes be made therein. These changes provided for both preferred and common stock. Instead of Starr borrowing $4,000 from White, the corporation was to issue only 10 shares of common stock of which Starr would purchase four and White would purchase six. White would purchase 90 shares of preferred stock. At this time Starr and White again discussed their proportionate shares in the corporation and White again stated that he would take a 60 percent share in the profits and that Starr should have 40 percent. Herbert T. White then prepared new articles on this basis. At each meeting in Herbert T. White's office, Starr and White stated that their respective shares in the profits of the corporation were to be 60 percent to White and 40 percent to Starr. The second and final set of articles were signed February 18, 1946.

Second is the fact that the division of the common stock of the corporation as made by the parties themselves, four shares of the common stock to Starr and six shares of the common stock to White, would entitle Starr to a 40-60 division of the profits and assets. Elko Lamoille Power Co. v. Commissioner of Internal Revenue, 50 F. 2d 595; Nichols v. Olympia Veneer Co., 139 Wash. 305, 246 P. 941; Heimbaugh v. Hitchcock, 115 Kan. 182, 222 P. 114; 11 Fletcher Cyclopedia, Corporations, § 5083, p. 28; 13 Am. Jur., Corporations, § 423, p.

475; 13 Am. Jur., Corporations, § 683, p. 685; 13 Am. Jur., Corporations, § 705, p. 721.

Third, there is the interesting and mysterious transaction of May 30, 1946, above referred to involving the fictitious expense accounts, described by Mr. Starr as follows: "Q- Did you receive any compensation whatsoever from the corporation? A- Yes, sir. Q- What did you receive? A- I received what is considered a dividend of $1031. Q- When did you receive that? A- I received that in May. Q- Recite the circumstances under which you received that? Mr. Smith: What is the amount? The witness: $1021.20. ($1031.20.) A- I came into the office one Saturday morning, Joe White was at the desk, and had the same kind of paper as you have in your hand there, he says, 'I am taking $1,000 a month out of this Company, because,' he says, 'I don't have to pay any income taxes on expenses,' he says, 'You are to get 40 per cent of that $1,000, which will give me $600.00, and you $400.' He prepared this fictitious expense account sheet, and the next Monday morning he says to me, 'Here is my expenses, you make yours up accordingly. * * * Q- How much was paid to Mr. White? A- $1546.80, which made a total of $2578." This happened long after all of the subcontracts had been entered into except the last one and when it was quite apparent that the corporation would reap an almost fantastic profit. ($103,931 of the subcontracts were dated March 20, 1946, one for $15,188 was dated April 8, 1946, and the last one for $7,368.48 was dated May 29, 1946.) It will be noted that the $2,578 taken by the two fictitious expense accounts, $1,546.80 to White and $1,031.20 for Starr, is exactly a 60-40 division of the money which was taken, and is a strong confirmation of plaintiffs' claim that the division of the profits was to be 40-60, 40 percent to Starr and 60 percent for White. Let it be said to Starr's credit that he reported this $1,031.20 as income, and not as White suggested to him as expense, which, of course, would have

been totally fraudulent. If it be said that this was before White attempted to convert, and represented Starr's actual interest at that time, it still must be remembered that White would probably not actually give Starr a 40 percent cut if his interest was only 4 percent, especially in view of White's claim that he told Starr during the final conversation just before the organization that they would convert as soon as they got going and knew they were going to make a go of it. At the time that this $2,578 was distributed they had been operating several months, the subcontracts had been let, and a large profit was assured.

Fourth, the articles did not provide for conversion by White of his 90 shares of preferred stock for 90 shares of common stock. Such a provision could easily have been put in, and would have been put in, we think, by lawyer White if that had been the agreement of the parties. The articles did not provide for the issuance of sufficient common stock to make the conversion, but for 50 shares only, whereas 100 shares would have been required. Appellants now claim that because there is a provision in the articles for amendment by a vote of 60 percent of the common stock, it indicates that White had the right to convert. However, it is not reasonable to assume or find that lawyer White would have resorted to this clumsy method and left to the uncertainty of parol evidence the establishment of this important and vital provision if the understanding between the parties had been as White now claims that it was.

A number of questions of law are discussed in appellants' brief. Appellants contend that Starr is attempting to vary and contradict the terms of the articles of incorporation by parol evidence. The fact is that Starr is relying on the articles of incorporation as they stand, and that it is White who wants to reform the articles in order to permit an amendment which would have the effect of confiscating Starr's interest in the corporation. White says he reserved the right to con-

vert his preferred stock into common stock, but he did not make such reservation in the articles. The claim of White that he has a right to amend in this way because the articles provide that they may be amended by a 60 percent vote of the stock is contrary to law. The kind of amendment referred to in the articles is a legal amendment, not an illegal amendment which would enable White to destroy a large part of the value of Starr's shares in the corporation.

White claims again and again that the suit is one for specific performance. It does not seem so to us. However, it is not the form of the action which controls. If the pleadings and evidence entitled Starr to the relief asked, the court should give it to him regardless of how his cause of action is denominated. Here again it is White who either seeks specific performance, or a reformation of the original articles. The articles of incorporation do not give White the right to make the amendments in question, nor does the fact that he owned 60 percent of the common stock and all of the preferred stock issued give him such right as against a minority stockholder who will be damaged. In order to convert under the circumstances existing in this case he must prove an oral reservation of the right to do so, since such right was not reserved to him in the articles. This burden he has failed to sustain.

The defendant White objects to the evidence of lawyer White on the ground that it varies the articles of incorporation. Lawyer White's testimony, however, is to the effect that the exact agreement of the incorporators was put into the articles and was followed out, just after they were filed, by the issuance of four shares of the common stock to Starr and six shares of the common stock to White, which would give them the 40-60 interest in the corporation claimed by Starr. White sets forth other propositions of law, most of which are answered by the discussion already made.

White's eighth proposition of law is that when Starr

signed the articles of incorporation, knowing that they provided for amendment without restriction by the majority of stockholders without his consent, that he cannot now complain because White exercised his lawful rights as a majority stockholder to amend the articles and provide for conversion of the preferred stock to common stock. A number of cases are cited in support of this proposition, all of which we have examined. None of the cases cited by defendant White goes so far as to hold that a majority stockholder can, under the circumstances in this case, manipulate the stock or property of the corporation in such a way as to prejudice the rights of the minority stockholders. To permit any such manipulation would place the minority stockholders at the mercy of the majority stockholders. The following cases hold that the majority stockholder has a duty to a minority stockholder and cannot, by amending the articles of incorporation, deprive the minority without their consent of their contractual rights to dividends under the articles as originally adopted. Hueftle v. The Farmers Elevator, 145 Neb. 424, 16 N. W. 2d 855; Heimbaugh v. Hitchcock, *supra;* Tennant v. Epstein, 356 Ill. 26, 189 N. E. 864; Johnson v. Bradley Knitting Co., 228 Wis. 566, 280 N. W. 688; Theis v. Durr, 125 Wis. 651, 104 N. W. 985; Forrest v. Nebraska Hardware Co., 91 Neb. 735, 137 N. W. 839; Ponca Mill Co. v. Mikesell, 55 Neb. 98, 75 N. W. 46.

A great many propositions and questions are presented in appellants' brief. It would extend this opinion beyond reasonable length to answer each of them specifically. While we have not discussed all of such propositions we have given them all careful consideration and we believe that this opinion either directly or by necessary implication answers all of the principal contentions made by appellant White. The judgment of the district court is affirmed.

AFFIRMED.

SIMMONS, C. J., did not participate in the decision of this case.

MESSMORE, J., concurring.

I concur separately with the legal principles announced in the opinion.

The record discloses that one of the parties to the litigation was an employee of the United States government as civilian chief of the Utilities Branch, Seventh Service Command, and in the fall of 1945 had drawn the plans and specifications for removing two complete B&W steam generating units, plant boilers Nos. 2 and 3, including all auxiliaries, from building III, St. Louis Administration Center, St. Louis, Missouri, and complete reinstallation at Fitzsimmons General Hospital, Denver, Colorado. This was a large job, and this government employee felt sure he could underbid any of his competitors; that he could bid personally, even though he had drawn the plans and specifications as an employee of the government for that very work. However, he felt that undue criticism might attach to him under the circumstances, if he should bid personally. Under what has been identified as W. D. Contract Form No. 2, Article 14, he claims he would be privileged to bid and still hold his government position as long as the bid was made by a corporation. A corporation was formed; the stock divided as shown in the opinion, and the unconscionable profits made by these federal employees are shown in the opinion.

I believe that in equity and good conscience, such employees should not be permitted to take advantage of their position, as occurred in this case. I can see nothing equitable in what the parties to this action did.

I desire to call attention to this matter, in the hope and expectation that conditions of this kind may be subsequently rectified should this country become engaged in another emergency.

ROBERT O. LINVILLE ET AL., APPELLEES AND CROSS-APPELLANTS, V. THEODORE L. KOWALSKI ET AL., APPELLANTS AND CROSS-APPELLEES.
31 N. W. 2d 281

Filed March 12, 1948. No. 32375.

1. **Actions.** When a plaintiff invokes a remedy in law and by amended petition invokes a remedy in equity, the identity of the cause of action being preserved; the defendant joins issue and affirmatively seeks an equitable remedy; and the cause is tried and decree entered in equity; the defendant cannot thereafter successfully complain that the form of the action was changed from one in law to one in equity.
2. **Equity.** Where a party, having the right to object, voluntarily submits to the jurisdiction of a court of equity, the cause will be retained for trial on its merits and the proper relief awarded.

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

Philip R. Kneifl and *Theodore L. Kowalski,* pro se, for appellants and cross-appellees.

Winters & Winters, for appellees and cross-appellants.

Heard before SIMMONS, C. J., MESSMORE, YEAGER, CHAPPELL, and WENKE, JJ., and BARTOS and JACKSON, District Judges.

SIMMONS, C. J.

This action originated as one in ejectment. It involves the right of possession of one part of a duplex residence property sold to plaintiffs by the defendants. By amended petition plaintiffs sought possession by praying for a determination of the rights of the parties and for specific performance of an alleged agreement to surrender possession. Defendants answered and cross-petitioned, praying for specific performance of the contract as they alleged it to be giving them the right to retain possession, or, in the alternative, for a reconveyance and accounting, and for equitable relief. Trial was had resulting in a judgment for the plaintiffs.

Defendants appeal. Plaintiffs cross-appeal as to the amount of a money recovery. We affirm the judgment of the trial court.

Defendants' first argued assignment of error is that the court erred in transferring the cause from the law to the equity docket, and permitting a hearing upon the cause in equity, contending that the cause of action remained substantially the same.

It appears that following the filing of the amended petition plaintiffs moved to transfer the cause from the law to the equity docket. The motion was granted. No resistance to the motion nor objection to the order granting it is shown. Defendants answered and cross-petitioned, without raising the issue now presented, and clearly invoked the equity jurisdiction of the court. Trial was had to the court without objection. During the trial defendants treated the issues as calling for equitable relief. This question was raised first in the motion for a new trial, and then only to the extent of alleging error in transferring from the one docket to the other. Here the defendants' contention is that they are entitled to equitable relief and state that we have jurisdiction to try this case de novo on the merits.

In Scroggin v. Johnston, 45 Neb. 714, 64 N. W. 236, plaintiff was given permission to change his petition from one in ejectment to one in equity. The defendants set up matters for equitable cognizance and demanded equitable relief. The cause was tried as one in equity. We held that the defendants, so pleading and trying the cause, could not thereafter successfully complain that the form of the action was changed. The form of action goes to the remedy, not to the cause. The identity of the cause of action was preserved. The trial court's order was not erroneous. See Criswell v. Criswell, 101 Neb. 349, 163 N. W. 302.

The defendants' next contentions are that the court decreed performance of a contract which the parties had not made, and that in any event the plaintiffs have

an adequate remedy at law. These contentions require a review of the evidence and the record.

The evidence shows the following factual situation. The defendants are husband and wife. Reference hereinafter to the defendant's testimony means that of defendant Mr. Kowalski. His wife did not testify and it appears her participation herein was to sign the papers involved.

On February 24, 1945, the plaintiffs signed an instrument on a printed form directed to a realty company, whereby they agreed to purchase the real estate involved in this action for $11,500. It also provided for a deposit of $200 and (inserted in longhand) "Balance cash on date of closing subject to a loan of $8,500. subject to owner having a lease for 6 months at $45 per month renewable at his option and subject to O. P. A. ruling and regulation." This instrument included a receipt from the realty company for the $200, which contains this clause in print: "In the event of the refusal or failure of the purchaser to consummate the purchase, the owner or vendor may, at his option, retain the said money hereby paid, as liquidated damages for such failure to carry out said contract of sale." Also a part of said instrument is an undated acceptance of the proposal signed by the defendants. It appears to have been signed about the date of the other executions in the instrument. It further appears the parties understood that the reference to the $8,500 loan was to a loan which the plaintiffs had to secure to make the purchase price. The plaintiffs negotiated a loan for an amount less than $8,500 but sufficient to enable them to make the purchase price payment. The loan had been approved and the transaction was ready for closing on March 3, 1945. The parties met at the loan office.

The defendants presented a lease for six months renewable at defendants' option. Plaintiffs testified that they refused to sign the lease and refused to complete the transaction under that condition. Defendant testi-

fied that they told him they could not get a loan with that sort of a lease on the property, and that the loan company required a lease for a definite period of time. The representative of the loan company denied that any such requirement was made, and testified that the loan had been approved prior to the meeting of the parties on March 3. Further negotiations were had with the result that on March 6, 1945, the parties again met at the loan company, and executed and delivered an instrument on a printed form entitled "City Lease," reciting that the plaintiffs leased to the defendants the property here involved for the term of two years from March 1, 1945, to March 1, 1947, for $45 per month, subject to the agreement that "* * * the lessees reserve the right to terminate said agreement by giving a thirty-day notice in writing of said termination to said lessors." Concurrently therewith the deed from defendants to plaintiffs, which had been executed on March 3, 1945, was delivered. Defendants remained in possession of the premises, paid the stipulated rent, gave no notice of an exercise of the "option" to renew at the end of six months, and otherwise appeared to hold under the two-year lease. On October 30, 1946, plaintiffs served on defendants a notice that they would not renew the lease after the expiration date of March 1, 1947. On the latter date the defendants tendered their rent and it was refused. The record contains some OPA proceedings wherein reference is made to defendants as tenants.

It is defendants' contention that they executed and delivered the two-year contract for the purpose of enabling the plaintiffs to secure a loan, and that the original agreement of February 24, 1945, is in force; and that they are entitled to specific performance of that agreement, or, in the alternative, to a cancellation of the entire transaction, an accounting, and a placing of the parties "in statu quo" as before this transaction began.

Defendants' contention that the two-year contract was only for the purpose of enabling the parties to secure a loan cannot be sustained. The record is clear that no such a condition was attached to the granting of the loan. The two-year contract negatives any such a condition, for the term is far less definite in it, as it clearly gave the defendants the right to terminate it in thirty days, whereas the original agreement bound the defendants, according to their construction of it, for a period of six months.

