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MINNEAPOLIS DREDGING COMPANY ET AL., APPELLANTS, V. ADDIE S. REIKAT, COUNTY TREASURER, ET AL., APPELLEES.
3 N. W. (2d) 889

FILED MAY 15, 1942. No. 31323.

1. **Taxation.** Under the revenue laws of Nebraska the county board of equalization has authority to hear and determine controverted issues of ownership and value of personal property for purposes of taxation.
2. ———. A complainant who appears before the county board of equalization and pleads that personal property assessed in his name is owned by another has the burden of proof on that issue.
3. ———. The decision of the county board of equalization on issues of ownership and value of personal property for purposes of taxation is not reversible on appeal unless it appears from clear and convincing proof that it is erroneous.
4. ———. Decision of the county board of equalization approving chased them for operation in the construction of a public dam, *held* not shown by the evidence to be erroneous on the ground an assessment of dredges as property of contractors who pur- that the dredges were owned by the owner of the dam.
5. ———. Assessment of two dredges at the site of the Kingsley dam in Keith county as the property of Minneapolis Dredging Company and Martin Wunderlich Company at a valuation of $142,000 April 1, 1940, *held* not shown by the evidence to be excessive.

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

Shuman & Overcash, for appellants.

Zelma Derry and *M. M. Maupin, contra.*

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

ROSE, J.

This is a proceeding to cancel or reduce the assessment of two dredges used by Minneapolis Dredging Company and Martin Wunderlich Company, contractors, in constructing for the Central Nebraska Public Power and Irrigation District the Kingsley dam in the North Platte river in east Ogallala precinct, Keith county, Nebraska.

The contractors scheduled for assessment personal property, consisting of "mechanical tools and industrial machinery" in Keith county as of April 1, 1940, at $70,000. This did not include the two dredges and the county assessor changed the schedule by inserting the dredges therein as "all other property and personal effects not otherwise listed," $142,000.

The contractors appealed to the county board of equalization and complained that the assessment of the dredges as their property was unlawful and void on the ground that they did not own the dredges April 1, 1940. The value placed thereon by the county assessor is also the subject of complaint.

After evidence had been adduced before the board, it found and determined that the contractors were the owners of the dredges April 1, 1940, and that the value thereof was as stated in the changed schedule—$142,000. From the decision of the board the contractors appealed to the district court where the assessment was sustained. The contractors appealed from the judgment of the district court to the supreme court.

The county board of equalization had jurisdiction to determine the questions of ownership and value. The presumption is that it faithfully performed its official duties on sufficient evidence of the facts. The burden was on the contractors to prove that they did not own the dredges April 1, 1940, or that the valuation of the county assessor was excessive. *Western Union Telegraph Co. v. Dodge County*, 80 Neb. 18, 23, 113 N. W. 805, 117 N. W. 468; *Hatcher & Co. v. Gosper County*, 95 Neb. 543, 145 N. W. 993; *Welch v. Douglas County*, 103 Neb. 469, 471, 172 N. W. 250, 173 N. W. 476. The county board of equalization is the tribunal empowered by law to determine controversial issues of ownership and value for the purposes of taxation and its decision is not reversible on appeal "unless it appears from clear and convincing proof that it is erroneous." *Kennedy v. Buffalo County*, 134 Neb. 744, 279 N. W. 464. *Field v. Lincoln Traction Co.*, 74 Neb. 418, 104 N. W. 931; *Woods v. Lincoln Gas & Electric Light Co.*, 74 Neb. 526, 104 N. W. 931.

On the question of ownership April 1, 1940, the contractors, Minneapolis Dredging Company and Martin Wunderlich Company, take the position that the dredges were illegally assessed for 1940, inasmuch as full title during that year was in the Central Nebraska Public Power and Irrigation District, a subdivision of the state, the property of which is exempted from taxation by a provision of the Constitution. Const. art. VIII, sec. 2. Is this position tenable?

The contractors, Minneapolis Dredging Company and Martin Wunderlich Company, entered into a written agreement with the Central Nebraska Public Power and Irrigation District July 20, 1938, obligating themselves "to furnish and deliver all tools, equipment, apparatus, facilities, transportation and services, labor and material, and do all work necessary to construct and complete according to the plans and specifications," the Kingsley dam. This contract contains the following paragraph:

"All right, title and interest of the contractor in such equipment, shall, upon the payment by the owner of the monthly progress payments therefor, become, by such progress payments, vested in the owner (Power and Irrigation District) and shall remain so vested until the completion of the work embraced in this contract. No progress payments will be made for any equipment in any way encumbered. The contractor and the owner shall at appropriate times furnish as necessary such instruments of title and other assurances as may be required."

The contractors named purchased from Bucyrus-Erie Company of South Milwaukee, Wisconsin, the two dredges for use in the performance of the contract to construct the Kingsley dam. In writing, October 24, 1938, the Bucyrus-Erie Company entered into this agreement with the purchasers, the contractors, "to design, build and deliver" to them two 30" hydraulic dredges. The purchase price was $542,500, payable as follows: "Upon signing of this contract, $54,250; December 15, 1938, $54,250; January 15, 1939, $54,250; February 15, 1939, $54,250; March 15, 1939, $54,250; April 15, 1939, $54,250; upon completion of the

first dredge, $81,375; upon completion of the second dredge, $81,375; upon completion of the first 30 days of the working period of the first dredge, $27,125; upon completion of the first 30 days of the working period of the second dredge, $27,125. (Total) $542,500."

