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# PAT O'CONNOR, APPELLEE, V. DANIEL M. ABBOTT ET AL., APPELLANTS.

279 N. W. 20[illegible]

FILED APRIL 15, 1938. No. 30339.

1. **Judgment:** RES JUDICATA. A judgment will not operate as *res judicata* unless it appears on the face of the record, or is shown by extrinsic evidence, that the precise question was raised and determined in the former suit.
2. **Workmen's Compensation:** BURDEN OF PROOF. "In a suit under the workmen's compensation law, the burden of proof is upon the claimant to show that he suffered an injury and that the injury resulted from an accident arising out of and in the course of his employment." *Price v. Burlington Refrigerator Express Co.*, 131 Neb. 657, 269 N. W. 425.
3. ———: ———. "Awards for compensation cannot be based upon possibilities or probabilities. They must be supported by evidence showing that claimant has incurred a disability arising out of and in the course of his employment." *Price v. Burlington Refrigerator Express Co.*, 131 Neb. 657, 269 N. W. 425.

APPEAL from the district court for Richardson county: VIRGIL FALLOON, JUDGE. *Reversed, with directions.*

*Paul P. Chaney* and *Chambers, Holland & Locke,* for appellants.

*LeRoy G. Stohlman, contra.*

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

GOSS, C. J.

This is an appeal from a judgment of the district court affirming an award of the workmen's compensation court.

This was a second complaint filed by O'Connor. In the first petition O'Connor claimed that on July 3, 1936, while engaged in his duties as a night watchman for Daniel M. Abbott, his employer, he fell from a window and sustained compensable injuries. An award was made in his favor and defendants appealed. Thereafter a rehearing was had and the compensation court entered an order dismissing O'Connor's petition. He took no appeal.

Later O'Connor filed another complaint in the compensation court, in which he contended that he suffered a heat-stroke about 4:30 p. m. on July 3, 1936, arising out of and in the course of his employment by Abbott as a hod-carrier, and as a direct result of the heat-stroke he fell from a window about 11:30 the same night and received compensable injuries. Defendants, in addition to the usual denials, pleaded that the matter had been adjudicated in the first hearing. Plaintiff's reply denied that the matter adjudicated was the same as alleged here. The compensation court heard the case very fully on the evidence and made an award in favor of O'Connor. Defendants appealed. The case was tried in the district court on the evidence contained in the bill of exceptions brought up from the compensation court. The district court affirmed the findings of the compensation court and awarded an attorney's fee of $150 to O'Connor's attorney. Defendants appealed to this court.

The main question is whether the evidence is sufficient to sustain the findings of the district court. The workmen's compensation law was amended by chapter 57, Laws 1935. The particular change to which we call attention is carried forward into the 1935 Comp. St. Supp. as section 48-174, in these words: "Provided, that a judgment, order or award of the district court may be modified or set aside only upon the following grounds: * * * (3) 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. (4) That the findings of fact by the court do not support the order or award."

The evidence establishes that O'Connor was, at the time alleged, July 3, 1936, employed by Abbott, and on that day the official record showed the temperature reached 106 degrees and that there was some breeze. Abbott was engaged upon a contract to repair a hotel and the particular employment of O'Connor was the preparation of plaster and carrying it upstairs to the plasterers. The

mortar was mixed on the street, but in such a position that the sun beat down upon O'Connor as he was mixing it and the wind was largely prevented from reaching him by the buildings and trees and material. He had to carry the mixture upstairs and deliver it to the two plasterers he was serving. There is evidence that he complained of the effect of the heat and that he ceased to work about 4 or 4:30 o'clock because of the heat. O'Connor himself testified that he felt nervous and fidgety, and when he was carrying the last hod of plaster upstairs he had a dizzy spell, objects in the form of "black beads came in front" of him, he craved something cold to drink, had to rest on the stairs, dumped his hod for the plasterers to use the plaster, and quit. He had cramps in his stomach and was sick. So he quit carrying plaster, but after a rest of perhaps ten minutes he broke up some chunks of lime to get it soaked, and after that he quit for the day. His testimony is that he did not get away from the job until 7:30 at night. Then he had supper of cornflakes and milk and went for a walk of about two miles to the Burlington depot and got a ride back, looked at the job about 10:15 p. m. and saw that it was all right. He then drank three bottles of beer, went to his room in the hotel they were plastering, got a cramp in his right leg and a cramp in his left side and abdomen, went to the window for air and to rub his leg, claimed to have lost consciousness, fell out and was injured.

Dr. Clayton Andrews, a member of the medical advisory board of the state of Nebraska, testified on behalf of O'Connor that O'Connor appeared on September 15, 1936, and he took a history of his illness and examined him. Answering a hypothetical question, purporting to contain the elements of the history of O'Connor's condition on July 3, 1936, and asked whether O'Connor had sustained a heat-stroke on that day, the witness said: "He was very definitely affected by the heat. Whether or not you should call it a heat-stroke is simply a matter of degree. All people who have heat-strokes do not

lose consciousness. In my opinion he was made ill by the heat. That is the fairest way it can be stated." This doctor expressed the opinion that three bottles of beer would not cause intoxication of an adult person.

Dr. C. L. Hustead of Falls City, who has practiced medicine 25 years, testified that the man was brought in about midnight of July 3, 1936; he described his injuries and said he was under the influence of liquor; he was led to that conclusion because the patient was "quite talkative, very rank liquor breath—odor upon his breath—and he admitted to me, told me he had been drinking very heavy of 12 per cent. ale." The patient came back to the hospital the next day and remained two days. This doctor testified that, when the patient was examined, his "pulse was slow, which would be directly opposite what you would get with a heat-stroke, his respiration was regular and normal, not labored, which is directly opposite what you would get in a heat-stroke, wasn't any psychosis, but he did have a lot of flush on his face, had had no vomiting, I asked him about the vomiting; he did have a terrible rancid liquor breath—beer odor on his breath—he had no symptoms I would connect with heat-stroke in any manner, shape or form."

Dr. Hustead testified that O'Connor gave him no history that he had been overcome by the heat during the day.

It is patent that the claim of O'Connor having been defeated in his suit for compensation on the ground that he was employed as a night watchman and fell out of the window while he was so engaged is not *res judicata* of the present claim that, while in the employ of Abbott, he suffered a heat-stroke during the afternoon, and at 11 or 11:30 p. m., while suffering illness as a result of that heat-stroke, fell out of the window and injured himself. Each is a separate case and stands on its own facts. That he was unable to prevail in his first claim as to the nature of his employment does not defeat or affect the present claim. A judgment will not operate as *res*

*judicata* unless it appears on the face of the record, or is shown by extrinsic evidence, that the precise question was raised and determined in the former suit.

But, in the present claim, it is not clearly shown that the fall was occasioned by the alleged heat-stroke. It may be conceded that, in the place where O'Connor worked in mixing the mortar, it was hot during the afternoon and that he was shut off from the effects of the breeze, and therefore subjected to a greater hazard from the heat than others in that neighborhood. But he had been able to carry on his arduous work of mixing the plaster and carrying it to the workmen plastering on the second floor until 4 or 4:30 p. m. of that afternoon. After that hour he did not finally leave the job for the day until about 7 o'clock, before which time he had slacked the lime for the batch of the next day. After that he was able to eat his evening meal, to walk two miles to the Burlington depot, and otherwise to put in his time until about 11 o'clock, when he went to his room and the injury occurred as heretofore related.

We do not derive from the record the facts sustaining the judgment of either the compensation court or the district court that we understand it was incumbent on the claimant to prove. We are of the opinion the proofs fail to show that the claimant sustained his injury as a result of a heat-stroke suffered by him while he was working during the day of his accident, and that the proof depends too much upon the possibility, or at the very strongest upon the probability, that the alleged heat-stroke caused him to fall from the window and be injured. The facts that he was able to slack his lime for the next day, that he was able to walk two miles to the depot, and that he spent the evening without any great discomfort seem to us to fail to raise his proof to any standard higher than that of a possibility that the effects of the heat-stroke of the afternoon persisted and caused him to fall from the window. It is not necessary for us to adopt the suggestion of the evidence that he was intoxicated and

that caused his fall from the window. In a recent case, *Price v. Burlington Refrigerator Express Co.*, 131 Neb. 657, 269 N. W. 425, we said:

"In a suit under the workmen's compensation law, the burden of proof is upon the claimant to show that he suffered an injury and that the injury resulted from an accident arising out of and in the course of his employment.

"Awards for compensation cannot be based upon possibilities or probabilities. They must be supported by evidence showing that claimant has incurred a disability arising out of and in the course of his employment."

The ruling in the above case is supported by many cases in recent years: *Bartlett v. Eaton*, 123 Neb. 599, 243 N. W. 772; *Townsend v. Loeffelbein*, 123 Neb. 791, 244 N. W. 418; *Kuhtnick v. Carey*, 124 Neb. 762, 248 N. W. 89; *Mullen v. City of Hastings*, 125 Neb. 172, 249 N. W. 560; *Huffman v. Great Western Sugar Co.*, 125 Neb. 302, 250 N. W. 70; *Saxton v. Sinclair Refining Co.*, 125 Neb. 468, 250 N. W. 655; *Hudson v. City of Lincoln*, 128 Neb. 202, 258 N. W. 398; *Milton v. City of Gordon*, 129 Neb. 888, 263 N. W. 208.

For the reasons stated, the judgment of the district court is reversed, with directions to enter a finding and judgment for defendants.

REVERSED.

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ANTONIO BONACCI, APPELLANT, V. THOMAS CERRA, APPELLEE.

279 N. W. 173

FILED APRIL 15, 1938. No. 30168.

1. Pleading: REPLY. "The office of a reply is to deny the facts alleged in the answer as a defense, or to allege matters in avoidance of such defense not inconsistent with the cause of action set out in the petition." *Plummer, Perry & Co. v. Rohman*, 61 Neb. 61, 84 N. W. 600.
2. ———. "Statements, admissions and allegations in pleadings

(upon which the case is tried) are always in evidence for all the purposes of the trial; they are before the court and jury, and may be used for any legitimate purpose." *Holmes v. Jones*, 121 N. Y. 461, 24 N. E. 701.

3. ———. A party may at any and all times invoke the language of his opponent's pleading, on which a case is being tried, on a particular issue, as rendering certain facts indisputable; and in doing this he is neither required nor allowed to offer such pleading in evidence in the ordinary manner.
4. Trial. "The value of testimony where the witness refuses to testify positively to the facts, is for the jury to determine, and will vary with the surrounding circumstances and the manner and appearance of the witness." *Collins v. Hughes & Riddle*, *ante*, p. 380, 278 N. W. 888.
5. Appeal. Evidence and pleadings examined, and *held* ample to support the verdict returned and judgment entered thereon.
6. Trial. Where, in an action to recover for personal injuries, the jury are properly instructed as to the burden of proving the negligence charged as a proximate cause of the injury, failure to further instruct on "unavoidable accident" or to further define that term is not error in the absence of a request therefor.

APPEAL from the district court for Douglas county: CHARLES LESLIE, JUDGE. *Affirmed.*

*O'Sullivan & Southard* and *George H. Merten*, for appellant.

*Crofoot, Fraser, Connolly & Stryker, contra.*

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

EBERLY, J.

This is a suit to recover damages for injuries alleged to have been received by plaintiff while riding as a guest in defendant's automobile, due to the latter's alleged gross negligence. A trial to a jury resulted in a verdict and judgment for defendant, and from the order of the trial court overruling his motion for a new trial, plaintiff appeals. For convenience the parties to this appeal will be referred to as they appeared in the trial court.

In this court plaintiff presents but four contentions,

viz.: That the verdict is not sustained by sufficient evidence; and that the court erred in giving instructions 6, 8, and 9 given on its own motion. The last three are combined in plaintiff's argument and presented together.

An examination of the briefs presented in this case discloses that its consideration may be simplified by a determination of the actual issues presented by the pleadings and tried in the district court.

It will be remembered that this jurisdiction has long been committed to the rule that a plaintiff must recover, if at all, on the cause of action stated in his petition. It is not the province of a reply to introduce a new cause of action. *Hastings School District v. Caldwell, Hamilton & Co.*, 16 Neb. 68, 19 N. W. 634; *Savage v. Aiken*, 21 Neb. 605, 33 N. W. 241; *Wigton v. Smith*, 46 Neb. 461, 64 N. W. 1080; *Snyder v. Johnson*, 69 Neb. 266, 95 N. W. 692; *Hallner v. Union Transfer Co.*, 79 Neb. 215, 112 N. W. 334.

"The office of a reply is to deny the facts alleged in the answer as a defense, or to allege matters in avoidance of such defense not inconsistent with the cause of action set out in the petition." *Plummer, Perry & Co. v. Rohman*, 61 Neb. 61, 84 N. W. 600.

In *Kearney County Bank v. Zimmerman*, 5 Neb. (Unof.) 556, 99 N. W. 524, we find the following: "It is contended by appellants, and we think with much force, that the judgment in favor of plaintiff in the court below cannot be sustained unless supported by sufficient allegations in the petition; and that it is not the province of a reply to * * * supply material allegations to the original petition."

And, stating the conclusion of this court in *Livanis v. Northport Irrigation District*, 120 Neb. 314, 232 N. W. 583, the opinion closes with the following: "In the instant case, the petition, contradicted by the admission in the reply and not being aided by the new allegations therein, required the judgment of the trial court."

The conclusion is that the reply must be consistent

with the allegations of the petition, and is not competent to supply or add thereto a material allegation.

It further appears that plaintiff specifically alleged in his petition, upon which this action was tried, that certain acts of commission and omission constituted the gross negligence of which defendant was guilty, which were, in part, incorporated into instruction 1 of the court given in this case in the following form, viz.: "Plaintiff further alleges that while riding in said automobile at said time and place, defendant operated same at an excessive and illegal rate of speed, to wit, seventy miles an hour, and in such a grossly negligent manner that he drove said automobile off the right side of the highway pavement, and then back onto said highway pavement to the left of the center, and then to the right side of the center of the pavement, and then again to the left side of the pavement, and then drove said automobile off the pavement upon and over the left shoulder, and then continued to drive it at said excessive rate of speed, causing said automobile to leave the shoulder on the left side of the pavement, and driven down an embankment, causing it to turn over, and plaintiff to suffer severe personal injuries."

The petition also alleged that the distance traveled by this automobile, while weaving from one side of the roadway to the other, was 150 yards, which, consistent with these allegations, we estimate occupied approximately four seconds of time. This petition is subscribed and sworn to by plaintiff.

Defendant's answer was limited, first, to a proper denial of the charge of negligence; and, second, to the following: "For further answer this defendant alleges that at said time and place he was driving said automobile east on said highway in a careful and proper manner; that at said time a large nail or spike became imbedded in the right rear tire of said automobile, causing same to be suddenly deflated; that this defendant applied his brakes and attempted to slow and stop said automobile, but on account of the deflated tire said automobile became

unmanageable and went off the left side of the road into a ditch, and this defendant alleges that said accident occurred without fault or negligence upon his part, and at a time when he was using his best endeavors to avert an accident."

By instruction No. 3 the jury were informed, viz.: "The plaintiff for reply to the answer of the defendant denies each and every allegation of new matter set forth by defendant in his answer as a defense to plaintiff's cause of action."

By the fourth instruction the jury were informed as to the burden of proof imposed by the issues on plaintiff, which he was required to carry to entitle him to a recovery, and by the fifth instruction gross negligence was defined, and the jury were further instructed therein: "In this action it is incumbent upon the plaintiff to establish by a preponderance of the evidence that the defendant was guilty of gross negligence, as hereinbefore defined, and in the event that plaintiff has failed to so establish gross negligence upon the part of the defendant by a preponderance of the evidence, your verdict must be for the defendant, even though you may find that the defendant was in fact guilty of ordinary negligence or slight negligence in the operation of his automobile."

It will be noted that no attack is made by plaintiff upon the correctness of these instructions.

For the purpose of this review, the jury's verdict determines for this court all questions of conflicting evidence. An examination of this car very shortly after the accident disclosed that this wrecked automobile was on its wheels on the left side of the road (U. S. Highway No. 30) at a point about five miles east of Grand Island, Nebraska, and showed evidence that it had rolled over once or possibly twice. "The right rear wheel (tire) was down" and a nail "about five inches long" was imbedded in it. The time of this occurrence was just after noon. It was a bright, clear day. The car had been proceeding eastward on a straight highway over a dry, smooth, level pavement, 18

feet in width, separated into two halves by a black strip marking the center of the road, and in which highway no defects are disclosed. No obstruction to the view existed and no other automobiles or vehicles were in sight. It appears that the tires were previously in good condition, and had been successfully tested by a journey of 700 miles.

The plaintiff in his brief insists that the speed of the automobile was established, at the time of the accident, as 80 miles an hour; that "in the case at bar there is absolutely no evidence that there was a nail in the tire *before* the automobile left the pavement, and no evidence of swaying or swerving of the automobile on the pavement. * * * All the evidence is direct, positive and uncontradicted that there was no flat tire *before* the defendant Cerra's automobile left the pavement, and there was no swerving of his automobile from side to side." On this basis plaintiff contends that, "while a given condition, shown to exist at a given time, may be presumed to have continued, *there is not,* on the other hand, *any presumption that it existed previous to the time shown.*" He further insists that, therefore, in the instant case, the nail in the tire, first discovered after the accident, would not support a legitimate presumption that it was the cause of what had happened.

It is thought the circumstances of this case wholly fail to justify these conclusions. It is obvious that plaintiff's contention in his brief that there was no swerving of the automobile from side to side ignores, and is wholly inconsistent with, the clear and definite allegations of his verified petition on which the case was tried. Wigmore states the rule applicable and controlling under the circumstances here presented, as follows:

"The pleadings in a cause are, for the purposes of use in that suit, not mere ordinary admissions, * * * but judicial admissions * * * i. e., they are not a means of evidence, but a waiver of all controversy (so far as the opponent may desire to take advantage of them) and

therefore a limitation of the issues. Neither party may dispute beyond these limits. Thus, any reference that may be made to them, where the one party desires to avail himself of the other's pleading, is not a process of using evidence, but an invocation of the right to confine the issues and to insist on treating as established the facts admitted in the pleadings.

"This much being generally conceded, it follows that a *party may* at any and all times *invoke the language of his opponent's pleading on that particular issue* as rendering certain facts *indisputable*; and that, in doing this, he is on the one hand neither required nor allowed to *offer the pleading in evidence* in the ordinary manner, nor on the other hand forbidden to comment in argument without having made a formal offer; for he is merely advocating a construction of the *infra*-judicial act of waiver of proof." 2 Wigmore, Evidence (2d ed.) sec. 1064.

This doctrine is, in general terms, fully recognized by our Civil Code, Comp. St. 1929, sec. 20-1315.

"In fact admissions in the pleadings cannot be either proved or disproved on the trial, but must be accepted for whatever they amount to in legal effect, without reference to any other evidence that may be adduced." 1 Phillips, Evidence (4th Am. ed.) 795. See, 1 Encyclopedia of Evidence, 422.

"The pleadings in a cause (upon which it is tried) are before the court and constitute a part of its proceedings, without being introduced in evidence. The averments contained in, and the admissions, if any, made by, such pleadings, may be commented upon before the jury in the same manner as any other facts appearing in the cause." *Colter v. Calloway*, 68 Ind. 219.

"Where, in an action to recover a money judgment, the answer of the defendant admits the right of the plaintiff to judgment for any sum, the defendant cannot give evidence contradicting the admission of his answer, nor can the plaintiff introduce the answer in evidence; and it is the duty of the court, regardless of an adverse verdict,

to render judgment for the plaintiff for that sum, without evidence." *New Albany & Vincennes Plank Road Co. v. Stallcup,* 62 Ind. 345. See, also, 1 Greenleaf, Evidence (13th ed.) secs. 27, 205; The Chamberlayne Trial Evidence (Tompkins) 446 *et seq.*

"Statements, admissions and allegations in pleadings (upon which the case is tried) are always in evidence for all the purposes of the trial; they are before the court and jury, and may be used for any legitimate purpose." *Holmes v. Jones,* 121 N. Y. 461, 24 N. E. 701.

*Colter v. Calloway, supra,* and *Holmes v. Jones, supra,* were cited to this court in *Woodworth v. Thompson,* 44 Neb. 311, 315, 62 N. W. 450, and were, by implication, approved, though expressly distinguished from the case then under consideration by this court.

Neither can we accept plaintiff's contention as to the rate of speed of the automobile at the time of the accident. True, 80 miles an hour is alleged in the reply, and testimony of plaintiff appears in the record tending to sustain that rate, but plaintiff's petition, verified by him, alleges the speed to have been 70 miles an hour. The instructions of the trial court, in stating the issues, properly followed the petition, and thus the charge of speed is limited to 70 miles an hour. The evidence of the defendant in the record is that the speed of the car at the time of the accident was "about fifty-five or sixty (miles an hour), I guess." The condition of the present record on this point invokes the application of the rule, viz.: "The value of testimony where the witness refuses to testify positively to the facts, is for the jury to determine, and will vary with the surrounding circumstances and the manner and appearance of the witness." *Collins v. Hughes & Riddle, ante,* p. 380, 278 N. W. 888. In view of the entire record, it follows that, the verdict of the jury being adverse to plaintiff, this question is concluded contrary to his present contention.

Neither are we in accord with plaintiff's contention that the facts disclosed by the record are insufficient to

support the conclusion that the imbedded nail deflated the right rear tire of the automobile, and thus caused the accident. The swerving of the car as it passed over the last 150 yards, which plaintiff's pleading establishes as an indisputable fact, in connection with the evidence in the record, affords ample basis for the contrary conclusion, and fully sustains the jury's verdict in the instant case on the theory that the accident was proximately caused by the puncture and deflation of the tire, and that the defendant was not guilty of gross negligence in connection therewith. *Kelly v. Gagnon,* 121 Neb. 113, 236 N. W. 160; *Heesacker v. Bosted,* 131 Neb. 42, 267 N. W. 177; *Seligman v. Hammond,* 205 Wis. 199, 236 N. W. 115; *Cornwell v. O'Connor,* 134 Kan. 269, 5 Pac. (2d) 861; *Anderson v. Anderson,* 142 Kan. 463, 50 Pac. (2d) 995; *Barber v. Gordon,* 111 Cal. App. 279, 295 Pac. 377; *Doggett v. Lacey,* 121 Cal. App. 395, 9 Pac. (2d) 257; *Markussen v. Mengedoht,* 132 Neb. 472, 272 N. W. 241.

We do not overlook plaintiff's contention that the trial court committed error in the use of the term "unavoidable accident" in instruction 6, in the following connection, viz.: "If you find that the accident was caused or brought about without gross negligence on the part of the defendant, or was caused by ordinary negligence or slight negligence on defendant's part, or was an unavoidable accident, your verdict must be for the defendant." It will be noted that no request for instructions on this question was made by plaintiff. Unexceptional instructions were given in this case by the trial court on the burden of establishing actionable negligence imposed by law upon the plaintiff. In this situation it appears that the rule is: "An instruction that plaintiff had the burden of showing defendant's negligence sufficiently submits the defense of unavoidable accident." 10 Blashfield, Cyclopedia of Automobile Law and Practice, 502. See, also, *Larrow v. Martell,* 92 Vt. 435, 104 Atl. 826. Under these circumstances, in Alabama it was held that either a giving or a refusal to instruct to find for defendant, if the

injury complained of was the result of a mere accident, will not be reversible error. *Smith v. Baggett,* 218 Ala. 227, 118 So. 283. In an action where the facts involved invoked similar principles, this court announced the rule, viz.: "Where, in an action to recover for personal injuries, the jury are properly instructed as to the burden of proving the negligence charged as a proximate cause of the injury, failure to further instruct on unavoidable accident not error in the absence of request therefor." *Thomas v. Haspel,* 126 Neb. 255, 253 N. W. 73. It is obvious therefore that, even if the contention of plaintiff be conceded arguendo, the matter is controlled by section 20-853, Comp. St. 1929, and substantial error does not appear.

Therefore, it follows that the judgment of the trial court is correct, and it is

AFFIRMED.

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## IN RE ESTATE OF IGNATZ KAJEWSKI. JOSEPH BOSHECK, APPELLANT, V. TERESA GAPPA ET AL., APPELLEES.

279 N. W. 185

FILED APRIL 15, 1938. No. 30236.

1. Wills: VALIDITY. Where a will contains a bequest due to undue influence, it may stand as to other bequests not so procured.
2. Trial. The trial judge is not required to submit forms of verdict to jury, but does so merely as a matter of convenience.
3. Wills. Where, as in this case, the jury were clearly instructed as to the findings allowable, and were not misled by the forms of verdict submitted, it is not prejudicially erroneous to omit to submit forms of all possible verdicts.
4. Trial. An objection to the forms of verdict should be made before or at the time the verdict is returned.
5. Wills: UNDUE INFLUENCE: BURDEN OF PROOF. The burden of proving that a will resulted from undue influence is ordinarily upon the contestants who assert it.

6. ———: ———. Mere suspicion of undue influence upon the testator as to the proposed will is not sufficient to require a submission of the issue to a jury, or to sustain a verdict for the contestants.
7. ———: ———: BURDEN OF PROOF. The contestants have the burden of proving that the proposed will was the result of undue influence in all cases except in such cases where the person charged with the exercising of undue influence sustains a confidential relation to the testator and is a beneficiary.
8. ———: ———: ———. A confidential advisor, receiving benefit under the will of an aged and sick person, must overcome the presumption of undue influence by competent evidence.
9. ———: ———: QUESTION FOR JURY. The question of undue influence should be submitted to the jury when the circumstances attending the execution of the will are such that reasonable minds might conclude from the evidence that it was not the voluntary act of the testator.
10. ———: ———: PRESUMPTION. Where the evidence establishes that there was no actual undue influence, the presumption that a priest receiving a beneficial bequest from a parishioner exerted undue influence disappears and is not evidence as to the fact.
11. ———. The statutes insure to every one of mature age and sound mind the right to make a will and dispose of his property as he wishes.
12. ———: COMPETENCY. Any one who understands the nature of the act, the extent of his property, the proposed disposition of it, and the natural objects of his bounty is competent to make a will.
13. Evidence: WILLS: COMPETENCY. Against the actual fact that the testator made a will according to his wishes which demonstrated his mental competency, the testimony of a medical expert in answer to a hypothetical question does not raise an issue of fact for the jury.
14. ———: ———: TESTAMENTARY CAPACITY. Evidence of testamentary incapacity is insufficient to require submission of the issue to the jury if the conclusion of the medical expert is weakened on cross-examination by an admission that the testator comprehended the extent and nature of his property, and if it definitely appears from the record that he knew his relatives.

APPEAL from the district court for Cuming county: DE WITT C. CHASE, JUDGE. *Reversed.*

*Zacek & Nicholson* and *Johnsen, Gross & Crawford,* for appellant.

*Stillman & Ptak* and *Robert R. Moodie, contra.*

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

DAY, J.

This is an appeal by the proponent, a legatee, and by the residuary legatee as intervener from a verdict and judgment denying probate of the purported will of Ignatz Kajewski, deceased. Objections to the probate of the will were that it was not legally executed; that the testator lacked testamentary capacity; and that it was procured under undue influence. The trial court withdrew the question of proper execution from the jury, and submitted the questions of testamentary capacity and undue influence. The jury found generally in favor of the objectors.

The appellant contends that the trial court erred in submitting the issues of testamentary capacity and of undue influence to the jury. He also insists that, even if there were sufficient evidence to submit the question of undue influence to the jury, the court should have submitted separate forms of verdict as to each legacy, and not merely general verdicts for the proponents or contestants. The intervener, St. Joseph's Home for Aged, particularly objects to the forms of verdict submitted to the jury for that its situation was different from that of the proponent of the will. The proponent of the will was Father Bosheck, pastor of St. Mary's Church, of which church the testator was a member. The testator was, for a period of about eighteen years during his lifetime, janitor of the church, the parochial school, and the rectory. The trial court correctly instructed the jury as to the difference between Father Bosheck and the Home for Aged when it instructed the jury that, if any beneficiary occupied any confidential relation with testator, it

became his duty to show that the purported will was not signed by the testator through undue influence. Surely under the circumstances the Home for Aged did not occupy any such confidential relation with the testator as that of priest and parishioner. The jury were given clear, detailed and specific directions as to the law applicable to the proponent and the intervener on the question of undue influence. The jury were in no wise misled by the instructions. Upon the question of undue influence, it had been held by this court that the will may be invalid as to one exerting the undue influence, and valid as to one legatee for whom no influence was present. Where a will contains a bequest due to undue influence, it may stand as to other bequests not so procured. *In re Estate of Koller,* 116 Neb. 764, 219 N. W. 4. A careful annotator states: "The authorities, with but few exceptions, support the general proposition that parts of a will may be held valid and enforceable, notwithstanding the fact that other parts have been affected by undue influence and are invalid; provided, however, that the parts so affected are separable, so that the will remains complete and intelligible in itself." 69 A. L. R. 1129. This statement is supported by the citation of many cases from various jurisdictions. The trial judge recognized this rule in his instructions to the jury. But both the proponent and the intervener complain that he erred in submitting only two forms of verdict to the jury for their use. One finding generally for the proponent, and the other for the contestants. This, it is said, had the effect of instructing the jury either to admit the will for probate or to hold it invalid. The trial judge is not required to submit forms of verdict to the jury, and it is only done for the convenience of the jury. Where, as in this case, the jury were clearly instructed as to the findings allowable, and were not misled by the forms of verdict submitted, it is not prejudicially erroneous to omit to submit forms of all possible verdicts.

The jury were not misled and the record does not dis-

close that they asked for further instructions. The parties objecting here, and for the first time in the motion for a new trial, did not object at the time the instruction was given, or request that an instruction be given as to the other possible forms of verdict. It is the rule of this jurisdiction that an objection to the forms of verdict should be made before or at the time the verdict is returned. *McGrew Machine Co. v. One Spring Alarm Clock Co.*, 124 Neb. 93, 245 N. W. 263.

It is complained by the appellant (proponent) that the evidence is insufficient to sustain a finding that the purported will was procured by undue influence. In the first place, it seems clear that, if any undue influence was exercised, it was not that of intervener, St. Joseph's Home for Aged. The will was executed in the hospital, and where the testator subsequently died. The Sister Superior in charge of the hospital and of the Home for Aged was called into the testator's room to witness, not the signing of the will, but the mark of the testator. The evidence of the objectors does not indicate that she had any ulterior motive in the matter. She was requested to sign as witness to the testator's mark, and apparently in a desire to be helpful to him complied with the request. She did not know of the contents of the will, and did not make then, or at any prior time, any suggestions as to the disposal of his estate. The Home for Aged was the residuary legatee under the proposed will. It is well settled in this state that the burden of proving that a will resulted from undue influence is ordinarily upon the contestants who assert it. *In re Estate of Kees*, 114 Neb. 512, 208 N. W. 637; *Stull v. Stull*, 1 Neb. (Unof.) 380, 96 N. W. 196; *In re Estate of Wilson*, 114 Neb. 593, 208 N. W. 961; *In re Estate of Bayer*, 119 Neb. 191, 227 N. W. 928.

It will be noted that there was no evidence introduced by the contestants sufficient to submit the question of undue influence to the jury as to the intervener, St. Joseph's Home for Aged. Mere suspicion of undue influence upon

the testator as to the proposed will is not sufficient to require a submission of the issue to the jury, or to sustain a verdict for the contestants. *In re Estate of Bayer, supra; In re Jackson's Estate,* 220 Mich. 565, 190 N. W. 762.

But the situation is slightly different as to the proponent of this will. Father Bosheck was the pastor of St. Mary's Church, and the superintendent of the parochial school connected with the church. The testator, Ignatz Kajewski, had been janitor for this church and school for about eighteen years. He was in such position when Father Bosheck became pastor, about three years before his death. The testator was a member of St. Mary's Church, and Father Bosheck was his spiritual adviser. The testator lived in the rectory with the priest. He assisted in the execution of the will in the manner delineated. When the testator was taken suddenly ill and removed to the hospital, the last rites of the church were administered to him by the assistant pastor. Father Bosheck advised him to make a will if he had any property requiring disposal. Subsequently an attorney, called at the request of the testator, went to the home of Father Bosheck and asked that he accompany him to the hospital. Father Bosheck did this, and at the request of Ignatz Kajewski made four different trips from the hospital to the testator's room in the basement of the rectory to bring certain specific articles to him. The testator knew well that which he possessed, and was not satisfied until it had all been brought to him. Father Bosheck testified that he did not know the extent of the testator's possessions, and it is evident that, had he known, so many trips would not have been necessary. The attorney gives a good account of the circumstances surrounding the execution of the will. Father Bosheck testified to the situation, as did also the witnesses to the will. Father Bosheck secured these witnesses from among visitors to the hospital. However, Father Bosheck and the testator having the relation of priest and parishioner, the burden of proof fell upon Father Bosheck to establish that he had not

exercised undue influence as alleged by the contestants. As has been stated, the contestants have the burden of proving that the proposed will was the result of undue influence in all cases where that is alleged, except in cases where the person charged with exercising undue influence sustains a confidential relation to the testator and is a beneficiary. *In re Estate of Lodge*, 123 Neb. 531, 243 N. W. 781.

As was stated by the court in the instructions, there arises a presumption of undue influence in the case of a confidential adviser who is a beneficiary. The rule is sustained by the following authorities: *In re Estate of Noren*, 119 Neb. 653, 230 N. W. 495; *In re Estate of Strelow*, 120 Neb. 235, 242, 231 N. W. 837, 233 N. W. 889. In the latter case, after an oral argument for rehearing, it was held: "In a will contest, where undue influence is alleged, that question should be submitted to the jury when the facts and circumstances proved, together with inferences fairly deducible therefrom, are such that reasonable minds might conclude that the will was not the free and voluntary act of testator, but the result of undue influence exercised upon him."

It is therefore announced as the rule of this jurisdiction that the question of undue influence should be submitted to the jury where the circumstances attending the execution of the will are such that reasonable minds might conclude from the evidence that it was not the voluntary act of the testator.

A well known authority states: "It is the general rule in practically all jurisdictions that undue influence is presumed and the burden of proof shifted so as to require the beneficiary to produce evidence which at least balances that of the contestant, when, in addition to the confidential relation, there exist suspicious circumstances, such as the fact that the beneficiary took part in the preparation or procuring of the will, or actually drafted it or assisted in its execution, or that the testator was weak-minded or in frail health and particularly suscep-

tible to influence, or that the provisions of the will are unnatural and unjust." 68 C. J. 759. Another recognized authority states the matter as follows: "It is the generally accepted view that the mere existence of confidential relations between a testator and a beneficiary under his will does not raise a presumption that the beneficiary has exercised undue influence over the testator, and does not cast upon the beneficiary the burden of disproving undue influence." 28 R. C. L. 146, sec. 100. The last text states that those consequences follow only when the beneficiary has been actively engaged in the execution of the proposed will. There are other circumstances also mentioned in the above text when the same consequences follow. The burden is upon a beneficiary of a will, when a confidential relationship existed, and where the testator is aged and infirm and makes an unnatural and unjust will, to disprove that the purported will is the result of his undue influence.

In the case at bar the appellant was the beneficiary of the testator's will, but the evidence discloses clearly that his assistance was merely that of a minister or instrument. At the request of the lawyer he accompanied him to the testator's room at the hospital. At the request of the testator he made four different trips to the room in the rectory which had served the testator to secure evidences of his ownership of property. The testator was not satisfied until he had been brought all his certificates of deposit, as well as the other evidences of his assets. None was found afterwards. The priest requested two visitors to the hospital to witness the will. He requested the Sister Superior to witness the mark. He did not suggest the disposition of any of the assets of the testator. Both the attorney and he testify as to all these circumstances surrounding the execution of the will. There is no testimony to the contrary on behalf of the beneficiaries. The evidence establishes that Father Bosheck did not interest himself in the contents of the proposed will.

The jury were correctly told that, as to the case of one

who assisted in the preparation of the will and benefited thereunder, there was a presumption that undue influence secured the will. Of course, in some criminal cases a presumption is said to be evidence, and sometimes statutes make the evidence of certain facts *prima facie* evidence of the commission of the crime. But generally presumptions are not evidence, but are merely the rule by which evidence is to be weighed and considered. In the ordinary sense a presumption is not evidence at all, but is based upon the probative strength as a matter of reasoning and inference of the evidentiary fact. The presumption is not the fact itself, but the legal consequences that are attached to it. In the present case there is no evidence of any facts from which an inference may be drawn, but the use of the presumption, which would indicate that the will was procured by undue influence. Therefore, since the presumption is the only evidence of undue influence, and the presumption is not evidence, there is no evidence sufficient to submit the question of undue influence to the jury as to Father Bosheck.

A well known authority states the rule as follows: "The presumption arising from evidence of trust and confidence may be rebutted by proof that the testator had competent independent advice or that the will was his own voluntary act, or by other evidence. Even though the contestant of a will makes out a *prima facie* case of undue influence, the proponent does not then have the burden of proving absence of undue influence, but only of rebutting the *prima facie* case with some evidence in states where the burden is on the contestant." 1 Schouler, Wills (6th ed.) sec. 311. In the present case there is no evidence on the part of the contestant which makes out a case of undue influence except alone the resort to the presumption which is not sufficient.

Another well known authority states as follows: "The better reasoned authorities hold that a presumption is not evidence of a fact, but purely a conclusion, having no probative force, and designed only to sustain the burden

of proof until evidence is introduced tending to overcome it. 'A presumption * * * cannot in itself possess probative weight, but merely necessitates evidence to meet the *prima facie* case which it creates. When evidence is introduced rebutting the presumption, the presumption disappears, leaving in evidence the basic facts which are to be weighed.'" 1 Jones, Commentaries on Evidence (2d ed.) sec. 30.

The evidence in the present case is that Father Bosheck, at the request of the testator, made several trips to secure certain papers evidencing the ownership of property, and that he did not act as scrivener of the will nor make any suggestions as to the disposition of the property. There is a total absence of proof that he exercised any influence in the procuring of the will, and the matter of undue influence as to Father Bosheck was erroneously submitted to the jury.

This court said: "Ordinarily, in a civil action, a presumption is not evidence, but a mere rule of law, and disappears when evidence on the subject is given." *Auld v. Auld,* 122 Neb. 576, 240 N. W. 756. And still more recently this court said: "The presumption against death by suicide prevails when the cause of death is unknown, but disappears when evidence is introduced tending to show the cause of death." *Falkinburg v. Prudential Ins. Co.,* 132 Neb. 831, 273 N. W. 478. A court of a near-by state gives the rule in the following language: "A presumption is not evidence of anything and only relates to a rule of law as to which party shall first go forward and produce evidence sustaining a matter in issue. A presumption will serve as and in the place of evidence in favor of one party or the other until *prima facie* evidence has been adduced by the opposite party, but the presumption should never be placed in the scale to be weighed as evidence." *Honrath v. New York Life Ins. Co.,* 275 N. W. (S. Dak.) 258. The presumption of undue influence on the part of Father Bosheck disappears when confronted with the evidence in the case disclosing that there

was in fact no procurement of the will by such influence, but that it was in fact the will of Ignatz Kajewski.

The will, under the circumstances disclosed, is not an unnatural one. The contestants, about twenty-three in number, are the sister and the nieces and nephews of the deceased. Only the sister and one nephew were present and actively participated in the contest. In fact, the record discloses that some of them had not been informed of the issues in this case, and that their names had been added to the list of contestants without their knowledge or permission. Neither of the contestants present at the trial, and only a single one of the others, attended the funeral of the deceased. They did not visit together often, and the correspondence was extremely meager. The letters in the record from the testator to all his relatives numbered five, the first written in 1920, and the last in 1928, and they do not indicate a close relationship. The contestant, Frank Gappa, had tried to borrow money from his uncle, the testator, in 1931, and was refused. At the time of his father's funeral the deceased was present. The father was a widower, his deceased wife having been the sister of the testator. While the family was together, the nephew, Frank Gappa, one of the two contestants present here, and Ignatz Kajewski were talking about another sister of testator, Mrs. Teresa Gappa, now living in Oklahoma, and who is also an active contestant of the purported will. The gist of the conversation was that the sister was very sick and needed financial help. But neither the nephew nor the deceased contributed anything to her aid in this serious and chronic illness. At the time of the execution of the will the deceased talked about his relatives, and stated that he did not wish to leave them anything. He stated that his sister, Mrs. Teresa Gappa, was probably dead as a result of her chronic illness, but even if she were not it was immaterial. The testator had not seen or visited with this sister for approximately twenty-five years. The provisions of the will were certainly consistent with his living relationship with his relatives, and,

under the circumstances, were not unnatural. It is asserted that the testator was old and infirm on March 14, 1935, but sufficient answer to this is that he knew what property he had, and where it was located. He was not satisfied without all of it, and sent Father Bosheck again and again until he had found it all in his room. There is evidence that he was sick, but no evidence that as a result of his sickness he was capable of being unduly influenced. Applying the rules applicable, there is neither evidence nor circumstances attending the execution of the will that might lead reasonable minds to conclude that the proposed will was not the voluntary act of the testator. An unavoidable suspicion amounts to nothing more than a presumption which is overcome by evidence that the testator made his will as he saw fit.

Of course, the foregoing is predicated upon the assumption that the testator had testamentary capacity. The objectors contend that he did not.

Ignatz Kajewski had been employed as janitor for St. Mary's Church and the parochial school in connection with the church for many years. When he was noticed to be unable to work because of an infection in his leg, and taken to a hospital, he executed his will. Father Bosheck, pastor of St. Mary's Church, and his assistant, advised Mr. Kajewski to make a will disposing of his property, although they did not advise any particular disposition. The will provided:

"Last Will and Testament

"Know all men by these presents: That I, Ignatz Kajewski, of West Point, Cuming county, Nebraska, considering the uncertainty of this mortal life and being of sound and disposing mind and memory and under no restraint or compulsion do hereby make, publish and declare this to be my Last Will and Testament in manner and form following, that is to say:

"First: I order and direct that my funeral expenses, expenses of last sickness, expenses of administering my estate, and all claims and demands of every nature

against my estate be paid by my executor hereinafter named as soon as possible after my death.

"Second: After the payment of the debts and expenses as provided in paragraph First I give, devise, and bequeath all of my property, real or personal of every kind or nature whatsoever, of which I may die seized, as follows:

"1. To the Pastor of St. Mary's Church West Point to be used and distributed for masses to be said for my soul the sum of $1,000.

"2. To Rev. Anton Paschang the sum of $500.

"3. To the Benedictine Fathers of Mt. Angel Oregon the sum of $500.

"4. To Rev. Joseph Bosheck all the money I may have in the banks at Panama and Portsmouth, Iowa, or in the hands of the trustees for the depositors for said banks being the State Bank of Portsmouth and the Panama Savings Bank.

"5. All the rest of my liberty bonds remaining—being what I received from Father Peitz I give to St. Mary's Church, West Point.

"6. All the rest of my property I give to St. Joseph's Home at West Point.

"Third: I hereby appoint John J. Gross to be the executor of this my said will.

"Fourth: I hereby revoke any and all former wills by me at any time made.

"In witness whereof I have hereunto set my hand this 14th day of March, 1935.

"Witness to mark

"Sister M. Antonella Ignatz X Kajewski

"(Attestation clause)"

According to the inventory the gross value of the estate is about $7,000. When he died on March 20, 1935, of streptococcic infection originating in his right leg, he was seventy-four years of age. He entered the hospital on the evening of March 13, 1935, and on the following afternoon, March 14, he made his will. The circumstances

attending the execution of the will have been further set out elsewhere in this opinion, but are applicable to this issue presented and are elaborated somewhat here. An examination of the evidence shows that witnesses who associated with him testified relative to his mental capacity. Schmitt, a clothier, knew him for almost the entire time of his residence in West Point. The testator transacted ordinary business and discussed other matters with him in his store. The witness visited him in the hospital on the evening of March 14, after the execution of the will. At that time the face was not flushed, although complaint was made of pain in his leg. The conversation was carried on in the same way it had been in the business dealings in the store.

Smith, an undertaker and furniture dealer at West Point, testified that he had known Mr. Kajewski about eleven years and had sold him glass and other materials used around the church, school and rectory. He had conversed with him on these many business transactions as well as on the ordinary affairs of life. Late in the afternoon of March 14 he was in the hospital on business, and noticed in passing his room that the testator was in bed. When he had finished his business at the hospital he stopped two or three minutes to visit with Kajewski. In response to the question of why he was there, he told Smith: "Well, they tell me my leg is sore. I don't know what business I got here. I don't feel bad." The witness did not recall any other conversation, and stated that his appearance and talk were normal.

Hugo, a plumber, had known Kajewski for about seventeen years, and during the past twelve years he had done some work at the church and school. He had become "more or less" intimately acquainted with the deceased, and had seen him at least once each week. He had visited him in the hospital on the evening of the 13th and again on the 17th. On the first visit Kajewski was rational and sound. Again he testified that the testator appeared to be one of sound mind, giving him the keys to the church and

the school with the specific instructions as to the details of the work. When this witness saw him on the 17th he was weaker and more nervous, but his mental condition "was good as ever," and he was not irrational.

These witnesses were clearly associated with the deceased for many years prior to his demise. Another was Luke Tierney, who lived at the Home for Aged. He knew Kajewski and visited with him every day in the hospital. He had known him ever since 1928 when he had first resided at the Home. The witness observed his mental condition during that time, and it was normal. On the day the will was executed he saw Kajewski three times, at 7:00 a. m., 11:00 a. m., and 5:00 p. m., and each time he asserts that his mental condition was normal.

The hospital charts were received in evidence, and together with the testimony of the superintendent nurse showed that Kajewski had a temperature all the time he was in the hospital. He had a temperature on March 14, and at 10:00 p. m. he was irrational and wanted to get out of bed.

The testimony of the attorney, John J. Gross, and others, has already been recited to the effect that he knew the property he had and was cognizant of his relatives. These witnesses were present at the execution of the will and testified as to the attending circumstances. The other witnesses other than the Sister, who was head nurse at the hospital, were Frank Gappa, a contestant and nephew, and Dr. G. Alexander Young, an alienist, who answered a hypothetical question as an expert. Frank Gappa was forty-two years of age, the son of a sister of Ignatz Kajewski. The deceased lived with his sister and her family, including the nephew, Frank Gappa, at Palo Alto, Iowa, but left there around 1912 or 1913. The nephew testified as to his actions around the farm home. He worked with him one year. The deceased never married, and never went out with girls. He smoked his pipe when he had finished his work, and he left alone even the other members of the family. He never visited his rela-

tives in Iowa very much because he feared losing his job.

These facts about the deceased about twenty-five years before were incorporated in a hypothetical question which was asked of Dr. G. Alexander Young, and in his answer he expressed the opinion that Ignatz Kajewski was of unsound mind on March 14, 1935. Of course, there are many other facts included in a long hypothetical question that is submitted to the witness. The witness never knew or saw Ignatz Kajewski, and his opinion is based solely on the facts as developed at the trial. The witness gave three sets of facts which he stated were of importance in determining this question. The first set of facts concerns the mental make-up of Ignatz Kajewski. In this category are listed his failure to have girl friends, and his persistent avoidance of the company of women; the fact that he was a bachelor at the time of his death; the fact that he avoided others, especially strangers; the fact that he was adversely affected by a storm and that he was continually fearful of losing his job. The second set of facts is that, although he had a safety deposit box, he kept his property hidden in his room in an unsafe place; and the third set of facts is that, although he had a serious blood infection, he did not see a doctor, and took care of it himself. "These facts," testified the witness, "are indication of a morbid change in this man's mind due to old age and to the infirmities that are attendant upon old age."

Several of those closely associated with the deceased during his lifetime testify that he was of sound mind. They base their conclusions upon actual transactions and visits with him. The evidence is that he directed the disposition of his property. He alone knew of its extent and the places where it was kept. He sent Father Bosheck to his room four times, and was not satisfied until each particular paper evidencing his ownership of the property had been secured. The statutes insure to every one of mature age and sound mind the right to make a will and dispose of his property as he wishes. *In re Estate of Johnson,* 100 Neb. 791, 161 N. W. 429.

It has been held by this court that any one who understands the nature of the act, the extent of his property, the proposed disposition of it, and the natural objects of his bounty is competent to make a will. The evidence indicates that Ignatz Kajewski qualified in every particular. The only evidence, if evidence that be, which justifies a submission to the jury is the opinion of the expert witness that when Mr. Kajewski made his will he was of unsound mind. Is this sufficient to take the question of testamentary capacity to the jury? We think it is not in view of the fact that all the other evidence shows that he was competent.

Mr. Kajewski accumulated all of his property, approximately $7,000, during his lifetime. He was employed at menial labor as a janitor around the church, the school and the rectory, and was paid, according to the evidence, a very insufficient amount to account for the estate which he left. As such janitor he conducted the business of buying glass for the buildings, and the other supplies that were needed. He was able to buy his own clothing and to look after his own business at that time. Still, the opinion of the expert as to his mental unsoundness was based upon facts which occurred during and before that time.

Where a will is contested on the ground of mental incapacity, it is insufficient to submit the issue to the jury on such a question when the only supporting evidence is that of an expert witness in opposition to testimony of actions and circumstances which show mental incapacity. *In re Spinner's Estate,* 248 Mich. 263, 226 N. W. 862.

A well known authority states that, where the evidence is against incapacity, the issue should not go to the jury if other evidence clearly establishes capacity. 68 C. J. 1082. This well known authority cites as illustrating the rule the following: "In a contest of a will on the ground of mental incompetency, testimony that in the opinion of witnesses the testatrix was not mentally competent to

make and execute the will, that she did not know the nature and extent of her property, that she was crazy, irrational, and made exaggerated statements as to the nature and extent of her property, was insufficient to raise a question for the jury as to whether she was incompetent at time of execution of the will, in view of the undisputed fact that she dictated her own will, the will itself negativing completely all such testimony. *In re Walz's Estate,* 215 Mich. 118, 183 N. W. 754." *In re Spinner's Estate, supra,* held: "Against the physical fact that testator actually made a will which was his own handiwork and which demonstrated mental competency, the lay and medical testimony did not raise an issue of fact for the jury."

In this case the reasons given by the expert witness were weakened on cross-examination and neutralized the effect of his testimony. He testified on cross-examination that if the testimony showed that Kajewski called for all his property, including certificates of deposit, and that he withheld fixing the amount of one of the bequests until he had checked the amount, it would indicate that he had a comprehension of the nature and extent of his property. If the testimony showed that he knew his relatives and expressed that he did not want to leave them any property, it would indicate that he had comprehension of his relatives, but would indicate a morbid change in his emotional condition. And, finally, the witness testified: "I think he knew what he was doing with his property, there is no question about that. * * * I think he did not know the natural objects of his bounty." The positive evidence disproves this theoretical conclusion. Furthermore, one of the reasons for the conclusions given was the keeping of papers in his room instead of in his box in the vault. On cross-examination he said if these papers had no intrinsic value the conclusion would be otherwise as to that matter. They had no such value. In a similar situation one court said: "Evidence of testamentary incapacity held insufficient to take case to jury; effect

of uncertain opinion of physician being neutralized by his admission on cross-examination that testator had sufficient mind and memory to understand and do everything necessary in making of valid will." *Broyles v. Able*, 208 Ky. 672, 271 S. W. 1040.

The rule applicable may be stated briefly as follows: Evidence of testamentary incapacity is insufficient to require submission of the issue to the jury if the conclusion of the medical expert is weakened on cross-examination by an admission that he comprehended the extent and nature of his property, and it definitely appears from this record that he knew his relatives.

Where there is evidence in the record, as in this case, that the testator actually made a will and disposed of his property according to his own wishes, and that he accumulated his property and was able to take care of it and other ordinary transactions of life, the opinion of the expert, based solely upon a hypothetical question, is not sufficient to require that the issue be submitted to the jury.

The trial court erred in submitting the issue of undue influence and testamentary capacity to the jury, and the judgment is reversed and the cause remanded for a new trial in conformity with this opinion.

REVERSED.

ROSE, J., dissents.

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WALTER R. PRESTON, APPELLANT, V. FARMERS IRRIGATION DISTRICT, APPELLEE.

279 N. W. 298

FILED APRIL 15, 1938. No. 30283.

**New Trial.** When the amount of damages allowed by a jury is clearly inadequate, under the evidence in the case, it is error for the trial court to refuse to set aside such verdict.

APPEAL from the district court for Scotts Bluff county: GEORGE W. IRWIN, JUDGE. *Reversed.*

*Morrow & Morrow,* for appellant.

*Neighbors & Coulter* and *Lester A. Danielson, contra.*

Heard before GOSS, C. J., EBERLY, PAINE, CARTER and MESSMORE, JJ., and LIGHTNER and SPEAR, District Judges.

PAINE, J.

Plaintiff brought action against the Farmers Irrigation District, defendant and appellee, to recover damages of $2,656.74 to an 80-acre tract of ground and the crops growing thereon, because of the wrongful failure of defendant to deliver water from its canal for irrigation purposes. The jury returned a verdict for only $118.75, upon which judgment was entered. Plaintiff has appealed.

Plaintiff sets out many assignments of error, among them that the verdict was not sustained by the evidence and is contrary to the evidence; that the verdict is so inadequate as to raise the presumption that it was the result of passion and prejudice, for it allows only a fractional part of the actual damages plaintiff was entitled to recover. The plaintiff then sets out a number of interrogatories, to which his objections were overruled during the trial and answers permitted to be made, and charges that the court committed prejudicial error in each of such rulings.

In 1891 the Farmers Canal Company issued certain water-right contracts, all identical in form, and when the plaintiff became the owner of the north half of the northeast quarter of section 21, township 23 north, range 57 west, in Scotts Bluff county, he thereby became the owner of one of these water-right contracts. The said contract, passing to him from the former owners of the land, is set out in full in the petition. The defendant, Farmers Irrigation District, now owns the canal formerly owned by the Farmers Canal Company, purchasing the same from the Tri-State Land Company, a New Jersey corporation. Such contract issued in 1891 provided generally that, in consideration of $200, receipt of which was acknowledged, the successors and assigns of the Farmers Canal Com-

pany agree to deliver to the second party, their heirs and assigns, during the irrigation season of each and every year in perpetuity, 80 square inches of water continually flowing through and during the irrigation season of each and every year thereafter, and, further, that it will deliver such water, at the headgates erected and provided by the second party along the line of said canal, in such amount at each headgate as may be directed by the party of the second part, but the total amount of water delivered not to exceed 80 square inches of flowing water.

The contract provided that the water should be measured according to the following rules: An inch of water shall be a quantity flowing through an inch-square orifice with a five-inch pressure; the flume at each and every headgate shall be at least 12 feet in length, and at the end nearest the canal shall be placed a movable gate for receiving the water, and at the opposite end of the flume the orifice for delivering the water shall be one inch square for each square inch of water to be delivered, and the receiving gate shall be raised high enough to allow the water to flow through in sufficient quantity to stand five inches above the upper line of the delivery orifice; to secure the faithful performance of this contract, the canal company and its successors and assigns forever waive all right to prorate the water in said canal, and the second party, his heirs and assigns forever, shall be supplied with water first in preference over any and all subsequent stockholders in said canal, and that this perpetual water right shall be forever free from any and all assessments or taxes of any nature or any purpose whatsoever. The quantity of water specified in all of these contracts was approximately 2,740 inches, and the agricultural land thereunder was 2,612 acres for irrigation in the season of 1934.

The defendant for answer admitted certain paragraphs of the petition, but denied others. In paragraph 7 the defendant alleged that all of the water diverted from the North Platte river into the canal, exclusive of storage

water, during the months of July, August, and September, was water obtained by contract with the Mitchell Irrigation District, and that plaintiff was not a party to said contract nor to said litigation, and alleged that, had not the contract between the defendant and the Mitchell Irrigation District, settling the controversy for the year 1934, been entered into, even with the water obtained thereby there was insufficient water available in the river for diversion into the defendant's canal, after allowing for loss and seepage and evaporation, to supply plaintiff and other holders of similar contracts with the amount of water provided in their contracts.

Defendant further alleged in its answer that plaintiff's contract is contrary to public policy, is null and void in so far as it attempts to give a preference right to the plaintiff, and that it would constitute a fraud upon the landowners within the district.

The plaintiff and holders of other priority contracts were entitled to receive water during the irrigation season of 1934 for approximately 2,612 acres of land. In the Farmers Irrigation District there were approximately 63,000 acres of land. The water from about the 1st of July, 1934, was insufficient to irrigate all the land, and the defendant district undertook to prorate the supply of it to all of the land. On the basis of 1/70 of one second foot of water for each acre, it would require 37.3 second feet of water to properly irrigate the 2,612 acres of priority contract holders. It is disclosed in the evidence of plaintiff that there were only seven days in July and three days in August in which there were less than 37.3 second feet of natural flow of the river diverted into the canal, and the supply was ample during practically all of the three months to have furnished priority contract holders the water to which they were entitled under the contracts.

There is a conflict in the evidence as to the exact amount of water received by the plaintiff during three of the months in dispute, which question was for the de-

termination of the jury. The plaintiff's evidence disclosed that his damages from failure of defendant to deliver the quantity of water to which he was entitled caused a loss of 34 tons of alfalfa at $12 a ton, $408; loss of blue grass pasture, $156; loss of 11.5 tons of hay on the new alfalfa seeding at $12 a ton, $138; loss of 23 acres of new seeding of alfalfa at $30 an acre, $690; making a total on these items alone of $1,392. Plaintiff alleged that he expended $275 to install an electric plant to pump water from Sheep creek to irrigate his land, and $40 for the current to operate said plant, but this plant can still be used by the plaintiff.

The plaintiff claims that the testimony of Phil Sheldon, Otto Juergens, and William Johnson, three of the defendant's expert witnesses, admits damage to 7.6 acres of young alfalfa of $228, to alfalfa hay of $45.60, also some damage to potatoes. It will be seen at a glance that the amount of these items is greater than the amount of the damage the jury returned.

In setting forth these items, it is understood that the defendant at all times insists that plaintiff suffered no damage to his crops other than was rightfully attributable to the shortage of the natural flow of water. A very large amount of testimony is found in the two volumes of the bill of exceptions tending to prove that defendant discharged more water into Sheep creek lateral during a part of this time than the plaintiff and other holders of preferred right contracts who took their supply for irrigation from this lateral were entitled to receive. Defendant insists that its evidence proves that it did not wrongfully withhold water from plaintiff during the month of August, but that it was physically impossible to make deliveries because of the extreme shortage of the natural flow of water; that the holders of preferred rights adjoining the Sheep creek lateral were being rotated in pursuance of some understanding reached among themselves.

The defendant argues that plaintiff would have suffered some damage if he had received all the water to which he

claimed to be entitled, and the court should have directed a verdict for defendant.

This mass of testimony was all properly submitted to the jury, and the trial court instructed the jury that the questions for their determination were these:

"First. Was the plaintiff prevented by the defendant from obtaining the water which he was entitled to receive from defendant's canal under the water-right contract owned by him for the irrigation of his land above described for July, August, and September, 1934, and if you so find, to what extent?

"Second. If you find from the evidence that plaintiff was prevented from obtaining water to which he was entitled under said contract for the irrigation of said land during said time, was his land and the crops growing thereon, or either the land or the crops growing thereon, damaged as a result of such prevention?

"Third. The amount plaintiff was damaged thereby, if any, you so find."

The jury found that plaintiff was prevented from obtaining the water he was entitled to receive, and returned a verdict which it is claimed is inadequate under the undisputed evidence.

We realize, as defendant argues, that a verdict based on conflicting evidence will not ordinarily be set aside unless clearly wrong. *Parkert v. Department of Public Works,* 131 Neb. 346, 267 N. W. 925.

Many of the early decisions in Nebraska held that a new trial could not be granted on account of the smallness of a verdict. Most of such decisions were based on section 315 of the Code of Civil Procedure of our state, which section was repealed by chapter 169, Laws 1911. 88 A. L. R. 943, Ann.

However, section 20-1142, Comp. St. 1929, provides clearly that a new trial may be granted: "Fifth. Error in the assessment of the amount of recovery, whether too large or too small, where the action is upon a contract, or for the injury or detention of property."

When the amount of the damages allowed by a jury is inadequate under the evidence in the case, it is error for the trial court to refuse to set aside such verdict. *First Nat. Bank of Dorchester v. Smith,* 39 Neb. 90, 57 N. W. 996; *Yager v. Exchange Nat. Bank of Hastings,* 57 Neb. 310, 77 N. W. 768; *Mares v. Chaloupka,* 110 Neb. 199, 192 N. W. 397; *Meier v. Bridgeport Irrigation District,* 113 Neb. 344, 203 N. W. 543; *Bishop & Parsons v. Mayor and City Council of Macon,* 7 Ga. 200, 50 Am. Dec. 400; *Nye v. Adamson,* 130 Neb. 887, 266 N. W. 767.

For the reasons stated, the judgment is set aside and a new trial ordered in accordance herewith.

REVERSED.

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DAWSON COUNTY V. LORENZO D. WHALEY ET AL.: CARL E. FAUGHT ET AL., APPELLANTS: CITY OF COZAD, APPELLEE.
279 N. W. 164

FILED APRIL 15, 1938. No. 30293.

1. **Appeal.** A bidder at a judicial sale whose bid has been accepted may appeal from an order setting the sale aside.
2. **Counties: TAX LIENS: FORECLOSURE.** Section 77-2039, Comp. St. Supp. 1937, provides a full, complete, and definite procedure by which a county may foreclose the lien of certain delinquent taxes.
3. **Statutes: CONSTRUCTION.** It is an established rule of construction that special provisions in a statute in regard to a particular subject control general provisions.

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

*Frank M. Johnson,* for appellants.

*Elbert Smith, Cook & Cook* and *R. E. Bannister, contra.*

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

PAINE, J.

This is an appeal by two bidders from an order of the

district court, setting aside the sales made by the sheriff to such purchasers, in a tax foreclosure suit.

On November 18, 1936, the county of Dawson as plaintiff filed an action to foreclose the lien for taxes upon some 13 or more tracts of real estate situated in the city of Cozad, Dawson county, all tracts being joined in one action under section 77-2039, Comp. St. Supp. 1937.

The appellants herein were the purchasers of the tracts of real estate set out in the first and second causes of action in such petition, which foreclosure was brought by the county of Dawson as trustee for all of the political subdivisions which were entitled to receive a portion of said taxes. At the sale of the said property, held May 24, 1937, the property described in the first cause of action was sold to D. M. Burgess, appellant, for the sum of $155, and the property described in the second cause of action was sold to Carl E. Faught for the sum of $155.

On June 2, 1937, the city of Cozad filed a motion, asking that the court set aside a number of said sales, including the sales to the two appellants herein, for the reason that the amounts bid were grossly inadequate, and did not represent the fair value of the property, and were insufficient to pay either the general taxes or the special assessments of said city, which were all included in said foreclosure, and for the further reason that a subsequent sale would realize a greater amount. The plaintiff, the county of Dawson, did not join with the city of Cozad in said motion, nor did it file any motion to the same effect on its own behalf to set aside such sale, nor did said county appear or file a brief in this court.

On June 22, 1937, said motion came on for hearing in the district court, and the court refused to set aside some of the sales that were had, but sustained the motion of the city of Cozad to the first, second, fifth, and sixth causes of action. The court's order, setting aside the sales in the first two causes of action, has been appealed to this court by the bidders at such sales, who are appellants herein.

As to each of these first two causes of action which are before us, the general taxes due to the state, county, school district, and city of Cozad, and which were delinquent, amounted to more than the amount bid by the purchasers, and the amount due to the city of Cozad for special improvement assessments for curbing, guttering, grading, and graveling in certain improvement districts also amounted to more than the amount bid by the purchasers of the respective tracts.

A separate decree of foreclosure was entered by the district court upon the first cause of action on March 22, 1937, and in such decree the court found that the amount due was $842.42, with 7 per cent. interest, and entered an attorney's fee of $84.24.

The trial judge entered a decree of foreclosure upon the second cause of action on February 8, 1937, and found the total amount due upon the tract of land therein set out, to wit, lot 12, block 5, in Pearson & Cumming's addition to the city of Cozad, to amount to $457.12, with interest at 7 per cent., and included in the costs an attorney's fee of $45.71.

There were attached as exhibits the affidavits of Ben A. Johnson, dated June 9, 1937, in which he sets out that, if a new sale was held on the first cause of action, he would bid the sum of $1,000 or more, and for the property described in the second cause of action the sum of $500 or more; and the affidavit of Charles H. Sheets that, if a new sale was held, he would bid more than the bid made at the sale on each of said tracts; and the affidavit of R. S. Perry that, if a new sale was held, he would bid $400 on the property set out in the first cause of action.

At the said hearing in the district court, a number of the bidders were personally present or represented by counsel, and offers of increased bids were made, as shown by affidavits in the first, second, fifth, and sixth causes of action, and the court found that said sales on the first and second causes of action should be set aside and new sales ordered, and directed the sheriff to return the pur-

chase price paid in by such bidders and hold another sale.

The bidder of the property described in the second cause of action gave a supersedeas bond in the sum of $350. The purchaser under the first cause of action gave only a cost bond in the sum of $75. The sheriff's return to the second order of sale, under date of July 28, 1937, shows that at the second sale he sold the property set out in the first cause of action to G. W. Eaton for the sum of $300; that the costs of the sale amounted to $123.10, leaving a net amount of $176.90 to be applied upon the taxes. In his return the sheriff shows that no sale was made of the tract described in the second cause of action because a supersedeas bond had been put up.

It is plain to be seen, by the return of the sheriff, that at the second sale R. S. Perry did not bid $400, as he had set out in his affidavit, nor did Ben A. Johnson bid $1,000, as promised in his affidavit, for the property described in the first cause of action, but the same was sold to one G. W. Eaton for $300, which implies that these affidavits were not made in good faith, and were not intended to be *bona fide* bids by the affiants. Yet, it was upon these affidavits that the court set aside the sale.

The bill of exceptions discloses that E. A. Cook, Jr., testified on behalf of the appellants that his law firm of Cook & Cook was employed by the county commissioners as assistant to the county attorney for the purpose of bringing this foreclosure action. That, in addition to the legal notice of the sheriff's sale, which was published in the Cozad Local for five weeks prior to the sale, handbills were prepared and printed and circulated in the city of Cozad, advertising the sale, and showing the legal description of the property, as well as a general description by streets, so that any one could easily locate the property which was to be sold for taxes; that a copy of this handbill was also printed in the local newspaper on Friday prior to the sale.

Mr. Cook also testified that, in a conversation had with

the mayor of Cozad prior to the sale, he told the mayor that, at a similar sale in which a number of Gothenburg properties had been sold a few weeks prior, the city of Gothenburg was represented and bid on a number of the properties, and as a result increased the sale price, and that, in his opinion, it would be advisable for the city of Cozad to do the same thing. As a result of that conversation, Mr. Cook prepared and sent to the mayor of Cozad a letter, giving a list of all the properties, giving the name of the owner, the amount of the decree, the amount of the general taxes, and also the amount of the special assessments of the city of Cozad on each property.

He testified further that he advised the mayor in such letter that the city would have to put up the costs and the amount of the general taxes on any property that was bid in by the city. Witness also testified that he attended the sale; that there were about 15 people there from the city of Cozad, and that the city attorney of Cozad attended the sale, but did not bid on any of the property on behalf of the city of Cozad. He further testified that the sale began at 1 o'clock in the afternoon, the notice of the sale was read, and each piece of real estate set out in the separate causes of action was auctioned off separately, and ample time given to receive any additional bids which any one present might desire to make, and the sale was not completed until 3:30 or 4 o'clock in the afternoon.

D. M. Burgess, one of the appellants, testified that at the first sale there was a bid upon the property described in the first cause of action of $150, and that he then placed his bid of $155, and that was the highest bid. He testified that, in the condition that the property is in, it is worth from $400 to $450 for immediate possession, but that he did not know what it would be worth in two years from that date.

Among the errors relied upon for reversal, it is charged that the court's order setting aside the sale was entered pursuant to a motion made by one not a party to the litigation, who has not complied with the statute authorizing intervention.

It is further charged that the court erred in setting aside the sales involved without any statutory authority therefor, and that the decision is contrary to the evidence and to the law.

"A bidder at a judicial sale whose bid has been accepted may appeal from an order setting the sale aside." *Penn Mutual Life Ins. Co. v. Creighton Theatre Bldg. Co.*, 51 Neb. 659, 71 N. W. 279. For, when a bid is made and accepted, rights become vested thereby. 16 R. C. L. 113, sec. 81. For, by the acceptance of his bid, the bidder becomes subject to the jurisdiction of the court and concluded by its orders, and he may be required and compelled to perform his bid; and it has been held that, if a purchaser fails to comply with his bid, a resale may be ordered at his risk and he be held for a loss if the resale is for a less amount. *Rife v. Swanson*, 109 Neb. 814, 192 N. W. 498.

As a bidder thus incurs obligations, he also acquires rights, one of which is to enforce the confirmation of the sale if it be a valid sale and the proceedings have been regular. *State v. Denton State Bank*, 126 Neb. 486, 253 N. W. 670.

This action is based upon section 77-2039, Comp. St. Supp. 1937, which provision was first enacted as chapter 73, Laws 1903, and has been recently amended, as found in chapter 162, Laws 1935, and the last two lines were added by amendment in section 14, ch. 167, Laws 1937. To avoid setting out this long act in full herein, we will abridge the same and set out briefly the provisions in so far as required by the issues presented in the case at bar. This law provides a full, complete, and definite procedure by which counties may foreclose the lien for certain taxes delinquent in the respective counties.

The tract of real estate must have been offered for sale for delinquent taxes for three consecutive years and not sold for want of bidders.

The county may include many separate parcels of land in one action, but the court in its decree shall find the

amount due against each parcel, and also apportion a share of the costs thereof to the date of the decree. It is specifically set out that the sale is to be conducted as are sales of real estate upon execution, and then sold to the highest bidder for cash.

When the purchaser has paid in the amount of his bid, the sale cannot be confirmed for two years, and the purchaser in the meantime is required to pay all taxes which are thereafter levied against such land during such period of two years, and all the tax receipts showing such payments are required to be filed with the clerk of the district court. During such two years the owner of the fee, or any person having a legal interest in a tract of land so sold, may redeem the same by paying to the clerk of the court, not the amount paid in by the bidder, but the full amount of taxes due on such tract of land, together with the subsequent taxes paid by the purchaser, with interest at 7 per cent., and a proportionate share of the costs up to the date of such redemption.

After the two years have expired and the bidder has paid all of the taxes for the two years, then, upon motion of the county attorney, the district court enters an order of confirmation, directing the sheriff to make and deliver a sheriff's deed to the bidder for any tract of real estate not redeemed. From the proceeds of such a sale, the costs of the foreclosure action are first paid; then the balance is paid to the governmental subdivisions entitled thereto in discharge of their tax liens, and if there is a surplus it shall be paid by the clerk of the court to the person entitled thereto, but if the proceeds, after deducting the costs, are insufficient to pay all of the taxes, the amount is then prorated among the governmental subdivisions and the land released from all liens for all taxes included therein, each tract of real estate being kept separate throughout the entire proceedings.

In *Gibson v. Peterson,* 118 Neb. 218, 224 N. W. 272, it is stated: "Where the language of a statute is clear and unambiguous it should be given effect according to its

plain terms." And, further: "Where the language of a statute is plain and unambiguous and its meaning clear and unmistakable, there is no room for construction, and the courts are not permitted to search for its meaning beyond the statute itself." *State v. First State Bank of Alliance,* 122 Neb. 502, 240 N. W. 747. See, also, 25 R. C. L. 957, sec. 213.

It appears to the court that section 77-2039, Comp. St. Supp. 1937, is unambiguous. It is complete, and does not omit any necessary provision. Therefore, the general provisions with reference to confirmation of ordinary foreclosure sales, such as, for instance, a nine months' stay, are not applicable to this form of tax foreclosure sales.

"It is an established rule of construction in this state that special provisions in a statute in regard to a particular subject control general provisions." *Mancuso v. State,* 123 Neb. 204, 242 N. W. 430. It was also held in the same case that, generally, where there is a conflict between a general and a special statute applicable to the same subject-matter, the latter must prevail.

This court has often held that mere inadequacy of price in a sale under foreclosure will not justify a court in refusing confirmation, unless such inadequacy is so great as to shock the conscience of the court, or amount to evidence of fraud. *Lemere v. White,* 122 Neb. 676, 241 N. W. 105; *Nelsen v. Doll,* 124 Neb. 523, 247 N. W. 44.

Now, in considering whether the bid of $155 amounts to fraud, or shocks the conscience of the court, we must face these facts: The successful bidder at the first sale bid $155; he was required to pay in that amount in cash, and, in addition, to pay all general taxes and any and all graveling, curbing, grading, guttering, or any other special assessments which might be assessed against this property within the following two years. However, the successful bidder could not secure a deed for the property, for during this two-year period the former owner, or any person having a legal interest in said property, had the right to redeem the same from such sale.

Under the necessity of advancing the amount of his bid for two years, and being required to pay taxes and assessments in full during said period, and considering the possibility of redemption, this court does not believe the price bid was so inadequate as to be evidence of fraud, or a shock to the court.

We have reached the conclusion that the trial court was in error in rejecting the bids as originally accepted by the sheriff, and such order is hereby

REVERSED.

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AGNES G. ENGLE BRISBIN, APPELLANT, V. E. L. OLIVER LODGE NO. 335, BROTHERHOOD OF RAILWAY CLERKS, ET AL., APPELLEES.

279 N. W. 277

FILED APRIL 15, 1938. No. 30115.

1. **Contracts**: ESTOPPEL: COLLECTIVE LABOR AGREEMENT. Where the representatives of a labor union, cooperating with an industry, puts into effect an agreement that, in the event a female employee of a class or craft marries, such employment will then cease, and where the person affected thereby is a voluntary member of the union, subsequently marries and conceals the fact of her marriage, even though she is not a member of the union subsequently selected by members of the class or craft, but applies for membership therein, receives the protection of the union and the benefits of her seniority rights, and has knowledge of the continuation of the agreement between the industry and the representatives of the chosen union, she is, by her conduct in acquiescing in such agreement, estopped to claim such contract as being against public policy.
2. ———. "A contract, to be void as against public policy, should be quite clearly repugnant to the public conscience." *Kloberg v. Teller*, 171 N. Y. Supp. 947.
3. **Master and Servant**: COLLECTIVE LABOR AGREEMENT. The selection by the clerical employees of a railroad company, of which the plaintiff was a voluntary member, of a union as the representative of a class or craft, such selection having been made by a majority vote of the clerical employees, pursuant to the rules promulgated by the railway labor board,

created under title III of the transportation act of 1920 (41 U. S. St. at Large, pp. 456-469; 45 U. S. C. A., sec. 131 *et seq.*), was proper, and a labor organization so selected was authorized to make contracts and agreements affecting the rules and conditions of employment which were binding upon all employees of such class or craft. *Pennsylvania R. Co. v. United States Railroad Labor Board*, 261 U. S. 72.

4. ———: ———. Under the railway labor act of 1926 (44 U. S. St. at Large, p. 577), the employees of any class or craft were empowered to select representatives for the purpose of collective bargaining with their employer in a similar manner.
5. ———: ———. The 1934 amendment to the labor act (45 U. S. C. A., ch. 8), which superseded the 1926 act (44 U. S. St. at Large, p. 577), continued and placed the duty on carriers and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules and working conditions and to settle disputes.
6. ———: ———. Subdivision 4, sec. 152, 45 U. S. C. A., provides that employees shall have the right to organize and bargain collectively through representatives of their own choosing. A majority of any class or craft of employees shall have the right to determine who shall be the representative of the craft or class.
7. ———: ———. Such provisions analyzed vested the defendant union with authority to invoke the enforcement of the contract against the plaintiff, as such union succeeded to all of the rights of the former union.
8. ———: ———: CONSTRUCTION. "The terms of the collective agreement, as included in an individual labor contract, ought not to be construed narrowly and technically, but broadly, so as to accomplish its evident aims and protect both the employer and the employee." *Rentschler v. Missouri P. R. Co.*, 126 Neb. 493, 253 N. W. 694.
9. ———: ———. "Such a collective agreement, being a general offer, becomes a binding contract when it is adopted into, and made a part of, the individual contract of each employee. A breach of its terms will give rise to a cause of action by either party." *Rentschler v. Missouri P. R. Co.*, 126 Neb. 493, 253 N. W. 694.
10. Estoppel. "Estoppel means the preclusion of a person from asserting a fact, by previous conduct inconsistent therewith, on his own part or the part of those under whom he claims, or by an adjudication upon his rights which he cannot be allowed to call in question." *Graham Ice Cream Co. v. Petros*, 127 Neb. 172, 254 N. W. 869.

11. ———. An estoppel arises from a party's conduct and may be predicated upon silence or omission as well as upon written words. 2 Pomeroy, Equity Jurisprudence (4th ed.) sec. 802.
12. ———. "The doctrine of equitable estoppel is frequently applied to transactions in which it is found that it would be unconscionable to permit a person to maintain a position inconsistent with one in which he has acquiesced or of which he has accepted any benefit. * * * And so also the acceptance of any benefit from a transaction or contract, with knowledge or notice of the facts and rights, will create an estoppel." 10 R. C. L. 694, sec. 22.
13. ———. When it appears that the facts on which it is sought to make the estoppel operate were known to the party against whom the estoppel is urged, and such party remains silent and receives the benefit of the contract, when he, in fact, has violated such contract, and has knowledge that such contract is in force and effect, he is estopped from asserting any rights which he may claim thereunder.

APPEAL from the district court for Douglas county: FRANCIS M. DINEEN, JUDGE. *Affirmed.*

*Fischer, Fischer, Fischer & Fischer,* for appellant.

*Rosewater, Mecham, Shackelford & Stoehr, contra.*

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

MESSMORE, J.

This is an appeal from the district court for Douglas county, wherein the court granted a temporary restraining order against the defendant brotherhood and its officers, restraining them from interfering with the employment of the plaintiff, who was working as a stenographer in the office of the auditor of miscellaneous accounts of the Union Pacific Railroad Company. The trial court dissolved the temporary restraining order and denied a temporary injunction. Plaintiff elected to stand upon the showing made, and an order was made denying a permanent injunction, from which order the plaintiff brings this appeal. The pleadings properly present the issues necessary for a determination of this case.

The evidence discloses that plaintiff, an unmarried woman, entered the employ of the Union Pacific Railroad Company at its headquarters in Omaha, Nebraska, July 5, 1923. She voluntarily became a member of the Clerical Employees' Association, a company union, in November, 1931. The union, acting as agent for the plaintiff and other member employees, entered into an agreement with the Union Pacific Railroad Company that no married woman thereafter would be employed, and that all married women then in the employ of the railroad company would be discharged. The plaintiff was secretly married at Papillion, Nebraska, on September 23, 1933. The union to which plaintiff belonged practically ceased to function, and on December 6, 1933, an election was held under the railway labor act, passed by the United States congress, to decide who should represent the clerical employees. The Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, a voluntary association of individuals, received the highest number of votes and became, by virtue thereof, the representatives of the clerical employees. The agreement relative to married women was still in full force and effect, and from the time of the selection of said brotherhood all agreements with the Clerical Employees' Association were terminated, and all employees were notified that a new agreement would be negotiated with the brotherhood. The plaintiff claims that she was not, and never had been, a member of the brotherhood and did not receive a notice of any kind that the agreement concerning the employment of married women was to be made a part of the new agreement. In this connection it might be well to state that the officers of the brotherhood, in cooperation with the railroad company, at all times previously and at this time, by oral agreement and by action of such officers, maintained and kept in force the so-called married women's agreement. This occurred just subsequent to the election at which the brotherhood was chosen to represent the clerical employees. There appear

to have been in the neighborhood of 150 agreements of different kinds, some of which were lost, made by the Clerical Employees' Association during its existence, but the one of interest in the case at bar is the married women's agreement.

The record discloses that there were 1,954 votes cast on the question of who should represent the Clerical Employees' Association, of which the brotherhood received 1,001. As to this election in December, 1933, and the plaintiff's participation therein, we find the following testimony by plaintiff: "Q. Now, you knew that there was an election in December, 1933, did you not, as between the clerical union and the new union called the brotherhood, the election among employees as to which union they wanted to represent them? A. Yes, sir. Q. You voted in that election, did you not? A. Yes, sir. Q. As a matter of fact you knew all about the brotherhood and you made application for membership in the brotherhood? A. Yes; I did." Exhibit 4, offered and received in evidence, is an application for membership in the brotherhood signed by the plaintiff.

Plaintiff remained in her employment, using her maiden name and concealing her marriage, until October, 1936, when it was discovered that she was a married woman. The representatives of the union, upon such discovery, notified the immediate superior of plaintiff. The letters requesting that she be taken out of the employment of the railroad company are in evidence. Plaintiff was given 30 days' notice, at the end of which time her employment would be terminated. She applied for a restraining order which was granted. When such order was dissolved the railroad company discharged plaintiff.

Several women employees of the railroad company, upon marrying, had voluntarily terminated their employment with the company, except in one instance when a leave of absence was granted, and subsequently such employment was terminated. The result was to advance the plaintiff in her seniority rights. In this connection the

seniority rights of employees of the railroad company had been in effect for some period of time. Plaintiff contends that it was a rule of the company and not of the unions. However, the unions participated in the rights relative to seniority, and on July 1, 1934, a set of rules became effective governing the working conditions of clerks and other office, station and store employees, represented by the brotherhood, which appears as exhibit 2 in the record. These rules do not contain the married women's agreement. Exhibit 5 is a seniority roster of employees in the office of the auditor of miscellaneous accounts, to be issued as of January 1, 1935, containing the seniority numbers of some 79 employees, their positions, seniority dates and the individual's approval of the seniority dates shown. The plaintiff approved her seniority date, signing her maiden name thereto.

After the termination of her employment, plaintiff and her husband talked to certain officers of the brotherhood, requesting that an exception be made in her case, but did not appear before the lodge itself. The brotherhood refused this request. There is some evidence in the record, given by the plaintiff, to the effect that she was told by officers of the brotherhood that if she was not a member of the brotherhood it would be difficult to make such exception, for the reason that they had refused to make such an exception in favor of members of the brotherhood. This statement is denied. The trial judge had the benefit of testing the credibility of the witnesses in this conflict of evidence. The record further discloses the enforcement of the married women's rule, and that no discrimination was shown by the union or brotherhood in enforcing this rule as a representative of the Clerical Employees' Association, as among any of the employees of said association or brotherhood. The "open shop" was maintained by the Union Pacific Railroad Company and the defendant, E. L. Oliver Lodge No. 335, which is a voluntary association of individuals created for the purpose of furthering the interests of its members as em-

ployees of the railroad company in the city of Omaha, and affiliated with the American Federation of Labor.

Exhibit 7 is the original memorandum and agreement between the Union Pacific Railroad Company, the St. Joseph and Grand Island Railway Company and the Clerical Employees' Association, and is the agreement which gives rise to this controversy. It is as follows:

"In accordance with request of the General Committee of the Clerical Employees' Association—UPRR and StJ& GIRy., in connection with the unemployment situation, it is agreed that the following will govern with respect to the employment status of married women, effective November 23, 1931.

"1. Married women residing with their husbands shall not hereafter be employed in positions coming within the scope of the agreement between the Clerical Employees' Association and the Union Pacific Railroad Company and the St. Joseph and Grand Island Railway Company, effective February 1, 1930, or as hereafter amended.

"2. Single women now in service or hereafter employed, who marry, will not thereafter be considered as coming within the scope of agreement with the Clerical Employees' Association, will forfeit all rights thereunder, and shall be dropped from the service within not to exceed thirty days following date of their marriage.

"3. Married women residing with their husbands and who are now in the service or on leave of absence, shall not be permitted to exercise seniority under the provisions of the Clerical Employees' Association, where it will result in displacing an employee with dependents.

"4. Exception to the foregoing may be made by mutual agreement between the representatives of the management and the General Chairman of the Clerical Employees' Association, where it is desired to give employment to the wife of an employee who is incapacitated for service."

The plaintiff contends that the district court erred, and, in stating such alleged errors, takes exceptions to

the findings of the court and special finding No. 2 of the court's order, also to findings numbered 3, 6, 7, 8, 9, 10 and 11; that the findings are not sustained by the evidence and are contrary to law.

Plaintiff contends that she, by virtue of the action of the brotherhood, was deprived of a valuable property right, in that she lost her seniority right covering a period of 13 years and was denied the right to earn a living, a right guaranteed by the Constitution of the United States and by the Constitution of the state of Nebraska, claiming, in effect, that the contract relative to employment of married women, and as evidenced by exhibit 7, is in restraint of marriage and against public policy. In this connection plaintiff cites section 42-203, Comp. St. 1929, as follows: "Any married woman may carry on trade or business, and perform any labor or services on her sole and separate account; and the earnings of any married woman, from her trade, business, labor, or services, shall be her sole and separate property, and may be used and invested by her in her own name." Plaintiff also cites section 1, art. I of the Constitution of Nebraska, as follows: "All persons are by nature free and independent, and have certain inherent and inalienable rights; among these are life, liberty and the pursuit of happiness;" and section 3, art. I of the Constitution of Nebraska: "No person shall be deprived of life, liberty, or property, without due process of law;" and a list of authorities, among which is the case of *Cameron v. International Alliance of Theatrical Stage Employees, etc.*, 118 N. J. Eq. 11, 176 Atl. 692, 97 A. L. R. 594. The case cited involves interference with the liberty of contract wherein a motion picture operators' union classified its members into senior and junior groups, not basing such classification on skill and experience, and assessing a rate against junior members of such union greatly in excess of that imposed upon the senior members; denied the right of participation of junior members in the formulation of the policies of the union in the management of its business,

and gave the senior members preferred rights in the event sound pictures became a failure. This practice was condemned by the courts, in that it interfered with the personal liberty and property right guaranteed by the Fifth Amendment of the federal Constitution. In this case it was said: "The personal liberty and right of property guaranteed by the Fifth Amendment of the federal Constitution embrace the right to make contracts for the purchase of the labor of others, and equally the right to make contracts for the sale of one's own labor." Without pursuing this case further, we are convinced that it is, in no respect, analogous to the case at bar.

Plaintiff cites *Parker Paint & Wall Paper Co. v. Local Union No. 813*, 87 W. Va. 631, 105 S. E. 911, wherein a union sought, by influence and intimidation, to interfere with a contract made between an employer and employees, and such interference by influence and intimidation caused breach of the contract and discharge of the employees from performance thereunder. The case was decided on the principle, as stated in the opinion (p. 639): "If one person wantonly or maliciously, whether for his own benefit or not, induces a person to violate his contract with a third person to the injury of that third person, an action will lie,"—citing *Thacker Coal Co. v. Burke*, 59 W. Va. 253. At page 641 it was said: "A man's labor is his most sacred asset. It is often his only capital, and as long as he exerts it without injury to others, government will protect him." No such situation arises in the case at bar, as compared with the cases above cited, and we can accept the principle of law announced therein. *Erdman v. Mitchell*, 207 Pa. St. 79, 56 Atl. 327, and *Kinane v. Fay*, 111 N. J. Law, 553, 168 Atl. 724, cited by plaintiff, hold to like effect.

Plaintiff cites several cases on her proposition of law No. 2, which she states as follows: "One who without justifiable cause induces an employer to discharge an employee is liable for the wrong, even though the contract of employment is terminable at will." Among the cases cited

under this proposition is *DeMarais v. Stricker*, 152 Or. 362, 53 Pac. (2d) 715, wherein it was held: "To render an act which interferes with another's employment a violation of his rights, there must be intention to bring about particular result, use of unlawful means, and absence of justification." Other cases are cited on this proposition of law, holding to like effect.

We believe that there is not here involved any question concerning the right of this plaintiff under the state or federal Constitution to earn a living; nor is there involved any question as to whether, in a proper case, equity will protect by injunction the property right of women in their employment as against unlawful and unjustified interference by strangers; nor is there involved any question of due process of law, meaning a party shall have his day in court.

As to whether or not this married women's contract, exhibit 7, is against public policy and in restraint of marriage, we find in the Restatement, Contracts, sec. 581, a concise, well-stated rule that apparently governs such contract: "A bargain not to marry, or to be subject to loss or deprived of profit in case of marriage, or a bargain to hinder or prevent the marriage of another, is illegal, unless the bargain is otherwise reasonable and the restraint is incidental to another lawful purpose of the bargain." Among the illustrations cited we find the following: "A employs B, an actress, who promises to work as such for one year. B also promises not to marry during that time, and A's promise to employ is conditional on her refraining from marriage. B marries during the year. A can refuse to continue the employment and maintain an action for damages." We find also the case of *Grimison v. Board of Education*, 136 Kan. 511, 16 Pac. (2d) 492, which is an action by a school teacher to recover for breach of contract for employment to teach school, when in May, 1931, the plaintiff contracted with the board of education to teach school for the ensuing year. The contract specifically provided that the mar-

riage of the teacher during the period of the contract would terminate it. The plaintiff married in June of the same year, and when school commenced in September the board of education refused to permit her to teach. The court held that such contract was not in restraint of marriage.

In *Crowder-Jones v. Sullivan,* 9 Ont. L. R. 27, 4 Ann. Cas. 729, it was held: "Plaintiff for several years had been housekeeper for a widower with a young daughter, and being about to be married, he promised her, if she would continue in his service as housekeeper so long as he needed her and abandon her contemplated marriage, he would either pay her $1,000 in cash, give her a promissory note for $1,500, or remember her in his will. The plaintiff thereupon abandoned the marriage and continued her service until her employer's death, which occurred four years afterwards, he, in the meantime having given her a note for $1,500. In an action against his administrator on the note: *Held,* that the primary object of the agreement was the continuing in the intestate's service, the restraint of marriage being merely an incident thereto, and that, under all the circumstances, the restraint was not such an unreasonable one as could be said to be contrary to the policy of the law."

In *Ansorge v. City of Green Bay,* 198 Wis. 320, 224 N. W. 119, the Wisconsin court held:

"Plaintiff entered into a contract to teach in the vocational school at Green Bay for the ensuing school year, by the provisions of which she agreed that her contemplated marriage would not take place prior to the Christmas holidays, and then only upon thirty days' notice, and that if it did not take place during the holidays it would be postponed until after the close of the school year. Plaintiff had knowledge of the unwritten policy of the board of industrial education not to employ married women as teachers. *Held,* that plaintiff was rightfully discharged upon her marriage during the latter part of January. * * *

"The action of the board in discharging the teacher after her marriage does not contravene the provisions of sec. 6.015, Stats., recognizing the freedom of women to contract the same as men."

In *Kloberg v. Teller*, 171 N. Y. Supp. 947, it was held: "A contract, to be void as against public policy, should be quite clearly repugnant to the public conscience."

Under the facts in the case at bar, we do not believe that there was any interference on the part of the brotherhood to such an extent that the plaintiff's rights were violated, nor was there an intention to bring about a particular result by the use of unlawful means in the absence of justification. She agreed with the group of employees with which she associated herself, and they with her, that in the event of marriage they would terminate their employment. Her action was purely voluntary, —a contract, we believe, which she had a right to make. The evidence in this case conclusively shows that the plaintiff, by her conduct and acquiescence, is estopped from asserting such contract as being against public policy, and it is not necessary for a determination of this case to decide whether or not the married women's contract is in restraint of marriage or against public policy.

Plaintiff contends that she was not a member of the brotherhood which was selected to represent the Clerical Employees' Association, of which she was a member; that under the agency theory she would be bound by any agreements made between the employees' association and the railroad until such time as the agreements would be abrogated; further, that the courts have held that this theory of agency is the only theory upon which the individual employee is bound by the contracts entered into by his union and the employer, and cites in this respect *Rentschler v. Missouri P. R. Co.*, 126 Neb. 493, 253 N. W. 694. The cited case is the first expression of this court on a collective bargaining agreement and a recognition of the validity of such agreements in the state of Nebraska. It was there held: " 'Collective labor agreement'

and 'trade agreement' are terms used to describe a bargaining agreement, as to wages and conditions of work, entered into by groups of employees, usually organized into a brotherhood or union, on one side, and groups of employers, or corporations, such as railroad companies, on the other side." As to the effect of the contract, it was held in that case: "Such a collective agreement, being a general offer, becomes a binding contract when it is adopted into, and made a part of, the individual contract of each employee. A breach of its terms will give rise to a cause of action by either party." As to the method of construing the contract, it was held: "The terms of the collective agreement, as included in an individual labor contract, ought not to be construed narrowly and technically, but broadly, so as to accomplish its evident aims and protect both the employer and the employee."

Plaintiff's contention in this respect follows: That she was a party to and a member of the Clerical Employees' Association at the time of the execution of the married women's agreement on November 23, 1931; that in December, 1933, a notice was published that the old agreements with the Clerical Employee's Association were at an end and that new agreements would be negotiated; that the Clerical Employees' Association would be served with a 30 days' notice of the termination of the agreement with that association; that the brotherhood would be advised that the management would undertake the negotiation of an agreement with the association during the interim. Plaintiff's contention is that the notice abrogated the former agreement and terminated all the side agreements, and it was then necessary to agree formally by the brotherhood and the railroad company that notice would be given to the employees who were affected thereby, the plaintiff not being a member of the brotherhood, and that such agreement, bringing back into force and effect the married women's agreement of November 23, 1931, was orally made between Fred Graham, general secretary and treasurer of the board of adjustment of the

brotherhood, and C. J. Connors, in charge of labor for the railroad company; that the side agreements would be in force and effect; that no notice of such rules was given to anybody, and, therefore, this contract was not carried over into the new brotherhood. In this connection plaintiff cites *Piercy v. Louisville & N. R. Co.*, 198 Ky. 477, 248 S. W. 1042. This case involved the seniority rights of a railroad conductor, but the principle of law announced, and as contended for by plaintiff, follows: "A trade union is not the agent of a member for the purpose of waiving any personal right he may have, but only for the limited purpose of securing for him, together with all other members, fair and just wages and good working conditions." It was also held: "The officers of trade unions are not to be deemed the agents of the members of the unions with respect to the individual rights of the members, since the purpose of the union is primarily to procure agreements with employers for the benefit of the members of the union, and not to affect the rights of the members secured by such agreements."

The transportation act of 1920 was superseded by the railway labor act of 1926 (44 U. S. St. at Large, p. 577). The labor board in its order No. 119, issued April 14, 1921, promulgated rule 15, which in part follows: "The majority of any craft or class of employees shall have the right to determine what organization shall represent members of such craft or class. Such organization shall have the right to make an agreement which shall apply to all employees of such craft or class." This rule was held valid in *Pennsylvania R. Co. v. United States Railroad Labor Board*, 261 U. S. 72. The plaintiff and the defendants in the instant case agree on the foregoing. The plaintiff, however, contends that the use of the word "agreement" or "contract," which is used to designate the agreement entered into by the union and the employer, is unfortunate terminology. The unions do not furnish the employer with employees. The agreement seeks to establish working conditions, rates of pay, rules for the con-

duct of relationship between the employer and employee—citing *Rentschler v. Missouri P. R. Co., supra.* To like effect are *West v. Baltimore & O. R. Co.,* 103 W. Va. 417, 137 S. E. 654; *Young v. Canadian Northern Ry.* (1929) 4 D. L. R. 452.

The testimony of defendant Graham was to the effect that the brotherhood was chosen by the clerical employees as their representative and negotiated a seniority agreement with the railroad in 1921. Thereafter the Clerical Employees' Association, of which the plaintiff was a voluntary member, acted until December, 1933, when a third election was held, by which the defendant brotherhood was again chosen as a representative of the clerical employees.

Subdivision 3, sec. 152, ch. 8, of the railway labor act (45 U. S. C. A. 1937 Pocket Supp. p. 152) in part reads: "Representatives, for the purposes of this chapter, shall be designated by the respective parties without interference, influence, or coercion by either party over the designation of representatives by the other; and neither party shall in any way interfere with, influence, or coerce the other in its choice of representatives," thus continuing the principle of collective bargaining through elective representatives of each class or craft of employees.

In the cases that have been before the federal courts, including the supreme court of the United States, the policy of collective bargaining between the great railroad systems of this country and their employees has been recognized in justice and wisdom. It may be said that the basic principle of this legislation is that, while the "open shop" rule is maintained, there must be some agency vested with authority to represent and bind all of the employees of each craft or class, whether members of a labor organization or not, for the preservation of the rights of the employees and for the protection of the public.

In the case of *Yazoo & M. V. R. Co. v. Webb,* 64 Fed. (2d) 902, the defendant, a porter, sought to recover wages

for doing the work of a passenger brakeman. The wages, rules and working conditions applicable to brakemen were embodied in a schedule of wages and rules negotiated between the railroad company and the Brotherhood of Railway Trainmen. Defendant Webb was not a member of the organization. The railroad company contended that, because he was not a member of the brotherhood, he was no party to and not a beneficiary of the contract. The court rejected the contention, stating, in substance, that an agreement on wages and working conditions between managers of an industry and its employees is an agreement as to the terms on which contracts of employment may be satisfactorily made and carried out; that it is a mutual, general offer to be closed by specific acceptance. It was said in the opinion (p. 903): "When negotiated by representatives of an organization it is called collective bargaining, but ordinarily the laws of the organization, which constitute the authority of the representatives to act, do not require the individual members to serve under it, but only that if they serve they will do so under its terms and will join in maintaining them as applied to others. When the agreement is published by the managers, it becomes until abrogated the rule of that industry and any individual who thereafter continues in its employment or takes new employment takes it on the terms thereby fixed. * * * But the employment though indefinite as to time is a relationship while it lasts, and is subject to the conditions fixed in the working agreement for the industry. * * * When it (referring to the agreement) is not by its terms confined to members but purports to cover all employees in the industry of the classes dealt with and is thus published by the employer, nonmembers who continue in the employment or who afterwards enter it accept and adopt the agreement, and are through the adoption as fully bound and protected by it as is any one else." The above case was cited with approval and quoted from at length in *Rentschler v. Missouri P. R. Co., supra.* There are other cases

cited by defendants holding to a like principle, but to quote them would unnecessarily extend this opinion.