It seems clear to us that the parties understood that this transaction was to involve a deed from defendants to plaintiffs and a lease from plaintiffs to defendants. Plaintiffs refused to perform if the option provision of the contract was to be included in the lease. Defendants had the option of accepting a breach and pursuing their rights resulting therefrom, or of consummating the contract with a modification as to the term of the lease. They accepted a modification and completed the contract. There was without doubt a meeting of minds in so doing. There is no basis for the contention that the agreement of February 24, 1945, is still in force. It was merged in the completed agreement. Likewise there is no basis for the contention that the transaction should be set aside in its entirety.

We find, as did the trial court, that in effect the deed and the lease were all one transaction, resting on the same consideration, whereby the defendants conveyed real estate to the plaintiffs and reserved possession of a part thereof for a period not beyond March 1, 1947, conditioned upon the payment of a stipulated rent for the reserved period. The trial court held that all that remained for the consummation of the contract was the surrender of possession and decreed specific performance and the use of a writ of assistance if defendants did not vacate.

The specific question comes, should an equity court, under the circumstances of this case, decree and, if need

be, enforce surrender of possession, or should that relief be denied and the plaintiffs left to a remedy in ejectment?

As has been stated, defendants did not object to the jurisdiction of equity when plaintiffs filed their amended petition. On the contrary they answered, specifically pleaded an alleged contractual right to remain in possession of a part of the premises for an indefinite period, upon condition of the payment of rent and subject to OPA regulations, and specifically prayed for a determination of their rights and for specific performance of the alleged contract. Defendants joined in making the right of possession an issue in equity. Assuming, but not deciding, that they had a right to object to that jurisdiction initially, they brought themselves within the rule that " 'Where the party, having the right to object, voluntarily submits to the jurisdiction of a court of equity, the cause will be retained for trial on its merits and the proper relief awarded.' " Penn Mutual Life Ins. Co. v. Katz, 139 Neb. 501, 297 N. W. 899. Accordingly, we hold that the trial court did not err in awarding possession to plaintiffs.

This brings us to plaintiffs' cross-appeal. Plaintiffs alleged in their amended petition that the reasonable value of the premises after March 1, 1947, was $65 per month. Defendants alleged that the reasonable rental value was $45 per month. The trial court found that the reasonable rental value was $45 per month and entered judgment for that amount from March 1, 1947, to September 1, 1947, in the sum of $270. Plaintiffs seek an award based on $90 per month.

The evidence as to the value of the use is fragmentary. An expert witness who stated that he knew the fair rental value from March 1 to date of trial on August 15, 1947, answered that as a real-estate operator "we would ask at least $90.00 a month. right now" and that it would rent for that amount. One of the plaintiffs testified that at one time they had been offered $75 a

month. This does not necessarily establish the reasonable rental value for the period involved. Defendant testified that the rental value was $45 a month. That is the price which the parties fixed as the rental value during the negotiations in 1945. There is no showing that the rental value of the property had increased since that time. We conclude, as did the trial court, that the value of the use was $45 a month for the period from March 1, 1947, to September 1, 1947.

The judgment of the trial court is affirmed.

AFFIRMED.

AUGUST H. WERNER, APPELLEE, V. NEBRASKA POWER COMPANY ET AL., APPELLANTS.
31 N. W. 2d 315

Filed March 12, 1948. No. 32382.

1. **Workmen's Compensation.** In this, a workmen's compensation case, the cause is considered de novo upon the record and a finding made that plaintiff is permanently and totally disabled as a result of a compensable accident.
2. ———. On the authority of Elliott v. Gooch Feed Mill Co., 147 Neb. 612, 24 N. W. 2d 561, it is held that defendants are not entitled to a reduction in the amount of compensation payable for a period of time that plaintiff was gainfully employed subsequent to the injury.
3. ———. On the authority of section 48-125, R. S. 1943, and Weitz v. Johnson, 143 Neb. 452, 9 N. W. 2d 788, it is held that the trial court did not err in the allowance of an attorney's fee to plaintiff.
4. ———. On the authority of section 48-125, R. S. 1943, and Faulhaber v. Roberts Dairy Co., 147 Neb. 631, 24 N. W. 2d 571, an attorney's fee is allowed in this court.

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

Fraser, Connolly, Crofoot & Wenstrand, J. V. Benesch, and *W. H. Wright,* for appellants.

Lee & Bremers, for appellee.

Heard before SIMMONS, C. J., MESSMORE, YEAGER, CHAPPELL, and WENKE, JJ., and BARTOS and JACKSON, District Judges.

SIMMONS, C. J.

Plaintiff secured an award of permanent total disability as a result of a hearing before one judge of the Workmen's Compensation Court. A like award was rendered as a result of a rehearing before the Workmen's Compensation Court. A like award was entered in the district court as a result of a hearing under the provisions of section 48-184, R. S. 1943. Defendants appeal. We affirm the judgment of the trial court.

Defendants' first two assignments of error here are: (1) "The Court erred in refusing to set aside the findings of fact and award made by the Workmen's Compensation Court, which findings of fact are not conclusively supported by the evidence in the Record"; (2) "The Court erred in affirming the award of the Workmen's Compensation Court, allowing the plaintiff full compensation for permanent total disability."

Both parties treat these assignments as sufficient to require a review here under the provisions of section 48-185, R. S. 1943, that a judgment of the district court may be modified or set aside only upon the ground that "the findings of fact are not conclusively supported by the evidence as disclosed by the record, and if so found, the cause shall be considered de novo upon the record."

Defendants ask for trial de novo. Plaintiff submits that the award is conclusively supported by the record, and in any event the award should be affirmed upon trial de novo. This procedure calls for us to review the evidence. If upon that review we find the award is conclusively supported by the evidence, that ends the matter. If, however, as a result of a review of the evidence on a trial de novo we find that the award should be sustained, it is not necessary to determine the question as to whether the award is "conclusively supported

by the evidence." If we find as a result of a trial de novo that the award should be modified or set aside, then obviously it is not conclusively supported by the evidence. As a practical proposition our review here is de novo upon the record. We so review this evidence. It is a fact question. It is conceded that defendant suffered a compensable accident resulting in a severe injury to the lower spine and back. The dispute is as to whether or not as a result of the accident he suffered an injury to the cervical spine with a resulting disability to shoulders, arms, and hands.

The accident occurred on April 16, 1945. Plaintiff at the time of the accident was 69 years of age, a large man, in good health, and able to do the heavy manual labor involved in concrete or cement work. No illnesses or disabilities are shown, save as to one finger, which is not involved here. Plaintiff was a cement mason, working on a repair job to a concrete wall. He was standing on a scaffold suspended six to nine feet above the surface beneath him. The ground below was covered with coal used in a heating plant. Apparently it sloped from the wall to the ground. The scaffolding broke and plaintiff fell. He testified that he hit the ground in a sitting position. Plaintiff remained in the position in which he fell for a few minutes, was helped up later by fellow employees, and immediately complained of pain in his lower back. He mentioned no other pain. He was taken to the hospital. At the hospital the diagnosis was fractures of the second and third lumbar vertebrae. The doctor making the X-ray on April 17 found "a definite compression fracture of 1st and probably some damage of the intervertebral disc between the 2nd & the 3rd lumbar vertebrae."

On April 23, 1945, plaintiff was placed in a cast from legs to neck, not including arms. The diagnosis then was a "Compression fracture, slight, first lumbar; slight compression - posterior margin, second lumbar at disc region." Plaintiff remained in this or another cast for

some two months when it was removed and he was placed in a steel back brace from his shoulders to hips. He wore this for some months and since has worn a corset that braces his lower back. There is no serious dispute but that this lower back condition is disabling so far as plaintiff's performing hard physical labor is concerned.

We now go to the evidence as to shoulder, arm, and hand injury. Plaintiff testified that after the fall he was lying on his right elbow when he first knew what happened. A fellow workman, testifying for defendants, tried to reconstruct the accident. He testified that in the fall plaintiff could not have come in contact with the plank on which he was standing, but "could have hit the wall with his shoulder"; that his right shoulder was bruised; and that after hitting the coal in his fall, he slid on the coal for some feet. The hospital records show at time of admission "No External Evidence of Injury." Plaintiff testified that after he was in the hospital he had bruised spots on his right shoulder. A physician examined plaintiff in October 1945, before any controversy had arisen with reference to compensation. Plaintiff's complaint was "Pain in arms." The physician recites a history given him at that time containing the following: "During the cast application he lay on his face, his chin resting on the table and slipped off at one time. Pain then radiated from his neck over his shoulders and down both arms to his little and ring fingers, with numbness and weakness developing later." The same history recites that plaintiff's "neck started hurting him after the cast was put on, about one week after the injury, not noted before." Defendants in their reply brief state that plaintiff gave that history to the doctor. The attending doctor does not remember anything unusual happening although there might have been a slight slipping. The cast was put on seven days after the accident.

The bedside charts show that plaintiff was in con-

siderable pain from the beginning of his hospital treatment and was repeatedly given drugs to deaden the pain and induce sleep. The charts show also that beginning with May 5, plaintiff complained of "pain in left arm," of "numbness in left arm," of pain in left arm not relieved by massage, "pain in arms," and "shooting pains" in shoulders and arms. In the face of this record the doctor testified that there was no complaint while plaintiff was in the hospital of pain in the cervical or neck region. The evidence is definite that during the first weeks plaintiff was in the hospital, he was unable to feed or shave himself. There is no serious medical contention that this inability of plaintiff to serve himself was caused by the cast. So far as determinable from the record, it began before the cast was applied.

It is apparent that the attending doctors considered that the shoulder pains were caused by the cast and that they would disappear when the cast was removed. Plaintiff was discharged from the hospital on June 16. The cast was removed shortly thereafter. The condition of the shoulders, arms, and hands continued and became worse. The first X-rays of the neck and shoulder area were taken in August. The experts seem to agree that such an examination might not reveal evidence of an injury such as plaintiff claims here. Defendants' physicians were unable to relieve or correct it.

At the time of the trial the plaintiff's hands had a contractual deformity and loss of grip, save for the index finger and thumb. There was a general muscular waste in the arms, some loss of pain sensation in the arms and hands, a loss of arm and shoulder movements, and pain in arms and neck region. The expert witness who made this examination testified that in his opinion it was the result of a cervical spine injury caused by the accident. There also is some leg involvement of later appearance, which plaintiff's expert witness connected with the accident.

Defendants' attending physician testified that he had

no knowledge of any complaint of pain or injury to the neck until some time after hospitalization, and that in his opinion the occurrence of this disability was too remote to be traced to the accident.

Defendants' expert witness, who had placed plaintiff in the cast and conducted some of the examinations thereafter, testified that he could not connect a cervical spine injury with the compression fractures in the lower back. On cross-examination he said that to cause such an injury to the cervical region, there would have to be a "fairly severe" injury to the lumbar spine; that to connect the two he would expect symptoms in the neck to appear within a week, such as pain in the neck region, with numbness and tingling in his fingers, followed by weakness in his hands and arms, and loss of nerve sensation; that he had no information of neck pain early in this case; and that with such information it might make a difference in his diagnosis. His final testimony was that the injury in the lumbar region was not severe enough to cause an injury in the neck region.

We find in the record no suggestion of the cause of this injury, save the accident involved.

Without further discussing the evidence, it is our conclusion on trial de novo that the facts and circumstances, and the inferences properly to be drawn therefrom, all point directly to the conclusion that plaintiff's disabilities and injuries were caused by the accident he suffered. We so find. The findings and judgment of the compensation court and the district court are in accord with the record and are supported by ample proof. We find no reason to modify or set aside the judgment of permanent and total disability resulting from the accident.

The defendants' next assignment of error is that in any event the trial court erred in awarding compensation for the year 1946, during which calendar year the plaintiff was gainfully employed. It appears that from January 1, 1946, to January 1, 1947, plaintiff was busi-

ness agent for his union. Defendants paid compensation until April 1, 1946, when it was stopped. The evidence as to the nature of the work and employment is fragmentary. It appears to have been an elective job on an annual basis. Compensation was on a commission basis. For the year plaintiff earned an average of $38 to $40 a week. The work did not require any "labor," lifting, bending, or stooping, nor was it work at his trade. Whatever it was, he did most of it over the telephone using his good fingers. He made the round of the jobs two or three times a week, although whether or not for all of the weeks is not shown, and the extent of this travel is not shown. On these occasions he drove his own car using his index fingers and thumbs on the steering wheel. He did not seek re-election for two reasons. Plaintiff did not want another accident, and superintendents on jobs did not want him climbing ladders, because of the danger to him of accidents on jobs. It does not appear that he could have been re-elected had he desired it. Defendants cite no authority to sustain their contention. On the authority of Elliott v. Gooch Feed Mill Co., 147 Neb. 612, 24 N. W. 2d 561, the assignment is not sustained.

An attorney's fee was not allowed in the compensation court. An attorney's fee of $200 was allowed in the district court. Defendants assign the allowance of the fee as error, contending that such a fee can only be allowed where the employer refuses payment of compensation, or neglects to pay compensation for the 30-day period following the accident. The statute is: "Whenever the employer refuses payment, or when the employer neglects to pay compensation for thirty days after injury, and proceedings are held before the compensation court, a reasonable attorney's fee shall be allowed the employee by the court. In the event the employer appeals to the district court from the award of the compensation court, or any judge thereof, and fails to obtain any reduction in the amount of such award,

the district court may allow the employee a reasonable attorney's fee to be taxed as costs against the employer, and the Supreme Court shall in like manner allow the employee a reasonable sum as attorney's fees for the proceedings in that court." § 48-125, R. S. 1943. The first sentence above quoted obviously applies to the allowance of an attorney's fee in the compensation court. We so construed it in Redfern v. Safeway Stores, Inc., 145 Neb. 288, 16 N. W. 2d 196. Defendants rely upon this decision, overlooking the fact that there the disallowance was of a fee in the compensation court. The second sentence above quoted is applicable here. It authorizes the allowance of an attorney's fee by the district court. We so held in Weitz v. Johnson, 143 Neb. 452, 9 N. W. 2d 788. The error assigned is without merit.

Plaintiff requests the allowance of an attorney's fee in this court. The statute authorizes it. We have so held in Faulhaber v. Roberts Dairy Co., 147 Neb. 631, 24 N. W. 2d 571. Plaintiff is allowed an attorney's fee of $250 for services in this court.

The judgment of the district court is affirmed.

AFFIRMED.

IN RE ESTATE OF WILLIAM A. SCOVILLE, DECEASED. FRANK P. JESSUP ET AL., APPELLEES, V. FLOSSIE WENSKY, APPELLANT.

31 N. W. 2d 284

Filed March 12, 1948. No. 32284.

1. Wills. The mental capacity of a testator is tested by the state of his mind at the time he executed his will. If a testator knows the extent and character of his property, the natural objects of his bounty and the purposes of his devises and bequests, he is mentally competent to make a will.
2. ———. A testator may dispose of his property as he pleases. The law does not require that he recognize his relatives therein, nor does it put any obstacle in the way of the aged or infirm in

making disposition of their property by will; provided, only, that their mentality conforms to the accepted tests at the time of the execution of such testamentary instrument.