This agreement of the Minneapolis Dredging Company and the Martin Wunderlich Company, contractors, to purchase the dredges from the Bucyrus-Erie Company, called "Builder," contained the following among other terms:

"Subject to any prior right or title in the Central Nebraska Public Power and Irrigation District, as provided for in the contract between the purchaser and said district, hereinafter identified, the title to said dredges shall be and remain in the builder until full payment of the purchase price; provided, however, that the purchaser shall become part owner thereof to the extent of the payments made from time to time, as provided by Article II of this contract." ("Article II" referring to purchase price, payments and dates.)

The Bucyrus-Erie Company manufactured or purchased different dredge parts and shipped them to itself by rail to a spur track on the site of the Kingsley dam and assembled them on the premises where they were to be used. There is evidence that the different parts of the dredges were shipped in about 35 carloads and that the working weight of each dredge exceeded 800 tons. There is also evidence that the seller and buyers of these dredges performed their contract of sale and purchase prior to April 1, 1940; that the payments of purchase price were made by the contractors; that satisfactory tests and inspection required by the contract were made; that the dredges were delivered by the Bucyrus-Erie Company to the contractors and purchasers prior to April 1, 1940; that the latter were in the exclusive possession of the dredges, using them in the construction of the Kingsley dam in June, 1939, and were so using them April 1, 1940, and afterwards. The evidence shows further that the district never had possession of the dredges or control over them. The making of the contract of sale and purchase, the payment of the purchase price pursuant to agreement, the

satisfactory tests of the dredges in operation, the delivery to and acceptance of the dredges by the purchasers and the continuous use of them by the contractors in the work of construction, evidence the intention of the contracting parties to transfer ownership and title to the contractors and also evidence the actual transfer from seller to buyers.

The ownership and title, being in Bucyrus-Erie Company, could only pass to the district from the contractors. While the agreement between the contractors and the district provided that "All right, title and interest of the contractor in such equipment, shall, upon the payment by the owner of the monthly progress payments therefor, become, by such progress payments, vested in the owner and shall remain so vested until the completion of the work embraced in this contract," the evidence fails to show a conveyance or a delivery essential to a transfer of ownership and title from the contractors to the district prior to April 1, 1940. On that date the dredges were in the exclusive use, control and possession of the contractors under ownership and title previously acquired from the Bucyrus-Erie Company, as found by the district court on sufficient evidence. The record does not contain evidence of a conveyance of title from the contractors to the district, nor does it otherwise disclose such a conveyance or a demand by the district for "instruments of title." It follows that the contractors did not sustain the burden of proving that they were not the owners of the dredges April 1, 1940.

Was the assessment of the dredges at the valuation of $142,000 April 1, 1940, shown to have been excessive? An engineer who testified on behalf of the contractors estimated the value then at $55,000. The grounds for this estimate, as expressed by the witness, may be summarized as follows: The dredges were manufactured for this particular project. The wearing parts were designed and built for a limited life of two years. The difficulty of finding another project for the use of the dredges and the expense of dismantling, shipping and reassembling them at a new location, if found, depreciate the value after completion of the project for

which they were manufactured. In addition, a comparison with the price of two similar dredges at a public sale after completion of the project for which they were manufactured, together with the experience and opinion of the witness as an expert, indicated a value of not more than $55,000 for the two dredges used in the construction of the Kingsley dam. Testimony of this nature did not necessarily disprove the valuation fixed by the county board of equalization nor conclude the district court on that issue.

The purchase price of the dredges was $542,500. The evidence shows that on April 1, 1940, they had been used less than a year; that not more than half the two-year life of the wearing parts had expired on that date; that the dredges were serviceable April 1, 1940; that they were in operation until December 24, 1940. The future earning capacity of the dredges in operation April 1, 1940, on the identical, partially completed project for which they were manufactured seems to have escaped the attention of the witness.

The evidence on the issue of value has been found wholly insufficient to overturn the estimate of the board of equalization as approved by the district court.

AFFIRMED.

MINNEAPOLIS DREDGING COMPANY ET AL., APPELLANTS, V. ADDIE S. REIKAT, COUNTY TREASURER, ET AL., APPELLEES.
3 N. W. (2d) 887

FILED MAY 15, 1942. No. 31323.

1. **Taxation.** Under the Nebraska revenue law, a county assessor has power to add to the assessment rolls any property omitted therefrom for the current year. Comp. St. 1929, sec. 77-1006.
2. ———. Where the jurisdiction of the county board of equalization is invoked by complainants to cancel or reduce an assessment of personal property, the board's denial of relief after a hearing is a final determination of those issues unless the action of the board is set aside on appeal.
3. ———. Appeal from the action of the county board of equalization in refusing to cancel or reduce an assessment of personal

property is an adequate remedy at law and failure to appeal precludes injunction to prevent enforcement of the assessment.

4. ———. In Nebraska, complainants who invoke the jurisdiction of the county board of equalization to cancel or reduce an assessment of personal property do not lose their statutory right to appeal from an adverse ruling on the complaint by failure of the county clerk to make a record of the decision, the final order being provable by parol evidence.

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

Shuman & Overcash, for appellants.

Zelma Derry and *M. M. Maupin, contra.*

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

ROSE, J.

Minneapolis Dredging Company and Martin Wunderlich Company, plaintiffs, applied to the district court by petition in equity for an injunction to prevent Addie S. Reikat, treasurer, and Fred G. Taylor, sheriff, of Keith county, defendants, from enforcing against plaintiffs an assessment of taxes for the year 1939 on personal property in Keith county.