As indicated by the authorities, to hold for the plaintiff would require this court to hold invalid the labor provisions of the transportation act of 1920 and the railway act of 1926, in face of the decision of the United States supreme court in *Pennsylvania R. Co. v. United States Railroad Labor Board, supra,* and the principle announced in our own state in *Rentschler v. Missouri P. R. Co., supra.*

Did the election of the defendant brotherhood as representative of the clerical employees abrogate the married women's contract of 1931? The record is bare of any evidence whatever of a cancelation of this agreement. There is an oral agreement by Mr. Graham and Mr. Connors in the latter's office that the side agreements would still be in force and effect. Plaintiff complains that she received no notice of this fact. The evidence discloses that she was listed on the seniority roster of January 1, 1935 (exhibit 5), as Agnes G. Engle after she was married. She testified as follows: "Q. Up to the time you had been notified that you would be discharged on account of your marriage? A. Yes, sir. Q. You did not tell anybody that you had been married? You did not tell the Union Pacific and did not tell the brotherhood and did not tell anybody that you were married? A. Yes. Q. And you continued to work under your maiden name? A. Yes. Q. And you did that because you knew there was a rule in effect that prohibited married women from continuing in the employment? A. Yes."

When the plaintiff entered the employment of the railroad company, rule 15 of order 119 of the railway labor act was in force. The principle of collective bargaining embodied in the rule was continued in force in the law of 1926, 44 St. at Large, p. 577. This act remained in force until it was superseded by the 1934 amendment of the railway labor act (45 U. S. C. A. ch. 8, sec. 151 *et seq.*). Subdivision 1, sec. 152, thereof reads:

"It shall be the duty of all carriers, * * * and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof." Subdivision 4, sec. 152, in part reads: "Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purpose of this chapter."

Therefore, when the plaintiff entered the employment of the railroad company, rule 15 of the railway labor act became a part of her contract, and when she continued in that employment from month to month the enactment of that rule in substance, in successive statutes, continued it in her contract. The substitution, therefore, of the brotherhood for the association had no effect whatever on the married women's contract, and the brotherhood succeeded to all the rights of the association to invoke the enforcement of the contract against the plaintiff. The married women's agreement was made by the Clerical Employees' Association in a representative capacity for the benefit of all the clerical employees, and when it was put in force the employees naturally acquiesced in such agreement, and it became a part of the contract of employment until the agreement itself, and not the agency from which the agreement was made, was changed. Unless this were true, there could be no such thing as collective bargaining in any industry.

Therefore, we believe that the contentions of the plaintiff, hereinbefore stated, are untenable when the facts in this case are analyzed with the authorities.

The evidence affirmatively, and practically without dispute, discloses full and complete knowledge, on the part of

plaintiff, of the married women's contract of 1931, she being a voluntary member of the organization which executed such contract. She recognized the binding force of this contract for a period of five years, enjoyed the benefits to her from its application to others similarly situated, and acquiesced in the enforcement of it by the union and the railroad against others for her benefit. She received the benefit of similar agreements negotiated for her, equally with others, for the same union. She deliberately concealed her marriage to escape the application of this contract to her and retained her position for a period of more than three years, and in the meantime accepted advancement in seniority through the application of this contract to other women employees, while the union, of which she was a member, was still functioning. She concealed the fact of her marriage and took advantage of the contract after the defendant brotherhood was, by a vote of the employees, substituted for the association of which she was a voluntary member. Upon discovery of her marriage and on her subsequent discharge, she then asked that an exception be made in her favor.

We believe that this case, as presented by the facts, discloses one wherein the doctrine of estopped is applicable. To state the principle of law in this respect: "Estoppel means the preclusion of a person from asserting a fact, by previous conduct inconsistent therewith, on his own part or the part of those under whom he claims, or by an adjudication upon his rights which he cannot be allowed to call in question." *Graham Ice Cream Co. v. Petros,* 127 Neb. 172, 254 N. W. 869.

The principle of law is announced in *City of Lincoln v. McLaughlin,* 79 Neb. 74, 112 N. W. 363, as follows: "In order to constitute an equitable estoppel by silence or acquiescence, it must be made to appear that the facts upon which it is sought to make the estoppel operate were known to the parties against whom the estoppel is urged."

In *Bichler v. Ternes,* 63 N. Dak. 295, 248 N. W. 185, in

the body of the opinion we find this language (p. 309): "An estoppel arises from the conduct of a party and may be predicated upon silence or omission as well as upon written words. 2 Pom. Eq. Jur. (4th ed.) sec. 802. 'Its foundation is justice and good conscience. Its object is to prevent the unconscientious and inequitable assertion or enforcement of claims or rights which might have existed or been enforceable by other rules of the law, unless prevented by the estoppel; and its practical effect is, from motives of equity and fair dealing, to create and vest opposing rights in the party who obtains the benefit of the estoppel.' 2 Pomeroy, *supra*."

In 10 R. C. L. 694, sec. 22, it is stated: "The doctrine of equitable estoppel is frequently applied to transactions in which it is found that it would be unconscionable to permit a person to maintain a position inconsistent with one in which he has acquiesced or of which he has accepted any benefit. * * * And so also the acceptance of any benefit from a transaction or contract, with knowledge or notice of the facts and rights, will create an estoppel."

For the reasons given in this opinion, the order of the trial court is

AFFIRMED.

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FRANK B. KIMBALL ET AL., APPELLEES, V. J. H. COOPER ET AL., APPELLEES: LINCOLN THEATRE CORPORATION, APPELLANT.

279 N. W. 194

FILED APRIL 15, 1938. No. 29968.

1. Contracts: CONSTRUCTION. When the provisions of a contract together with the facts and circumstances that aid in ascertaining the intent of the parties thereto are not in dispute, the proper construction of such contract is a question of law.
2. Sales. A lease of real estate for a term of years providing that chattels belonging to the landlord shall, if the lease be fully performed, become the property of the tenant for no

other consideration than the rentals, and further providing that upon default by the tenant the landlord could terminate the lease and recover the possession of both real estate and chattels, declared to be a conditional sales contract as to such chattels.

3. ———. Recovery of rent accruing before forfeiture and reentry by the lessor on account of breach by the lessee under a lease to real estate for a term of years that also contains a conditional sale of chattels to the lessee by the lessor does not vest the title to the chattels in the lessee, when the rent and purchase price of the chattels are payable in instalments and so intermingled in one sum as to be incapable of separation.

4. ———. As between a conditional seller and buyer of goods, a provision in the contract to the effect that the buyer may dispose of such goods and replace them with other goods may have the effect of causing the seller to occupy the same relation to the after-acquired goods as he occupied to the original goods.

5. **Trover.** An action in trover for the conversion of personal property cannot be maintained unless at least either title, absolute or special, or right to immediate possession at the time of the alleged conversion is in the plaintiff.

6. **Sales.** The buyer of goods under a conditional sales contract *held* not liable to the seller in an action of trover for conversion of goods of which he has disposed, when such conditional sales contract authorized such disposition under the proviso that the goods disposed of be replaced by other goods, even though no such replacement was made.

APPEAL from the district court for Lancaster county: ELLWOOD B. CHAPPELL, JUDGE. *Affirmed.*

*Beghtol, Foe & Rankin,* for appellant.

*Chambers & Holland, contra.*

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

TEWELL, District Judge.

This action was begun in the district court for Lancaster county by Frank B. Kimball and Jennie R. Kimball, plaintiffs, against J. H. Cooper, Lincoln Theatre Corporation, a corporation, Paramount-Publix Corporation, a corporation, and A. M. Avery, defendants, to recover damages al-

leged to have arisen on account of a conversion by the defendants of certain theater equipment and on account of injuries to a theater building. Damages in the amount of $20,000 are alleged by the plaintiff. The defendant Lincoln Theatre Corporation filed an answer and counterclaim. By this counterclaim recovery of damages from the plaintiffs in the sum of $16,835 is sought. These damages are alleged to have arisen on account of an alleged conversion by the plaintiffs of certain theater equipment. All other defendants by their joint answer denied generally the allegations of the plaintiffs' petition. At the close of the introduction of the plaintiffs' affirmative evidence, the trial court dismissed the plaintiffs' petition as against defendants J. H. Cooper, Paramount-Publix Corporation and A. M. Avery. The verdict of the jury was in favor of the plaintiffs upon their petition and fixed the amount of plaintiffs' recovery at $2,050. The jury found against the Lincoln Theatre Corporation upon its counterclaim. From a judgment in accord with the verdict of the jury the defendant Lincoln Theatre Corporation appeals. The plaintiffs cross-appeal.

The pleadings and evidence disclose that at all times material to this case plaintiffs owned the real estate in which a theater known as "The Rialto" was operated on O street in Lincoln, Nebraska. On January 31, 1920, the plaintiffs, who then were and prior thereto had been operating said theater, leased the same to Princess Amusement Company for the period of time from February 1, 1920, to February 1, 1935. On June 27, 1921, a new lease for such premises was entered into. By this second lease the prior lease of January 31, 1920, was abrogated and the premises leased to Princess Amusement Company from July 1, 1921, to February 1, 1935. The Princess Amusement Company operated the theater under this second lease until January 17, 1925, when such lease, with the written consent of the plaintiffs, was assigned to the defendant Lincoln Theatre Corporation. This last-named defendant operated the theater under this second lease until some time about

January, 1932, when it closed the theater and notified the plaintiffs that it would not pay rent due under the lease on March 1, 1932, or thereafter. On March 4, 1932, the plaintiffs herein filed suit against the defendant Lincoln Theatre Corporation to recover the sum of $800 for rent due March 1, 1932, and in such action by appropriate proceedings a portion of the equipment in said theater was attached. On March 6, 1932, the defendant Lincoln Theatre Corporation voluntarily delivered at least a portion of the keys to the theater to the officer who levied the attachment. About May 26, 1932, such action was tried and a judgment dismissing the action and dissolving the attachment without prejudice was rendered on account of such action having been brought prematurely because a written demand for payment of rent provided for by the second lease had not been given. All keys were then redelivered to appellants. No appeal was taken from this judgment. On June 13, 1932, plaintiffs made written demand upon defendants for the rentals due March 1 to June 1, both inclusive, and on June 15, 1932, such rent not having been paid, served written notice upon defendants of the election of the plaintiffs to terminate the second lease. About June 23, 1932, the keys to the theater were voluntarily delivered by defendants to the plaintiffs. Plaintiffs took possession of the premises. Upon being asked as to what had become of certain of the equipment, agents of the defendants said it had been loaned and distributed to various other theaters in Lincoln. The defendants thereupon sent a servant with the plaintiffs to obtain such equipment, and a few truck loads of the equipment were gathered from various theaters and delivered to the plaintiffs. No request to remove any equipment was made by defendants. On June 24, 1932, the plaintiffs filed suit against the defendants herein to recover rent accruing prior to June 15, 1932. In this action the plaintiffs alleged termination of the lease and that they were in possession of the theater. The action was based upon the second lease. The defendants by answer in that action then claimed to have been evicted from said theater wrongfully

by the attachment of March 4, 1932. The defendants' claim in that action was upheld by the trial court, but upon appeal to this court the judgment of the trial court was reversed and the cause remanded for a new trial. *Kimball v. Lincoln Theatre Corporation,* 125 Neb. 677, 251 N. W. 290. Upon a new trial plaintiffs recovered judgment for unpaid rent and upon a second appeal to this court such judgment was affirmed. *Kimball v. Lincoln Theatre Corporation,* 129 Neb. 446, 261 N. W. 842. This judgment was paid to the clerk of the district court of Lancaster county on September 26, 1935, by defendant Lincoln Theatre Corporation. On June 29, 1932, a few days after the commencement of the second of the above-mentioned actions to recover rent, the defendant Lincoln Theatre Corporation, as plaintiff, began an action against the plaintiffs in this action as defendants to enjoin the defendants therein, plaintiffs herein, from using or disposing of any of said theater equipment until the second action for rent was determined. This action for an injunction was never tried and was dismissed for want of prosecution on January 3, 1934. The first petition in this action was filed August 18, 1932. After payment on September 26, 1935, of the judgment for rent, the defendant Lincoln Theatre Corporation made oral demand upon the plaintiffs for possession of the theater equipment. The plaintiffs said they did not hold any equipment belonging to defendants. The counterclaim involved was thereupon filed in this action.

To determine the issues presented it becomes necessary to construe the written contract under which the Lincoln Theatre Corporation, hereinafter called appellant, held the real estate and equipment involved herein. The circumstances surrounding the plaintiffs and Princess Amusement Company at the time of the execution of this contract and the provisions of the written contract itself are not in dispute. None of the acts of the parties to the contract or of the appellant in connection therewith or with the subject-matter thereof that aid in making an interpretation of such contract is in dispute. When the provisions of a

contract, together with the circumstances surrounding its execution, the acts of the parties thereto in connection therewith and facts and circumstances that aid in ascertaining the intent of the parties, are not in dispute, the proper construction of the contract is a question of law. 35 C. J. 1141.

Omitting the parts thereof that either do not aid in a construction of the provisions that bear upon the issues involved or do not tend toward a different construction than that made by us, the contract is as follows:

"By this indenture witnesseth:

"Whereas, the lease heretofore existing between the parties hereto did not express the contract thereof and did not properly specify the property belonging to the Princess Amusement Company, and

"Whereas, it is desired that the errors be corrected and the dispute as to the property rights and terms be settled and determined,

"Now therefore, in consideration of their mutual promises, of the settlement of such dispute, of the fully setting out of their contract, and of the payments as herein specified, this indenture is made this 27th day of June, 1921, by and between F. B. Kimball and Jennie R. Kimball of Lincoln, Nebraska, parties of the first part, and Princess Amusement Company, * * * party of the second part, and thereby be it

"Witnessed: That said parties of the first part, hereinafter designated as the lessors, joint owners in fee of the property hereinafter described, in consideration of the covenants of the party of the second part, herein set forth, do by these presents lease and demise to said party of the second part, hereinafter designated as the lessee, the following described property, situated in the city of Lincoln, Lancaster county, state of Nebraska, to wit:

"Lot 14, Block 63, S. W. Little's Subdivision of Lot 30, of the original plat of Lincoln, Nebraska, otherwise known as 1500 O street, together with all and singular the appurtenances thereunto belonging.

"To have and to hold the same to said lessee, without any liability or obligation on the part of the lessors, of making any alterations or repairs of any kind on or about said premises, except as hereinafter specified, for the term of thirteen years and seven months from the 1st day of July, 1921, to the 1st day of February, 1935. Said lessee in consideration of the leasing of the premises as above set forth, covenants and agrees with the lessors to pay to them, * * * as rent for said premises the sum of $130,400, payable as follows, to wit: $800 on the 1st day of July, 1921, and $800 on the 1st of each and every month thereafter, to and including the 1st day of January, 1935.

"For the considerations as above set out, and the leasing and demise of said premises, it is further agreed by and between said parties as follows: * * *

"2. That said lease heretofore existing and being under date of January 31st, 1920, shall, from the first day of July, 1921, be abrogated and this lease and agreement be substituted therefor. * * *

"4. That all the equipment (except the fire curtain, together with the heating, lighting, and ventilating systems, existing in said building upon the date thereof, with fans and other equipment used in connection therewith which it is agreed belong to lessors) including, among other things, the seats, carpets, fans, furniture, lamps, signs, machinery, fixtures, pipe organ, musical instruments, pictures, decorations, fixtures and theater and stage equipment of every kind, used in the operation or use of the Rialto Theater is the property of party of the second part and the same, or that with which it is replaced, shall be, and the same is hereby given as security for the fully performing by party of the second part of the covenants by it hereby to be performed, but may be removed at any time, provided same is replaced by that which is as good, or better, and the building restored, and upon the expiration of this lease, may, if the covenants thereof have been fully performed, be removed upon condition that the building be restored.

"5. That party of the second part may install in said

building at its own expense a ventilating system and may, at the expiration of this lease, remove the same upon condition that the building be restored and that said system shall remain the property of party of the second part. * * *

"8. That the lessee will carry insurance against loss by fire and tornado, covering all furnishing and equipment of every kind in said theater, in a sum sufficient to replace said furnishings and equipment in as good condition as they existed prior to the fire or tornado, and in any event, no less than $20,000 fire insurance, and $20,000 tornado insurance. * * *

"10. That the lessee will * * * be responsible for and at its own expense keep in repair all plumbing, water pipes, gas pipes, steam pipes, radiators, electric wiring, and sewerage or other fixtures, including plate glass, and window glass, and that said lessee will not suffer or allow any damage to any of the equipment, building or other improvements belonging to said premises. * * *

"12. That, subject to the provisions of paragraph numbered 1 hereof, upon a failure to make payments of rent as herein agreed, or upon the violation or nonfulfilment of any of the covenants of this lease, said lessors may, at their election, either distrain for said rent due and damages sustained, or declare this lease at an end, and recover possession, as if said property together with the furnishings and equipment were held by forcible detainer, the said lessee hereby waiving any notice of such election, or any demand for the possession of said equipment and premises. * * *

"These presents are executed in duplicate as aforesaid."

The evidence shows without dispute that at the time of the execution of the second lease on June 27, 1921, the plaintiffs were the owners of all the equipment in the theater. The value of such equipment was upwards of fifteen to twenty thousand dollars. The theater business was of such a nature that it was necessary to constantly add new innovations and methods in such business, and in doing so to exchange old equipment for more modern equip-

ment. While the old lease was erroneously excluded from evidence, its exclusion was without prejudice as enough evidence exists to lead to the same interpretation of the second lease as would be made had the first lease been admitted into evidence. It is important to note that no part of the purchase price of this equipment was ever agreed upon or ever paid to the plaintiffs except as it may have been included within the monthly rental payments. The total rental of $130,400 is so commingled with and so includes the purchase price of the equipment as to cause the purchase price and rentals to become impossible of separation. Subdivision 6, omitted from the portions of the lease above set out, provided a complete restriction upon alienation of the title to said equipment by the lessee whether such alienation be of equipment received from plaintiffs or later placed in the theater by the lessee. Subdivisions 4 and 12 provided that at the expiration of the lease the equipment may be removed by the lessee if the lessee has fully performed, and provides that if default be made by lessee the plaintiffs may recover the equipment. The contract is silent as to what the plaintiffs shall do with the equipment in case of such a recovery. The uniform conditional sales act is not in force in this state. Could the plaintiffs recover any more of the purchase price of the property than that included within rents that accrued prior to the breach? The law seems to say they could not. 36 C. J. 335, and cases cited. Had the breach and forfeiture occurred one month after the commencement of the lease, and if the plaintiffs are prevented from recovery of rent accruing after the date of forfeiture, could the appellant successfully contend that it owned the equipment free of encumbrance after payment of rent accruing prior to forfeiture? After the forfeiture the parties treated the equipment as belonging to the plaintiffs, at least until the action for an injunction was begun. We construe the contract between the parties as a conditional sales contract so far as it relates to the equipment involved. See 8 C. J. S. 230, sec. 3 C; 24 R. C. L. 450, sec. 748.

It is a contention of the appellant that the plaintiffs had merely a lien on the equipment and that when action was brought and attachment made to collect rent such lien was lost. *Potter v. Greenleaf,* 21 R. I. 483, 44 Atl. 718; *Shelton v. Jarrell,* 54 S. W. (2d) (Tex. Civ. App.) 1082. This contention is predicated upon the supposition of title to the equipment being in the appellant during the term of the lease, and would render nugatory the provision in the contract allowing plaintiffs to recover the equipment upon forfeiture and reentry. It may be claimed by appellant that an election to sue for a recovery of a portion of the sale price by a conditional seller of personalty accompanied by attachment of the goods sold, in the absence of statutory regulation or provisions in the contract to the contrary, constitutes such an election of remedies as to vest absolute title in the vendee. See 55 C. J. 1221, 1223, and cases cited in footnotes; 24 R. C. L. 482, sec. 776; *Mathews Piano Co. v. Markle,* 86 Neb. 123, 124 N. W. 1129. The rule stated is subject to exceptions. Here a predominant part of the consideration was rent for the real estate. The purchase price of the equipment is inextricably woven into the amount of the rentals. Plaintiffs are prevented from recovery of rentals accruing subsequent to forfeiture and reentry and hence prevented from recovery of the unpaid balance of the purchase price of the equipment. What would be the effect of an action by plaintiffs for the unpaid part of the reasonable value of the equipment, or whether such an action could be maintained, we need not decide. Plaintiffs have not brought such an action. The rule to the effect that recovery of the purchase price by the seller under a conditional sales contract vests title to the goods in the buyer does not apply to recovery of rent accruing before forfeiture on breach by a tenant and reentry into possession by the landlord of both real estate and goods under a lease to real estate for a term of years that contains a conditional sales contract of goods, when the rent and purchase price are due and payable in instalments and are so mingled into one sum as to be incapable of separation. 55 C. J. 1274.

The appellant attempts to distinguish between the rights of the plaintiffs in the equipment delivered to the original lessee by the plaintiffs and that subsequently placed in the theater by the original lessee or by the appellant. The provisions of the lease under which appellant held and the interpretations of those provisions by the parties as disclosed by their acts made no such a distinction. As between a conditional seller and buyer of personal property a provision in a contract to the effect that the buyer may dispose of such property and replace it with other property may have the effect of causing the parties to occupy the same relation to such after-acquired property as they occupied to the original goods. See 55 C. J. 1213, and cases cited. The evidence in this case when considered in connection with the contract involved is such as to show title to any equipment placed in the theater by appellant to have vested in plaintiffs subject to the right of appellant to become the owner thereof at the expiration of the term of the lease upon full compliance with the terms thereof. Otherwise, the provisions of the contract to the effect that plaintiffs may recover all equipment upon termination of the lease by forfeiture is rendered nugatory as to equipment placed in the theater by appellant or its assignee to replace that removed.

We deem it unnecessary under the view herein taken of the issues involved to determine many assignments of error made by appellant. Questions of whether certain parts of the equipment involved were fixtures and certain parts not fixtures become immaterial. We deem it unnecessary to make any application of the rule relating to the right of a tenant after forfeiture and reentry by the landlord to remove fixtures. See *Stevens v. Burnham*, 62 Neb. 672, 87 N. W. 546. The trial court submitted the counterclaim of the appellant upon the issue of whether or not the appellant had abandoned the equipment involved, and in doing so gave instruction No. 12. The appellant assigns the giving of this instruction as error. It has been held by this court that error in the giving of an instruction

is not prejudicial when the verdict rendered is the only verdict that the pleadings and evidence would support. *Leichner v. First Trust Co.*, 133 Neb. 170, 274 N. W. 475. An action in trover for the conversion of personal property cannot be maintained unless at least either title or right to possession of such property at the time of the alleged conversion is in the plaintiff. 26 R. C. L. 1131, sec. 41.

We have examined all assignments of error made by appellant and find no error prejudicial to its rights.

The plaintiffs have perfected a cross-appeal. By their cross-appeal plaintiffs complain of the action of the trial court in refusing to submit to the jury the question of whether or not appellant had converted a pipe organ, various sets of furniture and scenery which had been delivered to the original lessee and never returned to the plaintiffs. By instructions Nos. 7 and 8 the trial court limited the plaintiffs to recovery for damages to the real estate caused by destruction of brick and plaster in removing the pipe organ, and damages to the heating plant, radiators and electric wiring. Such damages the jury fixed at $2,050. True the plaintiff's petition sets forth a copy of the second lease and a copy of the assignment to appellant. Nowhere does such petition mention any damages arising from an inability to rent the premises for the unexpired term of the lease for as large a rental as appellant had paid prior to a breach of the lease. Had appellant complied with the terms of the lease, it would have been the owner and entitled to remove from the theater at the expiration of the lease all items of property that plaintiffs now allege it converted. Furthermore, plaintiffs' petition pleads and the lease provides that appellant could rightfully dispose of and remove from the theater during the term of the lease all articles that plaintiffs now allege it converted. The lease bound the appellant to replace any equipment removed. Is not a failure to do so a breach of covenant and not a conversion? A study of the plaintiffs' amended petition will disclose that it pleads a cause of action only for waste upon the real estate, as it pleads the appellant's

right of removal and disposition of equipment during the term, and does not contain sufficient allegations to plead a cause of action for breach of covenant. If the plaintiffs were yet to bring action for breach of covenant, would not the measure of damages be the decrease in rental caused by the breach minus rental received during the unexpired term and the value of equipment that plaintiffs received? We do not decide. It is difficult to see how the judgment in this action as against either the plaintiffs or the appellant could be a bar to such an action. Would the denial to appellant of the right to recover in trover in this action be inconsistent with allowing it credit for equipment received by plaintiffs in an action for breach of covenant? We do not decide. We do hold that a seller in a conditional sales contract that reserves title in the seller until the purchase price is paid and that expressly authorizes a disposition of the property by the buyer, provided it is replaced by property that is as good or better, cannot recover against the buyer in an action of trover for the conversion of property of which the buyer has disposed, even though no replacement is made. 55 C. J. 1230.

The plaintiffs do not seriously contend and could not successfully maintain a contention to the effect that any judgment should be rendered against defendants other than the Lincoln Theatre Corporation. Aside from a determination of the amount of damages for waste, the verdict rendered by the jury is the only verdict that could be supported under the pleadings and the evidence. The evidence would support other amounts than $2,050 for waste, but of this amount no complaint is made.

For reasons above stated, the judgment of the trial court is

AFFIRMED.

GUSTAVE SCHULZ ET AL., APPELLEES AND CROSS-APPELLEES, V. DIXON COUNTY, APPELLANT AND CROSS-APPELLEE: SCHOOL DISTRICT NO. 60, INTERVENER, APPELLEE AND CROSS-APPELLANT.

279 N. W. 179

FILED APRIL 16, 1938. No. 30290.

1. **Taxation.** "Farm lands," for the purpose of taxation, shall be valued and assessed at their actual cash value—their value in the market in the ordinary course of trade.
2. **Municipal Corporations.** Local self-government, having always been a part of the American system, finds recognition in the provisions of our state Constitution; and even if not expressly recognized, it is still to be understood that these instruments are framed with its present existence and anticipated continuance in view.
3. **Schools and School Districts: TAXATION.** The school district in Nebraska is a unit of local self-government, democratic in form, possessing no rights or powers whatever beyond those conferred upon it by the terms of the statutes of its creation. It possesses no power, actual or potential, express or implied, to adversely affect or interfere with the state's constitutional and statutory right to tax and assess lands situated within its boundaries for public purposes, including the support and maintenance of state government, at actual value as determined in the market in the ordinary course of trade.
4. **Taxation.** A general tax cannot be dissected to show that as to certain constituent parts the taxpayer receives no benefit and therefore is entitled to relief because of such fact. Property within the limits of a municipality is subject to local taxation although it derives little or no benefit from the municipal government.
5. *Schmidt v. Saline County*, 122 Neb. 56, 239 N. W. 203, expressly overruled and doctrines announced therein rescinded.

APPEAL from the district court for Dixon county: MARK J. RYAN, JUDGE. *Reversed and dismissed.*

*John E. Newton*, for Dixon County, appellant.

*McCarthy & McCarthy*, for Gustave Schulz et al., appellees.

*Harry N. Larson*, for School District.

*Ray E. Sabata, amicus curiæ.*

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

EBERLY, J.

This appeal involves the assessed valuation for taxation of fifteen parcels of land in school district No. 60 (Wakefield) in Dixon county, Nebraska. Wakefield is a city of the second class. District No. 60 embraces the city of Wakefield and sections 28, 29, 31, 32 and 33, township 27, range 5, adjacent thereto. The lands situated within school district No. 60, and without the corporate limits of Wakefield, are farm lands, and were so used at the time of the assessment complained of. The owners of these farm lands allege in their petition that the school district levy in school district No. 60 is 18.3 mills; that the school district levy in other and adjoining districts does not exceed 6 mills; and that by reason of the higher levies in school district No. 60 plaintiffs' lands are not worth as much as similar farm lands in adjoining school districts, and that they should therefore be reduced in valuation for tax purposes. This petition was given due consideration by the county board of equalization and denied. Plaintiffs thereupon prosecuted an appeal to the district court, where, after a trial *de novo* on the merits, the district court found for plaintiffs and ordered the assessment of the lands of plaintiffs reduced to the extent of 25 per cent. In the last paragraph of a memorandum opinion the trial judge sums up the situation presented by the record, as follows:

"It is true that the farm lands involved in this case are perhaps as valuable for farming purposes as any land in northeastern Nebraska, and the present rate of assessment does not exceed their actual value. Still the fact remains that the taxes on these lands are double that of lands of like character in the adjoining school districts; and if the case of *Schmidt v. Saline County, supra* (122 Neb. 56, 239 N. W. 203), is to remain the law of this state, the court can do but one thing, and that is to order a reduction of the valuation."

The defendants Dixon County and School District No. 60, as intervener, prosecute appeals from the judgment so entered to this court.

The principal point presented for decision in *Schmidt v. Saline County,* 122 Neb. 56, 239 N. W. 203 (hereinafter referred to as the *Schmidt* case), and the actual determination made by this court therein appear in the following paragraph of the opinion, viz.:

"The principal controversy here is with reference to the cause which affects the value of plaintiffs' lands. It appears that for many years school district No. 68, in Saline county, has levied a tax, for school purposes, running from 14 to 17 mills annually on the dollar of assessed valuation, and that a like levy will be necessary and will continue in said district for years to come. It also appears that the tax levy for school purposes on lands of the same character and quality, situate outside of and adjacent to the district, is from 4 to 5 mills on the dollar of assessed valuation. This has resulted in imposing a tax on an average quarter-section of land within district No. 68, for several years last past, of about $350 per annum, while in a quarter-section of land of the same quality and character, lying adjacent to but outside the district, the tax is about $175 per annum. This situation has caused a decrease in the actual value of the lands within the district, for sale and loan purposes, of 20 to 25 per cent."

The correctness of the conclusion stated must be determined by the proper application of the constitutional and statutory provisions directing and regulating the valuation of lands for assessment purposes. Reduced to its elements, the sole question presented is the simple one of valuation in conformity with law.

The only authorities cited to sustain the conclusion thus stated in the *Schmidt* case are: "The better rule and the one generally recognized is: 'If the property is devoted to the use for which it was designed, and is in a condition to produce its maximum income, one very important element for ascertaining its present value is the net profits derived

therefrom.' 26 R. C. L. 367, sec. 324. See, also, note to *Wells Fargo & Co. v. Johnson,* L. R. A. 1916C, 529, 532; 3 Cooley, Taxation (4th ed.) 2308, sec. 1146."

So far as farm lands are concerned, the constitutional provision pertinent is: "The necessary revenue of the state and its governmental subdivisions shall be raised by taxation in such manner as the legislature may direct; but taxes shall be levied by valuation uniformly and proportionately upon all tangible property and franchises, and taxes uniform as to class may be levied by valuation upon all other property. Taxes other than property taxes, may be authorized by law. Existing revenue laws shall continue in effect until changed by the legislature." Const. art. VIII, sec. 1.

Pursuant thereto the legislature duly enacted section 77-201, Comp. St. 1929 which provides: "All property in this state, not expressly exempt therefrom, shall be subject to taxation, and shall be valued and assessed at its actual value. 'Actual value,' as used in this act, shall mean its value in the market in the ordinary course of trade."

Examining the authorities cited by the majority opinion in the *Schmidt* case to sustain the conclusion there announced: In 26 R. C. L. 367, sec. 324, set forth more at length with the portion quoted in the opinion in the *Schmidt* case underlined, we find the following:

"When property has a known and determinate value ascertained by commerce in it, as in many kinds of personal property and in certain classes of real estate, there can be no difficulty in ascertaining its value for purposes of taxation. In many cases, however, the assessor has no such satisfactory guide, and must value the property by other means. In such cases, *if the property is devoted to the use for which it was designed, and is in a condition to produce its maximum income, one very important element for ascertaining its present value is the net profits derived therefrom.* In such a case the tax is not levied upon the earnings as such, but the earnings are treated as a guide to the capital value. The value of the property is arrived at by capitaliz-

ing the net income therefrom at the rate of return prevailing in the same section of the country upon investment of a similar character. In determining the net income of any item of property as a basis for valuation for the purpose of taxation, the average net income for a number of years should be considered, rather than the earnings of a single year standing alone."

It is obvious that the first sentence of the paragraph just above quoted is in strict harmony with the Nebraska statute, and is the controlling rule to be followed in the valuation of the farm lands here in suit. The words "in such cases," which in the original preceded the words quoted in the opinion in the *Schmidt* case, constitute an obvious limitation thereof, and the text following these words is applicable only "in such cases" wherein "the assessor has no such satisfactory guide," etc.

Accepting the conception that a law text is authoritative only so far as supported by adjudicated cases, we find this conclusion is sustained by the cases cited in notes 9 and 10 in support of the quoted part carried in our opinion in the *Schmidt* case. In these notes we find fifteen cases cited, fourteen of which were occupied with questions arising out of the assessment of railways, and one of which related to the assessment of an express company. It may be noted that our present revenue act recognizes the peculiar nature of these businesses and properties, and provides special methods of assessing the same. In like manner, the note to *Wells Fargo & Co. v. Johnson,* L. R. A. 1916C, 529, 532, does not pertain to the assessment of farm lands. So, likewise, 3 Cooley, Taxation (4th ed.) 2308, sec. 1146, so far as in point here, is limited in its application by its supporting cases to special classes of property, such as railways, toll bridges, express companies, and special constructions, all in strict harmony with the principles announced in 26 R. C. L. 367, sec. 324, and is therefore inapplicable to, and in no manner controlling in, the question of the proper assessment of "farm lands." It cannot be said that either the nature of the property or the circumstances sur-

rounding it in the *Schmidt* case were effective to withdraw it from the scope of the plain mandate of section 77-201, Comp. St. 1929.

By section 77-1801, Comp. St. Supp. 1937, the county board on the last day of sitting as a board of equalization, or the county clerk after its adjournment, is authorized and directed to levy the amount of taxes which were adopted by the several school districts of the county. Now, in the instant case, there is no complaint as to the valuation of real estate for assessment, save as such complaint is based upon the levy of school taxes and the results thereof. Eliminating all question of school taxes and the effect thereof, the valuation of plaintiffs' farm lands is unchallenged. The result of the application of the state and county levies thereto would not result in plaintiffs paying an excessive state or county tax. It must be conceded that their state and county taxes thus assessed would be but proportionate to the exactions by the state and county from other owners of real estate of equivalent actual value. Their claim for relief is bottomed solely on the fact that their school taxes amount to 18.3 mills while the levy of surrounding districts for that purpose is not to exceed 6 mills. The relief granted, viz., lowering their valuation 25 per cent., reduced the same not only for the purpose of determining their school taxes, but also unjustly decreased the amount of their county and state taxes in that proportion.

Our statute provides that all real property in this state shall be assessed on the first day of April of every even-numbered year (Comp. St. Supp. 1937, sec. 77-1601) at its "actual value," meaning "its value in the market in the ordinary course of trade." Comp. St. 1929, sec. 77-201. This valuation of lands is made and returned by the officers as provided by law. The combined assessment and valuation of lands for the county is equalized by the county board sitting as a board of equalization, which, for that purpose, is required to hold a session of not less than three nor more than twenty days after the second Monday in June each year. Thereafter, abstracts covering all assessments

in the several counties of the state are submitted to the state board of equalization on the first Monday of July of the year of assessment, which board likewise equalizes the same, and on the basis of the valuations thus approved by it determine and assess state taxes as required. The object and purpose of the procedure is to secure for each real estate owner a fair assessment of state and county taxes on the basis of actual valuation of his property, determined by "its value in the market in the ordinary course of trade." Comp. St. 1929, sec. 77-201. The amount of the school taxes was a matter which neither county nor state was in any manner responsible for. It was the inevitable result of the exercise of the powers of local self-government by the school district alone.

"Local self-government having always been a part of the English and American systems, we shall look for its recognition in any such instrument (state Constitution). And even if not expressly recognized, it is still to be understood that all these instruments are framed with its present existence and anticipated continuance in view." 1 Cooley, Constitutional Limitations (8th ed.) 92.

One of the units of local self-government is the school district. "Originally in New England, * * * the township and the school district were identical. * * * And the character of the school district as essentially a township has never been lost." In the transactions relating to the support and maintenance of the public schools in this state, "a spirit of vigorous self-government" is fostered. "Every school district is a miniature democracy where the people, within certain limits, enact their own laws, levy their own taxes, and choose their own officers." 1 Howard, Local Constitutional History of United States, 234-236.

True, in Nebraska, a school district is a creature of statute, possessing no power whatever beyond those given by the legislature. *American Surety Co. v. School District,* 117 Neb. 6, 219 N. W. 583. As an instrumentality of local self-government, in the discharge of its functions under all the statutes of its creation, the school district possesses

no power, actual or potential, express or implied, to adversely affect directly or indirectly the state's right and power, constitutionally vested, to assess the lands within its borders for the public benefit, at their value "in the market in the ordinary course of trade." Comp. St. 1929, sec. 77-201.

It would follow that if a relievable wrong exists in the present case, the remedy may not extend to the impairment of the taxing power of the state and county. But the very inherent nature of the basis of the claims of plaintiffs precludes the idea of a "legal wrong." We are here dealing with "public taxes," which we find defined as "those which are levied and taken out of the property of the person assessed, for some public or general use or purpose, in which he has no direct, immediate or pecuniary interest." 61 C. J. 75.

The following may be regarded as a summary of principles applicable in the instant case, viz.:

"Taxes proper, or general taxes, it has been said, 'proceed upon the theory that the existence of government is a necessity; that it cannot continue without means to pay its expenses; that for those means it has the right to compel all citizens and property within its limits to contribute; and that for such contribution it renders no return of special benefit to any property, but only secures to the citizen that general benefit which results from protection to his person and property, and the promotion of those various schemes which have for their object the welfare of all.' That this is the correct theory is beyond doubt, but nevertheless the contention has often been presented that property receiving no direct benefit from a tax for a particular purpose should not be taxed for such purpose. However, it is almost unanimously held that it is no defense to the collection of a tax for a special purpose that a person liable for the tax is not benefited by the expenditure of the proceeds of the tax or not as much benefited as others. For instance, every citizen is bound to pay his proportion of a school tax although he has no children, or is not a resident, and this also applies to corporations; of a police or

fire tax, although he has no buildings or personal property; or of a road tax although he never used the road. In other words, a general tax cannot be dissected to show that, as to certain constituent parts, the taxpayer receives no benefits. So property within the limits of a municipality is subject to local taxation although it derives little or no benefit from the municipal government. This rule is often applied to the taxation for special purposes of agricultural lands situated within the corporate limits of cities. If such property was exempted, the provision of the Constitution requiring taxes to be equal and uniform would be violated." 1 Cooley, Taxation (4th ed.) 213-215.

In the instant case obviously if these petitioners were to admit that they had each received full pecuniary compensation to the extent of the school tax paid, they would be entitled to no relief. Their real contention is made on the basis that, no such compensation being shown, they have sustained an injury because of not receiving any direct benefit of the school tax paid. This, in effect, is a dissection of the school tax to show that as to the tax in excess of 6 mills they have received little or no benefits. But this violates the basis of general taxation and the contention cannot be sustained. The payment of general taxes for school purposes may not operate, directly or indirectly, to secure immunity from the payment of state or county taxes, in whole or in part. To do so would be to violate the constitutional provision requiring state and county taxes to be equal and uniform throughout the state and throughout the county. Such is the inescapable effect of the decision before us.

It is obvious that the doctrines announced in the *Schmidt* case, as set forth in the majority opinion thereof, are not in harmony with the views herein expressed, and, upon due consideration, that case is expressly overruled and the doctrines announced therein rescinded. It also follows that, notwithstanding in the instant case the trial court has followed the case of *Schmidt v. Saline County, supra,* its judgment, for the reasons stated herein, is erroneous. There-

fore, the judgment of the district court is reversed and the cause dismissed.

REVERSED AND DISMISSED.

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RUTH GREENAMYRE ET AL., APPELLEES, V. THURSTON COUNTY, APPELLANT.
279 N. W. 184

FILED APRIL 16, 1938. No. 30319.

**Case Followed.** This case is ruled by *Schulz v. Dixon County, ante*, p. 549, 279 N. W. 179.

APPEAL from the district court for Thurston county: MARK J. RYAN, JUDGE. *Reversed and dismissed.*

*Robert G. Fuhrman*, for appellant.

*Cecil R. Boughn, contra.*

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

EBERLY, J.

This is a companion case to *Schulz v. Dixon County, ante*, p. 549, 279 N. W. 179. It was submitted at the same time the Dixon county case was heard by this court, without argument. It is a taxpayers' proceeding wherein the relief claimed was similar in all respects to that applied for in the Dixon county case. The county board of equalization of Thurston county denied the claims presented. The taxpayers thereupon appealed to the district court for Thurston county. The defendant county demurred generally to the petition, which was overruled. Defendant thereupon refused to plead further, and the trial court entered findings and judgment sustaining the claims of the taxpayers. The bill of exceptions, duly settled and allowed, discloses that "there was no evidence offered on behalf of the plaintiffs, either oral or documentary." A discussion of the matters of practice presented by the able briefs filed by the parties

would serve no good purpose at the present time. The claims of the taxpayers in this case are foreclosed and determined adversely to them by *Schulz v. Dixon County, ante,* p. 549, 279 N. W. 179, and this case is ruled by that opinion. The action taken by the district court for Thurston county was therefore erroneous.

The judgment of the district court is reversed and the cause and proceedings dismissed.

REVERSED AND DISMISSED.

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JOHN B. GILMORE, APPELLEE, V. JAMES H. COVER, JR., APPELLANT.
279 N. W. 177

FILED APRIL 21, 1938. No. 30253.

1. **Pleading.** A pleader alleging a fact against his interests on a controverted issue is bound by it for all purposes of the trial, though the allegation is not introduced in evidence in the ordinary manner.
2. **Vendor and Purchaser.** A vendee who purchases land and, instead of canceling the contract for defects in the title, makes a demand on vendor to quiet his title in a suit in equity, waives performance on vendor's part for a reasonable time in which to comply with the demand.
3. ———. Vendor in a contract to sell land, if not in default, may cancel the contract for failure of vendee to pay a balance of the purchase price and retain an initial payment pursuant to agreement, when to do so would not be inequitable.

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

*Cook & Cook,* for appellant.

*R. E. Bannister* and *D. E. Harper, contra.*

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

ROSE, J.

This is a suit in equity by vendor to cancel a contract

for the sale of land and to forfeit a payment by vendee on the purchase price.

John B. Gilmore, plaintiff, entered into a contract May 21, 1935, to sell and convey to James H. Cover, Jr., defendant, the northwest quarter of section 12, township 10 north, range 23 west, in Dawson county, for $12,000. The contract was reduced to writing and signed by both parties and by Catherine Gilmore, wife of plaintiff. Defendant paid $1,000 and agreed to assume a mortgage of $4,200 in favor of the Federal Land Bank of Omaha, subject to a second mortgage of $2,600, in favor of the Federal Land Bank Commissioner and to pay the remainder of the purchase price of $4,200 March 1, 1936.

Failure of defendant to make the stipulated payment of $4,200, his abandonment of the purchase, election by plaintiff to cancel the contract and to forfeit the 1,000-dollar payment were pleaded in the petition.

Defendant answered that failure of plaintiff to furnish an abstract showing a good merchantable title and to tender a warranty deed at the time appointed by the contract justified nonpayment of the remainder of the purchase price March 1, 1936. There was a prayer by defendant for either permission to perform the contract on his part or to recover back his payment of $1,000. The reply put in issue the facts interposed as defenses. Upon a trial of the cause the district court granted plaintiff the relief sought by him. Defendant appealed.

On appeal defendant contends that plaintiff did not make a case for the reasons he failed to prove that, pursuant to contract, he delivered or tendered a warranty deed, furnished an abstract showing a good merchantable title, surrendered or tendered possession to defendant, all on March 1, 1936, when the latter was able and willing to pay the balance of the purchase price.

This position of defendant is untenable, when his answer and a preponderance of the evidence are considered in connection with the law applicable to the controversy. Defendant pleaded in substance in his answer that, as pro-

vided in the contract, plaintiff submitted for examination an abstract, which, upon examination by counsel, disclosed defects; that defendant made a demand on plaintiff to proceed to quiet his title, a proceeding delayed until March 23, 1936; that the title was not quieted in plaintiff until May 5, 1936, a time when defendant was unable to procure funds for payment of the remainder of the purchase price. The allegation that defendant demanded a proceeding to quiet title determined that fact against him for all purposes of the trial. *Bonacci v. Cerra, ante,* p. 476, 279 N. W. 173. (No. 30168, April 15, 1938.) By demanding the quieting of the title in plaintiff, defendant waived the furnishing of an abstract showing a good merchantable title March 1, 1936. *Shonsey v. Clayton,* 107 Neb. 695, 187 N. W. 113. Plaintiff had in fact a good title on that date as shown by the decree of the district court in the subsequent suit to quiet title. Having demanded the litigation for that purpose, a reasonable time for a decision was necessary. The evidence does not show any unreasonable delay on the part of plaintiff in obtaining such relief. On the very day the title was quieted in plaintiff, defendant notified the former's agent that the contract of purchase had been assigned to George E. Kerry who agreed to comply with its terms. The truth of the record is that defendant abandoned the contract when it was in full force and neither he nor his assignee performed the obligation to tender or pay the balance of the purchase price before or after the quieting of the title.

Defendant attempts to justify nonperformance on his part March 1, 1936, and afterward, by failure of plaintiff to deliver or tender the warranty deed required by the contract. The right to the deed depended on payment of $4,200, an unperformed obligation. A preponderance of the evidence requires findings that plaintiff and his wife, at the time of signing the contract of sale, executed the necessary deed and placed it in the hands of plaintiff's agent for delivery upon payment of the remainder of the purchase price. It follows that curable defects in the record title and as-

serted failure to deliver or tender a proper deed do not constitute a defense.

Failure to deliver possession March 1, 1936, is also urged as a defense. There is some conflict in the evidence on this issue, but the clear preponderance is in favor of plaintiff. He had good title by adverse possession as subsequently decreed and he was in possession with nothing to prevent him from surrendering it to defendant. The defects in the record title did not interfere with change of possession. There was some discussion by the parties about permission of plaintiff to remain temporarily in possession of the house and a pasture for reasons well understood by both, such as the hardship of moving when roads were bad and when there was snow on the ground. The true import of the testimony on this feature of the defense is that plaintiff recognized defendant's right to possession, and tendered it to him in the event of his performance of the contract, and that remaining on the premises depended on a lease from defendant for that purpose. This defense also fails.

The homestead character of the property did not excuse nonpayment of the purchase price for the reason that both plaintiff and his wife executed a warranty deed which was ready for delivery.

The plea of defendant for a return of the initial payment of $1,000 is unavailing for the following reasons: The contract provided in definite terms for the forfeiture of this payment in the hands of plaintiff for the default of defendant. There was no default or other wrongful conduct by plaintiff to require the refunding of this money. In view of all the circumstances shown by the entire record, it would be inequitable to compel plaintiff to return to defendant the payment in controversy.

AFFIRMED.

GEORGE E. PARISH, APPELLEE, V. COUNTY FIRE INSURANCE COMPANY OF PHILADELPHIA, APPELLANT.
279 N. W. 170

FILED APRIL 21, 1938. No. 30310.

1. **Appeal.** A verdict will not be disturbed where there is some evidence tending to support it, but this does not apply where the verdict is opposed to the undisputed physical facts of the case.
2. **Insurance.** An insurance policy is a contract, and, if couched in unambiguous and clear language should be construed as other contracts.
3. ———. Where a wind, which caused only slight damage, preceded a severe rainstorm, which of itself caused great damage to a dwelling, recovery cannot be had upon a policy of insurance covering damage from windstorm and hail, except for the very slight damage caused directly thereby.

APPEAL from the district court for Douglas county: WILLIS G. SEARS, JUDGE. *Reversed.*

*Ramsey & Welpton*, for appellant.

*George Evens, contra.*

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

PAINE, J.

This is an action upon an insurance policy to recover damages to a house, alleged to have been caused by hail and windstorm. The jury, by a vote of 10 to 2, returned a verdict for $2,000, being the amount of the policy. The insurance company appealed. The only errors relied upon for reversal are that the verdict and judgment are contrary to law and not sustained by the evidence.

The action arose out of a storm that occurred in Omaha on the afternoon of May 17, 1936. The house was a two-story cement block house, located at 3465 Ames avenue. The house was rented to two families, one residing on the upper floor, which was at the street level, and the other apartment on the lower floor, which was entered from a door at the rear, for the ground sloped very abruptly down

from the paved street level. The house was located at the low point of the area to the west and north. This square house had a four-sided roof going up to the chimney in the middle, the chimney being four or five cement blocks high. The north part of the roof extended out as a porch in front of the house, and rested on several posts.

The evidence offered on behalf of the plaintiff disclosed that a terrific wind preceded a violent rainstorm and hail, and that there was a lull between the wind and the rain. The tenant testified that the house shook and quivered, and that the porch posts were broken loose at the bottom, and that the house was cracked and weakened by the wind. One witness testified that the roof was raised by the wind and dropped back on the house.

The defense charges that the loss and damage were caused by the high water, the rain being of cloudburst proportions, and that, while the water ran through the house, it did not enter the building through any openings in the roof or walls made by the direct action of the wind, and that the loss and damage were not covered by the windstorm insurance. The defendant produced evidence showing that the water rushed down Ames avenue to the low place where this house was erected; that it carried cans, débris, and everything with it; that the water ran into the house and ran through it; that it came across the paved street as a column of water the width of the street, and eight or ten inches deep, rushed over the curb and sidewalk and into this house. It is claimed that, while the porch columns were broken loose at the bottom and left suspended, this was entirely the effect of the water. Defendant's evidence is that the roof could not have been raised up by the wind and settled back, for there is no sign of any cracking of the paint anywhere around the base of the roof, and the chimney going up through the center of the house was entirely intact, as shown by the evidence and the photographs introduced in evidence, the testimony indicating that it could not have been left intact if the roof had been raised up by the wind.

The testimony of a defendant's witness, who held an engineer's degree from the Worcester Polytechnic Institute in Massachusetts, was to the effect that the porch floor had settled where the understructure had been washed away by the water; that a water line appeared 22 inches above the floor of the lower apartment, showing that water had stood at that depth; that this volume of water was more than the joists could carry, and was the cause of the lower floor caving into the basement; that in his opinion the total amount of the damage that had been done by the wind was two or three broken window-glass; that there might have been slight damage to the roof on the north and east slopes by the hail, and that the damage by water could have occurred in five or ten minutes by the stream of water described by the witnesses striking the front of the house and washing out part of the retaining wall.

Another witness testified that he had lived across the street and in the same block from this house for about 28 years; that he was home at the time of the storm; that during the storm he did not notice that the wind was blowing very hard, and that the wind did not shake his house, nor affect his property any, but that after the rainstorm their basement was flooded with water to the depth of four or five feet, the water having come in the basement windows, which were 18 inches above the ground; that the big cottonwood tree leaned more to the east after the storm, and that this was the only damage that he observed done by the wind.

Another witness testified that her house is the next house on the same side of the street as the Parish property, with vacant lots between; that she was at home at the time of the storm; that the rain accompanied the storm as a cloudburst, and she saw the water rush across Ames avenue from the north side and rush through insured property; that tubs and other things were being washed out of the insured property; that the only damage done to her house by the wind was to an old chimney which had been plastered with cement, which cement was cracked.

Another woman testified that she was at home on the afternoon when the storm occurred; that the wind came, but did not shake nor damage their house, although the hail battered the paint some; that after a little lull the rain "poured just like the top of the heavens had dropped out;" that the water came down the alley in the back of their house from the north and west into their front yard; that their fence was soon jammed with brush, paper, rags, tin cans, and then the water flattened their fence and rushed into Ames avenue at a depth of three feet or more, went over the south curb, and into the front of the insured property.

Another neighbor living near-by testified that the wind did no damage to his house, nor to the back roof over the porch; that he saw water coming down the street to a depth of about two feet and rushing into the front of the insured house; that there were no trees blown down in that immediate vicinity by the wind.

A building contractor testified that he made an inspection of the property a week after the storm; that one could push the porch posts back and forth; that the lower floor had caved in; that there were sediment, grass, rocks and débris throughout the basement; that there was no evidence of water having gone through the roof, except some small spots in the ceiling of the upstairs apartment; that he had often made inspections during the 25 years that he had been a building contractor in Omaha, and that in his opinion the damage to the old composition roof which was over the shingles might have been caused by hail, and would not exceed $25; that the damage to the house had in his opinion been caused by the water.

It is argued by the defendant that the large double cottonwood tree, estimated to be 75 feet high, and very old, standing close to this insured house on a vacant lot, had none of its many branches injured by the wind. The rather light porch around the entrance to the lower apartment was not torn down by the wind, which all indicates that the wind was not very strong or destructive.

The examination of the photographs introduced in evidence shows clearly that the house is cracked and settled, the lower floor caved into the basement, and that the damage done to this house was of a serious nature, and of a very extensive character; but from the evidence in the case, as given by neighbors living in the immediate vicinity, and by construction engineers, we have reached the conclusion that the evidence will not support a verdict on the ground that the serious damage was caused by the wind or the hail, but, on the other hand, the enormous flood of water following this cloudburst practically ruined the house, and the insurance policy in this case does not provide insurance against such water damage, but is limited to fire, windstorm, cyclone, tornado, and hail.

We are cited to many cases by the plaintiff, especially that of *Jordan v. Iowa Mutual Tornado Ins. Co.*, 151 Ia. 73, 130 N. W. 177, in which it was held that, if a windstorm was the efficient cause of the loss of live stock covered by a policy insuring against loss by windstorm, the fact that other causes may have contributed to that loss does not relieve the insurer from liability. We admit this as a statement of the law, but the facts in the case at bar do not show that the severe gust of wind which came ahead of the rain was the efficient or adequate cause of the damage to the property in this case.

This court has held many times that the rule that a verdict will not be disturbed where there is some evidence tending to support it does not apply where the verdict is opposed to the undisputed physical facts of the case. *Dodds v. Omaha & C. B. Street R. Co.*, 104 Neb. 692, 178 N. W. 258.

"An insurance policy is a contract and, if couched in unambiguous and clear language, should be construed as other contracts." *Omar Baking Co. v. Employers Liability Assurance Corporation*, 130 Neb. 365, 264 N. W. 873. See, also, *Shambaugh v. Great Northern Life Ins. Co.*, 131 Neb. 415, 268 N. W. 288; *Rye v. New York Life Ins. Co.*, 88 Neb. 707, 130 N. W. 434.

Where the evidence is convincing that serious damage to

a dwelling occurred by a flood of rain-water rushing down the street to this lower place, and then from the paved street over the curb and sidewalk and into a house, and where an insurance policy insured such building against direct loss by windstorm and hail, and expressly exempted damage caused by rain, high water, overflow, or cloudburst, which did not enter the insured building through openings in the roof or walls made by the direct action of the wind, such damage is not covered by a policy against hail and windstorm. This is true because the natural and obvious meaning of the provisions of an insurance contract control, rather than a forced or strained construction. *Davis v. Aetna Life Ins. Co.*, 128 Neb. 154, 258 N. W. 58.

We have reached the conclusion that the testimony in this case, taken as a whole, including both that produced by the plaintiff as well as the defendant, does not support this verdict for the plaintiff, and that the verdict and judgment are contrary to the law of the case and cannot be sustained by the evidence, and the judgment of the trial court is hereby

REVERSED.

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HENRY GRAMANN V. ULYSSES S. BEATTY, APPELLEE: RUDOLPH D. MAULIS, APPELLANT.
279 N. W. 204

FILED APRIL 21, 1938. No. 30307.

1. **Adverse Possession.** The general rule is that, where one enters into and holds possession of land under an executory contract of purchase, his entry and possession are in subordination to, and not adverse to, the rights of the vendor.
2. ———. "Where the entry is under such circumstances, the possession retains its subordinate character until payment or performance of all conditions by the vendee or until he surrenders the possession which he has had under the agreement or until he has distinctly and unequivocally repudiated the title of his vendor and such repudiation has been brought either expressly or by legal implication to the vendor's knowledge, or until execution of a conveyance by the vendor to the

vendee terminating the executory character of their relationship." 2 C. J. S. 673.

3. **Tenancy in Common: ADVERSE POSSESSION.** Possession by one joint owner of common property is presumed to be friendly as regards his coowners, and before such possession can become adverse, notice that the part owner in possession is claiming the entire estate in hostility to his coowners must be brought home to the latter in some plain and unequivocal manner.

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

*Hubka & Hubka,* for appellant.

*S. D. Killen* and *Jack & Vette, contra.*

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

CARTER, J.

This suit was commenced to obtain a foreclosure of a tax-sale certificate on a part of two lots in the village of Adams. The contest from which an appeal was taken arose over the question of the ownership of the property. The appellant, Rudolph D. Maulis, contends that he is the owner of an undivided one-half interest in the property, while the appellee, Ulysses S. Beatty, claims to be the owner of the whole tract. The judgment of the trial court was to the effect that Beatty was the sole owner of the whole tract, and Maulis appeals therefrom.

The record discloses that in 1916 Beatty and Maulis purchased the property and obtained and recorded a warranty deed thereto. For three years they jointly operated a garage on the property. In 1919 Maulis engaged in the garage and oil business in Sterling, and subsequently at Crab Orchard. Beatty remained in Adams and continued to operate the business at that point.

On September 30, 1919, Maulis and Beatty entered into a contract whereby Maulis agreed to sell his interest in the lots in question, together with the garage building, stock and fixtures, for $2,200, $100 of which was to be paid

in cash and the balance to be taken in stock and merchandise at invoice price not later than November 20, 1919. This contract was not acknowledged and was not filed for record until December 4, 1935.

It is the contention of Beatty that Maulis, over a long period of time, received stock and merchandise from his garage in an amount approximating $3,800, and that, in a settlement of accounts had on June 30, 1930, the $2,100 due on the contract was credited and that he has been entitled to a deed from Maulis since that date. Maulis contends that the contract was never intended as a sale of his interest in the property and that the contract was made to enable Beatty to hold his agency contract with the Ford Motor Company which was threatening to cancel it because Maulis, a partner, was selling a different make of automobiles at Sterling. The evidence further shows that for almost 10 years prior to June 30, 1930, Maulis was selling gasoline to Beatty in wholesale quantities. Maulis contends that, in their settlement of accounts on June 30, 1930, it was found that Beatty was indebted to him in the sum of $145, exclusive of the sum of $2,100 alleged to have been due under the contract. It is not disputed that Beatty gave Maulis a note for $145 on that date. The documentary evidence in the record does not disclose the amount of gasoline delivered by Maulis or the items taken into consideration by the parties in arriving at their settlement. The oral testimony on the subject is in irreconcilable conflict.

The evidence further shows, however, that on May 23, 1932, almost two years after the settlement of accounts, Beatty wrote Maulis a letter which in part is as follows: "I have been expecting to get a contract from you in accordance with our agreement when you were here. But Mr. Gramann informed me that he had written you and received a reply indicating you would not do this but would take $2,100. I do not think it will do me any good to try to sell and settle with you at this figure under present conditions, but would like to have a chance to try it according to

your agreement when you were here. Mr. Gramann said you mentioned settling in court and if you wanted to do this it would be useless for me to try to get a settlement with you otherwise, but thought you might be kidding him and I would like to try it anyway."

The letter from Gramann, Beatty's banker, under date of May 16, 1932, referred to in the letter of Beatty to Maulis, contains the following: "We are sorry that you did not come back to fix up some kind of a deal with Less (Beatty) whereby you enable him to go ahead and sell the garage. It is a great help and necessary that Less knows from you beforehand how much you will take for your half interest before he goes ahead and tries to make a deal for the garage. We would have liked it and believe that it would be the easiest if you would place in escrow with us a deed to Less for your half interest at $1,500 as you suggested with the instruction to use the same only against payment of this amount."

It also appears that on March 7, 1935, Beatty and wife gave a mortgage on the property to the Adams State Bank. It is worthy of notice that it covered only an undivided one-half interest in the lots.

Subsequently, on March 23, 1936, an opportunity to rent the premises in question to the Nebraska United Co-operative Oil Supply Company was presented to Beatty and Maulis. The result was that each, with full knowledge of the other, executed a lease upon the premises. The lease signed by Maulis stipulated that $20 of each monthly rental was to be sent direct to Maulis.

Upon a consideration of this evidence, we necessarily conclude that the contentions of Maulis are established by a preponderance of the evidence. If all accounts were settled on June 30, 1930, as contended by Beatty, there would have been no reason for a new agreement or a new settlement with Maulis. The admissions of Beatty in his letter to Maulis corroborate the testimony of Maulis that the contract price of the property had not been paid. The subsequent conduct of the parties in leasing the premises

supports the same conclusion. It is not shown anywhere in the record that Beatty demanded a deed or even contended that he had paid for the lots prior to the filing of the suit at bar. We conclude that the evidence preponderates in favor of Maulis on the question whether Beatty fulfilled the terms of the contract of sale and paid for the Maulis interest in the lots.

Beatty contends, however, that he has been in the exclusive and adverse possession of the lots for more than 10 years and that he has obtained a prescriptive right thereto. The contract of September 30, 1919, for the sale of the interest of Maulis in the lots provided that a warranty deed would be furnished upon the payment of the amount due thereunder. The amount was not paid. Maulis therefore still owned the fee simple title to an undivided one-half interest. There is no evidence in the record that Beatty claimed any interest adverse to Maulis until this suit was commenced. There is no evidence that Beatty in any way notified Maulis that he claimed title to the whole of the property. The following are the rules of law applicable to such situation.

"It is a well settled general rule that where one enters into and holds possession of land under an executory contract of purchase or bond for title, his entry and possession are in subordination to, and not adverse to, the rights of the vendor or of those holding under him. In such case a privity exists which precludes the idea of a hostile tortious possession pending the completion of the contract which can silently ripen into title by adverse possession under the statute of limitations. * * * The vendee is equitably estopped from claiming that the possession is adverse. * * * Where the entry is under such circumstances, the possession retains its subordinate character until payment or performance of all conditions by the vendee or until he surrenders the possession which he has had under the agreement or until he has distinctly and unequivocally repudiated the title of his vendor and such repudiation has been brought either expressly or by legal implication to the vendor's

knowledge, or until execution of a conveyance by the vendor to the vendee terminating the executory character of their relationship." 2 C. J. S. 672.

"Where the purchaser of real estate under a verbal contract of sale is put in possession by the vendor under an oral agreement for the payment of the purchase price thereafter, the possession of the vendee will not become adverse until payment in full of the agreed consideration. But in such a case where a dispute arises between the parties as to whether or not such consideration has been paid in full, and the vendee in person or by his agent or attorney notifies the vendor that he claims full payment of such consideration has been made, and demands of the vendor a deed for said real estate, such acts will constitute such an assertion of ownership by the vendee that his possession thereafter will be adverse; and, if such possession is permitted to continue for the full statutory period of ten years thereafter, it will vest in the vendee an absolute title to such real estate." *Lanham v. Bowlby*, 86 Neb. 148, 125 N. W. 149.

"The possession of land under an executory contract of purchase is not adverse to the vendor until the purchase price is paid, or until the vendee is entitled to a deed of conveyance from his vendor under the terms of the contract." *Beer v. Dalton*, 3 Neb. (Unof.) 694, 92 N. W. 593.

"The statute of limitations will begin to run in favor of a cotenant in possession claiming title in himself to the entire estate as against the other cotenants, as soon as knowledge of the fact that he is in possession asserting that he owns the entire estate, hostile and adverse to any claim of right in them, is clearly brought home to them." *Keleher v. Kelly*, 89 Neb. 127, 130 N. W. 1032.

"Possession by one cotenant of common property is presumed to be friendly as regards his cotenants; and before such possession can become adverse, notice that the tenant in possession is claiming the entire estate in hostility to his cotenants must be brought home to the latter in some plain and unequivocal manner. * * * Ex-

clusive possession by a cotenant, receipt of the rents and profits, payment of taxes and making ordinary improvements proper for the full enjoyment or use of the estate, however notorious and long continued, are not, of themselves, acts of such character as to give notice to his cotenants of a hostile claim. * * * The possession by a cotenant being presumed to be friendly, his cotenants are not chargeable with laches for failure to demand their share of the possession and profits, where they have no notice of a hostile claim by the tenant in possession." *Walter v. Walter,* 117 Neb. 671, 222 N. W. 49.

Under these holdings, we are constrained to the view that the possession of Beatty in the case at bar was not adverse, under the facts set out in this opinion, and that no right of prescription could be grounded upon his occupancy of the property.

We think the trial court erred in decreeing that Beatty was the sole owner of the property in suit. The judgment of the district court is reversed, with directions to enter judgment decreeing that the appellant is the owner of an undivided one-half interest in the lots described in the petition.

REVERSED.

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OCCIDENTAL BUILDING & LOAN ASSOCIATION, APPELLEE, V. CARL E. CARLSON ET AL., APPELLANTS.

279 N. W. 162

FILED APRIL 21, 1938. No. 30273.

1. **Appeal: BOND.** Where the appellant executes a bond or undertaking for the purpose both of an appeal or cost bond and a supersedeas, and it is filed too late to operate as a supersedeas, it will nevertheless operate as an appeal or cost bond or undertaking if filed within time fixed by statute for filing appeal or cost bond and is sufficient for that purpose.
2. ———. Where on appeal in equity from a judgment of the district court the record contains no bill of exceptions and the pleadings are sufficient to support the judgment it will be affirmed.

APPEAL from the district court for Buffalo county: BRUNO O. HOSTETLER, JUDGE. *Affirmed.*

*N. P. McDonald,* for appellants.

*Robert G. Simmons, T. F. Wiles* and *M. H. Worlock, contra.*

Heard before GOSS, C. J., EBERLY, PAINE, CARTER and MESSMORE, JJ., and LIGHTNER and SPEAR, District Judges.

LIGHTNER, District Judge.

Foreclosure, decree for plaintiff and defendants appeal.

Appellee first contends that the appeal should be dismissed because a valid bond was not filed. At the time the motion for new trial was overruled the district court fixed the amount of the supersedeas bond at $500, and thereafter, but not within the 20 days limited by section 20-1916, Comp. St. 1929, the defendants filed a bond, which they designated "Appeal Bond," in the words and figures following:

"Know all men by these presents: That we, Carl E. Carlson, as principal, and Thomas G. Tritt, as surety, are held and firmly bound unto Occidental Building & Loan Association, a corporation, in the sum of $500, for the payment of which we jointly and severally bind ourselves, our heirs, executors and administrators.

"The condition of this obligation is such that,

"Whereas, the said Carl E. Carlson has appealed to the supreme court of the state of Nebraska from the decree of the said district court in the above entitled suit ordering and decreeing sale of the real estate involved in said action; and

"Whereas, said court has fixed the sum of $500 for bond to appeal from said decree to the supreme court of said state;

"Now therefore, if the appellant shall prosecute such appeal without delay and will not during the pendency of such appeal commit or suffer to be committed any waste upon said real estate, and pay all costs and all rents or

damages to such real estate which may accrue during the pendency of such appeal, then this obligation to be void, otherwise to be and remain in full force and effect." (Signatures and justification of surety.)

Appellee contends that this bond is ineffective because it was filed too late to supersede the judgment, and that it is not a proper cost bond under section 20-1914, Comp. St. 1929; that the consideration therefor wholly failed and that it is void. The general rule is laid down in 3 C. J. 1166, as follows: "It is generally held that, where the appellant executes a bond or undertaking for the purpose both of an appeal and a supersedeas, and it is insufficient in amount or in the conditions to operate as a supersedeas bond or undertaking, it will nevertheless operate as an appeal bond or undertaking if sufficient for that purpose." This in our judgment is a reasonable rule and we believe that it should be applied in this case. It follows that the bond in question was sufficient to operate as an appeal bond if it was filed within the time required by statute for filing a cost or appeal bond.

Appellee insists that the bond was not filed in time. It was filed 28 days after the motion for a new trial was overruled. While therefore it was not filed within the 20 days' limitation fixed by section 20-1916, Comp. St. 1929, it was filed well within the three months' limitation for a cost bond fixed by section 20-1914, Comp. St. 1929.

Appellee further claims that the consideration of the bond has failed, but inasmuch as it contains the necessary provisions under section 20-1914, Comp. St. 1929, to bind the obligors to pay the costs, it is effective as an appeal or cost bond and there is not a total failure of consideration. The mere fact that a $500 bond instead of a $75 bond was given and that it contains provisions sufficient to make it a supersedeas bond if it had been filed in time does not vitiate the valid provisions required in a cost bond, since it contains a provision to "pay all costs," which is equivalent in our judgment to the requirement of section 20-1914, Comp. St. 1929, that the bond be conditioned "that the ap-

pellant shall pay all costs adjudged against him in the supreme court." The motion to dismiss the appeal is therefore overruled.

The appellants make various complaints about the decree, but there is no bill of exceptions. Where on appeal in equity from a judgment of the district court the record contains no bill of exceptions and the pleadings are sufficient to support the judgment it will be affirmed. It is hardly necessary to cite authorities in support of this proposition. Late cases reiterating the rule are *Slosburg v. Hunter*, 132 Neb. 529, 272 N. W. 571, and *State v. Barney*, 133 Neb. 676, 276 N. W. 676. We have carefully examined the pleadings in this case and they are in our judgment sufficient to support the judgment. The judgment of the district court is therefore

AFFIRMED.

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JOHN L. LAUTENSCHLAGER, APPELLEE, V. GEORGE W. LAUTENSCHLAGER, APPELLANT.

279 N. W. 200

FILED APRIL 21, 1938. No. 30142.

1. Appeal: EXCLUSION OF EVIDENCE. In a trial to the court, where evidence is excluded erroneously, and where the same evidence is elicited from the same witness and admitted later on in the trial of the case and is fully and completely presented, error cannot be predicated on such erroneous rejection.
2. ———: ———. Error in excluding evidence is cured by its subsequent admission.
3. ———: ———. Alleged error in the exclusion of offered testimony is of no avail if the same testimony or testimony to the same effect had been, or was afterwards, allowed to be given by the witness.
4. ———: ———. Where evidence is improperly excluded, but the witness, on a subsequent examination, states substantially the same facts sought to be elicited, the error is cured.
5. ———: FINDINGS. Findings of the court with reference to matters not presented as issues must be disregarded as surplusage.
6. ———: ———. Findings of the court which are consistent with the pleadings and proof will not be disturbed because the

court has made findings with respect to matters not presented as issues in the case.

7. ———. On appeal in an equity suit involving questions of fact where there is a conflict in the evidence which cannot be reconciled, this court will consider the fact that the trial court observed the witnesses and their manner of testifying.

8. Evidence examined, and *held* sufficient to sustain the judgment of the trial court where the witnesses and their demeanor while testifying were observed.

APPEAL from the district court for Saline county: ROBERT M. PROUDFIT, JUDGE. *Affirmed.*

*Otto E. Placek* and *John E. Mekota*, for appellant.

*H. J. Whitmore, contra.*

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

YEAGER, District Judge.

This is an action which was originally instituted in the district court for Saline county, Nebraska, by John L. Lautenschlager, plaintiff and appellee herein, against George W. Lautenschlager, defendant and appellant herein. The action was to set aside a release of mortgage given by plaintiff to defendant and to foreclose the mortgage which had been released.

That portion of the petition relating to foreclosure was in the usual form. The portion relating to the vacation of the release set forth that the plaintiff had executed the release in question, but that he had never made delivery to the defendant and that defendant had obtained its possession by extracting it from the papers of plaintiff without the plaintiff's consent, and that defendant thereafter filed it for record in the office of the register of deeds of Saline county, Nebraska. The amended answer contained a general denial and the further allegation that plaintiff executed and delivered to defendant the release of the mortgage and that the said mortgage was therefore canceled.

No question is raised as to the validity of the mortgage

and none that it was in default. The sole question on the issues is as to whether or not there was a delivery of the release. In addition to this question on the issues, a question is raised as to the propriety of the rejection of certain offered testimony of a witness on the ground that it was privileged, being conversations between attorney and client. The district court canceled and held for naught the release and decreed foreclosure of the mortgage.

We will discuss the matter of the rejection of the offered testimony first, since if this point is decided favorably to appellant the other one need not be considered at this time, because in such case a reversal of the judgment herein and a new trial would be required.

Plaintiff and defendant went to the office of Stanley Bartos, an attorney, in Wilber, Nebraska, for the purpose of discussing the necessity and legal effect of the release in question, and other matters pertaining to the estate of the plaintiff. These matters were discussed among all three of them. Mr. Bartos was called as a witness for the defendant to testify in relation to the matters discussed. He was asked to state the conversation, and so that there may be no mistake the record thereon is quoted: "Q. State that conversation. Plaintiff objects as calling for a privileged communication." The objection was sustained. The following offer was made, to which objection was made and sustained: "Q. We offer to prove that in a conversation which was taken part in by the plaintiff in this action and the witness on the stand, in the presence of the defendant, George W. Lautenschlager, in the latter part of February or the fore part of March, 1935, at the office of the witness in Wilber, Nebraska, the plaintiff inquired of the witness about transferring his securities, including the release of the mortgage involved in this action, to his son, George Lautenschlager, and was told of the necessity of a delivery to make a valid and binding transfer." There were other offers made and rejected, but they have no direct bearing on the particular subject-matter of this action.

If nothing further appeared in the bill of exceptions,

it would be necessary to determine whether or not under the law this evidence was properly excluded. This necessity has not arisen since, if its exclusion were erroneous, it is cured further on in the direct testimony of the same witness. Subsequently in his testimony, the same witness testified without objection to a conversation with plaintiff and his daughters which occurred in May or June, 1936, wherein in much more detail than the quoted offer contemplates, the identical conversation called for by the question to which objection was sustained was related. The conversation testified to without objection is as follows: "Q. Tell us what that question was. A. They came into the office and Mr. Lautenschlager introduced them, says that those were his daughters. He made a remark then how fleshy they were, and we passed the time of the day. And Mr. Lautenschlager says to me, he says, 'Now, what did you do to me, Stanley?' He always called me by my first name. I says, 'Why?' He says, 'Why,' he says, 'I didn't intend that George should have all that property, all of my property.' I says, 'Yes, you did, Mr. Lautenschlager,' I says, 'You and I have gone over that very fully.' Then the ladies interrupted and they wanted to know the condition, mental condition. One of them, I don't know which one, says, 'My father at that time when he was down here didn't know what he was doing.' I says, 'Yes, he did, he had his mind pretty well made up.' I says, 'As a matter of fact I sent him home the first time and told him not to do anything until he has plenty of time to think matters over.' They says, 'Well, he was suffering.' I says, 'Yes; he had or thought he had at that time what was going to be a fatal disease; he didn't look very good to me, but so far as mental condition is concerned, that was all right.' And then Mr. Lautenschlager says, 'Well,' he says, 'Stanley, I didn't intend that George should have that only after I die.' I says, 'Mr. Lautenschlager, you know that you told me that on account of Bill's estate having been so much trouble in its probate that you did not want your estate to be probated.' I says, 'You remember when I told you that

there was two ways of fixing these papers, one was by making a will and a second one was by absolute delivery in your lifetime. I went over all that matter with you. Don't you remember when I told you you couldn't be like an Indian giver, or you can't keep something and give it at the same time.' I says, 'Now, didn't I make that statement to you?' And Mr. Lautenschlager says, 'Yes; you did.' I says, 'You know just as well as you are sitting before me that all these papers were delivered by you to George and that you knew that you were giving the property away.' And then the ladies spoke up and says, 'Well, will you testify to Mr. Lautenschlager's condition?' I says, 'I will get up and testify to the truth, if you want me to.' I says, 'I will not appear for Mr. Lautenschlager as a lawyer;' and then they accused me of wanting to have a lawsuit about this. I says, 'No, ladies, you are mistaken; if Mr. Lautenschlager brings a lawsuit I will not be his attorney, and I will get up and testify to the facts as they occurred.' And with that they picked up and didn't even say goodby, and left the office."

A comparison of the offer with the quoted lengthy answer of Mr. Bartos shows clearly and without question that, though the trial court excluded the testimony contemplated in the offer when the conversation was called for directly, yet the selfsame conversation was admitted without objection when the witness was called upon to relate it as he had previously related it on the occasion when the plaintiff and his daughters were in the office of the witness. The court had before it the rejected evidence in all of its details and doubtless considered it along with all the other evidence in the case.

It is but the statement of a truism to say that in a trial to the court where evidence is excluded erroneously, but where the same evidence is elicited from the same witness and admitted later on in the trial of the case and is fully and completely presented, error cannot be predicated on such erroneous rejection. The principle controlling this situation has been before this court on a number of occa-

sions and the following pronouncements have been made: Error in excluding evidence is cured by its subsequent admission. *Farmers & Merchants Ins. Co. v. Malone,* 45 Neb. 302, 63 N. W. 802. "Alleged error in the exclusion of offered testimony is of no avail if the same testimony, or testimony to the same effect, had been, or was afterwards, allowed to be given by the witness." *Union P. R. Co. v. Evans,* 52 Neb. 50, 71 N. W. 1062; *Atwood v. Marshall,* 52 Neb. 173, 71 N. W. 1064. See *Union State Bank v. Hutton,* 1 Neb. (Unof.) 795, 95 N. W. 1061; *Flanagan v. Fabens,* 77 Neb. 705, 110 N. W. 655. Where evidence is improperly excluded, but the witness, on a subsequent examination, states substantially the same facts sought to be elicited, the error is cured. *Jonasen v. Kennedy,* 39 Neb. 313, 58 N. W. 122. It thus becomes apparent that it is not necessary in this case to determine the question of whether or not the offered testimony was privileged.

The two remaining assignments of error will be treated together. The appellant contends that the court erred in deciding the case on theories not alleged or proved, and that the court erred in finding that no delivery of the release of mortgage had been made.

It is true that an examination of the decree shows that the trial court made findings not based upon the issues presented by the pleadings; yet, on the other hand, a specific finding was made upon the issues presented to the trial court and on the issue presented to this court for review. The only issue before the court outside of the mortgage foreclosure, which is not in question except as an incident to the judgment on the release, is as to whether or not there was a delivery of the release by plaintiff to defendant. The specific finding in the decree is as follows: "That the defendant, George W. Lautenschlager, wrongfully and secretly obtained possession of the said release on May 23, 1936, wrongfully filed the same in the office of the register of deeds of Saline county and caused the same to be recorded, whereby the said mortgage deed appeared to be discharged of record"

The issue before the court was the question as to whether or not there was a delivery of the release and that issue was specifically determined. The finding is not inconsistent with the pleadings or the proof, and it is nowhere contended that this finding is inconsistent with any other finding made with respect to the issues properly presented by the pleadings or proof. Therefore, such findings as were made with reference to matters not presented as issues must be disregarded as surplusage.

Did the court err in finding that no delivery of the release of mortgage had been made and delivered? A determination of this question must rest upon the credibility of witnesses, surrounding circumstances, and an interpretation of the intent and purposes of the parties as disclosed by the evidence, and must be weighed in the light of the rule laid down for review of equity cases coming to this court. A statement of the rule is as follows: On appeal in an equity action involving questions of fact where there is a conflict in the evidence, this court will consider the fact that the trial court observed the witnesses and their manner of testifying. *Johnson v. Erickson,* 110 Neb. 511, 194 N. W. 670; *Otto v. Gunnarson Bros.,* 102 Neb. 613, 168 N. W. 361; *Enterprise Planing Mill Co. v. Methodist Episcopal Church,* 100 Neb. 29, 158 N. W. 386.

On the part of plaintiff there is a direct denial of delivery and an accusation that the release was extracted from the plaintiff's private papers. On the other hand, the defendant testifies that there was an actual manual delivery, but that when the parties returned home he permitted his father, the plaintiff, to take the release into the house and place it with other papers. Stanley Bartos also testifies to a manual delivery. There are other matters which are of significance, as disclosed by the evidence, which should be considered here and which were doubtless considered by the trial court. The release of mortgage was executed in January, 1935, when plaintiff was living in the home of defendant. It was not recorded until May, 1936, which was after plaintiff had gone to Lincoln, and

immediately after plaintiff had called from Lincoln and made inquiry about the release. No satisfactory explanation of the immediate recording is given.

Another matter of considerable significance appears. Plaintiff had other children and he wanted a distribution of his estate among them, but did not want a distribution through the processes of the county court. At the time of the execution of the release, transfers of all other properties of plaintiff, including securities, were executed to the defendant. From the bill of exceptions it is apparent that there was no intention at any time, if delivery was made, that these properties should become the absolute property of the defendant. The defendant does not seriously so contend. And no conversation is related applying separately and alone to the release. It is clear that, if plaintiff desired to transfer and deliver his estate to defendant, he also intended that there should be a distribution of the estate among his children on his death. No method of distribution was apparently arrived at or discussed. It seems that some significance ought to be attached to the circumstance of a delivery without an accompanying plan of distribution, when it was a distribution without probate that plaintiff was seeking to effectuate, which purpose was well known to defendant.

In view of the fact that the trial court observed the parties and the witnesses and their demeanor while testifying, and doubtless took into consideration all circumstances disclosed by the evidence, we cannot say that the decision was contrary to the evidence or the greater weight of the evidence.

AFFIRMED.

SOPHIA E. HUPFER, APPELLEE, V. CITY OF NORTH PLATTE, APPELLANT.
279 N. W. 168

FILED APRIL 21, 1938. No. 30169.

1. **Municipal Corporations:** CARE OF STREETS. A municipal corporation is not an insurer of the safety of travelers along its streets and highways and is required to employ only reasonable diligence to keep its sidewalks in a reasonably safe condition for the use of persons passing over them in the exercise of ordinary care and caution.
2. ———: ———: DUTY OF PEDESTRIAN. It is incumbent upon persons using the sidewalks of a city to exercise ordinary care and caution for their own safety.
3. ———: ———: ———. "In exercising reasonable care and diligence a person using a street or public highway has the right, in the absence of knowledge to the contrary, to act on the assumption that the sidewalk or roadway, throughout its entire width, or so much of it as is intended for travel, is in a reasonably or ordinarily safe condition; and he is not required as a matter of law to be on the lookout for defects or obstructions therein." 43 C. J. 1078.
4. ———: ———. "Holes, ruts, or depressions in the street or sidewalk may give rise to a right of action for injuries caused thereby if they are of such a nature that danger therefrom might reasonably be anticipated. But slight holes or depressions which are not in the nature of traps, and from which danger could not reasonably be anticipated, are not defects for which an action will lie." 43 C. J. 1014.
5. ———: ———. Evidence examined, and *held* that danger to plaintiff could not have been reasonably anticipated from the defect complained of, if she had been exercising reasonable care and diligence for her own safety.

APPEAL from the district court for Lincoln county: ISAAC J. NISELY, JUDGE. *Reversed, with directions to dismiss.*

*William D. Deakins, Jr.*, for appellant.

*Beeler, Crosby & Baskins* and *Robert B. Crosby, contra.*

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

YEAGER, District Judge.

This is an action instituted by Sophia E. Hupfer, plaintiff and appellee, against the city of North Platte, Nebraska, defendant and appellant, the object and purpose of which is to recover damages for personal injuries resulting from a fall by appellee upon one of the public sidewalks maintained by appellant in the city of North Platte.

On the 21st day of July, 1936, the appellee was walking upon the sidewalk in question, and looking at a parade which was passing along and was paying no attention to the place where she was walking and did not look at the sidewalk, when she fell. After having fallen, appellee looked and saw that a block of the walk was, as she says in one place in her testimony, sunken about four or five to eight inches in different directions, and, in another, "about three inches, two or three inches." Other witnesses estimate the depression from two to five inches.

On trial of the case in the district court a verdict was rendered in favor of appellee for $97, upon which judgment was rendered for $97 and costs. From this judgment the appellant has appealed the case to this court and seeks a reversal of the judgment of the district court.

Many errors are set forth as grounds for reversal, but we find it necessary only to direct our attention to a few of them.

A municipal corporation is not an insurer of the safety of travelers along its streets and highways and is required to employ only reasonable diligence to keep its sidewalks in a reasonably safe condition for the use of persons passing over them in the exercise of ordinary care and caution. *Gates v. City of North Platte*, 126 Neb. 785, 254 N. W. 418; *Walters v. Village of Exeter*, 87 Neb. 125, 126 N. W. 868; *Strubble v. Village of DeWitt*, 81 Neb. 504, 116 N. W. 154. Along with this rule is a reciprocal one which exacts observance by persons using the highways and sidewalks of a municipal corporation. This rule requires that persons using the sidewalks of a city shall in such use exercise ordinary care and caution for their own safety. *Walters*

*v. Village of Exeter,* 87 Neb. 125, 126 N. W. 868; *Strubble v. Village of DeWitt,* 81 Neb. 504, 116 N. W. 154. In 43 C. J. 1078, the following rule is laid down: "In exercising reasonable care and diligence a person using a street or public highway has the right, in the absence of knowledge to the contrary, to act on the assumption that the sidewalk or roadway, throughout its entire width, or so much of it as is intended for travel, is in a reasonably or ordinarily safe condition; and he is not required as a matter of law to be on the lookout for defects or obstructions therein."

In the light of these rules, did the defendant keep the sidewalk in a reasonably safe condition for the use of persons passing over them in the exercise of ordinary care and caution? Ordinary care and caution required the plaintiff to take some note of her own surroundings. In this case, though it was broad daylight; she walked along with eyes averted and without any effort to observe the sidewalk over which she was passing or its condition. This would seem to be a failure to exercise the ordinary care and caution enjoined upon her by law and a proper regard for her own safety.

However that be, it seems apparent that the evidence fails to show that the condition complained of was one such as would fix a liability on the defendant for failure to keep its sidewalks in a reasonably safe condition for the use of persons passing over them. The evidence as to the character of the condition complained of is very indefinite. No measurements as to the depth of the depression were testified to nor is there any satisfactory evidence as to the length or width of the depressed portion of the walk. The plaintiff in her first estimate placed the depth at eight inches, but immediately thereafter changed her estimate to from two to three inches. Other witnesses give an estimate of from two to five inches. 43 C. J. 1014, lays down the rule: "Holes, ruts, or depressions in the street or sidewalk may give rise to a right of action for injuries caused thereby if they are of such a nature that danger therefrom might reasonably be anticipated. But slight holes or de-

pressions which are not in the nature of traps, and from which danger could not reasonably be anticipated, are not defects for which an action will lie." This rule in general has been approved in *City of Lincoln v. Staley*, 32 Neb. 63, 48 N. W. 887.

In the light of the evidence, we fail to perceive that danger to plaintiff could have been reasonably anticipated from the defect complained of, if she had been exercising reasonable care and diligence for her own safety. Likewise we fail to recognize in the condition described anything partaking of the nature of a trap.

It is therefore our conclusion that the plaintiff cannot recover and that the judgment be reversed and the cause remanded, with directions to dismiss the action of plaintiff.

REVERSED.

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ANGELINA BONACCI, APPELLEE, V. THOMAS CERRA, APPELLANT.

279 N. W. 314

FILED APRIL 26, 1938. NO. 30240.

1. **Appeal.** "An order of the trial court granting a new trial will not ordinarily be disturbed by this court, and not at all unless it clearly appears that no tenable ground existed therefor." *De Matteo v. Lapidus*, 116 Neb. 549, 218 N. W. 379.
2. **New Trial.** "In passing upon a motion for new trial by a *nisi prius* court, it is proper to consider conflicting and improbable evidence received upon the trial, together with all other facts, circumstances, conduct and events occurring during trial, as they appeared to the trial judge." *De Matteo v. Lapidus, supra.*
3. **Appeal.** "An order granting a new trial by a *nisi prius* court which affords a litigant an opportunity to present his claims fairly in another trial will not be scrutinized as closely as would an order putting an end to his demands." *De Matteo v. Lapidus, supra.*
4. **Trial.** "An affidavit of a juror as to what items the jury allowed or disallowed in computing the amount due, or what the jury believed they had a right to do under the instructions, is incompetent. Such matters are commonly held to inhere in the verdict." *Palmer v. Parmele*, 104 Neb. 30, 175 N. W. 649.

5. **Damages.** "In this case, it is *held* that the verdict is excessive, and, taken in connection with the evidence, appears to be the result of passion or prejudice, and a new trial is granted." *Stewart v. Weiner*, 108 Neb. 49, 187 N. W. 121.

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

*Crofoot, Fraser, Connolly & Stryker*, for appellant.

*O'Sullivan & Southard* and *George H. Merten, contra.*

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

EBERLY, J.

This is an action under the Nebraska automobile guest statute. Angelina Bonacci, as plaintiff, seeks a recovery for personal injuries inflicted upon her by the defendant, Thomas Cerra, while she was a guest riding in an automobile then operated by him. It is alleged the injuries thus sustained by plaintiff resulted from gross negligence of defendant in operating his automobile. In his answer defendant denies the commission of negligence, and alleges that the injuries in suit were the result of an accident wherein the automobile in which plaintiff was riding left the highway because of a punctured right rear tire, and that the defendant was guilty of no gross negligence in connection therewith.

This is a companion case to *Antonio Bonacci v. Thomas Cerra, ante*, p. 476, 279 N. W. 173. Angelina and Antonio are wife and husband, and the two cases referred to arose out of the same accident. However, as finally presented to the triers of fact, in issues and proof these cases are materially and substantially different.

As bearing on the real interests of the parties to this litigation, it may be said that Bonacci and Cerra were friends in the land of their nativity. Both migrated to this country some years ago. Here the friendship formerly existing was renewed and continued. On August 4, 1935, Mr. and Mrs. Bonacci, as the invited guests of Mr. and

Mrs. Cerra, left Omaha with the latter on a vacation trip to Colorado. Mr. Cerra furnished the car, the necessary gas, oil and maintenance for the car, at his own expense. On August 15, 1935, about 1 o'clock p. m., on the return trip, in Cerra's automobile then driven by him, an accident occurred about five miles east of Grand Island on U. S. Highway No. 30. No other automobile was involved.

The following is an excerpt from the bill of exceptions, viz.: Thomas Cerra testified, in answer to questions propounded by his own counsel: "Q. Of course, you are protected by liability insurance, are you? A. Do you want me to say that? Q. I want to know. You are sworn to tell the truth, Mr. Cerra? A. Well, I am protected; if you insist on me saying it, I will say I am protected by liability insurance. Q. And I am the attorney for the insurance carrier? A. You are." This evidence was received without objection.

The petition, originally filed in this case on October 18, 1935, charged the negligence of the defendant substantially in the identical manner as set forth in *Bonacci v. Cerra, ante,* p. 476, 279 N. W. 173, viz.: That the defendant operated said automobile at an excessive and illegal rate of speed, to wit, about *70* miles an hour, and in such a grossly negligent, careless and reckless manner that he drove said automobile *off the right side of said highway pavement, then drove said automobile back onto said highway pavement to the left of the center of said highway pavement, then drove said automobile to the right side of the center of said highway pavement and then drove said automobile* to the left side of said highway pavement across the center thereof, and then in a grossly negligent, careless and reckless manner drove said automobile off said highway pavement upon and over the left dirt and gravel shoulder along said paving, etc. Further, *that from the point where defendant's automobile first left the pavement to the point where said automobile overturned was approximately 150 yards,* etc.

It also appears that the petition in *Bonacci v. Cerra, ante,* p. 476, 279 N. W. 173, and the original petition of plaintiff in the instant case were prepared by the same

attorney, substantially at the same time, after a consultation with Antonio Bonacci and Angelina Bonacci, his wife, the plaintiff herein, in which he was aided by an unnamed interpreter whose ability is not questioned by the record. These petitions so drawn were sworn to by these parties on the 15th and 17th days of October, 1935, respectively, and on the 16th and 18th days of October, 1935, respectively, the same were filed. It may be said that the petitions thus prepared are not substantially inconsistent with the depositions of these parties taken on February 29, 1936.

In speaking of the movement of the car at the time of the accident, Antonio Bonacci in his deposition says, in part: "Q. How far did it travel after the trouble started? A. I couldn't tell. Q. Well, did it travel a distance of a hundred feet after the trouble started? A. Maybe it was more or less; I don't remember. Q. It may have been more than a hundred or may have been less than a hundred feet? A. Yes; I can't remember. Q. You knew when the car started to weave that way, and then all of a sudden it was all over; is that it? A. Yes."

Angelina Bonacci was present when her husband's deposition was taken, and in her deposition her first answered question was: "Q. Well, Mrs. Bonacci, your testimony is just the same as your husband's, isn't it? A. I guess it is." As to the movement of the automobile at the time of the accident, she said, in part: "Q. Do you know what went wrong with the car, or what happened? A. No, sir. I just saw when the car went like this and like this, you see (indicating). Q. Well, it just went on the paved road and then went off the left side of the paved road? A. Left side. Q. It didn't go out on the right shoulder and then come back or anything like that? A. No; just like this (indicating). Q. Well, how far did it go as it was weaving that way, as it was going back and forth, was it a hundred feet? A. I can't tell you. Q. Was it a hundred feet, or less than a hundred feet? A. I can't tell you about that; I ain't that smart to know; I don't know."

It should be noted that the depositions were taken with-

out the aid of an interpreter; that no reference was made therein to the removal of the right hand of the driver from the steering wheel, or the turning of his face to the right and his eyes from the road. Further, the reaching for a cigaret, or the lighting of the same, were not mentioned, and neither was any reference made to a speedometer, but all statements as to speed were mere estimates of the deponents.

The facts of the accident here in suit have been presented to trial juries three times. The first was in the trial of the case of Antonio Bonacci v. Cerra, resulting in a verdict and judgment for the defendant. The second was the presentation of the case of Angelina Bonacci v. Cerra, the first trial of which resulted in a verdict for the defendant, as to which a motion for new trial was sustained by the trial court, and the second trial resulted in a verdict and judgment, from which this appeal is prosecuted. Prior to the second trial plaintiff's petition was amended by changing the rate of speed alleged from 70 miles an hour to 80 miles an hour, and striking therefrom all portions thereof as hereinbefore italicized. The testimony as received in each of the three cases is embraced in the bill of exceptions allowed in the instant case.

In the first trial the negligence upon which a claim to recovery was based was excessive speed. The speedometer then appears for the first time, and the rate of speed, a matter of estimate when Bonacci's deposition was taken, becomes definite and fixed. He now testifies that he observed the speedometer just before the accident and it showed 80 miles an hour. Defendant Cerra, at the trial of Antonio Bonacci's case, testifying as to the accident, said: "It just happened that the car got out of my control, and went over in the ditch all at once. * * * Well, the first I know I had my hands on the wheel, and the car turned over on the side, that is all; that is all I remember."

Mrs. Bonacci was present at this trial but did not testify. Bonacci and wife were at this time represented by the same attorney. Some three days after this trial was

concluded, for the first time she informed her attorney (as she later testified) that after requests by her, through her husband, to Cerra that the latter drive slower, the car went off the paving on the left side of the road, and went into the ditch; that immediately before this happened Cerra, the driver of the car, turned his head to the right, looked at his wife seated in the front seat beside him, took his right hand from the steering wheel and handed something to his wife, and that is the way he lost control of the car.

Antonio Bonacci also so testified for the first time in his wife's case. It was then that, in reply to a question as to what he saw Cerra, the defendant, do just before the accident, he answered: "Well, I saw Mr. Cerra take his right hand from the steering wheel and reach something to his wife and then he lost control of the car and it go to the left side into the ditch." Further, that at this time Cerra "had his eye off the road and was looking at his wife." This witness did not so testify in the trial of Antonio Bonacci v. Cerra.

The testimony of Cerra, the defendant, also appears to have changed materially in the course of the litigation. As to speed, he originally testified, on direct examination, that at the time of the accident the automobile was traveling "about fifty-five or sixty, I guess;" on cross-examination, "I will estimate about fifty-five to sixty miles." In the present case his testimony is: "Q. What caused you to lose control of the car? A. Well, when the occurrence of the accident, you know, Your Honor, as you go usually on the road, usually anybody,—the gentlemen of the jury they probably know also,—you might have a smoke or something. Now, I asked my wife to give me a cigarette and as I lit the cigarette the accident occurred and then I saw for certain I lost control and no way for me to avoid the accident. Q. That is, you reached over with your right hand for the cigarette? A. Yes; my right hand. I had the left hand on the wheel. Q. And your right hand off? A. The right hand was off, yes. Q. And at that time what speed

were you making? A. Well, the average; you know, I go pretty speedy, sixty, seventy, and sometimes seventy-five, I don't recall, but at the moment I just don't recall the rate of speed I was going, but I was going pretty fast, but I don't recall the rate of speed. Q. Would you say that it was eighty miles an hour? A. I couldn't say. Q. And as far as you know there wasn't any flat tire on your car at that time just before it left the road? A. No; there wasn't anything wrong with the car all the way through. Q. The car was running along smoothly? A. Yes, sir." It also appears as an established fact that Thomas Cerra first informed his own attorney of the above incident after the first trial of Angelina Bonacci v. Cerra had commenced and plaintiff had, as a witness therein, testified thereto.