3. ———. In a will contest based on objection that the testator was mentally incompetent to make a will the burden devolves on the proponent to make a prima facie case that the testator was mentally competent. The burden then devolves on the contestant to produce sufficient evidence to support a contrary finding by a jury.
4. Witnesses. An expert witness will be permitted to give his opinion as to mental capacity if it is predicated on a proper and sufficient foundation.
5. ———. The opinion of a medical expert must be predicated on one or more of the following: Examination and observation of the person who is the subject of the inquiry, examination and history, or supposed facts of which there is evidence.
6. ———. A nonexpert witness who is shown to have had a more or less extended and intimate acquaintance with a person may be permitted to state his opinion as to the mental condition of that person, if that condition becomes a subject of inquiry, by giving the facts and circumstances upon which the opinion is based.
7. Wills. In order that a will may be rejected on the ground of incompetency of the testator the evidence of the objector must be sufficient to sustain a reasonable inference that the testator was incompetent to make a will.
8. ———. The elements necessary to be established to warrant the rejection of a will on the ground of undue influence are: (1) That the testator was subject to such influence; (2) that the opportunity to exercise it existed; (3) that there was a disposition to exercise it; and (4) that the result appears to be the effect of such influence.
9. ———. Undue influence, in order to invalidate a will, must be of such character as to destroy the free agency of the testator and substitute another person's will for his own.
10. ———. It is the duty of trial courts to determine the issues upon which there is competent evidence and submit them, and them only, to the jury. In a will contest on the ground of mental incompetency and undue influence, if the evidence is insufficient to sustain a verdict upon either of such issues in favor of the contestants, then the trial court should withdraw both issues from the jury and direct a verdict.

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

Torgeson & Halcomb and *Bernard O'Brien, for* appellant.

Kuns & Van Steenberg and *W. H. Kirwin,* for appellees.

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

MESSMORE, J.

This is a will contest in which the validity of an instrument purporting to be the last will and testament of William A. Scoville, deceased, and a codicil thereto, is involved.

The will and codicil were admitted to probate in the county court over objections of the contestant, a daughter of the deceased. The objections to the probate of the will and codicil were that the instruments were not executed as required by law, and not properly attested; that at the time of the making and executing of the instruments the testator was not possessed of sufficient mental or physical capacity to so make and execute such instruments, by reason of old age and infirmity; and that undue influence was exerted upon the testator by his daughter, Orpha Cross, and her husband. From admission of the will and codicil to probate in the county court, the case was appealed to the district court and, by stipulation, tried on the pleadings filed in the county court. At the close of all the evidence in the district court, the proponents moved for a directed verdict, which was sustained. The district court entered judgment for the proponents and decreed the will and codicil thereto to be the last will of William A. Scoville, deceased. Upon the overruling of the motion for new trial, the contestant appeals.

The contestant predicates error in that the district court did not submit the case to the jury on the issues presented in the objections to probate. Under this as-

signment of error, the question to determine is the sufficiency of the evidence to warrant submission of the case to the jury on the issue of testamentary capacity, or undue influence, or both.

In considering this question it is necessary to have in mind certain legal principles governing testamentary capacity, as follows: The mental capacity of a testator is tested by the state of his mind at the time he executed his will. If the testator knows the extent and character of his property, the natural objects of his bounty, and the purposes of his devises and bequests, he is mentally competent to make a will. See In re Estate of Laflin, 108 Neb. 298, 187 N. W. 885; In re Estate of Frazier, 131 Neb. 61, 267 N. W. 181; In re Estate of Bose, 136 Neb. 156, 285 N. W. 319; In re Estate of Inda, 146 Neb. 179, 19 N. W. 2d 37; In re Estate of Winch, 84 Neb. 251, 121 N. W. 116; In re Estate of Johnsen, *ante* p. 34, 30 N. W. 2d 70.

In the instant case, the proponents made a prima facie case in substance as follows: The attorney who drafted the will in question and the codicil thereto testified that he had been acquainted with the testator since October 1942, until his death; that he saw him from 10 to 12 times a year; that on the occasion of the execution of the will and codicil, the testator knew the objects of his bounty, what he was doing, and possessed testamentary capacity. This attorney also witnessed the will. A banker who was acquainted with the testator for a number of years, as a witness to the will, testified that the testator knew that he was executing a will, and at the time was of sound mind. One of the witnesses to the codicil, made and executed on November 2, 1944, testified that William A. Scoville knew who his heirs were, where his land was located, and what he was doing at the time he executed the codicil. To the same effect was the testimony of another witness to the codicil. Other details need not be set out.

If the proponent makes a prima facie case as to testa-

mentary capacity, it then devolves upon the contestant to overcome the presumption arising therefrom after which the burden of going ahead and proving testamentary capacity by a preponderance of the evidence devolves upon the proponent. See In re Estate of Witte, 145 Neb. 295, 16 N. W. 2d 203, and cases hereinbefore cited in this opinion.

It is well established in this jurisdiction that upon a motion for a directed verdict at the conclusion of all of the evidence, the motion must be treated as an admission of the truth of all of the material and relevant evidence admitted and all proper inferences to be drawn therefrom. See Curtice Co. v. Estate of Jones, 111 Neb. 166, 195 N. W. 930.

With the foregoing legal principles in mind we set forth the relevant and material evidence, not in detail but sufficiently to discern the contestant's view thereof to sustain her contention with reference to the errors complained of.

The testator, William A. Scoville, commonly referred to as W. A. Scoville, engaged in farming in Banner County, Nebraska, since about 1907. He was a cripple since early life, and in later life wore glasses and became hard of hearing. His family consisted of his wife and three daughters who were living at the time the will in question was made and executed; two daughters who predeceased the testator; also a son, W. B. Scoville, unmarried and referred to in the record as Bud, who died in August 1942; and certain grandchildren. During his lifetime, Bud Scoville lived with and resided with his parents on the home place, and for a number of years prior to his death farmed the land owned by his father and a half section which he owned, under an arrangement whereby, after deducting certain expenses, the net proceeds were divided equally between the father and son.

Our attention is directed to three wills; each made in close proximity with the other. One is dated in Sep-

tember 1942, in which the testator devised the home place, consisting of 160 acres, to the contestant, and to her son, Robert Wensky, 80 acres. He bequeathed to his daughters, Jessie McArthur and Orpha Cross, each $1,000, and made certain bequests to four grandchildren. The three living daughters were made residuary legatees upon the death of the testator's wife, a trust having been set up in the will for her benefit.

On July 8, 1943, the testator made and executed a will wherein he devised to the contestant 160 acres as set forth in the will of September 1942, and to his daughter, Orpha Cross, 80 acres which he had previously devised to the contestant's son, Robert Wensky; canceled the $1,000 bequest to Orpha Cross, and removed the contestant as a residuary legatee.

With reference to the devise of the home place to the contestant, there is evidence on her part that the testator told her he was making the devise because it was Bud's wish, as she was his favorite sister.

The will involved in this appeal, dated September 1, 1943, was made and executed when the testator was approximately 83 years of age. This will bequeathed to the contestant the sum of five dollars, and there appears in the will an explanation as to why he bequeathed her only five dollars which is, in substance, as follows: That the contestant and her husband "shared in the 1943 wheat crop to the sum of $3,000.00." The daughter, Orpha Cross, was devised 160 acres, and also the 80 acres owned by the testator. The daughter, Jessie McArthur, was bequeathed $1,000; and certain bequests were made to grandchildren. The residue was placed in trust for the benefit of the testator's wife, and thereafter Jessie McArthur and Orpha Cross were to receive the benefit of the residue.

When the testator's son Bud died, the testator was left alone with his wife who was mentally incompetent to care and provide for herself. The contestant lived with her parents for over 22 years, and when Bud died,

she came and stayed a week with her parents. Other help was obtained for a while. In January 1943, the contestant, her husband and family, visited the testator and while there entered into an agreement whereby the contestant and her husband were to live with the testator and his wife and farm the land on the same basis as Bud had farmed it during his lifetime. The ground had been prepared and the crop planted when the contestant and her husband moved in with the testator in March 1943. The wheat was harvested and sold in the latter part of July, the contestant's share amounting to approximately $2,980. In the fore part of August 1943, the contestant and her family, in order to take advantage of a trucking situation whereby they could move their belongings to Cheyenne, Wyoming, where they lived, left the testator and his incompetent wife, explaining to the testator that the trucks were going to Cheyenne and they were going back home, and that "Orpha knows we are going, and I am sure she will get someone to stay with you."

The contestant and her husband testified that the agreement was that they were to return to their home in Cheyenne, and come back the next year and carry on the farming of the land. It appears that the testator, in making the agreement, desired to have someone stay with him and help take care of his incompetent wife, and this is borne out by the fact that he wrote to his daughter Jessie in Canada, remarking that the contestant did not care for him or his wife and left them, further that they had got over $3,000 from him, and he was through with them forever. On other occasions, the testator expressed his opinion that the contestant had all of his money she was going to get from him.

After the contestant and her family left, or about September 10, 1943, the testator and his wife moved in with a sister of the testator's wife. Shortly thereafter, and for about two years prior to his death, the

testator and his wife lived with his daughter, Orpha Cross, and her husband, and on occasions made contributions for the purchase of groceries. There was no particular arrangement made by the Crosses with the testator, with reference to the testator and his wife living with them.

The testator entered a hospital on June 25, 1945. The diagnosis made of his then condition was: A pathological heart, senile dementia, and emaciation. He died on July 29, 1945, and at the time of his death was insane.

Approximately 24 days after the testator made and executed the will in question, he endeavored to sell the land which he had devised in the will to his daughter Orpha Cross, to a son-in-law and another individual, and went to an attorney to have the papers made out with reference to the sale. He was admonished to think the matter over for a few days. However, immediately after seeing the attorney he said he knew all he wanted to know about the matter and was ready to consummate the sale of the land. Apparently he had not taken into consideration that his incompetent wife could not sign the instruments passing title. As a result, guardianship proceedings were started. The question arose as to whether or not the testator should be appointed guardian of his incompetent wife. The evidence was to the effect that he was not a proper person to be so appointed. The testimony of his daughter Orpha was to the effect that he was susceptible to influence, which extended to his business transactions.

With reference to the matter of guardianship, Orpha wrote a letter to the contestant, the substance of which is to the effect that she could handle her father, and for the contestant to talk the matter over with her and, if possible, be present at the hearing, and she recommended her husband as a proper person to be appointed guardian. She also informed the contestant that their father had considerable money. She was afraid other relatives would get it, and she desired that

their mother should not be deprived of her share. Other parts of the letter are not material.

It further appears from the evidence that the testator, prior to the death of his son Bud in August 1942, and more especially thereafter, was very eccentric and had formed many idiosyncrasies and peculiarities. The contestant testified to certain incidents: That during the time they lived with the testator, from March 1943 to the fore part of August, he would prowl around in the nighttime creating disturbances and knocking over furniture; that he, on many occasions, charged his grandchildren with stealing his watch and tools, which were later always found, and with destroying his property by putting sand in a motor, when in fact the rats running over the motor were the cause of the damage. He further charged the children had punched holes in the water tank, when in fact they had not. He had a dislike for turtle doves and wanted them shot. He always had firearms around the premises and on at least two occasions wanted to use them to dispose of two of his relatives who were creating trouble, as he viewed it. He scolded his wife on occasions, to endeavor to have her eat certain foods that she did not like. He quarreled with the contestant and on occasions wanted her and her husband to move, but retracted and wanted them to stay to help him. He was angered at the contestant's husband because he contemplated renting more land, and admonished him if he did he could leave the testator's premises. He was using water out of the stock tank when he could have used it out of the regular water barrel. He sold a tractor, received the money for it, was told about the denomination of the bills, and placed the money in a pocket. During the same night he believed that he had been defrauded and cheated, and told the contestant about it, saying that he was going to have the law on the purchaser. He left early the next morning and went to see the purchaser. He was angry with him, and finally took the money out of his pocket; it was counted and found to be the correct

amount. He then remarked that he was relieved.

After the death of his son Bud, and while certain parties were staying with him and his wife, the testator had a dog tied to the porch with insufficient slack in the chain to permit the dog to get off the porch, and when the dog would create a mess on the porch the testator kicked and scolded the dog. He oftentimes let the dog loose in the house to run around, but not outdoors. He listened to radio programs and made peculiar remarks with reference to the same; also a peculiar remark with reference to a clock striking.

It further appears from the evidence that during his lifetime, Bud purchased $500 worth of bonds. The testator felt that the contestant received two bonds when in fact it was Bud's intention for her to have but one, and that his daughter Jessie received no bonds from Bud, but he felt that Bud intended her to have a bond. It developed, however, that the contestant's brother's intention was that she should have two bonds. The testator was not convinced, and sent his daughter, Jessie McArthur, a check for $100 for a bond.

The testator was childish; talked about his immediate relations in their absence; did not want strangers on his premises; and had no use for people in general. He objected to the marriages of his different daughters, became unfriendly with them at the time, and did not make up until some time thereafter. He became forgetful and did not remember people whom he had known, although at one time he was well acquainted with them. He paid no attention to one of his granddaughters when she married a soldier and introduced him to the testator as her husband. He felt that his sister-in-law, where he and his wife stayed, was mean. He was described by the contestant as a dirty, mean, old man.

It is obvious that the contestant, in view of the evidence heretofore set out, contends that the testator, at the time he made and executed the will in question, was suffering with senile dementia, and that the disease had

so firmly clasped itself upon the testator's mind that he did not know the extent of his property, the purpose of his bequests and devises, or the natural objects of his bounty at the time he made and executed the will here involved; and, therefore, the district court erred in not submitting the issue of testamentary capacity to the jury.

"No right of a citizen is more valued, and more assured by law, than the power to dispose of his property by will. He is entitled to the control of his property while living, and by will to direct its use after his death, subject only to the restrictions which are imposed by statute. * * *

" 'It is one of the painful consequences of extreme old age that it ceases to excite interest, and is apt to be left solitary and neglected. The control which the law still gives to a man over the disposal of his property, is one of the most efficient means which he has in protracted life to command the attentions due to his infirmities.'

"A testator may dispose of his property as he pleases. The law does not require that he recognize his relatives therein, nor does it put any obstacle in the way of the aged or infirm in making disposition of their property by will; provided, only, that their mentality conforms to the accepted tests at the time of the execution of such testamentary instrument." In re Estate of Bose, *supra*. See, also, In re Estate of Goist, 146 Neb. 1, 18 N. W. 2d 513.

"In the contest of a will on the ground of incompetency, it does not necessarily follow as a matter of law from proof of temporary mental infirmities before and after the testamentary date that the jury should be permitted to pass on the state of testator's mind at that time, in absence of proof that there was then a mental disturbance." In re Estate of Laflin, 108 Neb. 298, 187 N. W. 885; In re Estate of Slattery, 125 Neb. 194, 249 N. W. 597.

"Gross eccentricity, slovenliness in dress, peculiarities of speech and manner, or ill health are not facts

sufficient to disqualify a person from making a will." In re Estate of Frazier, *supra.*

The foregoing authorities are applicable to the facts in the instant case.

The contestant presented the testimony of an expert who defined the disease of senile dementia, its effect, and the manner in which it applied to the testator. He testified that the disease is progressive, cannot be remedied, and grows worse as time progresses; that when it is determined that the disease is present in a person at a certain time, that the expert is placed in a position, due to the fact that the disease cannot be remedied and the quality of the mind is in constant deterioration, to determine at all time intervening the quality of the mind from and after the date the disease is established as being present in the person. He never had the opportunity to examine the testator, or observe him.