It is alleged in the petition that plaintiffs are contractors engaged in constructing a dam for the Central Nebraska Public Power and Irrigation District in Keith county and have therein personal property which they are using in the work of construction; that John Leonard, about July 1, 1939, purported to make a personal tax schedule against plaintiffs and included therein a dredge at the value of $189,000; that the schedule was filed in the county assessor's office and by virtue thereof an unlawful and void assessment of $2,228.31 was made against plaintiffs; that the dredge was not the property of plaintiffs April 1, 1939, nor at any time during that year, but was owned by the district named; that, notwithstanding the invalidity of the tax, defendants threaten to enforce payment thereof by means of a distress warrant.

By answer to the petition defendants admit they threaten

to enforce by distress warrant the taxes of which plaintiffs complain, and plead that on April 1, 1939, the personal property described in the petition was then owned by plaintiffs, was then in their possession and under their control, subject to taxation in Keith county; that plaintiffs refused to schedule their dredge property for taxation and that John Leonard, county assessor, made and returned an assessment thereon, notified plaintiffs thereof and delivered to them a copy of the assessment schedule; that the dredge property was legally assessed and that taxes so levied are due and owing by plaintiffs to Keith county; that plaintiffs appeared before the county board of equalization, objected to the assessment and requested cancelation thereof; that the board sustained the assessment as made; that plaintiffs did not appeal from the action of the board and consequently are bound by it and are not entitled to an injunction.

Upon a trial of the cause the district court found the issues in favor of defendants, refused to grant an injunction and dismissed the action. Plaintiffs appealed.

Plaintiffs contend that the assessment of the dredge property for the year 1939 was void for the reason that it was not assessed by the precinct assessor nor by any other officer having authority to make an assessment. This position is untenable. Plaintiffs alleged in their petition for an injunction that they are engaged in constructing a dam and have in Keith county personal property which they are using in the work of construction. The record contains evidence that a schedule listing some of their personal property did not include dredge equipment; that the county assessor inserted it therein as omitted property at a value of $189,000 and gave them notice of the fact; that the greater portions of the dredge material were at the dam site April 1, 1939. The statute provides:

"The county assessor or county clerk may, at any time, add to the tax rolls any property omitted therefrom for the current year." Comp. St. 1929, sec. 77-1006. See, also, *Bankers Life Ins. Co. v. County Board of Equalization*, 89 Neb. 469, 131 N. W. 1034.

In due time, as shown by the evidence, plaintiffs appeared before the county board of equalization and invoked its jurisdiction to cancel the assessment on the ground that plaintiffs were not the owners of the dredge. The valuation was also assailed as excessive. The evidence shows further that, after a hearing, plaintiffs were notified that the board of equalization refused to change the assessment and allowed it to stand as made. The board had jurisdiction to grant or deny the relief sought. The failure to cancel the assessment or to reduce the amount of it was a denial of any relief. Plaintiffs did not appeal and are bound by the decision of the board. Appeal was an adequate remedy and failure to appeal precluded relief in equity to prevent enforcement of the assessment. *State v. Drexel,* 75 Neb. 751, 107 N. W. 110; *Hahn System v. Stroud,* 109 Neb. 181, 190 N. W. 572; *Western Union Telegraph Co. v. Douglas County,* 76 Neb. 666, 107 N. W. 985; *Chapel v. Franklin County,* 58 Neb. 544, 78 N. W. 1062; *Kennedy v. Buffalo County,* 134 Neb. 744, 279 N. W. 464.

Plaintiffs assert, however, that the county clerk did not enter upon the records of the county board of equalization any order denying the relief sought by them and they argue that there was nothing from which to appeal. The statutory right of appeal was not lost by failure of the county clerk to perform his duty to record the decision. The petition for an injunction alleged that the purported schedule was filed in the office of the county assessor and that by virtue thereof an unlawful assessment was made against plaintiffs, who pleaded also that the assessment was unlawful because excessive and levied on property not owned by them—subjects over which the board had jurisdiction. The evidence does not show that plaintiffs demanded a transcript of the proceedings and order of the board for the purposes of an appeal or that the board was requested to require the clerk to complete the record to show the making of the order. In Nebraska, the revenue law does not make the record of the board the exclusive evidence of its decision. The ruling of the board, if omitted from the record, may be shown by parol

evidence. *Ragoss v. Cuming County*, 36 Neb. 375, 54 N. W. 683; *Green v. Lancaster County*, 61 Neb. 473, 85 N. W. 439. Reasons for the rule were stated by the supreme court of California as follows:

"The power of the board to act exists independently of any action of the clerk, and the validity of an exercise of it does not depend upon the diligence of the clerk. Were it otherwise, the clerk would have it in his power to, either by carelessness or design, defeat any of the actions of the board." *County of San Luis Obispo v. White*, 91 Cal. 432, 24 Pac. 864, 27 Pac. 756. See, also, *Burns v. McNally*, 90 Ia. 432, 57 N. W. 908; *Ewing v. Duncan*, 81 Tex. 230, 16 S. W. 1000; *Mecom v. Ford*, 113 Tex. 109, 252 S. W. 491.

It seems clear that plaintiffs did not exhaust their remedy by appeal, that they were bound by the assessment as made, that injunction was properly denied and that there was no error in the record to prejudice them.

AFFIRMED.

JAMES BENES, SPECIAL ADMINISTRATOR, APPELLEE, V. CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RAILWAY COMPANY ET AL., APPELLANTS.

3 N. W. (2d) 909

FILED MAY 15, 1942. No. 31391.

Railroads. There being insufficient evidence of negligence on the part of the defendants to support a verdict in favor of plaintiff, the judgment is reversed and the action dismissed.

APPEAL from the district court for Burt county: FRANCIS M. DINEEN, JUDGE. *Reversed and dismissed.*

Wymer Dressler and *Robert D. Neely*, for appellants.