The foregoing record fairly discloses a course of litigation with peculiar progressive developments. In whatever aspect it may be viewed, it admonishes that great care should be exercised by this court in weighing and analyzing the evidence in this, as well as in all other "guest cases." Owing to the degree of negligence necessary, the guest statute presents cases new in character, and certainly involves characteristics peculiar to themselves. Almost invariably the occupants of the car are either relatives or intimate friends, and consequently friendly to recovery. That the present case is not an exception to this rule plainly appears. "Especially is this true in cases where an insurance company will be the one ultimately liable. Oftentimes even the defendant seems willing to stultify himself by confessing to wrong-doing that the plaintiff might prevail." *Belik v. Warsocki,* 126 Neb. 560, 253 N. W. 689.

Applying to the instant record the strict tests which the nature of the case and the clearly established relations and apparent inclinations of the parties involved necessitate, we will now consider the assignments of error on behalf of the appellant.

Appellant contends that no error was committed by the trial court in the first trial of this case, and that no tenable ground existed for the trial court to set aside the verdict

first rendered, and that error was committed in so doing. The principles controlling were well stated in the case of *De Matteo v. Lapidus,* 116 Neb. 549, 218 N. W. 379, viz.:

"An order of the trial court granting a new trial will not ordinarily be disturbed by this court, and not at all unless it clearly appears that no tenable ground existed therefor.

"In passing upon a motion for new trial by a *nisi prius* court, it is proper to consider conflicting and improbable evidence received upon the trial, together with all other facts, circumstances, conduct and events occurring during trial, as they appeared to the trial judge.

"An order granting a new trial by a *nisi prius* court which affords a litigant an opportunity to present his claims fairly in another trial will not be scrutinized as closely as would an order putting an end to his demands."

See, also, *Wells v. Cochran,* 84 Neb. 278, 120 N. W. 1123; *Schlaifer v. Omaha & C. B. Street R. Co.,* 98 Neb. 207, 152 N. W. 370; *Clausen v. Omaha Loan & Bldg. Ass'n,* 131 Neb. 666, 269 N. W. 517.

The letter of the trial judge disclosed by the record in the instant case forms no part of the judgment roll. The present determination must not be construed as an approval of the reasons stated therein as necessitating the sustaining of the motion for a new trial. For many assignments of error are contained in the motion for a new trial now under consideration which this order of the court in this case sustained generally. It is therefore the correctness of this order as an entirety, and not the reasons which the letter of the trial judge may contain, that is controlling. So considered, in view of the necessary discretion vested in the trial judge, we find no reversible error in his action so taken. The discussion of this subject in *De Matteo v. Lapidus, supra,* is extremely apropos in the instant case.

The appellant contends that improper methods were used by the jury in arriving at the amount of the verdict. To sustain this contention appellant relies on the affidavits of certain jurors to the effect that the verdict as returned by them was made up of estimated compensation of $25 a

month for 24 years, a total of $7,200, to which the jurors added $1,300 as probable medical expenses, which item is unsustained by evidence in the record.

The controlling principle applicable to the facts set forth in these affidavits is: "An affidavit of a juror as to what items the jury allowed or disallowed in computing the amount due, or what the jury believed they had a right to do under the instructions, is incompetent. Such matters are commonly held to inhere in the verdict." *Palmer v. Parmele,* 104 Neb. 30, 175 N. W. 649. See, also, *In re Estate of Alton,* 128 Neb. 411, 258 N. W. 871; *Schindler v. Mulhair,* 132 Neb. 809, 273 N. W. 217.

The questions covered by the assignments in appellant's motion for a new trial, based on the insufficiency of the evidence and that excessive damages appear to have been given by the jury under the influence of passion and prejudice, are more serious.

It appears that in the accident of August 15, 1935, plaintiff sustained a comminuted fracture of the humerus of her right arm. This was the chief injury suffered, though she received multiple bruises, and had abrasions and black and blue marks on her body, particularly her shoulder. She remained under the care of the surgeon practically continuously from the date of the accident to the date of her second trial, which occurred on May 4, 1937. Some three weeks had been spent in the hospital, and the surgeon testified that he made well over a hundred professional calls upon her. From this surgeon's testimony it is plain that at the point of fracture new bone was formed, and the humerus became solid again; that the junction was good and the bone united firmly; that it was this witness' opinion at the time of the trial that in another six months or a year Mrs. Bonacci would get back a 50 to 65 per cent. use of the injured arm. Mrs. Bonacci was 47 years of age at the time. Her occupation was housewife; no special qualifications appear, and no express value of her services was proved. There is no question that she suffered severe pain at the time of the accident, and the treatment to which

she was necessarily subjected entailed suffering and discomfort usual in view of the nature of the injuries suffered. On the other hand, by amendments to her pleadings, all reference to medical and surgical care, nurse and hospital expenses was stricken from her petition. No evidence as to the value thereof appears in the record. These items which often constitute an element of recovery in personal injury cases are thus entirely removed from our consideration. We are then left to determine the matter of the excessiveness of the recovery on the basis of pain and suffering and discomfort experienced and the fact of disability after the accident to the time of the last trial, with assurance that in substantially a short period of time she will be fully restored to the 50 or 65 per cent. use of the injured arm. We are fully agreed that the verdict of $8,500 under the facts is not only excessive (*Mullally v. Haslam,* 106 Neb. 860, 184 N. W. 910; *Orleans Village v. Perry,* 24 Neb. 831, 40 N. W. 417), but to such a degree, when taken in connection with all the evidence in this case, as to fairly establish that the same is the result of passion and prejudice. *Stewart v. Weiner,* 108 Neb. 49, 187 N. W. 121; *Hutchinson v. Western Bridge & Construction Co.,* 97 Neb. 439, 150 N. W. 193. We conclude, therefore, that the trial court erred in its order overruling appellant's motion for a new trial, and in its entry of judgment on the verdict.

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

REVERSED.

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CLYDE M. EMPSON, APPELLEE, V. DEUEL COUNTY STATE BANK ET AL., APPELLANTS.
279 N. W. 293

FILED APRIL 26, 1938. No. 30318.

1. **Banks and Banking:** STOCK: BONA FIDE PURCHASER. In order that a purchaser of stock may acquire a title free from secret liens in favor of the corporation, or latent equities between prior

parties, he must be in a position of a *bona fide* purchaser for value.

2. ———: ———: ———. A purchaser of stock in a corporation takes the same subject to such liens or equities as he has notice of at the time of purchase, or of which he has notice of facts sufficient to put him on inquiry in relation thereto.
3. **Equity.** "Equity seeks the real and substantial rights of the parties, and applies the remedy in such manner as to relieve those having the controlling equities." *National Mortgage Loan Co. v. Hurst*, 120 Neb. 37, 231 N. W. 519.
4. ———. It is an old and well-established principle that equity looks to the substance of things rather than the form, and will endeavor to carry out the real intent and purpose of the parties to a contract.

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

*Francis P. Matthews*. *William P. Kelley* and *L. O. Pfeiffer*, for appellants.

*Beatty, Maupin, Murphy & Derry, contra.*

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

PAINE, J.

This is an action in equity against the Deuel County State Bank and its stockholders and the Reconstruction Finance Corporation, hereinafter styled R. F. C., and the department of banking of the state of Nebraska, and its superintendent, wherein the plaintiff sought a decree declaring that he was entitled, upon the retirement of preferred stock in said bank, to have issued to him common stock in the amount of 50 per cent. of the preferred stock so retired, and plaintiff prayed that the defendants be enjoined from issuing said stock upon any other basis.

The court found that the plaintiff was entitled to the issuance of such common stock upon the retirement of the preferred stock under an oral agreement made at the time the preferred stock was issued, and that the defendants had actual knowledge thereof and bought their stock sub-

ject to the rights of the plaintiff under said agreement, and enjoined the defendants from issuing the new common stock upon any other basis. Defendants gave a supersedeas bond in the sum of $1,000, and appealed from said decree.

The decree of the district court found that the R. F. C. and the department of banking of the state of Nebraska and its superintendent were neither necessary nor proper parties, and dismissed them as defendants.

The defendants assign as errors that the decree and findings are contrary to law and contrary to the evidence; that the court erred in not sustaining the motion of defendants objecting to the taking of any evidence, near the commencement of the trial, on the ground that the petition fails to state a cause of action, and on the ground that there is a defect of parties defendant; that the court erred in not sustaining the motion made when the plaintiff rested his case, in which defendants moved that the action be dismissed against each of them for the reason that the evidence was insufficient to sustain the allegations of the petition. As these grounds for reversal rest so largely on the question of the sufficiency of the evidence, it will be necessary to make a statement of the facts in the case.

The Deuel County State Bank, of Chappell, had a capital stock of $25,000, divided into 250 shares of common stock, and on or about March 4, 1933, the said bank, with all other banks in the United States, was closed by presidential proclamation. At that time J. W. Rogers and the plaintiff owned the entire capital stock of the bank. After the bank holiday the said bank was only permitted to operate on a restricted basis, for its capital had been impaired, and it continued so to operate until August 8, 1934. Rogers and Empson immediately started to work to remove the restrictions and to restore any impairment, and to strengthen the capital of the bank by securing an R. F. C. loan. While these negotiations were in progress, and before the plans could be carried out, Mr. Rogers was accidentally killed. Rogers and the plaintiff were personally liable to the city of Chappell upon a bond to secure a municipal deposit, and

Rogers had either indorsed, or was maker on, a note of $3,400 which Empson had given to an Omaha bank, and the Rogers estate desired to be free from the liability thereof, and thereupon the plaintiff acquired all of the Rogers stock in the said bank and assumed all liability to the city of Chappell, and the Omaha bank thereupon withdrew the claim it had filed against the estate of Rogers. These statements are disputed by the defendants, who claim that the Rogers stock certificates were never assigned to Empson, but were just surrendered by order of the court as worthless. But, at any rate, the certificates were delivered by the administrator to the possession of Empson, who turned them in for cancelation. In the statement of facts in relation to the ownership of the stock of the bank, no special mention will be made of the fact that at times some officers carried a small portion of their stock in the names of their wives.

The plaintiff, in continuing his efforts to strengthen the capital of the bank, interested Ben B. McNair, then residing north of Grand Island, at St. Libory. After McNair became interested in the proposition, it was agreed between the plaintiff and McNair that plaintiff would own 50 per cent. of the capital stock and McNair would own 50 per cent. of the capital stock.

To enable the bank to remove the restrictions placed thereon by the state banking department, it was finally agreed that $20,000 should be borrowed from the R. F. C. and put into the capital structure of the bank, and on January 3, 1934, an application therefor was made to the R. F. C. This loan was granted, but, because of the double liability attached to ownership of stock in Nebraska state banks, the R. F. C. required that the preferred stock issued to secure such loans should be issued to individual stockholders, who in turn would give their individual notes to the R. F. C. and put up the preferred stock standing in their names as collateral security therefor with the R. F. C.

In accordance with this arrangement, Ben B. McNair was issued $10,000 of preferred stock and the plaintiff was

given $10,000 of preferred stock, and each put up with the R. F. C. their personal notes and, as security therefor, their shares of preferred stock. It was also required by the state banking department that slow assets of a face value of about $32,000 should be eliminated from the reported assets of the bank, and that an additional $10,000 be put up in cash instead of such slow assets. Mr. McNair thereupon contributed his one-half, or $5,000 in cash, of such additional requirement, but the plaintiff found himself unable to raise but $2,000 of his $5,000, and he therefore secured three of his friends, to wit, John R. Wertz, A. R. Todenhoft, and H. R. Isenberger, to each loan him $1,000 in cash to make the $5,000 that the plaintiff was required to put in. The evidence does not disclose that Empson gave any notes for such money, but he had a certificate for five shares of stock issued in the name of each of these three individuals, out of the stock which Empson had owned, but such certificates were not delivered, receipted for, nor taken out of the stock book at the time of their issuance, and there is some doubt whether they knew the certificates had been issued to them until some time afterwards. Each testified that they did not want bank stock, but expected Empson to pay back their $1,000 as soon as he could.

When this arrangement was completed, and the bank was reorganized to carry it out, the plaintiff had 100 shares of preferred stock and 10 shares of common stock, and Ben B. McNair had 100 shares of preferred stock and 25 shares of common stock, and Empson's three friends had five shares apiece. Empson and McNair had each secured $10,000 in cash from the R. F. C., and each had raised an additional $5,000 to eliminate slow assets of $32,000 from the bank, and Empson, in addition, had waived his rights, as the sole remaining stockholder in the old bank, to all recoveries which might be made upon the $32,000 of assets eliminated.

For many years there had been a competing bank in Chappell, to wit, the Chappell State Bank, which bank failed and was taken over by the department of banking.

Chester A. Peterson testified that on October 2, 1934, Paul Martin, representing the stockholders of the Chappell State Bank, approached Ben B. McNair with reference to buying out Mr. McNair's stock in the Deuel County State Bank.

In February, 1935, McNair went to see Todenhoft at Sterling, Colorado, and wanted to buy Todenhoft's certificate for five shares. It appears that up to that time Todenhoft did not know that any such certificate had been issued. Shortly thereafter McNair made another trip to Sterling, taking the stock certificate which Empson had made out in Todenhoft's name, and Todenhoft was paid $800 by McNair for this certificate, and signed a receipt for the original certificate which he then assigned. The plaintiff claims that McNair had in this deal taken advantage of him, and that he protested that McNair had violated their agreement by thus securing more than a 50 per cent. interest in the bank. McNair admitted that Todenhoft had told him that Empson had the right to acquire this stock, and McNair offered to sell Empson his stock in the bank, but Empson was not in a financial position to buy, and made out the new certificate for McNair, thus giving him a majority of the stock in the bank.

Chester A. Peterson, representing the stockholders in the closed bank, had entered into a written contract with McNair to purchase his control of the Deuel County State Bank, and had paid $1,000 down. These new purchasers had, through McNair, secretly examined the assets of the bank in the nighttime, unknown to Empson, and on May 11, 1935, the new stockholders, with their attorney, L. O. Pfeiffer, came into the bank and announced that they owned the control thereof through the purchase of McNair's stock. They inquired whether Empson would sell his ten shares of stock in the bank, and he told them that he could not afford to sell because he had $40,000 invested in the bank, and explained to them the agreement with McNair that as the shares of preferred stock should be retired he should be issued 100 shares of common stock.

When the new stockholders with their attorney examined

the stock book, a list of the stockholders was attached to the front of the stock book, which list is exhibit No. 7 in the bill of exceptions, and lists the stockholders of the bank, omitting their addresses, as follows:

| Name | No. of shares owned | Paid-up capital represented |
|---|---|---|
| Ben B. McNair | 120 | $12,000.00 |
| E. E. McNair | 10 | 1,000.00 |
| John R. Wertz | 5 | 500.00 |
| H. R. Isenberger | 5 | 500.00 |
| C. M. Empson | 110 | 11,000.00 |
| | | $25,000.00 |

On that same morning, Frank O. Carlson had attempted to purchase the five shares of stock belonging to Wertz, and shortly thereafter Wertz and Isenberger sold their certificates of five shares each to the new stockholders for $2,500.

New officers and directors were elected. The plaintiff was elected vice-president of the bank, the other offices being filled by the new stockholders who had bought out McNair's stock. Empson continued as vice-president, and in December Chester A. Peterson, the cashier, showed Empson a letter he had written to the banking department, asking permission to retire a portion of the preferred stock and to issue common stock to be prorated among the present common stockholders in accordance with their common stock holdings, and not in accordance with Empson's agreement, to which Empson objected. Empson had discovered certain irregularities in the note pouch, being notes purporting to have been signed by the cashier's minor brother, aggregating several thousand dollars, and also excessive loans to the cashier's father, and other irregularities, and he protested these matters directly to the cashier, who invited Empson to ride home in his car on the night of December 31, 1936, and upon arriving at the home he told him he was discharged and would be replaced the next day

by the young son of Frank O. Carlson, the president of the bank.

On March 29, 1937, the plaintiff filed the petition in the case at bar.

On many of the points the evidence of the plaintiff and the defendants is in sharp conflict, but the trial court in its decree found that it was orally agreed and distinctly understood by the parties at the time of the issuance of the new stock that Clyde M. Empson would, upon the retirement of the preferred stock, receive 100 shares of common stock, and Ben B. McNair should receive the same amount, in lieu of the preferred stock they each owned, and it was further agreed by and between the parties that Wertz, Todenhoft and Isenberger were not to receive, as dividends or otherwise, any additional stock; that the individual defendants herein, at the time of purchasing their stock, each and all had full, actual, and constructive knowledge and notice of said agreement, and took their stock subject to the rights of the plaintiff therein; that said agreement is a valid, binding agreement, and one that the plaintiff is entitled to have enforced. In the opinion of this court, these findings of the trial court are fully supported by the evidence in the case.

A number of propositions of law appear in the briefs, but we have given so much space to the statement of the evidence that, while we have examined them, we will not be able to discuss all of them in this opinion.

A stockholder in a corporation is entitled to relief in equity for specific performance of an agreement with other stockholders for equalizing their stock.

The defendants insist that the directors of a corporation have no legal right to discriminate between stockholders; that all are entitled to share equally in the distribution of dividends, which should go to the record owners of the stock when such dividends are declared. The law well supports each of these propositions. However, it is also the law that a purchaser of corporate stock, with notice of latent equities between the prior parties, or with notice of facts sufficient to put him on inquiry, takes the title thereto subject to such equities.

This rule is discussed in 12 Fletcher, Cyclopedia Corporations (Perm. ed.) 274, sec. 5479, under the heading, "Who are *bona fide* purchasers for value and without notice," and states: "In order that a purchaser of stock may acquire a title free from secret liens in favor of the corporation, or latent equities between prior parties, he must be in the position of a *bona fide* purchaser for value. He takes subject to such liens or equities if he has notice of them at the time of his purchase, or notice of facts sufficient to put him on inquiry, or if he is not a purchaser of the stock for value."

In the case of *Tecumseh Nat. Bank v. Russell,* 50 Neb. 277, 69 N. W. 763, Commissioner Irvine stated that, while Bush claimed to be a purchaser for value without notice, he failed to establish the fact by the proof. In the case at bar, there can be no doubt that the defendants had actual notice of Empson's claims. His evidence is clear and positive; it is supported by many exhibits; the denials of the defendants are not convincing.

Equity will examine the whole transaction, looking through corporate forms to protect the rights of innocent parties, for "Equity seeks the real and substantial rights of the parties, and applies the remedy in such manner as to relieve those having the controlling equities." *National Mortgage Loan Co. v. Hurst,* 120 Neb. 37, 231 N. W. 519.

And again, the case of *Fenton v. Tri-State Land Co.,* 89 Neb. 479, 131 N. W. 1038, where Judge Letton said that it is an old and well-established principle that "Equity looks at the substance of things rather than the form, and will endeavor to carry out the real intent and purpose of the parties to a contract."

The evidence is convincing that Wertz, Isenberger, and Todenhoft, who advanced $1,000 apiece to help Empson, were not to participate in any common stock issued in the retirement of the 100 shares of preferred stock purchased by Empson with his $10,000 note.

"The general rule that the transferee of stock is entitled to all dividends declared after the transfer, and the trans-

feror to all those declared before the transfer, may be changed by the terms of the transfer or agreement of the parties, where that is the intention of the parties." 11 Fletcher, Cyclopedia Corporations (Perm. ed.) 937, sec. 5381.

Corporate dividends may be made the subject of a valid contract in like manner and to the same extent as other personal property. *Bank of Waverly v. Daily*, 103 Neb. 7, 170 N. W. 183; *Cook v. Monroe*, 45 Neb. 349, 63 N. W. 800; *Platte County Independent Telephone Co. v. Leigh Independent Telephone Co.*, 80 Neb. 46, 116 N. W. 511; *Latson v. Buck*, 87 Neb. 16, 126 N. W. 760.

The oral contract was not within the statute of frauds merely because it might not have been performed within a year.

The record discloses that the two owners of this bank, Empson and McNair, were willing to go to any sacrifice to give the community a going bank, running without any restrictions. They first borrowed and put into its assets $10,000 apiece from the R. F. C.; they next each raised and put in $5,000 cash to enable the bank to take out of its assets $32,000 of slow paper. These were not assessments, but voluntary acts on their part. When better days came, and the bank was making money sufficient to retire a portion of the preferred stock, it is clear that it should be retired on the terms and in the manner agreed to by the stockholders at the time the money was invested to save the bank.

We find no prejudicial error in the record, and the decree of the lower court is

AFFIRMED.

# IN RE ESTATE OF CHARLES D. MATHEWS. W. T. BARSTOW, APPELLEE, V. CITY NATIONAL BANK OF LINCOLN, APPELLANT.

279 N. W. 301

FILED APRIL 26, 1938. No. 30275.

1. **Contracts:** ASSENT. "In the absence of some statutory requirement or specific agreement that a contract is not to become effective until signed, assent thereto may be shown in other ways, as by accepting or delivering the contract and acting under it." *Utilities Ins. Co. v. Stuart, ante,* p. 413, 278 N. W. 827.
2. **Bills and Notes:** DISCHARGE. When the principal debtor becomes the holder of a negotiable instrument at or after maturity in his own right, the instrument is discharged.
3. ———: ———. If a negotiable instrument be discharged, it extinguishes the liability of all the parties thereto as a matter of law.
4. **Principal and Surety.** As against all persons chargeable with notice that a judgment debtor is a surety only, any act which, had it occurred before the judgment, would have released him has the same effect when occurring after a judgment, and constitutes a sufficient defense to any action thereon, when the judgment did not determine whether the liability was primary or secondary.
5. **Judgment:** DISCHARGE. The filing of a motion or application in the same action in which the judgment was rendered is the proper procedure to obtain a discharge or satisfaction of a judgment of record when the movant or applicant is entitled thereto.

APPEAL from the district court for Lancaster county: ELLWOOD B. CHAPPELL, JUDGE. *Affirmed.*

*Stewart, Stewart & Whitworth* and *Charles B. Paine,* for appellant.

*J. W. Kinsinger* and *H. C. Henderson, contra.*

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

CARTER, J.

In this case it appears that the City National Bank of Lincoln filed a claim against the estate of Charles D.

Mathews, deceased, in the amount of $268,135.98 and interest. The claim was allowed and no appeal taken therefrom. Several years later the executor of the estate of Charles D. Mathews filed a motion in the same proceeding to require the bank to satisfy its claim for the reason that the notes on which the claim was based were canceled, paid and discharged. The county court denied the executor's motion and no appeal was taken therefrom by the executor. However, the appellee, W. T. Barstow, as a general creditor of the estate, perfected an appeal to the district court. After a trial, the district court held that the bank's claim was satisfied and discharged and that the claim and order of allowance should be satisfied and discharged of record. From this order, the bank appeals. The only question for our determination is whether the claim allowed by the county court has been satisfied and discharged as found by the district court.

The record discloses that the Continental Mortgage & Land Company, hereinafter called the Continental Company, was a corporation engaged primarily in the buying and selling of Canadian lands. William White and Charles D. Mathews owned all of the stock of the corporation during the times mentioned herein until White became the sole owner in 1924. White was its president and handled all of the business transactions of the company. During 1922 the Continental Company purchased a large quantity of land in Canada, which necessitated the borrowing of money from the City National Bank of Lincoln in the principal amount of $278,135.98.

The Continental Company pledged its stock and all of its Canadian land contracts as security for the loan. In addition thereto, White indorsed all of the notes and Mathews indorsed all except one for $10,000, which was given subsequent to his death. Mathews died on October 4, 1922, and the claim of the bank was filed against his estate on March 14, 1923, and allowed on February 13, 1924.

The evidence discloses that in 1926 the bank demanded

that the Canadian land contracts be sold and that the amounts derived therefrom be applied on the notes of the Continental Company. An agreement was drafted which provided in substance that White should proceed to sell the Canadian lands and would receive $250 a month salary and his traveling expenses out of the collateral for so doing. In addition thereto, the agreement provided that, when the bank had received $100,000 under the agreement, and prior liens on the Canadian lands had been reduced $50,000, White was to be released from all further liability on his personal indorsement. The agreement also provided that, when the bank had received a net of $250,000 from the liquidation of the land contracts, any surplus obtained therefrom was to be divided equally between the bank and White. Incorporated in the agreement was the further provision: "However, the bank reserves its right of action and claim against the estate of Charles D. Mathews, deceased, as guarantor on the notes herein mentioned." This agreement was signed by the Continental Company and White, but it was never signed by the bank. The evidence discloses, however, that White proceeded to liquidate the land contracts and received a salary of $250 a month and traveling expenses for so doing. The evidence also shows that White paid in an amount in excess of $250,000 and he thereafter was released from any personal liability on his indorsement on the notes. He also received back the stock of the Continental Company, which had been pledged, and a half interest in two tracts of the land which had been included in the collateral security for the loan. And also White received back all of the notes from the bank at a time when he had become the sole owner of the stock of the Continental Company. At the time of the trial of the case in the district court, appellant claimed that there was still a sum in excess of $200,000 due on its claim against the estate of Charles D. Mathews, after crediting all payments made by White.

An officer of the bank testified that the bank did not sign the agreement for the reason that it might injure the

rights of the bank in some litigation against the executor of the Charles D. Mathews estate then pending in the Canadian courts, and for the further reason that the signing of the agreement might amount to a waiver of its claim against the Mathews estate filed and allowed in the county court of Lancaster county. It appears, however, that the agreement was carried out by the parties thereto. The bank, having received the benefits of the contract, and having treated the contract as binding between the parties thereto, is not now in position to say that it was ineffective. In the recent case of *Utilities Ins. Co. v. Stuart, ante,* p. 413, 278 N. W. 827, this court, in discussing this point, said: "In the absence of some statutory requirement or specific agreement that a contract is not to become effective until signed, assent thereto may be shown in other ways, as by accepting or delivering the contract and acting under it." We believe this rule to be controlling in the case at bar.

Under the contract, White was to be personally released as indorser on the notes upon the happening of certain conditions set out therein. These conditions were complied with and White was released, in writing, and the original notes returned to him. Appellee contends that this releases the other indorser, Mathews, for the reason that the delivery of the notes to White, the president, manager and sole stockholder of the Continental Company, the principal debtor, discharged the obligation.

The Negotiable Instruments Law provides in part as follows: "A negotiable instrument is discharged: * * * Third. By the intentional cancelation thereof by the holder; Fourth. By any other act which will discharge a simple contract for the payment of money; Fifth. When the principal debtor becomes the holder of the instrument at or after maturity in his own right." Comp. St. 1929, sec. 62-801.

"A person secondarily liable on the instrument is discharged: First. By any act which discharged the instrument; * * * Third. By the discharge of a prior party; * * * Fifth. By a release of the principal debtor, unless the

holder's right of recourse against the party secondarily liable is expressly reserved." Comp. St. 1929, sec. 62-802.

When the principal debtor becomes the holder of a negotiable instrument at or after maturity in his own right, the instrument is discharged. *Joy v. Buchanan*, 131 Neb. 83, 267 N. W. 174.

Appellant contends, however, that the notes were delivered to White in his individual capacity and not as the president, manager or sole stockholder of the Continental Company. It must be borne in mind that the notes in question were payable to "ourselves" and indorsed by the Continental Mortgage & Land Company, William White and C. D. Mathews. White testified that he received them in his capacity as president of the Continental Company. It is quite apparent that the written release procured by White was sufficient to release his personal liability. There was therefore no object to be gained by a delivery of the notes to him personally. The record also shows that the last five notes returned to White were marked "paid." This indicates an intent on the part of the bank to treat the obligations represented by the notes as satisfied. The only logical conclusion that can be drawn is that they were delivered back to White as an officer of the company. Fraud or mistake is not alleged or claimed. It is clear therefore that the Continental Company, the party primarily liable on the notes, became the holder thereof in its own right after maturity. Under the Negotiable Instruments Law, heretofore cited, and the decisions of this court, the notes were discharged. The instruments representing the indebtedness having been discharged, those secondarily liable were discharged by virtue of the provision numbered first of section 62-802, Comp. St. 1929, heretofore quoted.

Appellant contends that the liability of Charles D. Mathews was reserved in the contract between White and the bank. It is not necessary for us to discuss the effect of this provision of the contract in so far as it affected Mathews, who was not a party to it. The fact remains that, after the contract was carried out, the bank, by delivering

the notes to the Continental Company, thereby discharged the notes. Under the Negotiable Instruments Law, a party may be released without destroying the entire instrument, but if the instrument be discharged it extinguishes the liability of all the parties thereto as a matter of law. The instrument having been discharged, it is not necessary for us to discuss the effect of the loss of Mathews' right of indemnity against White and the property pledged as security for the debt which was returned to White free of the lien of the debt.

Appellant contends that the allowance of the claim of the bank against the estate of Charles D. Mathews was in effect a judgment and that the disposition of the notes subsequent thereto could not affect it in any way. With this we are not in accord.

We believe the correct rule is stated in an annotation to *Little Rock & F. S. Ry. Co. v. Wells*, 54 Am. St. Rep. 216 (61 Ark. 354, 33 S. W. 208), at page 258, wherein it is said: "The better opinion, however, is that a judgment does not, through the operation of the law of merger, change the relation of the parties so that a defendant who, before its rendition, was a surety becomes a principal. At least as against all persons chargeable with notice that he is a surety, any act which, had it occurred before the judgment, would have released him has the same effect when occurring after a judgment, and constitutes a sufficient defense to any action thereon." This court, in the case of *Drexel v. Pusey*, 57 Neb. 30, 77 N. W. 351, adopted the foregoing rule, the applicable language being: "We adopt that which is deemed the better rule, namely, that the judgment entered on the note did not preclude Coffman from proving that he signed as accommodation indorser merely, and from insisting that he was discharged by the release by the judgment creditor of the property of Morrison." See, also, *Trotter v. Strong*, 63 Ill. 272. We necessarily conclude that the judgment of the county court allowing the bank's claim, but not determining whether the debtor was primarily or secondarily liable, does not preclude the appellee from show-

ing a release of the debtor as indorser by a subsequent discharge of the notes representing the indebtedness.

Appellant also contends that appellee did not prove sufficient interest to maintain this appeal. Appellee alleged in his petition that he was a creditor of the estate, that his claim had been allowed and that the sum of $12,275.48 remained unpaid. Appellant in its answer admitted the filing and allowance of the claim and alleged that it had been paid, settled, satisfied and discharged. Upon a trial of the case, appellee offered in evidence the claim and the order allowing it. Appellant offered no evidence tending to prove that the claim of appellee had been paid or discharged. We are of the opinion that this evidence was sufficient to sustain the trial court's finding that appellee had sufficient interest in the suit to maintain an appeal.

Under the evidence in this case, the trial court properly ordered appellant's judgment satisfied and discharged of record under the authority of *Luikart v. Bredthauer*, 132 Neb. 62, 271 N. W. 165, wherein this court said: "Appellant contends that the court was without jurisdiction to consider appellee's application to have the records of the court show that the judgment was barred by the discharge in bankruptcy. We are of the opinion that a motion or application filed in the same action in which the judgment is rendered is a proper procedure to obtain the relief to which appellee is entitled."

We find no prejudicial error in the record and the judgment of the trial court is

AFFIRMED.

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CITY OF LINCOLN, APPELLANT, V. HENRY H. STEFFENSMEYER ET AL., APPELLEES.
279 N. W. 272

FILED APRIL 26, 1938. No. 30313.

1. **Workmen's Compensation: PENSIONS.** The receipt and acceptance by appellee of benefits under the workmen's compensation

act will not operate to bar his right to a fireman's pension, and section 48-111, Comp. St. 1929, when construed with sections 48-121, 48-122, as amended by sections 40, 41, ch. 57, Laws 1935, and sections 48-117, 48-130, 48-148, Comp. St. 1929, of the workmen's compensation act, is ineffectual in barring appellee's right to both benefits.

2. ———: ———. The term "pension" is not synonymous with "compensation," and is not compensation within the meaning of the statute governing workmen's compensation.

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

*Ralph P. Wilson, Clarence G. Miles* and *Frederick H. Wagener*, for appellant.

*Beghtol, Foe & Rankin, contra.*

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

MESSMORE, J.

Plaintiff filed a petition praying for a declaratory judgment. The agreed facts disclosed by the pleadings are as follows:

March 23, 1916, defendant Henry H. Steffensmeyer was employed by plaintiff city as a member of its paid fire department at a salary of $142 a month. September 12, 1935, he became totally and permanently disabled in the course of his employment and was paid his regular salary for one year from and after September 15, 1935. October 5, 1936, he filed a claim for a pension with the plaintiff under the terms of the firemen's pension law of this state. December 11, 1936, he filed a claim for workmen's compensation benefits. January 27, 1937, he filed a petition for workmen's compensation with the Nebraska workmen's compensation court and is receiving the benefits of the act. February 1, 1937, the city council of plaintiff city, by resolution, authorized the city attorney to bring this action for declaratory judgment, to have the plaintiff's liability under the workmen's compensation act and the firemen's pension act determined. The defendants' answer claimed right of re-

covery under both acts. The plaintiff and defendants joined in a motion for judgment on the pleadings. The trial court rendered judgment for the defendants. Plaintiff appeals. The use of the word "defendant" in this opinion refers to defendant Henry H. Steffensmeyer.

The only assignment of error urged by plaintiff is: The trial court erred in finding defendant was entitled to compensation under the workmen's compensation act and, in addition thereto, one-half of his regular salary under the firemen's pension act, and that such recovery allows the defendant to receive double protection and double benefits for compensation for the same injury.

In support of its contention plaintiff cites section 48-111, Comp. St. 1929, in part as follows: "Such agreement or the election hereinafter provided for shall be a surrender by the parties thereto of their rights to any other method, form or amount of compensation or determination thereof than as provided in Part II of this article." In connection with the above section we cite section 35-203, Comp. St. 1929, a section of the firemen's pension law, viz.:

"In case any fireman in a paid fire department in any metropolitan city, or city of the first class, except any city of the first class that has heretofore adopted a charter for its own government, shall become permanently and totally disabled from accident or other cause, while in the line of his duty, such fireman shall forthwith be placed upon the roll of pensioned firemen, at the rate as provided for retired firemen in the second preceding section: Provided, the provisions of this article shall apply to all paid firemen now on the retired list, and to the widows and minor children of any deceased fireman who was on the retired list, under the provisions of this article at the time of his death, and such widow and minor children shall receive such pension as is provided for in this article; in case of partial disability of a fireman received while in the line of duty, he shall receive his salary during the continuance of such disability for a period not to exceed twelve months; Provided, further, if it shall be ascertained by the board of fire

and police commissioners or other proper municipal authorities within twelve months that such disability has become permanent, then his salary shall cease, and he shall be entitled to the benefits of the provisions with reference to pensions referred to in this article."

It will be observed that to entitle a fireman to a pension 21 years of service are necessary, or he must have sustained an injury, such as suffered by the defendant, in the course of his employment, resulting in total and permanent disability. Plaintiff contends that defendant elected to come under the workmen's compensation act, and that the language contained in section 48-111, Comp. St. 1929, i. e., "to any other method, form or amount of compensation," constitutes a surrender of defendant's right to obtain a fireman's pension, and that such section of the statute is an express provision which precludes defendant from receiving both benefits.

Plaintiff cites *State v. Love,* 89 Neb. 149, 131 N. W. 196, and contends that such case holds a fireman's pension to be compensation. Without repeating the language contained in the opinion relative to this proposition, we can safely say that the question of whether or not a fireman's pension is "compensation," within the statutory meaning of the compensation law, was not for determination in that case, and a judicial opinion, expressed by the writer on a point that is not necessarily raised and not involved in the case, or on a point in which the judicial mind was not directed to the precise question necessary to be determined to fix the rights of the parties, constitutes *dictum.* The cited case was an action in mandamus brought to compel the placing of a fireman on the pension roll. Several defenses were involved, but the precise question of whether or not a fireman's pension is compensation was not raised, and the decision on this point does nothing more than indicate that it might be compensation.

Plaintiff cites *Slater v. City of Grand Rapids,* 248 Mich. 480, 227 N. W. 788, as holding to the effect that a policeman's widow, electing to take under the workmen's com-

pensation act, could not recover a pension from the city. In that state the workmen's compensation act contained specific language as follows: *"Provided, however,* That policemen or firemen, or employees of the police or fire departments, or their dependents, in municipalities or villages of this state having charter provisions prescribing like benefits, may waive the provisions of this act and accept in lieu thereof such like benefits as are prescribed in such charter, but shall not be entitled to like benefits from both." Comp. Laws Supp. 1922, sec. 5429. No such language appears in the compensation act of this state, nor in the firemen's pension act. Obviously, the court, in construing this language, precluded the claimant from recovering both benefits, since, under the exact language of the statute, the claimant would not be entitled to like benefits. The case is not in point, and the language appearing in section 48-111, Comp. St. 1929, i. e., "any other method, form or amount of compensation," must be construed with other sections of the workmen's compensation act, as later set forth herein.

When the defendant entered the employment of the plaintiff city, both the firemen's pension act and the workmen's compensation act had been enacted into law. The firemen's pension act was originally enacted in 1895 (Laws 1895, ch. 39), thereafter amended in 1909 (Laws 1909, ch. 60). The workmen's compensation act was passed and approved in 1913 (Laws 1913, ch. 198). By chapter 122, Laws 1921, approved April 21, 1921, the terms of the workmen's compensation act were, by amendment, broadened so as to embrace within their benefits policemen and firemen of metropolitan cities. In 1923 the firemen's pension act was amended to exclude charter cities, but protected the rights of firemen then in the employ of the city as continuing under the act. The trend of this legislation discloses the evident intent of the legislature to include firemen within the provisions of the workmen's compensation act, and, if there existed an intent to the contrary, we believe such intent would have been incorporated within

the act, for the reason that this legislation over a period of years, involving both the firemen's pension act and the workmen's compensation act, was continually before the legislature, and the legislature was aware of both acts.

Sections 48-121 and 48-122, Comp. St. 1929, as amended, provide the method of computing the benefits under the workmen's compensation act by taking as the basis a certain *per centum* of the wages received at the time of the injury. Section 48-126, Comp. St. 1929, as amended by section 39, ch. 57, Laws 1935, provides in part: "Whenever in this article the term 'wages' is used, it shall be construed to mean the money rate at which the service rendered is recompensed under the contract of hiring in force at the time of the accident, and shall not include gratuities received from the employer or others, nor shall it include board, lodging or similar advantages received from the employer, unless the money value of such advantages shall have been fixed by the parties at the time of the hiring." Section 48-117, Comp. St. 1929, uses this language: "Where compensation is claimed from, or proceedings taken against a person, firm or corporation * * * the compensation shall be calculated with reference to the wage the workman was receiving from the person by whom he was immediately employed at the time of the injury." Thus, it will be seen that, if a firemen's pension is synonymous with compensation, then the pension, by necessity, would be included in arriving at the amount of the compensation and would then be figured in such amount as provided for by the foregoing sections. The conclusion is obvious.

In addition to the foregoing sections of the workmen's compensation act, section 48-130, Comp. St. 1929, makes this exception in favor of the employee: "No savings or insurance of the injured employee, or any contribution made by him to any benefit fund or protective association independent of this article shall be taken into consideration in determining the compensation to be paid hereunder; nor shall benefits derived from any other source than those paid or caused to be paid by the employer as herein pro-

vided, be considered in fixing the compensation under this article." And section 48-148, Comp. St. 1929, reads in part: "But liability for compensation under this article shall not be reduced or affected by any insurance * * * or other benefit whatsoever, due to or received by the person entitled to such compensation."

Sections 48-130 and 48-148, Comp. St. 1929, are cited with approval and determine one phase of the case in the opinion in *Shandy v. City of Omaha,* 127 Neb. 406, 255 N. W. 477, the only case involving the same subject-matter that has been before the court in this state. In the cited case the widow of a fireman, killed in the course of his employment, first obtained a fireman's pension, and subsequently sought benefits under the workmen's compensation act, which the court allowed her. The plaintiff seeks to distinguish this case from the facts in the case at bar on the theory that, if the fireman's widow had first taken under the workmen's compensation act, then section 48-111, Comp. St. 1929, and the language therein contained, i. e., "any other method, form or amount of compensation or determination thereof than as provided in Part II of this article," would bar her right subsequently to receive a fireman's pension. In the body of the opinion in *Shandy v. City of Omaha, supra,* we find this language (p. 412): "None of the provisions of our law on which the city relies to sustain this defense in express terms negatives the right of a pensioner to recover under the provisions of the workmen's compensation law, or declares the receipt of a pension to be a bar to such recovery." To quote the last paragraph of the opinion: "We are therefore constrained to accept the view that the payment of pensions to firemen or their dependents under the laws relating to metropolitan cities in no way affects the claims of such persons under the workmen's compensation act or their right to recover under the provisions thereof."

In view of the sections of the statute hereinbefore set out, and the express language used in the case of *Shandy v. City of Omaha, supra,* we believe that it is established by

the law of this state that the defendant is entitled to receive the benefit of the workmen's compensation act and the firemen's pension act, and that it is of small consequence under which act he first accepts the benefits. To follow the plaintiff's contention in its distinction of the *Shandy* case from the facts in the instant case would place a technical refinement on a just analysis of the law and would not be in keeping with the thought of the opinion in *Shandy v. City of Omaha, supra,* but would, in fact, nullify the spirit of the law as announced in the opinion in that case.

Many definitions have been given by the courts of the word "pension." We can say in this state that a fireman's pension is not "compensation," within the meaning of the workmen's compensation act, and that a fair interpretation and definition of the term "pension" is reflected by the following authorities, as set forth in Words and Phrases:

"A 'pension' is a stated and certain allowance made and granted by the government for valuable services performed in its behalf. It is a reward for continuous faithfulness in the discharge of public duty, and is a compensation for the hazard of the employment. *In re Roche,* 126 N. Y. Supp. 766, 768, 141 App. Div. 872." 3 Words and Phrases (2d ser.) 952.

"A 'pension' is a bounty springing from the graciousness and appreciation of sovereignty. It may be given or withheld at the pleasure of a sovereign power. Because one is placed upon a pension roll under a valid law is no reason why that law may not be repealed and the pension cease. *Eddy v. Morgan,* 75 N. E. 174, 178, 216 Ill. 437." 3 Words and Phrases (2d ser.) 952.

"A pension is the regular allowance paid to an individual by the government in consideration of past services or in recognition of merit, and to the payment of which the whole resources of the government are pledged. *Hawkins v. Randolph,* 231 S. W. 556, 559, 149 Ark. 124." 5 Words and Phrases (3d ser.) 930.

"A 'pension' is usually regarded as a matter of grace and

not of right. *Gleason v. Board of Com'rs of Sedgwick County*, 141 P. 584, 585, 92 Kan. 632." 5 Words and Phrases (3d ser.) 930.

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

AFFIRMED.

CARTER, J., dissenting.

The question in this case is whether a fireman, totally and permanently disabled while in the employ of the city of Lincoln, can recover both compensation and a fireman's pension under the circumstances detailed in the majority opinion. An award of compensation has already been made. Is the defendant also entitled to a pension?

It is provided in the workmen's compensation law of this state, section 48-111, Comp. St. 1929, that an election to come under the act "shall be a surrender by the parties thereto of their rights to any other method, form or amount of compensation or determination thereof."

A fireman's pension is a form of compensation, within the meaning of the workmen's compensation act hereinbefore quoted. The majority opinion states that this is not the case because it is not used as a part of the basis for calculating a compensation award under sections 48-121 and 48-122, Comp. St. 1929, as amended. The writer of the opinion overlooks the fact that an award of compensation is based on the wages being earned at the time of the accident, and that the term "wages" is specifically defined and limited in meaning by the terms of the act itself, while the term "compensation," used in section 48-111, Comp. St. 1929, is used in its ordinary sense, unrestricted by statutory definition. As a matter of fact, the statute by using the words "any other method, form or amount of compensation or determination thereof" indicates that the word was used in its broadest sense. A fireman's pension is not the result of any contribution by the employee from wages or otherwise. It is either compensation or a gratuity. If it is a gratuity, the act providing for its payment is violative of constitutional provisions; if it is compensation,

it is barred by the express provisions of the compensation law.

In *State v. Love,* 89 Neb. 149, 131 N. W. 196, this court, in discussing firemen's pensions, said: "In applying these limitations to the instant case, it may be conceded that the pension forms an inducement to the individual to enter and remain in the service of the fire department, and that the pension in a sense is part of the compensation paid for those services. 2 Goodnow, Comparative Administrative Law, p. 74; Gray, Limitations of Taxing Power and Public Indebtedness, sec. 336. In this aspect of the case, if no part of the service was rendered subsequent to the enactment of the law, the compensation would be a gratuity forbidden by the fundamental law of the state. *Mead v. Inhabitants of Acton,* 139 Mass. 341."

In *Cobbs v. Home Ins. Co.,* 18 Ala. App. 206, 91 So. 627, the court said: "The legislature, looking to the future, and not retrospectively, may provide a system whereby municipalities can increase the efficiency of their fire departments by providing pensions for the firemen or their dependents, not as a gratuity, but as a part of the stipulated consideration for which they contracted and served."

Also, in *State v. City of Minneapolis,* 174 Minn. 594, 219 N. W. 924, the court said: "A pension or retirement allowance is a gratuity where it is granted for services previously rendered and which, at the time they were rendered, were fully paid for and gave rise to no legal obligation for further compensation. *Stevens v. Minneapolis F. D. Relief Ass'n,* 124 Minn. 381, 145 N. W. 35, 50 L. R. A. n. s. 1018; *O'Dea v. Cook,* 176 Cal. 659, 169 Pac. 366. It is not a gratuity when the services are rendered while the pension or retirement relief statute is in force, so that the statute becomes a part of the contract of employment and contemplates such pension or allowance as part of the compensation for the services rendered. * * * In *Douglas v. Pension Board,* 75 Cal. App. 335, 242 Pac. 756, it is stated that retirement pensions to employees are increased compensation, and this proposition has particular force as to

employees who perform such services subsequent to the passage of the law granting pensions."

The only logical conclusion that can be drawn is that a fireman's pension is a form of compensation within the meaning of the compensation act. Clearly, the legislature never intended that an injured fireman should receive anything other than compensation payments if he elected to come under that act. This court should give effect to the plain language of the compensation law and deny the recovery of a fireman's pension in addition to the compensation award already recovered. For the reasons herein set forth, I feel obliged to voice my dissent to the decision of the majority in this case.

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NEBRASKA STATE BANK LIQUIDATION ASSOCIATION, APPELLANT, V. VILLAGE OF BURTON, APPELLEE.
279 N. W. 319

FILED APRIL 26, 1938. No. 30279.

1. **Limitation of Actions.** Statute of limitations on implied obligation to repay money borrowed by issuance of a void warrant begins to run on date of last payment on the warrant.
2. ———. Defendant village borrowed $700 on August 14, 1926, by issuance of a void warrant. Several payments were made thereon, the last on November 27, 1931. No further payments were made thereafter and no action by the village of any kind was taken in recognition of the warrant. Suit was begun on the warrant January 3, 1936. Amended answer repudiating the warrant was filed June 3, 1936, and this was the first action of any kind by the village attacking the warrant. Amended petition for money had and received was filed May 7, 1937. *Held*, that the action for money had and received was barred by the statute of limitations.

APPEAL from the district court for Keya Paha county: ROBERT R. DICKSON, JUDGE. *Affirmed.*

*Greenamyre & Nelson* and *Frederick M. Deutsch*, for appellant.

*Ross Amspoker, contra.*

Heard before GOSS, C. J., ROSE, DAY, CARTER and MESSMORE, JJ., and LIGHTNER and SPEAR, District Judges.

LIGHTNER, District Judge.

This suit was filed on January 3, 1936, in the district court, and originally sought recovery for balance of a $700 warrant issued by certain officers of the defendant village on August 14, 1926. Payments had been made thereon as follows, to wit: October 26, 1928, $175; November 18, 1931, $175; November 27, 1931, $125. The trial began in the district court on April 26, 1937. Plaintiff by permission of the court filed an amended petition on May 7, 1937, changing its cause of action from a suit on the warrant to a suit for money had and received. Defendant filed its amended answer on May 27, 1937, pleading various defenses, but the only one we deem important is that the suit was barred by the statute of limitations. No reply was filed, but we consider this of no importance since the case was tried on the theory that the allegations of the amended answer were denied. *Stewart v. American Exchange Nat. Bank*, 54 Neb. 461, 74 N. W. 865; *Sanely v. Crapenhoft*, 1 Neb. (Unof.) 8, 95 N. W. 352. Jury was waived. Finding was for defendant, and plaintiff appeals.

It is asserted in plaintiff's brief, and not denied by defendant, that the district court based its judgment entirely upon the finding that the action was barred by the statute of limitations.

Further facts necessary for an understanding of the case are that in the late spring or early summer of 1926 there was a water shortage in the village of Burton. Burton is a village of about 100 population and the total assessed valuation of its property in 1926 was $46,250, upon which a levy of 5 mills had been made for village purposes. The $231.25 so raised was sufficient for all village needs. No estimate of expenses was ever made by the village pursuant to section 5185, Rev. St. 1913, which was then in effect, and no annual appropriation bill was ever passed pursuant to section 5184 of the same statute. The warrant in question was issued to assist in putting in a water plant for the

village, but none of the provisions of section 5119, Rev. St. 1913, were followed. The testimony of the village treasurer, George J. Kirsch, indicates the circumstances under which the warrant in question was issued:

"There was a meeting held at one time prior to the undertaking of the installation of the water, and the matter of finances was discussed. At that time they had an estimated amount that could be raised from a certain number of subscribers, and the amount of money that could be raised through popular subscription. This was considerably short of what the estimated cost of the water plant would be; so I was asked to find out whether or not a warrant could be sold. It was also discussed at the time as to what the new law that had just been passed meant; what bearing it might have on this particular project. Well, I took the matter up to find out where this might be disposed of, and among others I wrote to Jabe Gibson, who at that time was connected with one of the Norfolk banks. He agreed to accept the warrant. After I had the correspondence showing it would be accepted by them, it was then undertaken and the system installed."

No claim was filed for $700, no formal action of any kind by the village board and none of the necessary steps taken to authorize borrowing the $700.

The movement for a water supply had been begun by the citizens and twenty-five $50 shares were subscribed by 23 different subscribers, two having taken $100 each, part of which was paid in cash and part in labor on the proposed system. The system was duly installed and the $700 was borrowed as explained by Mr. Kirsch and the warrant issued. The $700 went into the village treasury and it was all expended by the village in putting in the water system. All parties seem to have acted in the utmost good faith. The system was later taken over and conducted by the village.

It may be conceded we think that, although the warrant itself was void and the contract to borrow the money was void and all the proceedings in regard to establishing the

water system were void, nevertheless the village having taken over the system and received the benefits from the money borrowed became liable in an action for money had and received.

Where a municipal corporation receives money or property of another under and pursuant to a contract upon a subject within its corporate powers, which contract was entered into in good faith and without purpose to violate or evade the law, but for the failure to comply with the requirements of statutes made essential to a valid contract such contract was illegal and void, but the money or property so received is retained and subsequently devoted to legitimate municipal purposes, the municipality is liable therefor, and recovery may be had against it as upon an implied contract. *Lincoln Land Co. v. Village of Grant*, 57 Neb. 70, 77 N. W. 349; *Rogers v. City of Omaha*, 76 Neb. 187, 107 N. W. 214; *Nebraska Bitulithic Co. v. City of Omaha*, 84 Neb. 375, 121 N. W. 443.

The only question in our judgment is with reference to the statute of limitations which under sections 20-206 and 20-211, Comp. St. 1929, is four years. It will be seen from the above statement that the last payment on the warrant was on November 27, 1931, whereas plaintiff's original petition was filed on January 3, 1936, or more than four years after the last payment on the warrant.

A careful examination of the Nebraska cases indicates in our judgment that an action to recover on an implied assumpsit is barred at the expiration of four years after the cause of action accrues and that the cause of action arises, not at the time of repudiation of the void warrant or contract, but when the money was borrowed or the labor or materials furnished. In *O'Neill v. City of South Omaha*, 102 Neb. 836, 170 N. W. 174, it is said in the opinion: "Plaintiff's cause of action accrued when the city accepted the dirt and retained it. It is therefore barred by the four-year statute of limitations." In *Murphy v. City of Omaha*, 1 Neb. (Unof.) 488, 95 N. W. 680, a municipal corporation had levied a special assessment which was afterwards

adjudged to be invalid and the suit was for money paid under the void or invalid assessment. The court held that an action therefor, which was an action for money had and received, must be brought within four years from the receipt of the money. *Markey v. School District,* 58 Neb. 479, 78 N. W. 932, was a suit for school furniture furnished to the district, but the warrant was held invalid because payable in the future. The furniture in question was furnished and the time warrant issued in October, 1886. In that case the district not only did not repudiate the warrant, but seems to have taken action at several times in an attempt to validate it. It was held in that case that an action to recover on an implied assumpsit is barred at the expiration of four years after the cause of action arose. It is said in the opinion: "A recovery cannot be had in this case upon a *quantum meruit,* for the reason that such cause of action, if it ever existed, arose, as disclosed by the petition, not later than October, 1886, and the action was not instituted until February 4, 1895, more than 8 years after the acceptance of the furniture by the defendants." In *Pomerene v. School District,* 56 Neb. 126, 76 N. W. 414, it is said in the opinion: "Nor can we in this case determine whether, the work having been performed and accepted by the district, an implied assumpsit arose to pay therefor. If such an obligation existed the cause of action arose on completion of the work, or at latest on its acceptance, which is shown by the petition to be September 2, 1889. This suit was brought June 7, 1895. The statute of limitations is a defense presented by the demurrer, and affords an effective bar to the implied assumpsit."

Appellant claims that the statute of limitations does not begin to run against a suit by the holder of a void warrant, even on the implied obligation, until the warrant is repudiated by the city, of which the holder has knowledge, citing in support of such rule, note, 94 A. L. R. 608; *Geer v. School District,* 111 Fed. 682; *Incorporated Town of Gilman v. Fernald,* 141 Fed. 941; *Board of Commissioners v. Irvine,* 126 Fed. 689.

We have carefully examined these cases and, while some of them state the rule in the above words, we find that the rule actually applied is not so broad. What these cases hold is that, if the municipality does some affirmative act within the period of limitation in recognition of the bond or warrant, it prevents the statute of limitations from running even against the implied obligation. The holding is that it would be inequitable to permit the municipality to recognize the obligation and thus lull the holder into a sense of security and afterwards successfully plead the bar of the statute.

In *Geer v. School District*, 111 Fed. 682, the void bonds were executed July 1, 1892; interest was paid January 1 and July 1, 1893. Interest was not paid on the coupons maturing in 1894, 1895, 1896, and 1897, but a special tax was duly assessed and levied for the purpose of paying the interest for 1894, 1895, and 1896. This remained a lien on the taxable property of the district until after a suit was begun on the coupons in November, 1897. During these years the district repeatedly promised to pay the coupons, but failed to do so, and suit was begun in November, 1897, but the court in that suit, which was a suit on the obligation, held that the bonds were void. The *Geer* case, *supra*, was assumpsit for the amount paid for the void bonds. It was instituted on April 16, 1900, which was more than six years after the bonds were purchased, but less than six years after the assessment, levy and promises above referred to. Six years was the period of limitations applicable. The court held that the district had recognized by such acts the bonds as valid obligations and had given no intimation of an intention to repudiate them until its answer was filed. The following quoted from the opinion gives the gist of the court's reasoning:

"As long as the district so recognized the same, and elected to treat them as legal obligations, we know of no reason requiring the plaintiff to take any steps to rescind the contract, or obligating him to resort to the courts to enforce the implied obligation. It would be a harsh and

thoroughly impractical rule to establish that the holder of a claim against a municipality is bound by any consideration of statutes of limitations to take steps to rescind an express contract to pay the same, as long as the municipality itself recognizes such express contract as a valid and binding obligation. The effect of such a rule would be to permit the municipality to lull the holders of its obligations into inaction, and thereby, taking advantage of its own wrong, deprive them of a valuable right."

In *Coffin v. Board of Commissioners,* 114 Fed. 518, the court followed the *Geer* case. In the *Coffin* case the county passed a resolution within the statutory period ordering the void warrants to be exchanged for bonds. The court said:

"The statute of limitations does not begin to run against such (suit for money paid for void bonds) until denial by the county of its obligation on such bonds; and the action of the county commissioners * * * in adopting a resolution recognizing the obligation of the county on the warrants, and directing the funding of the debt into bonds, is tantamount to a new acknowledgment, and stopped the running of the statute of limitations."

In *Incorporated Town of Gilman v. Fernald,* 141 Fed. 941, the city paid interest on the void obligations within the statutory period. The opinion explains the matter as follows, the two opinions referred to being the opinions in the *Geer* and *Irvine* cases:

"This court in two opinions has passed upon what we conceive to be the very question now involved, and has held in substance that when a municipality issues void bonds as evidence of an indebtedness which it had power to incur, for work or property of which it received the benefit, and subsequently paid the holder of the bonds interest as it matured according to the tenor of the bonds, the statute of limitations does not begin to run against an action brought to recover the money as long as the municipality recognizes its express obligation to pay the bonds and pays the holder interest thereon according to the requirement of the bonds themselves."

Here the Village of Burton did nothing within the statutory period after the last payment was made that would justify a finding that it had waived the statute. Furthermore, it would seem that the failure to make any further payment upon the warrant after November 27, 1931, amounted to a repudiation of the warrant. In our judgment the facts in this case do not bring plaintiff within the rule or reasoning of the *Geer* and other cases just discussed.

Appellant further contends that the statute of limitations was not properly pleaded and cites *Pinkham v. Pinkham,* 60 Neb. 600, 83 N. W. 837, *Id.* 61 Neb. 336, 85 N. W. 285, and *Dufrene v. Anderson,* 67 Neb. 136, 93 N. W. 139. The pleading is not open to the objection stated, since it alleges that no payments were made after November 27, 1931; that the suit on the warrant was filed on January 3, 1936, and the amended petition for money had and received was filed May 7, 1937; that any cause of action in plaintiff accrued more than four years prior to the commencement of plaintiff's action, and that any cause of action which may have at any time existed in favor of the plaintiff and against the defendant was barred by the statute of limitations when plaintiff's action was commenced. Pleading the facts with reference to the statute of limitations with greater particularity is not necessary nor in fact desirable.

A number of other contentions are made by appellant, all of which we have considered, but it would unduly extend this opinion to mention them all.

The judgment of the district court is

AFFIRMED.

# RALPH RUSSELL, APPELLEE, V. GLENS FALLS INDEMNITY COMPANY, APPELLANT.

279 N. W. 287

FILED APRIL 26, 1938. No. 30146.

1. **Insurance**: APPLICATION: ESTOPPEL. Where an agent of an accident insurance company takes an application for an accident policy and assumes the responsibility of answering the questions asked in such application, answers such questions falsely or incorrectly, and without the applicant having made any statement in connection therewith or knowing the manner in which they were answered, the insurer will be estopped to claim that such representations were false or incorrect.
2. ———: POLICY: CONSTRUCTION: "TOTAL DISABILITY." "A literal interpretation of the term 'total disability,' in an accident insurance policy implying by its terms utter mental and physical helplessness as a condition of liability, will not be adopted, where it would result in an unreasonable and unjust forfeiture of the accident insurance." *McCleneghan v. London Guarantee & Accident Co.*, 132 Neb. 131, 271 N. W. 276.
3. ———: ———: ———: ———. "As a general rule, the term 'total disability,' in an accident policy, is, in insurance law, such a disability as renders insured unable to perform the substantial and material acts of his business or occupation in the usual way." *McCleneghan v. London Guarantee & Accident Co.*, 132 Neb. 131, 271 N. W. 276.
4. ———: ———: ———: ———. "Where a total disability clause, purporting to make physical and mental helplessness essential to liability of insurer, if enforced literally, would result in an unreasonable and unjust forfeiture of accident insurance, it should be liberally construed to mean such a disability as renders insured unable to perform the substantial and material acts of his business or occupation in the usual way." *McCleneghan v. London Guarantee & Accident Co.*, 132 Neb. 131, 271 N. W. 276.
5. ———: RECOVERY: TOTAL DISABILITY. In an action on a policy of accident insurance, which provides for payment for total disability from bodily injury, effected directly and independently of all other causes through accidental means, and provides for such payments, if the injury, independently and exclusively of all other causes, shall wholly and continuously disable the insured from the date of accident from performing any and every kind of duty pertaining to his occupation, and further provides that the policy shall not cover accident, injury, or disability caused directly or indirectly, wholly or partly, by

bodily or mental infirmity, or by any other disease, the insured cannot recover for total disability where the effect of a disease, existing in insured at the time of the accident (the disease not being normal and usual to one of insured's advancing years), added to the effect of the accident, causes the total disability, if the accident alone would not have caused such total disability had the insured not been so diseased.

6. Instructions examined and *held* not to present the theory of the defendant supported by the pleadings and evidence to the jury.

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

*Kennedy, Holland, De Lacy & Svoboda,* for appellant.

*Johnsen, Gross & Crawford, contra.*

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

MUNDAY, District Judge.

This is an action by Ralph Russell against the Glens Falls Indemnity Company on an accident insurance policy. The plaintiff claims he was wholly and continuously disabled for 15½ weeks from August 29, 1935, by an accident, while using a telephone, which prohibited him from performing any and every kind of duty pertaining to his occupation. The policy provides in part as follows:

"Does hereby insure Ralph Russell * * * by occupation a president—Russell Sporting Goods Company—against loss resulting from bodily injuries, effected directly and independently of all other causes, through accidental means. * * * Total loss of time. Or, if such injuries, independently and exclusively of all other causes, shall wholly and continuously disable the insured from the date of accident from performing any and every kind of duty pertaining to his occupation, the company will pay the weekly indemnity. * * * This insurance shall not cover * * * disability * * * caused directly or indirectly, wholly or partly, by bodily or mental infirmity * * * or by any other kind of disease."

Plaintiff claims that on August 29, 1935, while he was

talking over long-distance telephone, he received a severe electric shock which resulted in total deafness and resultant injury to his nervous system, thus causing him to become totally and continuously disabled from August 29, 1935, until December 16, 1935; that he is entitled to a weekly indemnity of $50 a week, or a total of $775. There was no claim for partial disability, which was also covered by the policy.

The defendant by answer admits the issuance of the policy, and alleges that the plaintiff in his application answered the questions as to his physical condition falsely, and that, although plaintiff answered the question as to his hearing being impaired in the negative, the defendant alleges the fact to be that the plaintiff was completely deaf in one ear and that his hearing was diminished in the other, and that the entirely deaf ear was not affected by the shock received; that the deafness of the plaintiff in one ear was unknown to the defendant; that the deafness materially affected the hazard, and the plaintiff fraudulently procured the policy of insurance by concealment of said fact; that if the defendant had known the true facts it would not have issued said policy. Defendant further answers by showing a tender of the premium paid by the plaintiff to the date of the accident and an election to rescind the policy from its date of issuance. Defendant denies that the plaintiff was totally disabled within the meaning of the policy, and that the plaintiff received an accident which directly and independently of all other causes produced total disability, and alleges that the condition of the plaintiff's ear and his deafness, if any, was the result of a diseased condition which plaintiff had had for a number of years prior to the alleged accident.

Plaintiff replies by denying allegations of the answer not admitted, and alleges that he had no knowledge of the questions and answers referred to in the answer as to his hearing, and alleges he was not asked the questions by the agent of the company; that the answers were not made by him but were filled in by the agent at a time and place

when the plaintiff was not present. Plaintiff further denies that he was completely deaf in one ear, and alleges that he had useful hearing in both ears at the time of making the application and at the time of the alleged accident.

The cause was submitted to a jury, which found in favor of the plaintiff for the full amount claimed.

Appellant sets out many assignments of error, but the principal ones relied on are: That the plaintiff cannot recover because of the fraudulent misstatements in his application for insurance; that the plaintiff's condition was such as did not wholly and continuously disable him from performing any and all kinds of duties pertaining to his occupation; that the accident did not, independently and exclusively of all other causes, cause the disablement of the plaintiff; that there was error in giving and refusing certain instructions.

The evidence of the plaintiff was principally that of his associates and friends, who stated that in their dealings with him he had a fairly useful hearing. The plaintiff himself stated that he had normal hearing in his right ear, but had deficient hearing in the left ear before the accident. Dr. Kully testified in behalf of the plaintiff that many people, especially in advanced years, have catarrhal trouble in the ear, but that catarrhal trouble and resultant deafness were never alone of sufficient severity to cause the need of hearing aids; that it was his opinion the injury to the nerve and the concussion which caused the total deafness in the right ear; that plaintiff had a useful hearing before the accident. Dr. Callfas was a witness for defendant. He had examined the plaintiff several times in years previous to the accident and had charts made at the time of some of these examinations. Dr. Callfas stated that the plaintiff had at all times previous to the accident quite defective hearing in his ears, especially the left ear; also, he had examined the plaintiff soon after the accident. Other medical witnesses for defendant stated that the plaintiff's total deafness after the accident was contributed to by the previous diseased condition of his ears. We think a fair con-

clusion from the evidence is that there was considerable defect in hearing of the plaintiff's left ear previous to the accident, and that the hearing in the right ear was probably somewhat less than normal, but he had a fairly useful hearing. It would serve no useful purpose to analyze all the evidence. Our study of the evidence convinces us that the plaintiff was for all intents and purposes disabled for the period claimed in the petition.

The trial court fairly submitted the question to the jury as to whether or not the agent for the defendant, without the applicant's knowledge and without the applicant ever having made any statement in connection with the questions alleged to have been fraudulently answered by the plaintiff, answered the questions and placed the answers in the application. It is the settled law of this state that, where an agent of an insurance company takes an application for a policy and assumes responsibility by answering the questions presented in such application, without the applicant having made any statements in connection therewith, or knowing the manner in which they are answered, the company is not permitted to rely on the representations being false. *Scott v. New England Mutual Life Ins. Co.*, 128 Neb. 867, 260 N. W. 377; *Home Fire Ins. Co. v. Fallon*, 45 Neb. 554, 63 N. W. 860; *German Ins. Co. v. Frederick*, 57 Neb. 538, 77 N. W. 1106; *Roth v. Employers Fire Ins. Co.*, 123 Neb. 300, 242 N. W. 612. The jury correctly found this issue against the defendant.

Was the plaintiff wholly and continuously disabled from performing any and all kinds of duties pertaining to his occupation for the period of 15½ weeks? At the date of the accident the plaintiff was 63 years of age and in seemingly good health. He was the managing head of a large retail business in Omaha, Nebraska. Before the accident he was at his desk every day handling the details and assuming the responsibility of his large company, together with the burdens of financing and handling the various problems and incidents in connection therewith. Every day his duties made it necessary for him to have many conversations

over the telephone and directly with different individuals. This was shown by the testimony of his associates. That the accident occurred is not disputed. The same line of testimony showed that after the accident the plaintiff for the time in question was unable to carry on conversations and was nervous and irritable. There are a few incidents indicating that plaintiff might have been able to transact some of his former duties during the period of claimed disability. This court in the well-reasoned case of *McCleneghan v. London Guarantee & Accident Co.*, 132 Neb. 131, 271 N. W. 276, states a just and equitable rule as the law of this state. Under this rule the trial court properly instructed the jury as to determining whether or not the defendant was totally disabled within the meaning of the policy. While the court's instruction might have been improved by stating that the disability must be such as to prevent *the* substantial and material acts of the plaintiff's business, instead of indicating only "substantial and material acts," but, since the case is reversed, if there is any error in this instruction, it can be given further attention if this question arises later.

The defendant earnestly contends that the total disability is not wholly the result of the accident, but results from the accident cooperating with existing disease or infirmity, and that a claim based on such disability is not within the terms of the policy, especially where the resulting total deafness would not have been produced but for such existing bodily defect or infirmity. This brings us to a question in the case that is more perplexing and for its solution requires painstaking study of the evidence, the law, and the instructions given by the court. Did the trial court properly submit the question to the jury as to whether or not a disease of the insured existing at the time of the accident cooperated with the results of the accident to produce the total disability?

In instruction No. 4 the court instructed the jury, in so far as material to this question, as follows: "The burden is upon the plaintiff to establish by a preponderance of the

evidence the following propositions: (1) That on or about August 29, 1935, the plaintiff had an electric shock over the telephone under the conditions as described in the petition as instruction No. 1; (2) that as a result of such electric shock the plaintiff became totally deaf and received an injury to his nervous system; (3) that such injury and deafness was caused solely from such claimed accidental means directly, independently and exclusively of all other causes."

In instruction No. 5 the jury were told that, if the plaintiff knowingly and falsely signed the application as to his hearing, he could not recover.

Instruction No. 7 given by the court is as follows: "If you find for the plaintiff on instruction No. 5, and you further find that the plaintiff was partly deaf before the claimed accident was received by him; that he suffered an electrical shock at the time and place claimed and as a result thereof became totally deaf, and you further find that he was during the 15½ weeks after receiving such electrical shock totally incapacitated from performing any and every kind of duty pertaining to his occupation, then the fact that the shock aggravated a prior condition, if such you find, would not defeat the plaintiff's recovery unless you further find that during the period of 15½ weeks for which the plaintiff is attempting to recover, any disabling condition of deafness because of such claimed accident was due partly to the progressive character of disease, the progress of the disease manifesting itself after such claimed accident, and thereafter such progressive character of disease either directly or indirectly contributed toward such claimed total disability, then in the latter event, the plaintiff would not be entitled to recover, the policy excluding any liability for disability by any kind of disease, and in this case, if you find for plaintiff on instruction No. 5, the accidental injury independently and exclusively of all other causes arising after such accident must be the disabling factor."

Defendant requested the following instruction: "You are instructed that the plaintiff in his petition alleges that

the accident in question resulted in total deafness causing total disability during the period sued on. Now you are instructed that if you believe that the deafness which the plaintiff was suffering after the accident was caused both by the accident and the diseased condition of plaintiff's ears, and that the diseased condition of plaintiff's ears at the time of the accident directly and indirectly, or wholly or partly, caused such total disability, as claimed by plaintiff then your verdict should be for the defendant." Also, defendant requested two other instructions setting out in different form the same proposition as in its requested instruction above.

The decisions on the question above set out in other jurisdictions are not uniform and are inharmonious and in conflict, and we find by examination of the many cases cited in the briefs that any attempted reconciliation of them is hopeless and would result in absurd distinctions. In this state there is not a clearly defined rule under the previous decisions of this court. One source of confusion in the decisions on this question in different courts, even in the same jurisdiction, is in applying the reasoning and law of one case, based on a certain insurance contract providing for benefits resulting from accident, to another case with a different contract. Many of the cases are where contracts involve only the provision "resulting directly, independently, and exclusively," while others have the additional phrase "wholly or in part, directly or indirectly, from disease or other bodily infirmity or other disease," or a phrase of like nature. There is clearly a distinction between the two contracts. Of course, this is not the only reason for the conflict in decisions. It is not the reason that the rule of this court is somewhat confused, as will be hereinafter shown.

The different courts have adopted different reasons as a basis to determine whether or not there shall be a recovery on such policies. Some courts base their decisions on the rule of efficient proximate cause of the accidental injury, others the remote cause, others reasonable interpretation

of the contract, others the intention of the parties to the contract, and others whether or not the diseased condition of the insured was the usual or necessary effect of the insured's age.

It seems reasonably clear that a policy with the phrase "resulting directly, independently and exclusively" refers to the efficient, substantial and proximate cause of the disability at the time it occurred. On the other hand, a policy which also has the phrase "wholly or partly, directly or indirectly, from disease or mental or bodily infirmity" refers to another contributory cause, whether proximate or remote. To illustrate: A person might be standing near a stone wall and become dizzy and fall and receive a serious injury. Clearly there is an accident. But if the dizziness was caused by an existing illness or disease of the insured, the illness or disease would be the remote or indirect cause of the injury. It would at least in part cause the injury. It would be a contributing and cooperating cause. But, whether a proximate or remote cause, if a contributing cause, there can be no recovery where such a cause is excluded by the policy. If the results of the accident, added to the diseased condition of an insured, produced the ultimate total result, under policy having the phrase "wholly or in part, directly or indirectly," there could be no recovery. But the disease must be of such a substantial character as to cause or in a substantial way to cooperate with the results of the injury to produce the total disability. Of course, in a case where the disease of which an insured was disabled resulted from the accidental injury, the situation would be different; as also it would be if the insured had a disease and the accidental injury caused the disablement independently of the disease.

Where the policy does not include the disease provision against disability "caused directly or indirectly, wholly or partly, by bodily or mental infirmity or other disease," or a like phrase, the modern rule seems to be as expressed in *Fidelity & Casualty Co. v. Meyer,* 106 Ark. 91, 152 S. W. 995, 44 L. R. A. n. s. 493, and in *Driskell v. United States*

*Health & Accident Co.*, 117 Mo. App. 362, 93 S. W. 880. In the latter cause it is stated:

"People differ so widely in health, vitality and ability to resist disease and injury that what may mean death to one man would be comparatively harmless to another, and, therefore, the fact that a given injury may not be generally lethal does not prevent it from becoming so under certain conditions; and if, under the peculiar temperament or condition of health of an individual upon whom it is inflicted, such injury appears as the active, efficient cause that sets in motion agencies that result in death, without the intervention of any other independent force, then it should be regarded as the sole and proximate cause of death. The fact that the physical infirmity of the victim may be a necessary condition to the result does not deprive the injury of its distinction as the sole producing cause. In such case, disease or low vitality do not arise to the dignity of concurring causes, but, in having deprived nature of her normal power of resistance to attack, appear rather as the passive allies of the agencies set in motion by the injury."

In the *Meyer* case it is stated that the policy does not contain the disease provision and this is given as a reason for not following several leading cases named in the opinion, and the above quotation from the *Driskell* case is approved.

Now, what are the decisions of this court on such policies? In *Ward v. Aetna Life Ins. Co.*, 85 Neb. 471, 123 N. W. 456, the first point of the syllabus is: "In an action on a policy of accident insurance, which provides that the company shall be liable for the death of the assured resulting from bodily injuries effected through external, violent and accidental means which, independently of all other causes, produced his death, it is error to instruct the jury that there may be a recovery under such policy if they find that the death resulted proximately and as the moving cause from the accident, where 'there were other causes that accelerated, or, even being added, resulted in death.'" In the opinion is the following language: "If a beneficiary under an accident policy can add other causes than those

resulting from the accident and base a recovery upon the death of the assured from such added causes, there would be no limit to the liability of an accident insurance company, and the conditions in its policy would be valueless." The case was before the court several times. There appears to be no disease provision in the policy, but the court did not permit a recovery when the results of the disease were added to the results of the accident, thus causing total disability.

Then later, in *Moon v. Order of United Commercial Travelers,* 96 Neb. 65, 146 N. W. 1037, the policy included the disease provision. A careful study of this case shows that recovery was permitted on the theory that the accidental injury was the proximate cause of the death of the insured, suffering from a diseased condition, which was the usual and necessary condition of old age. This conclusion as to the basis of the decision is sustained by statements in the opinion: "It is also contended by the defendant that the death was in consequence of disease, and that it was caused wholly or in part by bodily infirmity, and that the injury received was not the proximate, sole and only cause of the death. This would seem to bring us to the question whether the beneficiary of an elderly person who dies because of the injury received through an accident can recover anything if the organs of the body are affected by the age of the assured. When the membership is created, it must be known that the member will grow old if he lives, and that the organs of his body, including the heart, lungs and kidneys, are likely to be affected in time, and that the assured will be unable to resist in his old age the force of an accident which he might have successfully resisted at an earlier period." The only cases cited in the opinion on the question now under consideration are Iowa and Wisconsin cases, where the disease resulted from the accident. The case of *Ward v. Aetna Life Ins. Co., supra,* was not mentioned. In the opinion a large amount of evidence is set out. There seems to be no complaint as to instructions. A reading of the opinion does not convince us that the ques-

tion now considered was then considered by the court. See note, 34 L. R. A. n. s. 445.

The defendant pleaded and its evidence tended to sustain the contention that plaintiff's total deafness was partly caused by disease. This evidence was disputed by the plaintiff. Nevertheless it was one of the theories of the defense presented by it at the trial. Therefore, it was a question for the jury under proper instructions. On this phase of the case, instruction No. 7 given by the court permits the jury to find for the plaintiff, if they find plaintiff was partially deaf before the accident, and that the electrical shock received by him in the accident added and caused additional deafness, which, combined with the prior deafness, resulted in the total disability. The instruction disregarded and eliminated the effect of the condition of plaintiff's ear at and prior to the time of the accident, unless any disabling condition of deafness because of such claimed accident was due partly to the progressive character of the disease. This is contrary to the insured's contract and to the law, as heretofore shown. The requested instruction was made at the proper time by the defendant and was such an instruction as would serve to guide the jury in weighing certain features of the evidence in connection with the issues made by the pleadings. It was a correct statement of the law and was not covered by any instruction given by the court. The court did give an instruction touching this feature of the case, but it was not complete. It was the duty of the court to give the requested instruction or one of similar import. Not to do so under the above facts, issues and circumstances was prejudicial error.

The appellee in his brief seemingly endeavored to justify the giving of instruction No. 7 and the not giving of defendant's requested instruction by contending the substance is covered by the court's instructions, and that some of the defendant's expert medical witnesses on cross-examination in effect stated that the total deafness of plaintiff would have been produced by the accident whether plaintiff's ears were diseased or not at the time of the accident. The record

does not sustain this contention. Even though the witnesses did so state, the defendant produced other evidence in conflict therewith, which made the question one for the jury under proper instructions.

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

REVERSED.

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OSCAR A. HOFFMAN, APPELLANT: IDA M. HOFFMAN ET AL., INTERVENERS, APPELLANTS, V. LEMUEL D. GEIGER ET AL., APPELLEES AND CROSS-APPELLEES: WHITEBREAST FUEL COMPANY ET AL., INTERVENERS, CROSS-APPELLANTS.

279 N. W. 350

FILED APRIL 29, 1938. No. 30246.

1. **Pleading.** "In general a plaintiff waives error in sustaining a demurrer to his petition by filing an amended petition." *Wheeler v. Barker*, 51 Neb. 846, 71 N. W. 750.
2. **Corporations:** NOTICE OF INDEBTEDNESS. The liability of a stockholder for the debts of a corporation following a failure to publish annually the existing debts of a corporation, provided for by section 24-213, Comp. St. 1929, is penal in its nature and will be strictly construed.
3. ———: ———: RIGHT OF ACTION. "The liability of a stockholder in a corporation for failure of the corporation to publish notice of indebtedness required by section 577, Rev. St. 1913 (now section 24-213, Comp. St. 1929), is in the nature of a penalty for neglect of duty. One stockholder, who is equally in fault in that regard with all other stockholders, cannot maintain such action, as creditor of the corporation, against the other stockholders." *Singhaus v. Piper*, 103 Neb. 493, 172 N. W. 523.
4. ———: ———: ———. In a suit to enforce stockholders' liability for failure to publish notice of indebtedness, though a plaintiff and interveners fail to maintain their causes of action, yet that will not deprive other interveners, similarly situated, from proceeding in the same case to enforce liability of the stockholders to them, if such interveners have a good cause of action.
5. **Limitation of Actions.** As regards limitation for suing under stockholders' double liability statute (section 24-213, Comp. St. 1929), corporate assets in bankruptcy are not "exhausted"

until final dividend is paid to creditors. *Hansen v. Welch, Cook, Beals Co.*, 49 Fed. (2d) 576.

APPEAL from the district court for Lancaster county: ELLWOOD B. CHAPPELL, JUDGE. *Affirmed in part and reversed in part.*

*Arthur Balis*, for appellants.

*O. B. Clark*, for cross-appellants.

*Ralph S. Moseley, J. W. Kinsinger, Woods, Aitken & Aitken, John J. Ledwith, R. O. Williams, George Risser, William Niklaus, Field, Ricketts & Ricketts, Sterling Mutz, William Holt* and *McKillip & Barth, contra.*

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

GOSS, C. J.

This is a suit to enforce liability against holders of stock in a failed corporation for failure to publish notice of indebtedness as required by section 24-213, Comp. St. 1929. It never reached the trial stage. To state the facts concisely is difficult because the transcript alone, on which the questions of law arise, consists of 386 pages.

The suit was begun by a petition in equity filed May 24, 1934, by Oscar A. Hoffman, alleging himself to be a creditor, for himself and for all other creditors similarly situated, of the Globe Delivery Company, a corporation, against stockholders of the Globe Delivery Company, on their statutory liability as such stockholders. The petition alleged that the corporation had been put through bankruptcy and had no funds or property except $5,176.33 with which to pay the proved and listed creditors $21,859.54, the debt due them. Plaintiff alleged that the debt due him was $2,867.29 and his dividend in the bankruptcy proceeding was $678.97, leaving a balance of $2,188.32 still due him; that plaintiff became a creditor on or about March 10, 1923, by accepting a series of notes, one of which fell due each month; that the company paid to apply upon plaintiff's

indebtedness from time to time so that on the 14th of March, 1934, the indebtedness was as above stated; that from August 2, 1919, up to the time the corporation was declared a bankrupt, it had failed to publish notice of its indebtedness and defendant stockholders had become jointly and severally liable for the debts of the corporation. Plaintiff prayed an accounting and recovery.

May 28, 1934, Ida M. Hoffman and Charles F. Hoffman filed their petition of intervention and set up their claims as creditors on the same grounds as plaintiff; that is, that they held notes of Globe Delivery Company.

Defendants moved to make the petition more definite and certain by stating the nature of the consideration given by Globe Delivery Company in exchange for the notes alleged to have been taken by plaintiff. Likewise defendants moved to make the petition of intervention, which had set up notes of Globe Delivery Company as the basis of the debt to interveners, more definite and certain. Both motions were sustained and, in his amended petition, plaintiff, and, in their amended petitions of intervention, Ida M. Hoffman and Charles F. Hoffman, pleaded that the considerations for the notes held by them had their inception in the purchase of stock of Globe Delivery Company in 1919. Both plaintiff and interveners exchanged this stock for notes of the company in 1923.

Defendants filed demurrers to the amended petition of plaintiff and to the amended petition of intervention on the ground that they did not state causes of action; and these demurrers were sustained.

Thereupon plaintiff filed his second amended petition in which he alleged that he brings this action for himself and all other creditors similarly situated, a list of whom he attaches; that between February 1 and June 1, 1919, he purchased 50 shares of the capital stock of Globe Delivery Company for $5,000; that the company used false representations and deceit to accomplish the sale and he did not discover that the representations were false until about March 10, 1923, whereupon the company admitted

the deceit and settled with plaintiff by taking back his stock and giving him $100 in money and 49 notes, each of like amount, of which 20 are unpaid; that there is due him $2,188.32, with interest from March 10, 1931. Likewise, Ida M. Hoffman filed a second amended petition in which she alleged that on May 18, 1919, August Hoffman was induced by false representations to purchase $2,500 or 50 shares of stock in Globe Delivery Company; that on August 20, 1920, the purchaser, who was her father, died, and she took the stock under his will and learned about February 1, 1923, of the fact of such misrepresentation; that she rescinded the sale of stock and demanded the $2,500 on or about February 1, 1923; that on or about the 10th of March, 1923, the company paid her $100 on account of said stock, accepted the certificates of stock, and gave her 24 notes of $100 each, upon which there is an unpaid balance of $1,102.23, with interest from March 10, 1931. Also, in his second amended petition Charles F. Hoffman alleged that he became a stockholder of Globe Delivery Company in 1919 to the extent of 50 shares and that about March 10, 1923, the company admitted false representations in its sale and gave him money and notes for the stock, on which notes there is due him $2,189.79, with interest from March 10, 1931.

Defendants demurred to these second amended petitions of plaintiff and of interveners and on January 14, 1936, the demurrers were sustained.

In December, 1936, plaintiff and interveners filed their third amended petitions, in which they entirely omitted to state ownership of the capital stock of the company during years when failure of the company to publish notice of indebtedness was the basis of penal liability to them and they all merely alleged the same amounts of indebtedness of the company as previously alleged in their original pleadings.

On March 30, 1937, defendants moved to strike from the files the third amended petitions of plaintiff and of interveners and to dismiss the action on grounds which

may be summarized as follows: (1) That these third amended petitions are in all respects substantially the same as the original petition and petition of intervention filed in May, 1934, to which the court sustained motions to make more definite and certain by requiring plaintiff and interveners to set forth the nature of the consideration for the alleged debts to the parties and that amended petitions filed later disclosed that the alleged debts grew out of their ownership of stock in Globe Delivery Company during the period when it was failing to publish notice of its debts; (2) that when the first amended petitions were filed by plaintiff and interveners, setting forth that plaintiff and interveners had been stockholders during the period when publication of debts had been omitted, demurrer of defendants thereto was sustained; (3) that when plaintiff and interveners by their second amended petition sought to justify their ownership of the stock and escape stockholder's liability thereon by alleging that they were induced to buy said stock and to hold it by fraud of Globe Delivery Company, demurrers were filed and sustained to those petitions; (4) that plaintiff and interveners did not stand on their pleadings, suffer a dismissal and appeal therefrom, but filed their third amended petitions, based substantially on the same grounds as their original petitions. These third amended petitions were stricken from the files and the causes of action dismissed by the court on motions of defendants. The motions were based on the ground that the pleadings were in contempt of court and to circumvent, evade and defeat prior orders and rulings of the district court in the cause.

Plaintiff Hoffman and interveners Hoffman appealed. They did not appeal from any prior rulings relating to their original petitions or to their first amended petitions or their second amended petitions, but from the action of the court in striking their third amended petitions from the files and dismissing their causes of action.

Appellants assign that the district court erred (1) in sustaining the demurrers of defendants to the second

amended petitions of appellants; (2) in striking from the files the third amended petitions of appellants; and (3) in dismissing the actions of appellants.

"In general a plaintiff waives error in sustaining a demurrer to his petition by filing an amended petition." *Wheeler v. Barker,* 51 Neb. 846, 71 N. W. 750. So this is authoritative precedent for the error alleged in sustaining the demurrer to the second amended petition. By pleading over and setting up a cause of action in their third amended petitions, plaintiff and interveners waived any possibility of asserting error in the sustaining by the district court of a demurrer to their second amended petitions. If that is what they wanted to do they should have stood on their second amended petitions and, by refusing to plead further, it would have been the duty of the district court then to dismiss their petitions and thereby to cause a final order to be entered from which they could have appealed. But, instead of thus obtaining a final order from which they might appeal, they waived that chance by pleading over. This answers in the negative the first assignment of error.

The liability of a stockholder for the debts of a corporation following a failure to publish annually the existing debts of a corporation, as required by section 24-213, Comp. St. 1929, is penal in its nature and will be strictly construed. *Thomas v. Scoutt,* 115 Neb. 848, 215 N. W. 140; *Bourne v. Baer,* 107 Neb. 255, 185 N. W. 408; *Singhaus v. Piper,* 103 Neb. 493, 172 N. W. 523; *Kleckner v. Turk,* 45 Neb. 176, 63 N. W. 469.

In their amended petitions plaintiff and interveners had disclosed that from 1919 to 1923 they held stock in Globe Delivery Company. During that period some, at least, of the indebtedness of the company was incurred. In *Singhaus v. Piper, supra,* the law, as declared in the first point of the syllabus, is as follows:

"The liability of a stockholder in a corporation for failure of the corporation to publish notice of indebtedness required by section 577, Rev. St. 1913 (now section 24-213, Comp. St. 1929) is in the nature of a penalty for neglect of

duty. One stockholder, who is equally in fault in that regard with all other stockholders, cannot maintain such action, as creditor of the corporation, against the other stockholders."

It was probably on account of that fact, pleaded by plaintiff and interveners in their first amended petitions, that the district court sustained demurrers to those petitions. That fact once disclosed to the court on solemn oath of plaintiff and interveners could not be forgotten or overlooked by the court when the same parties later filed their third amended petitions. The demurrers of defendants searched the whole record.

So, when the court was considering the evasive and concealing manner in which plaintiff and these interveners sought to circumvent prior rulings of the court in their third amended petitions, it held that those petitions should be stricken from the record. The district court found authoritative precedent in this court for dismissing the petitions of plaintiff and interveners in *Ferson v. Armour & Co.*, 109 Neb. 648, 192 N. W. 125, where we said:

"A court of general jurisdiction has inherent power to protect itself, litigants and the public from vexatious proceedings by dismissing with prejudice suits instituted by plaintiffs who repeatedly violate the rules of pleading and the orders relating thereto, after having had a full opportunity to present litigable controversies in proper form."

What we have said disposes of the appeal of plaintiff and interveners. We turn now to the creditor-appellants.

The petitions of the plaintiff Hoffman and of the interveners Hoffman alleged that they were suing for themselves and all similarly situated. In that respect they set out the names of 43 creditors, other than themselves, and the amounts for which claims in favor of those creditors had been respectively adjudicated in the bankruptcy proceedings. Nine of these creditors, who were pure creditors, and had not been stockholders of Globe Delivery Company (as the Hoffmans had), with leave of court, intervened on April 10, 1935. Each pleaded its claim, set forth the lists

of stockholders and of creditors and prayed for an accounting and decree, very much as the Hoffmans had done.

These nine petitions of intervention were demurred to on the ground that they showed on their faces that they were barred by the statute of limitations. The demurrers were sustained and these nine creditors filed amended petitions on May 1, 1936. There was filed a motion to strike these amended petitions from the files and it was sustained. Then these creditor-interveners asked leave to file second amended petitions, which applications were denied April 27, 1937, to which the parties excepted. In the same order, third amended petitions of plaintiff Hoffman and of interveners Hoffman were stricken and they elected to stand on their pleadings, and on the same day filed written notice of appeal.

These creditor-interveners designate themselves as cross-appellants, and the substance of their assignments of error is that the court erred in striking their amended petitions from the files and in dismissing their causes of action.

We are not favored with any expression from the trial court as to the reason for not leaving these "pure creditors" in the case. None of them are shown to have ever been stockholders and therefore estopped to sue the stockholders on their stockholder's liability. Each of these interveners was apparently in the case in good faith. Each had filed a petition in intervention rather fully setting forth what was intended to be a statement of the facts entitling him to recover from the stockholder defendants. If he had a right to be and continue in the case, and if he had not stated properly a cause of action in his amended petition, it would seem that he had a right to file a second amended petition, which was denied him.

The first reason assigned by the brief of appellees arguing that we have no jurisdiction over the subject-matter of the case of these nine creditors is that no proper præcipe has been filed so as to appeal for them to this court. The præcipe filed in this court in the title describes the interveners as such, but in the connected directions to the clerk

he is advised to list the Hoffmans as appellants and these nine interveners as cross-appellants. Only the one præcipe was filed for all parties. It is elaborately argued that this is not in accordance with the various provisions of rule 7 of this court. We think the argument is very technical. All parties well understood that these nine interveners were appealing. We think they perfected their appeal by the filing of the transcript and præcipe and that we have jurisdiction of their appeal under the provision of the rule which says that "coparties of appellants may join in the appeal or take cross-appeal." The præcipe described these interveners as "cross-appellants." In the circumstances we are of the opinion this court has acquired jurisdiction of their features of the controversy.

Section 20-328, Comp. St. 1929, provided the right to these parties to intervene. They had a vital interest in the matter in litigation, which was the recovery of stockholders' liability for failure to publish debts of the corporation, from year to year, when they as creditors were extending credit and the debts to them had not been paid by the corporation. They had the right to a trial of the issues on the facts. Of this the record before us indicates they have been deprived.

While appellees have not argued that the statute of limitations has run against the creditor-interveners so as to prevent their actions to enforce stockholders' double liability under section 24-213, Comp. St. 1929, it may be desirable to make brief mention of that subject here. The point was carefully considered by the circuit court of appeals in an appeal from the district court of the United States for the district of Nebraska, and the statute was carefully analyzed, in a case very similar to the one at bar. The court considered the meaning of the words "first exhausted" and held: "As regards limitation for suing under stockholders' double liability statute, corporate assets in course of administration before receiver, on assignment for benefit of creditors, or in bankruptcy, are not 'exhausted' until final dividend is paid to creditors and fact

judicially determined (Comp. St. Neb. 1922, sec. 470)." *Hansen v. Welch, Cook, Beals Co.*, 49 Fed. (2d) 576.

Without taking further space, we think the conclusion of that court of such high authority is sufficient to hold that the statute of limitations has not run in the case at bar. For, as shown in the statement of facts, the petitions of creditor-interveners were filed by them here within a very short time after the bankruptcy dividends were declared and shortly after the dividends were paid to these respective creditors.

We have contented ourselves by discussing the vital matters suggested by the briefs of appellees, and are of the opinion the case should be sent back to be tried on the nine petitions of these creditors, subject to the rules discussed in the opinion.

We affirm the judgment of the district court as to Hoffman, plaintiff, and interveners Hoffman, and reverse the judgment and remand the cause for further proceedings as to the other nine creditor-interveners, in accordance with this opinion.

AFFIRMED IN PART AND REVERSED IN PART.

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CORA M. HALL ET AL., APPELLANTS, V. CITY OF FRIEND ET AL., APPELLEES.

279 N. W. 346

FILED APRIL 29, 1938. No. 30314.

1. **Municipal Corporations**: SEWAGE: EASEMENT. If a city discharges water from its disposal plant into a gully known as Sucker creek, which connects with a stream known as Turkey creek, for a period of over ten years, in an open, notorious, peaceful, uninterrupted, and adverse manner, such city may thus acquire an easement for that purpose.
2. ———: NUISANCE: INJUNCTION. Where the evidence is not clear and satisfactory, but is conflicting, as to any obnoxious odors arising from the effluvia from a disposal plant which are alleged to create a nuisance, an injunction will not be granted, but reasonable time may be given to improve the operation of said plant.

3. ———: ———: ———. Courts will consider, among other things, whether an injunction would not destroy the sewer system of a city, and subject the public to serious inconvenience and danger.
4. ———: ———: ———. Under the facts in this case, the erection of a sewage disposal plant having been properly done, without negligence, it will be held to be a lawful exercise of power that equity will not restrain.

APPEAL from the district court for Saline county: FREDERICK W. MESSMORE, JUDGE. *Affirmed.*

*Albert S. Johnston,* for appellants.

*Joseph Ach* and *Edward J. Kubat, contra.*

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

PAINE, J.

This is an action in equity to abate a public and private nuisance resulting from the operation of the sewer system of the city of Friend, and to enjoin the defendants from continuing to operate the system in such a manner as to continue the nuisance. Trial court denied injunction, and gave city 90 days to correct odors by chemical means or otherwise. Plaintiffs appeal.

It is alleged in the petition that the city of Friend is a municipal corporation of the second class, and that the other defendants are its mayor and members of the council; that the plaintiffs are the owners of certain lands situated in sections 25 and 26, township 8, range 1, in Saline county, Nebraska, and that the plaintiff Frank Olmsted is a tenant in possession of the northwest quarter of said section 25. All of the land of the plaintiffs lies to the south and east of the city of Friend.

It is further alleged that the said city constructed a sewage disposal plant, located on a part of the northwest quarter of the southeast quarter of section 23, and that a tile drain, laid underground, ran from said disposal plant in a southeasterly direction and emptied the contents thereof on the west side of a traveled highway, where it flows above the ground by gravity along the west side of the

highway, thence across an east and west road through a culvert, and from thence flows in a meandering course across the corner of the land owned by plaintiff Bert Cain in section 26, and from there crosses the north and south highway and flows upon the northwest quarter of section 25, and follows a meandering course across said quarter-section, near the south line of which it forms a small lake; that this water emitted foul and noisome odors, and constituted a nuisance upon the highway, as well as upon the lands belonging to the plaintiffs.

It is further alleged that the course over the lands of the plaintiffs followed a natural depression, which, however, only carried run-off water after heavy rains or snows, after which the fields could be cultivated across the bottom of the depression, but as a result of the continuous stream flowing from the disposal plant of the city of Friend, the plaintiffs were unable to farm a large area of their lands, which were thereby damaged as to their permanent value and use; that plaintiffs have not consented thereto, nor have any proceedings been had by eminent domain, nor has any compensation been paid for the use thereof; that the defendants have been requested to abate the nuisance, but have refused to do so; that there was no adequate remedy at law, and it was a continuing nuisance.

The defendants, for answer to this petition, admitted the incorporation of the city and the ownership and use of the lands by the plaintiffs; alleged that the disposal plant was constructed and completed and had been in operation for more than twelve years prior to the commencement of the action; that plaintiffs' alleged cause of action did not accrue within four years prior to the commencement of the action, and therefore said action was barred by the statute of limitations; that by reason of the open, notorious, peaceable, and uninterrupted use of said disposal plant and drainage ditch for more than ten years prior to the commencement of the action, the defendant city had acquired an easement of the right to drain waters into and across the plaintiffs' lands.

At the trial in the district court a decree was entered finding that no injunction should issue against the city of Friend. The court further found that the noxious odors emanate from low places, and granted the city of Friend a period of 90 days to correct such odors by chemical treatment, or other sufficient treatment as may be recommended by competent engineers, and, upon correction of said odors, on written motion the action will be dismissed.

The plaintiffs appealed, and set out as the errors relied upon that the finding of the court that there were no elements of damage other than the odors is contrary to the evidence; that the judgment is contrary to law, as it affords no adequate or permanent relief, and does not require defendants to prevent the recurrence of the conditions resulting therefrom, and that the judgment permits the defendants to continue to damage and interfere with the use of plaintiffs' lands without compensation, and constitutes a taking or damaging of plaintiffs' property for the use of the defendants without compensation, and contrary to the Constitution of the United States and the Constitution of the state of Nebraska.

The evidence discloses that for many years a gully or draw, known as Sucker creek, ran across the land on which the city of Friend is located, and that it meandered southeasterly across the lands described in the petition; that when the north and south road on the east side of section 23 was improved, instead of building two culverts and allowing Sucker creek to cross the road twice, it was confined in a ditch on the west side of the highway, and then ran in a culvert under the east and west road between sections 23 and 26, and then ran southeasterly, crossing the north and south road, and meandered across section 25 in a southeasterly direction, and that this Sucker creek finally runs into Turkey creek; that drainage from the city of Friend, and from land in sections 23, 26 and 25, flowed in this Sucker creek after a rain, or whenever snows melted, but that there was not a continuous stream flowing therein.