"The opinion of a medical expert must be predicated on one or more of the following: Examination and observation of the person who is the subject of the inquiry, examination and history, or supposed facts of which there is evidence." In re Estate of Witte, *supra.*

"An expert witness will be permitted to give his opinion as to mental capacity if it is predicated on a proper and sufficient foundation." In re Estate of Witte, *supra.*

In the instant case the hypothetical question upon which the expert based his opinion discloses many eccentricities, idiosyncrasies, and peculiarities that properly reflect the record.

The expert, after proper foundation was laid for the admissibility of his testimony, gave his opinion that a year or more prior to September 1, 1943, the testator was afflicted with the disease of senile dementia, his final diagnosis being that he had the disease in 1942, or earlier. He testified with reference to two letters as constituting a false belief the testator had that influenced his behavior, and that the testator, on September 1, 1943, the day the will in question was made and executed,

and on November 2, 1944, the day the codicil thereto was made and executed, did not understand the extent and nature of his property or its value. "I believe that such a man could know what he was doing in a superficial way. He knew he was, perhaps, changing his will. I do not believe, by the nature of his disease, that he had any appreciation of this long term of significance."

The effect of the expert's direct testimony is that at the date of the execution of the will and the codicil thereto in question, the testator did not possess sufficient testamentary capacity to execute the instruments, and was incompetent to do so. On cross-examination the expert testified he was confined to the hypothetical question in the questions asked him. He testified that if the letters in evidence disclosed they were with foundation, his opinion would be different. He was asked, in substance, if after the execution of the will the testator corresponded with one of the heirs and he had shown in that correspondence knowledge of what he had done with reference to his property in connection with that heir, would that not be an indication that he knew the long-term effect of his will, and would it not be an indication of mental soundness? His answer was that it would be an indication. He was asked whether or not a person with senile dementia could pull himself together, so to speak, and transact business as a normal man. His answer: "Yes. At times, he may cover up to that extent." He was asked, in substance, if it was shown the testator lived with a family the last year of his life, in their home, and was friendly with them, would that be a factor which might incline him away from his opinion that he was suffering from senile dementia? The answer was "Yes." He was further asked if the same people were the principal beneficiaries under his will, and in the absence of undue influence, would that be a factor which might make him determine that he did not have senile dementia? His answer was "Yes."

It is apparent that matters brought out on cross-

examination would have a tendency to induce this expert to modify his opinion with reference to the competency of the testator at the time the will was made and executed, and also the time the codicil thereto was made and executed.

The rule with reference to nonexpert witnesses is as follows: "A nonexpert witness who is shown to have had a more or less intimate acquaintance with a person may be permitted to state his opinion as to the mental condition of that person, if said condition becomes a material subject of inquiry, by giving the facts and circumstances upon which the opinion is based." In re Estate of Witte, *supra*.

In the instant case, a son-in-law of the testator purchased an automobile from him in August of 1943, within a month of the time the will was executed and after the contestant and her family left for Cheyenne. He testified that at that time he thought the testator was competent, to the best of his knowledge. When this same witness contracted to purchase land from the testator, he testified relative to the testator's competency: "I wouldn't say too competent. In other words, he wasn't too bad and wasn't too good."

When the contestant and her family leased the testator's land and received their interest and share for the wheat crop, and then moved out leaving him alone with his incompetent wife without any previous notice that they were moving, they dealt with the testator as a competent person. The contestant never expressed any opinion with reference to her father's competency or incompetency at the time he executed the will in question and codicil thereto. She, in fact, said she had not formed an opinion, but guessed it would be "No."

A witness who resided with the testator subsequent to the death of his son Bud and prior to the time the contestant and her family came to live with the testator, testified that he thought that the testator did not understand what was said over the radio. His evidence does

disclose that the testator was competent to transact business at the time.

There are several letters in evidence, written by the testator to his daughter, Jessie McArthur, from August 4, 1943, to May 15, 1945, which indicate that he knew the members of his family, about whom he gave news in general and made reference to their trials and tribulations. He also gave news about neighbors, and expressed his opinion on certain events and with reference to family matters, indicating that during this period of time he possessed the same competence as an ordinary individual.

After the contestant and her family left, the testator had a farm sale. There is nothing to show that he did not know about his property. He collected his share of the federal AAA money in the late fall of 1943. The witness testifying to this fact testified that the testator was competent to transact business at that time.

As stated in In re Estate of Bose, *supra*: " 'Senile dementia, often a result from old age, does not necessarily result in mental incapacity to make a will, but there must be such a failure of mind as will deprive the testator of intelligent action. The disease is progressive in nature, and it must be determined whether its progress has so impaired the faculties of the testator that they fall below the mark of legal capacity. This must be determined not alone by the nature and tendency of the disease, but by its effect in the particular case.'

"On the other hand, the authorities generally sustain this conclusion, viz.: 'A person possessing the requisites of testamentary capacity is not incapacitated from making a will by old age, although his advanced years be accompanied by infirmity of mind and body. Nor is he incapacitated by failing memory, vacillating judgment, childishness, slovenliness in dress, eccentricities or peculiarities in habit or speech, and even delusions or hallucinations if they do not affect the execution of the

will, and he is not limited to conventional methods of disposition.' 68 C. J. 440.

"We appear committed to the view that, when the testamentary capacity of a testator is challenged on grounds of alleged senile dementia, this fact shall be determined according to the rules applicable to other forms of insanity. In re Estate of Winch, 84 Neb. 251, 121 N. W. 116. See, also, Stull v. Stull, 1 Neb. (Unof.) 389, 96 N. W. 196. The accepted view is, viz.: 'The mental capacity of a testator is tested by the state of his mind at the time he executed his will.' In re Estate of Laflin, 108 Neb. 298, 187 N. W. 885."

In the instant case, the application of this test to the testator's condition as it existed on the 1st day of September, 1943, when he made his will, and on the 2d day of November, 1944, when he executed the codicil thereto, is decided by ascertaining whether William A. Scoville then and there understood the nature of the act, the extent of his property, the proposed disposition of it, and the natural objects of his bounty. The result of that test necessarily determines the validity of these testamentary instruments in suit, so far as concerns questions of mental capacity. See In re Estate of Kajewski, 134 Neb. 485, 279 N. W. 185; In re Estate of Frazier, *supra;* In re Estate of Ayer, 114 Neb. 849, 211 N. W. 205; In re Estate of Nelson, 75 Neb. 298, 106 N. W. 326; In re Estate of Goist, *supra;* In re Estate of Witte, *supra;* In re Estate of Johnsen, *supra;* In re Estate of Inda, *supra.*

"It is said that less mental faculty is required to execute a will than to enter into any other legal instrument; that the testator's property was his own, he had the power to do with it as he chose, and while he may have had delusions, that does not of itself constitute incapacity, for a delusion affects testamentary capacity only when it enters into and controls its exercise." In re Estate of Frazier, *supra.*

The testator had a right, in making his will, to elim-

inate the contestant therefrom to the extent which he did. He gave his reason for so doing. Apparently he believed that when he leased the land to the contestant and her husband they would remain with, and live with, him and help to take care of his incompetent wife. This seems to be the very basis for making the agreement with the contestant and her husband. When he made and executed the will he gave directions to the attorney with reference to the paragraphs he desired to have retained in the will and those he wanted deleted. Later, when the trustee named in the will died, the testator retained knowledge of the will to the extent that he went alone to suggest another executor and trustee and, as a consequence, the codicil to the will was made.

"In order that a will may be rejected on the ground of incompetency of the testator the evidence of the objector must be sufficient to sustain a reasonable inference that the testator was incompetent to make a will.

"It is the duty of trial courts to determine the issues upon which there is competent evidence and submit them, and them only, to the jury. In a will contest on the ground of mental incompetency and undue influence, if the evidence is insufficient to sustain a verdict upon either of such issues in favor of the contestants, then the trial court should withdraw both issues from the jury and direct a verdict." In re Estate of Inda, *supra.*

" 'To justify the direction of a verdict, it is not necessary that there should be literally no evidence to go to the jury; it being sufficient that there is none that ought reasonably to satisfy the jury that the fact sought to be proved is established.' " In re Estate of Frazier, *supra.*

We conclude, in the light of the foregoing authorities and the evidence adduced in this will contest, that the trial court did not err in not submitting the issue of testamentary capacity to the jury.

The next question to determine is whether or not the trial court erred in not submitting to the jury the issue of undue influence alleged to have been practiced by

Orpha Cross, the testator's daughter, and her husband on the testator.

"The elements necessary to be established to warrant the rejection of a will on the ground of undue influence are: (1) That the testator was subject to such influence; (2) that the opportunity to exercise it existed; (3) that there was a disposition to exercise it; and (4) that the result appears to be the effect of such influence." In re Estate of Goist, *supra;* In re Estate of Inda, *supra.*

On the issue of undue influence, the record discloses that John R. Cross, the husband of Orpha Cross, had been acquainted with the testator since 1910, and more especially since 1917 when he married Orpha, and had visited the Scoville home at least once a month when the Crosses lived in the same county. After Bud's death they visited the Scoville home three or four times a week when nobody was staying with the Scovilles, and thereafter about twice a month if the Scovilles had help. There is no competent evidence to show that John R. Cross participated in any of the business of the testator, inquired about his property, or suggested how he should leave it. He was told by the testator, after the contestant and her family left, that his wife was to receive a quarter section of land. He was asked by the testator if he thought that Mr. Jessup would be a proper person to replace Mr. Snyder who had died, and who had been named executor and trustee in the will. Mr. Jessup was so named in the codicil. On the occasions of the Crosses visiting the Scovilles prior to Bud's death and subsequent thereto, they would take cream, milk, cakes, and other items on numerous occasions. It further appears from the record that John Cross manifested some interest in the guardianship matter and talked to an attorney about it when the testator had contracted to sell his land to a son-in-law and another person. He rented all of the testator's land after the contestant and her family had left, and gave the testator half of the crop the first year because it was summer tilled, and he per-

sonally paid the expenses and combined the wheat and drilled the land. Thereafter he paid the customary rent of one-third. He testified he first learned that his wife was devised the land of the testator the day after his death. He had never been told by the testator that he, the testator, had devised the land to his wife.

The daughter, Orpha Cross, testified that she had no conversation with her father with reference to a will or how he should dispose of his property at his death, or went with him to consult an attorney with reference to a will or change to be made in a will; that there was no arrangement for her father and mother to live with the Crosses; that they came one Sunday for dinner and asked if they might stay all night and the next morning the testator asked if they could stay, and they were permitted to stay; and that at times her father contributed approximately $10 per week to assist in payment of the groceries. She admitted testifying at the guardianship matter that her father was susceptible to influence, and easily influenced, and that this extended to his business transactions.

There is a letter written by this witness to the contestant with reference to the guardianship matter which is heretofore referred to in the opinion. It is apparent from this letter that she believed her parents should keep their property and that the income from it would be sufficient to provide for them or, in any event, she did not want to permit her father to dispose of the property to the detriment of her mother's interest.

This constitutes briefly the relevant and material evidence on the issue of undue influence upon which the court concluded such issue should not be submitted to the jury. It seems apparent from the evidence adduced on this issue that it is insufficient to make a prima facie case of the elements necessary to establish undue influence, and fails to show any undue influence exercised by either Orpha Cross or John R. Cross upon

William A. Scoville in connection with the execution of either the will or the codicil thereto.

We conclude the trial court was not in error in not submitting the issue of undue influence to the jury.

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

AFFIRMED.

KROGER, District Judge, dissents.

WALTER J. CATTIN, APPELLEE, V. THE CITY OF OMAHA, NEBRASKA, APPELLANT.
31 N. W. 2d 300

Filed March 12, 1948. No. 32335.

1. **Waters: Municipal Corporations.** In an action against a city of the metropolitan class to recover damages caused by surface water flooding plaintiff's premises, no recovery can be had unless it is shown that some negligent act or omission by the city caused the surface water to accumulate and be cast on plaintiff's premises.
2. ———: ———. While a city of the metropolitan class is under no obligation to construct a system of drainage for protection from surface water, however, having constructed a system of drainage, the city is not entirely absolved from liability for injury caused to private property when it fails to keep a sewer system in proper control after the same has been constructed.
3. ———: ———. When a metropolitan city makes provision by sewers or drains for carrying off the surface water, it may not discontinue or abandon the same, when it leaves the lot owner in a worse condition than he would have been if the city had not constructed such drains.
4. **Drains: Municipal Corporations.** While a metropolitan city is not required to construct sewers and drains, however if it does do so it is bound to use ordinary care or exercise due diligence to keep such sewers and drains as it constructs in proper condition and repair and free from obstructions, and will be held liable for damages to property resulting from its failure to do so.
5. **Waters.** Where the evidence is in controversy as to whether or not the rainfall at the time the plaintiff's premises were flooded

was unusual, excessive, or unprecedented, it is a question for the jury.

6. **Drains: Municipal Corporations.** A municipal corporation has the right to improve and provide for the drainage of its streets; but if in so doing it causes an increased flow of surface water upon or against private property and negligently fails to provide a sufficient outlet for the escape of water thus brought upon such property, it will be liable to the owner thereof for any damage which may result from such negligence.

7. **Damages.** Where property, a part of the realty to which it is attached, is destroyed without damage to the realty itself, and where the nature of the thing destroyed is such that it is capable of being replaced within a reasonable time, and the cost of doing so is capable of reasonable ascertainment, the measure of damages for its negligent destruction is the reasonable cost of replacing the property in like kind and quality.

APPEAL from the district court for Douglas County: FRANK M. DINEEN, JUDGE. *Affirmed.*

Edward Fogarty, Edward Sklenicka, Einar Viren, James Paxson, and *Herbert Fitle,* for appellant.

Fitzgerald & Smith, Seymour L. Smith, and *James W. R. Brown,* for appellee.

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

MESSMORE, J.

This is an action for damages from surface water flooding plaintiff's premises. Defendant moved for a directed verdict. The motion was overruled. The cause was submitted to a jury who returned a verdict for the plaintiff. Upon the overruling of motion for new trial, defendant appeals.

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

Due to considerable use of the words "Burt Street and Twenty-fifth Avenue," the same will be referred to as "Twenty-fifth and Burt."

The plaintiff predicates negligence on the part of

the city substantially on the following grounds. Located in the wall on the north side of Burt Street westward from the intersection of Twenty-fifth and Burt were three inlets constructed by the city in 1941. These inlets were about two feet high above the surface of the ground, ten feet long, and approximately 50 feet apart. In January 1944, these inlets were walled up by the city, and the city failed to provide other openings in lieu thereof for the escape of surface water at or near the said place into the sewer. The city, by stipulation, admits the construction of the inlets and the walling up of the same at the times heretofore mentioned.

The plaintiff charges the city with negligence without regard to the location of the plaintiff's property northeasterly from the intersection of Twenty-fifth and Burt, and at a lower level, because the city permitted surface water to accumulate at and near such intersection in greater volume than it would have accumulated naturally. The city defends on the ground that at the time in question there was an unusual, excessive, and unprecedented rainfall for such locality, and the damages plaintiff sustained, if any, were due to the same, over which the city had no control; that the closing of the inlets did not cause the flooding of plaintiff's premises.

The city predicates error on the trial court's failure to sustain its motion for directed verdict.