Chatt & Ellenberger, contra.

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

PAINE, J.

This is an action for damages by the administrator of decedent's estate. A judgment was entered immediately upon the $9,000 verdict, and defendants appeal, after putting up a supersedeas bond of $10,000.

An amended petition was filed on September 3, 1940, alleging in brief that the tracks of the defendant railway company run parallel for a short distance with U. S. Highway No. 73, which crosses the right of way and tracks a short distance north of the south line of Burt county; that on June 4, 1940, defendants were engaged in repairing and improving this crossing, and Denver LaVeck was the foreman in charge of said work, and Fred Wittig was one of said employees who was to wave a red danger flag signaling and warning passing motorists.

It is alleged that at about 12:45 p. m. on June 4, 1940, one Frank Malousek was riding north on said Highway No. 73, as a guest, and the automobile proceeded in the usual manner, at a speed of about 45 miles an hour; that when said automobile had almost reached said crossing Fred Wittig suddenly rushed up out of the ditch on the west side of said highway onto the highway in the path of the oncoming automobile, waving a red flag as a signal of danger; that as a result thereof the driver of the automobile swerved the car to the right, driving said car into a cement and steel signal post, and the deceased, Frank Malousek, was pitched from the car and thrown under the signal post.

It is further alleged that, by reason of the wrongful acts and conduct of defendants, plaintiff's intestate was severely injured, receiving a concussion of the brain and extensive fracture of the skull, together with extreme nervous and physical shock, from which injuries he died the following day. Plaintiff claims damages for mental and physical pain and suffering of said Frank Malousek in the sum of $10,000.

The amended petition further alleges that defendants were negligent in that they failed to post any warning sign or signal, or station a flagman, south of said crossing to warn oncoming traffic of construction operations, and direct

and protect oncoming traffic; that defendants were negligent in permitting said Wittig to leave his station and go to the west of said highway out of the usual range of vision of drivers of oncoming automobiles, and then, just as the automobile had nearly reached the crossing, to suddenly, wrongfully, negligently and carelessly rush upon said highway in or near the path of the oncoming automobile, waving a red signal flag in his hand, at or near the south edge of the crossing. Plaintiff alleges that said flagman should have been stationed at least 250 feet south of the railroad crossing at and immediately prior to the happening of the accident.

For a second cause of action, it is alleged that the deceased left surviving him his widow, Helen Malousek, and his father and mother, and that he was the sole support of his aged parents; that he was in good health, 34 years of age, and actively engaged in farming in Saunders county, and capable of earning $2,000 a year.

It is further alleged that it was necessary for the deceased to obtain medical attention and hospital service, and that he submitted to a cranial operation immediately prior to his death; that the medical, hospital and funeral expenses incurred amounted to the sum of approximately $750. Plaintiff claims damages on account of the wrongful death of said Frank Malousek and the hospital, medical and funeral expenses in the sum of $40,000, and prays judgment against defendants in the sum of $50,000 and costs of suit.

Defendants in their answer filed September 5, 1940, deny each and every allegation contained in the amended petition not specifically admitted, and allege that said accident was due solely to the negligence of the driver of the automobile and to the negligence of deceased; that said highway was open and clear, the visibility was ample, and that the accident was not due to any negligence of defendants.

The reply, very promptly filed on September 19, 1940, consists of a general denial and a renewal of the prayer of plaintiff's petition.

The defendant company set out 31 errors as grounds for a reversal, the principal argument being made on the charge

that the verdict was not sustained by the evidence, that there was no evidence of any damage to the widow, and the proof showed that the parents were not dependent upon the deceased son.

The widow did not appear at the trial. It seems they had been married some seven years before, and had lived together for one year only, and she had been living in Lincoln for the last six years. It is admitted that no damages to the widow were proved, and her claim is not competent, so it leaves only the parents of an adult son who are the owners of 240 acres of good farm land in Saunders county, and while it was mortgaged they were much better off in this world's goods than was the deceased son.

This is not a case where any train was involved. The automobile in which the deceased was riding was suddenly turned from the road and driven into a concrete block signal, or a support for the signal light. The deceased, by the force of the collision, was instantly pitched out of the rear window of the car against the steel signal, and a steel part of it fell over on him and caused a fracture of his skull. No one in the car could describe just how he got out of the car from the middle of the rear seat, but he went out so quickly that he could not grab hold of the side of the car or the two men with him.

The driver of the automobile testified that, as he was going north towards this crossing at about 45 miles an hour, the highway was clear; that he saw the wigwag was not in action, and although he had never been over this highway before he knew he had to cross the track, and he says that, when he was a distance of 140 feet from the crossing, this man Wittig flagged him down, and he thought there must be a train coming that he did not know about; he decided he would not go on the track, so he slid his wheels over 80 feet on the pavement, and went approximately 100 feet in all when he struck this signal block. The driver admitted he could have seen down the track back of him, but he did not look.

On the other hand, there is testimony by the defendants

that this automobile was coming at 65 miles an hour, and there was another car ahead of it, a coupé, which was coming slowly, and the flagman testified that he went over and flagged the coupé down and it stopped, and he was on the west side, and feared that this other car would run over him; he ran to the other side, and this fast-moving car "ducked" around the standing car, and then ran off the road and into this signal block. There is a sharp dispute in the evidence as to how far this flagman was south of the center of the crossing. Different witnesses testified from 10 feet to 175 feet, for one of the witnesses put this flagman south of the track near a mailbox.