The evidence discloses that the city of Friend constructed

a sewage disposal plant in 1924 adjacent to this Sucker creek, and the defendants maintain by their evidence that nothing comes out of the disposal plant but clear water, and that all of the solids and organic matter are taken out of the sewage of the city, and that it is clear water that is continuously oxidyzed which runs down Sucker creek. This Sucker creek is deeper in some places, and in other places has a wide bottom, where the water stands at times and becomes stagnant and gives off noisome odor, and the evidence is somewhat conflicting whether the odor given off is such as is to be found coming from any stagnant pool of water, or whether it is accentuated by the fact that the water flowing from the disposal plant adds to the odor.

It was disclosed in the evidence that up to the time of the trial the city had never used any chemicals in the sewage disposal plant, but the decree of the trial court requires the city to adopt the latest approved method of taking out all objectionable qualities in this water, and requires the city to so deodorize it that it will not contain foul, offensive, or noxious matter, capable of causing a nuisance.

A large number of photographs have been introduced in evidence, and have been carefully examined by this court. These photographs disclose that after a heavy rain the flood waters would be sufficient to wash away the topsoil and destroy crops planted in this Sucker creek or gully, and it was testified by some witnesses that parts of this gully had never been cultivated in the bottom. It is clear from the evidence that, with water flowing continuously from the disposal plant, the bottom of the gully will at all times have some water standing in the low places.

In accordance with sections 31-301 and 31-302, Comp. St. 1929, owners of land may drain the same into a natural watercourse; a watercourse being any depression or draw two feet below the level of surrounding lands and having an outlet to a stream.

Our court has held that an owner has a right to protect his land from surface water, and to drain lagoons and basins thereon of a temporary character by discharging

such surface waters by means of artificial channels into a natural surface water drain upon his own property and through such drain on and over the land of another, provided such person acts in a reasonable and careful manner and without negligence. *Todd v. York County*, 72 Neb. 207, 100 N. W. 299. But when it was attempted to drain a lake in Cherry county of 150 acres in extent, and of a depth of five feet, this court said it could not be done. *Davis v. Beem*, 115 Neb. 697, 214 N. W. 633. See, also, *Davis v. Londgreen*, 8 Neb. 43.

In *Central Irrigation District v. Gering Irrigation District*, 122 Neb. 199, 240 N. W. 289, it was held that landowners, by the open, notorious, peaceable, uninterrupted, adverse possession, maintenance and use of a ditch discharging water into an irrigation canal for more than ten years may therefore acquire an easement for that purpose.

In *Bures v. Stephens*, 122 Neb. 751, 241 N. W. 542, it was held that an owner may drain in the natural course of drainage, discharging water into a natural watercourse, and that damages for use of an easement for a drainage ditch cannot be recovered by the owner of the servient estate against the owner of the easement, unless the owner is negligent in its use.

The case of *Faiman v. City of Omaha*, 131 Neb. 870, 270 N. W. 484, was an action for damages to real estate occasioned by the discharge of sewerage into a ravine adjacent to the property of plaintiff. This ravine received all the surface waters of the entire basin drained by it, which were carried in a well-defined channel. It is said in the opinion that there is no definite proof of any specific damages occasioned by the odors arising from the channel, and that the evidence is conflicting as to whether the plaintiff has actually suffered any damage or injury in any way due to the improvement constructed by the city; that the verdict of the jury is sustained by ample evidence.

In *Stuhr v. City of Grand Island*, 120 Neb. 491, 233 N. W. 886, it was held: "While a court of equity may enjoin such manner of construction or operation of a sewer system as

causes or results in a nuisance, yet it will not perpetually enjoin the construction or operation of the system if so changed as not to cause or create a nuisance."

In 9 R. C. L. 694, sec. 87, it is said: "Where the nuisance has not been judicially established there must be clear and satisfactory evidence that it exists before an injunction will be granted to restrain a municipality from discharging its sewage into a stream. The courts will consider, among other things, whether an injunction against the use of a stream as a sewer outlet will destroy the sewerage system and subject the public to serious inconvenience and will be slow to grant injunctions when to do so would be to deprive a municipality of the only available means of disposing of its sewage. Certainly the injunction will be refused if it is possible to make full compensation in money. Nor generally will an injunction be granted in such form as to take effect until such subsequent time as will allow the municipality reasonable opportunity to change the manner of its sewage disposal."

In *City of Valparaiso v. Hagen*, 48 A. L. R. 707 (153 Ind. 337, 54 N. E. 1062, 74 Am. St. Rep. 305), it was held: "A city cannot be enjoined from discharging sewage into a stream, when it acts skilfully and in conformity to statute, and the stream constitutes the only natural and reasonably possible line of drainage." And also that "The lessening of the value of an estate by destruction of the grass and the creation of some personal discomfort to the owner by the discharge of sewage therein is not such a taking of his property as entitles him to compensation, where the damage results from the discharge of sewage into a stream by a city in a skilful manner and in conformity to statute, since the damage is merely consequential."

This case being closely in point in some features, we will state the facts. Salt creek was the natural watercourse flowing through the city, and connects with a river. A sewerage system was constructed at a cost of $50,000, and about 47,000 gallons of sewage are daily discharged into a marsh, which connects with Salt creek. The Indiana court

said generally that a city may open and improve streets and construct gutters, and if storm water carries filth and garbage incident to a city into natural channels to the general watercourse of that basin, the right of the municipality to permit it will not be doubted, even though the waters of the stream are thereby polluted. However, the city must take such action with a cautious regard for the rights of those below. There was no other possible outlet or practical means of disposing of sewage; hence, to forbid a discharge of sewage into Salt creek is to deny to the city the right to discharge it anywhere, and thus leave it without the ordinary means of sanitation. The facts present a case wherein the principle of the greatest good to the greatest number must be permitted to operate, and private interests must yield to public good, and if the erection has been skilfully performed and without negligence, and in a way to do the least mischief, it must be held to be a lawful exercise of power that equity will not restrain. The construction of sewers and outlets is sanctioned by law, and what the law grants will not constitute a nuisance *per se,* public or private, and if the law is obeyed no actionable wrong will result.

This case, involving the city of Valparaiso, Indiana, was released in 1899. In the many years since that time, extensive improvements have occurred, so that municipalities need no longer discharge rank sewage into a creek, as was done in that case.

In the case at bar, the disposal plant of the city of Friend was built in 1924 by a civil engineer who testified he had built 30 sewer plants. He described this plant of the city of Friend as follows: The disposal plant is two stories in height; the upper story is the sedimentation chamber, the lower is a digestion chamber. The effluent comes into a screen chamber, and the sewage falls over a weir into the sedimentation chamber, in the bottom of which solids settle. It is dumped onto filter beds, composed of crushed rock six feet in depth, and then percolates into the underdrain system, goes into a collecting or after-sedimen-

tation chamber, and from this the water which is left goes down to Sucker creek. The flow is 30,000 to 40,000 gallons a day. The solids which settle down are digested by bacteria in the digestion chamber, and then are taken out and placed on a sludge-bed, then these solids are dried.

The chemical examination by the State University of Nebraska of the effluent shows that the disposal plant is functioning in a proper manner.

The trial court granted the city of Friend a period of 90 days to correct any improper odor by chemical treatment, or other sufficient treatment as might be recommended by competent engineers, and, upon the correction thereof, on written motion the action will stand dismissed.

From an examination of the entire record, we find no prejudicial error, and the judgment of the trial court is

AFFIRMED.

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ELIZA STANTON, APPELLEE, V. EDWARD C. STANTON ET AL., APPELLEES: KENESAW STATE BANK, APPELLANT.
279 N. W. 336

FILED APRIL 29, 1938. No. 30103.

1. **Executors and Administrators.** The right of an executor to retain a legacy and apply it *pro tanto* upon the debt of the legatee owing to the testator exists independently of statute.
2. **Wills.** The title to real estate under a devise in a will is vested in the devisee at the instant of testator's death.
3. **Descent and Distribution: ADVANCEMENTS.** In this state the doctrine of advancements applies only to intestate estates.
4. **Wills.** Where the intention of the testator can be ascertained from the will, it is the duty of the court to give it effect.
5. ———. A will is presumed to contain the final manifestation of testator's bounty, and all advancements and charges against a devisee, not saved by the will, are extinguished.
6. ———. Where a testator, before his death, loaned money to a son, demanded and received notes payable at a future date and collected interest thereon, his omission to charge and encumber the estate devised to the son with the duty of paying the debt evinces an intent not to charge the devise with its payment.

7. **Executors and Administrators.** The debt of a devisee to the testator cannot be retained from or charged on the lands devised to him in the absence of language in the will making such debt a charge.

APPEAL from the district court for Kearney county: FRANK J. MUNDAY, JUDGE.

Opinion on motion for rehearing of case reported in 133 Neb. 563. *Judgment of the district court reversed, with directions.*

*Tibbets, Canaday & Hewitt,* for appellant.

*King & Bracken, contra.*

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

CARTER, J.

This is an appeal from the district court for Kearney county from a decree entered in a partition suit brought by one of the devisees under the will of Patrick W. Stanton, deceased, against the other devisees, partitioning the real estate devised by the will.

The record discloses that Patrick W. Stanton died on August 17, 1929, leaving a will by which he devised a one-eighth interest in his real property to each of his children or their representatives. The one-eighth interest of William P. Stanton is the only one that is involved in this suit.

The evidence shows that on October 17, 1921, William P. Stanton borrowed some money from Patrick W. Stanton, and gave two promissory notes in the amounts of $600 and $204.54 as evidence thereof. Payments of interest were made and indorsed on both notes on December 5, 1925. At the death of Patrick W. Stanton neither of the notes had been paid.

It further appears from the record that the Kenesaw State Bank obtained a judgment against William P. Stanton in the amount of $1,125 and interest and costs on January 25, 1926, and that it was a valid judgment on the date of the death of Patrick W. Stanton, the testator. The Kenesaw

State Bank contends that the judgment became a lien upon the interest of William P. Stanton in the lands devised by the will at the time of the death of Patrick W. Stanton. The plaintiff contends that the amount due the testator as evidenced by the notes given by William P. Stanton should be satisfied from the interest of William P. Stanton before the bank's lien can attach. The trial court sustained plaintiff's contention and the bank has appealed to this court.

It must be borne in mind that the case at bar involves a testate estate and that the will of the testator is silent regarding the indebtedness of William P. Stanton owing to the testator. The indebtedness of William P. Stanton was incurrred prior to the making of testator's will, and, necessarily, prior to the codicil that the testator subsequently executed. The question immediately arises as to whether the debt of William P. Stanton to the testator is an advancement. The doctrine of advancements rests upon the supposed desire of an ancestor to equalize his estate among his heirs, not only as to the property left at the time of his death, but as to all property that came to him, so that one child should not be preferred to another child in the final settlement of his estate. "In its strict technical sense an advancement is a perfect and irrevocable gift, not required by law, made by a parent, during his lifetime, to his child, with the intention on the part of the donor that such gift shall represent a part or the whole of the portion of the donor's estate that the donee would be entitled to on the death of the donor intestate." 1 Am. Jur. 715, sec. 3.

"The doctrine of advancements applies only to estates of persons dying intestate unless otherwise provided by statute. Our legislature has acted upon the question of advancements, but has apparently limited the doctrine of advancements to intestate estates; at least it has not gone so far as to apply it to estates of those dying testate." *In re Estate of Gibson,* 130 Neb. 278, 264 N. W. 762. See, also, Comp. St. 1929, secs. 30-112 to 30-116.

In the case of *In re Estate of Gibson, supra,* this court, in passing upon a similar state of facts, said:

"An advancement does not carry with it the obligation of repayment; nor is it founded upon a valuable consideration; while a debt or loan carries with it the obligation of repayment and gives the creditor the right to enforce the same in the courts. The enforceable obligation against the donee would, therefore, be contrary to the character of an advancement and must be viewed in the light of a debt. See 1 R. C. L. 653, sec. 1.

"In the instant case, when Joseph Gibson paid the debt of his son and required the son to recognize his obligation by giving his promissory note, bearing interest and payable at a future date, it was not in the nature of a gift, but was treated as a debt owing by the son to the father. It lacked the characteristics of an advancement. * * * We think that the county court and the district court rightly held that the note was not an advancement but was personalty, and, as such, passed by the will of testator to his widow."

Adopting the logic of Justice Good in the foregoing opinion, we conclude that the testator in loaning the money to William P. Stanton and taking his note therefor, bearing interest, payable at a future date and bearing the indorsements of interest paid apparently to bar the running of the statute of limitations, treated the amount due on the notes as a debt, and, as such, passes by the will to his executor as personalty.

Appellee contends, however, that the doctrine of retainer applies and that the amount owing by William P. Stanton can be retained by the executor from the proceeds of the sale of William P. Stanton's interest in the land.

The cases are uniform in holding that the doctrine of retainer applies where personal property is involved. This court has held that the right of an executor to retain a legacy and apply it *pro tanto* upon the debt of the legatee exists independently of statute. *First Trust Co. v. Cornell,* 114 Neb. 126, 206 N. W. 749. The question whether the right of retainer exists against a debtor heir where real estate is involved and the deceased left no will is one upon which the authorities are divided and upon which this

court has not passed. In view of the fact that a determination of this question is not necessary to a decision in this case, we will not undertake to discuss it here. Suffice it to say that the two contrary rules are ably discussed in *Marvin v. Bowlby*, 142 Mich. 245, 105 N. W. 751, and *Stenson v. H. S. Halvorson Co.*, 28 N. Dak. 151, 147 N. W. 800.

The question for our determination is whether the doctrine of retainer can be applied against the devisee of real estate under a will that is silent as to the devisee's indebtedness to the testator. Our former opinion in this case, 133 Neb. 563, 276 N. W. 180, holds that the doctrine of retainer applies. Upon a reconsideration of the case, after reargument, we have come to the conclusion that we erred in our former opinion.

An heir's distributive share of the personal estate, under all the authorities, may be applied by the administrator or executor in payment of a debt due the estate by such heir. The reason is that the personal estate passes to the administrator or executor, and, while it is in the possession of the administrator or executor, he may retain a sufficient amount of the legatee's share in the personal property to satisfy the claim of the administrator or executor against him. It is this situation that gives rise to the use of the term "retainer." But the title to real estate under a devise in a will is vested in the devisee at the instant of testator's death. *Brown v. Webster*, 87 Neb. 788, 128 N. W. 635; *Fischer v. Sklenar*, 101 Neb. 553, 163 N. W. 861. While it is true that the title of the devisee is subject to the right of the executor to sell the land to pay debts duly allowed against the estate and the expenses of administration, as by statute provided, the surplus will be treated as real estate, and consequently the doctrine of retainer could not apply unless it applies generally to a devise of real estate. *In re Estate of Schram*, 132 Neb. 268, 271 N. W. 694.

The testator, a widower, had the legal right to dispose of his property by will in any manner that he saw fit and, if the intention of the testator can be ascertained from the

will, it is the duty of the court to give it effect. *Luenenborg v. Luenenborg,* 128 Neb. 624, 259 N. W. 649; *In re Estate of Mooney,* 131 Neb. 52, 267 N. W. 196.

In the case of *Dearborn v. Preston,* 7 Allen (Mass.) 192, the court, in holding that the indebtedness owing the testator by a devisee of a share in testator's realty could not be charged against him, said: "The reason why that rule should prevail in reference to devisees to whom real estate is given without words of condition or limitation annexed to the devise is even more strong and obvious than why it should be applied in reference to the inheritance of heirs at law. The testator may prescribe at his own pleasure the terms of his gift; and, if he desires and intends to do so, he may charge and encumber the estate devised with the duty and obligation of paying any debt which shall remain due from the devisee to the testator at the time of his decease. His omission to impose any such condition unequivocally evinces an intention to make his gift absolute and unconditional. And it is a plain and unavoidable consequence of an unrestricted and absolute devise, that the estate devised comes to the devisee entirely free from any encumbrance or liability to be in any part appropriated to the payment or discharge of any debt which was due from him to the testator."

In *LaFoy v. LaFoy,* 43 N. J. Eq. 206, 10 Atl. 266, the court said: "The devisee of lands occupies no such relation to the executor as that which exists between legatee and executor. No act is necessary, on the part of the executor, to put the devisee in full enjoyment of the estate devised. The opportunity, therefore, could not arise for the executor to retain the debt of the devisee to the testator out of any demand which the devisee might seek to enforce against the executor. If such a charge attaches against the land devised, it would be necessary for the executor to establish it by proceedings in which he is the actor. After diligent search, I have been unable to find a case in which an attempt has been made to charge a devise of lands with a debt due from the devisee to the testator, in the absence

of language in the will manifesting the purpose of the testator to do so."

In *Avery Power Machinery Co. v. McAdams*, 177 Ark. 518, 7 S. W. (2d) 770, the court said: "In other words, it may be stated as the settled rule in this state that, except where the indebtedness be held an advancement, the distributive share of an heir or devisee in the real property of the estate is not chargeable with the heir's or devisee's indebtedness to the estate, either as against the land itself or the proceeds of the sale thereof; but the indebtedness must be collected in the same manner as any other indebtedness due the estate."

In the case of *In re Estate of Lyon*, 70 Ia. 375, 30 N. W. 642, the court in a similar case said: "The primary object in all cases is to ascertain the intention of the testator. The will must stand and speak for itself, unless it has been revoked or changed in the manner provided by statute. As the will gives the appellant an equal share of the estate, after the specific legacies have been satisfied, and no mention is made in the will of any advancements having been made to her, or that she is to be charged therewith, the presumption must obtain that such was not the testator's intent. This, it seems to us, must be so; and that it quite clearly appears that it was not the intent of the testator that appellant should be charged with money given her husband prior to the execution of the will, for the reason that he clearly intended she should receive the one-third part of the residue of his estate; and it is clear she would not receive this share if the so-called advancements are to be charged to her."

In *Kuhne v. Gau*, 138 Minn. 34, 163 N. W. 982, the court stated the rule as follows: "The theory is this: The doctrine of advancements has no application to testate estates. If a father gives his daughter $1,000 as an advancement, such amount will, in the event of the father dying intestate, be deducted from the daughter's distributive share of the estate, but, if the father leaves a will, it will not be deducted from the share given her in the will, for the will is

supposed to contain the final manifestation of the testator's bounty, and all advancements not saved by the will are extinguished (*Kragnes v. Kragnes,* 125 Minn. 115, 145 N. W. 785), and though it was understood at the time the payment was made that it should be an advancement, if the donor dies testate it becomes an absolute gift."

Other cases to the same effect are *Campbell v. Martin,* 87 Ind. 577; *Wisner v. Teed,* 9 How. Pr. 143; *Broas v. Broas,* 153 Mich. 310, 116 N. W. 1077.

Appellee relies upon the case of *In re Dayton's Estate,* 173 Okla. 180, 46 Pac. (2d) 933. The opinion in that case shows that Herbert J. Dayton died testate and that the doctrine of retainer was applied to the interest of a devisee. The decision, however, was based upon two Oklahoma statutes, the first of which provided that there shall be no priority as between personal and real property in its sale to pay debts, expenses of administration and the allowance to the family. The second statute provided that the executor or administrator must take into his possession all the estate of the decedent, real and personal, except the homestead and personal property not assets, and collect all debts due to the decedent or to the estate. Under these statutes, real estate is placed in the same status as personal property and the doctrine of retainer applies to the real estate to the same extent that it applies to personal property. This case is not, therefore, authority in the case at bar for the reason that it is founded entirely upon statutes taking it out of the general rule.

We have examined the cases in other jurisdictions and the only court which appears to have departed from the general rule, where a testate estate is involved, is the supreme court of Iowa. In *Russell v. Smith,* 115 Ia. 261, 88 N. W. 361, the Iowa court held: "A purchaser of an heir's share of the decedent's real estate pending administration does not take the land subject to a debt which the heir owed the deceased, the claim not being a lien on the heir's property until reduced to judgment." We think that this holding is in line with the great weight of authority. The

later case of *Senneff v. Brackey,* 165 Ia. 525, 146 N. W. 24, 1 A. L. R. 978, is also relied upon. In that case the testator devised an interest in land to his son who, at testator's death, had a sum of money belonging to the testator in his possession which he refused to turn over to the administrator. The obligation did not accrue until after the death of the testator. The administrator brought suit against the son and obtained a judgment. The question decided was one involving the priority of liens. However, the court in its opinion said: "So here, in view of the peculiar facts of this case, already set forth, the estate not being closed, we think it is clearly within the power of a court of equity to take from a specific devise, made to a distributee, a proper part of the funds of the estate in his hands at the time of testator's demise, and to decree the same to be a lien upon this specific devise." The court then added: "These cases are in equity, and they are both peculiar in their facts; so peculiar as to introduce exceptions to general rules, and this opinion is not to be taken as a precedent for more than is actually decided." We submit that this case is not in point either as to the facts or the propositions of law decided. In *Schultz v. Locke,* 204 Ia. 1127, 216 N. W. 617, the court held directly that retainer would not be denied by reason of the fact that no mention was made of the indebtedness of the devisee in the will when the devisee was insolvent. The court in its opinion relies upon *Russell v. Smith, supra, Senneff v. Brackey, supra,* and *Woods v. Knotts,* 196 Ia. 544, 194 N. W. 953, 30 A. L. R. 768, the latter of which involved an intestate estate. We are of the opinion from what we have heretofore said that these cases are not in point and that they do not support the holding in *Schultz v. Locke, supra.* We are unable to follow the reasoning of the Iowa court in the *Schultz* case, and we are convinced that it is not supported by the authorities. The next Iowa case is that of *Rodgers v. Reinking,* 205 Ia. 1311, 217 N. W. 441. It is based entirely upon the decision in the *Schultz* case and consequently is no better authority than the former. Likewise, the later case of *Johnson v.*

*Smith,* 210 Ia. 591, 231 N. W. 470, in so far as the doctrine of retainer is allowed against the interest of the devisee in the real estate is concerned, is based upon the *Schultz* case. We necessarily conclude that the decisions of the supreme court of Iowa on this subject constitute a view not supported by the authorities generally and, in our opinion, are not supported by the better reason and logic.

The notes given in the case at bar were evidence of a simple indebtedness owing to the testator. The indebtedness represented by them was not an advancement for the reason that it does not comply with our statutes on advancements nor does it have any of the characteristics of an advancement. It is not a charge upon the interest of the devisee in the real estate because it was not made so by the testator in his will. It is nothing more than an indebtedness due the estate which passes to the executor upon testator's death. The effect of our former opinion was to make the indebtedness a charge when a charge in fact was not created.

It must be remembered that at common law all of the property of a deceased person passed direct to his heirs upon his death, free from any debts due the deceased from the heirs. Most states, including this state, have enacted statutes providing that personal property passes to the executor or administrator upon the death of the owner. Such statutes are clearly in derogation of the common law and it is only because of them that an executor or administrator comes into possession of the personalty and may retain from the interest of a legatee or distributee the amount owing to the deceased. In this state the legislature has not changed the common law in so far as the descent of real estate is concerned. The result is that real estate descends to the devisees of a deceased free from the debts of such devisee subject only to conditions imposed by statute. Our statutes, hereinbefore cited, do not provide for advancements in testate estates, the will of testator presumably being the testator's last expression of his intention. There being nothing in the will purporting to charge the devisee

with the indebtedness owing the testator, it evinces an intention to treat the notes as a simple indebtedness and to leave their enforcement to the ordinary legal methods provided by law. No charge against the land was created by the testator in the case at bar. Under such circumstances, the only remedy of the administrator or executor is to invoke the ordinary legal remedies to enforce payment. The adoption of any other rule would be equivalent to a rewriting of testator's will by us or tantamount to the passage of a statute by the court in a field where the legislature has refused to act. If the legislature had intended to make a devisee's ordinary debt to his intestate an advancement or a charge upon the devisee's interest in the real estate, it would have been a simple matter for it to have done so. By the inclusion of one, the exclusion of the other is logically inferable. The testator in this case had the legal right to dispose of his property in any way that he saw fit. He was under no legal obligation to give his children equal amounts in his estate. The intention of the testator must be determined from the four corners of the will. If the testator had intended to give his son anything less than a one-eighth share in his real estate, he could have said so in the will, and, as he did not do so, it is not the province of this court to do it for him and thereby give an effect to the will that the testator never intended.

The effect of appellee's contention is that we should substitute the court's idea as to what is fair and equitable for that of the testator. This we cannot do. It might appear to the casual observer that the will as executed produced an inequitable result, but, on the other hand, we have no knowledge of the facts that motivated the testator in drawing the will as he did. He had the legal right to dispose of his property as he saw fit and the reasons he had for making the disposition that he did make are not of concern to this court. The fact remains that the inequity of the present situation, if there be such, cannot be adjusted by depriving the appellant of its legal interest in the devise and giving it to others.

In considering the case before us, we must give effect to the intent of the testator as shown by the will itself and the enactments of the legislature upon the subject. After doing so, the only sound conclusion that can be reached is that the debt of the devisee to the testator cannot be charged on the lands devised to him, in the absence of language in the will making such debt a charge, and this rule applies whether the devisee be solvent or insolvent.

The judgment of the trial court is reversed, with directions to enter a judgment for the appellant in accordance with the views expressed in this opinion.

REVERSED.

ROSE, J., dissenting.

It seems to me there is a better view of the law than that expressed in the carefully prepared opinion of Judge Carter. Justice, the goal of both law and court in litigation, makes payment of the valid unpaid debt of the son to the father a charge against the devise of the father to the son under the will, the law and the circumstances of this case. The residuary clause of the will reads thus:

"The residue of my estate to be divided as follows: One-eighth each to my children, Wm. P. Stanton, Edward C. Stanton, Kate Porterfield, Eliza Stanton, Dora Ragan, Anna Hawe, to my granddaughter, Stasia Hawe; and one-sixteenth each to Estella Stanton and Eugene Stanton, the children of my deceased son, Tim Stanton."

This testamentary gift is a legacy as well as a devise. It includes personalty as well as realty. It does not use the word "devise." The notes from son to father were parts of the residuary estate willed to all the children. On sound reasons the supreme court of Nebraska, in harmony with decisions generally throughout the country, adopted the following rule formulated by Chief Justice Morrissey:

"While a legatee retains in his own hands a part of the fund out of which his legacy and other legacies should be paid, he is not entitled to receive from the executor the amount of his legacy without deducting therefrom the amount of the fund which is already in his hands as a

debtor of the estate." *First Trust Co. v. Cornell,* 114 Neb. 126, 206 N. W. 749.

In reaching this conclusion, the court adopted from *Smith v. Kearney,* 2 Barb. Ch. (N. Y.) 533, the following unanswerable reasons:

"This right of retainer depends upon the principle that the legatee or distributee is not entitled to his legacy, or distributive share, while he retains in his own hands a part of the funds out of which that and other legacies or distributive shares ought to be paid, or which is necessary to extinguish other claims on those funds. And it is against conscience that he should receive anything out of such funds without deducting therefrom the amount of the funds which is already in his hands, as a debtor to the estate."

On principle, as I view the law, there is no rational distinction for applying these reasons to legacies of personal property and not to devises of real estate, unless the legislature has inserted heresies in the statutes. A wrong interpretation does not become right by repetition. Some of the ablest courts have refused to recognize such a distinction and have boldly held on reason and equity that a valid, unpaid debt owing by a devisee to testator may be made a charge against the devise. The supreme court of New York held:

"The rule of offset of an indebtedness by a legatee, if any, to the estate applies to a devisee as well, and such legatee or devisee must pay the indebtedness before he is entitled to the legacy or devise. *Smith v. Kearney,* 2 Barb. Ch. (N. Y.) 533; *Rogers v. Murdock,* 45 Hun, 30; *Clarke v. Bogardus,* 12 Wend. (N. Y.) 67; *Matter of Bogart,* 28 Hun, 466; *In re Matter of Colwell's Estate,* 15 N. Y. St. Rep. 742." *Warren v. Warren,* 255 N. Y. Supp. 206.

The following was adopted from the first of the New York cases cited:

"The right of the executor or administrator to retain the whole, or a part, of a legacy or distributive share, in discharge or satisfaction of a debt due from the legatee or

distributee to the estate, is not only consistent with the soundest principles of equity, but is perfectly well settled." *Smith v. Kearney*, 2 Barb. Ch. (N. Y.) 533.

With full knowledge of decisions to the effect that debts of a legatee to testator may be deducted from the legacy do not apply to devises of real estate or to testate estates, the supreme court of Iowa held:

"Claim of deceased against devisee may be offset against the devisee's share of the realty, where the devisee is insolvent and the estate unsettled, notwithstanding no mention was made of the indebtedness of the devisee in the testator's will." *Schultz v. Locke*, 216 N. W. 617 (204 Ia. 1127).

Whether the principle quoted is regarded as an exception to the general rule or as an avoidance of falacious holdings, it is sound in morals, equity and justice. The Nebraska supreme court is not embarrassed by any former decision of its own on the same subject or confounded by technical refinements borrowed from the common law of England. Nothing inconsistent with the spirit of our laws was adopted from the common law by the legislature. I have not discovered anything in our statutes to prevent justice in the present instance. All pertinent legislation and equity powers of courts should be considered together in determining the issue presented. The vesting of title in devisee upon the death of testator is not all the law on that subject. There is another law which says:

"The executor or administrator shall have a right to the possession of all the real as well as the personal estate of the deceased." Comp. St. 1929, sec. 30-406.

Notwithstanding the vesting of title, the executor gets possession of both personal property and real estate for the purposes of administration. He does not hold possession for himself. He represents all the beneficiaries under the will whether legatees or devisees. He does not lose possession until the distributive shares are determined. This possession is a temporary encumbrance and a limitation on vested title. The county court, with equity powers

conferred by law, determines each share and the charges against it, if any. To prevent discriminations not authorized by the will or the law, the county court may resort to equity powers. This procedure is inherent in our system of settling estates of deceased persons. It does not involve the courts in law-making and will-making. Those abominations are more likely to result from a different analysis of the problem.

The statute requires the court in the construction of a will to give effect to the true intent of testator so far as it can be collected from the whole instrument, if such intent is consistent with the rules of law. Comp. St. 1929, sec. 76-109; *Blochowitz v. Blochowitz*, 130 Neb. 789, 266 N. W. 644. Circumstances related to the will may be considered. *In re Estate of Hunter*, 132 Neb. 454, 272 N. W. 318. The right to make a will may be exercised by any competent person. Knowledge of technical terms like "retainer" and "advancement" is not essential to testamentary capacity. The true intent of testator in the present instance is expressed in clear and definite terms. He meant to give his residuary estate to his eight children in equal shares. He said so. The two notes belonged to that estate. They evidenced property of testator's estate in the son's hands—borrowed money. Testator had kept the notes from outlawing. That made them a valid charge against the son who was insolvent. Under the will and the statute the evidences of the debt fell into the hands of the executor. It was his duty to collect the amount due by any lawful method. Collection could only be made for the estate by deducting from the son's distributive share of the real estate devised to him the amount of his debt. In no other way could all beneficiaries under the will realize the bounties bestowed on them by testator. Discrimination in favor of the debtor would defeat the clearly expressed intent of testator. The executor had only this one way of collecting the debt. The vain and idle expedient of limiting him to a court of law in a separate action on the notes to recover a worthless judgment, under the circumstances, seems to

me to imply helplessness of equity and the triumph of injustice in spite of the clearly expressed intention of testator. The modern rule of reason and equity announced by the supreme courts of New York and Iowa is, in my judgment, supported by better reasons than the contrary doctrine of some other courts. I think common-law doctrines adapted to former times and conditions should slumber in the desuetude created for them by modern statutes.

Entertaining these views, I adhere to the former judgment of affirmance as the proper disposition of this appeal.

MESSMORE, J., concurs in this dissent.

PAINE, J., dissenting.

I fully concur in the excellent dissent filed in this case by Justice Rose and concurred in by Justice Messmore. This case has been very carefully considered by this court since it was first argued to the court on October 21, 1937. From the first opinion, found in 133 Neb. 563, 276 N. W. 180, two members of the court dissented, and another member, who did not sit, concurred in the propositions of law stated in the dissent. It was reargued to the full court on March 7, 1938, and to the opinion now adopted by four members of the court three are dissenting.

Patrick W. Stanton had loaned money to his son, William P. Stanton, and the notes which represented this loan he had kept alive by requiring such son to make payments thereon. The final decree states the amount due on these notes from his son to the estate is $1,109.11. This son was bankrupt, and owed a judgment to the Kenesaw State Bank of $1,125, with interest. This court is called upon for the first time to determine the question involved, which is, whether the one-eighth interest in the farm left by the father to this son can be taken by the bank in payment of its judgment, or whether in the settlement of this estate the debt due to the estate because of the money loaned by the father to this son shall be first deducted from this son's share of the real estate.

In state after state, as set out in the original opinion adopted in this case, courts have held that this was proper,

but it is argued in the present opinion that many of such cases arose in intestate estates. When the question first arose in Iowa, that state followed some of the older cases, and stated that such a debt could not be deducted from the share of the real estate.

Then, in 1923, the question coming up again in *Woods v. Knotts,* 194 N. W. 953 (196 Ia. 544) the court, in changing from its former holdings and taking the better view of the question, said: "Where deceased had, as surety, paid certain claims against an heir, and the heir was insolvent, his share of the real property will be offset against the claim of deceased; the personal property being entirely insufficient to offset the indebtedness."

The question again came up in Iowa in the case of *Schultz v. Locke,* 204 Ia. 1127, 216 N. W. 617; the earlier Iowa cases were discussed, and it was said that the right of retainer should not be denied because no mention was made of the indebtedness in the will of the testator, and it could not be fairly anticipated by the testator that the debt would not be fully paid without resorting to the share of the devisee in the real estate, and hence the failure to mention the debt in the will under all the facts was not controlling nor vitally significant, and that the insolvency of the devisee, where there is no personal estate for distribution, makes it a recognized exception to the general rule. The decision significantly remarks that, as the case is pending in a court of equity, with all parties in interest before it, and with issues calling for determination of the rights of all parties, the court allows retainer against the share of the devisee in the real estate of the decedent. The *Schultz* case was decided in 1927, and eight years later the same question came before the Iowa court again in *In re Estate of Flannery,* 221 Ia. 265, 264 N. W. 68, and while I believe the personnel of the Iowa court had entirely changed, with the exception of one justice, between the dates of the two decisions, yet it again states: "This is the rule definitely settled in this state by the case of *Schultz v. Locke,* 204 Ia. 1127, 216 N. W. 617, and cases therein cited. The de-

cree of the court, therefore, in subjecting the proceeds of the real estate devised to William Meade, together with the legacies, to the payment of his indebtedness owing to the estate and inheritance taxes due the state and costs of the application must be upheld."

Then follows *Rodgers v. Reinking,* 217 N. W. 441 (205 Ia. 1311) in which certain creditors holding liens against a son's interest are defeated in their contention, and it was held: "Mother's estate was entitled to retainer or offset of $30,000 which son D. had refused to pay brother in accordance with contract with mother against share going to D. under provision of mother's will."

Then in 1930 follows the case of *Johnson v. Smith,* 210 Ia. 591, 231 N. W. 470. The whole question is discussed at length in a decision reviewing the earlier authorities, and *Schultz v. Locke, supra,* is again approved.

In the case of *Thompson v. McCune,* 63 S. W. (2d) 41 (333 Mo. 758) the will of Charles W. Armour gave a legacy of $30,000 to Cora S. Thompson, but provided that her indebtedness should be charged against this legacy. The opinion, discussing at length many questions involved, said: "The right of 'retainer' is the right of an executor to retain or hold the legacy which is in his hands by treating the debt due to the estate from the legatee as assets of the estate also in his hands and collected by deducting such debt from the legacy."

In *Hornstra v. Avon State Bank,* 55 S. Dak. 513, 226 N. W. 740, we find this statement: "A judgment is a lien only against the property of the judgment debtor, and, while on the death of an ancestor intestate his real estate at once descends to his heirs, it does so under the provisions of our Rev. Code 1919, sec. 700, 'subject to the control of the county court, and to the possession of any administrator appointed by that court for the purpose of administration.' In the process of administration it is entirely just and equitable that any indebtedness due from an heir to the estate should first be deducted from any distributive share to which he might otherwise be entitled, and that, in

reality, he is only entitled on any principle of justice or equity to whatever balance there may be in his distributive share after deducting therefrom whatever he owes to the estate."

In *Smith v. Kearney,* 2 Barb. Ch. (N. Y.) 533, in addition to the citation made by Justice Rose, another paragraph is quite in point: "This right of retainer depends upon the principle that the legatee or distributee is not entitled to his legacy, or distributive share, while he retains in his own hands a part of the funds out of which that and other legacies or distributive shares ought to be paid, or which is necessary to extinguish other claims on those funds. And it is against conscience that he should receive any thing out of such funds without deducting therefrom the amount of the funds which is already in his hands, as a debtor to the estate. And the assignee of the legatee, or distributee, in such a case, takes the legacy or distributive share subject to the equity which existed against it in the hands of the assignor."

The Nebraska legislature, in section 30-406, Comp. St. 1929, clearly intended to make a devisee's ordinary debt a charge upon such devisee's interest in the real estate bequeathed him under the will. May we note the simple and precise language used by our legislature in this section: "The executor or administrator shall have a right to the possession of all the *real* as well as the personal estate of the deceased, and may receive the rents, issues and profits of the real estate, until the estate shall have been settled, or until delivered over, by order of the county court, to the heirs or devisees."

Under this section 30-406, Comp. St. 1929, this court held, in *Blochowitz v. Blochowitz,* 130 Neb. 789, 266 N. W. 644: "We have sustained the right of the executor and administrator, under this statutory provision, as a general rule, to maintain ejectment for real estate, pending payment of debts and settlement of the estate."

In *Tillson v. Holloway,* 90 Neb. 481, 134 N. W. 232, this court said: "It is true, as contended by defendant, that the

legal title belonging to an intestate estate descends to the heir subject to the payment of debts; but, under the statute, it is equally clear that the right of possession is in the administrator until his administration is closed."

In any event, would not the executor, under this statute, clearly have the right to retain the real estate of this son until the rents therefrom had paid the debt due the estate of his father?

A recent statement of the general rule is found in 2 Pomeroy, Equity Jurisprudence (4th ed.) 1009, sec. 541, as follows: "A legacy from a creditor to his debtor, unaccompanied by language in the will or exterior to it expressly showing the special intent, whether equal to, greater or less than, the debt, raises no presumption whatever, either of law or of fact, that the testator intended thereby to excuse, release, or discharge the debt, so that the legatee would be entitled to claim and receive the whole amount bequeathed, but would be freed from all liability to pay the debt."

It may be of interest to review the pleadings as shown by the record in this case. Section 27-503, Comp. St. 1929, sets out that the county court shall have exclusive jurisdiction of the probate of wills and the administration of estates, and by proper proceedings a final decree was entered in the county court on April 3, 1930, showing that the last will and testament was duly admitted to probate by that court on September 19, 1929, and that John R. Hoban was appointed executor thereof; that the final account of the executor is approved and allowed, and that the title to the real estate is assigned to each of the heirs (naming them and their shares), and "To William P. Stanton an undivided one-eighth interest subject to his indebtedness to said estate as herein found and the said share of William P. Stanton to the extent of his said indebtedness to the legatees above named in their several respective interests in the residue of said estate as provided by the terms of said will and codicil." No appeal has ever been taken from this final decree fixing the heirs and

shares and showing that the share of William is subject to his indebtedness to the estate. The action appealed to this court is a partition action, brought in the district court after such final decree was entered to have the property partitioned between the heirs, and, in case that is impossible, to have the same sold, and the question arises, how is it possible to change the provisions of the final decree when no appeal was taken therefrom?

This opinion now entered, setting aside the decree of the district court in the partition case, is said to be founded upon common-law doctrines. Does it not clearly violate the simple terms of our Nebraska statute and hold for naught the wishes of the testator? He had kept these notes of his son alive by requiring the three payments thereon, so he could collect them if possible before his death, and, if not then, he was certain that, being current obligations, they could be collected as part of the residuary estate left to his heirs, thus dealing fairly with the heirs who had not borrowed from him. When the intention of the testator is so clearly ascertained, is not this court bound to give it effect? To the contrary, the opinion now adopted declares that these notes so carefully husbanded by the father are null and void. For, as stated in the syllabus, it is held that the father's omission to mention them in his will evinces an intent not to charge the devise to his son with their payment; and, further, "The debt of a devisee to the testator cannot be retained from or charged on the lands devised to him in the absence of language in the will making such debt a charge."

The majority opinion thus makes it necessary that the will of this testator refer to and set out these loans or they are extinguished. This has never been the practice, as in this state we have permitted wills to be drawn by the testator himself who desired to dispose of his property in his own way, and by a layman as a friend of the testator, and never required that they be drafted by lawyers. Under the requirement all that has been necessary is that the testator be mentally competent and know the objects of

his bounty, and if so our courts have uniformly construed wills to be valid. In doing that we have taken from them every technical refinement, and not required the services of an expert in drafting wills, and the facts in this case show that the testator did not seek to forgive the debt of his son, but that he kept the notes alive by requiring interest to be paid upon them so they would not outlaw.

In the unanswerable logic of Justice Rose's dissent, he calls attention to the fact that the father in the case at bar gave his residuary estate to his heirs in equal shares and that these two notes due him from his son were a part of that residuary estate.

The bank has a judgment against the bankrupt son, and is entitled to collect it from all the property this son receives from his father's estate. The bank had no claim against the other seven-eighths of the property of the estate, but by the opinion now adopted the heirs of seven-eighths of the estate lose the $1,109.11 due from the eighth heir, and the bank collects its claim in full.

Is it not a most extraordinary situation to have this court hold that, if a deceased happens to make no will, or if by accident no will is found, the debt of an insolvent heir can legally be deducted from his share of the real and personal property left to him thereunder? but if, on the other hand, a will be discovered and probated, injustice will result to all of the heirs who do not owe the estate, by giving to the creditors of that one which owes the estate his share of the estate free and clear of all of his debts to the estate, if perchance such debts have not been specifically set out at length in the will.

As has well been stated, "If this opinion stands we will eventually have to change all of our rules of construction of wills relative to charges and liens against the land."

MARGARET MACKECHNIE, APPELLEE, V. OSCAR LYDERS ET AL., APPELLANTS.
279 N. W. 328

FILED APRIL 29, 1938. No. 30250.

1. **Automobiles:** TRANSFER OF TITLE. Sections 60-310 and 60-325, Comp. St. 1929, set forth the manner in which title to automobiles can be transferred between living persons, and substantial compliance with said sections of the statute is required. When facts are in controversy as to ownership of an automobile, and where such controverted facts are submitted to the jury by the trial court, persons who have not substantially complied with the provisions of the statute relative to such transfer are in no position to complain upon the submission of this issue to the jury.
2. **Master and Servant:** INJURY TO THIRD PERSON: LIABILITY OF MASTER. "To sustain a recovery for injuries caused by being run down by an automobile owned by the defendant, the plaintiff must show by a preponderance of the evidence that the person in charge of the machine was the defendant's servant, and was, at the time of the accident, engaged in the master's business or pleasure with the master's knowledge and direction." *Neff v. Brandeis*, 91 Neb. 11, 135 N. W. 232.

   Evidence examined in the instant case, and *held* to be a question for the jury as to whether or not one of the defendants was in the employ of the other defendant at the time of the accident in question.
3. **Automobiles:** INJURY TO PASSENGER: CONTRIBUTORY NEGLIGENCE. "The place which a passenger occupies in an automobile is important in determining whether he exercised reasonable care and prudence to detect and warn against danger, for one on the front seat with the driver may have a far better opportunity of discovering any danger ahead in the path of the car than one in the back seat." 5 Am. Jur. 771, sec. 478.

   Upon examination of evidence in the instant case, *held* such evidence is insufficient to show contributory negligence on the part of the plaintiff.
4. **Trial.** "It is proper practice for court to refuse to submit to jury defense not supported by evidence." *Sterns v. Hellerich*, 130 Neb. 251, 264 N. W. 677.
5. ———: MOTION FOR DIRECTED VERDICT. "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.

6. Automobiles: NEGLIGENCE: QUESTION FOR JURY. Negligence of defendant driver of bus as proximate cause of injuries sustained by plaintiff *held* question for jury.
7. Appeal: INSTRUCTIONS. Where the court gave an instruction, tendered by the defendants, to the effect that, if the jury find from a preponderance of the evidence that the proximate cause of the accident complained of by the plaintiff was the presence and action of a car driven by a third and unknown person, then, upon so finding, the verdict of the jury must be for the defendants, and, in addition thereto, the court gave instructions, on its own motion, similar in form and incorporating therein the same subject-matter as set forth in the requested instruction given, *held* such instructions in this behalf are sufficient under the circumstances and are not prejudicially erroneous.
8. Trial. INSTRUCTIONS. "It becomes the duty of the trial court to submit to the jury the necessary issues of fact presented by the pleadings and the evidence, whether requested or not, and a failure to do so constitutes error." *Wagner v. Watson Bros. Transfer Co.*, 128 Neb. 535, 259 N. W. 373.

   However, where all the facts and circumstances are before the jury relative to ownership of an automobile and employment of the driver, it is not necessary for the trial judge to select a statement of facts on the issues presented and incorporate such facts in the instructions and thereby qualify the instructions, and no error results from the court's failure to so do.
9. ———: ———. Where instructions given by the court, considered as a whole, properly state the applicable law, they are sufficient. *Holtz v. Plumer*, 133 Neb. 878, 277 N. W. 589.

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

*Baylor, Tou Velle & Healey* and *Courtright, Sidner, Lee & Gunderson*, for appellants.

*Stiner, Boslaugh & Stiner, Robins & Yost* and *Butler & James, contra.*

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

MESSMORE, J.

This is an appeal from the district court for Dodge county in a law action to recover damages for personal injuries on account of defendants' negligence. The jury returned a verdict for the plaintiff, and from such verdict defendants have appealed.

Plaintiff's petition alleges ownership of the bus in defendant Lyders, the occurrence of the accident, the driving of the bus by defendant Lyman as an employee of defendant Lyders, and alleges certain acts of negligence on the part of Lyman, the injuries sustained by plaintiff, and prays for damages. The answer of defendant Lyders admits the occurrence of the accident; that the plaintiff sustained injuries; alleges certain affirmative acts of contributory negligence on the part of the plaintiff, and denies ownership of the bus in Lyders. The answer of defendant Lyman is to the same effect. Both answers deny negligence on the part of defendants. The reply is, in substance, a general denial of defendants' answers.

The evidence discloses that Professor Lyders was the head of the music department of Midland College, Fremont, Nebraska; that defendant Lyman was a student in such college, and the plaintiff was an employee of the college, being an assistant to Professor Lyders. In April, 1936, a trip was planned to transport the acappella choir, consisting of 65 members, by two automobiles and two busses through certain parts of the state of Texas on a concert tour. On April 19, 1936, the choir had given a concert at Fort Worth, Texas, and was about to give another concert at Denton, Texas, approximately 35 miles distant, at 8 o'clock on the same evening. To be present in Denton for the concert required some haste on the part of the members of the choir. The 1928 Studebaker bus, in which the plaintiff was riding and which defendant Lyman was driving at the time of the accident, left Fort Worth about 5:30 p. m. When midway between Fort Worth and Denton, and when the driver of the bus was about to negotiate a curve on an oiled road, the right wheels of the bus followed the

right shoulder of the road across and over a ditch and into a field where the bus circled and was stopped. Plaintiff fell from the rear door of the bus and was injured. The facts will be more specifically covered in this opinion in relation to certain assignments of error, to which such facts as may be necessary will be applied.

The first four assignments of error are as to the insufficiency of the evidence to support the verdict; that the verdict is contrary to law, and that the separate motions of defendants for a directed verdict should have been sustained by the trial court.

The ownership of the bus in Lyders is questioned by defendants. The pertinent facts relating to this question follow: There had been some discussion between Lyders and Doctor Martin, the head of Midland College, relative to transportation of the choir and athletic teams of the college to and from different points, and that the hiring of transportation created too much expense on the part of the college. Lyders discovered the 1928 Studebaker bus, involved in this action, in the city of Omaha, took up the matter of purchasing it with Doctor Martin, and both agreed that it was a bargain at the price offered. Doctor Martin, however, stated, in substance, that the college did not have sufficient funds with which to buy the bus; that if Lyders would assume full responsibility for the purchase any profits made from the trips would be used to reimburse Lyders for the moneys expended. Thereafter Lyders purchased the bus, paying for it personally. He borrowed the money from the Fremont State Company, and gave a chattel mortgage on the bus to that company for the loan.

January 21, 1935, the original motor vehicle license, issued to Smith Robinson Motor Company, from whom Lyders purchased the bus, was transferred on the transfer record on the back of the original certificate to Lyders, and signed by Smith Robinson Motor Company of Omaha. Plaintiff's exhibit Y (defendants' exhibit 6) is an affidavit signed by Oscar Lyders and sworn to before a notary public on April 2, 1936, wherein he states that he is the

owner of the bus and petitions the treasurer of Dodge county to issue a license to "Midland College / Oscar Lyders." The transfer record shows a transfer to Oscar Lyders, and a bill of sale on a regular state of Nebraska form for the transfer of motor vehicles was issued to Oscar Lyders, sworn to before a notary public on January 21, 1935, and contained in the bill of sale were the words "has sold and transferred to Oscar Lyders." Subsequently, on January 23, in the same bill of sale appears "Midland College Choir, Oscar Lyders, Mgr.," which is also sworn to before a notary public. The county treasurer of Dodge county on January 23, 1935, issued a motor vehicle license covering the Studebaker bus to Oscar Lyders. The registration fee was paid by Oscar Lyders in the amount of $15. On April 16, 1935, a readjustment was made on the certificate and the sum of $3 was returned. This certificate reads in part: "This certifies that Midland College / Oscar Lyders * * * has registered as owner." A bus owned by an individual and used for transportation requires a higher registration fee than a bus used by a college or school. The state department had returned to the county treasurer the certificate for collection of the additional, or correct, amount, which was the reason for the showing of Midland College on the certificate. This required an expenditure of $12. April 2, 1936, there was a license or certificate issued reading "This certifies that Midland College / Oscar Lyders of Fremont," etc. There was no bill of sale of any kind showing the transfer of this property from Oscar Lyders to Midland College of record or filed with the county treasurer, as provided for by law. The registrations were made and paid for by Lyders; whatever personal tax assessed was paid for by him. Lyders individually executed a chattel mortgage to the Fremont State Company on the Studebaker bus, of record in the office of the county clerk, March 30, 1936. This mortgage was made for the purpose of financing the International bus, a second bus, and it is claimed that Doctor Martin and Mr. Lyders executed the note secured by the mortgage. The note is not in the

record. The mortgage was signed by Oscar Lyders. At the time of the purchase of the Studebaker bus a chattel mortgage for $275 to the Fremont State Company was filed of record, signed by Oscar Lyders. On September 26, 1936, a chattel mortgage was executed by Oscar Lyders, which included the Studebaker bus. Repairs were made on the Studebaker bus in the amount of $260 which were paid for by Lyders, and subsequent to the New York trip in 1936 there was a general overhauling of the bus, with a new motor and several other mechanical changes being made, requiring an expenditure of $233, paid by Lyders.

The appellants contend that Lyders was the agent of the college, and that the Studebaker bus was purchased for the college, used in its service, and that Lyders had the overseeing of the bus; that he had given a bill of sale for the bus April 15, 1935, and that the registration for the license for the bus discloses that the mark "/" meant "by" and therefore at no time did the registration disclose Lyders as the true owner of the bus. The bill of sale, as testified to by Lyders, was to put the ownership of the property where it belonged. This bill of sale was never filed of record, nor was it filed with the county treasurer of Dodge county as evidence of ownership in the college.

The college musical organizations netted $750 from a successful tour of New York state, the money being used to reimburse Lyders and extinguish the indebtedness on the busses. The Studebaker bus was painted an orange color, advertised the name of the college and the choir, and had on it other college insignia.

In the case of *Myers v. McMaken,* 133 Neb. 524, 276 N. W. 167, it was held: "In an action for damages growing out of a collision between an automobile and a truck, evidence that the name of defendant was on the sides of the truck raises a presumption that the truck belonged to defendant." In the instant case, while this presumption was in favor of the defendants, there was evidence to rebut it. It is not conclusive of ownership, but a fact for the jury's consideration in determining the question of ownership,

together with all the other evidence touching upon such question.

On the foregoing facts, the question of ownership of the bus was submitted to the jury, placing the burden on the plaintiff to prove that Lyders owned the bus.

This court held in *In re Estate of Wroth*, 125 Neb. 832, 252 N. W. 322: "Title to automobile can be transferred between living persons only by compliance with sections 60-310 and 60-325, Comp. St. 1929, relative to such transfer."

Section 60-310, Comp. St. 1929, in part provides: "Upon the transfer of ownership of any motor vehicle, its registration shall expire, and the person to whom ownership of such vehicle is registered, and the person to whom ownership of such vehicle is to be transferred, shall forthwith join in a statement of said transfer, indorsed upon the reverse side of the certificate of registration of said motor vehicle, in the space provided for said purpose, which statement shall be signed by the transferer in the manner and form of his signature, contained on the face of said certificate, and which statement shall likewise be signed by the transferee, who shall set forth, below his signature, his postoffice address." And section 60-325, Comp. St. 1929, contains this proviso: "Provided, upon the transfer of ownership of any motor vehicle the title shall not pass until the certificate of registration properly executed, shall be filed in the department of public works as required in this article."

Under the facts in this case, the noncompliance of Midland College with the sections of the statute relating to transfer of automobiles is obvious. Suffice it to say that the question of ownership of the bus was presented to the jury, the facts in relation thereto being in controversy, and the defendants, under this evidence, are not in a position to complain, especially in view of our decision in *In re Estate of Wroth, supra.*

We are next confronted with the question of whether defendant Lyman was in the employ of defendant Lyders at the time of the accident. The burden of proof was placed

on the plaintiff to prove this relationship; that is, the relationship of master and servant.

The evidence develops that Lyman, 26 years of age, a student at Midland College for four years, had driven cars from the time he was 14 years old and had driven for the college on different trips; that Doctor Martin told him before he left that he would have to be chaperon to the persons conveyed in his bus. Lyders selected Lyman and had charge of the transportation of the choir *en tour*, traveled with the choir in his own car, paid Lyman personally 4 cents a mile for driving; Lyman was to pay for the gasoline and oil, and any amount over that was to be his. Lyders received 50 cents a mile for the use of the two cars and the two busses. The choir's treasurer paid Lyman some of the money due him; Lyders paid him personally some of the money due and settled with him at the conclusion of the trip. Lyman testified that he was in the employ of Midland College, and there is evidence to the effect that the money was allocated by Midland College for this transportation. *En tour* Lyman was under the direction of Lyders, and, as the testimony discloses, Lyders assumed the responsibility for the busses and for the tour. Lyders testified that he did not employ Lyman in his individual capacity to drive the bus; that he had the consent of Doctor Martin to employ him. Lyman testified that he and Lyders had talked about the trip but did not come to any definite agreement; that one time Doctor Martin stopped him when he was leaving the chapel and told him he had been selected as a driver; that he was not sure he was to be the driver of the Studebaker bus; that Lyders was having a meeting with Doctor Martin.

In the case of *Neff v. Brandeis*, 91 Neb. 11, 135 N. W. 232, it was held: "To sustain a recovery for injuries caused by being run down by an automobile owned by the defendant, the plaintiff must show by a preponderance of the evidence that the person in charge of the machine was the defendant's servant, and was, at the time of the accident, engaged in the master's business or pleasure with the

master's knowledge and direction." And in *Weber v. Thompson-Belden & Co.*, 105 Neb. 606, 181 N. W. 649, the above rule was stated.

"(1) A master is a principal who employs another to perform service in his affairs and who controls or has the right to control the physical conduct of the other in the performance of the service.

"(2) A servant is a person employed by a master to perform service in his affairs whose physical conduct in the performance of the service is controlled or is subject to the right to control by the master." Restatement, Agency, 11, sec. 2.

"To constitute the relationship of master and servant, the one for whom the service is rendered must consent or manifest his consent to receive the services as a master." Restatement, Agency, 490, sec. 221.

Having in mind the foregoing principles of law announced, and analyzing the facts, we believe that the trial court was correct in submitting the issue of employment of Lyman by Lyders to the jury.

The appellants complain that the trial court did not present to the jury certain elements of contributory negligence as pleaded in the answer of the defendants. The only issue submitted to the jury for the defendants in this behalf was the issue on speed of the automobile and the plaintiff's contributory negligence in that regard.

The bus was about 28 feet long and was capable of carrying 20 to 25 passengers. Plaintiff testified that when she entered the bus she was seated in the rear seat and on the left side. Four other members of the choir were seated beside her. Three people were seated in front of and looking towards her, with their backs to the front of the bus. She was approximately 20 feet from the driver. The first thing that challenged her attention was the swaying of the bus when it "started bumping up and down and we were thrown from side to side and up and down until we were just all mixed up." Plaintiff was thrown from the bus and went out backward. She testified that she would not be

in a position to observe the accident because she was in the rear of the bus, and she made no protest.

The appellants cite the law of Texas in *San Antonio Brewing Ass'n v. Wolfshohl,* 155 S. W. (Tex. Civ. App.) 644, as follows: "The doctrine of comparative negligence is applicable only to common carriers, being made so in that case by statute, and in every other case contributory negligence is an absolute defense, however negligent defendant may be."

Appellants cite 5 Am. Jur. 775, sec. 485, as follows: "It is the duty of a passenger to register protest against the excessive rate of speed of a car in which he is riding and to take such measures looking to his safety as may be expected of a reasonably prudent man under certain circumstances. For a failure to discharge his duty in this respect, he will be considered contributorily negligent."

In 5 Am. Jur. 771, sec. 478, it is said: "The place which a passenger occupies in an automobile is important in determining whether he exercised reasonable care and prudence to detect and warn against danger, for one on the front seat with the driver may have a far better opportunity of discovering any danger ahead in the path of the car than one in the back seat."

In *Sterns v. Hellerich,* 130 Neb. 251, 264 N. W. 677, it was held: "It is proper practice for court to refuse to submit to jury defense not supported by evidence." Followed in *Suhr v. Lindell,* 133 Neb. 856, 277 N. W. 381.

Instruction No. 10, given by the court, is criticized by appellants, in that the court did not qualify such instruction by telling the jury that plaintiff's right of recovery could have been defeated if the jury found from her testimony that she was guilty of contributory negligence. We believe this criticism is without merit. The record fails to disclose any evidence upon which contributory negligence could have been properly submitted to the jury. *Carlson v. Roberts,* 133 Neb. 166, 274 N. W. 473.

Appellants contend that the negligence, if any, of Lyman, the driver of the bus, was not the sole and proximate

cause of the accident and the injury sustained by the plaintiff. Defendants took the deposition of one T. M. Jones, who was called and testified for the plaintiff. He lived 300 yards from the scene of the accident and saw the accident happen. Six photographs, properly identified and showing the topography of the land, the condition of the highway and all things necessary and incident in the surrounding territory at the base of the curve, also a map, properly identified, with the respective distances shown for the jury's consideration, were all received in evidence. There was some question as to whether another automobile was proceeding from the north to south that crowded Lyman at the curve in the road. Jones saw the bus leave the highway. At that time he observed no other car. When the bus left the highway, this witness saw the dust commence to fly, saw the bus hit the ditch and careen, and saw the plaintiff fall from the bus. The driver kept on going, made a circle, and came to a stop.

Harold Livers, driver of the International bus which was *en tour* with the choir, testified as to their hurry to reach Denton, and the packing of the suit cases on top of the Studebaker bus, inside of an iron rail and tied down. Ordinarily, the robe box was placed, together with some suit cases, on top of the Studebaker bus. Witness had a conversation with Lyman in Denton after the accident, wherein Lyman said that he noticed that day in driving that the unusual amount of luggage seemed to cause the bus to sway more than was usual, especially on the curves, and he thought this had a good deal to do with his going into the ditch on the curve.

William Burklund, riding in the center of the bus, noticed the bus swerving and rocking from side to side and bouncing a bit; he had a conversation with Lyman as to the luggage on the bus; Lyman told him substantially as testified to by Livers. Ray Vopalensky, riding in the Studebaker bus beside the driver, observed the driver wrestling with the wheel to a greater extent than he had been, was looking down just prior to the accident, but the first thing he

noticed was when he "heard the fenders rubbing on the wheels which caused a lot of noise." Lyman cramped the wheel, had one foot on the foot feed and the other on the clutch when the bus was going into the ditch, traveling about 35 miles an hour.

Lyman testified that the baggage was loaded by a committee, appointed by Harold Livers, president and manager of the choir. The witness had nothing to do with the loading of the baggage at Fort Worth; did not observe the loading. On the day of the accident 24 bags or cases were loaded in the baggage rack of the Studebaker bus, packed in two canvas sacks and tied down on the roof with ropes. He testified that he may have stated to one of the counsel for appellee that the placing of the bags on the bus had made it top-heavy and hard to manage; that he did not believe that he would have had trouble on the curve except for that circumstance; that in the evening of the day of the accident he had told Mr. Burklund that the baggage on the roof might have been a factor, but that he told Burklund the accident was due to the fact that he had pulled out on the shoulder of the road to avoid colliding with a car; that the shoulder was soft and it was either a case of running into the ditch and tipping over or straightening up the bus by turning into the field; that he did not recall the conversation with Vopalensky; that he was driving the bus on federal highway No. 377, a paved highway 18 feet wide, with a painted strip in the middle, about 35 miles an hour; decreased his speed as he entered the curve to not more than 30 miles an hour. He observed the unpaved shoulder in the highway, and it appeared smooth and firm; that more gravel had been sprinkled on it. Before he came to the turn, he noticed a car coming down the hill at a considerable rate of speed, over 50 miles an hour, and expected it to slow up by the time it came to the curve. Witness pulled over to the right side of the road as he approached the curve, and the oncoming car failed to slow down as it neared the corner, and it was past the center of the road. As witness entered the curve the car was passing alongside

the bus. The position of the bus on reaching this point was to the right on its own side of the road. The right wheels of the bus got off of the shoulder and proceeded around or into the curve. When the bus got over the shoulder of the curve it was like running into a pile of loose gravel, pulling the bus towards the ditch. The plane of the shoulder was lower than the plane of the road. The bus leaned and swerved somewhat.

Witness further testified that he made an effort to pull the bus back on the pavement, but was unable to do so without running into the ditch. He drove the bus on the shoulder some two bus-lengths before he turned off the highway. He stated it happened so suddenly that he thought, on the spur of the moment, he must either run into the ditch or straighten the bus and run into the field. He did not want to stop in the ditch and have trouble pulling out the bus, so he traveled in the field, making a complete turn, and was met by cries of "stop;" that except for the cries he would have driven right onto the road. Before the accident witness noticed nothing unusual in the operation of the bus. When he first saw the automobile approaching he remarked to Miss Anderson, seated beside him: "Look at that crazy car." The automobile crowded the bus from the curve; witness stopped feeding gas to the motor before it left the highway, and started to circle back to the pavement. The bus would require a distance of 100 feet in which to stop from a speed of 30 miles an hour. Witness did not apply the brakes of the bus when he felt the wheels sinking into the shoulder, for the reason that he feared by doing so he would be confronted by a greater danger than if he let the bus travel in its natural momentum. The distance from the edge of the pavement to the far side of the ditch was 18 to 20 feet; the slope from the pavement to the top was a continuous, smooth slope; the field appeared to be a typical, smooth pasture. Upon returning to the pavement after the accident, he drove the bus through the ditch out to the same place where it had been on leaving the pavement. He observed the tracks left

by the bus during the time it left the highway and they were over six inches deep at the edge of the paving. On cross-examination he testified that he was probably going a little faster than 35 miles an hour; he saw the approaching car about a block and a half north of the gravel, traveling at an excessive rate of speed in the middle of the road. Other evidence shows that this distance was over 300 feet from the place at which the bus left the highway. Witness drove the bus off the paving across the shoulder, down the sloping grade into the ditch, which was about four feet deep, with an abrupt 18-inch rise on its farther side.

Alice Anderson, riding in the front seat of the bus, immediately at the right-hand side of the driver, Eleanor Bethke, seated directly behind him, June Beam, seated in the right center of the bus, A. L. Mendenhall, seated right inside of the front door of the bus on the right side, all substantiated the testimony of Lyman in most particulars. Eleanor Bethke fixed the speed of the bus at 40 to 45 miles an hour.

Both defendants moved for directed verdicts, which motions were overruled. In *Moncrief v. Interstate Transit Lines*, 129 Neb. 168, 261 N. W. 163, this court held: "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."

We believe that the facts in the instant case were in controversy as to whether or not the negligence, if any, of Lyman was a direct and proximate cause of the injury sustained by the plaintiff; that the jury were properly instructed in this respect, and that the instructions on this feature of the case given by the court on its own motion and requested instructions are adequate.

Appellants in assignment of error No. 6 complain of instruction No. 3, stating that, the court having introduced the doctrine of concurrent negligence, it became the fur-

ther duty of the court to inform the jury that before the defendants, or either of them, could be held liable under the doctrine, the evidence must show that the accident would not have happened but for the specific negligence of the defendants; that the acts of the unidentified motorist, of which there is some evidence, in forcing the driver Lyman to turn off the pavement, were independent, self-operating forces, disconnected from any acts or omissions of defendants, and were alone the proximate cause of the accident; that it was not enough for the court to inform the jury that any negligence of the defendants, in conjunction with negligence of another, forming the proximate cause, would create liability on the part of the defendant; that the doctrine applies only when the accident would not have occurred except for the existence of both forces.

Instruction No. 3 placed the burden on plaintiff to prove by a preponderance of the evidence paragraphs 3 and 4 of said instruction, as hereinafter set out. Paragraphs 1 and 2 of the instruction are not set out. Paragraphs 3 and 4 thereof follow:

"That the proximate cause of the accident and the injuries resulting therefrom, if any, was the negligence of the defendant John Lyman in one or more of the particulars alleged in the plaintiff's petition, and that such negligence was the proximate cause of the accident and the injuries sustained by the plaintiff therefrom, if any.

"Or that because of such negligence, if any, in conjunction with the acts of some third person not a party to the suit, as a proximate cause the accident occurred."

Requested instruction No. 2 by defendants and given by the court told the jury: "You are instructed that if from a preponderance of the evidence you find the sole proximate cause of the accident complained of by the plaintiff was the presence and action of a motor car driven by third and unknown persons then upon so finding your verdict must be for the defendants."

We believe, in view of the foregoing, that the court sufficiently covered the matters complained of by defendants and clearly and unequivocally told the jury that before the

defendants, or either of them, could be held liable, the evidence must show that the accident would not have happened but for the specific negligence of defendants.

Objection is made to instruction No. 11 given by the court. When this instruction is read and considered with instruction No. 3 and with all of the other instructions given, we believe that it is free from prejudicial error.

The appellants cite the case of *Belik v. Warsocki*, 126 Neb. 560, 253 N. W. 689, wherein we held: "Where one driving an automobile is suddenly confronted by an emergency, requiring instant decision, he is not necessarily guilty of negligence in pursuing a course which mature reflection or deliberate judgment might prove to be wrong." We believe that instruction No. 1, requested by defendant John Lyman and given by the court covers the situation contended for as to emergency, if the same existed.

Appellants cite *Wagner v. Watson Bros. Transfer Co.*, 128 Neb. 535, 259 N. W. 373, in which this court held: "It becomes the duty of the trial court to submit to the jury the necessary issues of fact presented by the pleadings and the evidence, whether requested or not, and a failure to do so constitutes error." They also cite other cases to like effect.

Appellants complain that the trial court failed to give qualifying instructions by setting forth in such instructions facts and circumstances showing ownership of the bus in defendant Lyders, or the employment of defendant Lyman. We believe that the jury had sufficient facts before them to determine these two matters; that the court, by not attempting to set forth facts in such instructions, conformed to the best practice, and that the instructions in this behalf are adequate.

Other instructions given by the trial court, instructions requested and given, and instructions not requested, have been examined, and we believe that the instructions given by the court, considered as a whole, properly state the applicable law and are sufficient. See *Holtz v. Plumer*, 133 Neb. 878, 277 N. W. 589.

AFFIRMED.

## GENERAL AMERICAN LIFE INSURANCE COMPANY, APPELLEE, V. OMAHA NATIONAL BANK, APPELLANT.

279 N. W. 310

FILED APRIL 29, 1938. No. 30309.

1. **Insurance: POLICY: ASSIGNMENT.** The assignee of an insurance policy stands in the same place as the assignor, acquires no other or greater rights than the assignor possessed, and takes the policy with all the stipulations and conditions in the contract of insurance and subject to all defenses available at the time of the assignment.
2. ———: ———: ———: **SET-OFF.** Where a bank, assignee of an insurance policy, seeks to obtain the cash surrender value of such policy and offset a deposit of the insuring company in payment of the cash surrender value of such policy, the bank is obligated to conform to the terms and conditions in the policy, and, upon its failure to so do, it is not entitled to the set-off of the deposit.
3. ———: ———: ———: ———. Where a policy of insurance provides: "After three full years' premiums shall have been paid hereon, if any premium shall not be paid when due, and if there be no indebtedness hereon, upon written request of the insured within six (6) months from the said due date, and the legal surrender of this policy, the company will pay" the cash surrender value of said policy as designated therein, such conditions must be performed by the party seeking the cash surrender value of the policy, and where the evidence discloses the payment of premiums on the policy from and after the period of demand for the cash surrender value, and that the policy has not been surrendered, and subsequently the policy lapses for nonpayment of premium and is placed on extended insurance, as provided by the terms thereof, thus creating a potential obligation on the part of the insuring company to pay the face of the policy, a set-off against the deposit in the hands of the claiming party will not be allowed.
4. ———: ———: ———: ———. Where a policy of insurance provides: "After three full years' premiums shall have been paid, the owner at any time within three months after any default, but not later, may surrender this policy: (a) For its cash surrender value less any indebtedness to the company hereon," and such owner makes a demand for the cash surrender value of the policy; and where the evidence discloses that the policy was never surrendered, as provided by the terms thereof, but premiums were paid by the owner on such policy subsequent to the demand made for the cash surrender value,

and subsequently the policy lapses for nonpayment of premium and is placed on extended insurance, as provided by its terms, thus creating a potential obligation on the insuring company to pay the face of the policy, then, under the circumstances, a set-off will not be allowed the owner of the policy, such owner having failed to comply with the provisions of the policy necessary to obtain the cash surrender value.

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

*Wells, Martin, Lane & Offutt*, for appellant.

*Brown, Fitch & West, contra.*

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

MESSMORE, J.

Plaintiff's petition alleged insolvency of the Missouri State Life Insurance Company, the purchase of the assets of said company from the superintendent of the insurance department of the state of Missouri; that among the assets of said company was a bank deposit in defendant bank in the sum of $1,364, for which it prayed judgment. The answer was a general denial, pleaded the ownership of certain policies of insurance in possession of the defendant bank, and claimed a lien and a right of set-off on the deposit held in the bank for the cash surrender value of the two policies owned by said bank. The reply set forth the necessary requirements contained in the policies in order to obtain the cash surrender value of the same, and alleged that the plaintiff's action was for money had and received. The supplemental reply had reference to the taking over of the assets of the company by the superintendent of the insurance department of the state of Missouri, and alleged conditions of the purchase agreement by plaintiff company. Other elements as pleaded are contained in the opinion as reflected by the evidence. The cause was tried to the district court for Douglas county, without the intervention of a jury. The court found for the plaintiff, and defend-

ant has appealed. The facts necessary for a determination of this case and as found in the stipulation of facts are hereinafter set forth.

On July 23, 1919, the Commonwealth Life Insurance Company issued its policy No. 24353 (S-184173) to George L. Harding in the face amount of $2,000. On October 21, 1920, the same company issued its policy No. 31096 (S-186616) to William H. Harding in the face amount of $4,000. The Missouri State Life Insurance Company, by agreement, prior to August 28, 1933, took over the business of the Commonwealth Life Insurance Company, including the two policies. On April 24, 1928, the policy of insurance issued to George L. Harding was assigned by insured and John H. Harding, the beneficiary, to the Omaha National Bank. Likewise, on April 19, 1928, the policy of insurance issued to William H. Harding was assigned by the insured and Florence Harding, the beneficiary, to the Omaha National Bank. Both assignments were executed on printed forms, subject to the conditions of the policies and the rules and regulations of the company. The policies were held as collateral security by the bank for a loan, and when the assignments were issued on the policies to the bank a certain part of the original loan was paid, and the bank then became the owner of the policies.

The policy issued to George L. Harding provides: "Surrender for cash:—After three full years' premiums shall have been paid hereon, if any premium shall not be paid when due, and if there be no indebtedness hereon, upon written request of the insured within six (6) months from the said due date, and the legal surrender of this policy, the company will pay in cash therefor the amount specified in column (1) of the accompanying Table A for the year to the end of which premiums have been paid in full." The policy issued to William H. Harding provides: "After three full years' premiums shall have been paid, the owner at any time within three months after any default, but not later, may surrender this policy: (a) For its cash surrender value less any indebtedness to the company hereon."

On or about August 28, 1933, the Missouri State Life Insurance Company was adjudged insolvent, and the assets of said company were taken over by the superintendent of the insurance department of the state of Missouri as liquidating officer. At that time the Omaha National Bank had on deposit an account in favor of the Missouri State Life Insurance Company of $3,454.99 and a special account for the same company in the amount of $74.63. The defendant corporation received a telegram on August 28, 1933, from the superintendent of the insurance department of the state of Missouri, informing the bank that he had been vested with title to all of the assets of the Missouri State Life Insurance Company by order of the circuit court of the city of St. Louis. On August 29, 1933, the cashier of the defendant bank in a letter written to the superintendent of insurance acknowledged receipt of the telegram, advised him that the bank was the owner of two policies, one issued to George L. Harding, the other to William H. Harding, and informed him as to the cash surrender value of each policy, demanded payment of the cash surrender value of the policies, and claimed the right to offset the cash surrender value thereof against the liability to the company on the deposit account.

As shown by the stipulation of facts in the record, the bank paid to plaintiff the quarterly premiums on the George L. Harding policy after August 28, 1933, as follows:

| Quarterly Premium Due | Paid |
|---|---|
| 10-23-33 | 11-23-33 |
| 1-23-34 | 2-19-34 |
| 4-23-34 | 5-18-34 |
| 7-23-34 | 7-16-34 |
| 10-23-34 | 7-16-34 |
| 1-23-35 | 7-16-34 & 3-1-35 |

All of said premiums were in the amount of $17.18 each. The bank also paid to the plaintiff on the William H. Harding policy one annual premium of $110.40, paid November 23, 1933.

The evidence discloses a letter, dated November 18, 1933, written by the general attorney for the plaintiff company, in response to the bank's letter of August 29, 1933, setting forth the contentions of the plaintiff company in denying that the bank had a right of set-off, and giving some of the reasons therefor. The defendant bank responded to this letter November 23, 1933, claiming the right of set-off against the deposit account for the cash surrender value of the two policies. Subsequently, by arrangement between plaintiff and defendant, an account was opened in the name of plaintiff company, consolidating the two accounts previously on deposit in the name of the Missouri State Life Insurance Company, and the plaintiff company was credited with said amount, less the amount noted by the bank as a set-off, which is in controversy, separate from the new deposit credited to the plaintiff.

The plaintiff company became the purchaser of the assets of the Missouri State Life Insurance Company on September 7, 1933. The George L. Harding policy did not lapse for nonpayment of premium until April 23, 1935, and the William H. Harding policy did not lapse until October 21, 1934. At the time of its lapse, the George L. Harding policy was subject to a policy loan of $297.02, and at the time of the lapse of the William H. Harding policy, it was subject to a policy loan of $377.51. At the time of the lapsing of both policies they were placed on extended insurance by the company, as provided in the policies, which fact was unknown to the officers of defendant bank until after the commencement of this action.

In 37 C. J. 435, it is said: "Under the general rule the assignee stands in the place of the assignor, acquires no other or greater rights than the assignor possessed, and takes the policy subject to all the stipulations and conditions in the contract of insurance, and subject to all defenses available at the time of the assignment. If the assignment is of merely a contingent or part interest, when the assignor's interest ceases, the assignment is no longer operative." So, in recognition of this general rule, we can

safely say that the bank stood in the same position as the policyholders.

The plaintiff company, by its arrangement in the purchase agreement, sent out certificates of assumption to the last-known addresses of George L. Harding and William H. Harding. The defendant bank did not receive a certificate of assumption and knew nothing of the certificates mailed to the Hardings until after this suit was started. The officers of the defendant bank did not know that its clerks had paid the premiums on the insurance policies until after this action was commenced. The claim of the appellant in this behalf is found in the principle of law announced in *State v. Brown County Bank*, 112 Neb. 642, 200 N. W. 866, wherein this court held: "The employment by a bank of clerks to perform purely ministerial duties does not constitute them such agents of the bank that notice of transactions passing through the bank in the ordinary routine of the bookkeeping of the institution is notice of the transactions to the bank, in the absence of any showing that these clerks imparted the knowledge they acquired to any officer of the bank, or that it was their duty so to do." The above case was cited for the principle of law announced, and we believe that it will be conceded that the facts are not in any way analogous to those in the case at bar.

The bank contends that in no instance has it receded from its original view on the question of the right of set-off; that in no instance was the plaintiff led to believe otherwise, and specifically calls attention to a part of a letter of October 18, 1934, written by the general attorney for the plaintiff company, which part is as follows: "We are not interested in a receipt; we just want our money."

The bank at all times retained possession of the policies, and the premiums on the policies were paid by the bank subsequent to the insolvency of the Missouri State Life Insurance Company and the purchase of the assets of that company by the plaintiff. Upon the lapsing of the policies, they were placed on extended insurance, fixing a potential obligation on the part of the company as follows: The

George L. Harding policy is on extended insurance in the amount of $2,000, to expire on February 22, 1963; the William H. Harding policy is on extended insurance in the face amount of $4,000, to expire April 20, 1943. The plaintiff company was obliged to assume, under the terms of the two policies, this obligation. At the time the policies lapsed, there was no demand made for the cash surrender value, in conformity with the terms of the contract as stated in the two policies. Under the terms and provisions of each of the policies the cash surrender value could not be claimed while the policies were in good standing; that is, before there had been a default or failure to pay a premium.

In the case of *Blume v. Pittsburg Life & Trust Co.*, 263 Ill. 160, 104 N. E. 1031, in the opinion we find this language: "The parties being competent to contract, had a legal right to insert such provisions in the agreement as they saw proper, and it is the duty of courts to construe and enforce agreements as made and not to make new contracts for parties." There are many cases which hold directly on this point. Therefore, the bank, standing in the same position as the original policyholders who made the assignments of policies to the bank, took the contract of insurance as it found it and, in order to obtain the cash surrender value, as stated in the contract, must conform to the conditions required by the company in this behalf. The terms of the policy stating the manner in which cash surrender values could be obtained are plain and comprehensive.

Appellee cites the second paragraph of the syllabus in *Blume v. Pittsburg Life & Trust Co., supra,* as follows: "Where a life insurance policy provides that after full premiums have been paid for a certain number of years the policy can be surrendered within six months from the date of lapse for paid-up insurance or for cash, as specified in accompanying tables, and further provides that except as to such provisions the policy shall become void if the premium is not paid when due, the surrender of the policy within six months after the date of lapse is a condition

precedent to the right to paid-up insurance or cash, and if no surrender is so made such rights are forever gone." In the body of the opinion at page 164 we find this language: "Our conclusion is that the right to paid-up insurance or surrender value was conditioned upon the surrender of the old policy within six months from the time it lapsed for the nonpayment of the premium, and that a failure on the part of the insured to make an election within the time caused the forfeiture, which was conditional in the first instance, to become absolute after the expiration of six months. This view is supported by the decided weight of authority outside of this state."

Appellee cites *McLaughlin v. Equitable Life Assurance Society*, 38 Neb. 725, 57 N. W. 557, wherein this court held: "It was stipulated in a life insurance policy that in case of default of payment of the annual premium therein named, after the payment in full of three of such premiums, the insurance company would issue in favor of the beneficiary therein, a paid-up policy for as many parts of the amount insured as equaled the number of premiums paid, provided such policy should be surrendered duly receipted within six months from the date of such default. *Held*, That the surrender of the receipted policy within six months after default is a condition precedent to the right to demand paid-up insurance."

While the above case is not analogous to the case at bar relative to the cash surrender value of an insurance policy, yet it will be observed from the above holding that the policy constitutes the entire contract between the parties, and the terms of the policy must be met by the insured to obtain the benefits, as stated therein.

In *Universal Life Ins. Co. v. Devore*, 88 Va. 778, 14 S. E. 532, it was held: "Where a policy provides that when at least three full annual premiums are paid and the policy duly receipted and transmitted to and received by the company before default in payment of any premium due thereon, or within thirty days thereafter, the same may be exchanged for a paid-up term policy for the same amount;

and within thirty days after default, attorneys wrote that the policy had been left with them to procure a term policy, and demanded such term policy, saying that on receipt thereof they would send the original policy duly receipted: Held: The plaintiff has no right to a term policy or to payment of any amount from the insurance company upon their contract, not having complied with its conditions." See, also, *Smith v. National Life Ins. Co.*, 103 Pa. St. 177; *Equitable Life Assurance Society v. Evans*, 25 Tex. Civ. App. 563, 64 S. W. 74; *Meyer v. Manhattan Life Ins. Co.*, 144 Ind. 439, 43 N. E. 448. It is not necessary to discuss other cases of like holding.

Appellant's objection to the cases above cited, and cases cited therein supporting this rule, is to the effect that the cases are ones where it was attempted to surrender the policy after the final expiration date for such surrender; that after an insured defaults in the payment of premium the company has a right to put the policy on extended insurance, without a surrender value, and if the insured does not act within a specified time, this right is forever lost.

We are cognizant of the differences between the plaintiff company and defendant bank, as set forth in the correspondence between the two. We are convinced, however, that the policies were kept in full force and effect by the payment of premiums by the bank. To obtain the cash surrender value of the policies, as stated by the terms thereof, it was the duty of the bank to meet the requirements contained in the policies. This it failed to do, and having so failed, it is not in a position at this time to offset the deposit now held by the bank in the name of the plaintiff against the cash surrender value of the two policies in question.

Other propositions of law are urged, but in view of our holding they are not necessary for a determination of this case and are therefore omitted.

AFFIRMED.

CHARLES NORDEEN, APPELLEE, V. AMANDA NELSON ET AL., APPELLANTS: CARL A. NELSON, APPELLEE.
279 N. W. 323

FILED APRIL 29, 1938. No. 30213.

1. **Bills and Notes:** PRINCIPAL AND SURETY: EVIDENCE. As between parties in a suit on a promissory note, it being shown that the payee took the note with knowledge thereof, the relation of principal and surety of the makers may be shown and the established rules of law operating to discharge a surety may be pleaded as part of his defense.
2. **Principal and Surety.** A surety who by the terms of his contract has agreed to the making of extensions may not claim a release because an extension of time has been granted.
3. ———: ACTION ON NOTE: SET-OFF. Where a creditor with knowledge that one of the makers of a note is surety files and causes to be duly allowed a claim on said note as against the estate of the principal which is insolvent, and, without consent of the surety, said creditor voluntarily releases any portion of the said estate from payment of said debt, he may be charged with damages to the extent of the loss caused by such affirmative act, and such loss may be claimed as a credit and offset in a suit on said note.
4. **Fraud.** "Where a fraudulent transaction is sought to be enforced in the courts, the defendant may set up the fraud either as a complete or partial defense, as the case may be, or else in mitigation of damages or ground for recoupment." 12 R. C. L. 408, sec. 154.
5. **Bills and Notes.** In a suit upon a promissory note as between the parties to the instrument, no holder in due course being involved, partial absence of consideration is a defense *pro tanto*.

APPEAL from the district court for Knox county: DE WITT C. CHASE, JUDGE. *Reversed.*

*W. A. Meserve* and *Beghtol, Foe & Rankin*, for appellants.

*Peterson & Peterson, contra.*

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

WILLIAM A. DAY, District Judge.

This is an appeal from a judgment of the district court

for Knox county, Nebraska. The nature of the suit is an action on a promissory note brought in the district court for Knox county by the plaintiff against the various defendants. The plaintiff sought by his petition to recover from the defendants a judgment on a certain promissory note signed by the defendants, dated February 1, 1932, for a principal sum of $5,562.52, upon which he claimed that there was due the sum of $6,427.52. The defendants and each of them filed their separate answers, the first paragraph of which was a general denial. The remaining paragraphs allege, in substance, that on the 15th day of March, 1927, one Charles Nelson as principal, and the defendant Swan Hult as surety, executed and delivered to Charles Nordeen, the plaintiff, their promissory note in the sum of $5,000; that thereafter Charles Nelson died, an administrator was duly appointed, and, thereafter, on the 17th day of August, 1928, plaintiff herein, Charles Nordeen, filed his claim against the estate of Charles Nelson in the sum of $4,500, with interest at the rate of 7 per cent. per annum from March 15, 1928; that on the 12th day of November, 1928, the claim was allowed by the county court of Knox county, Nebraska, as a valid claim against the estate of Charles Nelson in the sum of $4,500, with interest at 7 per cent. per annum from March 15, 1928, and, thereafter, on the 23d day of July, 1930, the said Charles Nordeen, the plaintiff, without the consent or knowledge of Swan Hult, the surety on said note, entered into an agreement ratifying and approving the payment by the administrator of the said estate of the other claims filed against said estate and permitting his own claim to be continued for payment and to be allowed and paid out in the proceedings for the probate of the will of said deceased and consenting to the payment of his own note at a later date.

The defendants further allege that, had the said plaintiff not entered into said agreement to extend the time of payment on the note, he would have received from the estate of Charles Nelson the sum of $2,500. The defendants

further allege that thereafter, under date of February 1, 1932, the said plaintiff fraudulently, and with the intent to deceive, cheat and defraud the defendants, did falsely and fraudulently represent to the defendants, first, that the said Swan Hult was legally liable on said day for the payment of the said original $5,000 note and interest, and that the said Swan Hult on said day was indebted to the plaintiff for the said $5,000 with interest thereon, to wit, the sum of $5,562.52, and that he was willing to accept a renewal of the amount due on said $5,000 note by a new note, due in five years, if signed by each of the defendants, and threatened that, if the defendants did not sign said renewal note in said amount, he would immediately bring suit against said Swan Hult, reduce the same to judgment and force the collection thereof by execution. That the plaintiff fraudulently withheld information and concealed from the defendants the fact that he had acquiesced in and consented to the entry of the said decree in the county court, and that he had entered into said agreement to extend the time of payment of said note and postponed his right to enforce the said note; that he failed and neglected to demand his *pro rata* share of the personal property of the said estate of Charles Nelson, deceased, and that he had wholly failed and neglected to collect from the proceeds of the said personal property the sum of $2,500 due and legally payable on said note; that the said plaintiff made said false representations, and each of them, with the intent that the defendants should act upon the same; that the defendants were ignorant of the falsity of each of the said representations and statements, and believed said representations and statements, and each of them, and acting and relying upon said statements, and each of them, to their damage, signed the said note. Said defendants further allege that said representations were false and untrue, and that by reason thereof the said Swan Hult on said day was not indebted to the plaintiff, and the co-defendants further allege that, the defendant Swan Hult not being indebted to the plaintiff in any amount, they are

not now indebted in any amount to said plaintiff. Wherefore, the defendants pray that the plaintiff's petition be dismissed, and the defendant Swan Hult alleges that, if he is liable in any amount to the said plaintiff, he is entitled to a credit on said note in the amount of $2,500 with interest at 6 per cent. per annum from the 23d day of July, 1930, and prays that plaintiff's petition be dismissed, or, in the alternative, if he is held liable on said note, that he be given a credit thereon, with interest at 6 per cent. per annum from the 23d day of July, 1930. To which answers the plaintiff demurred, which demurrer was sustained by the court.

The appellants complain that the court erred in overruling their motion for a new trial, the essential error alleged being that the court erred in sustaining the several demurrers to each and all of the paragraphs of their amended answers, except paragraph 1.

Section 62-408, Comp. St. 1929, provides as follows: "In the hands of any holder other than a holder in due course, a negotiable instrument is subject to the same defenses as if it were nonnegotiable."

The plaintiff in this case was the original payee of the note, and the note in question had not been transferred. Therefore, the defendant Swan Hult, although he appeared to be a maker of said original note for which the note in question was given in renewal, was entitled to show that he in fact signed the note as surety only and was secondarily liable thereon, and that said Charles Nelson was in fact the principal and primarily liable, and that said Charles Nordeen took said note with knowledge of such facts. In support of this proposition of law this court has already said, in the case of *Hardin Trust Co. v. Wollard,* 119 Neb. 307, 228 N. W. 866: "A payee, taking a negotiable instrument, which is not negotiated, with knowledge that certain of the apparent makers thereof are in fact sureties who signed under an agreement with such payee that certain moneys were to be applied, when received and as received, to the payment of the instrument, is not as to such sureties

a holder in due course." The court further says, in the same opinion:

"Section 4801, Comp. St. 1922 (section 62-1702, Comp. St. 1929), is called to our attention as precluding the Hevners from proving that each signed as sureties and not as makers. The section, considered as a part of an independent act, as it is, does not warrant such conclusion. It provides: 'The person "primarily" liable on an instrument is the person who by the terms of the instrument is absolutely required to pay the same. All other parties are "secondarily" liable.' This does not prevent one appearing as a maker of a promissory note from alleging and proving that he signed as a surety, in a proceeding between the original parties on a note not negotiated. The section is dealing solely with the promissory note or instrument as it appears in its legal relation to the parties as by it disclosed, and does not necessarily prevent one who appears to be a maker or payor from showing by proof in a proper case his actual status. The different provisions of this act must be considered together, and if possible each of its nearly 200 sections be permitted to function in its own sphere in furtherance of the purpose and intent of the act.

"The following cases will be found instructive: *Bank of Commerce & Savings v. Randell,* 107 Neb. 332; *Farmers State Bank v. Lydick,* 112 Neb. 586.

"The instant case, as we have seen, is one between the original parties to the note, each acting with full knowledge of the facts, and in a transaction wherein the payee bank was the inspiring cause of the execution and delivery of the note, hence it is not, and could not be, a holder of the note in due course. While the note is negotiable in form, it has not been 'negotiated' within the meaning of the negotiable instruments statutes. Hence, as we conclude, these parties are governed as to their rights and relationship to each other, by that part of section 4669, Comp. St. 1922, which reads as follows: 'In the hand of any holder other than a holder in due course, a negotiable instrument is subject to the same defenses as if it were nonnegotiable.'

And they are governed further by the rule laid down by us in *Hatfield v. Jakway*, 102 Neb. 831, wherein we construed the above quoted statutory provision, and announced: 'A payee who takes a negotiable instrument with knowledge that one of the signers is only signing as a surety, and who agrees that certain collateral pledged to secure the note shall first be applied before the surety shall be liable, is not a "holder in due course" as respects such agreement with the surety.' "

Therefore, it is to be seen that negotiability is not the essential element to the validity of a note, and that it is negotiable in form does not, as between the maker and payee, deprive the maker of any defense thereto he would otherwise have, and, hence, the signer of a note can show by parol in an action thereon by the payee that he was a surety only. From the cases above cited it is to be seen that the law is that, as between the parties in a suit on a promissory note, it being shown that the payee took the note with knowledge thereof, the relation of principal and surety of the makers may be shown and the established rules of law operating to discharge a surety may be pleaded and proved as a defense.

The allegation that defendants were released from liability by extension of time of payment of said note without the consent of Swan Hult is negatived by the terms of his original obligation, set out as exhibit A in each of the amended answers, the terms of which agreement read as follows: "The makers, indorsers, sureties, guarantors and assignors of this note severally waive demand, presentment for payment, protest and notice of protest and of nonpayment, and agree and consent that, after maturity, the time for its payment may be extended from time to time by agreement between the holder and any of them, without notice, and that after such extension or extensions the liability of all parties shall remain as if no extension had been had." The provisions of the original obligation of Swan Hult, whereby he consented to extensions of time of payment, cannot be overcome simply by alleging the conclu-

sion that the extension was made without his consent, and the defendant Swan Hult, having consented that the time of payment might be extended by the terms of his original obligations, cannot now complain of the extension that may have been granted. The allegations of extension of time being entirely insufficient to state a defense, it follows that the rulings of the trial court on the demurrer as to this defense and the exclusion of evidence upon these allegations were correct. The agreement as to the extension of time embodied in the terms of the original instrument is a valid and binding agreement under section 62-105, Comp. St. 1929: "But the negotiable character of an instrument otherwise negotiable is not affected by a provision which: * * * Third. Waives the benefit of any law intended for the advantage or protection of the obligator." This section of the statute has been held valid in *First Nat. Bank v. Baldwin*, 100 Neb. 25, 158 N. W. 371, which holds as follows: "The clause waiving all defenses on the ground of extension of time has been held not to destroy the negotiability of note." The agreement, as heretofore stated, being a valid and binding one, the defendant Swan Hult cannot claim the protection of section 62-802, Comp. St. 1929, which provides as follows: "A person secondarily liable on the instrument is discharged: * * * Sixth. By any agreement binding upon the holder to extend the time of payment, or to postpone the holder's right to enforce the instrument, unless made with the assent of the person secondarily liable." The above section, however, is a complete defense where consent to the extension of the time of payment has not been given.

The respective answers of the defendant Swan Hult and his codefendants allege in substance that the plaintiff, Charles Nordeen, filed his claim in the estate of Charles Nelson, deceased, in the county court of Knox county, Nebraska, on the original note in question, which was allowed, in the sum of $4,500, and that thereafter, had he done nothing further, he would have received, by operation of law, in payment upon said claim, a sum of $2,500 or more, and that by an affirmative agreement on his part he volun-

tarily relinquished his right to receive the $2,500 out of the personal property of the estate of the decedent Charles Nelson. We find no quarrel with the plaintiff's proposition that a mere forbearance by a creditor to sue a principal will not release the latter's surety, or the mere failure of a creditor either to enforce the security or to take active steps to protect the same will not release the surety, but the allegations in the answer are to the effect that the plaintiff, by an affirmative, voluntary act on his part, deliberately and intentionally parted with the security which he had obtained. We may also concede that the plaintiff was under no duty to file a claim in the estate of Charles Nelson, deceased, but, having elected to act as a volunteer and having once acquired the security, which was the allowance of the claim, in effect a lien upon the assets of the estate, he cannot thereafter, by an affirmative act, destroy the security thus obtained, and which had inured to the benefit of the surety, Swan Hult. The authorities are in agreement upon the proposition that a surety is discharged to the extent of the value of the security lost where the creditor, *without* the surety's consent, affirmatively releases collateral security. The defendants in this case do not allege in their answers mere passive inaction or negligence, but do allege an affirmative act, whereby the plaintiff entered into an agreement with the administrator of the estate of Charles Nelson, deceased, by the terms of which he agreed to waive his right to receive the *pro rata* share of his claim previously allowed. Plaintiff's contention that it would have been necessary for him to have taken affirmative action to secure his *pro rata* share of the personal estate of the deceased, Charles Nelson, is without legal foundation. We think that the only logical conclusion that can be drawn from the facts alleged are that if the plaintiff had done nothing he would have received, in due course of time, his *pro rata* share of his claim out of the estate of the deceased Nelson. We cannot find any reason to believe that the administrator would have acted contrary to law, or that the county judge of Knox county, Nebraska, would have sanctioned the dis-

tribution of the personal property of the estate of Charles Nelson without the plaintiff, Charles Nordeen, receiving his *pro rata* share. In *Carson's Executors v. Buckstaff*, 57 Neb. 262, 77 N. W. 670, this court has said: "A debtor, when sued by his creditor, may plead as a counterclaim or set-off the actual value of any collateral security which the creditor has converted to his own use or the value of any collateral security which he has released, dissipated, or diverted from the purpose for which he held it." Also, in *Stewart v. American Exchange Nat. Bank*, 54 Neb. 461, 74 N. W. 865: "A creditor who without the consent of the surety voluntarily parts with security thereby releases the surety to the extent he has been thereby damaged." Therefore, we find that, where a creditor with knowledge that one of the makers of a note is surety files and causes to be duly allowed a claim on said note as against the estate of the principal which is insolvent, and, without consent of the surety, said creditor voluntarily releases any portion of the said estate from payment of said debt, he may be charged with damages to the extent of the loss caused by such affirmative act, and such loss may be claimed as a credit and offset in a suit on said note. *Carson's Executors v. Buckstaff*, 57 Neb. 262, 77 N. W. 670; *Brown v. Chicago, R. I. & P. R. Co.*, 76 Neb. 792, 107 N. W. 1024; *Stewart v. American Exchange Nat. Bank*, 54 Neb. 461, 74 N. W. 865; *Drexel v. Pusey*, 57 Neb. 30, 77 N. W. 351; Brannan, Negotiable Instruments Law (4th ed.) 268.

The defendant Swan Hult and his codefendants further allege in their respective answers that they were induced to sign the note by representations made by the plaintiff to the effect that Swan Hult was then and there indebted to the plaintiff in the sum of $5,562.52, and that the said plaintiff knew the same to be false and untrue. We think that this allegation is a defense, and that the trial court erred in sustaining the demurrer thereto. "When a fraudulent transaction is sought to be enforced in the courts, the defendant may set up the fraud either as a complete or partial defense, as the case may be, or else in mitigation of

damages or ground for recoupment." 12 R. C. L. 408, sec. 154. See *Brucker v. Kairn*, 89 Neb. 274, 131 N. W. 382; *McCandless v. Greusel*, 103 Neb. 472, 172 N. W. 249; *Olcott v. Bolton*, 50 Neb. 779, 70 N. W. 366.