We deem it advisable at the outset, to set forth certain facts established by the record and exhibits appearing therein.

The drainage area tributary to Twenty-fifth and Burt consists of 1,100 acres. The history of the construction of the sewer system in this locality is as follows: In 1885, a five-foot-six-inch sewer was laid in Burt Street; in 1910, a seven-foot-eight-inch sewer was constructed in the same vicinity, both in operation in 1941. In 1941, a sewer nine feet in diameter was laid underground, extending along and below Burt Street opposite the inlets previously mentioned. This sewer does not drain

east of Twenty-fourth Street. These sewers were designed to carry a three-inch rain of uniform intensity at the rate of three inches per hour. There is a run-off of six-tenths of the water that runs into the sewer, the balance evaporates and is absorbed in various ways. The sewers are not constructed to carry water from a flash flood or an unusual, excessive, unprecedented rain.

The plaintiff owns a two-story frame building located at 2419 Cuming Street on the south side thereof facing north, where he has conducted a plumbing business for 26 years. All parts of the building, the lot, and equipment are described in the evidence. The lot extends south to the alley which runs from Twenty-fifth east to Twenty-fourth and is between Burt and Cuming Streets. In 1932, the plaintiff built a stone wall 25 feet south of the back of his building, three and one-half feet in height, to protect his property from floods or high water which occurred every spring up to the time of the construction of the sewer and inlets built in 1941. Thereafter, he reduced the stone wall to a foot in height, to permit better ingress and egress, and for the reason he expected no more floods on account of the sewer construction of 1941. None did occur until between midnight September 3 and 1 a. m., September 4, 1946.

The intersection of Twenty-fifth and Burt is a low point. The water running from Cuming Street slopes toward the south; Twenty-fourth Street and Burt is a high point, the water slopes down from that intersection; Burt Street is higher toward the west than it is at Twenty-fifth; and Creighton stadium is located on the south side of Burt Street, so water runs from all directions to the intersection of Twenty-fifth and Burt, creating a pocket. The elevation between Twenty-fifth and Burt and the alley heretofore mentioned is less than a foot. The elevations along the alley run from a high point, 83.35, and decrease until it measures 74.63, a low place near plaintiff's property.

The records of a federal meteorologist show that from

midnight, September 3, to 1 a. m., September 4, 1946, it rained 1.32 inches. From 12:20 to 12:30 a. m., .52 inches of rain fell. The rain is described as "heavy." Records of rains of greater intensity per hour were received in evidence, covering a period of time from June 16, 1928, through July 18, 1942, and also records of greater rain intensity within a five-minute period between July 6, 1898, to the date in question.

Shortly after 2 a. m., September 4, the plaintiff arrived at his premises. He first endeavored to extricate tenants from the second floor. He was not able to go to the back of the building on account of high water, about six feet deep, which was coming down the alley east from Twenty-fifth. There was no upsurging of the toilet in his building. On his lot there was a hole about six feet wide and seven feet deep, where the water ran through an opening, pushing the building up and undermining it, causing the same to become completely demolished. To replace it would cost $11,500. The chief engineer of the building department of the city recommended it be condemned.

The night of the flood the plaintiff noticed that the street-level inlets and grates in the vicinity of Twenty-fifth and Burt had collected rubbish of various sorts. There was no upsurging of water in the inlets in that vicinity. The morning of September 5, 1946, he returned to his premises and noticed rubbish had collected in the grates of the inlets. He did not notice whether any manhole covers were lifted or not. He testified in detail as to his losses.

A civil engineer, connected with the city for many years and on leave of absence, testified for the plaintiff. On September 6, 1946, he investigated the flood situation in the vicinity of Twenty-fifth and Burt; and described in detail the construction, number and location of street-level inlets in that vicinity, which we have noted. He defined a sewer under pressure as one running full of water, with more water trying to get into

it. If there is enough pressure, water sprays through the holes in the manhole covers, or lifts them off completely. He was asked, assuming the manhole covers at Twenty-fifth and Burt were intact as was the one in the alley back of the plaintiff's premises and the toilet in his building was not flooding or showing pressure upward on the night and morning in question, would such facts indicate the sewer at such location was not running full? He answered, "Yes." He gave as his opinion, if 1.32 inches of rain fell in an hour in the sewer system designed to carry a three-inch rain of uniform intensity over the watershed, that would indicate the sewers on Burt Street were not running full. He testified further that in establishing grades, curbs, paving or resurfacing, the city could determine the rate of grade and the direction the water should flow. Paving and curbing of streets, and building sidewalks causes the water to run faster and have a smoother surface to run over than it would if it was natural dirt. At the intersection of Twenty-fifth and Burt there is no natural surface drain, so if that sewer stops up for one reason or another, there is no way of taking care of it except to overflow private property. The city knew that this intersection would not drain out, and also knew the alley back of plaintiff's place would not drain out. No other construction was made to take the place of the inlets bricked up. He further testified that the bricking up of the three inlets reduced very materially the facilities for receiving surface water in the pocket heretofore mentioned. Several complaints had been made about this pocket. The water backs up Twenty-fifth north to the alley and down the alley east to the plaintiff's property. This sewer system was constructed to alleviate the flood condition at Twenty-fifth and Burt.

The city produced a number of witnesses who testified to the intensity of the storm, most of whom stated that it was the worst in intensity that they had seen. There was evidence of upsurging of water causing man-

hole covers to be lifted from their set places; causing paving to buckle and wash in various parts of the city; and causing toilets to overflow. A few of these incidents occurred in the vicinity of Twenty-fifth and Burt.

A witness living in the immediate vicinity of Twenty-fifth and Burt testified that the time in question is the first time since the construction of the sewers in 1941 that the water ran from curb to curb on Burt Street.

A bus driver for the street railway company, due to arrive at the bus barn on Twenty-fifth and Burt at 12:39 a. m., took a route directly north on Thirtieth to Burt and east on Burt to Twenty-fifth. At and prior to 12:35 a. m., it was raining so hard the windshield wipers would not clean the rain from the windshield. The water at Thirtieth and Cuming Streets was from curb to curb. Proceeding down Burt by Lincoln Boulevard his motor died. He took the bus out of gear and the water pushed him east on Burt to Twenty-fifth. He described the rainfall as the worst he had ever seen.

A mechanic's helper at the street railway company barn observed the rain at 11:30 p. m. About 12:17 a. m., he saw a car floating down Burt Street. The water was about three and a half feet high on the Creighton stadium wall at a point one block west of Twenty-fifth. After the water started to recede, it took 20 minutes before he could see the top of the street. He observed the manhole cover ten feet southeast of where it should have been, at Twenty-fifth. At 12:45 a. m., he noticed leaves, trash, and tin cans around the manhole. He had not seen a rain of like intensity in Omaha.

Another employee of the street railway company observed, about 11:30 p. m., it started raining. From 12:15 to 12:30 it rained in torrents and became pretty well flooded at 12:30. The water had accumulated in the intersection of Twenty-fifth and Burt to the extent that it was running over the retaining wall where the three bricked places, or inlets, are located. He noticed

two manhole covers that were dislodged south of the bus barn in the vicinity of Twenty-fifth and Burt that were 120 feet apart, and the one in between them was intact. The first was 100 feet west of the intersection of Twenty-fifth and Burt, and the other west of the first one.

The city sewer engineer who previously testified for the plaintiff, testified for the city and gave as his opinion that the sewer at Twenty-fifth and Burt was under pressure, assuming water was running down Lincoln Boulevard into Burt Street at a height of two and a half feet, and at a height of two feet down Burt Street west of the Boulevard, and assuming further, the water reached a height of six feet at Twenty-fifth and Burt. This was because the sewer inlets filled the sewers at the upper end of the drainage area and no more water could get in. He said the situation would not have changed in any way if the three inlets mentioned had been opened, because the sewer was already full and no more water could get into it. When these inlets were constructed he believed they would be of some value. They were closed without his knowledge. He recommended they remain closed. That due to the overflow in the alley, which is only a foot above the intersection, the inlets would not come into action until the water rose higher than a foot. If there were two feet of water in the street, one foot would go into the lower inlet, the other two inlets are a little higher.

He further testified, assuming that at the time of the high water it was three feet deep, 800 cubic feet of water per second flowing down the street would require an additional sewer of nine feet capacity to carry the water away. His explanation of why the flooding took place was that, during the rainfall, in twenty minutes everything was well saturated and the sewers were being filled from the upper end. As the rain progressed from the southwest toward the northeast, it took about 20 to 25 minutes for the storm water to reach from the upper

end of the drainage area to Twenty-fifth and Burt, and during the 20 minutes of hard rain the sewer filled up by virtue of an enormous shower, and the water had to go to the surface. Other facts will appear subsequently in the opinion as occasion requires.

The city, in support of its contention that the trial court should have directed a verdict for it, argues that the evidence discloses that the flood of the plaintiff's premises was caused solely by the intensity of the rainfall which amounted to a deluge, and not to the closing of the three inlets, citing Adams v. City of Omaha, 119 Neb. 753, 230 N. W. 680, and Wilson v. City of Omaha, 138 Neb. 13, 291 N. W. 732, which hold: " 'Cities of the metropolitan class are not liable for damages caused by surface water, because its storm sewers are of insufficient capacity to carry all of such water.' "

It is further said in the cited case, Adams v. City of Omaha, *supra*: "In an action against a city of the metropolitan class to recover damages caused by surface water flooding plaintiff's premises, no recovery can be had unless it is shown that some negligent act or omission by the city caused the surface water to accumulate and be cast on plaintiff's premises."

The following authorities are likewise pertinent to this appeal.

"When a city makes provision by sewers or drains for carrying off the surface water, it may not discontinue or abandon the same, when it leaves the lot owner in a worse condition than he would have been if the city had not constructed such drains." McAdams v. City of McCook, 71 Neb. 789, 99 N. W. 656. This case recognized the rule that the city is under no obligation to construct a system of drainage for protection from the surface water, but having constructed a system of drainage, the city is not entirely absolved from liability for injury caused to the private property by its failure to keep the ditches in proper control after they have been constructed.

As stated in 4 McQuillin, Municipal Corporations (2d ed. rev.), § 1568, p. 432: "While as stated a grant of power to a municipal corporation to construct sewers and drains does not require it to do so, yet if it does exercise the power conferred, it is bound to use ordinary care or exercise due diligence to keep such sewers and drains as it constructs in proper condition and repair and free from obstructions, and will be held liable for damages to property resulting from its failure to do so."

In Randall v. City of Chadron, 112 Neb. 120, 198 N. W. 1020, this court held: "Where a city has constructed in its streets a system of gutters or drains to carry off surface water, it is charged with the duty of ordinary care to maintain them in a proper manner; and where one of its agents negligently and carelessly obstructs a gutter or drain in such a manner as to dam the flow and raise the water in the street to such a height that it overflows the curb and runs into the basement of plaintiffs' store, injuring a part of a stock of goods, the city itself will be liable for such injury." See, also, McAdams v. City of McCook, *supra;* 6 McQuillin, Municipal Corporations (2d ed. rev.), § 2869, p. 1227; Pevear v. City of Lynn, 249 Mass. 486, 144 N. E. 379.

In the last cited case it is said: "The law governing actions of this nature is settled. A municipality is not responsible for damages which accrue to individuals through any defect or inadequacy in the plan of its system of sewers, because that is established by public officers acting, not as its agents, but in a quasi judicial capacity for the benefit of the general public. A municipality is responsible for damages which accrue to individuals through negligence in the construction, maintenance or operation of its system of sewers, because that system when constructed becomes the property of the municipality, no one else can interfere with it and its care and continuance devolve wholly upon the municipality through such agents as it may select."

The city attacks instruction No. 5, given by the trial

court with reference to the legal duty of the city to exercise ordinary care and diligence in the operation and maintenance of the sewer system involved in this case. The city criticizes this instruction, claiming the court did not present the issue of negligence involved, that is, the closing of the openings, and as the instruction reads would permit the jury to go into matters of whether or not the city kept the ordinary inlets, other than the three involved in this case, open, and to which issue there was no pleadings in the petition and no competent proof in the record.

We have analyzed this instruction and find it to be in keeping with the authorities heretofore cited on this point. Under the pleadings, we find no prejudicial error in the giving of the instruction.

The city was charged with negligently maintaining the sewer system. The plaintiff did not rely on the inadequacy or insufficiency of the sewer system for a cause of action against the city. The evidence of the plaintiff goes to the negligence of the city in maintaining the sewer system in question.

We proceed with the city's assignment of error with reference to the question of an unusual, excessive, and unprecedented rainfall, owing to an act of God over which the city had no control. In addition to the cited cases of Adams v. City of Omaha, *supra,* and Wilson v. City of Omaha, *supra,* the city cites 6 McQuillin, Municipal Corporations (2d ed. rev.), § 2868, p. 1226, as follows: "Whatever the rule may be as to ordinary surface water or rainfalls, it is settled that a municipal corporation is not liable for damages caused by an overflow of its sewers occasioned by extraordinary rains or floods."

Geuder, Paeschke & Frey Co. v. City of Milwaukee, 147 Wis. 491, 133 N. W. 835, is cited to the effect that within the rule that a municipality is not liable for injuries from insufficiency of its sewage system to carry off the surface water in case of an extraordinary storm, the word "extraordinary" is not used as synonymous

with "unprecedented," but with "unusual," that which is rare or uncommon, happens sometimes, but not so often as to be regarded as a common occurrence. Also to the effect that within the rule that the limit of municipal responsibility to dispose of surface waters and sewage is to provide for such storms as are usually liable to occur, the term "usually liable" excludes storms which are liable to occur, and so are within reasonable anticipation that they may or will occur, but only at long intervals.

The city contends, under the foregoing cited authorities, in order for a municipality to establish a defense it is not necessary to prove a rain of such degree as to be considered an act of God, as was required by the court in its instruction in the instant case, but merely to show a rain which is rare or unusual, and does not occur so often as to become a common occurrence.

The evidence as to whether or not the rainfall at the time in question was unusual, excessive, or unprecedented, is in controversy. As set out in the statement of facts, rainfalls of greater intensity over the same period of time as the rainfall in the instant case appear in the record. Subsequent to the construction of the sewers in 1941, the record shows that on June 19, 1942, there was a rainfall of 2.44 inches in one hour, and on July 18, 1942, 1.40 inches in one hour. Fifty-seven hundredths of an inch of rain fell in ten minutes during each of the foregoing storms.

The engineer who constructed and designed the sewer system in question testified to overflows previously at Twenty-fifth and Burt; knew of previous heavy rains; and had made a study of the rainfall in Omaha in the city from 1873 to 1924. It is obvious the construction of the sewer system in 1941 was to alleviate this flood condition.

Where there is controversy in the evidence as to whether or not the rainfall was unusual, excessive, or unprecedented, the cases generally hold it is a question

for the jury. Siegfried v. South Bethlehem Borough, 27 Pa. Super. Ct. 456; Yeager v. City of Pittsburgh, 103 Pa. Super. Ct. 34, 157 A. 353; Woods v. City of Kansas, 58 Mo. App. 272, 280, citing Haney v. City of Kansas, 94 Mo. 334, 7 S. W. 417; City of Litchfield v. Southworth, 67 Ill. App. 398; City of Birmingham v. Jackson, 229 Ala. 133, 155 So. 527; Hession v. Wilmington, 1 Marvel's (Del.) 122, 40 A. 749; The Mayor, etc., of Savannah v. Cleary, 67 Ga. 153; District of Columbia v. Gray, 1 App. Cas. (D. C.) 500; and other cases too numerous to cite.