Mrs. Anna Larsen, who testified for plaintiff, lived in a near-by house, shown in one of the pictures, and said the flagman was standing with a group of men around the battery box about noon, where some of the men were eating lunch. Plaintiff's evidence further shows there was a flat-top battery box some 40 feet north and west of the crossing. All the men in the automobile said he was sitting on the battery box, and suddenly jumped up from it and rushed out with this red flag and waved it violently. There is no doubt that the flagman did not intend to let any automobile go across the crossing without stopping, although the west half of the highway had not been torn up, and was all right to cross on.

The evidence shows that, when a "floating" gang of railroad repair men were going to fix this asphalt crossing, the section boss went to Tekamah to see Ward Maw, the state highway man in charge, and when inquiry was made Mr. Maw called up his superior, Mr. Easter, at Lyons, who said if the railroad company would furnish the necessary flagmen to direct traffic that would be sufficient. The section boss asked if they should also put out slow signs, and Mr. Easter said it would not be necessary if they had the flagmen.

This procedure is in accordance with section 39-1117, Comp. St. 1929, in which power is conferred upon the department of public works to devise and supervise the erec-

tion of stop signs, red flares, or warning signs, and to erect and maintain such of them at railroad crossings where the same intersect highways, where, in the judgment of the department of public works, it is deemed advisable.

The defendant company, engaged in repairing the crossing, which required temporary obstruction of part of said highway, is required to use ordinary care to prevent injury to others, and in the exercise of that ordinary care sought and followed the instructions given its employees by the officer of the state highway department in charge thereof. See *Simonsen v. Thorin,* 120 Neb. 684, 234 N. W. 628.

In the case at bar, while it is ordinarily the duty of the guest to exercise due care for his own safety, and to warn the driver of danger, yet the evidence and circumstances of the instant case are not such that the guest was in a position to anticipate danger sufficient to require the guest to warn the driver. See *Gleason v. Baack,* 137 Neb. 272, 289 N. W. 349; *Fischer v. Megan,* 138 Neb. 420, 293 N. W. 287; *Hendren v. Hill,* 131 Neb. 163, 267 N. W. 340.

There is considerable discussion in the briefs about the recovery by the wife or parents, but under our view of the case this phase need not be discussed.

We now come to the question of the negligent act committed by the defendants. The railroad company decided that it would rebuild this crossing, and had brought in an extra gang of employees, who were digging out one side of the highway, and who had gone to dinner when the accident happened. The state highway engineer had said that, if the company put out a flagman, that would be sufficient, and it need not put any slow sign, but the section foreman thought he would do better than he was required, and he put out two flagmen to flag down the traffic, one on each side of the track, and then would have the traffic proceed across slowly. The section boss was not given any directions as to how far away or where the flagman should stand.

The driver of the automobile could see he was approaching a railroad, and if one side of the highway was torn up he should have reduced his speed very materially. Now, the

negligence charged is that the flagman rushed in front of him and waved a red flag violently, and that this was the proximate cause of the accident.

When the flagman had done his duty, the driver of the car decided that maybe a train was coming from the rear which he had not seen, but admitted that he could have seen down the track if he had looked back. In carrying out his decision not to cross the track, he turned and ran down the side of the track, struck the electric signal, and his guest was killed. Was this not because of the driver's own dereliction in not looking back to see whether a train was approaching or not? If so, then the proximate cause of the accident might be said to be the negligence of the driver.

At the close of all the evidence, the defendants made this motion: "Mr. Dressler: Come now the defendants at the close of all the testimony and move the Court either to direct the jury to return a verdict for the defendants or to discharge the jury and dismiss the case at plaintiff's costs, for the following reasons:

"1. The evidence is wholly insufficient to sustain any verdict against any of the defendants.

"2. The evidence shows without dispute that the sole and proximate cause of the accident was the act of the driver, in becoming confused and misinterpreting the meaning of the flag signal which he received when the motor vehicle was one hundred and forty feet from the crossing, and which the overwhelming evidence shows was substantially further than that; and the evidence shows that he did not even see the crossing was out of repair, but says that he thought a train must be coming which he had not seen and had not looked by his own admission to the south for a train. Under these circumstances the condition of the crossing, or whether it was a flagman, or where he may have been stationed, was not the proximate cause of the accident, but the sole and proximate cause is the negligence and confusion of the driver, misinterpreting the signal of the flagman."

It is the opinion of the court that, under the evidence and the law, this motion should have been sustained by the court.

The verdict and judgment are hereby set aside, and the action dismissed.

REVERSED AND DISMISSED.

CONSOLIDATED CHEMICAL LABORATORIES, APPELLANT, V. CASS COUNTY, APPELLEE.

3 N. W. (2d) 920

FILED MAY 22, 1942. No. 31272.

1. **Statutes.** The word "must" in a statute will not be construed to mean "may" where the context shows it was used in a mandatory sense.
2. **Counties.** A legislative act, providing that all claims against a county must be filed with the county clerk within 90 days after the date on which the last item was furnished, *held* not unconstitutional as unreasonable or as legislation not within the title of the act.
3. ———. A petition for the allowance of a claim against a county is demurrable where it shows on its face that the claim was not filed with the county clerk within the time limited by a mandatory statute.

APPEAL from the district court for Cass county: WILMER W. WILSON, JUDGE. *Affirmed.*

Howard Saxton and *Robert Saxton,* for appellant.

Walter H. Smith, contra.

Heard before SIMMONS, C. J., ROSE, EBERLY, CARTER, MESSMORE and YEAGER, JJ.

ROSE, J.