The defendant Swan Hult alleges, by his amended answer, that the note sued on was wholly without consideration, this plea being based upon the proposition that Swan Hult was released as surety upon the original $5,000 note by reason of the extension of time of payment of said note. We, however, find that the defendant Swan Hult, by an affirmative agreement embodied in the terms of the original instrument, had agreed to an extension of time. Therefore, he cannot claim a complete absence of consideration, and the partial absence of consideration is only a defense *pro tanto* as to him, by reason of the plaintiff having affirmatively released the estate of the principal maker of the note, Charles Nelson, to the extent of $2,500 or more.

This being an action between the original parties to the note, the law is, in that regard: "Absence or failure of consideration is matter of defense as against any person not a holder in due course and partial failure of consideration is a defense *pro tanto*, whether the failure is an ascertained and liquidated amount or otherwise." Comp. St. 1929, sec. 62-205. See *Elmcreek Ditch Co. v. St. John*, 127 Neb. 253, 255 N. W. 16; *Spangenberg v. Losey*, 116 Neb. 112, 216 N. W. 191.

We therefore are of the opinion that the district court erred in sustaining the demurrers to the answers of the defendant Swan Hult and his codefendants, with the exception of that portion of the answers alleging a complete release by reason of the extension of time without the consent of the surety, and it is the order of this court that the order sustaining the demurrer of the plaintiff to the answers of the defendant Swan Hult and his codefendants, with the exception above noted, be and is hereby vacated and set aside, and that a new trial is hereby granted the defendants.

REVERSED.

# ETTA AVONDALE, APPELLANT, V. SOVEREIGN CAMP, WOODMEN OF THE WORLD, APPELLEE.

279 N. W. 355

FILED APRIL 29, 1938. No. 30259.

1. **Insurance.** A contract provision in a benefit certificate providing that no suit shall be brought thereon unless commenced within one year from the date of the member's death, if valid in the state where the contract is made, will be enforced in Nebraska.
2. ———: CONTRACT: LAW GOVERNING. A benefit certificate issued in Nebraska and sent to the clerk of the local camp in Louisiana and there delivered by the clerk to the member who at such time paid the first monthly instalment and signed an acceptance thereof is a Louisiana and not a Nebraska contract.
3. **Constitutional Law.** Refusal of a state court to recognize as valid a provision that suit must be commenced within one year after the date of loss, where such provision is valid under the law of the state wherein the contract was executed and was to be performed, is a denial of the rights guaranteed by the "due process clause" of the Fourteenth Amendment to the federal Constitution, is a refusal to give full faith and credit to the law of a sister state as required by section 1, art. IV, and is a denial of the rights guaranteed under section 10, art. I, of the Constitution of the United States.
4. **Insurance.** Where a fraternal benefit society which had issued an ordinary whole life certificate to a member payable to one named as the wife of the member paid the policy without notice that the named beneficiary was not the legal wife of the member, the legal wife cannot thereafter recover the amount of the certificate, the society having paid in good faith and not having been guilty of any negligence.

APPEAL from the district court for Douglas county: CHARLES LESLIE, JUDGE. *Affirmed.*

*Mossman, Anderson & Meissner, E. J. Petersen* and *McKenzie & Dugan,* for appellant.

*Rainey T. Wells, J. M. Sturdevant, George Yeager, John F. Futcher* and *Albert F. Wahl, contra.*

Heard before GOSS, C. J., DAY, PAINE, CARTER and MESSMORE, JJ., and LIGHTNER and SPEAR, District Judges.

LIGHTNER, District Judge.

Plaintiff seeks to recover $2,000 from defendant. At the close of the evidence both sides moved for a directed verdict. The district judge found for defendant, and under well-established rules in Nebraska his finding and judgment have the potency of a jury verdict. Plaintiff appeals.

The facts which give rise to the controversy are that defendant, which is a fraternal benefit society, issued an ordinary whole life certificate of $2,000 to Frank A. Avondale, who was then and for some time prior thereto had been a citizen and resident of Lake Charles, Louisiana, in which certificate and in the application therefor he named as his beneficiary "Edna Theodora Avondale, wife." Mr. Avondale died on August 1, 1931, and within a short time after his death the said Edna Theodora Avondale made due proof of his death and the entire amount of the certificate and interest, $2,006.59, was paid to her. The certificate naming Edna Theodora Avondale, the application and the proof were all in due form and gave in our judgment no notice to the defendant of the facts now about to be stated.

The evidence establishes that Edna Theodora was not the wife of Mr. Avondale at the time of his death, although a marriage ceremony had been performed between them December 30, 1917. The plaintiff was married to Mr. Avondale in 1908, and the evidence further establishes that no divorce was ever granted. The woman Edna knew at the time of her marriage to Mr. Avondale that he had a wife living from whom he was not divorced.

Further facts, which we consider of little importance, are that a benefit certificate was issued to Mr. Avondale on March 2, 1910, while he was living in Florida, in which he named the plaintiff, Etta Avondale, as beneficiary. This certificate was surrendered on June 10, 1918, and a new certificate was issued to Mr. Avondale, who was then living in Louisiana, in which the woman Edna was named as beneficiary. Later this was surrendered and on the 27th of April, 1929, an ordinary whole life certificate was issued to Mr. Avondale, who was still living in Louisiana, which

was in effect when he died. It named the woman Edna "wife" beneficiary and she made proof and received payment thereof as such. Since Mr. Avondale had the right to surrender these prior certificates and could at any time have ceased to be a member of the society by failing to pay the premiums, we feel that the plaintiff can base no rights upon the original certificate. Her rights, if she has any, must be founded upon the provisions of our statute (Comp. St. 1929, sec. 44-1207) and the provisions of the by-laws limiting the beneficiaries to certain named classes, of which the woman Edna was not one, and the holding of our court to the effect that where the designation of beneficiaries is void one in the lawful classes may recover the benefit. It further appears that Mr. Avondale left no children and that the plaintiff is the only person within the lawful classes competent to take the benefits.

It is insisted in the briefs and oral arguments that it was not conclusively shown that Mr. Avondale was not divorced from his first wife. While the proof as to this fact was unsatisfactory, we think that it was sufficiently shown that no divorce was ever granted.

Another defense was that the woman Edna, regardless of her doubtful marital status, was a dependent and entitled to take the insurance as such, a dependent being within the prescribed classes, and cases are cited to the effect that an unlawful wife may take as a dependent. We have examined these cases and find the rule to be that a woman who believed in good faith that she was married to the deceased can recover. But the evidence here shows that the woman Edna began keeping company with Mr. Avondale while she knew that he was married to the plaintiff; that she went to the depot when Mr. Avondale sent his lawful wife away to California; that there was a marriage ceremony performed soon afterwards between her and Mr. Avondale when she must have known that he was not divorced from the plaintiff. Under these circumstances, the authorities cited by defendant cannot be applied.

There are however other considerations which in our

judgment make it impossible for plaintiff to recover in this suit. One of the defenses interposed by defendant is that its by-laws provide that "no suit shall be brought upon this certificate, unless such suit is commenced within one year from the date of death." It is the law that this would not be a valid provision if the certificate in question was a Nebraska contract. *Miller v. State Ins. Co.*, 54 Neb. 121, 74 N. W. 416; *Omaha Fire Ins. Co. v. Drennan*, 56 Neb. 623, 77 N. W. 67; *Grand View Bldg. Ass'n v. Northern Assurance Co.*, 73 Neb. 149, 102 N. W. 246.

The evidence shows that defendant issued the certificate April 29, 1929, and sent it to the clerk of the local camp at Lake Charles, Louisiana. He delivered it to Mr. Avondale on May 3, 1929, who at said time paid the monthly instalment thereon and signed an acceptance thereof as follows: "I have read the above certificate and accept the same, and warrant that I am now in good health and have not been sick or injured since the date of my application."

The authorities are to the effect that the state in which the last act of a contract is performed is the situs of the contract. 45 C. J. 56; *McElroy v. Metropolitan Life Ins. Co.*, 84 Neb. 866, 122 N. W. 27.

It is further established by the evidence that such a contract provision is valid in Louisiana. *Deal v. Sovereign Camp, W. O. W.*, 161 So. (La. App.) 621; *Edson v. Merchants Mutual Ins. Co.*, 35 La. Ann. 353; *Carraway v. Merchants Mutual Ins. Co.*, 26 La. Ann. 298; *Clark v. Sovereign Camp, W. O. W.*, 8 La. App. 478; *Blanks v. Hibernia Ins. Co.*, 36 La. Ann. 599; *Williams v. Knights of Pythias*, 144 So. (La. App.) 754.

Mr. Avondale died on August 1, 1931, and the present suit was filed on the 6th day of October, 1934.

A refusal of a state court to recognize as valid a provision that suit must be commenced within one year after the date of loss, where such provision is valid under the law of the state wherein the contract was executed and was to be performed, is a denial of the rights guaranteed by the "due process clause" of the Fourteenth Amendment

to the federal Constitution, is a refusal to give full faith and credit to the law of a sister state as required by section 1, art. IV, and is a denial of the rights guaranteed under section 10, art. I, of the Constitution of the United States. *Home Ins. Co. v. Dick,* 281 U. S. 397; *Hartford Accident & Indemnity Co. v. Delta & Pine Land Co.,* 292 U. S. 143; *Aetna Life Ins. Co. v. Dunken,* 266 U. S. 389; *New York Life Ins. Co. v. Dodge,* 246 U. S. 357; *New York Life Ins. Co. v. Head,* 234 U. S. 149.

The appellant relies to some extent on section 44-320, Comp. St. 1929, which provides: "No insurance company shall issue in this state any policy or contract of insurance containing * * * any provision limiting the time within which an action may be brought to less than the regular period of time prescribed by the statutes of limitations of this state."

"The words 'issue,' 'issuance,' and 'issued,' in reference to an insurance policy, are used in different senses, sometimes as meaning the preparation and signing of the instrument by the officers of the company, as distinguished from its delivery to insured, and sometimes as meaning its delivery and acceptance. *Brix v. People's Mutual Life Ins. Co.,* 124 Cal. App. 65, 12 Pac. (2d) 108, 109." 2 Words & Phrases (4th ser.) 454.

However, we do not think that it is necessary to go into this question at any length because section 44-1208, Comp. St. 1929, provides: "Such societies shall be governed by this article (article 12, ch. 44) and shall be exempt from the provisions of the statutes of this state relative to life insurance policies." And this court has already held in *Masters v. Modern Woodmen of America,* 102 Neb. 672, 169 N. W. 1, that section 44-345, Comp. St. 1929, pertaining to attorney's fees was not applicable in suits against fraternal benefit societies by reason of the provisions of section 44-1208, Comp. St. 1929.

Appellant contends that even if section 44-320, Comp. St. 1929, does not apply the defendant could not write a contract of insurance in Louisiana that it was not per-

mitted to write in Nebraska, and relies on *Modern Woodmen of America v. Mixer*, 267 U. S. 544, and *Supreme Council, Royal Arcanum, v. Green*, 237 U. S. 531, L. R. A. 1916A, 771, and other cases to the same effect. These cases hold that a fraternal society is a brotherhood and that in order to put all the members on an equality the laws of the state of the domicile govern throughout its domain, but this rule only applies in our judgment to corporate matters such as the making of an assessment.

The cases cited in support of appellant's contention that defendant is not permitted to write a contract of insurance in Louisiana that it was not permitted to write in Nebraska hold that, in all matters governing fraternal associations such as the payment of dues and laws governing the society, the laws of the state in which the society was organized control. In *Supreme Council, Royal Arcanum, v. Green*, 237 U. S. 531, L. R. A. 1916A, 771, it was held that the Massachusetts laws under which said society was organized controlled as to the validity of an increase in the assessment against a member, rather than the New York law in which the member lived and wherein the policy had been delivered to him. Later, in a case that originated in Nebraska, *Modern Woodmen of America v. Mixer*, 267 U. S. 544, the supreme court of the United States held that a by-law which provided that "long continued absence of any member unheard of shall not * * * give any right to recover on any benefit certificate * * * until the full term of the member's expectancy of life, according to the National Fraternal Congress table of mortality, has expired * * * and this law shall be in full force and effect any statute of any state or country or rule of common law of any state or country notwithstanding," was binding in Nebraska, because it had been held binding in Illinois where the society was organized, although the local law of Nebraska permitted a suit after the unexplained absence of a member for 7 years. Judge Holmes wrote the opinion and states the gist of the matter in his usual succinct manner as follows: "The indivisible unity between the

members of a corporation of this kind in respect of the fund from which their rights are to be enforced and the consequence that their rights must be determined from a single law, is elaborated in *Supreme Council, Royal Arcanum, v. Green,* 237 U. S. 531, 542. The act of becoming a member is something more than a contract, it is entering into a complex and abiding relation, and as marriage looks to domicile, membership looks to and must be governed by the law of the state granting the incorporation. We need not consider what other states may refuse to do, but we deem it established that they cannot attach to membership rights against the company that are refused by the law of the domicile. It does not matter that the member joined in another state."

It seems manifest to us that in all matters above referred to fraternal societies must be governed by the same laws so as to put all members in the entire domain in which the society transacts business on an equal footing, but it seems equally manifest to us that such a uniform rule is not necessary in matters of procedure. The period of limitations in the various states vary, and no one would contend that the law of the domicile of the society would control so as to establish a uniform rule. The same would be true of all procedural matters. It seems to us that the same is true of contract limitations such as the one requiring suit to be brought within one year. The law of the state where the contract was entered into is the law that must govern, which in this case is the law of Louisiana where a contract limitation similar to the one in question had been held valid and enforceable.

There is in our judgment still another reason why plaintiff cannot recover in this suit. Plaintiff and Mr. Avondale separated in May, 1917, and she did not thereafter live with him. He sent her a little money after she left, but soon ceased to do that, and some time thereafter wrote to the plaintiff stating that he had obtained a divorce from her and had remarried. Plaintiff relied upon this information and on the 18th day of January, 1928, married one Ole Lysne, with whom she lived as wife for a certain length

of time, although it appears that this marriage was later annulled. It is the opinion of the court that plaintiff lost none of her rights by her marriage to Mr. Lysne, but she never lived with Mr. Avondale after the time she left him in May, 1917. She continued to live in California. She could easily have ascertained that Mr. Avondale's marriage to the woman Edna was bigamous. She apparently acquiesced in the relationship that existed between them and took no action in regard to the benefit certificate and gave no notice of any claim to defendant company until after it had paid the woman Edna the full amount of the certificate. The defendant had the right in our judgment to rely upon the proof that was furnished to it and to pay the amount of the certificate to the woman Edna. The beneficiaries of these certificates usually need the money represented by them immediately and we do not believe that it would be good public policy to lay down the rule that a protracted investigation has to be made where the proceedings are regular in form and where there is nothing to show that such investigation is necessary. While the plaintiff bore toward Mr. Avondale the legal status of wife, she had not lived with him or depended upon him for many years. She has no moral claim to the amount of the certificate. *Daniels v. Grand Lodge,* 62 S. W. (2d) (Tex. Civ. App.) 548; *Modern Woodmen of America v. Shattuck,* 266 S. W. (Tex. Civ. App.) 621; *Grand Lodge v. Harris,* 109 Miss. 173, 68 So. 75; *Metropolitan Life Ins. Co. v. Louisville Trust Co.,* 28 Ky. Law, 426, 89 S. W. 268; *Renick v. Mutual Life Assurance Co.,* 32 Ky. Law, 506, 106 S. W. 310.

Some of the cases hold that payment in good faith to the beneficiary named in the benefit certificate prevents a second recovery; that the remedy of claimant, if any, is against the person who wrongfully collects the certificate. In *Daniels v. Grand Lodge,* 62 S. W. (2d) (Tex. Civ. App.) 548, under like circumstances the court held:

"We think the trial court correctly held that defendant, having acted in good faith upon the sworn statement of the insured and paid the amount of the insurance to the

beneficiary named by the insured and shown by the application to be legally entitled to receive the benefits of the certificate, cannot now be required to pay that amount to the plaintiff. If the defendant had been given any notice of Warner's want of any insurable interest in the life of the insured, the situation would of course be different, and the defendant would be liable to the plaintiff as the person legally entitled to the benefits of the certificate, but, in the absence of such notice, it cannot be held liable for the mistake or fraud of the insured in designating Warner as his nephew and having the policy made payable to him.

"Plaintiff's cause of action is against Warner and those who assisted him in wrongfully obtaining the benefits of the certificate."

Other cases seem to deny recovery unless the society has been guilty of negligence in making the payment.

The syllabus in *Grand Lodge v. Harris*, 68 So. 75 (109 Miss. 173) is as follows: "Where a colored order which issued a life policy payable to one named as the wife of the member paid the policy without notice that the named beneficiary was not the legal wife of the member, the legal wife cannot thereafter, the order having been guilty of no negligence, recover the amount of the policy."

In the opinion in the *Harris* case it is said:

"A great many court decisions are cited in support of the trial court's judgment. All these cases at all pertinent to the present case were cases wherein there was a contest between a person of the class eligible under the laws of the order to be made a beneficiary of death benefits and persons not so eligible, with the insurer or some other party acting as stakeholder. In all of these cases the courts enforced the laws of the order as the law of the case, and held that the legal beneficiary was entitled to the fund. No case has come to our attention wherein the facts are similar to the facts of this case.

"We do not understand that the laws of the Grand Lodge compel the lodge to pay to some one of the class mentioned as legal beneficiaries. The member of the lodge who

seeks insurance must name the beneficiary. If he names a beneficiary not entitled to share in the benefits conferred by the laws of the order, the Grand Lodge is not required to pay the sum to such named beneficiary. The Grand Lodge, in the present case, was not bound to pay the money to Katie, and if Mamie had propounded her claim before it had been paid to Katie, it may be conceded for the purposes of this case that in a contest between the rival claimants the courts would award the fund to the lawful widow. That is not the case here. The lodge paid the money to the person named in the policy, who, so far as the lodge knew or had reason to believe, was, as she represented herself, the widow of the deceased brother.

"We do not believe that the lodge was under any obligations to search the records of all the counties for the purpose of ascertaining whether or not the brother was the owner of more than one wife, or to demand of the claimant that she produce her marriage certificate."

In *Smiley v. Modern Woodmen of America,* 112 Neb. 10, 198 N. W. 157, Judge Rose said: "Of course, payment in good faith, without notice of a rival claim, to the person substituted by the by-laws for the original beneficiary would have prevented a recovery by plaintiffs in an action between them and the insurer, but that is not the case presented." However, in that case the person referred to by Judge Rose as substituted by the by-laws was the surviving wife of the insured and was eligible to take, whereas the woman Edna in this case was not eligible. Nevertheless, under the circumstances, the defendant having paid the certificate once is not required to pay it a second time.

The judgment of the district court is

AFFIRMED.

MAUD OHME, APPELLEE, V. FRANK THOMAS ET AL., APPELLANTS.

279 N. W. 480

FILED MAY 6, 1938. No. 30176.

1. **Appeal.** "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." *Johnson v. Erickson*, 110 Neb. 511, 194 N. W. 670.
2. **Adverse Possession.** Where a fence is constructed as a boundary fence between two properties, and where the parties claim ownership to the fence for the full statutory period of ten years, and are not interrupted in their possession or control during that time, they will, by adverse possession, gain title to such land as may have been improperly inclosed with their own.
3. **Evidence** examined, and *held* to support the action of the trial court in denying to defendants the benefits of the occupying claimant's act.

APPEAL from the district court for Sioux county: EARL L. MEYER, JUDGE. *Affirmed.*

*Auburn H. Atkins*, for appellants.

*Morrow & Morrow, contra.*

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

EBERLY, J.

This is an action to quiet title to a strip of land situated between the adjoining farms of plaintiff, Maud Ohme, and defendant Frank Thomas. The land in controversy is a tract twenty-nine feet wide on the east end and eight and one-half feet wide on the west end, and it extends across the quarter-section wherein situated. In September, 1907, the husband and grantor of plaintiff, Maud Ohme, entered a United States government homestead on the north half of the southeast quarter of section 30, township 24 north, range 56, west of the 6th P. M. In October or November

following, the defendant Frank Thomas entered a homestead on the south half of the southeast quarter of said section 30 aforesaid. In 1908 both parties took up their residences on their respective homesteads. Frank Thomas received his patent in 1915, and has remained in continuous possession of his homestead since 1908. In 1931 Otto Ohme, who had also become the patentee of his land, conveyed his homestead to his wife, plaintiff herein, and the possession of their homestead, including the strip of land in dispute, has likewise been continuous in this husband and wife from the date of the first occupation of their homestead. After an extended hearing upon evidence in part conflicting, and visits to the *locus in quo*, a decree was entered substantially as prayed by plaintiff, quieting title to the disputed strip of land in her, and awarding other relief consistent therewith. From this decree the defendants appeal.

Four errors are assigned in appellants' brief, which, in view of the record, may properly be covered by a determination of the sufficiency of the evidence, and of the refusal of the trial court to allow full reimbursement under the occupying claimant's act.

The trial court heard the witnesses, and visited the premises which are level with a southerly slope, and made an inspection of at least part thereof, and from the situation as indicated by the evidence, the entire terrain was then and there open to view.

Under the circumstances here presented, the controlling principle is, viz.: "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." *Johnson v. Erickson*, 110 Neb. 511, 194 N. W. 670. See, also, *Gentry v. Burge*, 129 Neb. 493, 261 N. W. 854; *Higgins v. Adelson*, 131 Neb. 820, 270 N. W. 502.

While the evidence in this case is conflicting as to the manner in which the improvement was made, it is clearly established that by 1916 the division fence was actually built where it now remains, along and north of an irrigation lateral constructed by defendant Thomas. Just north of and along this ditch division fence trees were planted in 1909 by Otto Ohme. This line of trees was originally three feet from the division fence, and was planted from the east terminus of the lateral the full length of the dike. These trees were approximately four feet in diameter at the time of trial. All of the farm lands lying north of this fence had been continuously and without interruption farmed up to the fence by the Ohmes and their tenants since before 1916, as owners thereof, and where the farm buildings and improvements were situated the land was also continuously used for that purpose by the Ohmes for the same period of time. No other person used it for farming purposes during that time. There was, according to the weight of the evidence, no substantial interruption of this possession which was under claim of ownership on part of the Ohmes, asserted and maintained for more than 16 years prior to 1934, and likewise continuously since that time to date of trial. In the fall of 1934, while plaintiff and her husband were temporarily absent in California, the defendants entered the disputed strip of land and sunk a well north of the lateral and within this strip of land in suit. Ohme never learned of this incursion until in September, 1934. And the evidence in the record is to the effect that neither Frank Thomas nor Everett Thomas, nor any one representing them, ever used the land north of the division fence until they put down this well in 1934, in the absence of Mrs. Ohme and her husband.

The facts disclosed by the record bring this case within the well-established rule in this state that, where a fence is constructed as a boundary fence between two pieces of property, and where the parties claim ownership to the fence for the full ten-year statutory period, and are not interrupted in their possession or control during such

time, they will, by adverse possession, gain title to such land as may have been improperly inclosed with their own. *Carnahan v. Cummings*, 105 Neb. 337, 180 N. W. 558; *Pfeifer v. Scottsbluff Mortgage & Loan Co.*, 105 Neb. 621, 181 N. W. 533; *Krumm v. Pillard*, 104 Neb. 335, 177 N. W. 171; *Zweiner v. Vest*, 96 Neb. 399, 147 N. W. 1129; *Andrews v. Hastings*, 85 Neb. 548, 123 N. W. 1035; *Sittler v. Wittstruck*, 122 Neb. 452, 240 N. W. 562.

In this connection, possession may be adverse without any declaration of hostility against the true owner. *City of Florence v. White*, 50 Neb. 516, 70 N. W. 50.

And, again, the occupant's intention at the time he took possession is not necessarily a controlling factor. It is sufficient if possession is taken and the premises held actually, openly, notoriously, adversely, and exclusively for ten years under a claim of ownership. *Fitzgerald v. Brewster*, 31 Neb. 51, 47 N. W. 475; *Erickson v. Crosby*, 100 Neb. 372, 160 N. W. 94.

The trial court denied relief to Frank Thomas for expenditures for the construction of the well on the disputed strip of land in 1934, for the reason that he "does not come under the occupying claimant's act." The evidence clearly discloses that defendants entered upon this land in the character of incursionists, and constructed the well while the plaintiff, the then owner of the land, was away from home, six years after plaintiff's rights as owner thereof by virtue of ten years notorious, open, continuous, adverse, and exclusive possession had fully accrued, and at a time when circumstances prevented the present protection of her rights so acquired. Thus, necessary good faith lacking, it appears that the defendants do not come within the scope of the occupying claimants act. 31 C. J. 320; *Davidson v. McDonald*, 131 La. 1047, 60 So. 679; *Wright v. Johnson*, 108 Va. 855, 62 S. E. 948; *Titus v. Poland Coal Co.*, 275 Pa. St. 431, 119 Atl. 540; *Carter v. Brown*, 35 Neb. 670, 53 N. W. 580.

As to defendants' claim for taxes paid, a careful consideration of the evidence discloses that this claim is not

established thereby in excess of the amount allowed by the trial court.

Therefore, it follows that the judgment of the trial court is right, and it is

AFFIRMED.

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NEW MASONIC TEMPLE ASSOCIATION, APPELLEE, V. GLOBE INDEMNITY COMPANY, APPELLANT.
279 N. W. 475

FILED MAY 6, 1938. No. 30185.

1. **Contracts**: CONSTRUCTION. "When an instrument consists partly of written and partly of printed form, the former controls the latter, where the two are inconsistent." Comp. St. 1929, sec. 20-1216.
2. ———: ———. Typewriting is "writing," within the contemplation of such statute. *American Surety Co. v. School District*, 117 Neb. 6, 219 N. W. 583; *Flower v. Coe*, 111 Neb. 296, 196 N. W. 139; *Petersen v. City of Omaha*, 120 Neb. 219, 231 N. W. 763.
3. **Insurance**: POLICY: CONSTRUCTION. "If an insurance policy is so drawn as to require interpretation, and to be fairly susceptible of two different constructions, the one will be adopted that is most favorable to the insured. The language employed is that of the insurer and it is consistent with both reason and justice that any fair doubt as to the meaning of its words should be resolved against it." *Baumgart v. Sovereign Camp, W. O. W.*, 127 Neb. 865, 257 N. W. 269.
4. ———: ———: ———. "If any uncertainties or ambiguities appear in an insurance policy which may be solved by either one of two reasonable constructions, the one that is more favorable to the insured and which will give life, force and effect to the policy should be adopted." *Morse v. General American Life Ins. Co.*, 130 Neb. 37, 263 N. W. 676.
5. **Cases Distinguished.** *Omaha Bridge & Terminal R. Co. v. Hargadine*, 5 Neb. (Unof.) 418, 98 N. W. 1071; *Hargadine v. Omaha Bridge & Terminal R. Co.*, 76 Neb. 729, 107 N. W. 864; *Boyd v. Humphreys*, 117 Neb. 799, 223 N. W. 658; *Matthews v. Crancer Co.*, 117 Neb. 805, 223 N. W. 661; *Sloan v. Harrington*, 117 Neb. 809, 223 N. W. 663, distinguished.
6. **Master and Servant**: WORKMEN'S COMPENSATION LAW: "EMPLOYER." "Owner of building, used in conducting owner's busi-

ness, who enters into contract with contractor for certain repairs to said building, is an 'employer' within the terms of section 48-116, Comp. St. 1929, unless it be shown that the contractor was required to procure compensation insurance for protection of his employees." *Jones v. Rossbach Coal Co.*, 130 Neb. 302, 264 N. W. 877.

7. Insurance: POLICY: CONSTRUCTION. Policy in suit construed, and *held* an indemnity contract providing coverage for the liabilities here in controversy.

APPEAL from the district court for Lancaster county: ELLWOOD B. CHAPPELL, JUDGE. *Affirmed.*

*Hall, Cline & Williams*, for appellant.

*Beghtol, Foe & Rankin, contra.*

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

EBERLY, J.

This is an action at law to recover upon a policy of insurance issued to plaintiff, New Masonic Temple Association, by defendant, Globe Indemnity Company. The parties will be referred to herein as in the court below. In that court, a jury was waived by the parties, the issues made up by the pleadings, and evidence introduced, at the conclusion of which findings of fact and of law were made, and judgment entered in favor of plaintiff and against defendant. From the order of the trial court overruling its motion for a new trial, defendant appeals.

The record presents questions of law, none of fact. The issuance of the policy in suit in the form established by the evidence is admitted by the pleadings. The payment of the premium is not denied. That the policy was in full force and effect at the time the transaction occurred which furnishes the basis of this litigation, the pleadings and evidence sustain. It thus appears that on or about September 18, 1934, one John Brotzman was in the employ of one Christopher A. Nootz, as a plasterer and cement worker. Nootz had entered into a contract with plaintiff to make certain repairs on a building owned by it, a corporation having power to maintain and own the said building. While

Brotzman was thus employed by Nootz, and in the course of the regular business of making repairs on this building so owned, he sustained personal injuries in an accident arising out of and in the course of his employment, occasioned by falling from the roof of the building on which he was working. At the time of said accident, Christopher A. Nootz, his immediate employer, had failed to obtain and have in force any workmen's compensation insurance to protect defendant, and the New Masonic Temple Association likewise had failed to require the said Nootz to procure and have in force workmen's compensation insurance, as provided by the Nebraska workmen's compensation act, and to otherwise avoid liability under that act. As a result of this transaction, and in a proper proceeding had for that purpose, a judgment was made and entered in favor of Brotzman, based on the injuries thus sustained by him, and against the New Masonic Temple Association in the sum of $2,664.34 and costs. The demands upon defendant for reimbursement were then refused by it. Thereupon action was instituted by plaintiff, resulting as hereinbefore set forth.

The sole challenge presented by defendant in this court is that the coverage provided for in the policy in suit does not extend to nor cover any liability for this accident suffered by Brotzman.

It may be fairly inferred that, in the negotiations which preceded the issuance of the policy in suit, it was discovered that the printed forms of the defendant company did not conform to the situation of the insured, nor cover the risks for which insurance was then sought, and that a change thereof was necessary. Accordingly, the following paragraphs were typewritten on the face of the policy, viz.:

"It is agreed by the Insuring Company that the words 'not employed by the Assured' appearing in the fourth line of the first paragraph of 'Insuring Agreements' Number One (1) shall be stricken out and become of no force or effect."

Also, "The 'Insuring Agreements,' as set out in a contract of insurance under General Liability Policy #GL-856117, as included within paragraphs numbered from one (1) to four (4) issued by the Globe Indemnity Company, are hereby declared to include within their definition and the liability assumed that the Company agrees to indemnify the assured against loss by reason of accidental bodily injuries to persons who may be so injured while upon the premises of the assured or the ways adjacent thereto, without regard to the relation of the person so injured may bear to the Assured, in so far as it relates to the employment, directly or indirectly, of the person so injured."

The "Insuring Agreements" as originally set forth in the blank form of policy employed by defendant, were as follows:

"To pay to the persons entitled thereto any sums imposed by law upon the Insured as damages on account of bodily injuries, including death at any time resulting therefrom, accidentally suffered or alleged to have been so suffered from any cause whatsoever during the policy period defined in Statement No. 6, by any person or persons *not employed by the Insured,* or by any employee of the Insured *if such injuries do not arise directly or indirectly out of and in the course of his employment by the Insured or in connection therewith,* while within or upon the premises designated in Statement No. 4 as the premises to which this policy applies or upon the sidewalks, areas, or other ways immediately adjacent to the said designated premises, or away from the said designated premises if caused by an employee in the course of his employment by the Insured in connection with the business of the Insured conducted on the said designated premises." (Italics supplied.)

In connection with these "Insuring Agreements" defendant insists that plaintiff's contentions are foreclosed by the following printed provisions as contained in the original printed form of policy, viz.:

"The Agreements of this policy are subject to the following conditions: * * * This policy shall not apply in re-

spect of any liability voluntarily assumed by the Insured under any agreement, oral or written, or any liability, imposed upon or voluntarily accepted by the Insured, by reason of obligations, requirements, impositions, or penalties under any workmen's compensation plan or law."

In determining whether indemnity against John Brotzman's claim on account of injuries suffered is within the coverage of the policy of insurance in suit, the instrument must be construed as an entirety, and read in the light of certain canons of construction, of which we refer to the following:

"When an instrument consists partly of written and partly of printed form, the former controls the latter, where the two are inconsistent." Comp. St. 1929, sec. 20-1216. And typewriting is "writing," within the contemplation of such statute. *American Surety Co. v. School District,* 117 Neb. 6, 219 N. W. 583; *Flower v. Coe,* 111 Neb. 296, 196 N. W. 139; *Petersen v. City of Omaha,* 120 Neb. 219, 231 N. W. 763.

"If an insurance policy is so drawn as to require interpretation, and to be fairly susceptible of two different constructions, the one will be adopted that is most favorable to the insured. The language employed is that of the insurer and it is consistent with both reason and justice that any fair doubt as to the meaning of its words should be resolved against it." *Baumgart v. Sovereign Camp, W. O. W.,* 127 Neb. 865, 257 N. W. 269. See, also, *Arendt v. North American Life Ins. Co.,* 107 Neb. 716, 187 N. W. 65; *Funke Estate v. Law Union & Crown Ins. Co.,* 97 Neb. 412, 150 N. W. 262; *Connecticut Fire Ins. Co. v. Jeary,* 60 Neb. 338, 83 N. W. 78.

So, too, "If any uncertainties or ambiguities appear in an insurance policy which may be solved by either one of two reasonable constructions, the one that is more favorable to the insured and which will give life, force and effect to the policy should be adopted." *Morse v. General American Life Ins. Co.,* 130 Neb. 37, 263 N. W. 676. See, also, *Schollman v. Prudential Ins. Co.,* 130 Neb. 662, 266 N. W. 75.

Reading and harmonizing the typewritten provisions of the policy in suit with the printed provisions appearing on the printed form employed by defendant, in compliance with the principles of construction hereinbefore set forth, it is obvious that the italicized words, "not employed by the insured," originally appearing in the first paragraph of the printed "Insurance Agreements" have been stricken out, and become of no force and effect. Thereby what was originally intended in the printed policy form as a term of exclusion from insurance coverage provided by this policy ceases to exercise that function. In other words, the effect of this typewritten provision is to extend the insurance coverage to all persons without reference to employment by the insured. This conclusion is fortified by the express terms of the language of the second paragraph of typewritten provisions hereinbefore set out, wherein the coverage of the policy is, in express terms, extended to include "bodily injuries to persons who may be so injured while upon the premises of the assured * * * *without regard to the relation of the person so injured may bear to the Assured, in so far as it relates to the employment, directly or indirectly, of the person so injured.*" (Italics supplied.) The necessary effect of this language we have italicized, properly construed, is to remove from the terms of the policy the italicized words, "if such injuries do not arise directly or indirectly out of and in the course of his employment by the Insured or in connection therewith." The language last quoted is obviously wholly inconsistent with the express words of the typewritten provision, in effect that liability to indemnity shall be "without regard to the relation of the person so injured may bear to the Assured, in so far as it relates to the employment, directly or indirectly, of the person so injured." This typewritten provision necessarily excludes from consideration the printed form so far as inconsistent therewith. These conclusions are not wholly denied by defendant, for it apparently concedes that the typewritten provisions are effective to change the coverage so far as employees are concerned, but insists

that as to "third persons" no change was made. It is the thought of the writer of this opinion that a change of liability was effected as to both employees and third persons. Nevertheless, this difference of view may not be vital so far as the determination of the issues here presented is concerned. The gist of defendant's contention appears to be that the relationship of Brotzman to plaintiff was not that of an employee, and therefore, Brotzman not being an employee of plaintiff, he was not within the coverage of the policy. This apparently involves a concession that, if Brotzman was an employee of plaintiff under the terms of the policy, liability of defendant would be established. In support of this contention defendant cites as sustaining its contention the following Nebraska cases, viz.: *Omaha Bridge & Terminal R. Co. v. Hargadine,* 5 Neb. (Unof.) 418, 98 N. W. 1071; *Hargadine v. Omaha Bridge & Terminal R. Co.,* 76 Neb. 729, 107 N. W. 864; *Boyd v. Humphreys,* 117 Neb. 799, 223 N. W. 658; *Matthews v. Crancer Co.,* 117 Neb. 805, 223 N. W. 661; *Sloan v. Harrington,* 117 Neb. 809, 223 N. W. 663.

We do not overlook cases cited by defendant from other jurisdictions to sustain this position, which are regarded as inapplicable to the question here presented, because of arising in the interpretation of statutes the terms of which are essentially different from our own.

It will be noted that the transaction before us is one within the purview of our workmen's compensation act, originally passed in 1913. The *Hargadine* cases, cited by defendant, were decided by this court in 1904 and 1906, respectively, and prior to the adoption of our compensation act, and hence have no direct application to the present controversy.

*Boyd v. Humphreys, supra, Matthews v. Crancer Co., supra,* and *Sloan v. Harrington, supra,* are decisions under our workmen's compensation act, but are inapplicable to, and do not decide, the question presented in the instant record. In each of the three cases last referred to, the compensation statute requiring the contractor to take out ade-

quate insurance for the benefit of his employees had been fully complied with. This fact formed the controlling element of the decisions cited. The requisite adequate insurance being in force, upon this basis this court properly held that the owner of the property on which the contractor was employed was not the employer of the contractor's employees, nor liable as such. In the instant case, the required insurance was not provided by the contractor, nor required by the owner of the property. Under the terms of section 48-116, Comp. St. 1929, the owner of the property then and thereby became included in the term "employer," and with the immediate employer became jointly and severally liable to pay the compensation therein provided. In view of the difference in controlling facts, this conclusion was wholly inapplicable to the three cases cited by defendant, above referred to. Defendant's contention in this respect is fully answered, not only in the express terms of the statute referred to, but by the pronouncement of this court in *Jones v. Rossbach Coal Co.*, 130 Neb. 302, 264 N. W. 877, wherein we held, viz.:

"Owner of building, used in conducting owner's business, who enters into contract with contractor for certain repairs to said building, is an 'employer' within the terms of section 48-116, Comp. St. 1929, unless it be shown that the contractor was required to procure compensation insurance for protection of his employees." See, also, *Sherlock v. Sherlock*, 112 Neb. 797, 201 N. W. 645.

It follows that, the New Masonic Temple Association being, in law, under the facts in the instant case, an employer of Brotzman, the damages it suffered occasioned by his injuries are, as the issues in this case are here presented, within the indemnifying provision of the contract of insurance in suit.

But this decision is not to be limited to the point here under discussion, for, construing the policy as an entirety, we find the printed condition hereinbefore quoted is wholly ineffective to limit the scope of the coverage set forth in the "Insuring Agreements" as modified and enlarged by

the typewritten clauses constituting a part of the insurance policy in suit. Resolving ambiguities and conflicts in the language employed in favor of the insured, it is plain that the typewritten clauses set out herein extend the coverage of the policy to include Brotzman's injuries, as "accidental bodily injuries to persons who may be so injured while upon the premises of the assured * * * without regard to the relation of the person so injured may bear to the Assured, in so far as it relates to the employment, directly or indirectly, of the person injured."

It follows that the judgment of the trial court is right, and it is

AFFIRMED.

YEAGER, District Judge, dissents.

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STATE, EX REL. JOHN D. ZEILINGER, APPELLANT, V. EDGAR THOMPSON, APPELLEE.
279 N. W. 462

FILED MAY 6, 1938. No. 30208.

1. **Statutes:** JUDICIARY ACT. The nonpartisan judiciary act, sections 32-1201 to 32-1208, Comp. St. Supp. 1937, with its amendments, is a statute complete in itself and relates to an independent subject.
2. ———. A statute may be a complete and independent act even though the legislature adopts the provisions of prior acts by reference.
3. **Elections.** The nonpartisan judiciary act does not provide for nor prohibit the writing in of names on the nonpolitical ballot.
4. ———. Under such circumstances, the general election law is applicable, the nonpartisan judiciary act having provided that the general election laws shall apply so far as the same are applicable and not inconsistent with the provisions of that act.
5. ———. Section 32-508, Comp. St. 1929, of the general election laws, providing that a blank space shall be provided into which electors may write the name of any person for whom they wish to vote, and whose name is not printed upon the ballot, is incorporated into the nonpartisan judiciary act and becomes a part thereof by reference.

APPEAL from the district court for York county: HARRY D. LANDIS, JUDGE. *Affirmed.*

*Waring & Waring*, for appellant.

*C. E. Sandall, contra.*

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

CARTER, J.

This is an action in *quo warranto* brought in the district court for York county to test the right to the office of county judge of that county, of the respondent, Edgar Thompson. The relator and claimant to the office is John D. Zeilinger. The trial court sustained a demurrer to the information and dismissed the action. The relator appeals.

It appears from the record that the relator and one George W. France were regularly nominated for the office of county judge for the term commencing in January, 1937. The county clerk, in making up the general election ballot, included a blank line below the names of the regularly nominated candidates in order that the electors, if they desired, might write in the name of some other person for the office. At the general election held on November 3, 1936, the respondent, Edgar Thompson, received more votes by having his name written in for the office than either of the two regularly nominated candidates. A certificate of election was issued to respondent and he thereupon qualified and has held the office since January, 1937. Relator, who had the next highest number of votes, also qualified by giving bond and taking the oath of office but has never taken over the office because of the alleged wrongful act of the respondent in holding it.

The question for determination is whether the blank line provided for the writing in of a name for the office of county judge was proper and whether the respondent, after receiving the highest vote for the office by having his name written in, was lawfully elected to the office.

The nonpartisan judiciary act, sections 32-1201 to 32-

1208, Comp. St. Supp. 1937, with its amendments, is a statute complete in itself and relates to an independent subject. *State v. Penrod,* 102 Neb. 734, 169 N. W. 266. It is an elementary rule of construction that special provisions in an act relating to particular subject-matter will prevail over general provisions in other statutes, so far as there is a conflict. *Williams v. Williams,* 101 Neb. 369, 163 N. W. 147. Also, the mere fact that an act of the legislature adopts the provisions of prior acts by reference thereto does not render the new act amendatory of the acts to which reference is made, if in other respects it is a complete act in itself. *State v. Ure,* 91 Neb. 31, 135 N. W. 224.

The nonpartisan judiciary act makes no provision for the adding of lines for the convenience of the voter in writing in a name of a person for the office that is not printed on the ballot. Relator contends that the words "but in no event shall the names on the official ballot in each office division be more than twice the number of offices to be filled at the said general election" and "the candidate or candidates receiving the highest number of votes at said general election shall be declared duly elected to the office or offices for which they were candidates," contained in section 32-1203, Comp. St. Supp. 1937, prohibit the adding of a line below the names of the regularly nominated candidates for write-in purposes. It is our opinion that this section means that the regular candidates shall be the only candidates whose names shall be *printed* on the ballot and does not prohibit the writing in of names for the office. In a case involving like statutory provisions, this court said: "We understand the provision that the only candidates 'whose names shall be placed upon the official ballot' (sec. 7) at the city election means that these are the only candidates whose names shall be printed on the official ballot, and we find no prohibition against any voter inserting the names of such other persons as he may desire to vote for." *State v. Ure, supra.* We conclude that the nonpartisan judiciary act does not prohibit the writing in of names on the nonpolitical ballot or the placing of blank

lines for the convenience of voters desiring to write in the names of other candidates.

The general election law of this state provides in part as follows: "In each division, and beneath all candidates placed there by nomination or petition, a blank space shall be provided, into which electors may write the name of any person for whom they wish to vote and whose name is not printed upon the ballot." Comp. St. 1929, sec. 32-508. It is apparent that the legislature never intended to limit the voter to the candidates whose names appear on the ballot, under the general election laws of this state, but left to him the choice of writing in the name of any person for whom he desired to vote. The nonpartisan judiciary act also provides: "In all other respects the general laws in force in this state respecting the holding, conducting and declaring the results of any such general election shall apply so far as the same are applicable and not inconsistent with the provisions of this act." Comp. St. Supp. 1937, sec. 32-1203. In commenting upon these very provisions of our statutes, this court said: "Thus it is plain this judicial act provides that every section of the election laws of this state shall be read into and become a part of this act in so far as they are not in conflict with the provisions of the act, and necessary to its plan and purpose, and every printed official ballot of this nonpartisan judicial act provides, according to law, a blank space for the voter to write in the name of any one whom he wishes to vote for. In other words, it is the statutory provision of the election laws of this state that a blank space be left for persons not named 'in each division, and beneath all candidates placed there by nomination or petition, a blank space shall be provided, into which electors may write the name of any person for whom they wish to vote and whose name is not printed upon the ballot.' Rev. St. 1913, sec. 1995. Thus it is the policy of the election laws of this state to make the provision so liberal and unhampered that a voter can exercise the right of suffrage for whomever he pleases, and shall not be bound to vote exclusively for those whose names

are printed on the ballot, but for any one whom he chooses to vote for, by writing in his name and placing a cross opposite." *State v. Hogeboom,* 103 Neb. 603, 173 N. W. 589.

In *State v. Penrod, supra,* this court said: "The nonpartisan act having no such provision, and its language seeming to contemplate that there may be but one candidate at the general election, we are convinced that it was the legislative intent that the candidates whose names appear on the nonpartisan ballot at the general election must be restricted to such candidates as have been nominated under that act at the primary. Of course, this does not prevent the voter from writing on the ballot at the general election the name of any person for whom he wants to vote." While the last sentence of the above quotation states a proposition that was not before the court for decision in that case, nevertheless it is some indication of the interpretation that was placed upon it at that time by this court. We believe that it properly states the law in the case at bar.

It appearing that the nonpartisan judiciary act makes neither a provision for nor a prohibition against the placing of blank lines below the list of regularly nominated candidates for the convenience of electors desiring to vote for persons whose names were not printed on the ballot by writing in their names, the general election laws with reference thereto are applicable under the express provisions of the nonpartisan judiciary act. This being true, the county clerk properly placed the blank lines for write-in purposes on the ballot and the votes written in for respondent were properly counted. The trial court was right in sustaining the demurrer to relator's information.

AFFIRMED.

HOWARD KENNEDY, TRUSTEE, APPELLANT, V. BUFFALO COUNTY, APPELLEE.
279 N. W. 464

FILED MAY 6, 1938. No. 30271.

1. **Taxation.** In an appeal from a board of equalization by a taxpayer, wherein such board fixed the value of his property for taxes, the burden of proof is on the appealing taxpayer to show that the action of the board of equalization is erroneous.
2. ———: ASSESSMENT. Where it appears that land, compared to complainant's land, is assessed too low, such fact, in and of itself, will not warrant a reduction of the assessed valuation of complainant's land.
3. ———: ———: APPEAL. "The assessment of property for the purpose of taxation as ultimately fixed by the board of equalization is final, except upon appeal to the district court, and should not be disturbed on such appeal unless it appears from clear and convincing proof that it is erroneous." *First Nat. Bank of Blue Hill v. Webster County*, 77 Neb. 815, 113 N. W. 190.
4. ———: ———. "'Farm lands,' for the purpose of taxation, shall be valued and assessed at their actual cash value—their value in the market in the ordinary course of trade." *Schulz v. Dixon County*, *ante*, p. 549, 279 N. W. 179.

APPEAL from the district court for Buffalo county: BRUNO O. HOSTETLER, JUDGE. *Affirmed.*

*King & Haggart* and *M. H. Worlock*, for appellant.

*Guy N. Henninger* and *George A. Munro*, *contra.*

Heard before GOSS, C. J., EBERLY, PAINE, CARTER and and MESSMORE, JJ., and LIGHTNER and SPEAR, District Judges.

MESSMORE, J.

Plaintiff, trustee for certain bondholders under a mortgage which was foreclosed and the land bid in by the trustee, appeals from a decree and judgment of the district court for Buffalo county, wherein said court dismissed plaintiff's petition, finding that the valuations placed for assessment purposes for the year 1936 upon approximately 700 acres of land situated within Kearney School

District No. 7, about 400 acres of which are within the city limits of Kearney, were not excessive, in comparison with the valuation of other lands of similar character lying within Kearney School District No. 7, or situated adjacent thereto.

The petition of plaintiff and answer of defendant properly present the issues for this court's determination. The case is tried *de novo* upon an independent investigation of the record and the law applicable thereto, and presents primarily a question of fact. Plaintiff sets out four paragraphs in his brief wherein he contends the trial court erred. Paragraphs 1, 3 and 4 are to the effect that the evidence fails to support the findings and decree of the trial court. Paragraph 2 relates to the overruling of paragraphs 7 and 8 of plaintiff's motion for a new trial, respecting comparative tax burdens, as follows: "That the court erred in finding that the board of equalization took into consideration the comparative tax burden upon part of the plaintiff's land and that of other land outside District No. 7;" and "That the court erred in finding that there exist differences in productivity, location, or other factors sufficient to account for the differences in valuation and tax burden between the plaintiff's land and other comparable land." This alleged error refers to the insufficiency of the evidence to support the findings and decree of the trial court. All of the aforementioned errors relate to questions of fact which must be determined from the evidence.

The evidence is, for the most part, directed to the value of the land in question and of other lands in School District No. 7, in School District No. 114 and in School District No. 12, and directed mostly to the comparison of values, the productivity of said lands, for the purposes for which they are used, and all matters generally that pertain to their valuation, the evidence being largely opinions of experts.

The lands involved in this proceeding consist of the north half of section 3 and 122 acres of pasture land in section 34, within the city limits of Kearney, Nebraska,

in School District No. 7. The south half of section 3 is within School District No. 7, but outside of the city limits. School District No. 7 extends a mile and a half west of section 3; School District Nos. 114 and 12 lie further west. The average assessed valuation, as testified to by W. R. King, of land in School District No. 7, consisting of 16 tracts as shown by exhibit 1, which is a map received in evidence, is $48.30 an acre; the average assessed valuation of 11 tracts located in School District No. 114 is $39 an acre; and of 20 tracts in School District No. 12 is $45 an acre. The average tax per acre on lands in School District No. 7 is $1.76; in School District No. 114 is 56 cents, and in School District No. 12 is 60 cents, with no prospects of reduction in valuation in School District No. 7 in the immediate future. The valuation of lands appearing on exhibit 1 has not been materially reduced since 1933. The aforementioned figures were computed only on agricultural land.

The evidence of the plaintiff is to the effect that all of the plaintiff's land is used exclusively for agricultural purposes, excluding a small acreage out of the center of section 3 on the north side containing six acres. The plaintiff's lands are described and shown in his brief, together with the number of acres, the value per acre, exclusive of improvements, the 1936 mill levy, and the tax per acre, as follows:

| | Acres | Value per acre | 1936 Mill levy | Tax per acre |
|---|---|---|---|---|
| Tract I, S.½ of section 3 | 303 | $55.27 | 31.54 | $1.74 |
| Tract II, N.½ of section 3 | 218 | 74.17 | 42.686 | 3.31 |
| Tract III, Villa lots | 39 | 175.00 | 42.686 | 7.85 |
| Tract IV, South of Villa lots | 12 | 90.00 | 42.686 | 4.02 |
| Tract V, Around improvements | 11.51 | 71.50 | 42.686 | 3.17 |
| Tract VI, Pasture | 122 | 20.00 | 42.686 | .89 |

Tract III of plaintiff's land, as set out above, carries a tax burden of $7.85 an acre. This land was platted for residence lots. There is a tourist camp on a part thereof. Its location is advantageous for suburban property. The evidence discloses that the lots have not sold to any extent since they were platted. The plaintiff's land has the advantage of fire and police protection from the city of Kearney, of electric lights along the highway, free delivery service by the merchants of the city; the facilities of modern, well-equipped junior and senior high schools and transportation to and from school paid by the district. The lands, compared by plaintiff with the land here involved, are outside of School District No. 7. A brief summary of some of the expert testimony in this respect may be advantageous, and follows:

The F. L. Robinson land is valued at $43.91 an acre, exclusive of improvements; the 1936 mill levy was 14.6 mills and the tax per acre was 64 cents. The west half of this land is very choice and its distance from section 3 is a mile and a half. The Mansfield land, considered as good land as plaintiff's, and consisting of 319 acres, is valued at $40.46 an acre, exclusive of improvements, with 14.6-mill levy for 1936; tax per acre 59 cents; distance from section 3 is three miles. The Roy Knapp land, considered by plaintiff's witness as choice, if not the best land in the county, consisting of 147 acres, is valued at $45.60 an acre, exclusive of improvements, with a 14.6-mill levy for 1936; tax per acre 67 cents; distance from section 3 is 3½ miles. The E. S. Kentner land, which is valuable land, and whose productivity and fertility are analogous to plaintiff's land, consists of 158 acres, valued at $37.47 an acre, exclusive of improvements, with a 14.28-mill levy, with a tax burden per acre of 54 cents; distance from section 3 is four miles. There are other comparisons in the record of plaintiff's land with land outside of School District No. 7, with the same mill levies, and where the highest range of tax per acre is 78 cents. Plaintiff's land carries a perpetual water right of the value of $1.50 an acre per year, which must

be taken into consideration, together with other evidence respecting plaintiff's land, as hereinbefore set out.

The values placed on plaintiff's land, as reflected by the testimony of the defendants, and referring to the tracts as set out herein, are as follows: On tract I, from $70 to $100 an acre; on tract II, from $125 to $150 an acre; on tract III, from $250 to $300 an acre; on tract IV, $150 an acre; on tract V, from $120 to $150 an acre; on tract VI, from $35 to $40 an acre. The assessed valuation per acre on tract I is $55.27; on tract II $74.17; on tract III $175; on tract IV $90; on tract V $71.50, and on tract VI $20. There was a slight reduction in valuation for tax purposes on 122 acres of pasture land which is tract VI.

The evidence of the plaintiff is to the effect that the tax burden on the land in the north half of section 3 is $3.31 an acre, which, compared with the tax on the Roy Knapp land of 67 cents an acre, leaves a difference of $2.64 an acre in taxes, reducing the income from the land in section 3 that much less than it does on the Knapp land; that, with reference to the market value of the land in section 3, as compared with the Knapp land, under present conditions, investors figure 5 per cent. interest on the investment in a speculative buying of land; that, figuring the land in section 3, capitalized on a basis of 5 per cent. interest, makes a difference of $52 an acre in the value of the land in section 3, as compared with the Knapp land, which would require that the land in section 3 make interest on $52 an acre more than the Knapp land, to make the same return as on the Knapp land; and, with respect to the Mansfield land, on $54 an acre. Several comparisons are made respecting the value of the south half of section 3. This part of section 3 is assessed at $55.27 an acre, with a tax burden of $1.74 an acre, and comparing it with the Carey land, which is assessed at $49.05 an acre, with a tax burden of 70 cents, makes a difference of $1.04 an acre. The same comparison may be made with respect to lowering of value of the south half of section 3 as given in the analysis herein as to the north half of said section. It is contended

that loan companies will not make a loan on land on which the tax burden is more than $1.50 an acre. On the north end of section 3 is what is known as the Villa lots,—39 or 40 lots of one acre each,—which plaintiff claims are used for agricultural purposes and farmed with the balance of the land. There are no fences or dividing marks segregating this land from the balance of plaintiff's land. These lots consist each of one acre, assessed at $175, the tax burden being $7.85 an acre. Two of these lots sold for $700 and one of them for $250. Other comparisons are made similar to those given above, all of which are shown on exhibit 1 and compared in the briefs and extensively in the evidence.

The trial judge, who had been acquainted with this land for 50 years, personally inspected the land prior to making his decision in this case. The matter was heard originally before the board of equalization in Buffalo county, and while it is true that there is an open admission in the record, so far as certain members of the board of equalization are concerned, that certain lands are not assessed high enough, we take cognizance of the value of all lands and the tax burden thereon, as portrayed by exhibit 1, and as testified to by the experts, and that the advantages in location, the fire and police protection, school facilities and transportation, and favorable rental terms are items to be considered in fixing the assessed valuation of lands.

In reference to weighing conflicting testimony in equity cases, the court will consider the fact that the trial judge saw the witnesses, their general demeanor while testifying, and reached a conclusion as to which testimony was the more credible. In this connection see *Johnson v. Erickson*, 110 Neb. 511, 194 N. W. 670; *Ellingwood v. Schellberg*, 121 Neb. 207, 236 N. W. 451; *Eichholz v. Luikart*, 128 Neb. 368, 258 N. W. 869; *Cunningham v. Armour & Co.*, 133 Neb. 598, 276 N. W. 393. In the latter case it was held: "Where the evidence is conflicting and cannot be reconciled, this court, upon a trial *de novo*, * * * will consider the fact that the district court observed the demeanor of witnesses

and gave credence to the testimony of some rather than to the contradictory testimony of others." This holding was quoted in paragraph 5 of the syllabus in *Farmers Elevator Co. v. Peck, ante,* p. 305, 278 N. W. 499.

On the question of discretion of a board of equalization, this court held in *Meridian Highway Bridge Co. v. Cedar County,* 117 Neb. 214, 220 N. W. 241: "The sound discretion reposed in the board of equalization to hear and determine the valuation of property will not be disturbed by this court, unless so manifestly wrong that reasonable minds cannot differ thereon."

In *First Nat. Bank of Blue Hill v. Webster County,* 77 Neb. 815, 113 N. W. 190, we held: "The assessment of property for the purpose of taxation as ultimately fixed by the board of equalization is final, except upon appeal to the district court, and should not be disturbed on such appeal unless it appears from clear and convincing proof that it is erroneous." See, also, *Woods v. Lincoln Gas & Electric Light Co.,* 74 Neb. 526, 104 N. W. 931.

In cases of this nature, the burden is on the taxpayer who appeals from a decision of the board of equalization, fixing the value of his property for taxes, to show that the action of such board is erroneous. *Western Union Telegraph Co. v. Dodge County,* 80 Neb. 23, 117 N. W. 468; *Welch v. Douglas County,* 103 Neb. 469, 172 N. W. 250. In the instant case, the plaintiff has failed to sustain this burden.

"A general tax cannot be dissected to show that as to certain constituent parts the taxpayer receives no benefit and therefore is entitled to relief because of such fact. Property within the limits of a municipality is subject to local taxation although it derives little or no benefit from the municipal government." *Schulz v. Dixon County, ante,* p. 549, 279 N. W. 179.

" 'Farm lands,' for the purpose of taxation, shall be valued and assessed at their actual cash value—their value in the market in the ordinary course of trade." *Schulz v. Dixon County, supra.*

We find on an examination of the evidence in the instant case, with reference to assessment of plaintiff's lands, that it meets the requirements of *Schulz v. Dixon County, supra,* as hereinbefore announced.

AFFIRMED.

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REETA COX, APPELLANT, V. STATE OF NEBRASKA, APPELLEE.
279 N. W. 482

FILED MAY 6, 1938. No. 30333.

1. **Constitutional Law.** Constitutional provisions are to be construed as mandatory, unless, by express provision or by necessary implication, a different intention is manifest.
2. **Statutes:** CONSTITUTIONALITY. Where the state, by legislative enactment, waives its sovereignty and creates liability on the state's part in favor of an individual for negligence of the state's agents and servants, resulting in injuries to the individual, *held,* a special law, where a general law can be made applicable, is in contravention of section 18, art. III of the Constitution.
3. ———: ———. Special act of the legislature, waiving its sovereignty and authorizing an individual to maintain an action against the state to recover damages caused by the negligence of the agents and servants of the state, and creating liability in favor of the individual against the state, does not render the state liable for the negligence of its agents and servants, in the absence of a general statute making the state liable therefor.
4. **Constitutional Law:** LEGISLATIVE ACTS: UNIFORMITY. "By section 18, art. III of the Constitution, the legislature is prohibited from passing any act granting to an individual any special or exclusive privileges or immunity, and it is provided that, in all cases where a general law can be made applicable, no special law shall be enacted. *Held,* to prohibit class legislation which does not operate equally and uniformly upon all members of the class brought within its operation." *State v. Hall,* 129 Neb. 669, 262 N. W. 835.
5. ———: ———: ———. "The legislature may make a reasonable classification of persons, corporations and property for purposes of legislation concerning them, but the classification must rest upon real differences in situation and circumstances surrounding the members of the class, relative to the subject of the legislation, which render appropriate its enactment; and to be valid the law must operate uniformly and alike upon every

member of the class so designated." *State v. Hall*, 129 Neb. 669, 262 N. W. 835.

6. Statutes: CONSTITUTIONALITY. Where the state by law is empowered to maintain highways, liability of the state for negligence of its agents and servants can be created only by a general statute, operating equally and uniformly upon all persons using the highways of the state. A special act, waiving the sovereignty of the state, creating liability of the state in favor of an individual, is void and unconstitutional, in that it contravenes section 18, art. III of the Constitution, and creates a law which fails to operate uniformly and alike upon all members of a class; that is, persons using the highways of the state.

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

*E. H. Evans* and *Urban Simon*, for appellant.

*Richard C. Hunter, Attorney General*, and *Bert L. Overcash, contra.*

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

MESSMORE, J.

This is an appeal from the district court for Lincoln county, wherein the court sustained a demurrer to the plaintiff's petition, which she filed pursuant to Legislative Bill No. 20, passed by the Fifty-second session of the Nebraska legislature. Laws 1937, ch. 132. The bill, in substance, waived the sovereignty of the state, the statute of limitations, created liability on the part of the state for negligence of its agents and servants, causing injury to the plaintiff, provided for the bringing of suit in the district court for Lincoln county, designated the attorney general to represent the state, and provided for payment out of the general fund of the state of any judgment finally rendered against the state.

Plaintiff's petition, in substance, alleged the authority granted by the state to bring this action, alleged negligence of the state's agents and servants, resulting in injury to the plaintiff, and prayed for compensatory relief.

Section 22, art. V of the Constitution of Nebraska, pro-

vides: "The state may sue and be sued, and the legislature shall provide by law in what manner and in what courts suits shall be brought." Acting under this constitutional provision, Legislative Bill No. 20 was passed and intended as a special law in substance and form, permitting plaintiff to recover from the state for the tort of its agents and servants.

Section 27-319, Comp. St. 1929, provides, in part, as follows: "The several district courts of the judicial districts of the state as now provided for and established by the Constitution of the state, and of such judicial districts as may hereafter be provided by law, shall have jurisdiction to hear and determine the following matters: * * * Second. All claims or petitions for relief that may be presented to the legislature, and which may be by any law, or by any rule or resolution of the legislature, or either house thereof, referred to either of said courts for adjudication."

Plaintiff contends that the court erred in finding Legislative Bill No. 20 unconstitutional on the theory that it violates the constitutional restriction against special legislation. She cites the case of *McNeel v. State,* 120 Neb. 674, 678, 234 N. W. 786, wherein, referring to the second part of the statutory provision above quoted, it was stated that "claims in the second of the statutory classes are not included in the first but are based on wrongs or torts committed by departments, officers or agencies of the state," and claims coming under the second part of the statutory provision "must be presented to a district court with legislative authority to sue the state."

In the case of *Shear v. State,* 117 Neb. 865, 223 N. W. 130, one branch of the legislature authorized an individual to maintain an action against the state to recover damages caused by the negligence of a state employee. This court held: "Where the legislature has not by law provided for the recovery by an individual or corporation against the state for damages caused by the negligence of an officer, agent, or employee of the state, there can be no recovery

for such negligence until the legislature expressly by law makes the state liable therefor." In the body of the opinion we said (p. 866):

"Section 22, art. V of the Constitution, provides: 'The state may sue and be sued, and the legislature shall provide by law in what manner and in what courts suits shall be brought.'

"This provision is not self-executing and requires legislative action to make it effective, and no suit could be maintained against the state until the legislature, by law, made provision therefor." The above case is quoted and approved in *Kent v. State,* 118 Neb. 501, 225 N. W. 672.

It therefore seems apparent that only by general law, uniform in its application to persons, can a liability of the state be constitutionally created for the negligence of its agents and servants. To like effect is *Sirrine v. State,* 132 S. Car. 241, 128 S. E. 172, wherein the supreme court of South Carolina, with constitutional provisions similar to ours, made a like pronouncement of the law as set forth in *Shear v. State, supra.*

Plaintiff cites the case of *City of Chadron v. State,* 115 Neb. 650, 214 N. W. 297. The 1922 legislature of Nebraska permitted recovery against the state by the city of Chadron for property of the city wrongfully taken, to the amount of the value of such property only, which is significant. The holding in that case was based on the principle of law announced in *Lancaster County v. State,* 74 Neb. 211, 104 N. W. 187, and *Lancaster County v. State,* 97 Neb. 95, 149 N. W. 331, that, where the state had taken and received property wrongfully, it was liable for the amount so taken and received. See *Nine Mile Irrigation District v. State,* 118 Neb. 522, 225 N. W. 679.

A clear distinction exists between the case at bar and the class of cases such as *City of Chadron v. State, supra,* and the *Lancaster County* cases, which *City of Chadron v. State* follows, in that in the instant case, in order to impose a liability on the state, a law must be passed which imposes such liability equally and uniformly in favor of all persons,

for future acts of negligence on the part of the state's agents and servants, while in the case of *City of Chadron v. State, supra,* and cases of like nature, there is a liability imposed upon the state by the Constitution in favor of any one which can be enforced.

In *Gledhill v. State,* 123 Neb. 726, 243 N. W. 909, it was held: "One whose land is damaged temporarily for public use by the construction of a public improvement by the state constitutes such a damage as requires compensation under section 21, art. I of the Constitution." Said section 21 provides: "The property of no person shall be taken or damaged for public use without just compensation therefor."

Legislative Bill No. 20 involves the right of an individual to sue the state, and the state in such bill creates a liability in the individual's favor that heretofore did not exist by virtue of general statute. The legislature is without force to pass a special law creating a liability in behalf of an individual and authorizing such individual to institute suit, in the absence of a general statute providing liability on the part of the state for the negligence of its agents and servants. *Shear v. State, supra; Kent v. State, supra.*

Section 18, art. III of the Constitution, provides: "The Legislature shall not pass local or special laws in any of the following cases, that is to say: * * * Granting to any corporation, association, or individual any special or exclusive privileges, immunity, or franchise whatever. In all other cases where a general law can be made applicable, no special law shall be enacted."

Plaintiff's contention in this respect is reflected by the case of *Weston v. Ryan,* 70 Neb. 211, 97 N. W. 347, which held: "It is for the legislature to determine as to the applicability of a general law to a given emergency, and as to the consequent propriety or otherwise of a special law." Cases are cited wherein this court has used similar language to that contained in *Weston v. Ryan, supra.* Therefore, plaintiff contends, section 18, art. III of the Constitution, is advisory, permissory, and not mandatory, which,

if true, would be tantamount to prohibiting judicial review of a special law passed by the legislature.

This court in *Barkley v. Pool,* 102 Neb. 799, 169 N. W. 730, held: "The general rule is that constitutional provisions are to be construed as mandatory, unless, by express provision or by necessary implication, a different intention is manifest."

In 11 Am. Jur. 686, sec. 69, it is said: "So strong is the inclination in favor of giving obligatory force to the terms of the organic law that it has even been said that neither by the courts nor by any other department of the government may any provision of the Constitution be regarded as merely directory, but that each and every one of its provisions should be treated as imperative and mandatory, without reference to the rules distinguishing between directory and mandatory statutes."

The reason for the foregoing rule is expressed by this court in *Baker v. Moorhead,* 103 Neb. 811, 174 N. W. 430. After announcing the general rule as set forth in *Barkley v. Pool, supra,* we said (p. 813): "The main reason for this rule is that in Constitutions the sovereign power itself speaks and is laying down rules which, for the time at least, are to control alike the government and the governed. It is an instrument of a solemn and permanent character, laying down fundamental maxims, and, ordinarily, is not supposed to concern itself with mere rules of order in unessential matters."

This court has reviewed the action of the legislature in passing a special law where a general law can be made applicable, as provided for by section 18, art. III, of the Constitution. In *Anderson v. Lehmkuhl,* 119 Neb. 451, 229 N. W. 773, an act of the legislature was attacked as special legislation. In the opinion we find this language (p. 463): "In our judgment this act is a special law and violates section 18, art. III of the Constitution, providing that, 'In all other cases where a general law can be made applicable, no special law shall be enacted.'" See, also, *State v. Wallace,* 117 Neb. 588, 221 N. W. 712.

We believe that this court has committed itself in holding that the provisions of the Constitution of the state are mandatory, having reference to section 18, art. III of the Constitution, and not permissory or advisory, and that special legislation is subject to judicial review in construing said section.

Plaintiff cites *Cunningham v. Douglas County,* 104 Neb. 405, 177 N. W. 742, which held: " 'The power of classification rests with the legislature, and this power cannot be interfered with by the courts, unless it is clearly apparent that the legislature has by an artificial and baseless classification attempted to avoid and violate the provisions of the Constitution prohibiting local and special legislation.' *Allan v. Kennard,* 81 Neb. 289."

In *State v. Wallace, supra,* the court said:

"It is within the power of the legislature to enact such special legislation covering the matters involved in this suit, where, in its judgment, the subject or matters to be remedied could not be properly remedied by a general law, and where the legislature has a reasonable basis for the enactment of the special law.

"While the legislature cannot arbitrarily and unreasonably make classification by legislation, it has the right to make reasonable classifications where the law will operate equally to all within the same class."

It will be noted in this case that, under the law of Nebraska, the legislature has a right to pass special legislation, as hereinbefore stated, and make a reasonable classification where the law will operate equally to all within the class.

In *State v. Hall,* 129 Neb. 669, 262 N. W. 835, it was held:

"By section 18, art. III of the Constitution, the legislature is prohibited from passing any act granting to an individual any special or exclusive privileges or immunity, and it is provided that, in all cases where a general law can be made applicable, no special law shall be enacted. *Held,* to prohibit class legislation which does not operate equally and uniformly upon all members of the class brought within its operation.

"The legislature may make a reasonable classification of persons, corporations and property for purposes of legislation concerning them, but the classification must rest upon real differences in situation and circumstances surrounding the members of the class, relative to the subject of the legislation, which render appropriate its enactment; and to be valid the law must operate uniformly and alike upon every member of the class so designated." In *Tukey v. Douglas County*, 133 Neb. 732, 277 N. W. 57, *State v. Hall, supra,* was cited with approval.

Section 39-1404, Comp. St. 1929, amended by chapter 83, Laws 1931, in part reads: "From and after the passage of this act, it shall be the duty of the department of public works to maintain the whole of the state highway system." In the instant case, the legislature created a liability in favor of this plaintiff for the tort of the state's agents and servants, resulting in an injury to her while she was traveling a highway under the control of the state. Legislative Bill No. 20, in substance and form, grants to this plaintiff a right as against all other persons using the highways of the state who are similarly situated. We believe that such act does not operate equally and uniformly on all members of the class brought within its operation. While a special privilege is granted to this plaintiff, the right is denied to others similarly situated to recover for the torts of the agents and servants of the state. To uphold this legislation would require individuals, similarly situated, to knock at the door of the legislature and ask that an exception be made in their particular cases, while others, less fortunate, may not be able to obtain the relief sought. If any basis for the classification can be said to exist, it must be found in the peculiar facts and circumstances of the injuries sustained by this plaintiff. Legislative Bill No. 20 discloses nothing unique or peculiar in the circumstances of the alleged injury which would serve to distinguish it, either in a legal or a moral sense, from any other wrongful act or commission of the agents or servants of the state. The act provides a special exemption in favor of this plaintiff,—

the right to recover for damages,—which it denies to all other persons similarly situated.

For the reasons given in this opinion, Legislative Bill No. 20 is void and unconstitutional. Other constitutional questions have been raised which it is not necessary to determine in this case.

AFFIRMED.

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HOMER D. KIRK, ADMINISTRATOR, ET AL., APPELLANTS, V. JOHN TACKETT ET AL., APPELLEES.
279 N. W. 468

FILED MAY 6, 1938. No. 30262.

1. **Deeds:** VALIDITY. Where grantor's mind is somewhat impaired by poor health and he executes a deed to substantially all of his property to one with whom he lives, to the exclusion of his relatives, such transaction will be closely scrutinized.
2. ———: ———. Evidence examined and found to disclose that at the time of the making of the deed the grantor knew the extent of his property and the natural objects of his bounty. The evidence further shows that the transaction was natural and fair. Under these conditions, the deed will not be canceled.

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

*F. A. Hebenstreit,* for appellants.

*A. E. Henry* and *Jean B. Cain, contra.*

Heard before GOSS, C. J., DAY, PAINE, CARTER and MESSMORE, JJ., and LIGHTNER and SPEAR, District Judges.

SPEAR, District Judge.

Action in equity to set aside a deed from Grant S. Ocamb to Celina Tackett, conveying a house and lot and 80 acres of land. Plaintiffs, appellants here, allege that the deed is void because of undue influence, the mental capacity of Ocamb, and because there was no consideration. The district court found for the defendants, appellees here.

Grant S. Ocamb, now deceased, was for years the owner

of a small grocery store in Rulo, Nebraska, where he accumulated a comparatively small amount of property, although reputed to be a good business man. He had always been a bachelor, and built a house in which he lived with his father and mother until they died. After his mother and father had passed away, John Tackett and his wife, Celina, defendants, moved into Ocamb's house and kept house for him. They remained there from perhaps 1930 until 1933, when they moved out and established a boarding house. Mrs. Tackett continued to go to Ocamb's house occasionally to do little things for him. In 1934 Ocamb asked them to return, and they did return under a written contract, by the terms of which the Tacketts were to move into Ocamb's house, pay all the grocery and light bills and take care of Mr. Ocamb. No rent was to be paid by the Tacketts. Mr. Tackett at this time had worked a number of years for Mr. Ocamb in his store and the agreement also provided that Tackett and his wife should take care of the store. For all of this the Tacketts were to receive $60 a month. This contract is not in evidence, but it apparently was to continue for three years.

It appears that, beginning in 1934, Ocamb began to decline somewhat both physically and mentally. He apparently had difficulty in making change in the store in some instances, and had difficulty in ordering his meals at the restaurant. In 1935 he had a stroke and from that time his condition became worse. In February, 1936, he owned the house in which he lived, one or two very small properties in Rulo, and a little farm of less than 80 acres, which was worth perhaps $4,000, with an encumbrance of $2,000 plus interest and some taxes. His heirs at that time were Chester Ocamb, who had lived on the eighty, George Ocamb, who lived near North Platte, Harry Ocamb, who lived in Kansas City, the children of a deceased brother, Howard Ocamb, and the children of a deceased sister, Emma Ward. None of these relatives except Chester lived in Rulo or vicinity. On October 29, 1936, he deeded the farm and the house in which he lived to Mrs. Tackett. At this time

Ocamb was 66 years of age, Mr. Tackett was 68 and Mrs. Tackett 55. The deed contained this recital:

"This conveyance is made subject to a charge on all of the above described real estate that the grantee herein shall during the remainder of the natural life of the grantor, so far as the strength and physical ability of the grantee herein permits and the needs of the grantor herein require, devote her time and strength to caring for and nursing the grantor herein."

A few weeks later, about January 11, 1937, Grant S. Ocamb died.

There is a great deal of testimony as to the mental capacity of the deceased, but probably his condition is best stated by Dr. William G. Shepherd, Ocamb's physician, who treated him from the time of his stroke in January, 1936, until his death a year later, and who was called as a witness for the defendants. He says that his mental condition varied during that time; that there were days when he did not recognize people, his intimate friends, and there were days when he apparently knew everything that was going on. Dr. Shepherd says that on October 31, 1936, he went there with another man to get Ocamb's vote for the election of November 3. Dr. Shepherd testifies that Ocamb voted for all the principal candidates; that he knew them by name and he knew who he wanted to vote for; that after he got down to a certain line he did not know one of the candidates from the other, which situation, we think, is not unusual in competent voters. Dr. Shepherd says at that time he was competent to transact business. On cross-examination Dr. Shepherd stated that on his better days Ocamb was not more than half as intelligent as he was before his illness, Dr. Shepherd having known him before he became ill. It thus appears that Ocamb at times was rational and that at times he was not rational. Just how much the stroke had impaired his business judgment, even when he was rational, is impossible definitely to say, so we must be guided largely by the other facts.

The Tacketts had been intimate with Ocamb for many

years. After his stroke in 1936 he gave a power of attorney to Tackett to transact his banking business and to conduct his merchandise business. He told several people that he was going to leave his property to Mrs. Tackett because she was good to him and also mentioned it after he had made the deed. On the other hand, he had quarreled with his brother George 35 years ago, and the feeling was perhaps none too cordial at the time of his last illness. After his first stroke he also quarreled with his brother Chester, who lived on the eighty. Chester had moved to California with a large family, where he had left them, and had been back farming the eighty for several years. It seems that Chester wanted to move his family from California into Grant S. Ocamb's house and Grant did not want that, so they disagreed. Harry Ocamb lived in Kansas City and one brother and one sister were dead. It therefore seems that the Tacketts had the most legitimate claim upon the affections of Ocamb, and that it was perfectly natural for him to deed what little property he had to Mrs. Tackett, upon the condition that she care for him during his life. There is not any affirmative evidence of undue influence on the part of the Tacketts, although they knew that Ocamb would die soon and also knew that his mental condition was not the best. Tackett at one time told some one that Ocamb minded mama (Mrs. Tackett) like a baby and there is some evidence that the Tacketts did not want George Ocamb to visit his brother, but there is also evidence that the brothers were not very friendly.

The notary says that one of his children came downtown and told him that he was wanted at Grant S. Ocamb's, and to bring his seal. When he arrived at Ocamb's house the deed was on the table and present were Grant S. Ocamb, Mr. and Mrs. Tackett, Cecil McMullen, and the notary, Kermoade. The deed was ready to be signed. It appears that Tackett's son had gone to Mr. Henry, a lawyer at Pawnee City, and had the deed prepared. Mrs. Tackett says that Ocamb was talking about it and he told her that he would like to have the deed made out to her; that he told

her that he would be glad to have it done; that he wanted it done; that he said to go ahead and have it done and he would sign it and have it fixed up. Then she had the son have the deed made at Pawnee City and sent to her. Kermoade says that when he got there Ocamb got up and walked across the room and sat down. Kermoade then picked up the deed and asked him if he was familiar with the contents of the document and Ocamb said that he was. Ocamb then asked Kermoade where to sign and Kermoade showed him where to sign. He says that Mr. and Mrs. Tackett did not enter into the conversation at any time except that Grant S. Ocamb said, "I am going to give everything I own away to Mrs. Tackett," and Mrs. Tackett said, "You aren't giving it away, not as long as you need it." It will be noted that the notary had Cecil McMullen put his name on the deed also as an additional witness. The plaintiffs claim that this shows that Kermoade had suspicions of Ocamb's mental capacity. Kermoade said on cross-examination that he expected some fight to come up over the deed, but that he did not know that there was anything unfair about the transfer. Kermoade says that Ocamb was competent to make the deed. Cecil McMullen, the other witness, says that Mr. and Mrs. Tackett were not in the room when the deed was signed. He apparently had been in the room with Ocamb about an hour before the notary came. He says Ocamb was competent.

Clara Murphy, who had done work of various kinds for Grant S. Ocamb for 20 years, who nursed him some in his last year, shaved him twice a week, and who appears to have been in Ocamb's confidence, testified that he told her on several occasions that he intended to leave the property to Mrs. Tackett for his care. After he had made the deed he told her that he had concluded that he could not recover; that he would have to have care for the rest of his life, and for that reason they had made an agreement; and that he left his property to Mrs. Tackett for his keep the rest of his life, whether he lived ten days or ten years.

In view of his family situation and his meager estate,

the above explanation seems to this court to be a just and common-sense line of reasoning, and one that evidences ordinary intelligence. We also think that there was nothing so unjust or so unusual in such an arrangement as to impel this court to say that Grant S. Ocamb was incompetent, or that the deed was the result of undue influence exerted upon a weak mind. In addition to these things, we are impressed with the fact that the district judge had the opportunity to see the witnesses, observe their demeanor, and in many ways had a better opportunity to weigh the evidence than has this court.

Plaintiffs contend that the rule announced in *Chamberlain v. Frank*, 103 Neb. 442, 172 N. W. 354, places the burden of proof upon defendants to show that the transaction was fair and just. Although the situation in that case was far more extreme than in the case at bar, we have in the instant case applied this yardstick and find that the defendants have successfully carried the burden.

AFFIRMED.

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EWEN M. BLACK, APPELLANT, V. ARTHUR NEILL, APPELLEE.
279 N. W. 471

FILED MAY 6, 1938. No. 30280.

1. **Automobiles: GROSS NEGLIGENCE.** "Gross negligence, within the meaning of section 39-1129, Comp. St. Supp. 1935, means negligence in a very high degree, or the absence of even slight care in the performance of a duty." *Lemon v. Hoffmark*, 132 Neb. 421, 272 N. W. 214.
2. ———: ———. "The existence of gross negligence must be determined from the facts and circumstances in each case." *Lemon v. Hoffmark*, 132 Neb. 421, 272 N. W. 214.

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

*Everett C. Pilcher* and *R. B. Hasselquist*, for appellant.

*Kennedy, Holland, De Lacy & Svoboda, contra.*

Heard before GOSS, C. J., ROSE, DAY, CARTER and MESSMORE, JJ., and LIGHTNER and SPEAR, District Judges.

SPEAR, District Judge.

Ewen M. Black was the plaintiff in the district court and is the appellant here. Arthur Neill was the defendant in the lower court and is now the appellee. At the close of plaintiff's testimony the district court dismissed plaintiff's case for the reason that the plaintiff's evidence did not show gross negligence on the part of the defendant. From this ruling of the district court, the plaintiff has appealed.

This case is governed by section 39-1129, Comp. St. Supp. 1937, which is commonly known as the "guest statute." This statute, in so far as applicable to the present case, in effect provides that the operator of a motor vehicle shall not be liable for any damage to any person riding in said motor vehicle as a guest and not for hire, unless such damage is caused by the gross negligence of the operator. The rules governing this case were laid down originally in *Morris v. Erskine,* 124 Neb. 754, 248 N. W. 96, and are as follows:

"We are of the opinion that in adopting the guest act the legislature used the term 'gross negligence' as indicating a degree of negligence. Negligence may be slight, ordinary, or gross. Gross negligence means great or excessive negligence; that is, negligence in a very high degree. It may be said that it indicates the absence of even slight care in the performance of a duty, and such, we think, is the meaning intended by the legislature.

"What amounts to gross negligence in any given case must depend upon the facts and circumstances. What would amount to gross negligence under certain circumstances might, under different circumstances, be even slight negligence. Ordinarily, the question of negligence, whether slight or gross, is one of fact. If the evidence respecting it is in conflict and is such that ordinary minds might draw different conclusions therefrom, then a question of fact is presented for the jury to determine."

These rules have been steadfastly adhered to in numerous decisions of this court, some of which are of very recent date. In the instant case this court is required to apply

the above rules to the facts brought out in the plaintiff's evidence, and these facts appear to be as follows:

At the time of the accident plaintiff was 72 years of age and his wife was 65. The defendant Neill is a traveling salesman and has driven a car for over 20 years. Plaintiff and defendant are neighbors, living in north Omaha. On the day in question, at about 10:00 a. m., plaintiff and his wife were leaving their home to go down-town on business. At the same time defendant was driving out in his automobile on his way down-town. He invited plaintiff and wife to ride with him and they accepted the invitation. Plaintiff seated himself in front with defendant, Mrs. Black seated herself in the back seat of the sedan, and they started down-town, driving south on Sixteenth street. For the purposes of this appeal the persons in the car are the only material witnesses. Their testimony coincides closely, but differs in some details. It is manifestly impossible for this court to point out all of these details, but we shall attempt to fairly state the evidence as it appears to us.

As the car approached Yates street, which is one block north of Grace street, there were many automobiles going each way; that is, north and south. There were eight or ten cars ahead of defendant's car, including a police cruiser car which was immediately ahead of defendant's car. There is a stop sign on Sixteenth street at the intersection of Grace street. Defendant had traveled this route before and knew of this sign. Mrs. Black says on direct examination that the eight or ten cars had been ahead of them for two or three blocks and that at Yates street the police car was about half a block ahead of them. On cross-examination she testifies that at Yates street it was four or five car-lengths ahead and that it had maintained that relative position for four or five blocks. Plaintiff could not qualify as a witness as to speed. His wife did, and says their speed was 35 miles an hour as they approached Grace street and that she does not think that defendant slowed down any until just before the accident. Defendant, who was called as a witness for plaintiff, says it was 20 miles an hour.

A great deal of dispute arose at the trial as to whether the speed limit at Grace street was governed by the ordinance relating to business districts or by that relating to residence districts. We have examined the ordinances and find them impossible of exact determination. However, we do not think it makes any difference under the facts in this case.

As the defendant was driving south between Yates and Grace streets he turned his head to the left and pointed out a tree which had blown down upon a porch. He forgot about the stop sign at Grace street. The police car stopped at the stop sign, and when defendant looked ahead again it was necessary for him to apply his brakes suddenly to avoid a collision. The brakes took hold with such force that the car stopped very quickly, throwing plaintiff into the windshield of defendant's car and throwing Mrs. Black onto the floor in the back of the car. Plaintiff was seriously injured. It was conceded by plaintiff during the argument in this court that, while defendant's car did come in contact with the police car, the contact was only slight, and that plaintiff's injuries occurred from the sudden application of the brakes and not from the force of the contact. Plaintiff says that they were between Yates and Grace streets when defendant turned his head to the east to look at the tree, and that he did not look south again until close to the police car. It is impossible to tell from his testimony just how far it was. Mrs. Black testifies that defendant turned his head east at a point about 100 feet north of Grace street and motioned toward the tree with his hand. She contends that he did not turn his face south until his automobile was within 20 feet of the back of the police car. The defendant says he glanced at the tree and at that time the police car was two car-lengths ahead; that the police car was about a car-length ahead of him when he applied his brakes; and that he only traveled a car-length while looking at the tree.

Mrs. Black testified that in the vicinity of Yates street they were about half a block behind the police car. On

cross-examination she said that they had been traveling about four or five car-lengths behind the police car all of the time they were on Sixteenth street. We think it fair to say the evidence shows that the defendant was driving at about the same rate of speed that all of the cars were driving along Sixteenth street, and that there was no gross negligence on the part of defendant in so far as speed alone is concerned. This view makes it immaterial which speed ordinance governed. Although there is conflict in the evidence as to speed, this court will assume that the testimony most favorable to plaintiff, 35 miles an hour, is correct.

Plaintiff offered to prove that after the accident one of the police officers asked defendant if he did not see the stop sign, and that defendant replied that he had not. Defendant objected and the court sustained his objections. Plaintiff contends that this is error, upon the ground that it is an admission against interest. We think that perhaps this should have been admitted as bearing upon the general question of defendant's negligence in looking aside, although it is immaterial here, because it is established that defendant knew that the stop sign was there, whether he saw it or not.

Having determined that defendant's speed was not in itself excessive, we must now decide as to whether the turning of his head by defendant constituted gross negligence when done in conjunction with the speed with which he was driving, as related to the surrounding conditions. There is a dispute in the testimony as to whether or not on the way down-town defendant told the others that he would point the tree out to them. We do not think this is material, because Mr. and Mrs. Black did not know what the conditions were to be at the place of accident and therefore could not anticipate any negligence.

This court has decided so many cases involving the statute under consideration here that it is impossible to discuss them all in this opinion. In *Lemon v. Hoffmark*, 132 Neb. 421, 272 N. W. 214, this court stated:

"Counsel for appellant have analyzed for the benefit of

the court all of the Nebraska decisions involving an interpretation of the guest act. Most of these indicate excessive speed or a continuous course of negligent conduct on the part of the driver or protests made by persons riding in the car to the driver about the manner of his driving."

"It is true that it is not necessary, in order to show gross negligence, to prove several acts of negligence; that is, a continuous course of negligent conduct, * * * or protests on the part of the guest to the driver at and prior to the time of the accident.

"It is also true that gross negligence may consist, in some cases, in turning the head or taking the eyes off the road, but all the conditions and circumstances in existence at the time of the commission of the alleged grossly negligent acts are to be taken into consideration."

Resolving every doubt, both as to facts and in the rulings upon the evidence, in favor of the plaintiff, we are of the opinion that plaintiff has not proved a case of gross negligence.

AFFIRMED.

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IN RE ESTATE OF NIKOLAI OHLSEN.
RHODA NELSON, APPELLEE, V. C. H. CHRISTENSEN, ADMINISTRATOR, APPELLANT.
279 N. W. 473

FILED MAY 6, 1938. No. 30111.

**Executors and Administrators.** Evidence examined, and *held* insufficient to support an order allowing a claim to be filed against the estate of a deceased person after the expiration of the time originally allowed for the filing of claims.

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

*Courtright, Sidner, Lee & Gunderson* and *Waldo Wintersteen*, for appellant.

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

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

TEWELL, District Judge.

Proceedings to probate the estate of Nikolai Ohlsen, deceased, were begun in the county court of Dodge county, Nebraska, on August 20, 1934. The appellant, C. H. Christensen, was duly appointed as administrator of that estate. An order of the county court dated September 10, 1934, limited the time within which creditors might file claims to four months after the date of the order. A decree barring claims not filed was entered on January 12, 1935. On March 16, 1935, the appellee, Rhoda Nelson, made application for permission to file a claim against such estate. Permission to file such claim was denied by the county court. Upon appeal by claimant to the district court permission to file such claim was given. Trial to a jury upon the merits of the claim was later had in the district court. The jury returned a verdict for the claimant in the amount of $3,500. Upon motion for a new trial a remittitur of $1,250 was required to prevent a new trial being granted. Such remittitur was filed and a judgment for the claimant for $2,250 was entered. The administrator appeals. The claimant has perfected a cross-appeal by which she seeks to have the amount of the remittitur included in the judgment.

The record discloses that Nikolai Ohlsen died intestate on August 14, 1934, while a resident of Dodge county, Nebraska. Strict compliance with statutory requirements in the proceedings to probate his estate is not questioned, except as such proceedings relate to whether or not permission to file such claim should have been granted. This court has held that permission to file a claim against the estate of a deceased person after the expiration of the time allowed for filing claims is essential to the allowance of such belated claim. *In re Estate of Golden,* 120 Neb. 226, 231 N. W. 833. A hearing was had in the district court upon the application for permission to file a claim and the ob-

jections of the administrator thereto. The evidence taken upon such hearing appears in the bill of exceptions.

The evidence upon the application to file the claim, together with the evidence taken upon the trial upon the merits of the claim, discloses that the farm home of claimant and that of deceased for many years prior to his death were only a few hundred yards apart. Claimant knew of the death of the deceased and was present at his funeral. Prior to the date set for a hearing upon the application for the appointment of an administrator she read the published notice of the time and place of such hearing. Immediately after the appointment she became aware of the fact that appellant was the administrator. She admits having read the notice to creditors during the period of its publication. This notice stated that all claims not presented on or before January 12, 1935, would be and remain forever barred. While the application for the appointment of an administrator was pending, the appellant and Waldo Wintersteen, an attorney for two heirs, visited the claimant at her farm home. She was informed that they were looking for a will that was rumored to have been made by the deceased. Long prior to the time of the expiration of the time for filing claims she knew that no will had been found. At the time of this visit the claimant told appellant and said Wintersteen that she felt she should be paid for the services she had performed for the deceased. The nature of the claim filed is for the value of about 3,500 meals that claimant alleges she furnished to the deceased and persons in his employ, and for other house work and nursing that the claimant alleges she performed for the deceased during the time from in March, 1910, to the date of his death, and for which she alleges the deceased was to pay her through a provision in his will. The deceased was never married. Claimant lived with her husband upon a farm adjoining that upon which the deceased resided and lived as a bachelor. Both appellant and Wintersteen had known both the claimant and the deceased for many years. Wintersteen had been regarded as the family attorney of claimant and her

husband. The evidence does not disclose that the appellant or said Wintersteen or any one else ever said or did anything that the claimant could possibly construe as an assurance that any attention was being given by any one to the matter of her claim. That Wintersteen told the claimant and her husband to get a lawyer if they had a claim and desired to file it is shown by the evidence and not denied by the claimant. After the time allowed for filing claims had expired the administrator with permission of the probate court accepted $50 in full payment of a note for the principal sum of $400 that had been made by the claimant and her husband to the deceased for money borrowed. Soon after this compromise the application for permission to file the claim involved in this action was filed. The evidence does not show fraud, accident, mistake, unavoidable misfortune or excusable neglect. It does show an extreme lack of diligence on the part of the claimant.

Under a state of facts as above outlined, one question presented is that of whether or not the district court committed error in permitting the claim involved to be filed. Section 30-605, Comp. St. 1929, provides in part as follows:

"On the application of a creditor who has failed to present his claim, if made within three months after the expiration of the time previously allowed, the court may for good cause shown allow further time not exceeding three months for the filing and determination of such claim."

Other relevant statutory provisions are set forth in the opinion in *In re Estate of Tucker*, 128 Neb. 387, 258 N. W. 645, and will not be set forth herein. An interpretation of the phrase "good cause shown" as used in the above-quoted statute as well as a declaration of many of the rules relevant to this case are set forth in that case and in the following cases: *In re Estate of Golden, supra; In re Estate of Yetter*, 125 Neb. 763, 252 N. W. 202. The evidence submitted to the district court was insufficient to support its order permitting the claim involved herein to be filed.

Assignments of error made by the appellant relative to the trial court having allowed the husband of claimant to

testify concerning conversations and transactions with the deceased and of the evidence being insufficient to support the verdict need not be discussed.

For reasons above given, the judgment of the trial court is reversed and this cause remanded, with directions that permission to file the claim involved be denied, that such claim be dismissed without prejudice to such legal status as it would now hold had it never been filed, and that such judgment of the trial court so entered be certified to the county court for further proceedings in conformity with this order.

REVERSED.

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F. J. RIESLAND, ADMINISTRATOR, APPELLANT, V. DAWSON COUNTY IRRIGATION COMPANY, APPELLEE.
279 N. W. 726

FILED MAY 20, 1938. No. 30295.

1. **Automobiles: COLLISION: BURDEN OF PROOF.** In an action against an employer for a personal injury inflicted by an employee upon a third person by the negligent use of an automobile owned and operated by the employee, the burden is on plaintiff to prove that the employee was acting within the scope of his employment at the time of the injury.
2. **New Trial.** A variance between the testimony of a witness on the trial of a case at bar and at a former trial of another action does not require a new trial on the ground of surprise, where the variance is immaterial.

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

*B. J. Cunningham, H. G. Wellensiek, W. P. Lauritsen* and *T. M. Hewitt,* for appellant.

*W. A. Stewart, Jr.,* and *Cook & Cook, contra.*

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

ROSE, J.

This is an action to recover $15,468.45 in damages for

alleged negligence resulting in the injury of George C. Mead in an automobile accident September 9, 1933, and in his death September 16, 1933. The administrator of his estate is F. J. Riesland, plaintiff. Decedent left surviving him his widow, Carrie M. Mead, and his mother, Lena J. Beehler. Defendant is the Dawson County Irrigation Company.

It is charged in the petition, among other allegations, that Milo Allen, an employee of defendant, while in the performance of his duties as such, negligently drove his automobile westward on the left side of the Lincoln highway in Dawson county, approximately half a mile east of Cozad, into the path of an automobile carefully operated by George C. Mead and thus caused the fatal injury.

A collision between the cars of the drivers named at the time and place stated was admitted in an answer by defendant, but unadmitted allegations of the petition were denied. Two paragraphs of the answer read thus:

"The defendant alleges that from time to time during the month of September, 1933, the defendant engaged the said Milo Allen to work for defendant as a ditch rider, but alleges that said employment was not continuous but by the day or fraction thereof and that from time to time as defendant should be in need of the services of said Allen. The defendant alleges that on said 9th day of September, 1933, the said Milo Allen was engaged by the defendant to work during the morning of said day and that his employment by the defendant terminated at noon of said day, and that said Milo Allen during the afternoon of said day was engaged upon his own business, to-wit: The cutting of fire wood for sale, in which business the defendant was not engaged and had no interest; that at the time of said collision between the automobiles of the said Mead and of the said Allen, the said Allen was returning to his home in the city of Lexington and was not in the employ of the defendant and was not the agent or employee of the defendant and was not then acting in the scope of any employment by the defendant.

"Further answering, the defendant alleges that the automobile driven by the said Allen at the time of said collision was the sole and exclusive property of the said Milo Allen and that the defendant had no interest therein. The defendant further alleges that in any use that said Allen at any time made of said automobile in connection with the business of the defendant, the said Milo Allen acted as an independent contractor and not as the servant of the defendant."

The reply was a general denial of facts pleaded in defense. When plaintiff rested after the introduction of his evidence, the district court sustained a motion by defendant for a nonsuit and dismissed the action for insufficiency of the evidence to sustain a verdict in favor of plaintiff. From the dismissal plaintiff appealed.

The appeal presents for review the sufficiency of the evidence to sustain a verdict in favor of plaintiff. Did plaintiff make a case for the consideration of the jury?

The evidence proved without dispute that Milo Allen, by negligent operation of his own motor car, about 7 o'clock in the evening, September 9, 1933, on the wrong side of a public highway, approximately half a mile east of Cozad, Dawson county, collided with an automobile driven by George C. Mead, who was fatally injured in the impact as alleged in the petition. There is evidence that Allen negligently caused the injury and damages of which complaint is made, but he is not a party to the action. His negligence, the resulting injury and liability therefor are charged by plaintiff to the Dawson County Irrigation Company, defendant, employer of Allen. The theory of plaintiff is that Allen was engaged in the duties of his employment by defendant when the accident occurred. The evidence will not support a finding that Allen was an independent contractor. He was an employee of defendant September 9, 1933. The proofs will not admit of any other conclusion on that issue.