We have analyzed the instruction on this issue and find no prejudicial error contained therein.

The city predicates error on the court's submitting the second allegation of the plaintiff's petition, with reference to negligence on the city's part, to the jury. We have heretofore set forth in substance the plaintiff's allegation on this point. The contention is that the city is not liable for an increased flow of water upon the private premises of an individual which is due to the paving, curbing, installation of sidewalks, building of residences, or in other words, the natural growth of the city, citing 6 McQuillin, Municipal Corporations (2d ed. rev.), § 2882, p. 1269: "A fortiori, a municipality is not liable to a property owner for the increased flow of surface water over or onto his property, arising wholly from the changes in the character of the surface produced by the opening of streets, building of houses, and the like, in the ordinary and regular course of the expansion of the municipality." And, as stated in Fox v. City of New Rochelle, 240 N. Y. 109, 147 N. E. 544: "Nor is it liable for damage caused by the discharge of surface water which is the result solely of the grading of streets, the erection of buildings and the improvement of private grounds." Cases are cited.

In the case of Naysmith v. City of Auburn, 95 Neb. 582, 146 N. W. 971, this court held: "A municipal corporation has the right to improve and provide for the drainage of its streets; but if in so doing it causes an

increased flow of surface water upon or against private property, and negligently fails to provide a sufficient outlet for the escape of the water thus brought upon or against such property, it will be liable to the owner thereof for any damage that may result from such negligence." See, also, 43 C. J., Municipal Corporations, § 1905, p. 1145; Robbins v. Village of Willmar, 71 Minn. 403, 73 N. W. 1097; Sandy v. City of St. Joseph, 142 Mo. App. 330, 126 S. W. 989.

We make reference to the testimony of the civil engineer heretofore set out on this issue. We conclude the trial court did not err in submitting the plaintiff's second cause of action to the jury, necessarily, it ties in with the plaintiff's first cause of action.

We conclude from the evidence and the authorities heretofore set out and cited, the trial court did not err in overruling the city's motion for a directed verdict.

The city contends the court erred in instructing the jury as to the measure of damages. The evidence does not disclose the value of this property prior to the flooding thereof, or the value of the property when new. The plaintiff testified there was depreciation of the property from 35 to 40 percent. His expert witness testified that it would cost $11,500 to restore the property, and the use of old materials was not advisable and would cost too much.

The city offered the following instruction, which was rejected: "You are instructed that the uncontradicted evidence in this case establishes that plaintiff's building has been completely destroyed. In such case, in the event you find for the plaintiff, the measure of damages is the diminution in the value of the real estate at the time of and on account of such flood, plus interest at the legal rate of six per cent."

In support of this contention the city cites 25 C. J. S., Damages, § 85, p. 608, as follows: "The measure of damages for injury to, or destruction of, buildings or other structures is the amount of the loss, which may be

the difference in the value of the premises before and after the injury, the value of the building or structure, or, where practicable, the cost of restoration."

Davenport v. Intermountain R. L. & P. Co., 108 Neb. 387, 187 N. W. 905, is also cited, which held: "The measure of damages for the destruction of a building * * *, or the partial destruction thereof to such an extent that restoration would not be advisable, is, in cases where the building forms a part of the real estate and such real estate has a market value, the diminution in the value of such real estate at the time of and on account of such fire, plus interest at the legal rate."

The court instructed the jury on the measure of damages as follows: "The measure of plaintiff's damages to the building on his property is the reasonable cost of restoring same in the same condition it was in before the flood. In arriving at this cost of restoring such building, you shall consider the evidence relating to the cost new of a frame building of like kind and character to the existing building on the property prior to the flood, and the amount of depreciation that the latter had undergone just before such flood. From the reasonable cost new which you find, you will deduct the amount which corresponds with the depreciation which you find existed.

"Plaintiff, in the event you find that he is entitled to recover damages, is entitled to recover the cost of restoring the building to its original condition as nearly as may be determined, but not to that of a building in better condition."

"The cost of replacing the building, making a proper deduction for its age, utility, use, and condition, is a better measure of what the property was fairly and reasonably worth at the time it was destroyed." Kennedy v. Heat and Power Co., 103 Kan. 651, 175 P. 977.

In Graessle v. Carpenter, 70 Iowa 166, 30 N. W. 392, it is said: "* * * the plaintiff may recover as damage the sum which, expended for the purpose, would put

the property in as good condition as it was in before the injury, * * *."

"Where property, a part of the realty to which it is attached, is destroyed without damage to the realty itself, and where the nature of the thing destroyed is such that it is capable of being replaced at once, and the cost of doing so is capable of reasonable ascertainment, the measure of damages for its negligent destruction is the reasonable cost of replacing the property in like kind and quality." Koyen v. Citizens Nat. Bank, 107 Neb. 274, 185 N. W. 413. See, also, Missouri P. R. R. Co. v. Wood, 165 Ark. 240, 263 S. W. 964.

Davenport v. Intermountain R. L. & P. Co., *supra,* recognizes that a different rule than applied therein might be advisable in certain cases, that is, where the property might not have market value, or the building might not be a part of the real estate, or, in case of partial destruction, restoration of the building might be advisable.

We conclude, from a review of the authorities and applying the same to the evidence in this case, that the trial court did not err in giving the instruction on the measure of damages.

Other assignments of error are without merit.

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

AFFIRMED.

JACOB EDWARD KEYSER, JR., APPELLEE, V. J. PRESCOTT ALLEN ET AL., APPELLANTS.
31 N. W. 2d 309

Filed March 12, 1948. No. 32303.

1. **War: Penalties.** In an action by a purchaser to recover for an overcharge under the Federal Emergency Price Control Act of 1942, as amended, the burden is on him to prove by a preponderance of the evidence: The purchase, that there was an

established ceiling price, that the price paid exceeded the ceiling price, the amount of the excess, and that the article or merchandise purchased was for use other than in the course of trade or business.

2. ———: ———. In case of sale over the ceiling price the liability is three times the excess, however, the judgment may not be for less than the overcharge nor more than three times that amount.
3. ———: ———. If the seller shall prove that the violation of the price schedule was neither willful nor the result of failure to take practicable precautions against the occurrence of violation then the judgment shall be only for the amount of the overcharge.
4. ———: ———. If the seller shall fail to so prove then the amount of the judgment shall reside in the discretion of the court but shall be not less than the overcharge nor more than three times that amount.
5. Evidence. Where a statute authorizes executive officers to make general rules for the conduct of public business, and such rules are duly made and published, the courts will take judicial notice of them.
6. ———. State courts will take judicial notice of general rules and regulations established and published by federal agencies under authority of law.

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

Aten & Chadderdon, B. F. Butler, and *Hugh W. Eisenhart,* for appellants.

Perry & Perry, for appellee.

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

YEAGER, J.

This is an action by Jacob Edward Keyser, Jr., plaintiff and appellee, against J. Prescott Allen and Walter J. Middleton, defendants and appellants, to recover triple damages pursuant to the provisions of section 205 (e) of the Emergency Price Control Act of 1942 (Public Law 421, 77 Congress, 2nd Session, chapter 26, 58 Stat-

utes 43, January 30, 1942, 50 U. S. C. A., 901 et seq.) as amended, on account of the sale or trade to plaintiff of an automobile at a price in excess of the ceiling price fixed upon the automobile under regulations established pursuant to the said Emergency Price Control Act. This is the description given by plaintiff to the Act under which this action is brought. However, the description is incorrect. It should be 56 Statutes at Large 23, as amended June 30, 1944, which amendment appears as 58 Statutes at Large 632 et seq.

A trial was had to a jury which resulted in a verdict in favor of plaintiff and against the defendants for $875. Judgment was rendered on the verdict. Motion for new trial was filed which was overruled. After verdict motion was filed by plaintiff for an attorney's fee to be taxed as a part of the costs. This motion was sustained and an attorney's fee in the amount of $300 was allowed and awarded to plaintiff.

From the verdict and judgment, the order overruling the motion for a new trial, and the award of an attorney's fee in favor of the plaintiff, the defendants have appealed.

The petition upon which the case was tried sets forth substantially that on or about October 14, 1945, the defendant Allen as owner with the defendant Middleton as agent sold to plaintiff a 1938 LaSalle convertible coupé automobile for $1,350 and that plaintiff gave in payment therefor $800 in cash and a 1940 Packard six-cylinder, four-door sedan automobile of the agreed value of $550, whereas the ceiling price of the LaSalle automobile under regulations established pursuant to the Emergency Price Control Act was $912 without heater and radio or $950.40 with heater and radio.

The claim of the petition is based on a valuation with heater and radio making an over-ceiling exaction of $399.60, hence the valuation without heater and radio was and is of no importance in the determination of this case except in the ascertainment of the combined

ceiling price. This amount tripled is $1,198.80, however, by declaration of the petition and prayer plaintiff seeks under his claim for triple damages only $1,099.80.

To the petition the defendants filed separate answers. The answers were general denials of the allegations contained in the petition.

The pleadings put in issue the following questions: Was there a violation of the Act? Was plaintiff entitled to recover, if anything, up to three times the excess of the price exacted over the ceiling or only the excess? Was he entitled to recover an attorney's fee? If so, was the fee allowed excessive? If he was entitled to recover was he entitled to recover against one or both defendants?

The portion of the Act on which plaintiff bases his right of recovery is the following: "(e) If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, the person who buys such commodity for use or consumption other than in the course of trade or business may, within one year from the date of the occurrence of the violation, except as hereinafter provided, bring an action against the seller on account of the overcharge. In such action, the seller shall be liable for reasonable attorney's fees and costs as determined by the court, plus whichever of the following sums is the greater: (1) Such amount not more than three times the amount of the overcharge, or the overcharges, upon which the action is based as the court in its discretion may determine, or (2) an amount not less than $25 nor more than $50, as the court in its discretion may determine: *Provided, however,* That such amount shall be the amount of the overcharge or overcharges or $25, whichever is greater, if the defendant proves that the violation of the regulation, order, or price schedule in question was neither wilfull nor the result of failure to take practicable precautions against the occurrence of the violation." 50 U. S. C. A., § 925.

Thus the burden devolved upon the plaintiff, in order to permit him to recover against the defendant Allen, to prove by a preponderance of the evidence (1) that he purchased the automobile from the said defendant, (2) that there was an established ceiling price for the automobile and that the price paid therefor was in excess of such established ceiling price, (3) the amount of the excess, and (4) that it was purchased for use other than in the course of trade or business. Shearer v. Porter, 155 F. 2d 77; Bowles v. Silverman, 57 F. Supp. 990, appeal dismissed, 145 F. 2d 1022; United States v. Siegel Bros., 52 F. Supp. 238; Young v. Wierenga, 314 Mich. 287, 23 N. W. 2d 92.

In order to permit a recovery against the defendant Middleton, the burden devolved on plaintiff in addition to prove that Middleton was acting as agent for the defendant Allen.

It will be observed from a reading of the provision quoted that the maximum liability of a seller is three times the amount of the overcharge. It will be further observed that if the defendant shall prove that the violation of the price schedule was neither willful nor the result of failure to take practicable precautions against the occurrence of the violation that no award or judgment may be made in excess of the overcharge. It will also be observed that in the absence of proof by the defendant that the violation was not willful nor the result of failure to take practicable precautions against the occurrence of the violation the amount allowable is a matter resting in the discretion of the court within the range of the overcharge and three times that amount.

The defendants, as ground for reversal, assert that the plaintiff has failed to sustain the burden imposed upon him in consequence whereof the trial court erred in overruling motions made at the close of plaintiff's evidence and at the close of all the evidence to dismiss the action. Also as ground for reversal defendants assert that the court erred in taking judicial notice of the

price ceiling established by the Office of Price Administration for the automobile in question; that the court erred in giving certain instructions and in refusing to give one instruction tendered by the defendants; and that the court erred in fixing the amount of the attorney's fees for plaintiff's attorneys.

On the trial of the cause, in proof of the ceiling price of the automobile purchased, plaintiff directed the attention of the court to the maximum price regulations for said automobile as contained in the Federal Register, an official publication of the United States government promulgated and published under authority of law. Of the ceiling price of the automobile as it appeared in the Register the court took judicial notice without further proof. This action of the trial court defendants assert was error and that without this the record stands devoid of evidence of an established ceiling price for the automobile.

This contention of defendants may not be sustained. This court has said: "Where a statute authorizes executive officers to make general rules for the conduct of public business, and such rules are duly made and published, the courts will take judicial notice of them." Larson v. First Nat. Bank of Pender, 66 Neb. 595, 92 N. W. 729; Powell v. Anderson, 147 Neb. 872, 25 N. W. 2d 401.

It has also been said: "That state courts will take judicial notice of general rules and regulations, established and published by federal agencies under authority of law, is generally accepted." Powell v. Anderson, *supra*.

The trial court therefore properly took judicial notice of the ceiling price of the said automobile as that price was found in the Federal Register and properly submitted that price to the jury for consideration.

What has been said here with regard to judicial notice of the price of the automobile purchased by plaintiff

is equally applicable to the one surrendered by plaintiff as a part of the purchase price.

The judicial information which came to the court in this connection showed that the ceiling price of the automobile purchased was $912 without heater and radio and was $950.40 with these accessories. This information was, by appropriate instruction, communicated to the jury for consideration with all the other evidence in the case.

The basis of the contention that the court erred in refusing to sustain the motions made at the close of plaintiff's evidence and the close of the entire evidence is that plaintiff has failed to sustain the burden devolving upon him as hereinbefore announced and pointed out.

We are convinced that the contention of the defendants in this connection may not be sustained and that on the record the court was required to submit the issues made by the pleadings to a jury for determination. The question of whether or not they were submitted on proper principles and theories will be considered later herein.

As pointed out plaintiff showed that he purchased for $1,350 an automobile the ceiling price of which was $912 without heater and radio and $950.40 with heater and radio, the difference between the two in the one instance being $438 and the other $399.60. There was no counter evidence.

With the valuation without heater and radio the trial court was not properly concerned except insofar as that amount entered into the ascertainment of value with heater and radio since by his petition plaintiff seeks a recovery on the basis of a difference of $399.60 and not $438.

It therefore becomes clear that there was sufficient evidence upon which a verdict could be grounded finding that plaintiff purchased the automobile at a price in excess of the established ceiling price.

There was evidence that the defendant J. Prescott

Allen was the owner of the automobile purchased by plaintiff. Also there was evidence showing that the said automobile was not purchased by plaintiff for use in the ordinary course of trade or business. As to the defendant Walter J. Middleton there was evidence that he was the agent of the defendant Allen in the making of the sale of the automobile to plaintiff. The weight of the evidence on these questions was for the jury and we do not hesitate to say that it was ample for submission.

The rule as above stated is that the evidence on these points must preponderate in favor of plaintiff. Whether it did or did not was not a question for the trial court nor is it one for this court. The trial court correctly instructed that the weight of evidence was a question for determination by the jury.