This is an action to collect from Cass county, defendant, an unpaid account or claim of $502.64 for soap, disinfectants and other jail-cleaning supplies ordered by the sheriff, sold by Consolidated Chemical Laboratories, plaintiff, and delivered. The claim was presented to the county board of Cass county and disallowed. Plaintiff appealed to the district court where the claim was again disallowed. From the

judgment of the district court plaintiff appealed to the supreme court.

The following facts are shown by the petition and by attached exhibits filed in the district court: The items enumerated in plaintiff's claim were sold to defendant through the sheriff between October 30, 1936, and April 29, 1937. The claim was filed in the office of the county clerk January 18, 1938. It was disallowed by the county board December 13, 1938.

The petition was attacked by general demurrer, which was sustained on the ground that the claim was not filed with the county clerk within 90 days from the date of the furnishing of the last item of supplies—the period limited by statute. Plaintiff refused to plead further and the action was dismissed.

By the appeal, this question is presented: Did the trial court err in sustaining the demurrer? In 1935, before the claim of plaintiff arose, the legislature amended existing law to provide:

"All claims against a county must be filed with the county clerk within ninety days from and after a time when any materials or labor, which forms the basis of the claim, shall have been furnished or performed." Laws 1935, ch. 50, sec. 1; Comp. St. Supp. 1939, sec. 26-119.

Plaintiff argues that the word "must" in the foregoing language should be construed to mean "may" and that otherwise the legislation is unconstitutional. Powers and duties of counties and of county officers come from the lawmakers and the context shows that they did not leave it to the discretion of claimants or county officers to say when claims shall be filed with the county clerk for allowance. The sheriff is not an officer with power to allow claims against the county. The petition shows that he ordered and received the supplies in controversy, but it fails to allege he presented the claim of plaintiff to the county board. In the connection used, the language of the statute containing the word "must" is mandatory and too plain for construction.

It is argued further that the provision quoted, if manda-

tory, is unreasonable in requiring claimant to file its claim with the county clerk within 90 days after the date on which the last item was furnished. The petition shows that the invoices were presented to the sheriff promptly. The same diligence would have resulted in the filing of the claim with the county clerk in due time. A merchant dealing with counties and county officers must note and respect their powers and duties. It was for the legislature to say when the claim for sanitary supplies for the county jail should be filed with the county clerk. Opportunity for inspection when knowledge is available may have been a legislative safeguard for protection of the public. There is nothing substantial in the record or argument to show that the time limited by the legislature is unreasonable.

The validity of the legislation is questioned also on the ground that the limitation quoted is not within the title of the act. The title is one for an act to amend section 26-119, Compiled Statutes of 1929, relating to claims against counties, and "to fix the time for the presentation of claims against counties." The limitation therefore is strictly within the title. Other objections to the act as unconstitutional are found to be without merit.

The petition shows on its face that the claim of plaintiff was not filed with the county clerk within the time limited by law. For that reason the demurrer was properly sustained.

AFFIRMED.

NORMA R. RISK, APPELLANT, V. DIRECTOR OF INSURANCE ET AL., APPELLEES.
3 N. W. (2d) 922

FILED MAY 22, 1942. No. 31284.

1. **Judgment.** If the district court enters a judgment made in accordance with the agreement of the parties to the suit, the court does not inquire into the equities of the matter, and there-

fore such a judgment is not a judgment upon the merits, for it is not, strictly speaking, the act of the court.

2. **Insurance.** A contract for reinsurance and merger of a mutual insurance company must be submitted to the members at an annual meeting, or a special meeting called for that purpose, with 30 days' notice to the members, which notice must contain all the required statements set out in section 44-414, Comp. St. 1929, and said steps are jurisdictional requirements.

3. ———. If an order made by the director of insurance lacks certain jurisdictional requirements set out in the statute, then such order is void.

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

Tyler & Frerichs, for appellant.

Peterson & Devoe and *Chauncey E. Barney, contra.*

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

PAINE, J.

This action was originally a proceeding before the insurance commissioner of the state of Nebraska, attacking the validity of a reinsurance agreement between appellee companies. Objections were filed to the jurisdiction of the said commissioner over the subject-matter. The objections were sustained and the petition dismissed. Appeal was taken to the district court, where the objections to jurisdiction were again sustained and the appeal dismissed, from which ruling Norma R. Risk appeals.

The petition on appeal was filed in the district court for Lancaster county by Norma R. Risk, plaintiff, on August 3, 1939, and, while of considerable length, will be briefly summarized by stating that it alleged that on September 30, 1937, the American States Life Insurance Company, a mutual legal reserve insurance company, a Nebraska corporation, issued a $10,000 policy of insurance upon the life of plaintiff, Norma R. Risk. After the issuance of said policy, the name of the insurance company was changed to American Annuity Assurance Company.

It is further alleged that on June 1, 1938, there was submitted to the director of insurance of Nebraska a reinsurance contract between said American Annuity Assurance Company and the Republic National Life Insurance Company, of Dallas, Texas, by the terms of which said American Annuity Assurance Company reinsured with the Republic National Life Insurance Company all of its outstanding policies and contracts of insurance, including "thrift policies," and said Republic National Life Insurance Company assumed the liability of said American Annuity Assurance Company upon every policy and contract of insurance including "thrift policies," issued by said American Annuity Assurance Company and then in force.