The burden was on plaintiff to prove that Allen was acting within the scope of his employment by defendant

when his negligence was committed. On that issue plaintiff called Allen, himself, to the witness-stand, and he alone testified to the nature of his employment by defendant, to his duties as employee and to performance thereof September 9, 1933. His testimony on direct and cross-examination tends to prove the following facts: For 18 years was "ditch rider and ditch foreman" on defendant's irrigation system which extended from ditch headgates a mile and a half south of Cozad to Elm Creek; resided in Lexington and his duties took him between there and Cozad; rode the ditch almost daily during the irrigating season which extended from late spring until freezing weather in the fall and included September 9, 1933; water in ditch flows through a weir or gauge situated three-fourths of a mile below the headgates and automatically, by means of a float or small cable and clock, registers or measures the rise and fall of the water on a sheet of paper which is usually removed by Allen weekly on Saturday; duty of employee to adjust flow of water into ditch at headgates, read gauge at weir and turn in the report automatically registered or hand it to a designated bank; left Lexington shortly after 7 o'clock in the morning of the accident; went up the ditch to the headgates; got his readings at gauge; worked down ditch to each farmer taking water; completed day's ditch riding about noon; afternoon went in his car with Byrul Goochey to Knautsen farm, about a mile from Darr and five or six miles east of Cozad, and blasted stumps and logs for firewood for their own use—work in which defendant had no interest; in evening went from Cozad to headgates for sole purpose of giving another employee, Allen's brother, a pay check, but in the absence of the brother put his pay check in his trailer house there; went on to automatic gauge, took from his car a little cable and with it replaced the old one, a task consuming five or ten minutes; in the morning, read the gauge, removed the registration sheet and put it in the car; from the gauge went back to Cozad for the accommodation of Goochey, who was not an employee of defendant in any capacity; ate lunch with him at a restaurant

in Cozad; afterward Allen, in his own car, took Goochey to the home of his girl in Cozad, left him there, started for the Allen home in Lexington; a little later the collision occurred on the highway.

It may fairly be inferred from the testimony of Allen that it was his duty as an employee of defendant to "ride the ditch;" to adjust the flow of water into the ditch at the headgates; to change the cable or float at the automatic gauge; to read the registration sheet and deliver it to the proper person. It was no part of his duty as employee of defendant to spend Saturday afternoon, September 9, 1933, blasting firewood for himself and Goochey, or to transport Goochey from one place to another in Allen's own car, or to take the brother's pay check to the headgates of the ditch.

The testimony shows that there was a steel box back of the driver's seat in the motor car owned and operated by Allen; that he kept therein the tools used in the performance of his duties as "ditch rider;" that the cable with which he replaced, at the gauge, the one already in use there was taken from his car at the time; that the registration sheet of paper was in his car when he left Cozad in the evening.

Plaintiff contends that, in reviewing a nonsuit on his evidence alone, the court should consider established the issuable facts proved and therefrom draw all proper inferences in his favor; that an employer authorizing an employee to use his own automobile in performing his duties as such is, while doing so, liable for negligence resulting in personal injury to a third person. In connection with these propositions of law, it is argued that the evidence is sufficient to sustain a verdict that Allen was acting within the scope of his employment when the collision occurred. Assuming, without deciding, the soundness of the propositions of law stated and the facts that Allen acted for defendant while transporting the cable and the tools to the gauge, while changing cables there, and while taking the registration sheet with him to Cozad in the evening, he

nevertheless was not engaged in the performance of any duty of his employment after he left Goochey at Cozad and pursued an exclusive purpose of his own—driving to his home at Lexington. While on the way he did not use his car, or the cable or the tools or the registration sheet for his employer. It was his custom to use his car for his employer at times and at other times for himself. He was not using it or any article in it for his employer when he committed the negligent act charged. Plaintiff relies on the ruling in *Keebler v. Harris*, 120 Neb. 739, 235 N. W. 328, to sustain his position that Allen was acting within the scope of his employment at the time of the accident. The opinion in that case shows distinctly that the employee named therein, after departing temporarily from the duties of his employment for his own pleasure, resumed his duty as employee to take a repossessed automobile to the garage of his employer and was doing so under specific instructions when the negligent act was committed. That case, therefore, is not in point. It would be stretching the maxim *respondeat superior* beyond reason to apply it to the present controversy. A critical examination of all the evidence from every standpoint leads to the conclusion that plaintiff did not make a case. The nonsuit was free from error.

An assignment of error challenges as erroneous the denial of a new trial on the ground of surprise arising from a variance between the testimony of Allen in the case at bar and his testimony at the former trial of another action. Plaintiff asserts that the witness Allen testified at the former trial that he removed the registration sheet from the gauge in the evening and at the trial herein, in the morning. The variance is immaterial since, as already explained, in neither aspect of such testimony was Allen acting within the scope of his employment when his negligence inflicted the fatal injury. Error prejudicial to plaintiff has not been found in the record.

AFFIRMED.

CONSERVATIVE SAVINGS & LOAN ASSOCIATION OF OMAHA, APPELLEE V. SAMUEL MANCUSO ET AL., APPELLANTS.
279 N. W. 725

FILED MAY 20, 1938. No. 30311.

Mortgages: FORECLOSURE: SALE: CONFIRMATION. Inadequacy of price will not prevent confirmation of a sheriff's sale of land under a decree foreclosing a mortgage thereon unless the price is so low as to shock the conscience of the court or to evidence fraud.

APPEAL from the district court for Douglas county: JOHN A. RINE, JUDGE. *Affirmed.*

*Thomas E. Conley,* for appellants.

*William Baird & Sons, contra.*

Heard before GOSS, C. J., ROSE, DAY, CARTER and MESSMORE, JJ., and LIGHTNER and SPEAR, District Judges.

ROSE, J.

This is a suit in equity to foreclose a mortgage on lot 10, McCandlish Place, an addition to the city of Omaha. Conservative Savings & Loan Association, mortgagee, is plaintiff. Samuel Mancuso and Mary Mancuso, mortgagors, are defendants. Upon a trial of the cause the district court for Douglas county found there was due plaintiff from defendants on the debt secured by the mortgage, interest and taxes, the sum of $7,058.92 March 3, 1936, and entered a decree of foreclosure for nonpayment thereof. On a former appeal the decree was affirmed. *Conservative Savings & Loan Ass'n v. Mancuso,* 132 Neb. 379, 272 N. W. 223.

Under an order of sale issued May 8, 1937, the sheriff sold the mortgaged premises to plaintiff June 15, 1937, for $5,000. Defendants objected to confirmation of the sale for inadequacy of price. On that issue there was a trial. The objection was overruled and the sale confirmed. From the confirmation defendants appealed to the supreme court. The question now for determination is the adequacy of the price for which the sheriff sold the property to plaintiff.

The rule often repeated is that inadequacy of price will not prevent confirmation of a sheriff's sale of land under a decree foreclosing a mortgage thereon unless the price is so low as to shock the conscience of the court or to evidence fraud.

The lot is situated at the northwest corner of Twenty-second and Mason streets, Omaha, and is 67½ feet wide and 132 feet long. The improvements are three frame houses about 30 years old and a brick garage. Samuel Mancuso, defendant, estimated the value of the property at $10,000. On his behalf there is other testimony to the same effect. Values of witnesses for plaintiff varied from $4,500 to $5,000. There is no evidence of fraud or of irregularity in the sale. A preponderance of the evidence indicates there would not be a better bid in the event of a resale. Under the circumstances disclosed by the record and the rule of law stated, the sale price of $5,000 is not so low as to imply fraud or to be unconscionable.

AFFIRMED.

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## STATE OF NEBRASKA V. THEODORE H. MCCOSH.

279 N. W. 775

FILED MAY 20, 1938. No. 29995.

1. **Statutes: CONSTITUTIONALITY.** Chapter 117, Laws 1931, construed, and *held* not vulnerable to the objection that this act was broader than its title, or that it was enacted in violation of section 14, art. III of the Nebraska Constitution.
2. **Constitutional Law.** Section 81-903, Comp. St. Supp. 1935, and sections 81-905, 81-910, and 81-911, Comp. St. 1929, so far as relating to "ice cream and/or dairy products made in the semblance of ice cream," construed, and *held* to be a proper exercise of police power, and in no manner contravening the Fourteenth Amendment to the Constitution of the United States or section 3, art. I of the Constitution of this state.

ERROR to the district court for Scotts Bluff county: GEORGE W. IRWIN, JUDGE. *Exceptions sustained.*

*Richard C. Hunter, Attorney General, Bert L. Overcash, Rush C. Clarke* and *Robert W. Patterson,* for plaintiff in error.

*Howarth N. Olsen* and *W. F. McGriff, contra.*

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

EBERLY, J.

This is a proceeding by the county attorney of Scotts Bluff county to secure a review of the decision of the district court for that county made in the above-entitled cause, wherein that court determined that section 81-903, Comp. St. Supp. 1935, and sections 81-905, 81-910, and 81-911, Comp. St. 1929, "are unconstitutional and void." The provisions of the statutes referred to, so far as involved in this proceeding, are as follows:

Section 81-903, Comp. St. Supp. 1935: "For the purpose of this chapter an article shall be deemed to be adulterated: * * * C. In the case of ice cream and/or dairy products made in the semblance of ice cream. If it does not contain at least fourteen per cent. butter fat, finish, and of fruit cream twelve per cent. butter fat, finish, if it contains any ingredient deleterious or detrimental to health. Provided: There shall be allowed a tolerance of one-half per cent. provided the one-half per cent. is not constantly below the standard."

Section 81-905, Comp. St. 1929: "The term 'food,' as used herein shall include all articles used for food, drink, confectionery or condiment by man or animals, whether simple, mixed or compound."

Section 81-910, Comp. St. 1929: "No person shall, within this state, manufacture for sale therein or have in his possession with intent to sell * * * articles of food * * * which are adulterated * * * within the meaning of this title (article)."

Section 81-911, Comp. St. 1929: "Any person * * * violating any of the provisions of this article (81-901 to 81-914), shall be guilty of a misdemeanor, and, upon con-

viction thereof, shall be fined in a sum not less than ten ($10) dollars nor more than one hundred ($100) dollars."

The complaint in writing, on which this trial was had, in apt language charged that the defendant, McCosh, "did then and there, wilfully and unlawfully have in his possession with intent to sell certain articles of food which were adulterated, to wit, twenty-five gallons of a dairy product, made in the semblance of ice cream, which did not contain at least fourteen per cent. of butter fat."

After the introduction of evidence and submission of the case, a judgment of guilty as charged was entered in due form, and thereafter a motion for a new trial was sustained by the trial court and the proceeding was dismissed because the provisions of law upon which the prosecution was based were deemed unconstitutional and void.

It is the contention at the bar of this court that chapter 117, Laws 1931, was enacted in violation of section 14, art. III of the Constitution of the state of Nebraska, for that (1) the act is broader than the title; (2) that it in effect amends section 81-904, Comp. St. 1929, a part of the chapter of which the amended section 81-903 also constituted a part, and that section 81-904 is not contained in the amendment nor is this section repealed.

The questioned title is in the following form: "An act to amend section 81-903, Compiled Statutes of Nebraska for 1929, and to define ice cream and prescribe the tolerance and to repeal section 81-903, Compiled Statutes of Nebraska for 1929."

Read in connection with the body of the enactment of which it is the title, we find it ample and sufficient. It fairly appears that the act is not broader than the title. Nor is it vulnerable to the objection that section 81-904 is not contained in the amendment nor is this section repealed. Section 81-903 is wholly occupied with the subject of adulteration. Section 81-904 is limited to the subject of misbranding. The proviso, upon which the challenge of defendant in error to the validity of this legislation is based, forms a part of the fifth section of division "B" of section

81-904, Comp. St. 1929. The controlling construction of this proviso is:

"The operation of a proviso is usually and properly confined to the clause or distinct portion of the enactment which immediately precedes it, and does not extend to or qualify other sections, unless the legislative intent that it shall so operate is clearly disclosed." 59 C. J. 1090. See, also, *Paxton & Hershey Irrigating Canal & Land Co. v. Farmers & Merchants Irrigation & Land Co.*, 45 Neb. 884, 64 N. W. 343.

The language of this proviso, thus limited, is wholly restricted to section 81-904, and has no application to section 81-903. The amendment of 1931 to section 81-903 in no manner affects or qualifies the legal effect of the proviso under consideration, and therefore it is not vulnerable to the objection on which the defendant in error relies.

Lastly, the defendant in error insists that chapter 117, Laws 1931, is an arbitrary and unlawful exercise of police power, and violates the Fourteenth Amendment to the Constitution of the United States, and section 3, art. I of the Nebraska Constitution.

The substance of the provisions here under consideration was originally enacted as chapter 109, Laws 1913. It was then incorporated into the Civil Code as article V, title 3, ch. 190, Laws 1919. In turn this provision was carried into the Compiled Statutes of 1929 as sections 81-901 to 81-914, inclusive. The amendment of 1931 adds to the specific provisions of section 81-903, the words "and/or dairy products made in the semblance of ice cream," and also by way of a modification adds to this provision a specific tolerance.

In this connection, it may be said that "ice cream" as defined by Webster's New International Dictionary (2d ed.) is: "A frozen food containing cream, or butter fat, flavoring, sweetening, and, usually, eggs; specif., such a food made smooth by stirring during freezing;—distinguished from *parfait* and *mousse*."

So, too, the same lexicographer gives as one of the defini-

tions of the word "dairy" the following: "An establishment for the sale or distribution of milk or milk products," and among its combinations and phrases the term "dairy product" is noted.

The facts upon which the information in this case is based are not in dispute. The defendant is the proprietor of the McCosh drug store at Gering, Nebraska. He has and uses in this establishment a "Mills counter freezer" in which he freezes "Temptation ice cream," "Frozen Luxury," and "sherbets," and which he sells to his patrons in the drug store. The test of the "Temptation ice cream" thus sold disclosed that it contained a butter fat content of 15.5 per cent. butter fat; the test of "Frozen Luxury" revealed a butter fat content of but 6.9 per cent. It further appears that the "Temptation ice cream" sold by Mr. McCosh contains, for every 100 pounds of mix, two dozen fresh eggs, 14 pounds of sugar, and 36 per cent. solids and 18 per cent. butter fat. "Frozen Luxury" is made substantially with the same amount of eggs, milk, sugar, and solids, but with the butter fat reduced to 7 per cent. To both products flavoring ingredients are added. As to the appearance of "Frozen Luxury" as sold, the undisputed testimony is that "It was just like any other ice cream, perhaps a little coarser in grain, but outside of that the texture was the same as any ice cream." It is obvious that both "Temptation ice cream" and "Frozen Luxury" are within the terms of the statute quoted, and within the scope of the penalties and prohibitions provided. "Temptation ice cream" complies with and conforms to the statutory mandate, but "Frozen Luxury" violates the same, and thereby subjects the violator to the penalties therein provided. In view of the public policy evidenced by the terms of the statute, immunity cannot be established by substitution of a mere trade-name for a product which its constituent elements fairly identify as one embraced within the terms of the regulating statute.

The right of the state, under the police power, to enact laws which are designed to provide a minimum amount

of nutritional elements and prevent fraud and deception in the sale of foodstuffs extends to ice creams and to dairy products made in the semblance of ice cream, and such enactments are not arbitrary, excessive, or unlawful exercises of the police power, and do not violate the Fourteenth Amendment to the Constitution of the United States, nor transgress section 3, art. I of the Nebraska Constitution. *Hutchinson Ice Cream Co. v. State of Iowa,* 242 U. S. 153, 61 L. Ed. 217; *State v. Hutchinson Ice Cream Co.,* 168 Ia. 1, 147 N. W. 195; *Carolene Products Co. v. Evaporated Milk Ass'n,* 93 Fed. (2d) 202; *United States of America v. Carolene Products Co.,* 58 Sup. Ct. Rep. 778; *Powell v. Pennsylvania,* 127 U. S. 678, 32 L. Ed. 253; *Schmidinger v. City of Chicago,* 226 U. S. 578, 57 L. Ed. 364; *Armour & Co. v. State of North Dakota,* 240 U. S. 510, 60 L. Ed. 771.

It follows that the provisions of the laws upon which the prosecution in the instant case was based were valid, the information charged an offense thereunder which was fully proved by the evidence introduced, and the action of the trial court complained of on this appeal is wholly unjustified. The exceptions of the county attorney are, therefore, sustained.

EXCEPTIONS SUSTAINED.

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FIRST TRUST COMPANY OF LINCOLN, AS SUCCESSOR-TRUSTEE, APPELLEE, V. EASTRIDGE CLUB OF LINCOLN ET AL., APPELLEES: ADELMAR B. CHALOUPKA ET AL., APPELLANTS.
279 N. W. 720

FILED MAY 20, 1938. No. 30219.

1. Mortgages: DEFICIENCY JUDGMENTS. "The general saving statute preserves a right of action on a claim for deficiency judgment in a suit to foreclose a mortgage not due nor in litigation at the time the legislature, without a special saving clause, passed the act of 1933 repealing the statutory provision which permitted such a judgment." *Stowers v. Stuck,* 131 Neb. 409, 268 N. W. 310.
2. ———: ———: REVIEW. "While the decree finding personal liability first rendered in a foreclosure proceeding is to a certain

extent interlocutory, yet, as to findings of fact made in such decree on issues properly pleaded, it is not subject to review on objections to a deficiency judgment." *Parratt v. Hartsuff*, 75 Neb. 706, 106 N. W. 966.

3. ———: ———. "Where facts showing defendant's liability for a deficiency are set out in the petition to foreclose, and judgment for a deficiency against those personally liable for the debt is prayed, the court has jurisdiction, after a sale of the mortgaged premises, to enter a deficiency against the defendants so found liable on a motion therefor by the plaintiff." *Patrick v. National Bank of Commerce*, 63 Neb. 200, 88 N. W. 183.
4. Guaranty: CONSTRUCTION. The mortgage bonds, a mortgage securing them, and a guaranty relating thereto, being executed substantially contemporaneously as one transaction, are to be construed together.
5. ———: ———. In view of the facts in this case, the contemporaneous contracts between the parties, pertaining to the same subject-matter, the nature of the transaction between them, and the attendant circumstances, including the result sought to be attained, by necessary implication evidencing what the parties intended the language of the guaranty to provide for, may properly be taken into consideration in interpreting that document.
6. ———: ASSIGNMENT. In this case, under the facts disclosed by the record, the assignment of the "first mortgage real estate bonds," evidencing the debt secured, by necessary implication carried with it to the assignee the mortgage by which they were secured, and also the guaranty assuring the payment of the indebtedness evidenced thereby.

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

*Beghtol, Foe & Rankin, Max Anderson, Ralph W. Ford, S. M. Kier, F. H. Wagener, Walter E. Nolte* and *Peterson & Devoe*, for appellants.

*Harry R. Ankeny, contra.*

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

EBERLY, J.

This is an appeal from a deficiency judgment entered in behalf of plaintiff on April 19, 1937, in a suit in equity for

the foreclosure of a certain mortgage and the enforcement of obligations secured thereby and connected therewith.

The brief of appellants says, in part:

"There were thus involved in this action two principal issues—one for the foreclosure of the mortgage, and the other the liability of the guarantors. It is concerning the latter action that this appeal is taken. There is no controversy in this case concerning the propriety of the foreclosure action, the issue in this court being whether or not the terms of the instrument signed by the members of the Eastridge Club bind them to pay certain sums for which judgment was entered against them in the district court."

In connection with the issues thus stated, the chronology of the events of this litigation becomes of importance. On September 12, 1936, plaintiff, the First Trust Company, as the duly appointed, qualified and acting successor-trustee of the Lincoln Trust Company, a bankrupt, and the Lincoln Safe Deposit Company, a bankrupt, filed its petition in equity as such successor-trustee of an express trust for all beneficiaries of said trust. The relief sought included the enforcement of certain first mortgage bonds set forth therein and copies of which formed a part of the petition for the foreclosure of the mortgage executed and delivered by the Eastridge Club in consideration of a loan of $50,000 received from the Lincoln Safe Deposit Company, securing the payment thereof, and the enforcement of a certain contract of guaranty set forth therein which was executed by appellants herein and others, and for other relief.

The following is a copy of this guaranty, omitting the signatures thereto, viz.:

"Guarantee against ultimate loss.

"Know all men by these presents: That the undersigned in consideration of Lincoln Safe Deposit Company, a corporation of Lincoln, Lancaster county, Nebraska, making a loan to the Eastridge Club, a corporation, of Fifty Thousand Dollars, do hereby guarantee the said Lincoln Safe Deposit Company against ultimate loss by reason of the making of said loan, it being understood and agreed that

in case it becomes necessary to foreclose said mortgage that said Lincoln Safe Deposit Company will attend to such foreclosure, pay all court costs incident thereto, and when the property securing said loan is sold and sheriff's deed issues, if it does not sell for a sufficient amount to pay said loan in full with interest according to the terms of the mortgage including costs, then and in that event the undersigned each agrees to make up one one-hundredth part of such deficiency plus a reasonable attorney's fee for conducting said foreclosure. It being the intention that the loan will be guaranteed as above by one hundred members of Eastridge Club and it being further agreed and understood that in no event will any one guarantor be called upon to pay, or be liable for, more than Five Hundred Dollars.

"Said loan is secured by a leasehold interest in the South Half of the Northwest Quarter and a tract containing thirty acres in the North Half of the Northwest Quarter of Section Thirty-four, Township Ten, North, Range Seven, East of the 6th P. M. in Lancaster county, Nebraska, together with all improvements located on said land; is dated December 1, 1926, with Fifteen Hundred Dollars payable semiannually on principal until eight instalments are paid, and thereafter $2,000 payable semiannually until eleven instalments are paid, and the balance payable at the end of the tenth year with interest at the rate of six per cent. per annum, payable semiannually.

"Hereby binding our heirs, legal representatives, or assigns.

"Witness our hands this 1st day of Nov. 1926."

With respect to said guaranty, it is further alleged in said petition that as part of the loan transaction the defendants who are the appellants herein were financially interested in said Eastridge Club at the time of the making of said $50,000 loan, and for the purpose of securing the same from the Lincoln Safe Deposit Company, said appellants executed and delivered such guaranty, and the terms and effect of said guaranty are fully alleged in said plead-

ing. As a part of the prayer of said petition, plaintiff prays that "each of them (said guarantors) be decreed to be personally liable for any deficiency remaining after applying the proceeds of said sale (of the mortgaged property) to said indebtedness."

On October 20, November 7, and November 19, 1936, appellants filed demurrers to the petition, which challenge the sufficiency thereof on the same grounds as now presented on appeal. Thereafter demurrants "plead over" and in their several answers include the same defenses to the petition as now presented in the brief as appellants herein. Plaintiff then took issue by replies thereto.

On February 11, 1937, after hearing, on the evidence and pleadings, the district court found generally in favor of plaintiff upon its petition, that the allegations therein contained are true and the relief therein prayed should be granted, and found against the defendants. Also, the district court therein found specially as to the guarantors executing said guaranty (appellants herein) that they "were each at all times financially interested in the Eastridge Club, a corporation, and were the sole or principal stockholders, officers and directors of said corporation; that as part of the loan transaction involved herein, and as a consideration therefor, said defendants executed and delivered to the Lincoln Safe Deposit Company, a corporation, their certain written individual guaranty, a correct copy of which is attached to plaintiff's petition, marked Exhibit 'A' and made a part of said pleading; that, by the terms of said guaranty, said defendants and each of them guaranteed, covenanted and agreed that, in case of foreclosure of said mortgage and in the event of a sale of the mortgaged security and in the event of a deficiency resulting therefrom, they and each of them would pay a one one-hundredth part of the deficiency, if any, of principal, interest and costs, plus a reasonable attorney's fee for conducting said foreclosure, it being further agreed that no one of said guarantors would be called upon or liable for more than the sum of $500.

"That said guaranty, the mortgage bonds and mortgage securing said indebtedness, are all a part of the same transaction and should be construed together as one entire contract, and that the assignment and transfer of the mortgaged bonds by the Lincoln Safe Deposit Company operates as an assignment and transfer of the security of said guaranty and all rights thereunder; that the plaintiff, as the owner and holder of said mortgage bonds, has succeeded to all rights of the Lincoln Safe Deposit Company as mortgagee and holder of the security evidenced by said guaranty.

"That it was necessary to foreclose said mortgage and plaintiff, trustee, as holder and owner of said mortgage bonds, has by this action attended to such foreclosure as contemplated by the terms of said guaranty.

"That when the mortgaged security is sold and a sheriff's deed issues, if the mortgaged security does not sell for a sufficient amount to pay the mortgage debt in full with interest according to the terms of said mortgage, including costs, then and in that event the said guarantors, defendants herein, * * * shall be liable to plaintiff for a sum equal to one one-hundreth part of the total deficiency, the amount thereof to be hereafter determined by the court, but that in no event shall any of said guarantors be liable for more than the sum of $500."

It was in said decree adjudged that there was due plaintiff on the indebtedness evidenced by the bond and mortgage in suit and guaranteed by appellants herein the sum of $34,317.34 with interest, and said mortgaged premises were by the terms of said decree ordered sold as upon execution. It was further provided, ordered and adjudged in said decree "that if the amount derived from the sale of the mortgaged property * * * is insufficient to pay the amount due the plaintiff, the defendants (guarantors) * * * shall each be individually and personally liable * * * for a one one-hundredth part of the balance of the deficiency due plaintiff."

On March 5, 1937, an order of sale was issued on said

decree and the property covered by decree of foreclosure and sale was sold in the manner provided by law. And, on April 10, 1937, the sale was confirmed. On April 12, 1937, plaintiff filed a motion for deficiency judgment against all guarantors, appellants herein, each for the amount as determined by the decree of February 11, 1937. On April 19, 1937, motion for deficiency judgment was sustained and judgment entered conforming thereto. On April 22, 1937, motion for a new trial in behalf of guarantors was filed, and on May 13, 1937, such motion was overruled. On June 19, 1937, transcript on appeal was filed in the supreme court.

Notwithstanding the enactment of chapter 41, Laws 1933, this court is committed to the view that "The general saving statute preserves a right of action on a claim for deficiency judgment in a suit to foreclose a mortgage not due nor in litigation at the time the legislature, without a special saving clause, passed the act of 1933 repealing the statutory provision which permitted such a judgment." *Stowers v. Stuck,* 131 Neb. 409, 268 N. W. 310.

In the instant case, there being personal service of summons followed by personal appearance of the guarantors in the proceeding, the jurisdiction to enter a deficiency judgment, when sustained by proper evidence, is unquestioned.

In this case, the liability of appellants, upon issues duly formed by the pleadings as well as evidence introduced in support thereof, was fully determined by the decree entered on February 11, 1937.

Appellants' motion for new trial, filed on April 22, 1937, was directed to the deficiency judgment entered on April 19, 1937, and sets forth no facts occurring since the entry of the decree of foreclosure on February 11, 1937. It also must be conceded that more than three months elapsed between the filing and entry of that decree and the filing of the transcript on appeal in this court.

The situation thus disclosed brings this case within the scope of the following decisions:

"While the decree finding personal liability first rendered in a foreclosure proceeding is to a certain extent interlocutory, yet, as to findings of fact made in such decree on issues properly pleaded, it is not subject to review on objections to a deficiency judgment." *Parratt v. Hartsuff*, 75 Neb. 706, 106 N. W. 966.

See, also, *Stover v. Tompkins*, 34 Neb. 465, 51 N. W. 1040; *Brand v. Garneau*, 3 Neb. (Unof.) 879, 93 N. W. 219; *Carstens v. Eller*, 5 Neb. (Unof.) 149, 97 N. W. 631; *Smith v. Allen*, 72 Neb. 170, 100 N. W. 129; *Kloke v. Gardels*, 52 Neb. 117, 71 N. W. 955; *Union Central Life Ins. Co. v. Saathoff*, 115 Neb. 385, 213 N. W. 342; *Stuart v. Bliss*, 116 Neb. 305, 216 N. W. 944; *Arnold v. Hawley*, 128 Neb. 766, 260 N. W. 284.

In *Patrick v. National Bank of Commerce*, 63 Neb. 200, 88 N. W. 183, we held: "Where facts showing defendant's liability for a deficiency are set out in the petition to foreclose, and judgment for a deficiency against those personally liable for the debt is prayed, the court has jurisdiction, after a sale of the mortgaged premises, to enter a deficiency against the defendants so found liable on a motion therefor by the plaintiff."

Under the record thus presented, we are precluded from considering the matters embraced in and determined by the decree of February 11, 1937.

However, waiving arguendo these legal objections, and considering the case solely on the evidence, we are satisfied that the disposition made by the trial court of the issues presented by the motion for a new trial is in all respects correct.

In cases such as here presented, sound policy would appear to require the highest effort to discover and effectuate the intention of the parties involved at the time of the execution of the instrument in suit. For this purpose this court has said: "It is proper to look into other papers constituting parts of the same transaction and to consider the nature and course of the business between the parties." *Rice v. McCague*, 61 Neb. 861, 867, 86 N. W. 486. See, also, *Tootle v. Elgutter*, 14 Neb. 158, 15 N. W. 228.

So, also, where the contract of guaranty is executed contemporaneously with, and as a part of, the consideration of the contract guaranteed, the law imputes notice to all parties immediately related to the transaction of its character and extent. This principle is certainly applicable here in view of the identity of interest between the guarantors and the Eastridge Club. *Wright v. Griffith,* 121 Ind. 478, 23 N. E. 281.

The view above set forth is quite in harmony with the general rule that a note, a mortgage securing the same, and a guaranty relating thereto, being executed substantially contemporaneously as one transaction, are to be construed together. 28 C. J. 918; *Charlestown Five Cents Savings Bank v. Zeff,* 275 Mass. 408, 176 N. E. 191; *Baker v. James,* 280 Mass. 43, 181 N. E. 861; *Skilton v. R. H. Long Cadillac LaSalle Co.,* 265 Mass. 595, 164 N. E. 652; *Luikart v. Massachusetts Bonding and Ins. Co.,* 129 Neb. 771, 263 N. W. 124.

In the instant case, the assignment of the "first mortgage real estate bonds," evidencing the debt secured, by necessary implication, carried with it to the assignee the real estate mortgage by which they were secured, and also the guaranty assuring the payment thereof.

Nor do we find the guaranty in suit "special" in the sense contended for by appellants. Considered as an entirety, in connection with the bonds and mortgage evidencing the indebtedness referred to therein, and the purpose to be accomplished thereby as established by the surrounding circumstances, the guaranty is unrestricted as to right of transfer, and though running to the Lincoln Safe Deposit Company it is equally available to the assignee of the principal contracts and enforceable by him, or by the trustee who is his legal representative in the present suit. See, *Stillman v. Northrup,* 109 N. Y. 473, 17 N. E. 379; *Abraham Lincoln Life Ins. Co. v. Reynolds Mortgage Co.,* 30 Fed. (2d) 790; *Everson v. Gere,* 122 N. Y. 290, 25 N. E. 492; *First Nat. Bank v. Taylor,* 38 Utah, 516, 114 Pac. 529; *McGowan v. Wells' Trustee,* 184 Ky. 772, 213 S. W. 573.

It follows, even though we consider the defenses presented on this appeal as proper to be now heard, still the conclusion remains that the judgment of the district court is correct, and it is, therefore,

AFFIRMED.

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IN RE ESTATE OF PETER NISSEN.
AUGUST NISSEN, APPELLANT, V. CHRIS DAHL, EXECUTOR, APPELLEE.
279 N. W. 782

FILED MAY 20, 1938. No. 30220.

Wills: DEVISES: DEDUCTIONS. Under the facts in this case, the deduction by the executor of the estate of Peter Nissen, deceased, from the distributive share of August Nissen therein, as provided by the terms of the will duly admitted to probate, of the sum of $1,100 evidenced by two promissory notes executed by that legatee and payable to deceased is approved.

APPEAL from the district court for Cedar county: MARK J. RYAN, JUDGE. *Affirmed.*

*T. F. Donelson* and *L. T. Fleetwood,* for appellant.

*Clarence E. Haley, contra.*

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

EBERLY, J.

This is an appeal by August Nissen from so much of the judgment of the district court for Cedar county as directs the deduction of $1,100 by the executor of the estate of his father, Peter Nissen, from his distributive share in his father's estate.

The following facts are disclosed by the record before us: On February 20, 1929, August Nissen, for a valuable consideration, executed and delivered his promissory note in writing, for $800, payable to his father, Peter Nissen, the payee therein named, on August 20, 1929. On January 19,

1931, August Nissen, for a valuable consideration, executed and delivered his second promissory note in writing, for $300, payable July 19, 1931, to his father Peter Nissen, the payee therein named. Peter Nissen departed this life on May 4, 1933, leaving a last will and testament bearing date of September 10, 1931, and petition for probate of this instrument was filed in the county court of Cedar county on May 8, 1933, and a proper decree entered by that court in that cause duly admitting the same to probate was made on May 26, 1933.

This will, which may be said to be in usual form generally, provided for the payment of the testator's debts, the appointment of an executor, and certain specific legacies, and contained a residuary clause, of which the following relates to the present litigation, viz.:

"Fifth. I give, devise and bequeath all the remainder of my estate, both real and personal, to my other sons * * * as hereinafter specifically set forth, share and share alike, 'Ole Nissen,' 'August Nissen,' * * * with the following stipulation that should any of the aforesaid heirs be indebted to me at the time of my decease, the amount of such indebtedness shall be deducted from his or her part and distributed equally among the aforesaid heirs. This clause particularly applies to my son, August Nissen, to whom I have loaned the sum of Eleven Hundred Dollars as evidenced by two promissory notes of $800 and $300 respectively, both of which are still unpaid."

The executor named in the will qualified as by law provided, and in due course of administration of this estate filed his final report. This report disclosed that the share of August Nissen was charged by him with the two notes aggregating $1,100 and interest. To this report, August Nissen filed objections, which included the claim that the statute of limitations had run against said notes, and as such they are neither assets belonging to the estate nor charges or set-offs against August Nissen's distributive share therein. The county court of Cedar county denied the objector's contention. He appealed to the district court

for Cedar county wherein his claim, so far as based on the statute of limitations, was disallowed. He now presents this contention at the bar of this court.

The testator died on May 4, 1933. His will speaks from his death. The nature of the obligations involved, written promissory notes for the payment of money, renders applicable a five-year statute of limitations. Comp. St. 1929, sec. 20-205. But appellant's promissory notes were not for any purpose adversely affected by this statute of limitations at the time of his father's death. His father's will on the date of his father's death, and as of that instant, determined and measured his rights of inheritance and succession. This power so exercised by the testator, Peter Nissen, was clearly vested in him by our statute of wills, which was ample to authorize the deduction of the $1,100 here in suit, as directed by the provisions of that instrument hereinbefore quoted.

It follows that the judgment of the district court is, in all things correct, and it is

AFFIRMED.

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ANNA LORENZEN ET AL., APPELLEES, V. EZRA H. STOBBE ET AL., APPELLANTS.

279 N. W. 774

FILED MAY 20, 1938. No. 30336.

1. Mortgages: MORATORIUM. Even before the validity of the moratory act was questioned in this court, a mortgagor was not entitled to a stay under the moratorium statute where the mortgage lien on the land exceeded the value.
2. ———. A mortgage foreclosure sale of realty will not be disturbed unless there is such inadequacy of price as to show fraud or mistake.

APPEAL from the district court for Hall county: ERNEST G. KROGER, JUDGE. *Affirmed.*

*A. J. Luebs,* for appellants.

*Harry Grimminger, contra.*

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

DAY, J.

This is an appeal from an order of the trial court vacating a moratory stay and confirming a mortgage foreclosure sale.

The appellees (mortgagees) foreclosed their $19,000 mortgage on 200 acres of land in Hall county. A decree was entered in March, 1933, for $20,765.18, with interest at 10 per cent. from that date. The property was sold at foreclosure sale to the mortgagees in February, 1934, for $19,000, and there was due at that time approximately $22,600. The mortgagors continued in possession under a nine months' stay, a moratory stay, and extensions granted by the court. The rent paid under the moratorium was only an amount just about sufficient to pay the taxes on the real estate. In April, 1937, this application was filed to terminate the moratorium for the reason that there was no equity in the property belonging to the mortgagees. The application also sought the confirmation of the sale.

The moratory stay was properly terminated. This court held the statute invalid under which the moratory stay was granted. *First Trust Co. v. Smith, ante,* p. 84, 277 N. W. 762.

The moratory stay was also properly terminated because there was no equity in the premises. The evidence was in conflict as to the value of the land, but, in consideration of the evidence most favorable to the mortgagors, both as to the amount due on the decree of foreclosure and the value of the land, there is no equity. This court previous to the time the validity of the moratory act was questioned here held that a mortgagor was not entitled to a stay under the moratorium statute where the mortgage lien on the land exceeded the value. *First Trust Co. v. Stenger,* 130 Neb. 750, 266 N. W. 642; *Clark v. Hass,* 129 Neb. 112, 260 N. W. 792. Therefore, under no circumstances was there error on the part of the trial court in entering an order terminating the moratory stay.

There is no error predicated on the confirmation of sale except the termination of the moratory stay, unless it be that the sale price was inadequate. The mortgagees bid the amount of their mortgage. Interest and costs would increase the amount due. There was no irregularity in the sale and no showing that another sale would realize more.

A mortgage foreclosure sale of realty will not be disturbed unless there is such inadequacy of price as to show fraud or mistake. *Equitable Trust Co. v. Groves*, 133 Neb. 177, 274 N. W. 457.

In foreclosure suits, mere inadequacy of price, unless it be so gross as of itself to justify a suspicion of fraud, surprise or mistake, is not ground for the interference of the court, to set aside the sale. *Lindberg v. Tolle*, 121 Neb. 25, 235 N. W. 670. See, also, *Lougee v. Matters*, 124 Neb. 223, 246 N. W. 242; *Hill v. Campbell*, 125 Neb. 585, 251 N. W. 106.

The price of the land in this case at foreclosure sale was not so inadequate as to justify a suspicion of fraud, surprise, or mistake, and an examination of the record does not disclose any error.

AFFIRMED.

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CATHERINE TERNES, APPELLEE, V. CLARA C. WATKE, APPELLANT.

279 N. W. 718

FILED MAY 20, 1938. No. 30289.

1. **Garnishment.** In an action in the nature of a creditors' bill against a garnishee for alleged false answers, the decree of the court, finding for the plaintiff, is supported by the record.
2. ———. The court, having once obtained jurisdiction of the cause, can give relief, if no other remedy is available, by rendering a money judgment against garnishee.
3. **Appeal.** An appellee may take cross-appeal by filing with the clerk of this court, on or before the day originally fixed for the filing of appellant's brief, a præcipe on cross-appeal.

APPEAL from the district court for Platte county: LOUIS LIGHTNER, JUDGE. *Affirmed.*

*Skiles & Skiles,* for appellant.

*Wagner, Wagner & Albert, contra.*

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

PAINE, J.

The parties in this case are Miss Catherine Ternes, plaintiff and appellee and cross-appellant, and Clara C. Watke, the defendant and appellant. Her husband, Fred B. Watke, was also a defendant.

In the petition filed by the plaintiff she alleged that she secured a judgment October 20, 1934, in the district court for Platte county for $4,651 against the defendant Fred B. Watke; that upon an execution issued thereon certain real estate in Dawson county was sold for $3,000, leaving a balance due upon the original judgment of $1,687.21, with interest at 10 per cent. and costs which amount at the present time to over $2,500. The petition further alleges that on May 26, 1934, defendant Fred B. Watke conveyed certain lands in Butler county to his wife, and gave a chattel mortgage to her upon his cattle, horses, farm machinery, etc., and upon the sale of said personal property paid his wife $1,600 out of the proceeds; that said transfers were made to his wife without adequate consideration, and that said Clara C. Watke, defendant, holds the property only as trustee for her husband and the plaintiff; that in September, 1935, notice of garnishment was served upon defendant Clara C. Watke, in response to which notice she appeared before the court and testified with reference to said property, but she failed and refused to account for said property or any part thereof. Plaintiff asks that defendant Clara C. Watke be required to make a full and complete itemized statement of all moneys, personal and real property, and choses in action received by her from her husband since March 1, 1926, and all personal property be impounded for the payment of the balance due on the plaintiff's judgment. On April 10, 1936, a dismissal of said

cause of action as to defendant Fred B. Watke was filed by the attorneys for the plaintiff. Clara C. Watke, defendant, filed an answer, admitting the judgment of plaintiff, admitting that she received a deed to the land in Butler county from her husband, and praying that plaintiff's petition be dismissed.

On March 18, 1937, the cause of action came on for trial, and the evidence of Fred B. Watke, defendant, and John M. Cain was taken. The defendant, Mrs. Watke, was not in court, but it was stipulated between the parties that certain evidence taken in the original suit, when she appeared in the district court for Platte county as garnishee on September 28, 1935, might be considered in evidence, and the same appears in the bill of exceptions as plaintiff's exhibit No. 8. The evidence of Fred B. Watke, taken September 22, 1934, was introduced as exhibit No. 7 for impeachment purposes. Trial was completed, and the case was taken under advisement by the district judge.

Thereafter, on June 10, 1937, Clara C. Watke, defendant, filed a motion to dismiss the plaintiff's petition on the ground that the court has no jurisdiction to set aside a conveyance of real estate in Butler county, and that the several causes of action are improperly joined, and the evidence shows that the defendant had no money or property in her possession at the time the notice of garnishment was served upon her.

Thereafter, on June 17, 1937, a decree was entered by the district judge, finding that the defendant Clara C. Watke is indebted to the plaintiff for money being held by her on September 12, 1935, for the use and benefit of Fred B. Watke, in the sum of $500, with interest thereon at 6 per cent. from September 12, 1935, and further finding that the court is without jurisdiction to make any order with reference to the land located in Butler county, and directing that execution should issue. Motion for new trial, filed by the defendant, Clara C. Watke, was overruled.

Among the 14 errors relied upon for reversal, it is set out that the decree is contrary to the evidence; that the

judgment should have been for the defendant; that the court erred in admitting evidence in reference to the land in Dawson county, and also evidence in relation to the land in Butler county, and as to a chattel mortgage given upon personal property; and that the court erred in finding that the defendant Clara C. Watke had in her hands or under her control $500 belonging to Fred B. Watke at the time notice of garnishment was served upon her, and setting out many other errors.

The defendant insists that there was no conflict in the evidence, and that she did not make untrue or evasive answers, and that she had spent much of the money she had received from her husband, and that there was an absence of any evidence to prove that she still had $500 of it on hand, and that the judgment of the court was simply a conjecture.

The plaintiff insists that the evidence clearly shows that the husband conveyed valuable land and personal property to the wife, and that the evidence does not show that he owed her anything at all.

The petition in this case prayed that the real estate transfer be set aside; that the defendant be required to set out a full and complete itemized statement of all moneys and property received from her husband, and that the plaintiff have a judgment against defendant for the value of property conveyed by the husband to the wife since March 1, 1926, and for such other and further relief as equity may require.

Defendant insists that the only possible issue is as to $1,540 turned over to the defendant by her husband during a period of 18 months, and claims that this money not only belonged to the defendant, Clara C. Watke, but was all expended by her for family purposes prior to the garnishment proceedings. We cannot find that the evidence supports this claim.

The plaintiff endeavors to clarify the situation in regard to the pleadings in this case, and claims that the defendant made false answers in the garnishment proceeding, so that

the plaintiff was unable to state definitely what money or property she had, and therefore proceeded in a court of equity for an accounting of everything she had when she was served with a garnishment summons on September 12, 1935, and insists that this procedure is strictly in accord with the holding in *Hargreaves v. Tennis*, 63 Neb. 356, 88 N. W. 486, where the court said on page 359: "Such a suit is in the nature of a creditors' suit, to reach the goods and property of the judgment debtor fraudulently disposed of and enforce the equitable lien upon the goods arising from the garnishment. All equitable rights and charges are enforceable by appropriate proceedings in equity. Although we now have a further statutory remedy by action at law for unsatisfactory answer, the equitable remedy by creditors' bill is not superseded. Maxwell, Code Pleading, 165. * * * As to the last objection, if the facts alleged entitled the plaintiffs to proceed in equity, there was no need of a formal allegation of no remedy at law. *Ball v. Beaumont*, 59 Neb. 631. The old 'jurisdiction clause' is omitted today even in formal chancery pleading. Objection is also made that the court rendered a money judgment against the mortgagee who held the stock. * * * Where the subject of an equitable lien is put out of existence by the defendant, the court, having once obtained jurisdiction of the cause, will give complete relief by way of a money judgment. *Morrissey v. Broomal*, 37 Neb. 766."

The plaintiff followed the provisions of our statute, which provide generally that, if the garnishee appears and answers and his disclosures are not satisfactory to the plaintiff, the plaintiff may proceed against him in an action by filing a petition in his own name, and causing a summons to be issued upon it; and thereupon such proceedings may be had as in other actions, and judgment may be rendered for the plaintiff for the amount of the property of the defendant which is in the possession of the garnishee, and for what shall appear to be owing by him to the defendant, and for the costs. Comp. St. 1929, sec. 20-1030.

We have held: "In a creditor's suit to set aside a convey-

ance by a debtor to his wife alleged to have been made in consideration of money turned over by the wife to the husband many years before, the burden is upon the wife to show that the debt is genuine, that her purpose was honest, and that she acted in good faith in obtaining the title." *Waterbury State Bank v. O'Neill,* 129 Neb. 150, 260 N. W. 808.

In this case the plaintiff followed paragraph 2, rule 7-a, of our court, and cross-appealed simply by filing with the clerk of this court, on or before the day originally fixed for the filing of appellant's brief, a præcipe on cross-appeal, and in support of the cross-appeal insists that the evidence of the defendant and her husband clearly shows fraud, and that the trial court found the transactions between them fraudulent, and that the judgment for $500 should be increased to $940 and interest.

We have examined the evidence in this case, but the trial court heard evidence relating to these matters in 1934, 1935, and 1937, and had an advantage over this court in watching the reaction, if any, under cross-examination. We are not inclined to raise the amount of the judgment that the trial court entered. We have examined the errors set out by the defendant. We have reached the conclusion that, under the law and the evidence, the decree and judgment entered are supported by the evidence. We have examined the questioned rulings in regard to the admission of testimony and, while all of these rulings might not have been the same rulings that others might have made, yet in our opinion there is no prejudicial error in the rulings on the admission of evidence, and the decree and judgment of the trial court are

AFFIRMED.

JOSEPH C. STOLINSKI, ADMINISTRATOR, APPELLEE, V. ABRAHAM L. PATRICK ET AL., APPELLANTS.
279 N. W. 782

FILED MAY 20, 1938. No. 30350.

**Mortgages.** The action of the trial court in vacating an order for a moratory stay is not erroneous when it appears that the moratory act under which the stay was granted is void.

APPEAL from the district court for Sarpy county: WILMER W. WILSON, JUDGE. *Affirmed.*

*Nickerson & Nickerson,* for appellants.

*William R. Patrick, contra.*

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

CARTER, J.

This is an appeal from an order of the district court for Sarpy county vacating and setting aside an order allowing a moratory stay on 200 acres of land under the provisions of section 20-21,159, Comp. St. Supp. 1933.

The moratory stay was allowed on April 10, 1934. On July 30, 1937, a motion to vacate the order allowing a moratory stay was filed and the motion was sustained on October 18, 1937. The moratory act, as amended in 1937 (Laws 1937, ch. 42), has been held void. *First Trust Co. v. Smith, ante,* p. 84, 277 N. W. 762. In this situation, the trial court did not err in vacating and setting aside the order granting the moratory stay. *Mutual Benefit Life Ins. Co. v. Long, ante,* p. 186, 278 N. W. 270.

AFFIRMED.

CLAUDE HUSTON, APPELLANT, V. GAGE COUNTY ELECTRIC COMPANY, APPELLEE.
279 N. W. 797

FILED MAY 27, 1938. No. 30367.

**Evidence** in the record examined, and *held* sufficient to sustain the findings and judgment of the trial court.

APPEAL from the district court for Gage county: CLOYDE B. ELLIS, JUDGE. *Affirmed.*

*Frank A. Dutton,* for appellant.

*Jack, Vette & Lovewell, contra.*

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

EBERLY, J.

This is an action for compensation benefits under the Nebraska workmen's compensation act on account of personal injuries alleged to have been sustained by plaintiff due to an accident, arising out of and in the course of his employment by defendant on October 21, 1936. The trial of the issues presented by the pleadings and the evidence in the district court resulted in findings and judgment against the plaintiff, and a dismissal of his action. From the order of the trial court overruling his motion for a new trial, he appeals.

Viewing the record presented as an entirety, the controlling question is one of fact, which was clearly determined against plaintiff.

The substance of the testimony given by plaintiff as to the accidental infliction of the injuries of which he complains is that on October 20 or 21, 1936, he was in the employ of defendant at Blue Springs, Gage county, Nebraska, in the capacity of a common laborer; that he met with an accident in the afternoon of the day, which occurred while he was engaged in his work as an employee of defendant; that under the direction of his foreman he was then climbing a tree in an effort to oil a pulley located in the tree; that the accident occurred when he took hold of a branch

of the tree which broke off, and due to this he had considerable difficulty to keep from falling out of the tree; that concurring with this he had a sensation of pain in the back of his shoulders, in the back of his neck, and down his spine, and felt ill. Plaintiff claims he wrenched and twisted his back in this accident. But he further testified that he came down from the tree by himself, and sat down on the ground and rested a while, and thereafter he continued work for the rest of the day. He also testified that the following day there was no further work to be done, because the job had been finished, and the work ceased, and all men were laid off. He testified that prior to the time of the incident above related he was a man capable of doing a day's work and weighed somewhere between 150 and 160 pounds; further, that subsequent to the 21st day of October, 1936, he had some pain, but regarded the accident as trivial, and that he was not disabled until December 1, 1936. He further testified that in May, 1937, he went to see Dr. Arthur L. Smith at Lincoln, Nebraska, and that this doctor treated him; that on May 8, 1937, on advice of his attorney, he served, for the first time, a notice on defendant informing it that he was claiming disability benefits under the workmen's compensation act. He also states that in the Spring and early Summer of 1937, on the advice of a physician consulted by him, he had his tonsils and teeth removed. At the time of the trial in the district court plaintiff testified that he was then under his normal weight but had gained over eight pounds since his teeth and tonsils had been removed, and then weighed 124½ pounds.

The record also affords evidence corroborating plaintiff as to the occurrence of the accident at the time and place stated, and establishing his excellent character as an industrious workman, possessing, prior to the accident, a strong, muscular physique.

Dr. Arthur L. Smith was the sole medical witness testifying in behalf of plaintiff. He had first been consulted by plaintiff in May, 1937. At that time he examined plaintiff and took X-ray pictures. He made subsequent exami-

nations, taking X-ray pictures on July 10 and December 18, 1937. These were introduced in evidence. Dr. Smith testified that it was his opinion that the plaintiff had sustained injury to the soft tissues of his neck and to the ligaments and muscles of the neck and upper dorsal region; that plaintiff appeared weak and emaciated, and to suffer from fear and nervousness; that at the time of the first examination by this witness plaintiff's heart was normal; lungs normal; arms normal; abdomen normal; genitalia normal; reflexes normal; legs normal; blood normal; Wasserman negative; and urine normal. He stated that the X-rays showed that plaintiff had arthritis in his spine, and that in his opinion this was caused by the accident of October, 1936, now in suit. He also testified that this arthritis was progressive, and that the last X-ray pictures showed it more developed than the first ones; that he based his diagnosis of arthritis upon the proliferation of bony tissues shown in the X-rays. However, Dr. Smith admitted that arthritis could be caused by infection, traumatism, or degeneration. He further testified that in his opinion plaintiff was totally disabled, but that treatments were necessary and they would relieve the pain; further, that plaintiff had a chronic bronchitis, but this could not be attributed to the accident.

As to the cause of the arthritic condition, Dr. Smith, on cross-examination, testified, viz.:

"Q. Arthritis itself can be caused by infection, can it not? A. Yes, sir. Q. By infection, degeneration or traumatism, I think you said? A. Yes, sir; or a combination of those. Q. If it were not for your history of this accident and of the patient's complaints and the history given you, would you be able to tell what kind of arthritis this was? A. That is what I must depend on, that he was normal before, that he had an accident and within a reasonable time afterwards an arthritis developed. Q. But such a condition as you find by your X-rays could be caused by infection? A. Yes, sir. Q. Or by degeneration? A. No, sir. Q. Not by degeneration? A. No, sir; it is a different type.

Q. But it could be caused by infection? A. Yes, sir. Q. That would appear in the X-ray as the same? A. yes, sir."

Opposed to the foregoing is the testimony of Dr. W. T. Wildhaber of Beatrice, Nebraska, a physician consulted by plaintiff on March 14, 1937. This doctor's examination disclosed that the tonsils were cryptic and jagged; that nutrition was poor, and that the teeth and gums showed infection. No claim of the occurrence of an accident was made at this time by plaintiff, and the examination disclosed no evidence of injury caused by an accident. This physician removed plaintiff's tonsils on May 24, 1937. His opinion was that plaintiff was then suffering from rheumatism and infection of the tonsils and teeth, and a bronchial asthma.

Dr. J. R. Leibee, the local physician for the Eagles Lodge at Beatrice, testified that that organization provides benefits for disability arising out of an accident; that plaintiff, who appears to have been a member of that lodge, consulted him during the winter of 1936-1937, and filled out an application for the benefits, but made no claim of accident in said application, and stated to this doctor definitely that he had had no accident, and plaintiff was unable to get relief from the lodge because he did not show or claim to have had an accident.

Dr. W. W. Waddell of Beatrice, Nebraska, testified that he was consulted by plaintiff on his own behalf and not on behalf of defendant on January 12, 1937, and he made a complete examination; that as a result of such examination he made a diagnosis of myalgia, due to focal infection of teeth, tonsils and prostate; that he found pus about the teeth; that prostate on palpation was boggy, and found clumps of pus cells in the urine after palpation of the prostate; that plaintiff's tonsils were enlarged. There were no findings that in the opinion of this physician these conditions could have been caused by an accident. In this doctor's opinion the aching and soreness complained of by plaintiff were due to focal infection and not to an accident. On cross-examination he testified that pus from the teeth

could, and usually did, get into the blood stream by direct absorption; and further that the disability from which plaintiff was suffering at the time he examined him was caused by infection of one of the three sources of infection above referred to, or a combination thereof, and not by trauma.

Dr. W. A. Rush of Beatrice, Nebraska, testified that he had specialized in radiology (X-ray) for more than 15 years; that he took X-ray pictures of plaintiff's neck on July 15, 1937, at the request of defendant, and in those pictures he found absolutely no unusual pathology or any indication of traumatic arthritis; that he made a careful study and examination of the X-ray pictures taken by plaintiff's medical witness, Dr. Smith, in May, July and December, 1937, which were introduced in evidence, and in his opinion there was no evidence of unusual pathology, and he found no progressiveness in the pictures of December over those formerly taken; that there was no evidence of injury disclosed by such pictures; that the calcium deposits testified to by Dr. Smith as being evidence of arthritis were not evidence of arthritis, and especially of traumatic arthritis, and that the same were very common in individuals of 36 years of age or more, and especially among laboring people.

Dr. H. R. Brown, a physician of Beatrice, Nebraska, made an examination of plaintiff at defendant's request on July 15, 1937. This was after plaintiff's tonsils had been removed and his teeth extracted. The substance of Dr. Brown's evidence is that he then diagnosed plaintiff's condition and symptoms as secondary to infection of the tonsils and the mouth, but he found nothing in any wise attributable to an accident in October of 1936; that plaintiff was then only partially disabled; that there was no evidence of trauma; that such disability as plaintiff was suffering from at the time of the examination was directly the result of the infection above referred to. Dr. Brown also testified positively that he regarded a trauma as neither a cause nor an accelerating agent in this case.

In consideration of the evidence in the record before us, we conclude that this is not the usual case of conflicting evidence. The compensation claimant has the burden of establishing that the injury complained of was caused by an accident arising out of and in the course of his employment. Plaintiff has wholly failed to carry this burden of proof. Rather, the conclusion from the entire record is that plaintiff's present disabilities in suit are due to infection caused by diseased tonsils and infected teeth, and these sources of his troubles are wholly unconnected with the accident of October 21, 1936.

We are quite committed to the doctrine that awards of compensation cannot be based upon possibilities or probabilities, but they must be based upon sufficient evidence showing that claimant has incurred a disability arising out of and in the course of his employment. *Bartlett v. Eaton,* 123 Neb. 599, 243 N. W. 772; *Price v. Burlington Refrigerator Express Co.,* 131 Neb. 657, 269 N. W. 425; *Townsend v. Loeffelbein,* 123 Neb. 791, 244 N. W. 418; *Saxton v. Sinclair Refining Co.,* 125 Neb. 468, 250 N. W. 655; *Beatrice Creamery Co. v. Kizer,* 127 Neb. 34, 254 N. W. 690.

Thus, the evidence in the present record fully justifies and supports the judgment of the district court, and it is

AFFIRMED.

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IN RE ESTATE OF DORA J. ADEN.

CHRISTY J. ADEN, APPELLEE, V. GEORGE J. ADEN ET AL., APPELLANTS.

279 N. W. 794

FILED MAY 27, 1938. No. 30324.

**Wills.** When the signatures of the testatrix and of the three attesting witnesses of a will are unquestioned, and there is an absence of proof of any fact which discredits the recitals of the proper attestation clause thereof, the mere fact that one of such witnesses is unable to recall in detail all of the events which took place at the signing and execution of such will is not sufficient to justify a refusal to admit such will to probate.

APPEAL from the district court for Johnson county: VIRGIL FALLOON, JUDGE. *Affirmed.*

*John J. Ledwith, Jay C. Moore* and *Robert S. Finn,* for appellants.

*Lewis C. Westwood* and *Raymond B. Morrissey, contra.*

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

PAINE, J.

This is a will contest, where the principal questions involved were valid execution and undue influence. The court found there was insufficient evidence to submit these questions to the jury, and upon motion of the proponent, after all the evidence had been taken, the court instructed the jury to return a verdict that exhibit No. 1 was the last will and testament of Dora J. Aden, deceased. From this verdict and the order directing the county court of Johnson county to admit said will to probate, the five children and one grandchild of Dora J. Aden, deceased, have appealed to this court.

The contestants maintain that the evidence shows that the will was not duly and properly subscribed, attested, and executed, and that there was evidence of undue influence practiced upon his mother by Christy J. Aden; that this evidence was of such a character and nature concerning this will and its execution that reasonable minds might draw different conclusions, and that therefore the trial court should have submitted all of these questions to the jury. These are the principal errors alleged for reversal, and each is set out in several different forms. Another allegation is that the court erred in finding for the proponent on the issue of testamentary capacity.

It cannot be disputed that the burden is upon the proponent of a will of establishing that the statutory requirements concerning the manner in which wills must be executed have been strictly and fully complied with.

It was also held by this court in the case of *In re Estate*

*of Smith*, 130 Neb. 739, 266 N. W. 611: "The attestation required of witnesses to a will consists in their seeing that those things exist and are done which the statute requires to exist or to be done in order to make the instrument, in law, the will of the testator."

Dora J. Aden executed the will in controversy September 22, 1932, in the First State Bank at Sterling, Nebraska. The witnesses were R. F. Frerichs, Otto H. Stuve, and John R. Winter, said men being the president, the cashier, and the assistant cashier of such bank. President Frerichs died before the will was probated, the testatrix having died February 16, 1937. Cashier Stuve testified that he had known the testatrix over 40 years, but he does not remember anything regarding Mrs. Aden executing this will. He identified his signature as a witness, but stated that he could not recall the event. He also identified the signatures of the other two witnesses, and stated that, to the best of his recollection, the will was executed in the back room of the bank. He further testified that the testatrix was of sound mind at the time of the execution of the will. He testified that he did not recall whether her son, Christy J. Aden, was with her at the time of the execution of the will or not. John R. Winter, the assistant cashier, testified that he knew Mrs. Aden, and that he observed Mrs. Aden sign the instrument in his presence; that she asked all three witnesses to sign it as witnesses; that the attestation clause was typed on the paper at the time, and was below where she signed and above the signatures of the witnesses; that he read the attestation clause at that time, and that the statements now there were there then; that those statements of the attestation clause state the facts.

Now let us examine in greater detail the evidence of Otto H. Stuve, who appeared only in the county court upon the hearing when the will was admitted to probate, and very briefly answered a few questions in relation thereto. When the trial was had in the district court on appeal, it was stipulated that such witness was around Grand Island and could not be present, and that his testimony given in the

county court could be offered and received in evidence and read to the jury. He testified that at the time the will was written he was cashier of the First State Bank of Sterling; that he had known Dora J. Aden practically all his life, at least for 40 years; that she lived in the west edge of the town of Sterling. But he did not recall the occasion of signing that particular instrument, saying: "I mean by that, we witnessed a good many instruments and I don't remember any one in particular." He testified that he was familiar with the testatrix' signature, and identified her signature thereon, but did not remember her signing it. He testified that the testatrix was able to and did transact her own business; that she did business at their bank, and that he saw her once every week, or once every two weeks, and that she was of sound mind at that time. At the close of this direct evidence given in the county court, Mr. Ledwith stated that there would be no cross-examination.

In the direct evidence of Christy J. Aden, who is charged with exercising undue influence over his mother, he testifies that he did not know that his mother had made a will until after her death, when he received the notice of the county judge to appear in court, and denies the testimony of his brother William that he knew of it before that time. He positively denies that his mother ever talked to him about making a will; that he never tried to run her business, and he always considered her competent to manage her own affairs.

On cross-examination he testified that he left home when he was married, 16 years before the trial; that he saw her about once a week, and perhaps they telephoned back and forth once a day, and sometimes two or three times a day. He admitted that his mother had instituted a suit to collect a note against a deceased son's estate, and that she received a settlement of $1,600 or $1,700 thereon, but that he did not know how much money his mother had on hand at the time of her death. He testified that his mother owed a lot of back taxes, and owed accounts which she had paid up after she received this money.

On redirect examination Christy J. Aden testified that two or three months before his mother's death she started to tell him she had made a will, and he told her he did not want to hear anything about it; that it was her property, and she could do with it just as she saw fit, and that he did not care what she did with it.

George J. Aden, a contestant, testified that there had been an estrangement between him and his mother for six years before her death; that one time his mother showed violent anger and went into a kind of a fit, and since that occasion six years ago he thought it was better to keep away from his mother for the sake of her health.

Dr. W. L. Morrill testified that there was nothing wrong with her mind, that she was able to transact her own business, to know her own property, and that she had capacity to know to whom she wanted to leave her property.

At common law, attestation of a will was not necessary. Such requirement, in order to make valid the execution of a will, is purely statutory. The purpose of having disinterested witnesses is so that the testator may be entirely free from importunity of interested persons, and that a witness may be available to testify as to the mental condition of the testator. "Attestation, it has been said, consists in the act of witnessing the performance of the statutory requirement to valid execution. Subscription is the signing of the witnesses' names upon the same paper, for the sole purpose of identification, and implies that attestation has been performed. The one is mental, the other mechanical. Under this view there may be a perfect attestation in fact without subscription." 28 R. C. L. 123, sec. 78.

Wills have been admitted to probate where the testator's name was improperly given in the attestation clause, and it has been held that the attestation clause is not a necessary or material part of a will. *Monroe v. Huddart,* 79 Neb. 569, 113 N. W. 149; *In re Estate of Dovey,* 101 Neb. 11, 162 N. W. 134.

Section 30-205, Comp. St. 1929, provides the formalities required in executing a will in Nebraska. After the testa-

tor has signed the same, it must be attested and subscribed by two or more competent witnesses; "and if the witnesses are competent at the time of attesting the execution of the will, their subsequent incompetency, from whatever cause it may arise, shall not prevent the probate and allowance of the will, if it be otherwise satisfactorily proved."

This court has recently discussed many questions relating to the due execution of wills in the case of *In re Estate of Kajewski, ante,* p. 485, 279 N. W. 185, released April 15, 1938. It was there held:

"The burden of proving that a will resulted from undue influence is ordinarily upon the contestants who assert it.

"Mere suspicion of undue influence upon the testator * * * is not sufficient to require a submission of the issue to a jury, or to sustain a verdict for the contestants." In this late case it is held: "The question of undue influence should be submitted to the jury when the circumstances attending the execution of the will are such that reasonable minds might conclude from the evidence that it was not the voluntary act of the testator." And it was held that the trial court erred in submitting the issue of undue influence and testamentary capacity to the jury, and the judgment was reversed.

In the case of *In re Estate of Frazier,* 131 Neb. 61, 267 N. W. 181, it was held that, if a verdict against a will would have to be set aside as against the weight of the evidence, then that issue should not be submitted to the jury. It was further held: "To justify the direction of a verdict on competency of the testator, it is not necessary that there should be literally no evidence thereon, but it is sufficient if there is none which ought reasonably to satisfy the jury that the incompetency alleged has been established."

In the case at bar, the president of the bank, to whom the testatrix went to have her will prepared, took her into the back room of the bank and, using a standard blank of a short-form will, carefully prepared the will. He then called to the back room of the bank the cashier and the assistant cashier, and the three men were present when the testatrix

signed the will, and each of the three men then signed as a witness. The one who prepared the will, and knew the most about its preparation, is dead. The attestation clause is proper, the signatures of the testatrix and of the three witnesses are not questioned, but the contestants endeavor to deny this will probate on the ground that one of the witnesses fails to recollect certain details of what occurred at the time of signing on the ground that he witnessed a good many instruments and he did not remember any one in particular, but his present lack of an independent memory of the details is not sufficient in the minds of the court to discredit this witness. The attestation clause states all of the necessary legal requirements in Nebraska.

In *Holyoke v. Sipp*, 77 Neb. 394, 109 N. W. 506, it is held: "A presumption of the due execution of a will arises from the presence of an attestation clause which recites the facts necessary to the validity of the will, and, in the absence of evidence discrediting the statements, the will should be admitted to probate." In the text a quotation is made from 1 Underhill, Law of Wills, sec. 201, which states in brief that, if a subscribing witness is unable to recollect some or all of the facts attendant upon the execution of the will, yet a presumption of due and proper execution will arise from the recitals of a perfect attestation clause, which becomes conclusive in the absence of proof to the contrary, and in the case at bar there is an absolute lack of proof of any fact which discredits the execution of this will, and on the other hand there is no contest whatever as to the genuineness of the signatures of the testatrix or of the three witnesses. See *German Evangelical Bethel Church v. Reith*, 327 Mo. 1098, 39 S. W. (2d) 1057, 76 A. L. R. 604; *In re Claflin's Will*, 75 Vt. 19, 52 Atl. 1053, 58 L. R. A. 261; *Tyson v. Utterback*, 154 Miss. 381, 122 So. 496, 63 A. L. R. 1188; *Hauer v. Hauer*, 45 S. Dak. 103, 186 N. W. 566; *Lott v. Lott*, 174 Minn. 13, 218 N. W. 447.

In the opinion of the court, there being no sufficient evidence of a lack of any statutory requirement in the execution of this will, or of the presence of undue influence in

the execution thereof, the trial judge was justified in instructing the jury to return a verdict for the proponent.

AFFIRMED.

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CHARLES J. LEADERS, APPELLANT, V. SARPY COUNTY ET AL., APPELLEES.

279 N. W. 809

FILED MAY 27, 1938. No. 30317.

1. Waters: SURFACE WATERS. Where surface water resulting from rain and snow flows in a well-defined course, whether it be a ditch, swa'e or draw in its primitive condition, its flow cannot be arrested or interfered with by a landowner to the injury of neighboring proprietors.
2. ———: ———. "Every landowner must bear the burden of receiving upon his land the surface water naturally falling upon land above it and naturally flowing to it therefrom, and he has the corresponding right to have the surface water naturally falling upon his land or naturally coming upon it, flow freely therefrom upon the lower land adjoining, as it would flow under natural conditions." *Heier v. Krull*, 160 Cal. 441, 117 Pac. 530.
3. ———: ———: OBSTRUCTION. "It is the duty of those who build structures across natural drainways to provide for the natural passage through such obstructions of all waters which may be reasonably anticipated to drain there, and this is a continuing duty." *Crummel v. Nemaha County*, 118 Neb. 355, 224 N. W. 864.
4. ———: ———: ———: ABATEMENT. Where an obstruction in a natural watercourse constitutes a permanent and irremediable injury to an adjoining landowner, he is not confined to an action for damages, but may, on a proper showing, have a decree ordering the removal or abatement of the obstruction as a nuisance.

APPEAL from the district court for Sarpy county: WILMER W. WILSON, JUDGE. *Affirmed.*

*Ziegler, Dunn & Becker* and *D. L. Manoli*, for appellant.

*Nickerson & Nickerson* and *William R. Patrick*, *contra.*

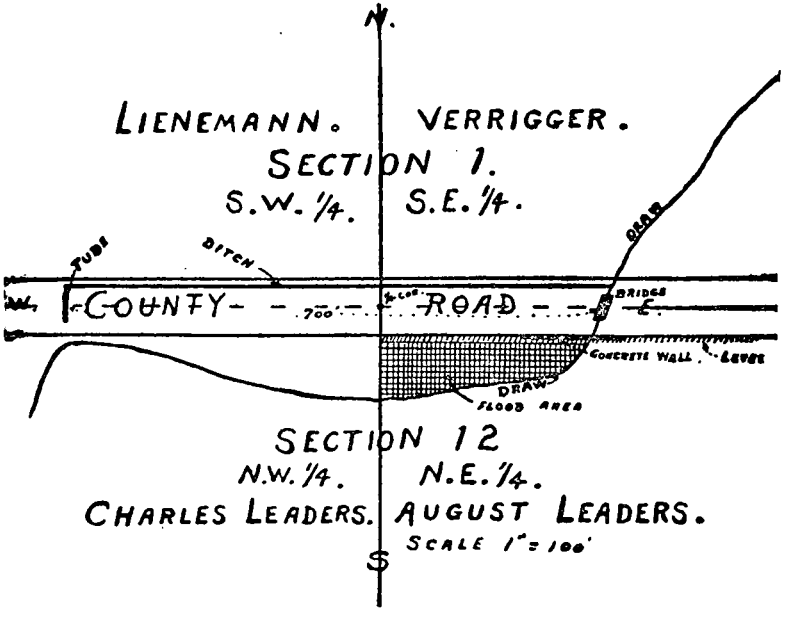
Heard before GOSS, C. J., ROSE, EBERLY, DAY, PAINE, CARTER and MESSMORE, JJ.

CARTER, J.

In this case the plaintiff seeks to enjoin the defendant Sarpy county and others from erecting or maintaining a dam across a road ditch north of plaintiff's land and from obstructing the westerly flow of water in said ditch from the lands to the north of it. The defendants by their answer and cross-petition allege that the natural and primitive course of drainage is across the road and through plaintiff's land; that plaintiff has constructed and now maintains a dam in the natural watercourse at the north edge of his land; and defendants ask for a mandatory injunction to compel its removal and for an order permanently restraining plaintiff from constructing or maintaining any obstruction to the flow of waters through the natural drainage course passing over plaintiff's lands. The trial court dismissed plaintiff's suit, and entered an order compelling plaintiff to remove the dam constructed by him in the natural drainage course and enjoined the construction or maintenance of any obstruction in the natural drainage course as prayed by the defendants. From this order, plaintiff appeals.

The evidence shows that plaintiff was the owner of the northwest quarter of section 12, township 13, range 12 east, in Sarpy county, and that he was the lessee from his father, August Leaders, of the northeast quarter of said section. North of this land, running east and west, was an improved state highway. Across the highway north of plaintiff's land is a quarter-section known as the Lienemann land, and north of the August Leaders land is a quarter-section known as the Vierregger land. It appears that the Vierregger lands naturally drained to the southwest and that the natural and primitive course of drainage was through a flat draw running from these lands in a southwesterly direction across the highway onto the August Leaders land. After entering the August Leaders land, the draw ran southwest for a short distance and then turned almost straight west onto plaintiff's land. On entering plaintiff's land, the draw followed a northwesterly course

until it reached a point very close to the highway where it turned south toward the Platte river. At a point 700 feet west of the place where the highway bridge across the draw was located, a tube culvert was constructed which permitted the drainage waters from the Lienemann land to cross the highway and enter the draw which approached close to the highway at that point. It also appears that a ditch had been constructed along the north side of the highway between the bridge across the draw and the tube to the west of it. The origin, maintenance and use of this ditch is directly involved in this suit, the plaintiff asking that the county be enjoined from damming it up or permitting it to become closed up. Immediately south of the bridge and upon his leased land, plaintiff has constructed a concrete wall and levee for the purpose of forcing the water from the draw, or a substantial part of it, to flow down the ditch along the north side of the highway and through the tube, hereinbefore mentioned, back to the draw. The following sketch will permit a better visualization of the conditions existing at the scene of the controversy.



An examination of the record discloses that the draw, as shown in the sketch, has always been the natural and primitive course of drainage from the Vierregger land. Plaintiff contends that the ditch along the north side of the highway is a natural drainage course. The evidence does not sustain this contention. It is true that a part of the lands north of the highway and between the bridge and the tube drain to the east and that the larger part drains to the west through this ditch. There was not, however, a flow of water from the draw through the ditch to the tube until 1909 when the ditch was constructed with a road grader. The evidence is clear that the ditch in the first instance was artificially constructed.

The evidence shows that the highway immediately west of the bridge was occasionally overflowed with water after a heavy runoff of surface water from the Vierregger watershed. Plaintiff contends that this is due to a damming up of the ditch or in permitting it to become filled up. The evidence, however, sustains a finding that the road was flooded because the flow of water in the draw was retarded by the cement wall and levee south of the highway bridge on August Leaders' land, causing the bridge to fill up with sediment and débris to such an extent that it could not carry the drainage water and thereby caused the road to become flooded.

Without any intention of unduly simplifying the facts in this case, we conclude, after a full consideration of the evidence, that the draw was the natural and primitive course of drainage from the Vierregger land, and that the ditch along the highway was artificially constructed and was not a natural drainage course in any sense of the word, in so far as the waters from the Vierregger watershed were concerned. The applicable rules of law are:

"Where water, be it surface water, the result of rain or snow, or the water of springs, flows in a well-defined course, be it ditch or swale or draw in its primitive condition, and seeks its discharge in a neighboring stream, its flow cannot be arrested or interfered with by a landowner

to the injury of the neighboring proprietors, and what a private proprietor may not do neither can the public authorities, except in the exercise of the right of eminent domain." *Roe v. Howard County*, 75 Neb. 448, 106 N. W. 587.

"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." *Kane v. Bowden*, 85 Neb. 347, 123 N. W. 94.

"Every landowner must bear the burden of receiving upon his land the surface water naturally falling upon land above it and naturally flowing to it therefrom, and he has the corresponding right to have the surface water naturally falling upon his land or naturally coming upon it, flow freely therefrom upon the lower land adjoining, as it would flow under natural conditions. * * *

"From these rights and burdens, the principle follows that he has a lawful right to complain of others, who, by interfering with natural conditions, cause such surface water to be discharged in greater quantity or in a different manner upon his land, than would occur under natural conditions." *Heier v. Krull*, 160 Cal. 441, 117 Pac. 530.

Plaintiff contends, however, that conditions have been changed and that more than the natural drainage waters are thrown upon his land if the road ditch is not kept open. The evidence shows that the drainage of the Vierregger watershed is through the flat draw hereinbefore described. The land is rather flat and drainage waters have a tendency to spread out both above and below the bridge. It is true that, with the building of the highway and bridge, the flow of the water is narrowed down at the bridge. The evidence also discloses that, if all obstructions were removed below the bridge, it would again fan out and not tend to cut a well-defined channel. The record discloses that the bridge is located across the natural watercourse, that it has three times the capacity required, and that it was located in its present position by an arbitration board, one of the members

of which was selected by the plaintiff. These facts, established by the evidence, lead us to the conclusion that the flood waters are not discharged upon plaintiff's lands in a manner different in volume or course from its natural flow.

The evidence discloses that, after the highway bridge across the draw was completed, plaintiff constructed a cement wall across the draw along the north line of the August Leaders land. This wall was 36 to 40 inches high, 24 inches of which was below the ordinary surface of the ground. Its length was approximately 100 feet. Heavy metal posts were set in the concrete extending four or five feet above the wall to which a 26-inch woven wire fence was attached. This wall and fence caught much rubbish and débris and in effect dammed up the natural watercourse to a considerable extent. This condition caused a heavy sedimentation under and around the bridge and caused flood waters to be turned west along the highway to the damage of the highway and adjoining landowners. The law applicable to the situation is well stated in the following cases:

"Where an obstruction in a watercourse constitutes a permanent and irremediable injury to the rights of the riparian owner, he is not confined to an action for damages, but may, on a proper showing, have a decree ordering the removal or abatement of the obstruction.

"It is the duty of those who build structures across natural drainways to provide for the natural passage through such obstructions of all waters which may be reasonably anticipated to drain there, and this is a continuing duty." *Crummel v. Nemaha County*, 118 Neb. 355, 224 N. W. 864.

"If, for the protection of his own lands, a person, by means of a dam or dike across the channel of a stream, diverts the waters thereof onto the lands of another, where such waters, but for the dam or dike, would not have flowed, he is liable in damages for the injuries inflicted by the diverted waters." *Keifer v. Stanley*, 111 Neb. 822, 198 N. W. 144.

Under these authorities, we conclude that the trial court,

under the facts of this case, properly entered the mandatory injunction compelling plaintiff to remove the obstructions placed in the natural drainage channel and correctly restrained plaintiff permanently from constructing or maintaining any obstructions to the natural flow of surface waters through the primitive and natural drainage course.

Defendants contend that a former decree of the district court for Sarpy county, entered on December 10, 1910, in a case in which Herman Liennemann was plaintiff and Sarpy county and others were defendants, decides all the questions involved in the suit at bar. It is true that this case and the decree entered therein deal with the same factual situation that is involved in this case, but in view of the fact that this opinion is in all respects in harmony with the decree of the trial court in that case, we do not deem it necessary to enter into a discussion of the effect of that decree.

Plaintiff contends that a subsequent decree entered by the district court for Sarpy county on October 31, 1927, in a case entitled Leaders v. Lilley, adjudicated the questions involved in the instant case favorably to the plaintiff's contention. The foregoing decree contained the following language: "That the dam which has been constructed upon the north side of the highway in question should be removed; that the county commissioners of Sarpy county should construct proper and suitable culverts, bridges and drains to permit the flow of water in its natural and primitive course along and across said highway, and that the defendants, and each of them and their successors in office, should be permanently enjoined from creating, or causing to be created, any dam or artificial obstruction to the flow of water in its natural and primitive course along and across said highway."

As we have heretofore said, there is some natural drainage to the west along the north side of the highway, but, under the evidence, there is no natural drainage from the draw leading from the Vierregger watershed through the ditch along the north side of the highway. This being true,

the decree in the *Liennemann* case is not in conflict with this opinion. Defendants contend that the decree in the *Liennemann* case ordered a dam removed from the road ditch to allow a natural flow of water in the ditch to the west. We must necessarily construe this holding to apply only to flood waters arising north of the highway, the natural drainage of which was to the west, and that this part of the decree could have no application to the surface waters arising in the Vierregger watershed, the primitive and natural course of drainage of which was across and over the lands of August Leaders and the plaintiff. We do not think that the decree in the *Liennemann* case is a bar to the decree entered by the district court in the case at bar.

The decree of the trial court in the instant case, under the facts disclosed by the record, is in all respects correct and it is

AFFIRMED.

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EDWIN F. MYERS, APPELLEE, V. CLARENCE M. MILLER, COUNTY JUDGE, ET AL., APPELLEES: WASHINGTON NATIONAL INSURANCE COMPANY, APPELLANT.

279 N. W. 778

FILED MAY 27, 1938. No. 30330.

1. **Clerks of Courts.** The clerk of a court of record is the proper custodian of money paid into court in pursuance of an order or judgment of the court.
2. **Attorney and Client:** ATTORNEY'S LIEN. The object of a special or charging lien is to protect the claim of an attorney by equitable interference of the court and to secure to him payment of just charges out of the fruits of his own labor.
3. ———: ———: ENFORCEMENT. Where an attorney has given proper notice to an adverse party that he claims a lien on money in the hands of the adverse party belonging to his client, and subsequently such attorney and a local attorney, representing the adverse party, agree that an amount be entered as a judgment in a court of record in settlement of a controversy between the adverse party and the attorney's client, and the local attorney, representing the adverse party, notifies the plaintiff's

attorney that the amount of such judgment has been paid into a court of record, and the attorney so notified then seeks to obtain the amount of his attorney's lien from the proceeds of the judgment from the judge of such court of record, *held*, such attorney, under such facts and circumstances, has no cause of action against the defendant to enforce his attorney's lien.

4. ———: ———: ———. Where an attorney claims a lien on money belonging to a minor plaintiff in the hands of an adverse party, and such attorney subsequently agrees with the attorney representing the adverse party to an amount to be paid by the adverse party in full and complete settlement of the minor's claim, and such amount is paid to the clerk of a court of record, and subsequently a guardian is appointed for the minor, the court and guardian having full notice of the lien of the attorney representing the minor, and such attorney seeks to obtain the amount of his lien from the proceeds of the judgment from the judge of the court, the proper practice is for him to file an intervening petition in such court and have the amount and extent of his attorney's lien judicially determined.

APPEAL from the district court for Custer county: ERNEST G. KROGER, JUDGE. *Reversed and dismissed.*

*Squires, Johnson & Johnson*, for appellant.

*Edwin F. Myers, Kenneth L. Myers* and *Schaper & Runyan, contra.*

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

MESSMORE, J.

Plaintiff brought action in the district court for Custer county against the county judge of Custer county and the surety on his bond and against the Washington National Insurance Company to recover attorney's fees pursuant to an attorney's lien, alleging proper notice of the lien given. After trial of the action the district court found generally in favor of defendants county judge and the surety on his bond and against the plaintiff, and generally against the defendant insurance company and for the plaintiff, fixing the amount of plaintiff's recovery in the sum of $250 attorney's fee and $4.80, balance due on disbursements,

or a total of $254.80. Defendant insurance company appeals.

The pertinent facts may be summarized as follows: A minor insured lost the sight of one eye by accident, and, under the terms of an insurance policy carried with defendant company, claimed $750 for the loss. On April 1, 1935, the plaintiff was employed by the minor and his next friend to represent the minor. Plaintiff corresponded with the defendant company, notified the company that he claimed an attorney's lien on any settlement made, and asked that settlement, if made, be made through him. Plaintiff prepared a petition to bring an action in the county court of Custer county against the defendant company in behalf of the minor, sending a copy of the petition to the company, and attached thereto notice of an attorney's lien. On July 2, 1935, plaintiff and a local attorney representing defendant company agreed to the entry of a judgment against the company in the sum of $625 and costs in favor of the minor. Plaintiff inquired of the local attorney representing defendant company as to when payment of the judgment would be made. On July 9 the local attorney notified plaintiff that the amount of the judgment had been paid to the clerk of the county court of Custer county; that the check was indorsed to the clerk of the court and the judge thereof.

There is evidence to the effect that plaintiff, on different occasions, sent his son to the county judge to obtain the attorney's fee, as provided for by his attorney's lien. The next friend was appointed guardian for the minor, and the papers were prepared by the local attorney representing defendant company. The county judge called the plaintiff, the guardian and the minor to come to his office. He there informed plaintiff that his attorney's lien was of no effect and refused to take cognizance of it. The county judge subsequently paid the full amount of the judgment to the guardian, and there is evidence to the effect that the county judge stated he would not pay out the money until after he had returned from his vacation, and that he was di-

rected to pay the money to the guardian by the defendant company. For a period of 16 days, from the time the money was paid into the county court until it was paid to the guardian, the plaintiff made an effort to obtain his attorney's fee from the county judge out of the proceeds of the judgment. The county judge testified that he requested the plaintiff to file an application for an attorney's fee. This testimony was denied.

Appellant's assignments of error may be grouped into one general assignment: That the judgment of the district court is contrary to the evidence and the law, and that the court's decision is that defendant company did not have the legal right to pay into the county court of Custer county the amount of the judgment rendered against said company and have such judgment satisfied and be released from further obligations thereon.

Section 7-108, Comp. St. 1929, provides in part: "An attorney has a lien * * * upon money * * * in the hands of the adverse party in an action or proceeding in which the attorney was employed from the time of giving notice of the lien to that party."

In the case of *McDonald v. Atkins*, 13 Neb. 568, 14 N. W. 532, this court held: "The receipt of money by the clerk of a court of record upon a judgment in his office, whether paid voluntarily or made by the sheriff on execution, is an official act, and his failure to faithfully account for such money is a breach of his bond, for which his sureties are liable in an action upon it." In the body of the opinion (p. 570) it was stated: "The uniform practice in this state has always been to make them (payment of judgments) to his clerk, to whose custody and care the files, records, and whatsoever else relates to cases in court, are confided."

In *Dirks v. Juel*, 59 Neb. 353, 80 N. W. 1045, in the opinion it was stated (p. 357): "That the clerk of the court is the proper custodian of the money paid into court in pursuance of an order or judgment of the court is a proposition upon which, so far as we know, there is no diversity of judicial opinion," citing *McDonald v. Atkins, supra.*

The county court in this state is a court of record. Comp. St. 1929, sec. 27-501. Suffice it to say that under the authorities and established practice in this state there is no doubt that a judgment debtor may pay a judgment to the clerk of a court of record. The plaintiff had a charging lien; that is, an equitable right of an attorney to have fees and costs due him for services in a particular suit secured by the judgment or recovery. The lien of an attorney upon a judgment, to the extent of his reasonable fee and disbursements, is paramount to any right of the parties to the suit. *Boyer v. Clark,* 3 Neb. 161; *Griggs v. White,* 5 Neb. 467.

Appellee contends that, if a defendant, after notice of an attorney's lien, pays a judgment on which there is an attorney's lien, he does so at his peril; that he does not escape even where he pays the amount to the clerk of the court, from whom the judgment creditor, or his agent, subsequently obtains it, and thus deprives the attorney of his lien, citing in support of such contention 6 C. J. 791; and, in turn, in 6 C. J. 791, is cited, in support of such statement of law, the Iowa case of *Fisher v. City of Oskaloosa,* 28 Ia. 381, wherein an attorney prosecuted an action for a client against defendant city and recovered a judgment. After judgment was rendered the attorney served the city with a written notice claiming an attorney's lien on the judgment in the sum of $35 for his fee, and directing the city not to pay the amount of the judgment to his client. He appeared before the city council and requested the council to pay the amount of the judgment to him. The judgment was paid to the clerk of the court, who had no notice of the lien. The clerk, in turn, paid the full amount of the judgment to the attorney's client. The court held: "*It seems,* that, if, for any reason, as the discharge of the attorney or the like, the amount of the judgment cannot safely be paid to him (the attorney), the judgment debtor may pay it to the clerk, under the condition and direction that it be held subject to the lien of the attorney; the judgment debtor thus making the clerk his agent for the proper appropriation of

the money." In the above case the city was required to pay the attorney his fee as set forth in his attorney's lien.

Appellee also cites *Hubbard v. Ellithorpe*, 135 Ia. 259, 112 N. W. 796, wherein the court held: "The lien of an attorney for his services attaches, under a statutory notice thereof, to the money due on the judgment when paid by the debtor to the clerk in satisfaction of the judgment, but subject to the claimed lien." In the body of the opinion it was said (p. 261): "The filing of this notice is sufficient to protect the attorney against payment of the judgment by the party against whom it is rendered, and, if the judgment debtor pays the judgment notwithstanding the notice, he does so at his own peril, but we know of no sound reason why the judgment debtor may not pay the money into the hands of the clerk conditionally—that is, he may deposit it with the clerk, making the clerk his agent for the purpose of protecting him against the attorney's lien, and enter into an arrangement with the clerk whereby the fee due the attorney may be turned over to him when the amount to which he is entitled is determined—and this we take from the nature of this proceeding and the record is what was done in this case." No attempt was made in the above case to fasten liability upon the judgment debtor for paying the amount of the judgment to the clerk.

The case of *Griggs v. White, supra,* does not support appellee's contention. The judgment debtor in that case paid the amount of the judgment direct to his creditor, and the court, in substance, held that, by such action on the part of the judgment debtor, the attorney's lien could not be defeated, the defendant having had notice of the lien.

In *Reynolds v. Reynolds,* 10 Neb. 574, 7 N. W. 322, attorneys sued on two promissory notes for a client, claimed 10 per cent. attorneys' fees, and filed an attorney's lien. The client appeared in court and had the action dismissed. The attorneys were permitted by the county court to be made parties plaintiff to assert their lien, which on appeal to the district court was denied, and, on appeal to the supreme court, the judgment of the county court was affirmed.

In this state there are no special statutory provisions relating to procedure to enforce an attorney's lien. In *Jones v. Duff Grain Co.*, 69 Neb. 91, 95 N. W. 1, we have the first expression by this court indicating the method of procedure. The court held:

"Where a judgment to which an attorney's lien has attached has been compromised between plaintiff and defendant in fraud of the attorney's rights, such settlement and compromise may be set aside at the suit of the attorney defrauded.

"The proper method of procedure in such case is for the attorney to file an intervening petition and have the amount and extent of his lien judicially determined before any other steps are taken for its enforcement."

To quote from the opinion (p. 93): "The object of special or charging liens is to protect the claim of the attorney by equitable interference of the court and to secure to him payment of just charges out of the fruits of his own labor. In order to reach this end it seems to us that the first thing necessary is to establish judicially the amount, nature and extent of the lien to the end that the attorney may be protected for what is justly due him and that the client and the judgment debtor may also be protected from extortionate and unconscionable charges which might be exacted, if liens of this nature could in the first instance be collected by summary process."

We believe, as set forth in this opinion, that the proper place to pay a judgment by a judgment debtor is to the clerk of the court in which the judgment is obtained. In the Iowa case of *Fisher v. City of Oskaloosa, supra*, the clerk of the court had no notice of an attorney's lien attaching, and the attorney desired to make no demands on the clerk for payment of his lien. A different situation would probably have been evident in that case if the clerk, or judge of the court, had had notice of the attorney's lien, and if the attorney had, on several occasions, requested payment from the court for the amount of the judgment, as in the instant case. As indicated by the cases from our

own jurisdiction, cited in this opinion, we recognize the validity and force of an attorney's lien and its purpose to protect the attorney for his labor against scheming or conniving clients who may seek to defeat the attorney's rights. In transactions of the character now before this court, where a minor is involved and where an agreement was made by the attorney, the next friend and the minor, each claiming certain amounts, based on the recovery which the minor might obtain, we believe the proper practice to be for the court, having exclusive jurisdiction over guardianship matters, to determine the rights of the parties and the amount of the fee.

The issue as to the liability of the county judge and his surety is not before this court. The evidence discloses that the judge failed to take an impartial attitude in this matter but was inclined to act in an advisory capacity. We do not feel that, in equity and good conscience, the defendant company should be penalized for paying a judgment under the circumstances and conditions as exist in this case. We believe, in the absence of fraud or conniving on the part of the judgment debtor against an attorney to defeat his attorney's lien, that such judgment debtor has a right to pay the amount of the judgment to the clerk of the court in which the judgment was rendered, when notice of an attorney's lien has been given to the judge of said court and to the clerk thereof. To hold otherwise would unnecessarily cause difficulty in the payment of judgments by judgment debtors, especially so in a controversy between the attorney, his client and the court, and unnecessarily work a hardship on a judgment debtor.

There is no merit to the contention of the appellee that an attorney's fee should be taxed in this court.

The judgment of the district court is reversed and the action dismissed.

REVERSED AND DISMISSED.

# RALPH C. RODGERS, APPELLANT, V. NEBRASKA STATE RAILWAY COMMISSION, APPELLEE.

279 N. W. 800

FILED MAY 27, 1938. No. 30348.

1. **Agriculture.** Included within the definition of agricultural commodities are milk and cream.
2. **Automobiles:** CONTRACT CARRIERS. One hauling milk and cream for a group of farmers under an oral agreement, and at times soliciting farmers, to haul milk and cream from farms to designated dairy and creamery and return the empty cans to the farms, the title to the milk and cream remaining in the farmer until delivered to dairy and creamery, and the hauler being paid by the creamery and dairy twice each month, *held* not to be a common carrier.

   Evidence examined, and applicant in the instant case *held* to be a contract carrier, within the meaning of section 75-223, Comp. St. Supp. 1937.
3. ———: CONSTITUTIONAL LAW. A subdivision of a legislative enactment which in part reads: "No provision of this Act or order of the Commission shall apply * * * to motor vehicles used exclusively in carrying for hire live stock or agricultural commodities or other commodities used in the production of agricultural products to and from any farm or ranch;" *held*, such exemption is not unreasonable or arbitrary, but based on permissible classification. Comp. St. Supp. 1937, sec. 75-224, subd. (d).
4. **Constitutional Law:** CONTRACT CARRIERS: REGULATION. The legislature may delegate power to the railway commission to regulate contract carriers where contract carriage and common carriage are so interdependent that the public may not continue to have a safe and dependable transportation system unless contract carriers, operating on the same roads with common carriers, are brought under just and reasonable regulations, bringing their service into relation with common carriers. Comp. St. Supp. 1937, sec. 75-222.
5. **Automobiles:** CARRIERS. Provisions of statute regulating common and contract carriers in intrastate commerce upon the public highways of Nebraska, in the interest of public convenience and safety, *held* valid.
6. ———: CONTRACT CARRIERS: REGULATION. An act seeking to regulate contract carriers, providing for regulatory fee to be paid by such carrier for the purpose of assisting in the administration of the act (Comp. St. Supp. 1937, sec. 75-226), stands upon a different footing than a provision in an act re-

quiring tax to be paid by a carrier for construction and maintenance of highways, or a provision requiring a carrier to file a bond or carriers' insurance for any negligence that might occur on the part of such carrier in operating upon the highways of the state.

7. ———: ———: EXEMPTION. Where a contract carrier, by oral agreement, hauls milk and cream for a group of farmers to a designated creamery and dairy over state highways inaccessible for rail transportation and returns empty cans to the farms, the title of the milk and cream remaining in the farmers until delivered, and the contract carrier being paid twice each month by the dairy and creamery, and where, at times, the contract carrier solicits farmers to haul milk and cream, but is engaged in hauling no other commodities and only in the manner as stated, such contract carrier *held* exempt under subdivision (d), sec. 75-224, Comp. St. Supp. 1937.

APPEAL from the Nebraska State Railway Commission. *Reversed.*

*Beghtol, Foe & Rankin* and *Allen, Requartte & Wood,* for appellant.

*Richard C. Hunter, Attorney General,* and *Edwin Vail, contra.*

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

MESSMORE, J.

This is an appeal from a decision of the state railway commission of Nebraska, in which the commission denied the appellant an exemption as contended for by him under Legislative Bill No. 178, passed by the 1937 session of the unicameral legislature. Laws 1937, ch. 142. The facts are not in dispute.

The appellant made application on August 24, 1936, to the state railway commission for a certificate of public convenience and necessity to operate as a common carrier of property by a motor vehicle under resolution 141 of the state railway commission, prior to the time Legislative Bill No. 178 became effective on August 16, 1937. Without appellant filing another application, the application so filed was recognized by the commission as effective under

the Nebraska motor carrier act of 1937, that is, Legislative Bill No. 178, and the ruling of the commission was made in connection with the administration of said act. Appellant described the route regularly operated by him in his own right as of April 1, 1936, the territory served, from Milford 15 miles north, 20 miles west, 20 miles south, and 7 miles east, and delivery made to Lincoln. He has five trucks each of which is insured from $5,000 to $10,000 for public liability, and $5,000 for property damage, and recognizes his legal obligation for the cargo which he hauls. The appellant is engaged in picking up cream and milk only. At times he solicits the farmers for the privilege of hauling their milk and cream, and at other times farmers come to him, requesting him to haul milk and cream for them. The milk and cream so hauled is hauled from the farms of his respective customers to the Roberts Dairy and Beatrice Creamery companies in Lincoln, where the milk and cream are weighed in, the farmers credited with the amount, and the appellant paid twice each month by the dairy and creamery. The title to the milk and cream remains in the farmers until such time as delivery is made to the dairy and creamery. The appellant returns the empty cans to the farms. He does not transport any other commodity than milk and cream as aforesaid and in the manner described.

The first question for our consideration is: What is meant by agricultural commodities?

In the case of *District of Columbia v. Oyster*, 4 Mackey (D. C.) 285, 54 Am. Rep. 275, in the body of the opinion the court said (p. 286):

"But the common parlance of the country, and the common practice of the country, have been to consider all those things as farming products or agricultural products which had the *situs* of their production upon the farm, and which were brought into condition for the uses of society by the labor of those engaged in agricultural pursuits, as contradistinguished from manufacturing and other industrial pursuits.

"The product of the dairy or the product of the poultry

yard, while it does not come directly out of the soil, is necessarily connected with the soil and with those who are engaged in the culture of the soil. It is, in every sense of the word, a part of the farm product. It is depended upon and looked upon as one of the results and one of the means of income of the farm, and in a just sense, therefore, it may be considered produce."

In 2 Am. Jur. 395, sec. 2, speaking of agriculture, it is said: "The term is broader in meaning than 'farming;' and while it includes the preparation of soil, the planting of seeds, the raising and harvesting of crops, and all their incidents, it also includes * * * dairying." To like effect are *Gregg v. Mitchell,* 166 Fed. 725; *Dillard v. Webb,* 55 Ala. 468.