This court will not disturb the findings of a jury unless on an examination of the record it may be said that such findings are not supported by any evidence or are clearly wrong. Rolfe v. Pilloud, 16 Neb. 21, 19 N. W. 970; Sippel v. Missouri P. Ry. Co., 102 Neb. 597, 168 N. W. 356; Curran v. Union Stock Yards Co., 111 Neb. 251, 196 N. W. 135; Dougherty v. Omaha & C. B. Street Ry. Co., 113 Neb. 356, 203 N. W. 538.

The trial court did not err in refusing to sustain the motions of defendants for dismissal of the action.

We revert now to the question of whether or not the issues were submitted under proper theories and on a proper basis. These questions must be ascertained and determined by an analysis of the statutory provisions quoted herein related to the subject of ceiling prices and the rights and liabilities incident to a violation thereof and an application thereof to the facts as disclosed by the record herein.

In this light it is to be observed that a jury found that plaintiff purchased an automobile from defendants at a price in excess of the established ceiling price. The finding of the jury in this respect is upheld. What then

shall the exaction or response of the defendants be under the Act? The trial court, in instruction No. 9, instructed the jury that it should be three times the amount of the overcharge.

This charge to the jury was incorrect and mistaken.

The Act clearly makes the liability of an offender three times the amount of the overcharge, but nowhere and under no circumstances does it require that there shall be such an exaction against an offender. The Act by clear and unmistakable implication distinguishes between liability and amount necessary to be exacted. There is an alternative to this where an amount not less than $25 nor more than $50 may be allowed but it has no application here since the amount of the proved overcharge here removes the alternative from consideration in this case.

This distinction operates in two different instances or ways. In a case where the defendant sustains the burden of showing that "the violation * * * was neither wilfull nor the result of failure to take practicable precautions against the occurrence of the violation" the exaction may be only the amount of the overcharge, notwithstanding the named liability is three times that amount. In a case where there is no proof that the violation was not willful and not the result of failure to take practicable precautions against the occurrence of violation, the liability is again three times the overcharge but the exaction need not be in that amount. The terms of the Act place the exaction at some point from the overcharge to three times that amount which point is to rest in the sound discretion of the court. Shearer v. Porter, *supra*.

The first instance of the distinction is not available here and the court did not err in failing to instruct thereon since the defendants neither pleaded nor attempted to prove that the violation, if it existed, was not willful and not the result of failure to take practicable precautions against occurrence of violation.

As to the other instance the appellants point out in

their brief that the trial court, instead of submitting to the jury only the determination of the overcharge and retaining to itself the determination of the exaction within the liability, instructed the jury, in case of finding of violation, to return a verdict for triple the amount of the overcharge. They point out that it gave no heed to the statutory provision that increased damage was a matter of discretion. This, it is contended, was error.

That this was error there can be no question. In dealing with this question, it was said in Shearer v. Porter, *supra*, "For the court to have viewed the assessment of treble damages as being legally mandatory under the statute and not to have permitted the question of increasing the damages and their amount to be determined on the basis of appraisal of the facts and exercised discretion, as discussed in the Goebel case, was error, for which judgment must be reversed." See Bowles v. Goebel, 151 F. 2d 671.

The procedure approved in Shearer v. Porter, *supra*, for such cases is that the question of the overcharge shall be submitted to the jury and if the defendant shall establish that the overcharge was neither willful nor the result of failure to take practicable precautions against its occurrence then judgment shall be rendered for the overcharge, but if the defendant shall fail to prove that the overcharge was neither willful nor the result of failure to take practicable precautions against its occurrence then the matter of increasing the damages and the amount of such increase shall be determined by the court on the basis of the facts and an exercised discretion.

Another or alternative procedure approved in that case was the submission of the question of increased damages to the jury under proper and suitable instructions.

This alternative procedure is not approved here. The statute referred to herein which provides the basis for actions such as this one, by its terms, appears to us to place the matter of increased damages exclusively in

the hands of the court without any aid from a jury. We do not see fit to extend the right or power granted beyond the express declaration of the statute.

Plaintiff contends that the failure to follow the statute in regard to the fixing of increased damages is not prejudicial to defendants and hence furnishes no ground for reversal. He says that the judgment was for less than three times the overcharge as shown by the evidence in the case hence defendants may not be heard to complain.

It is obvious for reasons already appearing herein that this contention may not be sustained. The judgment clearly is for more than the amount of the overcharge but not for three times the overcharge. The amount of the excess over the overcharge was not arrived at by an exercise of discretion by the court but by action of a jury. As pointed out this procedure is disapproved.

Again it is pointed out that the assessment of treble damages is not necessary under the statute. The following from Shearer v. Porter, *supra,* is apropos and controlling in these circumstances: "We have indicated that the judgment is required to be reversed for the trial judge's error in regarding the assessment of treble damages as being mandatory under the statute and not allowing the question to be determined as a matter of judgment or exercised discretion on the circumstances of the case."

Defendants contend that the court erred in fixing the amount of the attorney's fees for plaintiff's attorneys. This assignment does not require consideration since, as indicated, the case is to be reversed.

To summarize, which summary covers generally all of the assignments of error, the court did not err in taking judicial notice of established ceiling price regulations; the court did not err in submitting the case to a jury; the court did not err in giving any instruction except No. 9; the court did not err in refusing to give instruction No. 1 tendered by the defendants; and the matter of at-

torney's fees may not properly be considered on this appeal.

For the reasons herein stated the verdict and judgment of the district court are reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

IN RE APPLICATION OF CARL SCHWARTZKOPF.
CARL SCHWARTZKOPF ET AL., APPELLANTS, V. AARON L. COVER ET AL., APPELLEES.
31 N. W. 2d 294

Filed March 12, 1948. No. 32371.

1. **Adoption of Children.** Adoption proceedings under our statutes determine more than mere custody of the adopted child. Such proceedings create a status of parent and child between the adoptive parents and the minor child.
2. **Habeas Corpus.** The writ of habeas corpus is not a corrective remedy, and is never allowed as a substitute for appeal or proceedings in error.
3. ———. Habeas corpus is a proper proceeding to determine the right to the custody of a minor child.
4. ———. Ordinarily, the basis for the issuance of a writ of habeas corpus is an illegal detention, but in the case of a writ sued out for the detention of a child, the law is concerned not so much about the illegality of the detention as about the welfare of the child.
5. **Infants.** In a controversy for the custody of an infant of tender years, the court will consider the best interest of the child, and will make such order for its custody as will be for its welfare, without reference to the wishes of the parties.

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

Neighbors & Danielson, for appellants.

Morrow, Lovell & Bulger, for appellees.

Heard before SIMMONS, C. J., MESSMORE, YEAGER,

CHAPPELL, and WENKE, JJ., and BARTOS and JACKSON, District Judges.

BARTOS, District Judge.

On July 22, 1947, Carl Schwartzkopf, George F. Buechler, and Frances Buechler filed their joint petition in the district court for Scotts Bluff County, Nebraska, for a writ of habeas corpus against Aaron L. Cover, Beth L. Cover, and Aaron L. Cover as guardian of the person and estate of Robert Spencer Buechler, a minor. The object and prayer of the petition was to recover the custody of the minor child, Robert Spencer Buechler. The relators claim the right to the custody of the child by virtue of their relationship and contend that the respondents unlawfully are withholding from them the custody of the child.

The respondents, by their return to the writ, claim the right to the custody of the child by virtue of a relinquishment and consent executed by the mother in her lifetime in their favor.

A hearing was had to the court upon the issues as above outlined and evidence was adduced by all parties to this litigation. The trial court, after making special findings, entered a decree denying the writ of habeas corpus, dismissing the relators' petition, and declaring the infant to be in the lawful custody and care of the respondents. The relators have perfected their appeal to this court.

The appellants, hereinafter designated as relators, contend that: 1. The writing executed by Virginia Buechler was a relinquishment of control without an express consent and therefore was not sufficient under our statutes to justify adoption. 2. If the mother's relinquishment was a consent to adoption, it became inoperative upon her death and the exclusive right to custody of the child devolved upon the father, especially since the father has legitimated the child and there has been a judicial finding of his paternity. 3. The natural father

and the natural grandparents, as natural guardians, upon the death of the mother of a child born out of wedlock and before adoption is decreed, have the right to revoke the consent to adopt, executed by the mother in her lifetime. 4. The maternal grandparents of a child born out of wedlock, being found to be fit, are entitled to the custody of the child upon the death or disqualification of the parents. 5. The best interest of the child would be served by recognizing the natural guardian's right to custody in the absence of a clear showing of unfitness.

The following facts are either admitted by the pleadings or appear uncontroverted from the evidence. Virginia Buechler was a daughter of George F. and Frances Buechler, residents of St. Louis, Missouri. She came to Scottsbluff, Nebraska, the latter part of 1943 to work as a radio communicator at the United States Army air base located in that city. She commenced keeping company with Carl Schwartzkopf sometime in 1945. Schwartzkopf was then a married man and the father of two children. She gave birth to a male child on the 17th day of April, 1947, in St. Mary's Hospital in said city. Carl Schwartzkopf admitted before and after the birth of said child, and admits in the petition, that he is the natural father of the child. Virginia Buechler and Carl Schwartzkopf never married. She died in Scottsbluff on the 21st day of May, 1947, as a result of an automobile accident in which Carl Schwartzkopf was also injured and thereafter hospitalized for several weeks.

On April 23, 1947, while in the hospital and in the presence of a nurse, Virginia Buechler signed an instrument whereby she surrendered her child and the custody and control thereof to Aaron L. and Beth L. Cover, husband and wife. The child was named in that instrument as "Robert Spencer Buechler." This instrument was acknowledged by her before a notary public. She also, on the same day, signed and acknowledged before

a notary public a voluntary appearance in a court proceeding then filed in the county court of Scotts Bluff County and entitled "In the Matter of the Adoption of Robert Spencer Buechler, an infant." The respondents on the same day filed in the same court their petition, and the two instruments executed by the mother, for the adoption of the child. The child was then six or seven days old and the respondents took it to their home for the first time, where it has been in their custody ever since. The petition for the adoption of the child was set for hearing on the 12th day of June, 1947. No notice by publication or otherwise was ordered by the court, because the county court in fixing the time for hearing the petition for adoption of the child held that "no notice of publication be made herein for the reason that all interested parties are already before the Court." On June 12, 1947, the matter of the adoption was, on application of the petitioners (respondents herein), continued to the 25th day of October, 1947, for the reason that the child was not in the care and custody of the said petitioners for a period of six months as is required by law.

On May 29, 1947, the respondent Aaron L. Cover was, on due application therefor, appointed by the county court of Scotts Bluff County, guardian over the person and estate of the child. No notice was given by said court of the filing of the petition for the guardianship proceeding or of a hearing thereon. The respondent qualified as such guardian and is now the duly qualified and acting guardian over the person and estate of the child.

The relators demanded the custody of the child from the respondents. This demand was refused.

At the outset it must be remembered that this is an action for a writ of habeas corpus to determine the right to the custody of the child. It is not a proceeding to determine the right of adoption of the child by the respondents. As far as the record discloses, the adop-

tion proceedings are still undetermined and pending in the county court of Scotts Bluff County, Nebraska.

Adoption proceedings determine more than the custody of the adopted child. It has been held in the case of In re Estate of Enyart, 116 Neb. 450, 218 N. W. 89, that "Pursuant to this statute, the decree of adoption created, in law, between the adoptive parent and adopted child, the relation of parent and child, * * *."

Whether or not the writing executed by Virginia Buechler was a relinquishment of control without an express consent and therefore not sufficient under our statutes to justify adoption, or whether or not her consent to adoption became inoperative upon her death and could be revoked by the natural father of the child or by its grandparents, need not be decided at this time.

"Habeas corpus is not a corrective remedy and cannot be employed as a writ of quo warranto or as a writ of certiorari. While a writ of habeas corpus is in the nature of a writ of error in so far as it brings into review the legality of the authority by which the prisoner is confined, it is well settled that such writ will not be permitted to perform the functions of a writ of error or appeal for the purpose of reviewing mere errors or irregularities in the proceedings of a court having jurisdiction over the person and subject matter." 25 Am. Jur., Habeas Corpus, § 14, p. 152.

To the same effect is the case of In re Langston, 55 Neb. 310, 75 N. W. 828, wherein this court held that: "The writ of habeas corpus is not a corrective remedy, and is never allowed as a substitute for appeal or proceeding in error."

Habeas corpus proceeding is a proper remedy to determine the right to the custody of a child. The evidence in this case discloses the following pertinent facts relative to the custody of the child. The attending physician testified that the evening before the child was born he had a conversation in the hospital with Carl, who informed him that Virginia did not want the baby,

that she wanted it adopted into a good home, that he did not approve of her adopting the baby out but that there was not much he could do about it. The doctor also talked to Virginia about the child before it was born and she told the doctor in the presence of Carl that she did not want the child. They talked about adoption of the child and it was her wish that the child be adopted out, as they wanted to keep the child's birth a secret. The doctor had a number of conversations with her within the next two or three days after the child was born. He tried to convince her that the right thing for her to do was to keep the baby and get married. He even suggested that the baby remain in the hospital after she was well, for them to get married and then come back to get the child, but she was not receptive to that advice. She insisted that she could not get married and keep the baby. The doctor then made efforts to find a suitable home for the child. He did not tell her about the Covers. She told him that the lawyer was up to see her about the adoption papers for the child. She seemed relieved of the burden. After he told her he found a fine family she said: "That's fine."

The attending nurse during Virginia's stay in the hospital asked Virginia to look at the child and to feed it, but Virginia turned her back to her, said "No" and started to cry. While feeding the child in the same room the nurse asked Virginia why she did not want to keep the child since she and Carl were to be married. Virginia replied that she thought it was best they let it go and start all over. At no time did Carl or Virginia see the child while it was in the hospital, although they had plenty of opportunities to see it. Carl never asked who adopted the child. The nurse was present when the paper was signed wherein Virginia surrendered the child and the custody and control thereof to Aaron L. and Beth L. Cover. If Virginia did not read it, as Carl testified, she had the opportunity to read it. The evidence preponderates in favor of the fact that she did

read it because the nurse who is a witness to her signature testified that Virginia said, while reading the instrument, "So that's what they are going to call him?" The name "Robert Spencer Buechler" appears in the relinquishment.

We deem it necessary to detail this evidence in order to show that the respondents did not obtain the custody of the child surreptitiously. The mother and natural father of the child did not want it. It could not remain in the hospital. Through the kindly efforts of the attending physician a home was found for it. The Covers took it with the consent of its mother and at the same time took all necessary steps for its adoption and protection.

In a habeas corpus proceeding entitled In re Gould, 174 Mich. 663, 140 N. W. 1013, involving a contention between aunt and grandparents over the custody of their nephew and grandson, nine years of age, the Supreme Court used this language: "The power of parental control, though recognized as a natural right and protected when properly exercised, is by no means an inalienable one. When the 'right of custody' is involved between respective claimants for a child, the courts, though in the first instance recognizing prima facie rights of relationship, in the final test are not strictly bound by demands founded upon purely technical claims or naked legal rights, but may and should, in making the award, be governed by the paramount consideration of what is really demanded by the best interests of the child." The above is quoted with approval in Ex parte Bush, 240 Mich. 376, 215 N. W. 367.