In support of the application made to the commissioner of insurance of Nebraska, it is alleged there was submitted the purported reinsurance contract, together with the sworn certificate of the secretary of said American Annuity Assurance Company, setting out verbatim the purported minutes of the annual meeting of said company which was held on February 17, 1938, and of subsequent adjourned sessions of said annual meeting which were purported to have been held on March 28, 1938, and May 31, 1938; that the minutes of March 28, 1938, contained the following: "President Hutson then announced that the Company had not as yet completed its negotiations with the Modern Life Insurance of Saint Paul, Minnesota, or the Republic National Life Insurance Company of Dallas, Texas, or with other companies that are under consideration that because of the lack of time to consummate a favorable reinsurance contract, it would be desirable if said adjourned annual meeting be further adjourned for the purpose of consummating a reinsurance contract with some reputable company, if the same were found desirable by the respective Companies and the same approved by the Department of Insurance of the State of Nebraska. It was then moved * * * that the annual meeting of the members of said Company be further adjourned until May 31, 1938, * * * . The president announced that the motion was unanimously carried."

Plaintiff alleges that it was not announced at said adjourned meeting of March 28, 1938, that the American Annuity Assurance Company was negotiating with the Modern Life Insurance Company of St. Paul, Minnesota, or the Republic National Life Insurance Company of Dallas, Texas, and no adjournment was taken until May 31, 1938, for the purpose of approving and adopting a reinsurance contract with some reputable life insurance company, and that, on the contrary, there was presented at that meeting a reinsurance contract between the Modern Life Insurance Company of St. Paul, Minnesota, and said American Annuity Assurance Company, by the terms of which all of the outstanding policies and contracts of insurance of said American Annuity Assurance Company, including "thrift policies," would be reinsured by said Modern Life Insurance Company, and at said meeting on March 28 said proposed reinsurance contract was ratified and approved, subject to the approval of the department of commerce, division of insurance, of the state of Minnesota, and the approval and ratification of same by the board of directors of said Modern Life Insurance Company.

The plaintiff further alleges that on March 28, 1938, I. J. Good, secretary of the American Annuity Assurance Company, subscribed a written certificate, attached to the petition as exhibit A, certifying to the action taken at the annual meeting on said date, and that the department of insurance of Nebraska be notified of the ratification and approval of said reinsurance contract by the members of said company, and that the officers of said company be directed to enter into and consummate the contract for reinsurance and carry out the orders of the department of insurance relating thereto.

Plaintiff further alleges that, upon consideration of the application, the proposed reinsurance contract between said American Annuity Assurance Company and the Modern Life Insurance Company of St. Paul, Minnesota, was disapproved by the department of commerce, division of insurance, of Minnesota, and all proceedings to consummate the

said reinsurance contract were thereupon discontinued.

It is further alleged that thereafter the officers of the American Annuity Assurance Company entered into negotiations with the Republic National Life Insurance Company of Dallas, Texas, and on June 1, 1938, entered into a reinsurance contract with said company, and presented the same to the director of insurance of Nebraska for approval, and that in support of its application it caused a record to be made as quoted in part above, and further caused the following record to be made: "President Hutson then submitted the proposition of reinsuring and consolidating the American Annuity Assurance Company of Omaha, Nebraska, with the Republic National Life Insurance Company of Dallas, Texas, as provided for in the reinsurance contract, previously approved by the Board of Insurance Commissioners of the State of Texas. After full discussion and consideration of said reinsurance agreement, it was moved * * * that the reinsurance contract be ratified and approved."

Plaintiff alleges that, in truth and in fact, no meeting of the members was ever held at which said proposed reinsurance contract with the Republic National Life Insurance Company was presented, and that no vote of the members for approval or rejection of said reinsurance contract has ever been held, and that said reinsurance contract was made and entered into wholly without the authority of the members of said company.

Plaintiff further alleges that the director of insurance of Nebraska, relying upon the sworn certificate of the purported proceedings at said purported meeting of May 31, 1938, and being misled thereby, and believing that all of said proceedings were regular, entered an order on June 1, 1938, approving the reinsurance contract between the American Annuity Assurance Company and the Republic National Life Insurance Company; that the said director of insurance was without jurisdiction to enter said order, and the order is null and void and should be set aside, and plaintiff prays that the order be rescinded, canceled, set aside and held for naught, that all of the assets transferred to the said Repub-

lic National Life Insurance Company be returned to the state of Nebraska, under the direction and control of the director of insurance, and that a meeting of the members of said American Annuity Assurance Company be called for the purpose of ratifying or rejecting the proposed reinsurance contract, or of otherwise disposing of the assets, business and affairs of said American Annuity Assurance Company as the members of said company may lawfully direct.

The transcript shows that thereafter and on October 24, 1939, the American Annuity Assurance Company and the Republic National Life Insurance Company filed objections to jurisdiction of the court over the subject-matter and motion to dismiss, showing that on June 1, 1938, there was submitted to the director of insurance of Nebraska a reinsurance contract between the American Annuity Assurance Company of Omaha and the Republic National Life Insurance Company of Dallas, Texas, and that thereafter the director of insurance entered an order approving said reinsurance agreement; that on June 20, 1938, an appeal from said order was filed by Ralph J. McKinney for himself and all other policyholders of said American Annuity Assurance Company similarly situated, and on July 20, 1938, one Clyde D. Willson filed petition in intervention in said appeal as a policyholder of said company and on behalf of all others similarly situated; that on September 9, 1938, the district court for Lancaster county entered a decree dismissing the petition of Ralph J. McKinney and the petition in intervention of said Clyde D. Willson; that said decree entered on said petition and petition in intervention has never been appealed from, and is now final and conclusive on all of the policyholders of said American Annuity Assurance Company, and that said department of insurance and the district court have lost all of their jurisdiction by reason of said appeal to enter any other or further orders connected with said reinsurance agreement; that all of the issues sought to be raised by the petition on appeal have been fully litigated and determined, and the decree of the district court has become *res judicata* with respect to all of such issues, and the American

Annuity Assurance Company and the Republic National Life Insurance Company each and severally move the court to dismiss the appeal. On March 29, 1941, order was entered sustaining said objections to jurisdiction and dismissing the appeal of Norma R. Risk at her costs.