In the Non-Stock Cooperative Marketing Act (Comp. St. 1929, sec. 24-1401), the Nebraska legislature of 1925 defined the term "agricultural products" as "field crops, horticultural, viticultural, forestry, nut, dairy, live stock, poultry, bee and farm products." Decisions of the courts have adopted the foregoing definition of agricultural commodities or products. We believe that the applicant in this case was engaged in hauling agricultural commodities. This brings us to the question of whether or not the applicant is a common carrier or a contract carrier.

The term "contract carrier" was unknown to the common law, and is to be found in comparatively recent statutory enactments. The common law recognizes but two classes of carriers, viz., common carriers and private carriers.

The appellee contends that the applicant in this case is a common carrier, subject to regulation by the railway commission under section 20, art. IV of the Constitution, which in part follows: "The powers and duties of such commission shall include the regulation of rates, service and general control of common carriers as the legislature may provide by law. But, in the absence of specific legislation, the commission shall exercise the powers and perform the duties enumerated in this provision."

Section 4 of Legislative Bill No. 178 (Laws 1937, ch.

142) follows: "Jurisdiction is hereby conferred upon and vested in the Commission, and it shall be its duty: (a) To regulate common carriers by motor vehicle as provided in this Act, and to that end the Commission may establish reasonable requirements with respect to continuous and adequate service, transportation of baggage and express, uniform system of accounts, records, and reports, preservation of records, qualifications and maximum hours of service of employees, and safety of operation and equipment. (b) To regulate contract carriers by motor vehicle as provided in this Act, and to that end the Commission may establish reasonable requirements with respect to uniform systems of accounts, records, and reports, preservation of records, qualifications and maximum hours of service of employees, and safety of operation and equipment."

Section 2 of Legislative Bill No. 178 (Laws 1937, ch. 142) provides as follows: "(i) The term 'common carrier' means any person who or which undertakes to transport passengers or property for the general public in intrastate commerce by motor vehicle for hire, whether over regular or irregular routes, upon the highways of this state. (j) The term 'contract carrier' means any motor carrier transporting passengers or property for hire other than as a common carrier."

Appellee cites 10 C. J. 37, as follows: "While a common carrier has been defined as one that holds itself out to the public to carry persons or freight for hire, the term did not, at the common law, embrace a carrier of passengers, and is commonly confined to carriers of goods, as distinguished from common carriers of passengers. A common carrier differs from a private carrier in two important respects: (1) In respect of duty, it being obliged by law to undertake the charge of transportation, which none but a common carrier, without a special agreement, is. (2) In respect of risk, the former being regarded by the law as an insurer, the latter being liable like ordinary bailees."

Appellee cites *Terminal Taxicab Co. v. Kutz*, 241 U. S. 252, particularly that part of the opinion in which it was

pointed out that a taxicab company had an exclusive contract with a hotel to maintain sufficient taxicabs to be used by the guests of the hotel. The taxicab company claimed it was not a common carrier. The court held the taxicab company to be a common carrier; that the business engaged in by the company, in so far as the hotel was concerned, was of a public nature to such extent that the company would be obligated to haul other persons than guests of the hotel upon demand. This case is cited upon the principle that a carrier may be engaged in hauling one commodity and be a common carrier.

Appellee also cites Interstate Commerce, in Ex parte No. MC-12, Motor Carrier Cases, 1 I. C. C. Rep. 628, as follows: "Contract carriage is a form of private carriage, as distinguished from the carriage for the general public which common carriers hold themselves out to perform. That the business of common carriers is a public calling and subject as such to public regulation has long been recognized. It has become evident, particularly in the motor-carrier field, that private carriage also is sufficiently affected with a public interest to warrant public regulation, at least to an extent. The term 'contract carrier' was coined in state statutes for the regulation of motor carriers."

The applicant cites *Cushing v. White,* 172 Pac. 229 (101 Wash. 172) in which the court defined "common carrier" as follows: "A common carrier is one whose occupation is transportation of persons or things from place to place for hire or reward, and who holds himself out to the world as ready and willing to serve the public indifferently in the particular line or department in which he is engaged; the true test being whether the given undertaking is a part of the business engaged in by the carrier, which he has held out to the general public as his occupation, rather than the quantity or extent of the business actually transacted, or the number and character of the conveyances used in the employment." The opinion gives an exhaustive review of definitions of the term "common carrier."

In the case of *Georgia Life Ins. Co. v. Easter,* 189 Ala. 472, 66 So. 514, the following definition is given: "The real test whether a man is a common carrier, whether by land or water, therefore, really is whether he has held out that he will, so long as he has room, carry for hire the goods of every person who will bring goods to him to be carried."

In *Hogan v. Nashville Interurban R. Co.,* 131 Tenn. 244, 174 S. W. 1118, the court gave the following definition (p. 254): "The true test of the character of a party, as to whether he is a common carrier or not, is his legal duty and obligation with reference to transportation. Is it optional with him whether he will or will not carry; or must he carry for all? If it be his legal duty to carry for all alike, then he is subject to all those stringent rules which, for wise ends, have long since been adopted and uniformly enforced, both in England and all the states, upon common carriers." There are many decisions from the different states of like import.

In the case of *Dairymen's Cooperative Sales Ass'n v. Public Service Commission,* 98 A. L. R. 218 (115 Pa. Super. Ct. 100) it was held: "One engaging in the transportation, for members of a dairymen's cooperative association, of milk consigned by them to the association for sale, is not shown to be a common carrier and as such required to obtain a certificate of public convenience, by evidence that he solicited, at the request of the association, certain persons who were members of the association to sign a hauler's agreement, and that he called on a number of them to ascertain whether the milk would be delivered to him before the hauler's contracts were signed."

In *Public Utilities Commission v. Holdren,* 34 Ohio App. 416, 171 N. E. 255, it was held: "Truck owners, not holding themselves out as willing to serve the public indiscriminately, but hauling produce of their own and other farms only under private contracts, including one with a producers' association, which was not shown to be a common carrier and expressly stipulated in contract that no

goods should be hauled except as directed by it, held not common carriers."

Analyzing the facts in the instant case with the decisions of the courts on this proposition of law, we believe that the applicant is, for all intents and purposes, a contract carrier, within the meaning of Legislative Bill No. 178.

This brings us to the question of the exemption claimed by the applicant under subdivision (d), sec. 3, Legislative Bill No. 178 (Laws 1937, ch. 142). Said subdivision, in part, follows: "No provision of this Act or order of the Commission shall apply * * * to motor vehicles used exclusively in carrying for hire live stock or agricultural commodities or other commodities used in the production of agricultural products to and from any farm or ranch."

Appellee relies upon the case of *Smith v. Cahoon*, 283 U. S. 553, wherein the court held: "A state statutory provision which requires those who operate motor vehicles on the highways in the transportation of goods for hire to furnish a bond or insurance policy for the protection of the public against injuries received through negligence in such operation, but which does not apply to those 'engaged exclusively in the transporting agricultural, horticultural, dairy or other farm products and fresh and salt fish and oysters and shrimp from the point of production to the assembling or shipping point en route to primary market, or to motor vehicles used exclusively in transporting or delivering dairy products,' *held* repugnant to the equal protection clause of the Fourteenth Amendment." The opinion recognized the principle that the state has a broad discretion and classification in the exercise of its power to regulate, but declared that the discrimination was unreasonable and arbitrary. Appellee's contention is that the decision in the above case has never been departed from.

In the case of *Continental Baking Co. v. Woodring*, 286 U. S. 352, decided May 23, 1932, the court had under consideration the Kansas motor vehicle law of 1931, which imposed a tax on motor vehicles on the basis of gross ton

miles. There was an exemption in the statute which applied to the transportation of live stock and farm products to market by the owner thereof or supplies for his use in his motor vehicle. Among other things the court held:

"The provision in the Kansas Motor Vehicle Act that it shall not apply to 'the transportation of live stock and farm products to market by the owner thereof or supplies for his own use in his own motor vehicle,' is likewise based on permissible classification.

"The legislature in making its classification was entitled to consider frequency and character of use and to adapt its regulations to the classes of operations which by reason of their habitual and constant use of the highways brought about the conditions making regulation imperative and created the necessity for the imposition of a tax for maintenance and reconstruction." In the opinion it was said (p. 372):

"The statute does not attempt to impose an arbitrary discrimination between carriers who transport property for hire, or compensation, with respect to the class of products they carry. The exemption runs only to one who is carrying his own live stock and farm products to market or supplies for his own use in his own motor vehicle," distinguishing that case from *Smith v. Cahoon, supra.*

In *Hicklin v. Coney,* 290 U. S. 169, decided December 4, 1933, the supreme court had under consideration a regulatory act of South Carolina affecting transportation by motor vehicles. The act contained a provision exempting farmers and dairymen hauling dairy or farm products. Among other things the supreme court of the United States held: "The equal protection clause of the Fourteenth Amendment does not forbid discriminations in a state statute whereby those who use the state highways in the regular business of transporting goods for hire are brought under regulations which do not apply (a) to persons whose chief business is farming or dairying and who, occasionally and not as a regular business, haul farm and dairy products for compensation; and (b) to lumber haulers en-

gaged in transporting lumber or logs from the forests to the shipping points." The above case was distinguished from *Smith v. Cahoon, supra,* in that in the latter case the statute under consideration applied to all carriers for compensation over regular routes, and exempted any transportation company exclusively engaged in the transportation of agricultural, horticultural, dairy or other farm products, fresh and salt fish, etc., from the point of production to the assembling or shipping point en route to primary markets or to motor vehicles used exclusively in transporting and delivering dairy products. The court in *Hicklin v. Coney, supra,* said (p. 176): "Upon the present record, it appears that the exemption is applied with two limitations, *first,* that, as construed by the state court, it can refer only 'to one whose principal business is that of a farmer or dairyman and not to one merely incidentally engaged in farming or dairying,' and, *second,* under the construction of the Commission in enforcing the statute—a construction not disapproved by the state court—that it applies only to farmers and dairymen who occasionally, and not as a regular business, transport farm or dairy products for compensation. We cannot say that a classification based on such a use of the highways is an arbitrary one and thus encounters constitutional objection."

The last expression by the supreme court of the United States on the subject is found in the case of *Aero Mayflower Transit Co. v. Georgia Public Service Commission,* 295 U. S. 285, decided April 29, 1935. The court held: "A Georgia statute * * * imposing an annual license tax on private carriers by motor vehicle of $25 per vehicle using the state highways, the proceeds of which tax are applied to the upkeep of state highways, does not violate the equal protection clause of the Fourteenth Amendment by exempting: * * * Vehicles engaged exclusively in the transportation of agricultural or dairy products, whether the 'vehicle is owned by the owner or producer of such agricultural or dairy products or not, so long as the title remains in the producer.'" It was further held:

"A state legislature has a wide discretion in the classification of trades and occupations for the purpose of taxation and in the allowance of exemptions and deductions within reasonable limits.

"Exemption of private carriers of farm and dairy products from a tax, though one imposed for highway upkeep, stands on a different footing from an exemption from a general requirement that private carriers provide bonds to insure the safety of the public on the highways."

Other cases are cited but we deem the foregoing the pertinent and leading cases on the subject.

In the case of *Aero Mayflower Transit Co. v. Georgia Public Service Commission, supra,* appellee contends the court was dealing with an exemption from taxation, which distinguished the situation thus presented from that presented in *Smith v. Cahoon, supra,* where the exemption was from the general regulatory provisions of the act. While the court upheld the exemption, so far as the tax was concerned, it expressed no opinion as to the validity of the exemption regarding regulatory provisions.

We see no particular merit in the above distinction, in view of other statutory regulations in our law governing the operation of motor vehicles over the highways of this state, and to which the applicant is subject. Other cases cited do not disclose whether there are other pertinent provisions of the statutory law that relate to carriers in such cases. The fee designated under Legislative Bill No. 178 is used for administrative purposes, as applied to the instant case. Comp. St. Supp. 1937, sec. 75-226. In the case of *Smith v. Cahoon, supra,* the carrier involved was a common carrier and the statute provided for the placing of a bond or insurance policy by the carrier, to provide against negligence of such carrier in operating his vehicle upon the highways of the state. In other cases cited and analyzed, the fee charged to the carrier was used for the construction and maintenance of the highways of the states.

*Aero Mayflower Transit Co. v. Georgia Public Service Commission, supra,* in many respects, referring to the

facts and the law, is analogous to the case at bar and decisive of the issues as presented in the instant case, with the distinction as heretofore set out. In the instant case, the services of the applicant are not available to the public generally. He does not hold himself ready to serve the public indefinitely. He does not hold himself out to haul any other commodity of any kind or nature, and reserves the right to haul only milk and cream to a designated market, to wit, a dairy and creamery, and to haul the empty cans from the dairy and creamery back to the respective farms. The service which he renders is service done according to private contracts with a group of farmers. No one else is interested and no benefit or disadvantage, by reason of the contract, accrues to any one else. He travels over roads which it is impossible for railroads to reach. He renders a service at a minimum cost to the farmers whom he serves. Even though the regulatory fee which he may pay under Legislative Bill No. 178 (Comp. St. Supp. 1937, sec. 75-226) is apparently small, yet it is well known that if the applicant be forced to pay this fee the ultimate cost will fall on the farmers whom he serves. Taking into consideration the period of drouth over the last five or six years, the evident intention of the legislature in granting this exemption, under the provisions of the section referred to, was to relieve the farmers of this state of a burden, well knowing that commodities, such as milk and cream, constituted during this period a farmer's living. It would seem that this exemption is a reasonable and fair exemption, not arbitrary, and, in view of the authorities, most of which recognize this broad principle of law as to the right of the legislature to make a reasonable and fair classification, it should be granted. We therefore believe that the applicant is entitled to the exemption as contained in subdivision (d), sec. 3, ch. 142, Laws 1937 (Comp. St. Supp. 1937, sec. 75-224).

The railway commission derives jurisdiction over common carriers and the right to regulate such carriers under section 20, art. IV of the Constitution. The commission has been given the power to provide what routes must be

followed and what construction shall be adopted with reference to telephone lines, lines transmitting electrical energy for the purpose of providing electric current (Comp. St. 1929, sec. 86-305); the power to regulate the issuance of securities of all public utility companies (Comp. St. 1929, sec. 75-1201); the power to regulate rates and charges of private irrigation companies (Comp. St. 1929, sec. 46-627); the power to regulate construction and operation of pipe lines for the transmission of oil and gas (Comp. St. 1929, sec. 75-1101); the power to regulate both public grain warehouses (Comp. St. Supp. 1937, sec. 88-219) and the warehousing of grain upon the farm (Comp. St. Supp. 1937, sec. 88-320), and the power to conduct tests as to farm tractors (Comp. St. 1929, sec. 75-901).

The foregoing provisions of the Nebraska statutes are cited, showing the delegated powers granted to the railway commission by the legislature of this state and the extension of such powers and duties which have not been challenged in the courts. We have heretofore set out the powers granted to the railway commission, as disclosed by section 20, art. IV of the Constitution of this state. In addition to the constitutional and statutory powers delegated to the railway commission, we find expression in the case of *In re Yellow Cab & Baggage Co.*, 126 Neb. 138, 253 N. W. 80, as to the extensiveness of the delegated power to the railway commission by the constitutional provision over common carriers (Const. art. IV, sec. 20). The proposition of law announced in the above case is that the plenary power of the railway commission may only be curtailed or diminished where the legislature has, by specific legislation, occupied the field.

In *Stephenson v. Binford*, 53 Fed. (2d) 509, the court said (p. 515): "We think that, if a state determines that the business of common carriage by rail and road may no longer, from the standpoint of public interest, be looked upon as a business entirely separate and distinct from that of contract carriers by road, that all of its available carriage services are so bound together and so interdependent that

the public may not continue to have a safe and dependable system of transportation unless private carriers operating on the same roads with common carriers are brought under just and reasonable regulations, bringing their services into relation with those of common carriers thereon, no just or valid reason exists why it may not do so." The decision in the above case was substantially upheld by the supreme court of the United States. *Stephenson v. Binford,* 287 U. S. 251.

In section 1 of Legislative Bill No. 178 (Laws 1937, ch. 142) it was "declared to be the policy of the Legislature to regulate transportation by motor carriers in intrastate commerce upon the public highways of Nebraska in such manner as to recognize and preserve the inherent advantages of, and foster sound economic conditions in, such transportation and among such carriers in the public interest; promote adequate, economical and efficient service by motor carriers, and reasonable charges therefor, without unjust discrimination, undue preferences or advantages, and unfair or destructive competitive practices; improve the relations between, and coordinate transportation by and regulation of, motor carriers and other carriers; develop and preserve a highway transportation system properly adapted to the needs of the commerce of Nebraska; cooperate with the several states and the duly authorized officials thereof; and cooperate with the Interstate Commerce Commission in the administration and enforcement of the federal 'Motor Carrier Act, 1935,' approved by the President on August 9, 1935. The Legislature declares that all of the available carriage service, including common carriage by rail and road and contract carriage by road, are so interdependent that the public may not continue to have a safe and dependable transportation system unless contract carriers operating on the same roads with common carriers are brought under just and reasonable regulations bringing their service into relation with common carriers."

The section above quoted meets exactly the proposition of law as laid down in *Stephenson v. Binford, supra,* and

uses the exact language, in part, as stated in the opinion in that case. We believe that, under the authorities as herein stated, the provisions of Legislative Bill No. 178 herein discussed are not arbitrary or unreasonable; that common carriers and contract carriers are so closely allied as to be interdependent, and that the subject is a fit and proper subject for action by the legislature.

We are of the opinion that Legislative Bill No. 178 is constitutional in granting the right to the railway commission to regulate contract carriers, as provided in the act, and that the exemption contained in subdivision (d), sec. 3 of the act, upon which the applicant relies, is not unreasonable and arbitrary or in contravention of the Constitution of the United States, but is an exemption to which he is entitled under the facts in this case.

Other constitutional questions raised are not necessary for our determination.

Order of railway commission, denying exemption to applicant, is

REVERSED.

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PEARL L. HINNENKAMP, ADMINISTRATRIX, APPELLEE, V. METROPOLITAN LIFE INSURANCE COMPANY, APPELLANT.
279 N. W. 784

FILED MAY 27, 1938. No. 30153.

1. **Insurance: POLICY: ANNULMENT.** Where a policy of industrial life insurance provides that, if insured is not in sound health on the date of issuance thereof, or has been attended by a physician for any serious complaint within two years thereof, the insurer may declare the policy void, it is not necessary that the insurer should immediately declare the policy void in order to resist liability when sued upon it after death of insured.
2. **Evidence.** Proofs of death furnished by a beneficiary to the insurer, under such policy, are admissible in evidence against such beneficiary as *prima facie* proof of the statements therein contained, and, when not contradicted or explained, may become conclusive against the right to recover on the policy.

3. Insurance: POLICY: LIABILITY. Under such a policy, the fact that the insured did not know or was not aware, at the time the policy was delivered, that he was afflicted with a serious disease or was not in sound health is immaterial, and there can be no recovery if the insured was actually in unsound health at such time.
4. ———: ———: ———. "A provision that a policy shall not take effect unless the insured is in good health upon the date of issuance is a condition precedent without which there is no liability under the policy." *Weddle v. Prudential Ins. Co.*, 130 Neb. 744, 266 N. W. 624.
5. Evidence: OPINIONS OF EXPERTS. The jury must accept the opinions of experts as conclusive only in cases where the evidence and facts to be deduced therefrom are undisputed and where there is no substantial evidence to the contrary and where the opinions concern questions involving a highly specialized art or science or other matters of which a layman could have no knowledge. Such opinions are not conclusive in cases where there is a conflict in the opinion of experts or where the subject of discussion is on the border-line between general and expert knowledge, as in questions of the value of articles or real estate or services, but in such cases the jury may draw their own inferences from the facts, and either accept or reject the opinion of experts.
6. Insurance: QUESTION FOR JURY. An issue presented as to the condition of insured's health, where the plaintiff introduced no medical testimony to contradict the testimony of defendant's doctors, but where there is evidence of a favorable report upon assured's examination by the insurer's examining physician, who is also an expert witness for defendant at the trial expressing an opinion contrary to that given in such report, is for the jury's determination.
7. Evidence examined, and *held* to support the verdict of the jury.

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

*Beghtol, Foe & Rankin* and *Rinaker, Delehant & Hevelone*, for appellant.

*Jack, Vette & Lovewell, contra.*

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

MUNDAY, District Judge.

This action was brought by Pearl L. Hinnenkamp, administratrix, to recover from the defendant on an industrial life insurance policy on the life of Lou W. Hinnenkamp, her husband. The petition is in the usual form, alleging the execution and delivery of the policy, the payment of all premiums due thereon, the death of the insured, and the furnishing of proofs of loss, and the failure of the defendant to pay the claim.

Defendant joined issue by answer, alleging that the insured procured the policy by fraud and misrepresentation. For further defenses, it was alleged that the policy contained provisions, in substance, as follows: That conditions precedent to the policy's becoming effective and contained therein were that, if the insured is not alive or is not in sound health on the date of the issue thereof, or if insured has within two years before the date of issue thereof been attended by a physician for any serious disease or complaint, or, before said date of issue, has had any pulmonary disease, or cancer, then, in any such case, the company may declare this policy void, and the liability of the company in the case of any such declaration, or in case of any claim under this policy, shall be limited to return of premiums paid on the policy.

In this connection it was alleged that at the date the policy was issued the insured was not in sound health, but was in fact suffering from cancer of the rectum at that time and for a considerable period prior thereto; that before the date of issuance of the policy the insured was attended by his physician for a serious disease or complaint, and in fact had a serious disease and complaint, to wit, carcinoma of the rectum, and had received treatment by a physician for this disease within a period of two years prior to said issuance, and that because of these reasons the policy was void. The defendant further alleged that when it discovered these facts it tendered to the plaintiff the return of the premiums paid on the policy. The reply was a general denial.

On the issues so joined trial was had to a jury, which found generally for the plaintiff. Defendant has appealed to this court.

The principal complaints of the defendant are that there is a breach of the conditions in the policy, viz., that the insured was not in sound health on the date of the issue of the policy; that within two years before the date of the issuance of the policy the insured had been attended by a physician for a serious disease or complaint; that the assured before said date had a cancer; that the evidence is insufficient to sustain a verdict for the plaintiff, and that the plaintiff's recovery should be limited to the return of the premiums paid on the policy.

The appellee contends that the policy provides that the defendant may declare the policy void if these conditions are breached, but that it was not sufficient for the defendant under the provisions of the policy to tender a return of the premiums paid on the policy and refuse to pay after the death of the assured; that is, such a tender and refusal is not in and of itself a sufficient pleading that the policy is void. The plaintiff admitted the tender of the premiums by the defendant and her refusal to accept the same. The prevailing rule seems to be that, if the answer tenders a return of the premiums paid and resists the payment of the policy, it is sufficient. *Popowicz v. Metropolitan Life Ins. Co.*, 114 Conn. 333, 158 Atl. 885; *Orsini v. Metropolitan Life Ins. Co.*, 9 N. J. Misc. 407, 154 Atl. 201; *Souza v. Metropolitan Life Ins. Co.*, 270 Mass. 189, 170 N. E. 62.

Appellant contends that certain admissions in the proofs of death furnished by plaintiff to defendant are conclusive against her right to recover on the policy. The proofs of death, being in part a death certificate by Dr. Moritz, were admitted in evidence against the plaintiff as an admission of the statement therein contained as to the duration of insured's illness, and if not contradicted or explained would defeat her right to recover. *Stephens v. Metropolitan Life Ins. Co.*, 190 Mo. App. 673, 176 S. W. 253. But Dr. Moritz was a witness at the trial and testified

fully and stated that he did not know personally the deceased had cancer until 14 days before his death. We think this fact and the other facts and circumstances sufficiently contradict or explain the statements in the certificate.

Appellee also contends that as the insured did not know his condition at the time the policy was delivered there was no breach of the conditions. Whether or not the insured knew that he had or did not have a serious disease is immaterial in this case. There is no merit in this contention.

Also, it is immaterial that his serious condition, if any, developed between the time of the application and the delivery of the policy. If the deceased was actually afflicted with a serious disease at the time of the delivery of the policy, it is a defense to an action on the policy. It is the holding of some courts that if the serious disease arises between the application and delivery of the policy there can be no recovery. However, the rule in this state is that, if such a disease was present at the time of the delivery of the policy, it is fatal to a recovery. *Weddle v. Prudential Ins. Co.*, 130 Neb. 744, 266 N. W. 624.

It is also contended by the appellee that Dr. Thomas had knowledge when he made the examination in October, 1935, of the condition of the deceased and therefore there was a waiver by the company of the condition above mentioned. There was no pleading of waiver and the case was not tried on the theory of waiver, and there is no evidence that Dr. Thomas was in the employ of the defendant at the time of the examination in October, 1935. The results of this examination were privileged. *Stapleton v. Chicago, B. & Q. R. Co.*, 101 Neb. 201, 162 N. W. 644.

This brings us to the pivotal question in this case: Should the motion of the defendant for a directed verdict for it have been sustained? The answer to this question depends entirely on the evidence. It is undisputed that the agent of the defendant solicited the policy in question in September, 1935; that defendant's medical examiner examined the insured on September 28, 1935; that the policy

was delivered on October 14 following, being the date the policy bears; that the insured died of cancer or carcinoma of the rectum on January 17, 1936.

The plaintiff testified in substance that her husband was a pipe fitter in the Burlington railroad shops for 12 years prior to October, 1934; that he was never sick until October, 1935, except in February, 1918, when he had an attack of the flu; that he never suffered ill health or bodily ailments; that he worked in a garage in the summer of 1935 from 8 a. m. until late at night at hard work; that the insured consulted Dr. Peters in September, 1935, for intestinal flu on two occasions; that prior to October 14, 1935, the insured was examined for the insurance by Dr. Thomas, who was the company doctor; that after the middle of October the insured became sick and she went with him to consult Drs. Thomas, Moritz and Wildhaber for advice and treatment; that Dr. Peters was not consulted by the insured in 1934; that the insured consulted Dr. Peters twice in September, 1935, for running off of the bowels, and that she heard the conversation and was present at the second consultation, and that the doctor made no examination and nothing was said as to the insured having a malignant tumor or cancer, and that the doctor at that time gave the deceased medicine; and that her husband worked until the middle of October, 1935; that Dr. Thomas, about the middle of October, 1935, told the insured and the witness that there was a growth of some kind in the rectum or lower colon; told them to see a specialist; that plaintiff and insured went in the middle of October to see Dr. Moritz, who told them the same as Dr. Thomas, and advised them to see about it; that Dr. Thomas said something should be done; then plaintiff and her husband saw Dr. Wildhaber about November 1, 1935; that Dr. Wildhaber did not make a complete examination; he found a small fistula and took care of it, and also found colitis and gave medicine; that insured also saw Dr. Wildhaber several times in November following, and that in December following he recommended the insured to go to a hospital;

that the husband weighed 172 pounds in November and about 140 pounds at the time of his death; that Dr. Rush told her in January, 1936, that an X-ray showed deceased had cancer, and that he died after an operation by Dr. Moritz on January 17, 1936.

Del Whitmore, an employee at the garage where Mr. Hinnenkamp worked during the summer of 1935, stated that the insured was engaged in heavy work; that he worked 9 hours a day, except on certain days when he worked extra hours; that an agent of the defendant solicited Mr. Hinnenkamp for insurance during the summer of 1935.

Elmer Boughten testified that he was a neighbor of the assured; that he had seen him for some 12 or 13 years prior to his death almost daily; that the insured was a very rugged man and worked day and night in many instances at hard work; that he seemed the same during the summer of 1935 that he did prior thereto, and that after he quit working in the garage in the fall of 1935 he worked around the yard splitting wood with an ax.

R. L. Earnhart testified that he was a brother-in-law of the insured; that he had known him all his life; that the insured had worked on a farm, and had been with the Burlington, and had run a portable grinder, and had worked in Chamberlain's Garage; that he saw him several times during the summer of 1935, and that he seemed rugged and in good health, and that he continued in such condition until he quit working in the garage in the fall of 1935.

As a part of the cross-examination of the plaintiff, she stated that a physician's statement of Dr. Moritz was part of the proofs of death submitted by her. This statement was to the effect that the deceased had died of carcinoma of the rectum, and that the duration of the cause to his personal knowledge was 14 days prior to the date of death, but was 4 months from the history of the case given to him. On the reverse side of this death certificate is the following statement by Dr. Moritz: "May 6, 1936. I made a digital examination of rectum in October, 1935, and advised X-ray ex. and suggested Unv. Hosp. Found a lump

and told him he ought to have it investigated. John R. Moritz, M. D."

Dr. Thomas, as physician for the defendant, examined the insured, and after answering questions as to insured's physical condition made the following certificate: "This is to certify that I personally examined at the address given in part A hereof the life proposed for insurance, and saw the signature at the end of part C on the date stated, and am of the opinion that said life is in good health, and that said life's constitution is sound. I find the pecuniary circumstances and hygienic surroundings satisfactory and habits temperate, and the insurance applied for in good faith with the purpose of being continued. I therefore recommend that this application be accepted."

As a witness Dr. Thomas also stated: That he asked the routine questions set out in the application, and that he used the stethoscope and listened to the heart action of the deceased and that this was the entire examination; that either on October 6 or 14 Mr. Hinnenkamp consulted him privately, and that at that time he made a rather hurried general examination and made examination of parts to which the deceased referred and where the pain was; that the deceased gave him a history of pain low in his abdomen and complained of having had diarrhea which he attributed to eating considerable watermelon at a watermelon feed some days before; that he made a digital examination of the rectum and used a speculum, and found attached to the wall of the rectum a polypus about the size of a plum and told the patient that it was rather serious. He advised going to a hospital and consulting a specialist and tried to stress the time element. He never communicated this information to the defendant. Dr. Thomas stated, assuming that the phrase "sound health" means legally, generally the absence of any vice or disease in the constitution of a serious nature or that has direct tendency to shorten life, that it was his opinion that the deceased was not in sound health on October 14, 1935, and that under that definition he was not in sound health on September 21, 1935.

Dr. Moritz examined the deceased about the middle of October, 1935, and stated: That the patient complained of loss of weight, weakness and hemorrhage from the rectum and gave a history of having been seen by his family physician and treated for hemorrhoids and piles; that he made a digital examination which revealed the presence of a mass about three-fourths of an inch in diameter on the left side of the rectum; that he advised patient of the importance of a positive diagnosis and suggested the use of the X-ray, and taking of a section of tissue for microscopic examination, and indicated the danger or possibility of malignancy as one of the causes of the trouble; that he did not see the deceased again until 1936 at the hospital and that he diagnosed the cause of death as ademo-carcinoma of the rectum with secondary metastasis with extension to other abdominal viscera; that this was the same growth that he found in the middle of October; that it was his opinion that this tumorous growth was present in the rectum in September, 1935, and that it was in some phase of growth for perhaps 8 or 10 months prior to October, 1935. He gave the same opinion as Dr. Thomas on the sound health of the deceased in September and October, 1935. It was his opinion that the tumor was malignant in October, 1935, and he made it clear to the patient at that time that the condition was serious.

Dr. Wildhaber examined the deceased about October 14, 1935. He testified: That he made a general physical examination and digital examination of the rectum of the insured; that he found a mass in the rectum and told the patient that it was serious at that time; that he saw the deceased again in December and found the same mass and told the patient that he had cancer of the rectum and would advise an operation; that it was his opinion that the mass in the rectum had been there for a year or year and a half prior to this examination. Dr. Wildhaber stated that in his opinion, assuming the same definition of the phrase "sound health" as above set out, the deceased was not in sound health on September 21 or October, 1935.

Dr. Peters stated: That he saw the deceased about half a dozen times as a patient in 1934, and in the latter part of 1934 he made the diagnosis that deceased had a chronic ulcerated condition of the lower bowel; that he told the patient about his condition; that on September 15, 1935, he again examined the deceased; that the patient complained of a history of cramps of the stomach, diarrhea, passing of blood, loss of weight and being weak, and that he made a general physical examination; that on the 15th or 21st of September, 1935, he made a rectal examination of the deceased, and that the plaintiff was present; that he was unable to get his fingers around the entire mass in the rectum; that he advised the patient and his wife of the condition and they discussed it; that he recommended the University Hospital; that he told them that there was a possibility of it being a cancer; that assuming the same definition of the phrase "sound health," as above set out, he was of the opinion that the insured was not in sound health on September 21 or October 14, 1935.

On rebuttal plaintiff stated: That the deceased had never been treated by Dr. Peters in 1934; that insured had gone to Dr. Peters for treatment concerning the running off of the bowels in September, 1935, and that the doctor gave him some medicine, and about a week later deceased went to him for further treatment and complained that the medicine did not do any good; that Dr. Peters had made no rectal examination but said he would make the medicine a little stronger.

After the plaintiff made her *prima facie* case, the burden of proof was on the defendant to establish one or more of its defenses, that is, that the insured was not in sound health, or had been treated by a doctor for a serious complaint within two years, or that the insured had cancer of the rectum. *Weddle v. Prudential Ins. Co., supra.*

As to the defenses, the trial court instructed the jury as follows:

"The jury are instructed that the defendant in its answer alleges a second defense other than the defense of misrepresentation or fraud.

"You are further instructed that the essential elements of such second defense, which defendant must prove by a preponderance of the evidence to enable it to recover thereunder, may be summarized as follows: (1) That the insured, Louis W. Hinnenkamp, was not in sound health on October 14, 1935; (2) that within two years prior to October 14, 1935, the said Louis W. Hinnenkamp had been attended by a physician for a serious disease or complaint; (3) that said Louis W. Hinnenkamp on or before October 14, 1935, had a cancer or carcinoma of the rectum.

"You are further instructed that if the defendant has proved any one of the foregoing essential elements of its second defense, by a preponderance of the evidence, as pleaded in its answer, then your verdict will be for the defendant."

The jury were properly instructed as to these defenses. There is no complaint as to the instructions of the trial court. The case was, therefore, correctly submitted to the jury unless the evidence conclusively shows the insured was not in sound health at the time of the delivery of the policy, or had been attended by a physician for a serious disease within two years prior to the delivery of the policy, or had cancer or carcinoma of the rectum.

The plaintiff claims that the facts in evidence, upon each of the defenses pleaded, made each of those defenses questions for the jury; also, that the denial by the plaintiff that insured visited Dr. Peters in 1934 and the claim that the doctor was visited in September, 1935, only for the purpose to receive attention for the running off of the bowels, made it a jury question whether or not insured was treated or had been attended by a physician within the two-year period; that the opinions of the doctors, one of whom made the examination of the deceased on his application for insurance; that the insured was not in sound health, are contradicted by the certificate of health of the defendant's doctor, when he made the examination on deceased's application for insurance, and also by the evidence of the deceased's robust health up to October 14, 1935, and

by the appearance of deceased up to that time, and by his general good health, and by the hard labor that he performed, coupled with the additional fact that no witness stated as a fact that the insured had cancer of the rectum in September or October or before that time, but that there was in evidence only opinions as to unsound health and some other conditions.

None of the medical gentlemen testified that the insured had cancer in September or October, 1935, or expressed their opinion to that effect. The evidence is conclusive that the insured died of cancer of the rectum, but Dr. Moritz who performed the operation and who had examined deceased about the time the policy was delivered stated he did not personally know that the insured had such cancer until about 14 days before the death of the deceased. However, Dr. Moritz did testify that he was of the opinion that this tumor was malignant and probably was so at the date of the delivery of the policy, but he was not sure, and that a person might have a tumor which is harmless and that it would later develop into a cancer; that the type of cancer the decedent had was one that worked rapidly. Dr. Wildhaber stated he was of the opinion that the tumor had been present for a year or a year and a half before October, 1935. It thus appears that no doctor suggested until some time after the policy was delivered that the insured had cancer, but suggested an investigation of the tumor. Although the malignant growth developed soon after the delivery of the policy, this does not show, as a matter of law, that the insured was not in good health at the time of the delivery of the policy. *McLaurin v. Mutual Life Ins. Co.*, 115 S. Car. 59, 104 S. E. 327. In the last-cited case, paragraph 2 of the syllabus reads as follows:

"In an action on an insurance policy, wherein the defense was presented that insured was not in good health at the time of the payment of the first premium and delivery of the policy, evidence respecting the development of a cancerous growth soon thereafter *held* not, as a matter of law, to indicate that insured was not at that time in

good health; 'good health' being a generic expression, resting mostly in opinion."

Each of the doctors testified on the assumed definition of the phrase "sound health," as set out above, that it was his opinion that the deceased was not in sound health on September 21 or October 14, 1935. This testimony was not all opinion testimony, as it is based in part on facts observed and examination made; that is, it is not, in its entirety, a mere hypothetical question, as the opinions are based on facts previously observed. But these opinions of the doctors formed from the symptoms previously observed are not equal to positive statements of the facts of the existence of a serious disease or the want of good health at the times of the examinations, or the existence of cancer at those times. It is a well-known fact that symptoms may and do often mislead, and therefore it naturally follows that such conclusions are mere matters of opinion. The lay testimony was all to the effect that the insured appeared well and was stout and vigorous until he took ill about the middle of October, 1935. This apparent condition of the physical system as to health or sickness is beyond question a matter of fact and not entirely devoid of evidentiary strength in view of the other evidence.

It is the general rule in this state that expert evidence, even if all tending one way, is not conclusive upon the court and jury, but the latter may draw their own conclusions from the facts, notwithstanding expert opinion, where the subject is on the border-line between the expert and general knowledge, as in fixing the value of different articles, or of real estate or professional services. But when the opinion is on a highly specialized branch of medical service with respect to which a layman could have no knowledge, and there is no substantial evidence to the contrary and there is no dispute in the expert testimony, it is not a question for the jury. *American Nat. Ins. Co. v. Smith,* 18 Tenn. App. 222, 74 S. W. (2d) 1078. But in the instant case there is evidence to the contrary in the certificate and examination of the medical examiner, even though the lay testimony is disregarded.

The appellant insists that the medical examiner did not make a thorough examination and never discovered this ailment in the assured. This examination was made only about two weeks before the policy was delivered. The examination was by a qualified physician who appeared at the trial as an expert witness. However, he did make an examination and made a written report answering several questions as to the insured's physical condition, and by his own testimony at the trial showed that he used a stethoscope. In the certificate of Dr. Thomas made in September, 1935, he expressed a decided opinion as to the health of the assured and stated in this certificate that the insured's health was good and recommended him to the company. Now the lips of the insured are sealed and a different opinion is expressed. The contention that the medical examiner did not make a complete examination is considered and examined on a similar contention made to the court in *Remfry v. Mutual Life Ins. Co.*, 196 S. W. (Mo. App.) 775, wherein the following language is used:

"In view of these examinations by defendant's medical examiners, in which they found that the deceased was not suffering from the diseases now claimed by the defendant, the evidence on the point was contradictory, and therefore a jury question was presented. *Buchholz v. Ins. Co.*, 177 Mo. App. 683, 160 S. W. 573 (other authorities).

"But defendant urges that, as defendant's medical examiner testified at the trial that he refrained from making a more thorough examination of the insured because of the latter's answers made at the time of the examination and in his application respecting his condition of health, for that reason the medical examiner did not make as careful an examination as he otherwise would have done, and that the latter's report was partially based on the insured's answers made at the time.

"A similar contention was made in the case of *Bruck v. Ins. Co.*, 185 S. W. loc. cit. 756, and in making answer thereto the court said:

" 'But this affords nothing more than the basis for an

argument to be addressed to a jury, and in nowise affects the ruling on the demurrer to the evidence. This testimony could by no means entirely overcome the effect of the certificate of the medical examiner, who had full opportunity to examine the insured, and who did examine him and found nothing physically wrong with him.'"

The general rule stated above as to the weight to be given to the opinions of experts is applicable, and it is for the jury to pass on the question of the assured's health and whether or not he had a serious disease, and upon the evidence in this case we would not be warranted in concluding, as a matter of law, that the only inference that could be drawn from the evidence is that the assured was not in good health or had a serious disease. It is clearly disputed that the insured was treated for a serious disease by a physician within two years before the issuance of the policy, and, therefore, that was also a question for the jury to determine.

While, if we were deciding this case in the first instance, we might be inclined to decide the issues differently, however, this is not a sufficient reason for us to substitute our opinion for that of the jury and to hold that, as a matter of law, there was no question for the jury to decide.

The plaintiff is allowed $150, to be taxed as costs, as attorneys' fees for services in this court.

The judgment of the district court is

AFFIRMED.

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MICHAEL D. NOLAN ET AL., APPELLEES, V. DOROTHY F. KLUG ET AL., APPELLANTS.
279 N. W. 791

FILED MAY 27, 1938. No. 30265.

1. **Taxation: TAX SALES.** Private tax sale certificate issued by county treasurer to city on December 21, 1934, after making due return to county clerk on December 10, 1934, does not contravene section 77-2013, Comp. St. Supp. 1935.

2. ———: ———. Such sale dates from the issuance of the certificate to the city, not from the date when the county treasurer receives the money therefor. Comp. St. 1929, secs. 77-2010, 77-2011.
3. ———: ———: REDEMPTION. Foreclosure having been commenced more than two years subsequent to issuance of tax sale certificate, defendants are barred from the right of redemption on confirmation of such judicial sale. *Phelps County v. City of Holdrege*, 133 Neb. 139, 274 N. W. 483.

APPEAL from the district court for Box Butte county: EARL L. MEYER, JUDGE. *Affirmed.*

*R. O. Reddish,* for appellants.

*Boyd & Metz, contra.*

Heard before GOSS, C. J., EBERLY, PAINE, CARTER and MESSMORE, JJ., and LIGHTNER and SPEAR, District Judges.

SPEAR, District Judge.

Action to foreclose tax lien. From a decree of the district court for Box Butte county granting foreclosure, the defendants, appellants here, have appealed.

Appellants own certain lots in Alliance in Box Butte county. In October, 1934, there were taxes and assessments in the sum of $4,763.33, with accruing interest and costs, delinquent thereon. The county treasurer gave due notice of a public tax sale, including this item, and duly opened the sale in November, 1934. On December 10, 1934, the county treasurer made a return of the sale to the county clerk, and on December 21, 1934, the county treasurer issued a private tax sale certificate to the lots here involved to the city of Alliance. The taxes and interest at that time amounted to $5,767.98. December 8, 1936, the city of Alliance sold the certificate to Michael D. Nolan, who instituted this suit on February 23, 1937, and is now appellee here.

Defendants allege twelve grounds of error, but they all resolve themselves, we think, into three propositions:

First. That the certificate issued by the treasurer is

void because the treasurer did not hold the sale open until the first Monday in January.

Second. That the purchase by the city of the certificate was a "paper sale" with no money changing hands and therefore it was not a true sale but only a transfer of the lien.

Third. That the defendants have two years after the confirmation of sale in the district court in which to redeem.

As to the first contention, the writer of this opinion can do no better than to quote an opinion of the attorney general written July 8, 1937. The opinion is as follows, and this court now adopts it:

"You ask our opinion as to whether the purchase of tax sale certificates by county treasurer for the county is invalid by reason of the fact that the public sale of the land for taxes was not kept open until the first Monday of January.

"You say that the contention has been made that section 77-2013, Comp. St. Supp. 1935, requires that a public sale for taxes be kept open until the first Monday of January.

"This section relates to the return made by the county treasurer to the county clerk of the real estate sales and reads as follows:

" 'On or before the first Monday of January following the sale of the real property, the treasurer shall file in the office of the county clerk a return thereon as the same shall appear upon the treasurer's sale book, and such return, duly certified, shall be evidence of the regularity of the proceedings.'

"Prior to the amendment of 1933 (Session Laws, 1933, page 520) the date specified in the section just quoted was December instead of January.

"In our opinion there is nothing whatever in this section of the statutes, either before or after the amendment thereto, that requires the public sale of land for taxes to be held open until the final report day specified therein. This section merely requires the county treasurer to report the

sales made to the county clerk, and by its very language this report may be made 'before' the last day specified therein.

"Section 77-2006, Comp. St. 1929, seems to be the only statutory provision dealing with the date for beginning and ending public sales of real estate for taxes. This section provides:

" 'On the day designated in the notice of sale the county treasurer shall commence the sale of those lands and town lots on which the taxes and charges have not been paid, and shall continue the same from day to day, Sundays and holidays excepted, until each parcel, or so much thereof as shall be sufficient to pay the taxes and charges therein, including the cost of advertising, shall have been sold or offered for sale.'

"Under the section just quoted the duty to 'continue' the sale from 'day to day' ends when the property is 'sold or offered for sale.' This, in our opinion, may be accomplished prior to the final day a report is required to be made by the county treasurer to the county clerk. This conclusion seems to be supported by the general statement of law as found in 61 C. J. 1191, and the language of the court in the case of *State v. Farney*, 36 Neb. 537, which interpreted an earlier statute of this state upon the same subject but materially different from the present section 77-2006."

Next as to the second proposition: The statutes governing sales to cities are as follows:

Section 77-2010, Comp. St. 1929: "Whenever any real estate subject to sale for taxes shall be within the corporate limits of any city, village, drainage district or irrigation district such city, village, drainage district, or irrigation district shall have the right and power, through its governing board or body, to purchase such real estate for the use and benefit, and in the name of said city, village, drainage district or irrigation district as the case may be; and the treasurer of said city, village, drainage district or irrigation district may assign the certificate of purchase

by indorsement of his name on the back thereof, when directed so to do by written order of the city council of the city, board of trustees of the village, board of directors of the drainage district, or of the irrigation district as the case may be. No such sale shall be made to any city, village, drainage district or irrigation district by the county treasurer when such lands have been previously sold to the county, but in any such case, the city or village, drainage district or irrigation district may purchase the tax certificate held by the county: Provided that the county treasurer shall not be required to account to the state treasurer, or to any person, for the amount of taxes due and represented by such certificate or certificates of purchase, until the drainage district or the irrigation district authorities as the case may be, have sold the certificate or certificates of purchase of such real estate, or until, by redemption or foreclosure proceedings, he shall have received the money thereon."

Section 77-2011, Comp. St. 1929: "Whenever real estate is purchased by a county board, or by the city or village treasurer, the county treasurer shall not be required to account to the state treasurer, or to any person, for the amount of taxes due, until the county board or city or village authorities have sold the certificate or certificates of purchase of such real estate, or until, by redemption or foreclosure proceedings, he shall have received the money thereon."

The statutes make it apparent that the legislature intended that the tax sale to a city is to be considered in the same general category as sales to individuals. Not only this, but sections 77-2040 and 77-2041, Comp. St. 1929, provide that a city may either demand a deed under certain conditions or bring action to foreclose the tax lien, which indicates that the legislature intended a sale to a city to be complete when the certificate is issued.

We therefore conclude that the sale in this case was consummated on December 21, 1934, the date of the tax certificate issued by the county treasurer to the city.

It seems that the third proposition is answered by the cases of *Phelps County v. City of Holdrege*, 133 Neb. 139, 274 N. W. 483, *Connely v. Hesselberth*, 132 Neb. 886, 273 N. W. 821, and *Peterson v. Swanson*, 133 Neb. 164, 274 N. W. 482, which held that, where foreclosure was commenced more than two years subsequent to issuance of tax sale certificate, the defendant was barred from the right of redemption on confirmation of the judicial sale.

In the case at bar we have said that the sale to the city took place at the time the treasurer gave the city the tax certificate. No foreclosure was instituted thereon until over two years from that date had elapsed. We deem it unnecessary to again state the holdings in the above cases or to restate the reasoning. The defendants are barred from the right of redemption on confirmation of the sale.

AFFIRMED.

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A. H. PIERSON, APPELLEE, V. STANLEY D. FAULKNER ET AL., APPELLANTS.

279 N. W. 813

FILED MAY 27, 1938. No. 30114.

1. **Statutes.** AMENDMENT: TITLE. The title of an act to amend a section of the statutes by an amendment that is germane to the section amended is sufficient to comply with the requirements of section 14, art. III of the Constitution of Nebraska, if such title designates the section to be amended and declares the purpose of the act to be that of amending and repealing such section.
2. ———: ———: CONSTITUTIONALITY. An act amendatory of one section of the statute and which merely incidentally restricts the operation of other prior existing statutes not set forth therein does not violate the constitutional provision requiring sections as amended to be set forth in the amendatory act.
3. ———: ———: ———. If a bill has been introduced in the legislature within the time limit provided by the Constitution, amendments that are germane to the subject of such bill may be made after the expiration of such time limit.
4. ———: CONSTRUCTION. The rule that statutes *in pari materia* should be construed together applies to earlier as well as to contemporaneous statutes.

5. ———: ———. When necessary to effectuate the legislative intent, a proviso in an amendatory act will be construed to apply to a section of an earlier statute *in pari materia* with such section.
6. **Constitutional Law**: STATUTES. When a statute is ambiguous or susceptible of two constructions, one of which creates absurdities, unreasonableness or unequal operation and the other of which avoids such a result, the latter should be adopted.
7. **Usury**. A clause in a mortgage upon real estate located in a foreign state to the effect that the mortgagor will pay the tax upon the note secured thereby does not render such note usurious, even though such note bears interest at the maximum rate allowed by the provisions of sections 45-101 to 45-105, Comp. St. 1929, and even though such note is taxable under the provisions of section 77-701, Comp. St. 1929.

APPEAL from the district court for Scotts Bluff county: GEORGE W. IRWIN, JUDGE. *Affirmed.*

*Clarke & Patterson*, for appellants.

*F. J. Reed, contra.*

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

TEWELL, District Judge.

This action was begun in the district court for Scotts Bluff county upon a promissory note. By agreement trial was had to the court. From a judgment in favor of the plaintiff for the face amount of the note plus interest as per the terms of the note the defendants appeal.

The defendants admit the execution of the note, and allege that the contract evidenced by the note and the real estate mortgage given to secure the payment thereof was usurious. The material facts are not in dispute. On March 15, 1930, the defendants were indebted to the plaintiff in the sum of $2,000, and on that date and in payment of such debt executed a note to plaintiff for the principal sum of $2,000, due March 15, 1932. This note bore interest at 10 per cent. per annum. Its payment was secured by a mortgage given by the defendants to the plaintiff upon real

estate located in the state of Colorado. This mortgage contained a clause requiring the defendants to pay all "taxes, levies and assessments levied upon this mortgage or the note which this mortgage is given to secure." As interest on this note the defendants paid the plaintiff the sum of $533.33, and on December 20, 1932, executed the note in suit in renewal of the note dated March 15, 1930. Payment of this second note was secured by a mortgage upon the same real estate in Colorado as was mortgaged to secure the note of March 15, 1930. Except as to date and the provisions as to time due, the two notes were identical in amount and as to form and provisions, as was likewise the two real estate mortgages above mentioned. Each mortgage above mentioned was executed at the same time and as a part of the same transaction as the note it was given to secure. Upon this second note the defendants paid interest to August 1, 1936, in the sum of $722.22. No mortgage other than upon real estate in Colorado secured either of these two notes. No payment other than the payments of interest above mentioned has been made upon either note. The defendants seek to have the payments of interest applied upon the principal. Defendants by their answer plead that chapter 178, Laws 1927 (section 77-1503, Comp. St. 1929) is unconstitutional and void for the reason that such act violates both sections 7 and 14 of article III of the Constitution of the state of Nebraska. By reply to the answer of the defendants, the plaintiff pleads the law of Colorado relative to the taxation of notes secured by a mortgage upon real estate. By stipulation during trial the parties agreed that the law of Colorado as pleaded by the plaintiff existed at the time of the execution of the note dated March 15, 1930, and at all times since. The sections of the Colorado statutes pleaded by plaintiff provide that, when real estate has been mortgaged to secure a note, such real estate and note shall be taxed as a unit and as of the value of such real estate, and further provide that such note shall not be otherwise taxed. At the trial the parties stipulated that no taxes had ever been levied

or paid upon either of the above-mentioned notes. At all times material to this action the plaintiff and both defendants were residents of Nebraska. Both notes above mentioned were payable at a bank in Mitchell, Nebraska. Nothing in the record shows any intent of the parties to cause their contract to be governed other than by the laws of Nebraska.

A brief statement relative to some of the statutes of Nebraska, and relative to a few prior holdings of this court, in addition to the facts above outlined, will aid in making clear our view of the law applicable to such facts. Sections 45-101 to 45-105, both inclusive, Comp. St. 1929, as existing at the time both notes above mentioned were delivered, provided that any rate of interest agreed upon not exceeding 10 per cent. per annum for the forbearance of money should be valid, and further provided that, if a rate of interest greater than 10 per cent. per annum were contracted for, such fact would not render the contract void, but that if, in an action on such contract, proof be made that such contract provided for interest at a greater rate than 10 per cent. the plaintiff could only recover the principal without interest minus any interest paid. Section 77-1502, Comp. St. 1929, provided that a real estate mortgage for assessment purposes was an interest in the real estate conveyed by such mortgage, and provided that the interest conveyed by the mortgage should be assessed and taxed against the interest of the mortgagee, and that the value of the real estate in excess of the mortgage should be assessed and taxed against the interest of the mortgagor. Section 77-1503, Comp. St. 1929, provided that, when any mortgage upon real estate contained a condition to the effect that the mortgagor should pay the tax assessed against the mortgage or the debt secured thereby, the interest of the mortgagee and the interest of the mortgagor should be taxed as one unit and not separately. Such section, in referring to such a condition in a mortgage, contained the following sentence:

"An agreement of this character in the mortgage shall

not destroy the negotiability of any note secured thereby *nor render such note usurious.*" (Italics ours.)

Section 77-701, Comp. St. 1929, provided that a note secured by a mortgage upon real estate located other than in Nebraska, such as the one in suit, when owned by an individual, should be taxed where assessed at the rate of eight mills on the dollar of the actual value thereof, the same to be assessed and collected where the owner resides, and further provided that such tax should be in lieu of all other taxes upon such note. From the year 1911 to the time of the passage of chapter 178, Laws 1927, the words "nor render such note usurious," italicized above, were not contained in section 77-1503, *supra.* By such chapter 178 the provisions of said section 77-1503 as theretofore existing (then section 5952, Comp. St. 1922) were purported to be repealed, such provisions to be reenacted in the identical words of the section repealed, and the phrase "nor render such note usurious" to be added thereto. In the case of *Stuart v. Durland,* 115 Neb. 211, 212 N. W. 31, this court held that a note secured by a mortgage upon real estate in Nebraska was usurious when the note and mortgage exacted the maximum legal rate of interest and in addition required the maker to pay the taxes upon the interest of the mortgagee in the mortgaged premises. The opinion in that case was filed February 1, 1927. The legislature was then in session, and the purported enactment of said chapter 178, Laws 1927, occurred.

Under the state of facts above outlined, and under the condition of the statutes and holding of this court above mentioned, and under certain existing facts relating to the manner of the passage of said chapter 178, Laws 1927, and to the title thereto hereinafter mentioned, the sole question presented is that of whether or not the note in suit is usurious.

Since we are unable to agree with certain contentions of the defendants hereafter mentioned that relate to the note in suit being usurious regardless of the validity of said chapter 178, Laws 1927, it would become necessary to de-

termine the validity, and also the effect, if valid, of such chapter after a disposition of such contentions. Both brevity and clarity in this opinion will be aided by a disposition of the contentions of defendants relative to such chapter 178, Laws 1927, being void prior to a discussion of other contentions made by the defendants.

Appellants contend that said chapter 178, Laws 1927, is void on account of restrictions contained in section 14, art. III of the Constitution of this state. Such section, as in force at the time of the purported passage of said chapter 178, provided in part as follows:

"No bill shall contain more than one subject, and the same shall be clearly expressed in the title. And 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 title to said chapter 178, Laws 1927, which now appears as section 77-1503, Comp. St. 1929, is as follows:

"An act to amend section 5952, Compiled Statutes of Nebraska for 1922, relating to revenue, to declare an emergency and to repeal said original section."

As heretofore noted, the only change made in said original section 5952 was the addition thereto of the words "nor render such note usurious." Such words, by their very nature, merely restrict and in no way enlarge the operation and effect of the provisions of the original section, and therefore cannot be other than germane thereto. The title to an act to amend a section of the statutes by an amendment that is germane to the original section amended is sufficient to comply with the provisions of section 14, art. III of the Constitution of Nebraska, requiring the subject of the amending act to be expressed in its title, if such title properly designates such original section by number only and declares the purpose of the act to be that of amending and repealing such original section. See 59 C. J. 816, and cases cited in the footnotes; *In re Estate of Austin*, 116 Neb. 137, 216 N. W. 171.

The appellants contend that said chapter 178, Laws

1927, violates said section 14, art. III of the Constitution, in that it amends sections 45-101 to 45-105, Comp. St. 1929, above mentioned, and also section 77-701 above mentioned, without containing such sections as amended. With this contention we cannot agree. These last-mentioned sections are not amended by said chapter 178. True, the effect of those sections is incidentally restricted. To uphold this contention of defendants would be to cause the provisions of the Constitution requiring an amendatory act to set forth the section or sections as amended to result in a different but worse evil than the evil that such provisions were intended to prevent. New legislation would be rendered very difficult of attainment. A major portion of new legislation effects incidentally in some form a large portion of prior existing statutes. An act amendatory of one section of the statutes, and which merely incidentally restricts the force and effect of other prior existing statutes, does not violate the constitutional provision requiring sections as amended to be set forth in the amendatory act, even though such other sections are not set forth. 59 C. J. 871, and cases cited in the footnotes.

Appellants contend that said chapter 178, Laws 1927, is void on account of section 7, art. III of the Constitution of this state. This section provides that after the expiration of the twentieth day of the legislative session no bill shall be introduced unless upon recommendation of the governor by special message, and that the introduction of bills after such twenty days shall be restricted to such special message. No special message of the governor dealt with the amending act involved herein. House Roll 421, introduced during the first twenty days of the session, was a bill for an act to amend section 5951, Comp. St. 1922, which section is now section 77-1502, Comp. St. 1929, above mentioned. Its purpose was to provide that the mortgagee should pay the tax assessed against the mortgagor's interest in mortgaged real estate if the mortgagor failed to pay such tax. After the expiration of the first twenty days of the legislative session, said House Roll 421 was

amended in the course of its passage and finally passed in the form of said chapter 178. Thus the title of the bill was changed in such manner as to cause the declared purpose of the bill to be that of amending section 5952, Comp. St. 1922, instead of section 5951 thereof, and the body of the bill changed so as to add the words "nor render such note usurious" to section 5952 as theretofore existing. A reference to the history of the five sections (sections 77-1501 to 77-1505, Comp. St. 1929) that now form article 15, ch. 77, Comp. St. 1929, will disclose that they were all originally enacted at one time and as a part of one act (chapter 105, Laws 1911). They dealt with the assessment and taxation of mortgages upon real estate. To avoid further discussion of such history, reference is here made to the dissenting opinion of Judge Eberly in *War Finance Corporation v. Thornton,* 118 Neb. 797, 226 N. W. 454. Attention is called to the fact that the majority opinion in that case differed from the dissenting opinion only upon the question of whether or not it was necessary therein to determine the validity of said chapter 178, Laws 1927, the notes upon which that action was based having been executed prior to the passage of such chapter. The said chapter 105, Laws 1911, was complete within itself and constituted original and independent legislation. The amendment to section 77-1503, by chapter 178, Laws 1927, is as germane to section 77-1502 as to the section amended. When a bill has been introduced in the legislature within the time limited by the Constitution for the introduction of bills, amendments that are germane to the subject-matter of such bill may be made after such time limit has expired. *Chittenden v. Kibler,* 100 Neb. 756, 161 N. W. 272; *State v. Ryan,* 92 Neb. 636, 139 N. W. 235; 59 C. J. 544; 25 R. C. L. 878, sec. 125. The subject-matter of House Roll 421 as originally introduced related to the taxation of real estate mortgages. The bill as it finally passed dealt only with a restriction upon the operation and effect of a provision in a real estate mortgage relating to such taxation. The amendment outlined above did not violate

section 7, art. III of the Constitution, on account of being made after the expiration of the first twenty days of the legislative session at which it was made.

Defendants contend that the decision in *Stuart v. Durland, supra,* was not based upon any provision of section 77-1503, Comp. St. 1929, but rather upon a construction of sections 45-101 to 45-105, Comp. St. 1929, above mentioned, together with section 77-1502, Comp. St. 1929, and that such decision would have been as it was even though section 77-1503 had not existed. Such contention is perhaps based on sound logic. They then further contend that therefore the amendment to section 77-1503 does not now effect the construction that now must be placed upon the same sections as were involved in the *Stuart v. Durland* case. With this contention we do not agree. Such a contention overlooks the fact that the sections involved in the case of *Stuart v. Durland, supra,* must now be read in connection with section 77-1503, *supra.* The rule that statutes *in pari materia* should be construed together applies to earlier as well as to contemporaneous statutes. The presumption is that the legislature at the time of the passage of section 77-1503, *supra,* had in mind the provisions of all existing earlier statutes and that it intended to create a harmonious whole. 25 R. C. L. 1063, sec. 287, and cases cited. When necessary to effectuate the legislative intent, a proviso in an amended section of a statute will be construed to apply to other sections of the act containing such amended section, or to apply to sections of other acts *in pari materia* with such amended section. 59 C. J. 1088.

A further contention of the defendants is that said chapter 178, Laws 1927, relates only to mortgages upon real estate in Nebraska, and that the laws of Colorado are immaterial. That the laws of Colorado are immaterial, we agree. No usury laws of Colorado are pleaded or proved. If the note in suit is usurious, such fact must arise from the provisions of sections 45-101 to 45-105 and 77-701, above mentioned, under the same reasoning as was applied to the effect of such sections, together with section

77-1502, in *Stuart v. Durland, supra.* Before the debt secured by the note in suit was created, said chapter 178 became effective. Thus we now have the question of whether or not said section 77-701 is prevented from having the same effect in connection with sections 45-101 to 45-105, *supra,* as section 77-1502 was declared to have in the case of *Stuart v. Durland.*

With the contention of the defendant that said chapter 178 deals only with mortgages upon real estate in Nebraska, we cannot agree. At the time said chapter 178 was passed the above-mentioned section 77-701, Comp. St. 1929, was in effect. It provided for the assessment of notes secured by a mortgage upon real estate in a foreign state at eight mills upon the dollar of valuation. If this contention of the defendants were upheld, we would then have the situation of a note bearing the maximum rate of interest allowed by sections 45-101 to 45-105, *supra,* when read alone, being rendered usurious on account of being secured by a mortgage upon real estate in a foreign state, when it would not be usurious if secured by a like mortgage upon land in this state. If the mortgage were upon land that lies partly in this state and partly in a foreign state, what would be the situation with relation to usury? When a statute is ambiguous or fairly susceptible of two constructions, one of which creates absurdities, unreasonableness or unequal operation and the other of which avoids such results, the latter will be adopted in the construction of such statute. 25 R. C. L. 1017, sec. 255.

The question here involved is that of whether or not chapter 178, *supra,* being declared valid, is *in pari materia* with sections 45-101 to 45-105, *supra,* and section 77-701, *supra,* so far as such sections relate to usury and the effect of the provisions of the revenue laws with relation thereto. If these sections are *in pari materia* and all are read together as they relate to the subject of usury, then the provisions of section 77-701 do not cause the note in the case at bar to exact a greater rate of interest than allowed by law. If, on the other hand, these sections are read as hav-

ing no relation to each other, then said section 77-701 causes the note in suit to be usurious under the holding in the *Stuart v. Durland* case. Various canons of statutory construction might appropriately be declared to be applicable to this question. Some of these are those relating to ascertaining the intent of the legislature, to the history of the sections involved, to the evil sought to be remedied, to the reasonableness of the result attained by the construction adopted, and to the circumstances surrounding the enactment of the statutes under consideration. None of these canons of which we are aware are inconsistent with views herein expressed. A discussion of when statutes are deemed *in pari materia* and when they are not is found in 25 R. C. L. 1060-1069. When all canons of construction are considered, we declare that the sections of the statutes above mentioned are *in pari materia* with relation to the subject of usury, and that section 77-701, *supra,* since the enactment of said chapter 178, does not cause a note secured only by a mortgage upon real estate in a foreign state to be usurious, even though the note exacts the maximum rate of interest allowed by sections 45-101 to 45-105, *supra,* and even though such mortgage contains a clause to the effect that the mortgagor will pay the taxes assessed upon such note or such mortgage.

We find no error prejudicial to the rights of the defendants in the record, and the judgment of the trial court is

AFFIRMED.

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HAROLD S. WHALEY ET AL., APPELLEES, V. JACK MATTHEWS, APPELLANT: COSMOPOLITAN OLD LINE LIFE INSURANCE COMPANY, APPELLEE: HAZEL W. JEWELL ET AL., INTERVENERS, APPELLEES.

280 N. W. 159

FILED JUNE 10, 1938. No. 30151.

1. **Corporations.** "A director of a corporation bears to it and its stockholders a fiduciary relation and is treated by courts of

equity as a trustee." *Howell v. Poff*, 122 Neb. 793, 241 N. W. 548.

2. **Trusts.** "Every violation by a trustee of a duty required of it by law, whether wilful and fraudulent, or done through negligence, or arising through mere oversight or forgetfulness, is a breach of trust." *First Trust Co. v. Carlsen*, 129 Neb. 118, 261 N. W. 333.
3. ———. A trustee is personally liable to beneficiaries of a fund for any misapplication of the fund to other beneficiaries not entitled thereto. *State v. Lincoln Hail Ins. Co.*, 133 Neb. 496, 276 N. W. 169.
4. **Insurance.** Under the general principles of equity, aided by sections 44-1106, 44-1107, and 44-1108, Comp. St. 1929, a mutual life insurance company may not discriminate in its distribution to its members.
5. ———: MUTUAL COMPANIES: MISAPPLICATION OF FUNDS: SUIT TO RECOVER. The surplus of a mutual life insurance company belongs to its members and a minority member may sue, on behalf of himself and all others similarly situated, for misapplication thereof. *Folts v. Globe Life Ins. Co.*, 117 Neb. 723, 223 N. W. 797.
6. ———: DOMESTIC COMPANIES: INVESTMENTS. A domestic insurance company is limited in its real estate mortgage investments to bonds or notes secured by first mortgages. Comp. St. 1929, sec. 44-310.

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

*Beghtol, Foe & Rankin*, for appellant.

*Bernard S. Gradwohl* and *Robert G. Simmons, contra.*

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

GOSS, C. J.

The three plaintiffs and three interveners, all holders of certain types of insurance contracts, brought this suit in equity against Jack Matthews and Cosmopolitan Old Line Life Insurance Company, on behalf of themselves and others similarly situated, for breaches of trust and violations of duty. They charged Jack Matthews, president of the company, with wrongful diversion of moneys from various

funds belonging to the company. The result was a judgment against Matthews and the company for $191,300. Matthews alone appealed.

The decree, dated December 10, 1936, shows that the items making up the above total sum of the judgment were: (1) $65,000 removed and overpaid from the cumulative endowment funds and $9,750 interest thereon, making the total of this first item $74,750; (2) $90,000 removed and overpaid from the general fund, plus interest thereon in the sum of $17,250, making the total of this item $107,250; and (3) $9,300 for the negligent and wrongful purchase of securities known as the Neverve mortgages, without securing and examining an abstract of title thereof, which would have revealed prior liens and would have avoided such loss. This makes a grand total of $191,300.

The insurance company had its origin in 1917 or 1918, beginning as Cosmopolitan Club of America, a cooperative investment association. In 1923 it became a mutual association as Cosmopolitan Thrift Association. In 1926 a mutual legal reserve insurance company was organized under the same name and it was agreed that members of the old association might exchange their memberships for insurance contracts in the newly organized mutual legal reserve insurance company. These contracts were called "thrift certificates." In 1929 the name of the company was changed to the Cosmopolitan Old Line Life Insurance Company. The life insurance participation was comparatively small, the chief business being the selling of thrift contracts as before, but thrift contracts were issued by the new company and contained the added life insurance feature. From the first the contracts issued by the various companies were issued by a mutual organization owned exclusively by its members. Since the organization of the present life insurance company some straight life insurance not connected with the thrift certificates has been issued, but the funds in connection with such straight life insurance contracts have been separately held and are not involved in this action.

For each unit of a general thrift certificate the holder contracts to pay in one dollar each month for ten years. Thus, when matured, he has paid in $120. The certificate contains this provision: "The Company agrees that not more than $28.00 per unit shall be allotted during the life of this contract to the General Fund for payment of all expenses of supervision and management." The company, by the terms of the contract, agrees to act as trustee for all holders of this class of certificates, as a whole, for their payments, after deducting that proportion of the payment alotted for expense of supervision and management and the net premium on the amount of insurance in force the current year under each respective certificate, which resultant amount, together with the accumulated interest thereon, shall be the basis for the fund known as the "cumulative endowment fund," which shall constitute the surplus of the association belonging to the holders of this class of certificates.

The contract provides that the company will pay the holder at the terminal age of the certificate a sum of money computed as follows:

"1. The entire amount he has placed in the Cumulative Endowment Fund, plus,—

"2. His proportionate share of the net interest earnings on said fund compounded annually, plus,—

"3. His proportionate share of the money left in the fund by reason of lapse of other holders of such certificates, together with the interest accumulations thereon, compounded annually, plus,—

"4. His proportionate share of all surplus interest earned on the funds of such members who withdrew before arriving at their terminal age, plus,—

"5. His proportionate share of all withdrawal values forfeited by beneficiaries who upon death of such member surrender the certificates for insured settlements, plus,—

"6. His proportionate share of all interest earnings compounded annually on all such withdrawal values forfeited by beneficiaries.

"7. Also a participation in any saving in expense of supervision and management as determined by the Board of Directors."

Then there was also a form of "Educational Certificate," which had the same general provisions of the other certificate described, but with the accumulations arising upon the forfeiture of the certificates on any surrenders upon the death of dependents for whose benefit the certificates were taken out.

Each application for a thrift certificate was attached to and made a part of the thrift certificate and contained this provision:

"I hereby designate the Cosmopolitan Old Line Life Insurance Company as Trustee of my payments to the Company or its authorized agent, and agree that my share of the Cumulative Endowment Fund of the Company shall be distributed according to the computation of the Company under the terms of the certificate to be issued to me hereon."

In blackfaced type on the margin of the certificate opposite the paragraph stating how settlements will be computed appears "Guaranteed Prompt Settlement of Full Share of Funds," and in a later paragraph of the certificate is stated: "The distribution of surplus, as well as the loan, extended insurance, and surrender values provided in this certificate are based upon the premiums paid rather than upon the American Experience Table of Mortality."

Literature put out by the company, and in evidence, says that the association "offers a unique plan of cooperative saving to the public" and, under the heading "How It's Done," recites: "First: Expenses are limited; Second: No dividends to stockholders; Third: Members get full share of surplus."

It should be stated early that there is no evidence showing or tending to show that Matthews, who is held for the payment of this large sum, ever profited to any extent (unless he profited by overpayment of his own thrift certificate), or that any of the other seven directors, who

were Fred Eymer, an employee of the company, F. B. Fleming, Sterling F. Mutz, H. A. Taylor, R. W. Reynolds, C. H. Roper, and D. H. Campbell, and voted the disbursements of the company on thrift certificates maturing from time to time during the period (1928 to 1935), ever profited personally. Yet none of the other directors was made a defendant in this action.

Defendant Matthews was a director of the company continuously from 1922. He was vice-president from 1922 to 1927 and president from 1927 to 1930 and again in 1935. He was chairman of the investment committee from 1927 to the date of the trial, and was chairman of the board or executive committee from June, 1935.

The accounting firm of Martin & Cole made an investigation and report with particular reference to the amounts paid by the company on thrift certificates of the character owned by plaintiffs and others for whom they brought suit, to determine whether there had been overpayments on those certificates paid from 1929 to 1935, both years inclusive. They did not pretend to make a complete audit of the affairs of the company. The company furnished them such records as were needed for the purpose. Primarily the records used were the general ledger and certain books of original entry and the worksheets of the company actuary which had been used by him to provide the data for fixing payments each of the years named. These worksheets were made by D. H. Campbell, who was the actuary as well as vice-president of the company. They were in his handwriting and were made each year by him up to the time of his death (probably in July, 1934).

O. R. Martin and Edward E. Lamphere, of Martin & Cole, did most of the investigation for plaintiffs (though others of their organization worked on the investigation) and both of them testified and their written report is in evidence. Mr. Martin testified in support of the report. On cross-examination he admitted certain errors in his report, but we do not think the errors were sufficient to change the legal result that would follow even if correction were al-

lowed for the errors. It would take too much space and discussion to detail the results of the report, which can be readily noted in the following statement we have prepared, showing the year, the amounts deduced from the worksheets as actually payable on each unit, the correct amounts payable as deduced from all sources, the amounts actually paid and the total overpayment:

| Year | Amounts shown by Worksheets | Amounts Payable | Amounts paid | Overpayment |
|---|---|---|---|---|
| 1928 | $165.25 | $130.76 | $231.29 | $ 5,026.50 |
| 1929 | 140.33 | 135.70 | 210.88 | 11,502.54 |
| 1930 | 131.36 | 137.54 | 214.35 | 22,582.14 |
| 1931 | 124.72 | 132.57 | 214.60 | 13,699.01 |
| 1932 | 127.82 | 135.36 | 200.80 | 2,617.60 |
| 1933 | 129.90 | 136.37 | 175.55 | 29,132.38 |
| 1934 | 129.90 | 132.48 | 164.58 | 32,196.30 |
| 1935 | 128.48 | 126.16 | 150.86 | 38,803.70 |
| | | | | $155,560.17 |

The report discloses that in the last three years about $65,000 came from the cumulative endowment fund and the additional excess payment of $90,000 came from the general fund. The great bulk of the company's business consists of these thrift units. As a result of the alleged unwarranted action of the company in taking money from these two funds to pay substantial bonuses to already matured thrift certificates, those funds have been depleted so that it is claimed to have jeopardized payments of certificates to mature later. And there is sufficient evidence to warrant the statement that the insurance department of the state stepped in and took over the company so as to make it more probable that the thrift certificate holders may stand a better chance to get at least their principal back than would be possible if the past management and practices had continued.

The minutes of the directors' meetings were in evidence for the years when these payments were made and they show that the payments were authorized by the directors

to be made on the maturing thrift certificates. We believe Matthews was present as a director at all of those meetings. The minutes show no dissenting vote on the subject of disbursements to pay maturing thrift certificates.

Defendant bases his denial of any overpayment, and if there were any overpayments to holders of thrift certificates, upon the advice and reports of D. H. Campbell, the skilled actuary of the company, and upon the advice of Sterling F. Mutz, the attorney, who were both directors of the company. As the minutes of the directors show, Mr. Campbell was a director of the company up to his death near the end of the period under examination, and Mr. Mutz was a director, too, during all the period. Usually the motion fixing the disbursement for the current year to maturing thrift certificate holders was made by the one and seconded by the other. They were considered to be supported by the worksheets of Mr. Campbell, the actuary, which must have been the result of complicated computations of the many intricate factors inhering in such matters. It is not claimed by any one familiar with such elements that it is a simple thing to determine results when so many factors have to be taken into consideration.

But, in each instance, there was added to the worksheet finding of Mr. Campbell, the actuary, a sum which appears to be arbitrarily added to secure the payments made to holders of thrift certificates. For example, the worksheet of the actuary Campbell, dated December 31, 1932, purporting to show the elements entering into the 1933 values to be distributed to thrift certificate holders, found the transfer value of these certificates as $129.90 each. When the directors met on January 30, 1933, the minutes show that the value of each thrift certificate was fixed at $175.55, and the evidence shows that the latter amount was paid. The amounts shown on the worksheet for each year and the amount paid to each thrift holder are shown on the schedule previously appearing in this opinion, based on the testimony of Mr. Martin.

Defendant procured and used in evidence a report of

Haight, Davis & Haight, consulting actuaries, who examined the company from October 15, 1925, to April 30, 1936. They also made use of an audit of October 15, 1925, made by Lester M. Buckley, a certified public accountant. Thomas M. Mott and Arthur Haight, on behalf of these consulting actuaries, testified for defendant. It might be said that their testimony sought to justify the attributing of general funds and of mortality funds to the payments of the amounts complained of by plaintiffs to thrift certificate holders, but that position was based upon the belief that the directors had a right, and the power, to determine how much of mortality savings can be distributed to certificate holders. That, of course, being a question of law, cannot bind the courts. So they were not permitted by the trial court to state the opinion. It might be well to remark here that mortality savings upon life insurance policies are in no way connected with this investigation. Whenever that term has been used by the parties it merely refers to any savings upon the thrift certificates.

To go into the many volumes of evidence would unduly extend this opinion. Suffice it to say that we think it fully sustains the findings of the trial court that the directors arbitrarily added each year to the funds payable to holders of thrift certificates sums not based upon actuarial findings and to which the thrift certificate holders whose thrift certificates were maturing during those years were not entitled. These overpayments jeopardized and depleted funds which should have been saved to apply to the certificates of holders maturing in later years, of which there were many. The probability, from the evidence, appears to be that, if the company had continued to make like payments to thrift certificate holders, these payments would soon have so depleted the funds of the company that they would early have reached the point that the thrift certificate holders could not be paid back the principal which they had paid in by persisting for the ten years of their contracts; and that, if and when the company was taken over by the state insurance department and in due time taken over

by another insurance company which would attempt to carry out the thrift contracts, a like result would follow.

Another phase of this case is involved in the purchase, as an investment for the company, of two certain mortgages made by Charles Neverve and wife. They were purchased from the Federal Trust Company (of Lincoln) in November, 1932. Mr. Matthews made the purchase and signed the company checks for them, totaling $9,300. He did not obtain an abstract showing that the mortgages were first liens on the real estate. It developed that Kansas City Life Insurance Company had a first mortgage of $10,800 and there were mechanics' liens on the property aggregating $4,000. Defendant argues that he was not negligent in taking these mortgage loans without having an abstract of title furnished showing clear title in the mortgagor because (as he says) the Federal Trust Company was solvent and he had further protected the Cosmopolitan by having a surety bond in a reputable company furnished by the Federal Trust Company guaranteeing the Cosmopolitan that no loss would accrue by reason of the purchase of such mortgages. The record does not bear out the statement that the Federal Trust Company was in good financial condition when the Neverve loans were taken, whatever Mr. Matthews may have supposed; it was made a bankrupt a few months later. The Neverve first mortgages were purchased by the Kansas City Life Insurance Company, they were foreclosed by it, and in the decree they were made a first lien on the real estate, the mechanics' liens were made second liens, and the claim of Cosmopolitan Life Insurance Company was disallowed and canceled.

We are of the opinion the district court was right in holding that, in the circumstances, defendant Matthews was liable for not securing mortgage investments that were first liens.

From the facts appearing in evidence, we apply the following principles of law:

"A director of a corporation bears to it and its stockholders a fiduciary relation and is treated by courts of

equity as a trustee." *Howell v. Poff*, 122 Neb. 793, 241 N. W. 548. See *Nebraska Power Co. v. Koenig*, 93 Neb. 68, 139 N. W. 839; *Bodie v. Robertson*, 113 Neb. 408, 203 N. W. 590.

"Every violation by a trustee of a duty required of it by law, whether wilful and fraudulent, or done through negligence, or arising through mere oversight or forgetfulness, is a breach of trust." *First Trust Co. v. Carlsen*, 129 Neb. 118, 261 N. W. 333. See *Masonic Bldg. Corporation v. Carlsen*, 128 Neb. 108, 258 N. W. 44.

A trustee is personally liable to beneficiaries of a fund for any misapplication of the fund to other beneficiaries not entitled thereto. *State v. Lincoln Hail Ins. Co.*, 133 Neb. 496, 276 N. W. 169.

Under the general principles of equity, aided by sections 44-1106, 44-1107, and 44-1108, Comp. St. 1929, a mutual life insurance company may not discriminate in its distribution to its members.

The surplus of a mutual life insurance company belongs to its members and a minority member may sue, on behalf of himself and all others similarly situated, for misapplication thereof. *Folts v. Globe Life Ins. Co.*, 117 Neb. 723, 223 N. W. 797.

A domestic insurance company is limited in its real estate mortgage investments to bonds or notes secured by first mortgages. Comp. St. 1929, sec. 44-310.

The judgment of the district court is

AFFIRMED.

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CAROLINE CATHERINE SCHULTZ, APPELLEE, V. JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY, APPELLANT.
280 N. W. 165

FILED JUNE 10, 1938. No. 30308.

1. Insurance: POLICY: CONSTRUCTION. "A contract of insurance should be given a reasonable construction so as to effectuate the purpose for which it was made. In cases of doubt, it is to be

liberally construed in favor of the insured." *Hamblin v. Equitable Life Assurance Society*, 124 Neb. 841, 248 N. W. 397.

2. ———: ———: ———: TOTAL DISABILITY. "A literal interpretation of the term 'total disability,' in an accident insurance policy implying by its terms utter mental and physical helplessness as a condition of liability, will not be adopted, where it would result in an unreasonable and unjust forfeiture of the accident insurance." *McCleneghan v. London Guarantee & Accident Co.*, 132 Neb. 131, 271 N. W. 276.

3. ———: TOTAL DISABILITY: QUESTION FOR JURY. Where different minds may draw different conclusions as to whether the facts establish liability for permanent and total disability, it is the duty of the trial court to submit the question to a jury.

APPEAL from the district court for Douglas county: CHARLES LESLIE, JUDGE. *Affirmed.*

*Harley G. Moorhead* and *Emmet S. Brumbaugh*, for appellant.

*Fried & Mars, contra.*

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

GOSS, C. J.

This is an action by plaintiff, the widow of Otto W. Schultz, and the beneficiary named in a group policy certificate of insurance issued by defendant to the insured as an employee of Armour & Company. The insured died October 27, 1935, and plaintiff sued for $2,000, alleged to be due under a "total, continuous and permanent disability" provision of the policy. From a verdict and judgment for plaintiff for $2,139.33 entered therein and an allowance to plaintiff of $400 attorney fees, defendant appeals.

The chief defense is that the policy had not been in force after May 30, 1935, and that insured was never prior to that date permanently and totally disabled. Defendant alleges that the insured was discharged on May 30, 1935, for drunkenness and that ended the liability on the policy, and that thereafter the insured was gainfully employed by Arnold Brothers of Chicago from July 22, 1935, to October 7, 1935.

The permanent total disability provision of the policy provided that before the insured became 60 years of age he must become wholly disabled by bodily injuries or disease and be permanently, continuously and wholly prevented thereby for life from engaging in any occupation or employment for wage or profit. The insured was about 48 years of age when he died.

Though less than 48 years of age at the time of his death, the insured had worked for Armour & Company 35 years, the last 10 years as a salesman out of the wholesale market. He was absent without leave and Mr. Waterbury, the general manager, testified that he discharged him because he had been warned many times before that he would be discharged for such cause. The insured had been in the habit of laying off without notice when he was on a drunken spree. This occurred several times the last year of his service.

When he was finally discharged he went to Chicago. Mr. Waterbury recommended him to Armour & Company of Chicago because he had been a very good salesman and believed if he got away from the environment he might possibly straighten up. He, however, was employed by Arnold Brothers of Chicago as a meat salesman and worked there from July 22, 1935, to October 7, 1935.

There is evidence that his height was six feet and two inches and his normal weight about 250 pounds. Plaintiff testified that his weight at the time of his death was 100 pounds and the attending physician testified that his weight at that time appeared to be 130 to 140 pounds. This physician, Dr. Oswin F. Koch, of Chicago, testified that the patient died of acute leukemia. Leukemia is a latent, progressive and incurable disease due to a derangement of the blood-making organs of the body. Toward the end the patient suffered from acute muscular myocarditis, which probably was the immediate cause of death, although the leukemia probably produced the said heart trouble.

The wife and daughter of the insured and neighbors,

friends and relatives testified to their relation to the insured and as to his habits, appearance and symptoms. We do not think it is necessary to go into this evidence in detail. It formed, in part, the basis of the hypothetical question put to the experts.

Dr. B. C. Russum, of Omaha, in charge of the department of pathology and medicine in Creighton University, qualified as an expert and gave an opinion based upon a hypothetical question fairly stating the evidence produced on behalf of plaintiff as to the condition of the insured prior to his removal to Chicago as well as thereafter. He testified that, assuming the facts stated to be true, the insured was suffering from leukemia on and before May 30, 1935. Dr. A. C. Fellman and Dr. Frederick J. Wearne, both of Omaha, expressed the same opinion in answer to a similar hypothetical question.

Plaintiff testified that, when the insured was working in Chicago for the few weeks before his last illness in the summer of 1935, and during the last few months in Omaha, he came home during the day occasionally and rested for a time and then continued his work. This was not in accordance with his habit formerly when he was in good health. From January, 1935, he had become very nervous. He was irritable and slept poorly. His nose bled frequently, lasting an hour or so at a time. He had lost much weight except as to his abdomen, which became enlarged. His face had become thin and had a yellow color. He had a foul breath, was very constipated, the stools were black and had a bad odor. After he was discharged in Omaha and went to Chicago he quit drinking intoxicating liquors and did not drink any more until the last week of his life.

"A contract of insurance should be given a reasonable construction so as to effectuate the purpose for which it was made. In cases of doubt, it is to be liberally construed in favor of the insured." *Hamblin v. Equitable Life Assurance Society,* 124 Neb. 841, 248 N. W. 397; *Oswald v. Equitable Life Assurance Society,* 128 Neb. 173, 258

N. W. 41; *Woods v. Central States Life Ins. Co.*, 132 Neb. 261, 271 N. W. 850.

"A literal interpretation of the term 'total disability,' in an accident insurance policy implying by its terms utter mental and physical helplessness as a condition of liability, will not be adopted, where it would result in an unreasonable and unjust forfeiture of the accident insurance." *McCleneghan v. London Guarantee & Accident Co.*, 132 Neb. 131, 271 N. W. 276; *Serven v. Metropolitan Life Ins. Co.*, 132 Neb. 637, 272 N. W. 922.

In the *McCleneghan* case above, the insured was a physician and surgeon, who was injured in an automobile collision October 20, 1933. He thought the injuries were minor and continued to work, believing his injuries were due to indigestion. In April, 1934, an X-ray examination disclosed a diaphragmatic hernia, for which he was operated. He was totally disabled and recovered for disability from April 1, 1934, to August 1, 1934. There, as here, the jury found that the disease was latent and that the insured was not precluded from recovering because he had attempted to carry on for a time as if he were not totally disabled.

Where different minds may draw different conclusions as to whether the facts establish liability for permanent and total disability, it is the duty of the trial court to submit the question to a jury.

We are of opinion the trial court did not err in submitting the issues of fact to the jury.

Besides errors assigned because the trial court did not take the case from the jury as requested at the close of plaintiff's evidence and again at the close of all the evidence, defendant has assigned many other errors relating to evidence and to instructions. We have examined them and content ourselves with saying that they do not show prejudicial error.

Plaintiff is allowed $200 for attorney fees in this court.

The judgment of the district court is

AFFIRMED.

HANS JENSEN, APPELLEE, V. J. VICTOR ROMIGH: EARL HEFFNER, APPELLANT.
280 N. W. 223

FILED JUNE 10, 1938. No. 30355.

Trial: DIRECTION OF VERDICT. Where but one rational conclusion can be drawn from all the evidence, it is the duty of the trial court to direct a verdict or to render judgment accordingly.

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

*Hoagland, Carr & Hoagland,* for appellant.

*Shuman & Overcash, contra.*

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

GOSS, C. J.

The first trial of this case was reviewed by this court and an opinion handed down about a year ago, reversing a judgment which had been rendered on the direction of a verdict against plaintiff. *Jensen v. Romigh,* 133 Neb. 71, 274 N. W. 199. The case went back to the district court and was tried on substantially the same pleadings as before. At the conclusion of all the evidence the district court sustained the motion of plaintiff and entered judgment against defendants J. Victor Romigh and Earl Heffner. Defendant Heffner alone has appealed.

The former opinion included in full the written agreement of Romigh and Heffner as a copartnership and Hans Jensen at the time the latter advanced the money here sued for, so we do not copy it again here. It purported to make plaintiff a limited partner in the firm for one year with a provision for extension for another year by mutual agreement, and such an extension was made. Plaintiff had sued on an oral contract for repayment of the $5,000 advanced by him as a loan. The former opinion decides that the contract was vague and ambiguous, that a fair construction of it is that plain-

tiff loaned the money to the partnership, that the practical interpretation put upon the agreement is one of the best indications of its true intent, that the trial court had erroneously excluded letters of plaintiff bearing on the subjects treated by letters of defendants, and that even the letters written by defendant Romigh for his firm were sufficient to carry the case to the jury on the theory that plaintiff had loaned his money to the company.

On this trial there is, of course, no complaint of plaintiff that this evidence was not fully received, because plaintiff won.

All that was decided in the former opinion became the law of the case. Some of these things are reargued in this hearing. We have considered them and find no reason to change the ruling here.

In sustaining the motion for judgment for plaintiff at the close of all the evidence, the trial court said in part:

"The written contract as well as any evidence introduced to substantiate the claims of the defendants is not sufficient to place the parties to the contract in the position they would occupy if a relationship of a limited partnership existed between them. The written contract itself, as well as the interpretation placed upon it by the parties by their actions subsequent to its execution conclusively shows that the parties intended that the principal sum advanced by the plaintiff should be repaid to him regardless of whether or not the partnership of Romigh and Heffner was financially successful."

After examining the evidence received by the trial court under the law laid down in our prior decision, we have reached the same conclusion so clearly stated by the trial court in the above paragraph quoted from his decision. It seems that it would be a useless gesture to submit the issues of fact to a jury. This evidence would not support a judgment for defendants.

Where but one rational conclusion can be drawn from all the evidence, it is the duty of the trial court to direct a verdict or to render judgment accordingly. *American*

*Surety Co. v. Musselman*, 90 Neb. 58, 132 N. W. 729; *Farmers Grain & General Shipping Ass'n v. Jordan*, 107 Neb. 537, 186 N. W. 528.

Taking into consideration the former decision which formed the law of the case and which we find no reason to modify, and the evidence on the second trial, we are of the opinion there was no error on the part of the trial court. The judgment is therefore

AFFIRMED.

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WILLIAM DONKER, APPELLEE, V. CENTRAL WEST PUBLIC SERVICE COMPANY ET AL., APPELLANTS.
280 N. W. 168

FILED JUNE 10, 1938. No. 30356.

1. **Workmen's Compensation: EVIDENCE.** "Cogent reasons and circumstances that strengthen the opinion of expert witnesses as to a scientific fact in issue and tend to weaken opposite expert opinions may determine the issue." *Montgomery v. Milldale Farm & Live Stock Improvement Co.*, 124 Neb. 347, 246 N. W. 734.
2. ———. "Where the evidence is conflicting and cannot be reconciled, this court, upon a trial *de novo* in a workmen's compensation case, will consider the fact that the district court observed the demeanor of witnesses and gave credence to the testimony of some rather than to the contradictory testimony of others." *Cunningham v. Armour & Co.*, 133 Neb. 598, 276 N. W. 393.
3. **Evidence** in the record examined, and *held* ample to support the findings and judgment of the district court.

APPEAL from the district court for Dakota county: MARK J. RYAN, JUDGE. *Affirmed.*

*Brown, Fitch & West* and *George W. Leamer*, for appellants.

*Bliven & McKinley, contra.*

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

EBERLY, J.

This is an appeal in a workmen's compensation case by the Central West Public Service Company, a corporation, and its insurance carrier, from an adverse finding and judgment. The judgment appealed from awarded William Donker, employee, the sum of $10.27 each week from and after January 3, 1936, for temporary total disability, for a period not to exceed 300 weeks, less, however, the amount of $10.27 each week for 17 weeks, or the sum of $174.59 previously voluntarily paid to the employee in behalf of appellants. Certain claims for medical services were also allowed.

The appeal presents a limited field for investigation. The appellants admit the employment of plaintiff, the rate of his wages, the occurrence of the accident on January 3, 1936, arising out of and in the course of his employment, and that in said accident, "plaintiff slipped and fell, causing an injury to his coccyx," and "that compensation has been paid by defendants from January 4, 1936, to May 1, 1936, at the rate of Ten and 27/100 Dollars ($10.27) per week." So, the only questions for determination are the extent of the injuries then received by plaintiff and the nature of the disabilities occasioned thereby.

The plaintiff, a man of 46 years of age and weighing a little less than 200 pounds at the date of the accident, had been employed by the Central West Public Service Company at Crystal Lake, Dakota county, Nebraska. He was engaged in running an "ice marker." He testified that on this day, January 3, 1936, "turning around in the ice marker, I went to pull back on it to line it up; and when I pulled back my feet went out from under me and I fell," that he lit on his body, "a little ways above my hips," and "somewhere near the small of the back." Further, that he could not get up at first and lay there awhile; that he then got up but found he could not continue his work; that his legs got kind of numb and there were pains in his legs and back; that he walked around for a while and tried to continue his work but found he could not;

that his foreman on the ice then sent him to the tool house, where the company timekeeper then dressed a superficial wound he had received on one of his legs, then called a car from the plant over at Sioux City, and took him over to Dr. Charles Katherman of Sioux City; that this doctor treated him for six or seven weeks, and his pains continued, and on April 12, 1936, Dr. Katherman operated on plaintiff and removed the coccyx, and continued to care for him until the last week of April, 1936, when plaintiff was informed by this doctor that all had been done for him that could be done, and that "he was going to release" plaintiff. This doctor then advised plaintiff to do something by way of exercise that would limber up his limbs. At that time plaintiff had a burning sensation up and down his spine that never left him. His "legs were numb and felt like a lot of needles were sticking in my leg—asleep like." About May 20, 1936, plaintiff employed Dr. Graham of Sioux City, Iowa, who prescribed a brace for the lower part of the body, and treated him until about August 19, 1936. Plaintiff's pains continued and he seemed to be growing worse, and Dr. Graham also prescribed exercises, but the effect of taking them was to "put me all in." Plaintiff then entered the Veterans' hospital in Lincoln, where, under the personal charge of Dr. H. Winnett Orr of Lincoln, Nebraska, he was treated from the 19th of August to the 3d day of November, 1936. Here plaintiff's tonsils were removed and some teeth were extracted. He was kept in a cast for five weeks and then given a brace to wear, which he still uses continuously, and without which he is largely deprived of control of the lower part of his body. He was released from the Veterans' hospital on November 3, 1936. At the trial plaintiff testified, viz.: "I haven't got much use of my limbs, and have that burning sensation of the spine, and those places on the back, and my hip pains me all the time." My legs are "still numb. My left leg is worse than the right one. There isn't much feeling in it." So far as exercise is concerned, plaintiff attempts to walk up town and back, once a day, ten blocks altogether. He can do no more now.

Later plaintiff employed Dr. Neil of Sioux City, who continued to care for him up to the date of the trial in the district court. During the month preceding the trial, he returned to Lincoln and was examined by Dr. Orr.

Plaintiff testifies that prior to this accident of January 3, 1936, he engaged in "all kinds of manual labor, shoveling coal, digging basements, hauling dirt, stacking hay, and all such work as that," and that he never had any trouble with his back before. Even when he worked all day shoveling coal, he testifies that prior to this accident he never experienced any pain or discomfort in his back. As to plaintiff's physical condition prior to January 3, 1936, this testimony is not only without contradiction, but is fully corroborated by witnesses who knew plaintiff and worked with him for as much as fifteen years last past.

The testimony of Dr. H. Winnett Orr of Lincoln, Nebraska, who had charge of plaintiff and who personally supervised the treatment given him at the Veterans' hospital at Lincoln, and who gave him an examination during the month preceding the trial in the district court, is, in part, as follows: "Q. Doctor, assuming that this man, William Donker, is engaged in manual labor, would you have an opinion as to the extent of his disability, if any, existing at this time? Will you answer yes or no? A. Yes. Q. What is your opinion? A. My opinion is that he is totally disabled for manual labor. Q. Would you have an opinion as to whether that is permanent or temporary? A. Yes; I have an opinion. Q. What is your opinion? A. I think he will not recover sufficiently to ever do manual labor again. I think it is permanent, in other words."

As to the condition of the lower spine, all the experts testifying conclude that at present the situation of the fifth lumbar vertebra is not normal. As to this condition, Dr. Orr also testified, in part, with reference to an X-ray picture concerning which he was then being cross-examined, viz.: "Now this vertebra, the fifth lumbar vertebra, the front edge should fit exactly to the front edge of this (indicating). Instead of that this (indicating) has slipped

forward about half an inch. Q. When you said should fit with the front edge of this? A. This (indicating) should come right down here. * * * Q. And the second 'this' was—(interrupted) A. The edge of the sacrum. Q. In other words the front edge of the fifth vertebra should be just in line, in line and above the front edge of the sacrum? A. That is right. They are somewhat out of line and the space between the two is wider than normal. That condition he may have had before the injury or may have been aggravated by the injury or entirely caused by the injury. We cannot be sure about that a year and half afterwards. But theoretically it was a condition he had before and exaggerated by the injury. That is what we usually find."

Dr. C. W. Neil, who has been acquainted with plaintiff for fifteen years, and has been his attending physician since plaintiff's release from the hospital, and who had treated him professionally many times prior to the accident in suit, testified, from the results of examinations made, including the use of X-ray plates, and his previous knowledge of plaintiff's condition, that the accidental fall suffered by plaintiff on January 3, 1936, would be sufficient to cause the injuries from which he is suffering, and that his opinion is that plaintiff's present disabilities are due wholly and entirely to that fall, and that he is totally and permanently disabled.

With the conclusion thus stated, the evidence of defendants' experts conflicts, both as to the existence of reasons stated as foundation therefor and the ultimate facts established by the testimony. It would unduly extend this opinion to abstract this evidence.