"Ordinarily, the basis for the issuance of a writ of habeas corpus is an illegal detention, but in the case of the writ sued out for the detention of a child, the law is concerned not so much about the illegality of the detention as about the welfare of the child." 25 Am. Jur., Habeas Corpus, § 78, p. 203.

"The writ of habeas corpus was limited originally to

cases of restraint under color or claim of law. It has, however, been extended to, and generally made use of in, controversies touching the custody of infants, which are governed, not so much by considerations of strictly legal rights, as by those of expediency and equity, and above all the welfare and interest of the infant, * * *." 29 C. J., Habeas Corpus, § 101, p. 108.

This rule of law has been recognized by this court. In the case of Norval v. Zinsmaster, 57 Neb. 158, 77 N. W. 373, this court said: "The statute and the demands of nature commit the custody of young children to their parents rather than to strangers, and the court may not deprive the parents of such custody unless it be shown that such parent is unfit to perform the duties imposed by the relation or has forfeited the right."

The fair interpretation of the holding in that case is that where there is no positive evidence of unfitness on the part of the parent, then by virtue of the statute now being considered, section 38-107, R. S. 1943, the parents or the survivor of them being the natural guardians of their minor children, should not be deprived of their custody. In other words, after a full hearing upon the merits, if the issue of unfitness is presented, it is up to the court to say what is for the best interest of the child. That this court has so interpreted the decision in Norval v. Zinsmaster, *supra,* is evident from the subsequent decisions.

In a habeas corpus proceeding entitled In re Burdick, 91 Neb. 639, 136 N. W. 988, this court, citing Norval v. Zinsmaster, *supra,* held that: "Where a mother dies immediately after the birth of a child, and the father commits it to the custody of a competent woman who properly cares for it in a suitable home without compensation, and the father permits a mutual attachment to grow up between them for a number of years under a contract with him awarding to her its permanent custody, in a proceeding by the father to regain his child, the

general rule, that the controlling consideration is the child's own best interests, applies."

In the case of Steward v. Elliott, 113 Neb. 421, 203 N. W. 580, the same being a habeas corpus proceeding involving the custody and control of a minor child, the relator being the father of the child and the respondent being a stranger to it but being entrusted with its custody since the death of its mother, this court, in denying the writ and citing Norval v. Zinsmaster, *supra*, held: " 'In a controversy for the custody of an infant of tender years, the court will consider the best interests of the child, and will make such order for its custody as will be for its welfare, without reference to the wishes of the parties.' "

The suitableness and fitness of the contending parties for the custody of the child was an issue in this case raised by the pleadings and the evidence adduced. The trial court found that Carl Schwartzkopf, the natural father, was an unfit person to be entrusted with the custody of the child. Upon a careful examination of the evidence we arrive at the same conclusion. It would serve no useful purpose to extend this opinion by setting forth the facts which led this court and probably led the trial court to arrive at that conclusion.

The trial court found the Buechlers, grandparents of the child, and the Covers, to be extraordinarily well qualified and fitted to have the permanent care and custody of the child. We concur in that finding. The provisions of the statute referred to in Norval v. Zinsmaster, *supra*, do not take into consideration the rights of grandparents to the custody of a minor child as a matter of law. Therefore, we are confronted, under the evidence in this case, with the question: What is for the best interest of the child?

The grandfather and grandmother are respectively 55 and 49 years of age. Aaron L. and Beth L. Cover are respectively 30 and 28 years old. The Buechlers have raised seven children. The Covers had no children of

their own, being unable, according to their physician, to have any. The grandparents never had the custody of the child. In fact, they did not know of its birth until more than two months after it was born. The Covers have had its custody ever since it was six or seven days old. They have watched over it, have seen to it that its health has been perfect, and have taken it monthly for a physical checkup. They testify that they love the child. They intend to keep and to treat it as their own. On the other hand, it is a fair deduction from the evidence of the grandparents that, if need be, they would accept the permanent custody of the child, but that if Carl Schwartzkopf could establish a home and be able to take care of the child and love it as they would, then they would be willing to relinquish its custody to him. We have come to the conclusion from a careful examination of the entire record that the trial court arrived at the correct conclusion in dismissing the writ and in its finding that the Covers should retain the custody of the child.

The judgment of the district court is affirmed.

AFFIRMED.

CLETUS BODE, APPELLANT, V. WILLIAM F. PRETTYMAN, APPELLEE.

31 N. W. 2d 429

Filed March 19, 1948. No. 32333.

SUPPLEMENTAL OPINION

APPEAL from the district court for Lincoln County: ISAAC J. NISLEY, JUDGE. On oral argument on motion for rehearing. See *ante* p. 179, 30 N. W. 2d 627, for original opinion. *Modified and affirmed.*

William S. Padley, for appellant.

Dent & Plummer, for appellee.

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

PAINE, J.

This case was argued to this court on December 3, 1947, an opinion of affirmance was released January 16, 1948, is found *ante* p. 179, 30 N. W. 2d 627, and to that opinion this is supplementary.

After the filing of appellant's motion and brief for rehearing, an oral argument was allowed thereon.

We have found that there is a material discrepancy between the decree of the trial court, which we affirmed, and the record in this case. The decree found as follows:

"The Court further finds from the evidence that all of the books and records of said partnership were kept by the plaintiff; that according to his books and records, he had on hand at the time of the trial of this matter $2,361.29 of partnership funds including cash and accounts receivable; that in addition thereto he had wrongfully taken from said partnership funds $100.00 for the purpose of paying his attorney a retainer fee, and that he had wrongfully taken from said funds $445.83 for the purpose of paying a personal obligation to the North Platte Loan & Finance Company, so that the plaintiff should account to the partnership for $2,907.12." The judgment was entered accordingly.

In the evidence in the bill of exceptions, J. H. Hansen, a public accountant, testified on cross-examination: "Q Then, from Exhibit 2, Exhibit 4 and 5, and the additional fact that Mr. Bode is entitled to one dollar of each eight dollars and fifty cents of gross income; your testimony is then; that the total amount of cash, plus accounts receivable belonging to this partnership, is $2361.29? A Yes sir. Q And Exhibit C, should be corrected to that effect? A It could be C - - Q If Exhibit C is corrected to make the changes are- including the $100 payment to me, myself; the $45 payment on the freight, and the

$445.83 payment which was improperly charged to the Company, in Exhibit 2- A Yes. Q All of those things taken into account, plus this credit for Mr. Bode, leaves, both accounts receivable and cash, is $2361.29? A Yes sir."

Thus it will be seen that the appellant was twice charged with the two items of the $100 retainer fee, paid to his attorney in this case, and $445.83 used in paying a personal obligation. Deducting these two items from the sum of $2,907.12, which the decree of the trial court required him to account for, leaves the correct amount of only $2,361.29, for which appellant should be required to account.

The trial court thereafter gave plaintiff credit for $802 paid the Fuchs Machinery Company on the scraper and $237 paid on the tilt dozer out of plaintiff's own funds, which sums, amounting to $1,039, being credited on the amount found due by this court of $2,361.29, leaves a net balance of only $1,322.29, for which appellant should be required to account.

With this modification, the decree of the trial court is affirmed. The motion for rehearing is, in all other respects, overruled.

AFFIRMED AS MODIFIED.

HILLIS C. NEWMAN, APPELLANT, V. PAUL CHRISTENSEN, APPELLEE.

31 N. W. 2d 417

Filed March 19, 1948. No. 32338.

1. **Assault and Battery.** A battery is defined as an actual infliction of violence on the person, or an unlawful, that is, an angry, rude, insolent, or revengeful touching of the person.
2. ———: **Negligence.** An assault and battery is not negligence. The former is intentional; the latter is unintentional.
3. ———. The action for a battery, which under the provisions of our statute must be brought within one year, is an action founded upon an intentionally administered injury to the person,

such an injury as could be made the basis of a criminal prosecution.

4. **Torts.** The fact that a practical joke is the cause of an injury to a person does not excuse the perpetrator from liability in damages for the injury sustained.
5. ———. When one does an act which proves injurious to another, an action in tort generally arises in favor of the injured person, although the act was done without malice and no injury was intended.

APPEAL from the district court for Dodge County: RUSSELL A. ROBINSON, JUDGE. *Reversed and remanded.*

Chambers & Holland, for appellant.

Sidner, Lee & Gunderson, Kennedy, Holland, DeLacy & Svoboda, and *Edwin Cassem,* for appellee.

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

PAINE, J.

This is an action for personal injuries suffered by the plaintiff by reason of his foot being suddenly jerked up by defendant, throwing him backward out of his chair, by which act he was injured. At the close of the plaintiff's evidence, the defendant moved to dismiss plaintiff's cause of action on the ground that it was barred by the statute of limitations. The court thereupon instructed the jury that it had become a legal question, which the court had determined, and instructed the jury to return a verdict for the defendant. Plaintiff appealed.

The evidence in the bill of exceptions discloses that the plaintiff was at the time of trial 54 years old. He was a traveling salesman for a Minneapolis firm, covering western Iowa, southern Minnesota, and a part of Nebraska, and had followed that occupation for 19 years.

At about 8:30 on the evening of March 18, 1945, the plaintiff, defendant, and two other friends were playing pitch in the Elks Club at Fremont. At the completion of a game two one-dollar bills were left lying on the corner of the table, which the plaintiff in a play-

ful spirit said if the defendant did not want to get them off the table, and plaintiff thereupon pushed the money off the table. The plaintiff was sitting in a bentwood chair, with gliders under the legs, the linoleum on the floor being highly waxed. The defendant stooped down to get the money, grabbed plaintiff's right foot, and gave it a sharp jerk upward. The chair spun away and plaintiff fell over backward, with his feet in the air, striking the middle of his back. However, while he continued the game that evening, yet from the fall he allegedly suffered serious injuries to his back and spine. He charged in his petition that he was unable to do any work for a period of approximately 38 weeks thereafter and will hereafter be partially disabled, decreasing his earning capacity at least 50 percent, the injury to his eighth dorsal vertebra causing great pain, and that the injuries are permanent.

The answer admitted the occurrence, which it claimed was "horse play," and charged that the cause of action, if any, was barred by the statute of limitations.

The two assignments of error are that the trial court erred in sustaining the defendant's motion to dismiss at the conclusion of the plaintiff's evidence, and erred in overruling the plaintiff's motion for a new trial.

The sole question involved is whether the action was governed by section 25-208, R. S. 1943, which provides that actions for assault and battery must be brought within one year, or by section 25-207, which provides that actions for tort can be brought within four years. The petition in this case was filed over a year and a half after the action arose.

If the act of the defendant was a battery, the Nebraska law requires that it should be filed within one year, and on that point alone the trial judge dismissed plaintiff's action.

We will examine several definitions of a battery by various authorities.

"A battery is defined as an actual infliction of vio-

lence on the person, or an unlawful, that is, an angry, rude, insolent, or revengeful touching of the person. Hilliard on Torts (3d Ed.) 181, Secs. 8 and 9." Razor v. Kinsey, 55 Ill. App. 605.

"The intention to do harm is of the essence of an assault; * * *." 2 Greenleaf, Evidence, § 83, p. 70.

"An assault and battery is not negligence. The former is intentional; the latter is unintentional." 6 C. J. S., Assault and Battery, § 11, p. 804.

"Bishop, in his work on Criminal Law, volume 2, section 72, says that to constitute a battery 'there must be some sort of evil in the intent.' We are, therefore, prepared to say that to constitute an assault and battery under the foregoing definitions the act complained of must be done with a hostile intent. * * * Under the petition as drawn the plaintiff is entitled to recover upon showing any degree of negligence, whether ordinary or gross, and we do not think that mere acts of negligence, in any of its degrees, are assaults and batteries in the meaning of the statute." Perkins v. Stein & Co., 94 Ky. 433, 22 S. W. 649.

The limit for bringing actions in Minnesota and Wisconsin for battery is two years, and we cite a case from each court.

"The action for a battery which must be brought within two years is therefore held to be an intentionally administered injury to the person." Donner v. Graap, 134 Wis. 523, 115 N. W. 125.

"The action for a battery which, under the provisions of section 8, supra, must be brought within two years, is an action founded upon an intentionally administered injury to the person,- such an injury as could be made the basis of a criminal prosecution." Ott v. Great Northern Ry. Co., 70 Minn. 50, 72 N. W. 833.

This court has said that "Assault and battery consists in an injury actually done to the person of another in an angry, resentful, or insolent manner." Miller v. Olander, 133 Neb. 762, 277 N. W. 72.

After this discussion of battery, we will now examine the negligence rule as applicable to the case at bar. Although it may be true that every personal injury committed through negligence is, strictly speaking, a "battery," within the common-law definition, it does not follow that the word "battery," as used in section 25-208, R. S. 1943, is to be construed to include all personal injury actions. The action for a battery, brought within the one-year limitation, is proper if founded upon an intentionally administered injury to the person. But there is another class of cases in which the personal injury occurred through the negligent act of one person, and such negligent acts do not come within the definitions of assault and battery heretofore set out, for the intention to inflict the injury is entirely lacking. 4 Am. Jur., Assault and Battery, § 3, p. 126. See, also, Baltimore City Passenger Ry. Co. v. Tanner, 90 Md. 315, 45 A. 188; Johnston v. Pittard, 62 Ga. App. 550, 8 S. E. 2d 717.

"The fact that a practical joke is the cause of an injury to a person does not excuse the perpetrator from liability in damages for the injury sustained." 52 Am. Jur., Torts, § 90, p. 436.

In the case of Great Atlantic & Pacific Tea Co. v. Roch, 160 Md. 189, 153 A. 22, where a dead rat was substituted for a loaf of bread in a package, which caused plaintiff such fright when she opened the package that she became a nervous wreck, the verdict for plaintiff was sustained. It was held that damages may be recovered for physical injuries caused by shock or fright.

Another illustration of the rule is shown in a case which occurred in 1891, where the defendant took away the lines so a horse could not be driven. The plaintiff brought suit for damages. The trial court said that if the defendant would return the lines he would dismiss the jury from further consideration of the case. Upon appeal, the Supreme Court reversed this dismissal, and said that the question could not be legally taken

from the jury and settled by the court. Wartman v. Swindell, 54 N. J. L. 589, 25 A. 356, 18 L. R. A. 44.

"It is reasonable to suppose that the law-makers had in mind an action *vi et armis* against the person when they used the words, 'an action to recover damages for assault and battery,' and meant to exclude an action for injury to the person by negligence, which at common law was an action on the case." Rieger v. Fahys Watch-Case Co., 20 N. Y. Civ. Pr. Rep. 204, 13 N. Y. Supp. 788.

It is a general rule that, when one does an act which proves injurious to another, civil liability usually follows from the existence of a right in the injured person. Although the act was done without malice, and no mischief was intended, he may be held answerable for the injuries which follow. See 26 R. C. L., Torts, § 6, p. 759; 22 Am. Jur., Explosions and Explosives, § 11, p. 131.

In the case at bar, we have reached the conclusion that, while actions for assault and battery, under section 25-208, R. S. 1943, must be brought within one year, this action is one for negligence, being an act which an ordinarily prudent man would not have done, and therefore, being in tort, may be brought within four years, as provided in section 25-207, R. S. 1943.

Having reached this conclusion, it follows that the trial court erroneously directed a verdict for the defendant. The judgment is hereby reversed and the cause is remanded for a new trial.

REVERSED AND REMANDED.