We are cited to this principle of construction, viz.: "Cogent reasons and circumstances that strengthen the opinion of expert witnesses as to a scientific fact in issue and tend to weaken opposite expert opinions may determine the issue." *Montgomery v. Milldale Farm & Live Stock Improvement Co.*, 124 Neb. 347, 246 N. W. 734. See, also, *McGuire v. Kansas City Bridge Co.*, 132 Neb. 1, 270 N. W. 669.

It is also true that, "Where the evidence is conflicting and cannot be reconciled, this court, upon a trial *de novo* in a workmen's compensation case, will consider the fact that the district court observed the demeanor of witnesses and gave credence to the testimony of some rather than to the contradictory testimony of others." *Cunningham v. Armour & Co.*, 133 Neb. 598, 276 N. W. 393. See, also, *Southern Surety Co. v. Parmely*, 121 Neb. 146, 236 N. W. 178; *Sherman v. Great Western Sugar Co.*, 127 Neb. 505, 255 N. W. 772.

Bearing in mind these principles of construction, from the evidence as an entirety we arrive at the conclusion that the findings of the district court that plaintiff is now suffering from at least temporary total disability are clearly established and in accord with the facts.

It is undisputed in this record that prior to January 3, 1936, plaintiff was an able-bodied laborer, capable of continuously performing hard work without ill effects. No new element, so far as shown by proof in the record, has entered into the situation. But since that date his condition has been markedly and continuously changed. This sudden change of physical condition must be due to some cause. The only explanation which the testimony of defendants' witnesses suggests is that plaintiff is a malingerer. But the evidence in the record preponderates against that conclusion. Besides, plaintiff and all of his witnesses save one, and all of defendants' witnesses save one, appeared in person and testified at the trial in the district court. The trial judge, from the conduct and demeanor of these witnesses on the witness-stand, and their manner of testifying in his presence, had a better opportunity for determining their credibility than has this reviewing court. This fact, under the limitations expressed in the authorities we have hereinbefore cited, is to be considered by this court in view of the conflicting nature of the testimony found in the record.

Taking into consideration all the proofs in the record, and interpreting the same in the light of all the attendant

circumstances disclosed, and the clear course of the events, we arrive at the conclusion that the findings and judgment of the trial court are in strict accord with the established facts of the transaction and are supported by ample proof.

It follows that the judgment of the district court is, in all respects, correct, and it is

AFFIRMED.

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STATE, EX REL. RICHARD C. HUNTER, ATTORNEY GENERAL, PLAINTIFF, V. FRED P. MARCONNIT, DEFENDANT.
280 N. W. 216

FILED JUNE 10, 1938. No. 30205.

1. **Attorney and Client.** The possession of a good moral character is required as a condition precedent to the right to practice law.
2. ———. The misconduct of an attorney indicative of moral unfitness to practice law, although not committed in a professional relationship, justifies disbarment.
3. ———: APPEAL. One cannot predicate error upon anything which he himself has induced in the trial court.

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

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

*Fred P. Marconnit* and *Joseph D. Houston*, for defendant.

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

DAY, J.

The attorney general began disbarment proceedings against the respondent, Fred P. Marconnit, by filing an original complaint in this court. This comes before us now on a motion of the attorney general for judgment on the report of the referee. There were no briefs filed, but the representative of the attorney general, Mr. Paul P.

Massey, and the respondent himself appeared before the court and argued the matter comprehensively.

There were two specifications in the complaint, but the referee found in favor of the respondent upon one, and it will not be further considered by us. The referee, the Honorable George W. Pratt, found that the respondent in his conduct and dealings as an attorney has violated his oath, and violated the confidence placed in him by his client, and violated the duty which he owed to that client. The referee further found that by his conduct and his breach of duty he had been unprofessional, and he recommended his disbarment.

The respondent has filed written objections to the report of the referee which are more or less of a formal nature, but which include all of the objections made orally before this court by the respondent, and they will be discussed and determined. It appears from the record that in September, 1933, there was transferred to the respondent by Pearl Wyrick, a client, certain stock in the Omaha Loan & Building Association. This transfer was made so that the respondent might sell the stock to some third party and that Pearl Wyrick could thereby realize something from the stock. It further appears that the stock was not subject to immediate withdrawal on account of the inability of the Omaha Loan & Building Association to make immediate payments upon withdrawal. The evidence further establishes that the respondent immediately caused to be transferred to himself the shares of stock which had been transferred to him for the purpose of selling to another, and that he used the shares of stock as collateral for a loan, and that the stock was subsequently sold in order that something might be realized on the collateral. It is apparent from the record that this stock passed out of the hands of the respondent and was not subject to his control after October 6, 1933. At that time he did not report that fact to Mrs. Wyrick, and later on he negotiated with her at a time when she did not have any stock, and he had transferred her stock out of his hands for the

purchase of said stock, and paid her approximately $379 at different times during the first half of 1934.

With this statement of facts we come to the first contention of the respondent that he did not receive any stock or any money from Mrs. Wyrick in a professional capacity. He states, and he sought to prove by evidence, that, in his transaction with Mrs. Wyrick, his was the relationship of a broker and not that of an attorney. A well-recognized authority states the rule thus: "The possession of a good moral character is universally required as a condition precedent to the right to admission to practice." 6 C. J. 573. And again the same authority states: "The standard of personal and professional integrity which should be applied to persons admitted to practice law is not satisfied by such conduct as merely enables them to escape the penalties of the criminal law." 6 C. J. 574.

In Nebraska, section 7-102, Comp. St. 1929, requires that an applicant for admission to the bar shall be of good moral character, and the rules of this court make the same requirement, so that in this state the possession of a good moral character is required as a condition precedent to the right to practice law. This requirement obtains whether the transaction complained of occurred in a professional capacity or not. If the contention of the respondent is true, and he was acting as a broker when the stock was transferred to him, he was not honest with his client when he did not tell her that the stock was beyond his ownership and control. He was not able to return the stock to her after October 6, 1933. By concealing this fact, he later entered into negotiations for the purchase of said stock himself, and made a payment, the amount of which is disputed, but which is approximately $400, in the first half of 1934. It will be remembered that Mrs. Wyrick had, previous to that time, been a client of the respondent, and that he had handled many legal matters for her. This is only important as it shows the previous relationship between the parties, and the manner in which she approached him in her problem of selling the stock. It is not necessary that

one, in order to be found not of good moral character, must have shown affirmatively that his character was not such that he did not possess common honesty in the professional relationship. Even if his relationship is that of a broker, and if he violated the trust obligation as was done in this case, and concealed the fact from his *cestui que trust*, he does not possess the requisite moral character of an attorney. This is not to be misunderstood by the profession as meaning that an attorney is required to pay his debts beyond his ability in order to continue to practice law, but it does mean that the attorney cannot enter into another relationship and act dishonestly, and avoid an action of disbarment because of moral turpitude simply because he was not acting in his professional capacity. In a sister state the court of last resort stated the rule very tersely: "Misconduct indicative of moral unfitness for the profession is sufficient to justify the court in suspending an attorney from the practice of law even though the misconduct arose out of transactions where there existed no attorney-client relationship between such attorney and those with whom he dealt." *In re Disbarment of Waleen*, 190 Minn. 13, 250 N. W. 798. More recently this court held: "Misconduct of an attorney, indicative of moral unfitness for the profession sufficient to deny an applicant admission to the bar, even if the act is not committed in a professional capacity, justifies disbarment." *State v. Scoville*, 123 Neb. 457, 243 N. W. 269. Later this court held, in *State v. Black*, 125 Neb. 382, 251 N. W. 109, following the *Scoville* case, to the same effect.

We think the rule applicable in this case is that the misconduct of an attorney indicative of moral unfitness to practice law, although not committed in a professional relationship, justifies disbarment. Surely the conduct of the respondent in this case, whether he was acting as the attorney or the broker for Mrs. Wyrick at the time the stock was transferred to him for sale in trust, was reprehensible when, after the trust property had passed from his hands, he bargained with her without disclosing to her

the fact that he had already disposed of the stock and that he did not have any stock in his hands. He deceived and misled Mrs. Wyrick, and he caused her to sell the stock to him without paying for it. It was his duty at the time to disclose the facts to Mrs. Wyrick, and he did not do this.

Much was said by the respondent as to a judgment returned in favor of Mrs. Wyrick by the district court which was not appealed from, and which was final against the respondent. Mrs. Wyrick brought an action in the district court to recover the value of the stock which she claimed had been transferred to him for the purpose of sale. She recovered a judgment, and much is said in the record by the representative of the attorney general, the respondent, and the referee as to the fact of this judgment. The opinion was expressed that the judgment was final as to the relationship between the respondent and Mrs. Wyrick. The parties hereto discussed *State v. Priest*, 118 Neb. 47, 223 N. W. 635, where it was held that "a suit for an accounting brought by the client against the said attorney is a final determination as to the rights of the attorney and client to the fund in question." Whether the judgment in *Wyrick v. Marconnit* is final in this case furnishes an interesting question for discussion. However, no prejudice resulted because the record discloses that the defendant testified as to the relationship and the representative of the attorney general offered to include all the evidence in that case. The respondent objected to that evidence, so that, if any error could be predicated upon that matter, the respondent is not in a position to raise it. It is a familiar rule of law, well established in this state, that one cannot lead a trial court into error and then predicate an appeal on that error. It is apparent from the record that the respondent did not offer any evidence which was rejected, and for that reason he cannot now predicate objections to the referee's report on that ground. One cannot predicate error upon anything which he himself has induced in the trial court. The entire record indicates that the respondent did not deal

honestly with Mrs. Wyrick, and regardless of the relationship between them the conduct indicates a lack of moral character which an attorney is required to maintain. It is therefore ordered that a judgment of disbarment be entered in accordance with the report of the referee, and that Fred P. Marconnit is enjoined from practicing law directly or indirectly through his agents and attorneys.

JUDGMENT OF DISBARMENT.

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ANTONIE SHANLE, APPELLANT, V. HENRY BUSCH ET AL., APPELLEES.

280 N. W. 174

FILED JUNE 10, 1938. No. 30378.

1. Wills: LIEN ON REALTY: RELEASE. When a bequest in a will is made a lien upon real estate, such lien may be released and satisfied by the one in whose favor it was made.
2. ———: ———: ———. Such a lien against real estate may be paid off in cash, or the holder thereof may see fit to accept a promissory note in full payment thereof, and such note will be a good consideration for the release of such lien.
3. Release. When a party of mature age, able to read and write, being somewhat experienced in business transactions, has an opportunity to read a release, and executes the same, she is bound thereby, her defense being that she does not remember the transaction at all.

APPEAL from the district court for Stanton county: JOHN W. YEAGER, JUDGE. *Affirmed.*

*A. R. Oleson,* for appellant.

*Fay H. Pollock, contra.*

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

PAINE, J.

The plaintiff brings an action in equity for an accounting of the amount alleged to be due her under a lien upon

real estate, and prays that the land be sold and her lien satisfied. The defense is that she had executed a full release of her lien before a notary public, and the court in its decree found against the plaintiff, from which finding she appeals.

Henry Busch, Sr., of Howells, Colfax county, Nebraska, died testate in 1925, and in his last will and testament he devised various tracts of real estate to each of his sons, Luey, Charley, Henry, Frank, William, and Herman, and then provided for certain liens upon land or funds to be raised from the lands devised to the above sons to pay to his son John $6,000, to his daughter Theresa $6,000, to his daughter Lena $6,000, to his daughter Antonie $6,000, and $6,000 to his son Albert.

This is simply a very brief statement of the provisions of the will for these children, as there are other bequests and sundry provisions which are omitted from this statement. In this action we are only concerned with the $6,000 bequest made to his daughter Antonie, which was combined with the devise to his son Henry, and found in the fourth paragraph of the will, exhibit No. 5, and reads as follows:

"I give, devise and bequeath to my son Henry Busch the northwest quarter of section number thirteen, township number twenty-one north, range number three east of 6th P. M., except the west half of the southwest quarter of said northwest quarter, subject to the condition that he pay the note of $6,000 which I owe to my son Frank Busch at the present time, or if by the time of my death I have paid said note and have borrowed the money elsewhere he is then to pay $6,000 of the indebtedness that I may have incurred since this date, and upon the further condition that he and his wife, make and deliver to my daughter Antonie Shanle a valid note and mortgage for $6,000, due seven years after date of my death, bearing interest at the rate of 5% payable annually, said mortgage to cover the land hereby given to him subject to no indebtedness exceeding $6,000. And if said mortgage is given subject to

any other lien or mortgage against said land (not exceeding $6,000 as stated) and he finds it necessary to extend or renew such first lien or mortgage, said Antonie Shanle is to release the second mortgage held by her with the understanding that said Henry Busch and his wife make and deliver to her a new second mortgage on same land subject to no more other lien or mortgage than said $6,000, said new mortgage to be due at the same date at which the old mortgage would have fallen due and to be on the same terms and rate. However, if said Henry Busch should prefer to pay said amount of $6,000 in cash instead of giving said second mortgage, he may do so, and he is to have the privilege of paying or reducing said mortgage at any time and not continue to pay interest on the amount thus paid. Said above described land is given to my said son Henry Busch upon the further condition that he pay the sum of $7,750 into a fund which is to be divided amongst some of my other children as below provided."

Henry Busch testified that he gave his sister Antonie a note for $6,000 to pay off the provision in his father's will. The note is exhibit No. 3, and is dated February 1, 1927, for $6,000, for five years, at 5 per cent. interest, and the back of the note has indorsed thereon some six payments of interest, and an indorsement of $2,000 on the principal under date of March 28, 1927. Exhibit No. 2 is the release signed by Antonie Shanle, which sets out that she is one of the heirs mentioned in the last will of Henry Busch, deceased, and is the one to whom Henry Busch (Jr.), another heir, was to execute and deliver one mortgage for $6,000, and she acknowledges that she has received from him a note for $6,000 in lieu of the $6,000 mortgage mentioned in said last will and also in the decree of the probate of said estate, and that no mortgage is therefore due her, as provided in said last will and decree of Henry Busch, deceased, and this release was subscribed and sworn to before J. R. Kosta, a notary public, on February 3, 1927. Mr. Kosta testified that this instrument was prepared and mailed to him by Mr. Wertz, of Schuyler, who was attorney

for the estate, and that Mrs. Shanle came to his bank and signed it before him as notary public.

It appears that against this farm of Henry Busch a mortgage of $11,000 was given to Fred Taylor on February 29, 1932, and the plaintiff prays in her petition that the balance due her of $4,850 with 5 per cent. interest be decreed to be a first lien against the land of Henry Busch, and prior to the mortgage given to Fred Taylor, which shall be decreed to be subjected to the amount due her on her lien.

Answers and cross-petitions were filed by Henry Busch and Fred Taylor, who seeks a foreclosure of his mortgage of $11,000. Practically the only question at issue in the trial of this case was whether the release signed by the plaintiff was a valid and good release of her right to have a mortgage lien against the land of her brother Henry. The trial court dismissed the plaintiff's petition, and gave a decree of foreclosure upon the $11,000 mortgage of Fred Taylor.

The asignment of errors set out that the court erred in finding that exhibit No. 2 constituted a release of the lien of the plaintiff under the will of her father; that the court erred in dismissing the action of the plaintiff; and, third, that the decree is contrary to, and not suported by, the competent evidence in the case. The plaintiff supports these errors by citing many authorities holding that a release of an existing right cannot be sustained when it is made without consideration or by misrepresentation of its contents and purport, whether innocent or otherwise.

The plaintiff testified that her brother Henry made a payment to her of $2,000, and paid $200 interest each year until March 16, 1932, and that in March, 1936, he paid her $350. On cross-examination she testified that she was 56 years of age, and that her husband died in 1936, and that she had been accustomed to transacting business before his death. She admitted that she could read and write English, and admitted that it was her signature on exhibit No. 2, the release in this case, but she said that she could

not remember signing that paper or any paper like it. She remembered Mr. J. R. Kosta, and knew that he was a notary public and a bank officer, and said that she had transacted business with Mr. Kosta, but that she had never seen the $6,000 note given to her by Henry Busch until last October, and that she did not remember signing exhibit No. 2 at all; that she never directed any one to credit the $2,000 on the back of the note which she received, or to credit any interest payments thereon. She admitted that she had left the note in the bank, and that she had received all the payments of money indorsed on the back of the note.

J. R. Kosta testified that, at the time she signed the release, exhibit No. 2, he had called her attention to the note that he had there in the bank, and that he wanted her to sign this receipt, exhibit No. 2, for the note, and she signed it; that L. R. Coufal, president of the Howells State Bank, obtained a mortgage from Henry Busch on this land about April 1, 1927, for $11,000; that exhibit No. 8, the $11,000 mortgage to Fred Taylor, is dated February 29, 1932.

Mr. Coufal identified an agreement made June 14, 1934, being exhibit No. 9, in which, in arranging to borrow $21,000 from the Federal Land Bank of Omaha, Rudolph Shanle and wife, the plaintiff, Antonie Shanle, assigned by such exhibit No. 9 a $1,000 interest in the debt due from her brother Henry, represented by the note of $6,000, with payment of $2,000 thereon, and which exhibit sets out that her lien against the land was released to give Henry Busch an opportunity to refinance the mortgage against the land, and therefore it appears from this exhibit No. 9 that she had used the note of her brother Henry as collateral security for $1,000.

In the examination of the plaintiff, it does not appear from her answers that she claims to have been under any mental incompetency, or that she was suffering any physical disability, nor does she charge any misrepresentations in regard to the terms of such release, and frankly admits

that her signature appears upon this release of her lien, exhibit No. 2, but testifies that she has no recollection whatever of signing the instrument.

It cannot be seriously contended that Henry Busch could not legally settle the lien charged against his land in the will of his father by paying his sister the $6,000 in cash, and if she was willing to accept his promissory note for $6,000 in lieu of cash and release her lien against his land, then in the absence of misrepresentations or fraud it would bind the plaintiff, for a charge on real estate for a bequest may be paid, released, and satisfied by the agreement of the parties to accept a certain note in lieu of cash. *Very v. Levy*, 13 How. *345, 14 L. Ed. 173; 41 C. J. 791; *De Coo v. Woodworth*, 96 Mich. 362, 55 N. W. 987.

In the Nebraska case of *Pasewalk v. Bollman*, 29 Neb. 519, 45 N. W. 780, it was held that, if a plaintiff accepts county warrants and promissory notes in satisfaction of a judgment, it constitutes a good payment of such judgment.

In 6 R. C. L. 835, sec. 225, it is said, generally, that courts will hold parties bound to their contracts if the intention of the parties can be arrived at from the contract; that the courts will not make an attempt to ascertain the actual mental processes of the parties, for the law presumes that parties understand the import of their contract, and intended to be bound thereby.

It seems to this court that, when a party of mature age, able to read and write, being somewhat experienced in business transactions, and having the opportunity to read a release, executes the same before a notary public, she is bound thereby, when her defense is that she does not remember the transaction at all.

Finding no prejudicial error in the record, the decree of the trial judge is hereby

AFFIRMED.

LLOYD E. PETERSON, APPELLANT, V. BRINN & JENSEN COMPANY, APPELLEE.
280 N. W. 171

FILED JUNE 10, 1938. No. 30158.

1. **Automobiles: NEGLIGENT USE BY EMPLOYEE: LIABILITY OF EMPLOYER.** Where an employer expressly or impliedly authorizes the use of an automobile owned by an employee in the pursuit of his duties, the employer is liable to innocent third persons for injuries resulting from its negligent use by the employee in the business of his employer.
2. **Master and Servant: QUESTION FOR JURY.** Whether an act of an employee was or was not within the scope of his employment is ordinarily one of fact for the determination of the jury.
3. ———. In actions wherein it is sought to hold the employer liable for the wrongful act of his employee, each case must be determined from the surrounding facts and circumstances, the character of the employment and the nature of the wrongful act.

APPEAL from the district court for Douglas county: WILLIAM A. REDICK, JUDGE. Opinion on motion for rehearing of case reported in 133 Neb. 796. *Former opinion vacated and judgment of district court reversed.*

*Wear, Boland & Nye* and *Tyler & Peterson*, for appellant.

*Brogan, Ellick, Shoemaker & Fitzgerald, contra.*

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

CARTER, J.

This action was commenced by plaintiff to recover for personal injuries sustained in an automobile accident resulting from the negligence of one of defendant's traveling salesmen. The trial court directed a verdict for defendant, and plaintiff appeals.

The record discloses that there are two questions to be determined on this appeal: First, was the salesman an employee or independent contractor; and, second, if the salesman was an employee, was he acting within the scope of his employment at the time of the accident. The

negligence of the salesman is conceded for the purposes of this suit.

There is evidence in the record to sustain the following statement of facts. John R. Porter had been employed by the defendant company for many years as a traveling salesman and had been assigned to cover a definite territory, the place of the accident being within it. Porter used his own automobile as a means of transportation and covered his territory once every five weeks. He worked on a commission basis but had a drawing account with the company which was treated as an advancement on commissions earned. He also made collections for the company and performed other services when so directed by the home office. The evidence shows that the company could discharge Porter at any time that it became dissatisfied with the manner in which he was doing his work. The company required Porter to furnish an automobile to be used in covering his territory and he would not have been retained if he could not have provided one. An officer of the company testified that he had known for years that Porter had used an automobile in his work and that he was expected to do so. The evidence shows that it was generally left to Porter to determine the route to be used in covering his territory, but that the company retained the right to direct him where to go within the territory if it desired to do so. It was required that Porter make personal calls on customers and send in his orders daily. The company gave instructions to him concerning the merchandise to be pushed. He was required to devote all of his time to the company's interests, no side lines being permitted. The company also knew that Porter ofttimes brought orders into Omaha with him on week ends. The company also had general information as to the route taken by Porter and it was known to it that Murray and Plattsmouth were on his regular route after leaving Nebraska City.

The accident happened on highway No. 75, approximately nine miles north of Nebraska City, about 9 p. m.

on February 21, 1935. Porter and his companion were killed and plaintiff and his companion, Varro E. Tyler, were seriously injured. At the time of the accident, Porter had with him his sample case, the forms, catalogues and samples necessary to his work, and a number of orders signed by customers of the company. That he was traveling the most direct route from Nebraska City to Murray and Plattsmouth is not disputed.

The defendant contends that Porter was an independent contractor and that there is no liability on the part of the employer where the employer has no control over the physical movements of the automobile being used by its salesman. Defendant cites the cases of *Pyyny v. Loose-Wiles Biscuit Co.*, 253 Mass. 574, 149 N. E. 541; *Stockwell v. Morris*, 46 Wyo. 1, 22 Pac. (2d) 189; *Wescott v. Henshaw Motor Co.*, 275 Mass. 82, 175 N. E. 153; and *McCarthy v. Souther*, 83 N. H. 29, 137 Atl. 445. A reading of these cases discloses that they are based on the proposition that, unless the employer has the right to direct the manner in which the car was to be operated, there is no liability. We cannot accept this theory of the law. It seems to us that the control of the operation of the automobile is not the dominant feature. It is a question of the control of the driver of the automobile by the employer, as distinguished from the physical control of the car, that to us seems the more important factor. We believe the proper rule to be as follows: Where an employer expressly or impliedly authorizes the use of an automobile owned by an employee in the pursuit of his duties, the employer is liable to innocent third persons for injuries resulting from its negligent use by the employee in the business of his employer.

In the very late case of *Kennedy v. American Nat. Ins. Co.*, 107 S. W. (2d) (Tex.) 364, the court said: "If circumstances are consistent with, or require, the inference that activity in which servant was engaged at time of tort complained of, and in which he was using his own automobile or one which he had hired, was within scope of his employment, person injured may recover from employer, if serv-

ant's use of automobile or other vehicle was authorized, either expressly or impliedly." See, also, 5 Am. Jur. 728, sec. 393.

In *Curcic v. Nelson Display Co.*, 19 Cal. App. (2d) 46, 64 Pac. (2d) 1153, the court said: "If the activity in which the agent was engaged at the time of the tort complained of was within the scope of his employment, the fact that the automobile used by him and which caused the injury, belonged to the agent, will not preclude the person injured in recovering from the employer, if the agent's use of the vehicle was, either expressly or impliedly, authorized by the employer."

The Iowa court, in the case of *Heintz v. Iowa Packing Co.*, 222 Ia. 517, 268 N. W. 607, expresses the rule in the following language: "We believe the better rule is that where the employer has control over the employee, the fact that the employee uses his own automobile is wholly immaterial if that automobile is being used when the employee is in the course of his employment. In other words, the control of the man behind the wheel is the same as the control of the wheel, for that car will go wherever the man directs it, and the man will direct it wherever the appellant company that has control over him, orders him to go."

Other cases supporting the rule are: *LaFleur v. Poesch*, 126 Neb. 263, 252 N. W. 902; *Tucker v. Home Stores, Inc.*, 170 Tenn. 23, 91 S. W. (2d) 296; *Borgstede v. Waldbauer*, 337 Mo. 1205, 88 S. W. (2d) 373; *Regal Laundry Co. v. Abell Co.*, 163 Md. 525, 163 Atl. 845.

We necessarily conclude that Porter was an employee, as distinguished from an independent contractor.

The next point to be determined is whether the evidence was sufficient to take the case to the jury on the question whether Porter at the time of the accident was acting within the scope of his employment.

The evidence shows that Porter had been working in Nebraska City during the day on which the accident happened. The company knew, and it is established by the

record, that Porter would call on customers at Murray and Plattsmouth before coming into the home office at Omaha. It is not disputed that the accident happened on the direct and most traveled route to Murray and Plattsmouth. At the time of the accident Porter had his sample case and portfolio with him. He had stationery, catalogues, forms and other equipment with him which were necessary in his work as a salesman. Both Porter and his companion were killed in the accident so that their evidence was not available. The evidence shows that the accident occurred at about 9 p. m., but there is no evidence in the record as to whether or not it was customary to engage in company work at that hour or to travel between towns during the evening. There is evidence in the record that the vice-president of the defendant company stated that "he (Porter) was working for us; our men are in our employ day and night when they are on the territory."

In *Goodwin v. Omaha Printing Co.*, 131 Neb. 212, 267 N. W. 419, we permitted a recovery in a compensation case where the salesman was murdered by a "hitchhiker." It is true in that case that Goodwin left the office of his company for the purpose of calling on customers at Columbus and was traveling the road to that point when he was killed. In so far as the record showed, Goodwin might have changed his mind and been on business of his own. We held, however, that the circumstances surrounding the incident recited were sufficient to sustain an award.

In *LaFleur v. Poesch, supra,* the salesman was traveling from Mitchell to Scottsbluff, after regular hours, in order that he might stay at his own home rather than in a hotel at Mitchell. He had with him at the time of the accident some samples of merchandise. The instructions of his employer permitted him to return to Scottsbluff if he so elected. Even though the salesman testified that the trip was for his own convenience, this court held: "Whether the act was done in the execution of the master's business, within the scope of his employment, is a question of fact. The rule cannot aid in the determination of the fact. Each

case must be determined with a view to the surrounding facts and circumstances, the character of the employment and the nature of the wrongful act. Whether the act was or was not such as to be within the scope of his employment is, ordinarily, one of fact for the determination of the jury. * * * Whether he may have had the option to go to his home or stay at Mitchell overnight can make no difference. In either event he was acting on the instructions of his employer, and his act in going from Mitchell to Scottsbluff under the circumstances disclosed by the evidence would support a finding that he was acting within the scope of his employment and in the execution of his master's business."

It is apparent therefore, from the foregoing cases, that the death of the employee does not remove the only source of proof as to whether he was engaged in the business of his master. That he was so engaged may be shown by the facts and circumstances existing before and at the time of the accident. Whether he traveled in daytime or at night would make no difference if he was in fact on the master's business. The question is one of fact for the determination of a jury. We are convinced that the facts disclosed by the record before us are sufficient to take the case to the jury on the question whether Porter was acting within the scope of his authority when the accident occurred. There is no evidence in the record that he was on any business of his own. It being a jury question, the trial court erred in directing a verdict for the defendant. Likewise, our former opinion, appearing in 133 Neb. 796, 277 N. W. 82, is erroneous and the same is hereby vacated and set aside. The judgment of the district court is reversed and the cause is remanded for further proceedings in accordance with this opinion.

REVERSED.

JOHN P. DALTON, APPELLANT, V. MARGARET DOROTHY WOODWARD ET AL., APPELLEES.
280 N. W. 215

FILED JUNE 10, 1938. No. 30373.

**Libel and Slander.** Mere words of general abuse and vituperation, not amounting to a libel *per se*, however opprobrious, ill-natured or vexatious, whether written or spoken, do not constitute a basis for an action for defamation, in the absence of an allegation of special damages.

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

*Fried & Mars, Gordon Diesing* and *John P. Dalton,* for appellant.

*Abrahams & O'Connor, contra.*

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

CARTER, J.

In this case the plaintiff, John P. Dalton, brought an action against Margaret Dorothy Woodward, doing business under the name and style of "The Valley Enterprise," George Woodward, Jr., and George Woodward, Sr., her servants and employees, to recover damages for an alleged libel published by the defendants on March 11, 1937, in the Valley Enterprise, a weekly newspaper published at Valley, Nebraska. At the conclusion of plaintiff's case, the trial court directed a verdict for the defendants. From the overruling of his motion for a new trial, plaintiff appeals.

The record discloses that an editorial written by George Woodward, Sr., was published of and concerning the plaintiff, John P. Dalton, an attorney-at-law in Omaha, Nebraska, which plaintiff alleges was libelous because of the inclusion therein of the following quotation:

"But who would have believed an obscure lawyer could have been dug up out of the mud in Omaha to shake himself all over us before the frost goes out. * * *

"The only Daltons I ever knew about that were not

killed in the Coffeyville, Kans., bank robbery about 45 years ago, died in the state penitentiary. Of course, some may have escaped. Might be. * * *

"Those illustrious men who drafted the Constitution 150 years ago knew that the human race was not only full of falsehood and deceit, but full of envy, jealousy, vicious hate, greed, intolerance, prejudice, and, boy, if you were to have all those infections cut out of your system there wouldn't be enough left of you to bait a mousetrap."

Plaintiff contends that the foregoing excerpts from the editorial in question are libelous *per se*. If such be the case, the plaintiff is not required to allege or prove special damages. *Pokrok Zapadu Publishing Co. v. Zizkovsky*, 42 Neb. 64, 60 N. W. 358; *Cline v. Holdrege*, 122 Neb. 151, 239 N. W. 639. In the case at bar, the plaintiff neither pleaded nor proved special damages. Under this condition of the record, the trial court properly directed a verdict for the defendants, unless the printed statements complained of were libelous *per se*.

An examination of the alleged libelous statements reveals the fact that they do not charge the plaintiff with criminal misconduct nor subject him to public ridicule, ignominy or disgrace, within the meaning of the rule applicable to this class of cases. They do not in any way reflect upon his honesty, integrity or ability as a lawyer. The plaintiff and defendants were complete strangers to each other when the editorial was published. The editorial was brought about by a communication directed to the defendants by the plaintiff which contained statements tending to arouse the ire of the recipients. This situation adds to our belief that the alleged libelous statements should be classified as words of general abuse and vituperation and are not libelous *per se*. This being true, the applicable rule is as follows: The general rule is that mere words of general abuse and vituperation, however opprobrious, ill-natured or vexatious, whether written or spoken, do not constitute a basis for an action for defamation, in the absence of an allegation of special damages.

In *Davis v. Meyer,* 115 Neb. 251, 212 N. W. 435, this court said: "It is a familiar rule in this state, and we think in most jurisdictions, that words, spoken and published of another, which are not obviously defamatory, will not support an action for damages, unless, by innuendo or otherwise, special damages are pleaded and proved. It is not every false charge against an individual which is sufficient to sustain an action for damages. Unless facts are pleaded and proved which show that plaintiff has sustained actual damages, there can be no recovery if the language used is not actionable *per se,* and, in order to be actionable *per se,* it must impute to the person the commission of a crime or subject him to public ridicule, ignominy or disgrace."

And, also, in *Callfas v. World Publishing Co.,* 93 Neb. 108, 139 N. W. 830, this court said: "If the published words are obviously defamatory, that is, libelous *per se,* it is not necessary in the petition to explain the meaning of the words nor to allege any special damages; the law implies damages. If the published words are ambiguous, or are meaningless unless explained, or *prima facie* innocent, but capable of defamatory meaning, it is necessary to specially allege and prove the defamatory meaning of the words used, and to allege and prove special damages. The plaintiff will not be allowed to prove upon the trial a different meaning than that which she has alleged. If the words, with the meaning alleged by the plaintiff, are not libelous, or if no special damages are alleged, the petition fails to state a cause of action. The petition and the publications complained of must be considered in the light of these well-established legal principles."

We necessarily conclude that the quoted portions of the editorial are not libelous *per se,* and, special damages not having been alleged or proved, the trial court properly directed a verdict for the defendants.

AFFIRMED.

# IN RE ESTATE OF MARY CHALUPA.
# AMELIA CHALUPA, APPELLEE, V. OTTO E. MOLINE, ADMINISTRATOR, APPELLANT.

280 N. W. 164

FILED JUNE 10, 1938. No. 30380.

1. **Work and Labor:** PARENT AND CHILD. Generally, where a child renders services for a parent, the family relationship existing at the time, the law presumes, by reason of the kinship of the parties, that such services were gratuituously rendered.
2. ———: ———. Such presumption is not a conclusive one, and the child may recover the value of the services rendered if the evidence shows that they were rendered under an express contract on the part of the parent to pay for them.
3. **Executors and Administrators:** WORK AND LABOR: QUESTION FOR JURY. Statements made by the parent to disinterested persons taken together with a signed memorandum setting out the wage scale for such services are sufficient showing of such a contract as to warrant the submission of the question to the jury.

APPEAL from the district court for Scotts Bluff county: GEORGE W. IRWIN, JUDGE. *Affirmed.*

*James H. Anderson,* for appellant.

*Floyd E. Wright, contra.*

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

RYAN, District Judge.

This is an appeal from a judgment of the district court for Scotts Bluff county in favor of the plaintiff allowing a claim against the estate of Mary Chalupa, deceased, in the amount of $1,680, for the care of said deceased for parts of the years 1926 to 1936.

Briefly stated, the facts in the case are these: Plaintiff's father died in 1926 leaving his widow and nine children of which the plaintiff is the youngest. Most of the children were then married and living away from the family home; the others with the exception of plaintiff married and established homes of their own before the death of the

mother. Plaintiff was 19 years of age at the time of her father's death and her mother was about 60. After her father's death plaintiff lived with and took care of her mother, who was in poor health and in need of care, except for the school months of three years when she was away teaching rural schools, and for a few months spent in Omaha in 1935 and 1936.

In support of her claim, plaintiff testified that she expected to be paid for the services she rendered for her mother and that her services were reasonably worth the sum of $30 a month. She produced a memorandum entitled "Wage Scale for Amelia" which enumerated the years and months plaintiff had been with her mother and fixed the compensation at $30 a month. This memorandum was signed by her mother, Mary Chalupa. Two disinterested witnesses testified to conversations had with the deceased in which the mother stated that Amelia would be paid for her services. One of them quoted the mother as saying, "Well, we have taken care of that. I will be sure Amelia will be paid for what she has done for me."

The leading cases in this state with reference to the question involved are *Bell v. Rice,* 50 Neb. 547, 70 N. W. 25, and *In re Estate of Wieland,* 104 Neb. 412, 177 N. W. 651. Those cases hold that, as a general proposition, where a child renders services for a parent, while the family relation exists, the law presumes, by reason of the kinship of the parties and such family relation, that such services were gratuitously rendered; that such presumption is not a conclusive one, however, and the child may recover the value of the services rendered if the evidence shows that they were rendered under an express contract to pay for them or under such circumstances as to justify the inference of a contract on the part of the parent to pay for them. The case of *Bell v. Rice, supra,* further holds that whether the evidence warrants such a conclusion is a question for the jury.

In instruction No. 5 the court told the jury that before they could find for the plaintiff they must find: "(1) That

Mary Chalupa expected to pay Amelia Chalupa; (2) that Amelia Chalupa intended to collect from Mary Chalupa, and performed the services for which she claims in the expectation of being paid; (3) that Amelia Chalupa knew that Mary Chalupa intended to pay her and that Mary Chalupa knew that Amelia Chalupa intended to collect for her pay." The court further instructed the jury: "Mere expressions of intent to bestow a bounty made by the deceased, Mary Chalupa, are not sufficient of themselves to show a contract for payment. Before you can find for the claimant in this action it must clearly and satisfactorily appear that there was an express contract whereby Mary Chalupa agreed to pay for the services of Amelia Chalupa, and that the claimant performed the services in expectation of receiving such pay." These instructions correctly stated the law applicable to the case and no exception is taken to them.

The appellant insists, however, that the evidence was insufficient and it was error for the court to submit the case to the jury. In cases of this kind, where the claimant is barred by statute from testifying to any conversation or transaction with the deceased, the only way of proving an express contract is by showing the facts and circumstances which existed and statements made by the deceased to third parties. While the statements to which the disinterested witness testified in this case are not definite as to the terms and provisions of the contract, they are sufficient to show that the mother expected to remunerate her daughter for the care which she was receiving and, coupled with the writing signed by her in December, 1936, were sufficient to warrant the submission of the case to the jury.

No reversible error appears in the record, and the judgment of the district court is accordingly

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**Damages.**

Evidence that a judgment for injuries has not been paid is not admissible in a subsequent action for injuries against the judgment debtor. *Gardner v. Metropolitan Utilities District* ..... 163

**Deeds.**

1. Where grantor's mind was somewhat impaired by poor health at times and he executes a deed to substantially all his property to one with whom he lives, to the exclusion of his relatives, such transaction will be closely scrutinized. *Kirk v. Tackett* ..... 759
2. Where grantor, at time of execution of deed, knew the extent of his property, the natural objects of his bounty, and the transaction was natural and fair, the deed will not be canceled for undue influence. *Kirk v. Tackett* ..... 759

**Descent and Distribution.**

The doctrine of advancements applies only to intestate estates. *Stanton v. Stanton* ..... 660

**Divorce.**

A divorce decree awarding custody of a minor child to the mother will not be modified unless the mother is unfit, or the best interests of the child require such action. *Downs v. Downs* ..... 457

**Elections.**

1. In an election contest on the ground that, through "ignorance and mistake" of election officers, enough illegal votes were cast in a voting precinct to change the result of the election, the burden is on contestant to prove the casting of the illegal votes and also the candidates for whom they were cast. *Mehrens v. Election Canvassing Board* ..... 151
2. The nonpartisan judiciary act not having provided for nor prohibited the writing in of names on the nonpartisan ballot, the general election law is applicable, the nonpartisan judiciary act having provided that the general election laws shall apply to the nonpartisan act so far as applicable and not inconsistent with that act. *State, ex rel. Zeilinger, v. Thompson* ..... 739
3. The provision of the general election laws that a blank space shall be provided into which electors may write the name of any person for whom they wish to vote, and whose name is not printed on the ballot, is incorporated into the nonpartisan judiciary act and becomes a part thereof by reference. *State, ex rel. Zeilinger, v. Thompson* ..... 739

**Electricity.**

1. The legislature has not lodged the power to regulate electric rates in the railway commission, and courts have no power to assume that function. *Cornhusker Electric Co. v. City of Fairbury* ..... 248
2. In a suit to enjoin discrimination between customers of a municipal electric plant, one who purchased current for resale *held* not in a class with another who purchased current for power in his own plant. *Cornhusker Electric Co. v. City of Fairbury* ..... 248

**Eminent Domain.**

1. In condemnation proceedings by power district, a circular letter containing admonitions warning of danger from high-tension power lines to persons, live stock, and property, *held* admissible, not as an independent element of damage, but as affecting the market value of land. *Lilienthal v. Platte Valley Public Power and Irrigation District* ..... 281

2. Where a transmission line cut a farm into four irregular tracts, award of $4,085.40 damages *held* not excessive. *Lilienthal v. Platte Valley Public Power and Irrigation District* ..... 281
3. The measure of damages for land condemned for electric power purposes is the fair and reasonable market value of land actually appropriated and the difference in value of the remainder of the land before and after the taking. *Lilienthal v. Platte Valley Public Power and Irrigation District* ..... 281
4. In fixing damages in consequence of appropriation of or injury to property for public use, the jury may take into account every element of resulting annoyance and disadvantage which would influence an intending purchaser's estimate of the market value. *Lilienthal v. Platte Valley Public Power and Irrigation District*..... 281
5. Transmission lines for which right of way by easement was condemned *held* an element of danger to owner of farm to which the general public was not exposed. *Lilienthal v. Platte Valley Public Power and Irrigation District* 281

**Equity.**

1. Equity will not aid a person whose conduct connected with the controversy has been unconscientious or unfair. *Shelby v. Platte Valley Public Power and Irrigation District* ..... 354
2. Equity seeks the substantial rights of the parties and applies the remedy so as to relieve those having the controlling equities. *Empson v. Deuel County State Bank* 597
3. Equity endeavors to carry out the intent of parties to a contract. *Empson v. Deuel County State Bank*..... 597

**Estoppel.** SEE ASSIGNMENTS, 6.

1. To create an estoppel *in pais*, the party pleading estoppel must have been misled to his injury and have suffered a loss of a substantial character or have been induced to alter his position for the worse in some material respect. *Shelby v. Platte Valley Public Power and Irrigation District* ..... 354
2. "Estoppel" defined. *Brisbin v. E. L. Oliver Lodge No. 335* ..... 517
3. An estoppel arises from a party's conduct and may be predicated upon silence or omission as well as upon written words. *Brisbin v. E. L. Oliver Lodge No. 335*..... 517
4. The doctrine of equitable estoppel is applied to transactions in which it is found that it would be unconscionable to permit a person to maintain a position incon-

sistent with one in which he has acquiesced or of which he has accepted any benefit. *Brisbin v. E. L. Oliver Lodge No. 335* ..... 517

5. A person is estopped from asserting any right under a contract where it appears that the facts on which it is sought to make the estoppel operate were known to such person and that such person remained silent and received the benefit of the contract which he, in fact, had violated. *Brisbin v. E. L. Oliver Lodge No. 335* ..... 517

**Evidence.**

1. The owner of personalty may testify as to its value. *Cox v. Greenlease-Lied Motors* ..... 1
2. The existence of a written contract does not prevent the party apparently bound thereby from pleading and proving that contemporaneously with the execution and delivery of the contract the parties entered into an oral agreement constituting a condition on which performance of the written contract should depend. *Johnson v. Shuler* ..... 25
3. An oral agreement made contemporaneously with three written instruments may be proved to show the entire contract. *Johnson v. Shuler* ..... 25
4. Any one with knowledge of time and distance is competent to give an estimate of the speed of an automobile. *Knoche v. Pease Grain & Seed Co* ..... 130
5. The court or jury is not required to accept as verity statement of a witness not contradicted by direct testimony. *Leon v. Kitchen Bros. Hotel Co* ..... 137
6. The testimony of a witness on a vital point which was materially changed to obviate objections pointed out by the supreme court on a former appeal without sufficient explanation for change was discredited as a matter of law, and required to be disregarded. *Peterson v. Omaha & C. B. Street R. Co* ..... 322
7. The contents of a lost deed of adoption may be proved by secondary evidence. *In re Estate of DeSoe* ..... 371
8. In a suit against two joint agents of an insurance company, entries on books of the agency kept under the supervision of one of the agents were admissions as against both defendants. *Utilities Ins. Co. v. Stuart* ..... 413
9. Where consideration for a contract is promissory or contractual, it cannot be varied by parol agreement. *Chalupnik v. Brant* ..... 465
10. Evidence in will contest *held* insufficient to require submission to jury of question of testator's competency to make a will. *In re Estate of Kajewski* ..... 485

11. Proofs of death by beneficiary to insurer are admissible against beneficiary as *prima facie* proof of statements therein. *Hinnenkamp v. Metropolitan Life Ins. Co.* ..... 846
12. Opinions of experts are conclusive only where undisputed, and where the opinions concern matters of which a layman could have no knowledge. *Hinnenkamp v. Metropolitan Life Ins. Co.* ..... 846
13. Cogent reasons and circumstances which strengthen expert opinion as to a scientific fact in issue may determine the issue. *Donker v. Central West Public Service Co.* ..... 892

**Exchange of Property.**

1. That a party to a contract for exchange of property might have discovered the truth by investigation is immaterial, where he is fraudulently induced by the other party to forego making investigation. *Hamaker v. Middaugh* ..... 440
2. One party to a contract for exchange of property has a right to rely as a basis of a mutual agreement upon the other party's express statement of an existing fact, and also upon representation of future facts which when acted upon turned out to be false. *Hamaker v. Middaugh* 440
3. Party to a contract for exchange of property *held* entitled to have the contract set aside for fraudulent representations. *Hamaker v. Middaugh* ..... 440

**Execution.**

One whose lands are sold on execution based on a judgment is not entitled to a moratory stay unless the judgment was obtained on a note or contract secured by realty. *Department of Banking v. Modrow* ..... 336

**Executors and Administrators.**

1. Where a county court acquires jurisdiction of the subject-matter and parties in a proceeding to settle an estate, its final judgment therein as to the amount due the estate from the administrator is not reviewable except on direct appeal and is not open to collateral attack except for fraud. *Starr v. Fidelity & Deposit Co.* ..... 240
2. A surety's liability on an administrator's bond is not affected by the fact that the surety had been induced to sign the bond through fraud of the principal. *Starr v. Fidelity & Deposit Co.* ..... 240
3. The executor's right to retain a legacy and apply it *pro tanto* upon legatee's debt to testator exists independently of statute. *Stanton v. Stanton* ..... 660
4. A devisee's debt to testator cannot be retained from proceeds of sale of land devised to devisee, in absence

of language in wi l making the debt a charge on the land. *Stanton v. Stanton* ..... 660
5. Evidence *held* insufficient to support an order allowing a claim to be filed against an estate after expiration of time originally allowed for filing claims. *In re Estate of Ohlsen* ..... 769
6. Whether a daughter's claim against her mother's estate for services was allowable was a question for the jury. *In re Estate of Chalupa* ..... 918

**Food.** SEE CONSTITUTIONAL LAW, 18.

**Fraud.**

Where a fraudulent transaction is sought to be enforced, defendant may set up the fraud as either a complete or partial defense, or in mitigation of damages or ground for recoupment. *Nordeen v. Nelson* ..... 707

**Fraudulent Conveyances.**

1. A conveyance from husband to wife was presumptively fraudulent as to an existing creditor, and in a suit by the creditor to set aside the conveyance, husband and wife had the burden to establish the good faith of the transaction. *Farmers Elevator Co. v. Peck* ..... 305
2. The question of fraudulent intent is to be considered as of the time when the conveyance is made, and with reference to the particular conveyance alleged to have been fraudulent as against creditors. *Farmers Elevator Co. v. Peck* ..... 305
3. A fraudulent conveyance is a conveyance, the object or effect of which is to defraud another, or a conveyance made with intent to avoid some duty or debt due by or incumbent upon the person making the transfer. *Farmers Elevator Co. v. Peck* ..... 305
4. Fraudulent intent may be established by proof of facts from which such inference may reasonably be drawn. *Farmers Elevator Co. v. Peck* ..... 305

**Garnishment.**

1. In a suit in the nature of a creditors' bill against a garnishee for alleged false answers, evidence sustained decree for plaintiff. *Ternes v. Watke* ..... 798
2. A court, if no other remedy is available, may render a money judgment against a garnishee. *Ternes v. Watke* 798

**Gas.**

1. A gas company must exercise the high degree of care and diligence required in the handling of a dangerous

commodity, and, if negligent, it is liable therefor. *Fonda v. Northwestern Public Service Co.* 430
2. Liability of gas company, which installed a gas burner, for injuries by escaping gas did not depend on notice of defect in burner, if defect was due to improper or careless installation and inspection. *Fonda v. Northwestern Public Service Co.* 430

**Guaranty.**
1. Mortgage bonds, a mortgage securing them, and a guaranty relating thereto, being executed substantially contemporaneously as one transaction, are to be construed together. *First Trust Co. v. Eastridge Club* 785
2. In construing a guaranty, contemporaneous contracts between the parties, the nature of the transaction and attendant circumstances may be considered. *First Trust Co. v. Eastridge Club* 785
3. The assignment of mortgage real estate bonds carried with it the mortgage and the guaranty assuring payment thereof. *First Trust Co. v. Eastridge Club* 785

**Husband and Wife.**
Whether a husband and wife may contract with each other under statutes depends on the nature of the statute in force in the jurisdiction, the law of which governs, and the construction that courts of that jurisdiction put on the statute. *Jorgensen v. Crandell* 33

**Infants.**
1. Evidence *held* to sustain conviction for aiding, abetting, and encouraging a child in delinquency. *Bolker v. State* 255
2. Evidence *held* to show prosecuting witness to be a delinquent minor. *Bolker v. State* 255

**Innkeepers.**
1. A husband and wife whose property was stolen while they were living at hotel *held* "guests" within meaning of statute dealing with innkeeper's liability for stolen goods. *Leon v. Kitchen Bros. Hotel Co.* 137
2. A hotel company claiming benefit of a statute altering its common-law liability for theft of guest's goods has burden of showing compliance with provisions of statute. *Leon v. Kitchen Bros. Hotel Co.* 137
3. A platinum wrist watch *held* neither an article of "jewelry" nor an article of "personal ornament," within statute regulating innkeeper's liability for stolen articles; but finger rings are within the statute. *Leon v. Kitchen Bros. Hotel Co.* 137

4. Hotel company *held* not liable for loss of guest's money not deposited in safe. *Leon v. Kitchen Bros. Hotel Co.*.... 137
5. The innkeepers statute limits innkeeper's liability for stolen articles to $300. *Leon v. Kitchen Bros. Hotel Co.* 137

**Insurance.**

1. The rule calling for construction of ambiguous or inconsistent terms of an insurance contract in favor of insured, because insurer selected the language, does not justify imposing of insurance risks not assumed. *Barish-Sanders Motor Co. v. Fireman's Fund Ins. Co.*.... 188
2. Under policy insuring goods in transit against damage by collision of vehicle with any other vehicle or object, insurer *held* not liable for damage to automobile in transit which came in contact with an overhead bridge. *Barish-Sanders Motor Co. v. Fireman's Fund Ins. Co.*.... 188
3. When a limited collision coverage of cargo is added to the policy, it cannot be extended by construction beyond limitations contained in the language employed. *Barish-Sanders Motor Co. v. Fireman's Fund Ins. Co.*.... 188
4. An insured's death may be held accidental if it results from something unusual, which took place without the foresight or expectation of insured, and could not have been reasonably anticipated by him. *Bernhard v. Prudential Ins. Co.*.... 402
5. When an insured attacked an officer, and while advancing to continue such attack was shot and killed by such officer, insured did not meet death through accidental means, within meaning of double indemnity clause of life policy. *Bernhard v. Prudential Ins. Co.*.... 402
6. Beneficiary *held* entitled to recover on a paid-up life policy, where defense was that policy had lapsed by reason of notice demanding payment of interest. *Apfel v. General American Life Ins. Co.*.... 408
7. An attorney's fee in action on insurance policy must always be reasonable in amount, and cannot be based solely on amount of judgment, but should only be fixed after examining questions involved and time, diligence and skill necessarily devoted to preparation and presentation thereof. *Apfel v. General American Life Ins. Co.*.... 408
8. An insurance policy, if couched in unambiguous language, should be construed as other contracts. *Parish v. County Fire Ins. Co.*.... 563
9. Where wind preceding a severe rainstorm caused only slight damage to a dwelling which was severely damaged by the rain, recovery could not be had on a policy cover-

ing damage from wind, except for slight damage caused by wind. *Parish v. County Fire Ins. Co.* ..... 563
10. Where false answers in an application for an accident policy were inserted by the insurer's agent without the applicant's knowledge, the insurer was estopped to claim that such answers were false. *Russell v. Glens Falls Indemnity Co.* ..... 631
11. A literal interpretation of the term "total disability" in an accident policy as meaning utter mental and physical helplessness as a condition of liability will not be adopted where it would result in an unjust forfeiture of the insurance. *Russell v. Glens Falls Indemnity Co.* ..... 631
12. The term "total disability" in an accident policy means such disability as renders insured unable to perform the substantial and material acts of his occupation in the usual way. *Russell v. Glens Falls Indemnity Co.* ..... 631
13. Where literal enforcement of a total disability clause in an accident policy would result in an unjust forfeiture of the insurance, it should be liberally construed to mean such disability as renders insured unable to perform substantial and material acts of his occupation in the usual way. *Russell v. Glens Falls Indemnity Co.* ..... 631
14. Insured could not recover on an accident policy for total disability, where disease added to the accident caused total disability, if the accident alone would not have caused total disability. *Russell v. Glens Falls Indemnity Co.* ..... 631
15. The assignee of an insurance policy acquires only the rights of his assignor. *General American Life Ins. Co. v. Omaha Nat. Bank* ..... 698
16. A bank, which as assignee sought to obtain cash surrender value of policy and offset a deposit of insurer in payment thereof, was obligated to conform to terms and conditions of the policy, and on failure to so do was not entitled to set off the deposit. *General American Life Ins. Co. v. Omaha Nat. Bank* ..... 698
17. A provision in a benefit certificate that no suit shall be brought thereon unless commenced within one year from date of member's death, if valid in the state where made, is enforceable in Nebraska. *Avondale v. Sovereign Camp, W. O. W.* ..... 717
18. A benefit certificate issued in Nebraska and accepted in Louisiana is a Louisiana contract. *Avondale v. Sovereign Camp, W. O. W.* ..... 717
19. Where a fraternal benefit society, which had issued a life certificate to a member payable to one named as the wife of the member, paid the certificate in good faith with-

out notice that the named beneficiary was not the member's legal wife, the legal wife cannot thereafter recover the amount of the certificate. *Avondale v. Sovereign Camp, W. O. W.* ..... 717
20. Fair doubt as to meaning of words used in a policy should be resolved against insurer. *New Masonic Temple Ass'n v. Globe Indemnity Co.* ..... 731
21. If ambiguities in a policy may be solved by either of two constructions, the one more favorable to the insured should be adopted. *New Masonic Temple Ass'n v. Globe Indemnity Co.* ..... 731
22. Under provisions of industrial life policy providing that insurer might declare policy void if insured was not in sound health at date of issuance or had been attended by a physician for any serious complaint within two years thereof, insurer was not required to immediately declare policy void in order to resist liability thereon in action brought after death of insured. *Hinnenkamp v. Metropolitan Life Ins. Co.* ..... 846
23. Under policy providing that insurer could declare policy void if insured was not in sound health at date of issuance or had been attended by a physician for serious illness within two years thereof, beneficiary could not recover on policy if insured was actually in unsound health at time of issuance of policy. *Hinnenkamp v. Metropolitan Life Ins. Co.* ..... 846
24. A provision that a policy shall not take effect unless insured is in good health at date of issuance is a condition precedent without which there is no liability under the policy. *Hinnenkamp v. Metropolitan Life Ins. Co.* ..... 846
25. Issue as to condition of insured's health at date of issuance of policy was for the jury. *Hinnenkamp v. Metropolitan Life Ins. Co.* ..... 846
26. Under statute and general principles of equity, a mutual life insurance company may not discriminate in its distribution to its members. *Whaley v. Matthews* ..... 875
27. The surplus of a mutual life insurance company belongs to its members, and a minority member may sue on behalf of himself and others similarly situated for misapp'ication thereof. *Whaley v. Matthews* ..... 875
28. A domestic insurance company is limited in its real estate mortgage investments to bonds or notes secured by first mortgages. *Whaley v. Matthews* ..... 875
29. In case of doubt, an insurance contract will be liberally construed in favor of insured. *Schultz v. John Hancock Mutual Life Ins. Co.* ..... 885
30. A literal interpretation of the term "total disability" in

an accident policy as meaning utter mental and physical helplessness as a condition of liability will not be adopted where it would result in an unreasonable and unjust forfeiture of the insurance. *Schultz v. John Hancock Mutual Life Ins. Co*..... 885

31. In action on accident policy, where different minds may draw different conclusions as to whether the evidence establishes liability for permanent and total disability, it is the court's duty to submit the question to the jury. *Schultz v. John Hancock Mutual Life Ins. Co*..... 885

**Judgment.**

1. Where the court overruled plaintiff's motion for directed verdict and submitted case to jury, which returned verdict for defendant, and plaintiff filed motion for judgment notwithstanding verdict, the court had jurisdiction at same term to sustain motion in part and enter judgment for plaintiff for portion of amount claimed. *Leon v. Kitchen Bros. Hotel Co*..... 137
2. The statute authorizing vacation of judgment after expiration of term at which judgment was rendered does not provide exclusive remedy, but such remedy is concurrent with equity jurisdiction. *Pavlik v. Burns*..... 175
3. A judgment may be set aside in equity for fraud after expiration of term at which it was rendered. *Pavlik v. Burns* ..... 175
4. After the term at which a judgment has been rendered, the court may vacate a judgment only for reasons stated and within time limited by statute. *Feldt v. Wanek*..... 334
5. A judgment will not operate as *res judicata* unless it appears on the face of the record or is shown by extrinsic evidence that the precise question was raised and determined in a former suit. *O'Connor v. Abbott*..... 471
6. The filing of an application in the same action in which the judgment was rendered is proper procedure to obtain discharge of a judgment. *In re Estate of Mathews*..... 607

**Jury.**

A prosecution for violation of a village ordinance which does not embrace a criminal offense under common law or statute is a civil proceeding to recover a penalty, and therefore defendant is not entitled to a jury trial. *Village of Utica v. Rumelin*..... 232

**Landlord and Tenant.**

1. A tender of money by lessor for cancelation of a lease which was refused, and after suit brought was deposited in court, *held* a sufficient tender. *Hole v. Hamp*..... 259

2. The burden of proof is on lessee alleging oral agreement for reimbursement for improvements if lease should be canceled. *Hole v. Hamp* ..... 259
3. A tenancy from year to year may be terminated at any time without notice by agreement. *Bailey v. Lund* ..... 319

**Libel and Slander.**

Mere words of general abuse and vituperation, not amounting to a libel *per se*, however opprobrious, ill-natured or vexatious, whether written or spoken, do not constitute a basis for an action for defamation, in absence of an allegation of special damages. *Dalton v. Woodward* ..... 915

**Licenses.**

1. Parol license to lay water pipes on defendants' land *held* irrevocable after thirty years' continuous and undisturbed use under claim of right. *Fitzsimmons v. Gilmore* ..... 200
2. A complaint charging violation of a village ordinance substantially in the language of the ordinance is sufficient. *Village of Utica v. Rumelin* ..... 232

**Limitation of Actions.**

1. An exception cannot be claimed in favor of minors in a statutory provision limiting time for commencing actions given by such statute, unless they are expressly mentioned by the statute as excepted. *Ray v. Sanitary Garbage Co.* ..... 178
2. A cause of action against a bank director participating in or assenting to an excessive loan is complete the moment the loan is made. *Department of Banking v. McMullen* ..... 338
3. The statute of limitations begins to run against a cause of action against bank directors for excessive loans at date of making loan, and is barred after four years. *Department of Banking v. McMullen* ..... 338
4. Limitations on implied obligation to repay money borrowed by a city by issuance of a void warrant begin to run on date of last payment on the warrant. *Nebraska State Bank Liquidation Ass'n v. Village of Burton* ..... 623
5. As regards limitation for suing under stockholders' double liability statute, corporate assets in bankruptcy are not "exhausted" until final dividend is paid to creditors. *Hoffman v. Geiger* ..... 643

**Master and Servant.**

1. Where an employee dies suddenly while engaged in his work, the burden is on the compensation claimant to

prove that death was an accident arising out of the employment. *Shamp v. Landy Clark Co.* ... 73
2. After waiver of rehearing before the workmen's compensation court and appeal to the district court, then by stipulation of the parties the case may be submitted to any district court. *Shamp v. Landy Clark Co.* ... 73
3. After a hearing before a judge of the compensation court a party may have a rehearing before the compensation court, or he may appeal directly to the district court. *Shamp v. Landy Clark Co.* ... 73
4. A party who accepts the judgment of a single judge of compensation court may not insist upon a rehearing before the full compensation court, where the opposing party waives such rehearing and takes an appeal directly to the district court. *Shamp v. Landy Clark Co.* ... 73
5. A party not satisfied with the decision of a single judge of the compensation court may appeal directly to the district court. *Shamp v. Landy Clark Co.* ... 73
6. The word "accident" defined. *Shamp v. Landy Clark Co.* 73
7. Where any one of the essential elements of an accident is absent, there can be no recovery for accidental injury or death under the compensation law. *Shamp v. Landy Clark Co.* ... 73
8. The claimant in a compensation case has the burden of showing with reasonable certainty that the employee sustained injury or death from an accident arising out of and in the course of employment. *Shamp v. Landy Clark Co.* ... 73
9. Where no exception is provided by the statute, the requirement for filing of a compensation claim within a specified time applies to an employee's minor dependent, and his failure to comply with the act precludes him from recovering compensation. *Ray v. Sanitary Garbage Co.* ... 178
10. The compensation act makes no exception in favor of minor dependents as to limitation of time for filing claims. *Ray v. Sanitary Garbage Co.* ... 178
11. Minor dependents of deceased employee were barred from filing claim for compensation one year after employee's death. *Ray v. Sanitary Garbage Co.* ... 178
12. Severe facial disfigurement is compensable although not specifically referred to in compensation act. *Wilson v. Brown-McDonald Co.* ... 211
13. The statute authorizing submission of disputed compensation claims to the compensation court includes cases not covered by the section containing the schedule of compensation. *Wilson v. Brown-McDonald Co.* ... 211

14. The compensation court is required to administer all provisions of the compensation act except those committed to courts of appellate jurisdiction. *Wilson v. Brown-McDonald Co.* ..... 211
15. An appellate court, in trying a compensation case *de novo*, has power to determine rights of the parties under the law relating to cases not covered by the schedule of compensation. *Wilson v. Brown-McDonald Co* ..... 211
16. The workmen's compensation act seeks to alleviate consequences of disability flowing from personal injury. *Wilson v. Brown-McDonald Co* ..... 211
17. Impairment of ability of earning power may result from ineligibility to obtain work as well as from inability to do procurable work. *Wilson v. Brown-McDonald Co* ..... 211
18. The workmen's compensation law will be liberally construed. *Wilson v. Brown-McDonald Co* ..... 211
19. A workman who because of injury is unable to perform a substantial amount of labor is "totally disabled," within the workmen's compensation act. *Wilson v. Brown-McDonald Co* ..... 211
20. Where the evidence disclosed that further medical services would not definitely improve disfigurement of face of employee, the employer's liability to furnish medical services ceased. *Wilson v. Brown-McDonald Co* ..... 211
21. Where a reasonable controversy exists as to liability, the employer is not liable for the statutory penalty for waiting time while the cause is pending in the courts. *Wilson v. Brown-McDonald Co* ..... 211
22. Allowance of attorney's fees to employee's attorney is erroneous, where the employer has not refused to pay compensation nor appealed from compensation award. *Wilson v. Brown-McDonald Co* ..... 211
23. The employer is liable for reasonable and necessary hospital and medical services and medicines, when they are approved by the compensation commissioner. *Summers v. Railway Express Agency* ..... 237
24. The statute fixes the amount of compensation. *Summers v. Railway Express Agency* ..... 237
25. Where deceased employee was employed jointly by two employers, one of whom carried workmen's compensation, the employer carrying workmen's compensation must pay only that proportion of the entire compensation which his proportionate wage liability bears to the entire wages of the employee. *Summers v. Railway Express Agency* ..... 237
26. A truck owner employed to haul gravel and acting under the employer's orders *held* to be an employee. *Westcoatt v. Lilley* ..... 376

27. The purpose of the workmen's compensation law is to shift to industry the burden of loss from accidents. *Westcoatt v. Lilley* ..... 376
28. One purpose of the workmen's compensation law is the prevention of an employee's dependents from becoming public charges. *Westcoatt v. Lilley* ..... 376
29. An employee who, after installation and inspection of a gas burner, by exercise of ordinary care should have known that the burner was defective is liable with his employer for injuries occasioned thereby. *Fonda v. Northwestern Public Service Co* ..... 430
30. A compensation claimant has the burden to show that he suffered an injury resulting from accident arising out of and in the course of his employment. *O'Connor v. Abbott* ..... 471
31. Awards for compensation cannot be based upon possibilities or probabilities. *O'Connor v. Abbott* ..... 471
32. A labor union selected by the clerical employees of a railroad company as the representative of a class was authorized to make contracts affecting rules and conditions of employment which were binding upon all employees of such class. *Brisbin v. E. L. Oliver Lodge No. 335* ..... 517
33. Under the railway labor act of 1926, employees of any class were empowered to se'ect representatives for the purpose of collective bargaining with their employer. *Brisbin v. E. L. Oliver Lodge No. 335* ..... 517
34. The 1934 amendment to the railway labor act continued and placed the duty on carriers and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules and working conditions, and to settle disputes. *Brisbin v. E. L. Oliver Lodge No. 335* ..... 517
35. The railway labor act provides that employees shall have the right to organize and bargain collectively through representatives of their own choosing and a majority of any class of employees shall have the right to determine who shall be the representative of the class. *Brisbin v. E. L. Oliver Lodge No. 335* ..... 517
36. Defendant labor union had authority to enforce contract between union and employee. *Brisbin v. E. L. Oliver Lodge No. 335* ..... 517
37. A collective labor agreement should be broadly construed. *Brisbin v. E. L. Oliver Lodge No. 335* ..... 517
38. A collective labor agreement between employee and employer becomes a binding contract when made part of the individual contract of such employee, a breach of

which gives rise to a cause of action by either party. *Brisbin v. E. L. Oliver Lodge No. 335* ..... 517
39. Acceptance by a city fireman of benefits under the workmen's compensation act did not bar his right to pension under the fireman's pension act. *City of Lincoln v. Steffensmeyer* ..... 613
40. A fireman's pension is not "compensation" within the workmen's compensation act. *City of Lincoln v. Steffensmeyer* ..... 613
41. To recover in an action for injuries caused by defendant's automobile, plaintiff must show that the chauffeur was defendant's servant and engaged in the master's business at the time of the accident. *Mackechnie v. Lyders* ..... 682
42. Owner of building, used in conducting owner's business, who engaged a contractor to make repairs, was an "employer" within the compensation law, where it was not shown that the contractor was required to procure compensation insurance. *New Masonic Temple Ass'n v. Globe Indemnity Co.* ..... 731
43. In action for compensation, evidence *held* sufficient to sustain judgment for defendant. *Huston v. Gage County Electric Co.* ..... 805
44. Where the evidence in a compensation case is conflicting, a reviewing court will consider the fact that the district court observed the demeanor of witnesses. *Donker v. Central West Public Service Co.* ..... 892
45. Whether an act of an employee was within the scope of his employment is a question of fact for the jury. *Peterson v. Brinn & Jensen Co.* ..... 909
46. In action against employer for wrongful act of employee, each case must be determined from surrounding facts and circumstances, character of employment, and nature of wrongful act. *Peterson v. Brinn & Jensen Co.* ..... 909

**Mortgages.** SEE EXECUTION.
1. In determining whether an instrument is a deed or mortgage, the value of land as compared with the consideration paid for it is an important factor to be considered in construing the transaction. *Johnson v. Shuler* 25
2. A mortgage moratorium, in applying to a restricted class of debtors, is essentially special and constitutes application of sovereign power. *First Trust Co. v. Smith* .... 84
3. A moratorium granted under a void moratory act is reversible on appeal. *Mutual Benefit Life Ins. Co. v. Long* 186
*Mutual Benefit Life Ins. Co. v. Long* ..... 187
4. A moratory stay will be denied where value of mort-

gaged realty is less than amount of liens. *Federal Land Bank v. Citizens Bank* ..... 252
*Federal Land Bank v. Soehl* ..... 254
5. In determining whether value of mortgaged lands exceeds amount of lien, it is improper to consider a value that is peculiar to mortgagor and not to mortgagee. *Federal Land Bank v. Citizens Bank* ..... 252
*Federal Land Bank v. Soehl* ..... 254
6. A moratory stay could not be granted on foreclosure of a land sale contract executed subsequent to March 1, 1934. *Neble v. Marshall* ..... 280
7. In a suit to foreclose a lien on land, petition *held* insufficient to justify decree by default against a defendant as to priority of liens. *Chrisman v. Daniel* ..... 326
8. Mere inadequacy of price will not preclude confirmation of a foreclosure sale unless the price is so inadequate as to evidence fraud. *Buchanan v. Rahmeyer* ..... 331
*Department of Banking v. Modrow* ..... 336
9. In a mortgage foreclosure, the mortgagor is not entitled to a moratory stay where the mortgage lien exceeds the value of the mortgaged premises. *Buchanan v. Rahmeyer* ..... 331
10. A moratory stay should be denied where it appears that amount of liens exceeds value of realty. *Balster v. Keller* 469
11. Inadequacy of price will not prevent confirmation of a foreclosure sale, unless the inadequacy is so low as to evidence fraud. *Conservative Savings & Loan Ass'n v. Mancuso* ..... 779
12. The general saving statute preserves a right of action on a claim for deficiency judgment in a suit to foreclose a mortgage not due nor in litigation at the time the legislature, without a special saving clause, passed the act taking away the court's power to decree deficiency judgment. *First Trust Co. v. Eastridge Club* ..... 785
13. A decree finding personal liability in a foreclosure suit, on issues properly pleaded, is not subject to review on objections to a deficiency judgment. *First Trust Co. v. Eastridge Club* ..... 785
14. Where facts showing liability for deficiency are set out in petition to foreclose a mortgage and judgment for deficiency against those personally liable is prayed, the court has jurisdiction, after sale of the mortgaged premises, to enter a deficiency against those found liable. *First Trust Co. v. Eastridge Club* ..... 785
15. Before the moratory act was declared unconstitutional, a moratory stay would be denied to mortgagor having no equity in mortgaged realty. *Lorenzen v. Stobbe* ..... 796

16. A mortgage foreclosure sale of realty will not be disturbed unless there is such inadequacy of price as to show fraud or mistake. *Lorenzen v. Stobbe* ..... 796
17. The trial court did not err in vacating a moratory stay where the act under which the stay was granted was adjudged void. *Stolinski v. Patrick* ..... 804

**Municipal Corporations.** SEE JURY.
1. Local self-government has always been a part of the American system, and finds recognition in the state Constitution. *Schulz v. Dixon County* ..... 549
2. Property within the limits of a municipality is subject to local taxation, although it derives no benefit from the municipal government. *Schulz v. Dixon County* ..... 549
3. A municipal corporation is not an insurer of the safety of travelers along its streets, but need employ only reasonable diligence to keep sidewalks in reasonably safe condition for use of persons passing over them in the exercise of ordinary care. *Hupfer v. City of North Platte* ..... 585
4. Persons using sidewalks of a city must exercise ordinary care for their own safety. *Hupfer v. City of North Platte* ..... 585
5. In exercising reasonable care, a person using a street or highway has the right, in absence of knowledge of defects therein, to assume that a sidewalk or roadway is in reasonably safe condition, and need not, as a matter of law, be on lookout for defects or obstructions. *Hupfer v. City of North Platte* ..... 585
6. Holes or depressions in a street or sidewalk may give rise to a right of action for injuries caused thereby if they are of such a nature that danger therefrom might reasonably be anticipated, but slight holes or depressions from which danger could not reasonably be anticipated are not defects for which an action will lie. *Hupfer v. City of North Platte* ..... 585
7. Where a village borrowed money by issuance of a void warrant, and suit was begun on the warrant and the city answered repudiating the warrant, an action for money had and received thereafter begun was barred by limitations. *Nebraska State Bank Liquidation Ass'n v. Village of Burton* ..... 623
8. A city which discharged water from its sewage plant into a gully which connects with a stream for ten years acquired an easement for that purpose. *Hall v. City of Friend* ..... 652
9. Where the evidence is conflicting as to whether ob-

noxious odors arise from effluvia from a sewage plant which allegedly create a nuisance, injunction will not be granted, but reasonable time may be given to improve operation of the plant. *Hall v. City of Friend* ..... 652
10. Courts will consider whether an injunction restraining a city from operating a sewage system will destroy the system and subject the public to serious inconvenience and danger. *Hall v. City of Friend* ..... 652
11. Injunction to restrain city from operating a sewage system *held* properly denied. *Hall v. City of Friend* ..... 652

**Negligence.**
1. The owner of a building is liable for defects in construction and maintenance thereof causing injury to any person lawfully in the vicinity. *Long v. Crystal Refrigerator Co.* ..... 44
2. A building maintained on a public street in negligent manner of construction or repair is a public nuisance, and the owner is liable for injury proximately caused by such negligence to those lawfully in the vicinity. *Long v. Crystal Refrigerator Co* ..... 44
3. An act of God will not excuse the owner for his negligence in construction or maintenance of a building unless the act is the sole cause of injury, and if the act of God and the owner's negligence are concurring causes of injury, the owner is liable for the injury. *Long v. Crystal Refrigerator Co* ..... 44
4. "Negligence" is a lack of due care under the circumstances. *Gardner v. Metropolitan Utilities District* ..... 163
5. In action for injuries, occupant of house who entered a darkened room in floor of which was a trapdoor which was likely to be open, without ascertaining whether the door was open, and fell down cellar steps, *held* guilty of more than slight negligence. *Gardner v. Metropolitan Utilities District* ..... 163
6. Questions of negligence and contributory negligence are for the jury where different conclusions may reasonably be reached from the evidence. *Zimmer v. Brandon* ..... 311
7. Where an ordinarily prudent person could reasonably apprehend that, as the probable consequences of his act, another person might receive an injury, a duty to exercise ordinary care to prevent injury arises, and the party failing to exercise that care will generally be liable for resulting injury, regardless of legal relationship of the parties. *Zimmer v. Brandon* ..... 311
8. An owner of an apartment building must exercise ordi-

nary care for the safety of an invitee. *Brown v. Davenport Holding Co.* ..... 455
9. The maintenance of polished floors and small rugs in an apartment building is not negligence which would render the owner liable to a prospective tenant for injuries sustained when she slipped on a rug and fell. *Brown v. Davenport Holding Co.* ..... 455

**New Trial.**
1. Affidavits of jurors may not be received to contradict anything essentially inhering in the verdict. *Cox v. Greenlease-Lied Motors* ..... 1
2. The statute requiring a motion for a new trial to be filed during the term at which the verdict is rendered is mandatory. *Heeter v. Nisi* ..... 209
3. A motion for a new trial filed after adjournment of the term is a nullity though filed within three days of rendition of the verdict. *Heeter v. Nisi* ..... 209
4. A verdict so clearly excessive as to induce belief on part of reviewing court that it must have been found through passion, prejudice, or mistake will be set aside. *Collins v. Hughes & Riddle* ..... 380
5. Refusal to set aside a verdict when the amount of damages is inadequate under the evidence is error. *Preston v. Farmers Irrigation District* ..... 503
6. A new trial will be granted where an excessive verdict appears to be the result of passion or prejudice. *Bonacci v. Cerra* ..... 588
7. In passing on a motion for new trial, the court may consider conflicting and improbable evidence and all facts occurring during the trial. *Bonacci v. Cerra* ..... 588
8. An immaterial variance between witness' testimony on the trial and his testimony on a former trial does not require a new trial on ground of surprise. *Riesland v. Dawson County Irrigation Co.* ..... 773

**Parent and Child.** SEE WORK AND LABOR.

**Pleading.**
1. An action for breach of promise of marriage may be united with one for seduction under such promise. *Ryan v. Oswald* ..... 265
2. A defendant pleading that a contract sued on was superseded by a later contract thereby admitted consummation of the original contract, though the answer also contained a general denial. *Utilities Ins. Co. v. Stuart* ..... 413
3. The office of a reply is to deny facts alleged in the

answer as a defense, or to allege matters in avoidance. *Bonacci v. Cerra* ..... 476
4. Statements, admissions, and allegations in pleadings are always in evidence for purposes of the trial. *Bonacci v. Cerra* ..... 476
5. A party may invoke the language of his opponent's pleading as rendering facts indisputable, and in doing so is neither required nor allowed to offer the pleading in evidence in the ordinary manner. *Bonacci v. Cerra* ..... 476
6. A pleader alleging a fact against his interests on a controverted issue is bound by it for all purposes of the trial, though the allegation is not introduced in evidence in the ordinary manner. *Gilmore v. Cover* ..... 559
7. Generally, a plaintiff waives error in sustaining a demurrer to his petition by filing an amended petition. *Hoffman v. Geiger* ..... 643

**Principal and Agent.**

1. Contract *held* to create relation of principal and agent. *Ericson v. Nebraska-Iowa Farm Investment Co* ..... 391
2. An agent who fails to disclose to his principal every material fact in the transaction which is the subject-matter of the agency is guilty of fraud, and may not retain anything acquired by him either in performance or violation of his agency. *Ericson v. Nebraska-Iowa Farm Investment Co* ..... 391

**Principal and Surety.**

1. As against all persons chargeable with notice that a judgment debtor is a surety, any act which would have released him before judgment has the same effect after judgment and constitutes a defense to any action thereon, where the judgment did not determine whether the liability was primary or secondary. *In re Estate of Mathews* ..... 607
2. A surety who by the terms of a note has agreed to extensions may not claim release because extension of time has been granted. *Nordeen v. Nelson* ..... 707
3. Where the payee, with knowledge that one of the makers of a note is surety, secures allowance of a claim on the note against the insolvent estate of the principal, and without the surety's consent releases the estate from payment of the debt, the payee is chargeable with damages in suit on the note to extent of loss caused by release of the estate. *Nordeen v. Nelson* ..... 707

**Property.**

The principle that the *lex rei sitæ* governs as to realty is

subject to an exception as to obligations in relation thereto which do not affect title to or interest in the realty. *Jorgensen v. Crandell* ..... 33

**Quieting Title.**

1. A suit is maintainable to quiet in plaintiff title to land which is in plaintiff's possession. *Ellsworth Corporation v. Stratbucker* ..... 246
2. In a suit to quiet in corporation title to land in its possession, as against defendants who claim an interest therein, uncontradicted testimony of corporation's president, who held title, that he conveyed it to the corporation is sufficient to make a *prima facie* case in favor of the corporation. *Ellsworth Corporation v. Stratbucker* .... 246

**Release.**

1. Where the amount received in settlement is grossly inadequate to compensate for injuries, that fact may be considered as tending to show unfair practice in procuring a release. *Collins v. Hughes & Riddle* ..... 380
2. Where parties reach a settlement for known injuries, but do so without knowledge of unknown injuries, a release purporting to release damages that may thereafter accrue will be set aside on the ground of mutual mistake. *Collins v. Hughes & Riddle* ..... 380
3. A release was binding on one who signed it whose sole defense was that she did not remember the transaction. *Shanle v. Busch* ..... 903

**Sales.**

1. The measure of damages in case of breach of warranty of quality is the difference between the value of goods at time of delivery and the value if they had been of the quality warranted. *Cox v. Greenlease-Lied Motors* .... 1
2. Notice of breach of warranty must refer to particular sales, must fairly advise the seller of alleged defects, and must be such as to repel inference of waiver. *Cox v. Greenlease-Lied Motors* ..... 1
3. Any affirmation of fact or any promise by the seller relating to the goods is an express warranty if the tendency thereof is to induce the buyer to purchase, and he does purchase, the goods relying thereon. *Cox v. Greenlease-Lied Motors* ..... 1
4. If a party is merely empowered to bind the owner of property by making a contract of sale, the contract is one of agency. *Ericson v. Nebraska-Iowa Farm Investment Co.* ..... 391
5. Where parties to a contract for sale of rock provided

for inspection by engineers, but designated no place for inspection, the place of inspection would be deemed to be the place of delivery. *Wheeler v. Dietz Hill Development Co.* ..... 448

6. A buyer who accepted and used quantities of rock without inspection as provided by the contract of sale was liable for the contract price. *Wheeler v. Dietz Hill Development Co.* ..... 448
7. The buyer of chattels under a conditional sales contract is not liable to seller for conversion of chattels disposed of, where the contract provided that chattels might be sold and replaced by other chattels, even though no replacement was made. *Kimball v. Cooper*..... 536
8. Under a conditional sales contract for sale of chattels providing that the buyer may dispose of the chattels and replace them with other chattels, the parties occupy the same relation with respect to substituted chattels as they occupied to the original chattels. *Kimball v. Cooper* ..... 536
9. Lease of a theater building for term of years providing that chattels belonging to the landlord shall, if lease be fully performed, become property of the tenant for no other consideration than the rentals, and further providing that, on default by tenant, the landlord could terminate the lease and recover possession of both the building and chattels, *held* to be a conditional sales contract as to the chattels. *Kimball v. Cooper*..... 536
10. Recovery by lessor of rent accruing before forfeiture and reentry, on account of breach by lessee under a lease of theater building for term of years which contains a conditional sale of chattels to lessee, does not vest in lessee title to chattels, where rent and purchase price of the chattels are payable in instalments and so intermingled in one sum as to be incapable of separation. *Kimball v. Cooper*..... 536

**Schools and School Districts.**

A school district may not interfere with the state's constitutional and statutory right to tax lands situated within its boundaries for public purposes, including support and maintenance of state government. *Schulz v. Dixon County* ..... 549

**Seduction.**

Seduction is the act of inducing a woman to consent to unlawful sexual intercourse by enticements which overcome her scruples. *Ryan v. Oswald*..... 265

**Specific Performance.**

1. To establish an oral agreement to convey or devise land, the proof must be clear, satisfactory and convincing. *Rogers v. Casady* ..... 227
2. Defendant power and irrigation district *held* not entitled to specific performance of contract for sale of land. *Shelby v. Platte Valley Public Power and Irrigation District* ..... 354

**Statutes.**

1. When language of a statute is unambiguous, courts will not by construction give it a meaning not intended or expressed. *Shamp v. Landy Clark Co* ..... 73
2. A provision expressing legislative intent as to separability of various parts of a statute is merely an aid to judicial interpretation. *First Trust Co. v. Smith* ..... 84
3. The legislative intent is the cardinal rule in construction of statutes. *First Trust Co. v. Smith* ..... 84
4. A section of an act properly amended should be construed as though it had been originally enacted in its amended form. *First Trust Co. v. Smith* ..... 84
5. Where words of a statute are changed by amendment and repeal, but it is intended that the statute should continue to operate, it is not strictly a repeal, but a continuation of the former law as amended. *First Trust Co. v. Smith* ..... 84
6. A statute may be remedial in one part and penal in another. *Department of Banking v. McMullen* ..... 338
7. Special provisions in a statute in regard to a particular subject control general provisions. *Dawson County v. Whaley* ..... 509
8. The nonpartisan judiciary act is a statute complete in itself. *State, ex rel. Zeilinger, v. Thompson* ..... 739
9. A legislative act may be complete in itself, though adopting provisions of prior acts by reference. *State, ex rel. Zeilinger, v. Thompson* ..... 739
10. A legislative act, creating a liability in behalf of an individual for negligence of the state's agents and servants, is unconstitutional as special legislation. *Cox v. State* ..... 751
11. The legislature has no power to enact a special law creating liability in behalf of an individual in absence of a general statute providing liability on the part of the state for the negligence of its agents and servants. *Cox v. State* ..... 751
12. The legislature may make a reasonable classification of persons, corporations and property for purposes of

legislation concerning them, but the classification must rest upon real differences in situation and circumstances surrounding members of the class, relative to the subject of the legislation, which render appropriate its enactment. *Cox v. State* ..... 751
13. Liability of the state for negligence of its agents and servants can be created only by a general statute. *Cox v. State* ..... 751
14. Act amending pure food law *held* not broader than its title, nor violative of constitutional provision requiring amendatory acts to contain sections as amended. *State v. McCosh* ..... 780
15. An act amendatory of section of statute and which merely incidentally restricts operation of other prior existing statutes does not violate the constitutional provision requiring sections as amended to be set forth in the amendatory act. *Pierson v. Faulkner* ..... 865
16. If a bill has been introduced in the legislature within the time limit provided by the Constitution, amendments that are germane to the subject of such bill may be made after expiration of such time. *Pierson v. Faulkner* 865
17. The rule that statutes *in pari materia* should be construed together applies to earlier as well as to contemporaneous statutes. *Pierson v. Faulkner* ..... 865
18. A proviso in an amendatory act will be construed to apply to a section of an earlier statute *in pari materia* with such section, when necessary to effectuate the legislative intent. *Pierson v. Faulkner* ..... 865
19. Title of act to amend section of statute is germane to section if title designates section to be amended and declares purpose of act to be to amend such section. *Pierson v. Faulkner* ..... 865

**Street Railways.**

In action for negligence against street railway company, direction of verdict for company *held* proper. *Peterson v. Omaha & C. B. Street R. Co* ..... 322

**Subrogation.**

1. "Conventional subrogation" defined. *Chrisman v. Daniel* 326
2. Legal subrogation exists only in favor of the surety for the payment of the debt, or one who is compelled to pay the debt to protect his own rights. *Chrisman v. Daniel* ..... 326

**Subscriptions.**

1. Conditions precedent contained in a subscription contract must be complied with to bind the subscriber. *Continental Co. v. Eilers* ..... 278

2. Where there has been substantial compliance with conditions precedent in a subscription contract, recovery may be had. *Continental Co. v. Eilers* ..... 278
3. A condition in a subscription agreement that the agreement was not valid unless $30,000 had been signed was substantially complied with where part thereof was in signed pledges and the remainder was in cash. *Continental Co. v. Eilers* ..... 278

**Taxation.**

1. Farm lands should be assessed for taxation at their value in the market in the ordinary course of trade. *Schulz v. Dixon County* ..... 549
*Kennedy v. Buffalo County* ..... 744
2. A general tax cannot be dissected to show that as to certain constituent parts the taxpayer receives no benefit and therefore is entitled to relief because of such fact. *Schulz v. Dixon County* ..... 549
3. On appeal from a decision of the board of equalization fixing the value of a taxpayer's property for taxes, the taxpayer has the burden of proving that the board's action is erroneous. *Kennedy v. Buffalo County* ..... 744
4. The fact that a tract of land is assessed too low will not warrant reduction of the assessed valuation of adjacent land. *Kennedy v. Buffalo County* ..... 744
5. The assessment of property for taxation should not be disturbed on appeal to the district court unless it clearly appears to be erroneous. *Kennedy v. Buffalo County* ..... 744
6. The county treasurer may make return of private tax sales to county clerk prior to the first Monday of January, the final date of making returns. *Nolan v. Klug* ..... 860
7. Private sale of realty for taxes dates from time of issuance of certificate. *Nolan v. Klug* ..... 860
8. Defendant in tax lien foreclosure suit was barred from right of redemption on confirmation of sale, where foreclosure was commenced more than two years subsequent to issuance of tax sale certificate. *Nolan v. Klug* ..... 860

**Tenancy in Common.**

Possession by one joint owner of realty is presumed to be friendly as regards his coowners, and before such possession can become adverse, notice that the part owner in possession is claiming the entire estate in hostility to his coowners must be brought home to the latter in some unequivocal manner. *Gramann v. Beatty* 568

Trial. SEE APPEAL AND ERROR.

1. Where plaintiff's evidence is not clearly disproved by undisputed physical facts and conditions, the court should not direct a verdict for defendant. *Long v. Crystal Refrigerator Co.* ..... 44
2. Bringing plaintiff into courtroom on a stretcher, or attended by a nurse, when her physical condition did not require it, was prejudicial error. *Gardner v. Metropolitan Utilities District* ..... 163
3. Instructions which, when taken together, accurately state the law pertinent to facts in the case are sufficient. *Meister v. Krotter* ..... 293
4. Where a witness refuses to testify positively to facts, the value of his testimony is for the jury and will vary with surrounding circumstances and manner and appearance of the witness. *Collins v. Hughes & Riddle* ..... 380
   *Bonacci v. Cerra* ..... 476
5. While it is proper practice for the court to furnish to the jury forms of verdict, yet, only such forms of verdict should be furnished as might, under the issues and evidence, be properly returned by the jury. *Utilities Ins. Co. v. Stuart* ..... 413
6. Disputed questions of fact, as well as credibility of witnesses, are for the determination of the jury. *Utilities Ins. Co. v. Stuart* ..... 413
7. Motion by defendant for a directed verdict admits as true plaintiff's evidence, and entitles plaintiff to every reasonable inference deducible therefrom. *Fonda v. Northwestern Public Service Co* ..... 430
8. When the evidence is such that reasonable minds might differ as to the cause of injuries, the question is for the jury. *Fonda v. Northwestern Public Service Co* ..... 430
9. In an action for personal injuries, failure to instruct on unavoidable accident is not error, in absence of a request therefor, where the jury were properly instructed as to the burden of proving the negligence charged. *Bonacci v. Cerra* ..... 476
10. An objection to forms of verdict should be made before or at time verdict is returned. *In re Estate of Kajewski* 485
11. The trial judge is not required to submit forms of verdict to jury, but does so merely as a matter of convenience. *In re Estate of Kajewski* ..... 485
12. An affidavit of a juror as to what items the jury allowed or disallowed in computing the amount due or what the jury believed they had a right to do under the instructions is incompetent. *Bonacci v. Cerra* ..... 588

13. The court should refuse to submit to the jury a defense not supported by evidence. *Mackechnie v. Lyders* ..... 682
14. A motion for a directed verdict admits the truth of evidence submitted by an adversary and entitles him to the benefit of every inference reasonably deducible from the evidence. *Mackechnie v. Lyders* ..... 682
15. The trial court without request should submit to the jury necessary issues of fact presented by pleadings and evidence. *Mackechnie v. Lyders* ..... 682
16. Where all the facts are before the jury relative to ownership of a bus and employment of the driver, the court need not select a statement of facts on the issues presented and incorporate those facts in the instructions. *Mackechnie v. Lyders* ..... 682
17. Where instructions as a whole properly state the applicable law, they are sufficient. *Mackechnie v. Lyders* .... 682
18. It is the duty of the court to direct a verdict, where but one conclusion can be drawn from the evidence. *Jensen v. Romigh* ..... 890

**Trover.**

An action for conversion of personalty cannot be maintained unless absolute or special title or right to immediate possession at time of alleged conversion is in plaintiff. *Kimball v. Cooper* ..... 536

**Trusts.**

1. A trustee who takes trust property in his own name violates his duty as trustee. *Rotzin v. Miller* ..... 8
2. A trustee who deals with trust property in the name of another or through an agency which he controls will be deemed to have acted in his own right. *Rotzin v. Miller* ..... 8
3. When it appears affirmatively that a trustee took title to the trust property in his individual name in good faith and no loss resulted from his so doing, he is not liable for breach of trust. *Rotzin v. Miller* ..... 8
4. An agent or other fiduciary who deals with the subject-matter of the agency so as to make a profit for himself will be held to account in equity as trustee for all profits acquired by him in such dealings. *Ericson v. Nebraska-Iowa Farm Investment Co* ..... 391
5. All persons who knowingly aid or participate in committing a breach of trust will be held responsible for resulting loss, and will be held accountable by personal judgment for the value of the property converted. *Ericson v. Nebraska-Iowa Farm Investment Co* ..... 391

6. Every violation of duty by a trustee is a breach of trust. *Whaley v. Matthews* ..... 875
7. A trustee is personally liable to beneficiaries of the fund for any misapplication of the fund to other beneficiaries not entitled thereto. *Whaley v. Matthews* ..... 875

**Usury.**

A clause in a mortgage on real estate located in a foreign state to the effect that the mortgagor will pay the tax upon the note secured thereby does not render such note usurious, though such note bears the maximum rate of interest allowed by sections 45-101 to 45-105, Comp. St. 1929, and though such note is taxable under the provisions of section 77-701, Comp. St. 1929. *Pierson v. Faulkner* ..... 865

**Vendor and Purchaser.**

1. Grantees in a deed must take notice of all facts affecting title to property conveyed which are disclosed by a prior recorded instrument. *Hylton v. Krueger* ..... 66
2. A purchaser who, instead of canceling contract for sale of land because of defects in title, makes demand on vendor to quiet his title, waives performance on vendor's part for a reasonable time in which to comply with the demand. *Gilmore v. Cover* ..... 559
3. Vendor in a contract for sale of land, if not in default, may cancel the contract for failure of purchaser to pay remainder of purchase price and may retain an initial payment pursuant to agreement. *Gilmore v. Cover* ..... 559

**Waters.**

1. Whether erection of dam across river was cause of overflow of upper proprietor's land *held* question for jury. *Meister v. Krotter* ..... 293
2. The measure of damages for overflowing of land as result of erection of a dam is difference in value of the land immediately before and after erection of dam. *Meister v. Krotter* ..... 293
3. The flow of surface water in a well-defined course cannot be interfered with by a landowner to the injury of neighboring proprietors. *Leaders v. Sarpy County* ..... 817
4. A landowner must bear the burden of receiving upon his land surface water naturally flowing to it from land above it. *Leaders v. Sarpy County* ..... 817
5. There is a duty on those who build structures across natural drainways to provide for the natural passage of all waters which may be reasonably anticipated to drain there. *Leaders v. Sarpy County* ..... 817

6. Where an obstruction in a natural watercourse constitutes a permanent and irremediable injury to an adjoining landowner, he may have it removed. *Leaders v. Sarpy County* ..... 817

**Wills.**

1. Admission of a will to probate by the county court does not determine to whom the personal estate will be distributed. *Woelk v. Luckhardt* ..... 55
2. Admission of a will to probate does not estop rightful owners of testator's property from securing an order of distribution of property not disposed of by the will. *Woelk v. Luckhardt* ..... 55
3. In construing a will, the court must, if possible, ascertain the testator's intent as disclosed by the language of the will and then give effect thereto if it is not contrary to law. *Woelk v. Luckhardt* ..... 55
4. Oral testimony cannot be received to explain the intent of the use of words in a will when such words have a fixed meaning in law. *Woelk v. Luckhardt* ..... 55
5. The word "relation," as used in the statute providing that when a devise is made to a child or other relation of testator, and the devisee predeceases testator, devisee's issue should take, means kindred of the blood only, and excludes a wife. *Woelk v. Luckhardt* ..... 55
6. The burden of proving that a will resulted from undue influence is ordinarily upon contestants who assert it. *In re Estate of Kajewski* ..... 485
7. Mere suspicion of undue influence upon testator in making a will is not sufficient to require submission of that issue to a jury in a will contest, or to sustain a verdict for contestants. *In re Estate of Kajewski* ..... 485
8. The contestants have the burden of proving undue influence in execution of a will, except where the person charged with having exercised undue influence sustains a confidential relation to testator and is a beneficiary. *In re Estate of Kajewski* ..... 485
9. A confidential advisor who is a beneficiary under the will of an aged and sick person must overcome the presumption of undue influence by competent evidence. *In re Estate of Kajewski* ..... 485
10. In will contest, question of undue influence should be submitted to jury where circumstances attending execution of will might cause reasonable minds to conclude that will was not voluntary act of testator. *In re Estate of Kajewski* ..... 485
11. Where evidence in will contest establishes that there

was no undue influence, the presumption that a priest receiving a bequest from a parishioner exerted undue influence in execution of will disappears. *In re Estate of Kajewski* ..... 485
12. The statutes insure to every one of mature age and sound mind the right to make a will and dispose of his property as he wishes. *In re Estate of Kajewski* ..... 485
13. One who understands nature of act, extent of his property, proposed disposition thereof, and natural objects of his bounty is competent to make a will. *In re Estate of Kajewski* ..... 485
14. Where the jury were clearly instructed as to findings allowable in a will contest and were not misled by two forms of verdict submitted, failure to submit additional forms of all possible verdicts was not prejudicial error. *In re Estate of Kajewski* ..... 485
15. A will containing a bequest due to undue influence may stand as to other bequests not so procured. *In re Estate of Kajewski* ..... 485
16. Where testator's intention can be ascertained from the will, it is the duty of the court to give it effect. *Stanton v. Stanton* ..... 660
17. A will is presumed to contain the final manifestation of testator's bounty, and all advancements and charges against a devisee not saved by the will are extinguished. *Stanton v. Stanton* ..... 660
18. The title to realty under a devise in a will vests in devisee at instant of testator's death. *Santon v. Stanton* 660
19. Where testator received from a son notes evidencing loans to the son and collected interest thereon, testator's failure to charge realty devised to son with duty of paying debt evinced intent not to charge the devise with its payment. *Stanton v. Stanton* ..... 660
20. Amount of notes due from son to testator was properly deducted from son's share of estate. *In re Estate of Nissen* ..... 794
21. Where the signatures of testatrix and of three attesting witnesses of a will are unquestioned and there is no proof which discredits recitals of the attestation clause, the inability of one attesting witness to recall all events which took place at signing and execution of the will does not require refusal to admit the will to probate. *In re Estate of Aden* ..... 810
22. A lien on realty under the terms of a will may be released by the beneficiary. *Shanle v. Busch* ..... 903
23. A lien on realty under the terms of a will may be paid in cash or by note. *Shanle v. Busch* ..... 903

**Witnesses.**

1. Circumstances surrounding making of a statement brought out on cross-examination may be shown on redirect examination. *Long v. Crystal Refrigerator Co*..... 44
2. Relationship to a party may affect the credibility of a witness, but not his competency. *Rogers v. Casady*..... 227

**Work and Labor.**

1. Generally, where a child renders services for a parent during the family relationship, the law presumes, because of the kinship of the parties, that the services were gratuituously rendered, but such presumption is not a conclusive one. *In re Estate of Cha'upa*..... 918
2. A child may recover the value of services rendered a parent if the evidence shows that the services were rendered under an express contract on the part of the parent to pay for them. *In re Estate of Chalupa*..... 918