At the trial held in district court on February 27, 1941, the bill of exceptions consists only of the record made by the attorneys in the introduction of 11 exhibits, as follows: (1) Petition on appeal of Ralph J. McKinney; (2) order approving reinsurance agreement, signed by C. Smrha, director of insurance; (3) petition of intervention of Clyde D. Willson; (4) decree entered by John L. Polk, district judge, September 9, 1938; (1-a) certified copy of reinsurance agreement; (5) transcript of proceedings before director of insurance; (6) petition on appeal of Norma R. Risk; (7) petition of Ralph J. McKinney to vacate judgment; (8) answer of two insurance companies; (9) reply of Ralph J. McKinney; (10) decree of E. B. Chappell, district judge.

From this record before us, the appellant argues that the order made on June 1, 1938, by the director of insurance of the state of Nebraska, approving a purported contract for consolidation of the American Annuity Assurance Company of Omaha with the Republic National Life Insurance Company of Dallas, Texas, was based upon a false record; that in the office of the director of insurance one record before him shows that the adjourned meeting of March 28, 1938, was again adjourned to May 31, 1938, while the other record shows that it was not so adjourned; that its business was finally completed on March 28, 1938, which later record is charged by appellant to be the true record, and shows that at the final adjourned session of the annual meeting held on March 28, 1938, the contract to reinsure the Omaha company in the Modern Life Insurance Company of St. Paul, Minnesota, was approved, but when it was later disapproved by the insurance department of the state of Minnesota, it is charged by appellant that false records were made, showing a further adjournment of the annual meeting from March 28, 1938, to May 31, 1938, at which date the purported minutes

show that a new arrangement had been made to have the American Annuity Assurance Company taken over by the Republic National Life Insurance Company of Dallas, Texas, and this action was approved on May 31, 1938, and it is charged that the department of insurance had no jurisdiction to act in the matter at all, for proper notice had not been given to the stockholders and policyholders, no meeting was held, and the approval of the department of insurance was secured by a fraudulent record, and no opportunity has ever been given for this fact to be brought out in a hearing or trial.

In opposition to this argument, it is insisted by appellee that an appeal from the action of the director of insurance was taken to the district court for Lancaster county by Ralph J. McKinney, the petition on appeal being filed June 20, 1938, and on July 20, 1938, Clyde D. Willson filed a petition in intervention, alleging that a pretended contract of reinsurance was entered into on June 1, 1938, between the Republic National Life Insurance Company of Dallas, Texas, and the said Omaha company, which purported contract was submitted to the director of insurance of Nebraska, who approved the same on June 1, 1938, although said Texas company in point of assets is much smaller than the Nebraska company, and is less than two years old. Appellee contends that a disposition of that case settles the case at bar.

An examination of the decree entered by Judge Polk on September 9, 1938, in the McKinney appeal, being exhibit No. 4 in the case at bar, shows that the parties had entered into an agreement between themselves, wherein they had settled all matters raised on the appeal and the petition of intervention, and further shows that the Republic National Life Insurance Company shall pay to William H. Wright and Jackson B. Chase, attorneys for Ralph J. McKinney and Clyde D. Willson, for services rendered and expenses and costs, the total sum of $5,000, and the decree was thereupon entered in accordance with the agreement of the parties, being in all respects a consent decree without trial.

This court in the recent case of *McArthur v. Thompson*, 140 Neb. 408, 299 N. W. 519, held as follows:

"'When a decree or judgment is made by consent of the parties, the court does not inquire into the merits or the equities of the case. The only questions to be determined by it are whether the parties are capable of binding themselves by consent, and whether they have actually done so. These two facts appearing, the court orders the judgment or decree to be entered.' 14 Standard Ency. of Procedure, 919.

"A judgment by consent constitutes the agreement of the parties, and is simply made a matter of record by the court at their request. Although purporting to be, it is not, strictly speaking, the act of a court, but rather the act of the parties to the suit. This feature imposes some restrictions upon the right to amend, and upon the right to appeal from such a judgment. It is not a judgment upon the merits."

"A judgment by consent of the parties is a judgment the provisions and terms of which are settled and agreed to by the parties to the action in which it is entered, and which is entered of record by the consent and sanction of the court. It is not the judgment of the court, except in the sense that the court allows it to go upon the record and have the force and effect of a judgment; it is the agreement of the parties, entered upon the record with the sanction and approval of the court, and is their act rather than that of the court." 34 C. J. 129.

In the opinion of this court, such a consent decree would not be binding on any of the policyholders or stockholders, except Ralph J. McKinney and Clyde D. Willson.

If in the case at bar it is found, when the evidence is adduced, that the further record of an adjournment of the annual meeting to May 31, 1938, was false, then it is difficult to see how approval of this consolidation was made at a special or an annual meeting, as required by section 44-414, Comp. St. 1929, for a contract for reinsurance and merger of a mutual insurance company must be submitted to the members at an annual meeting, or a special meeting called for that purpose, with 30 days' notice to the members, and said

steps are jurisdictional requirements.

This court has held that the service of notice of the time and place of meeting and of the proposition to be submitted, provided by statute to be sent to each person entitled to vote, through the mail, directed to his last known address, was a reasonable and practicable one and suited to the nature of the proceedings. See *Leininger v. North American Nat. Life Ins. Co.*, 115 Neb. 801, 215 N. W. 167; 10 Neb. Law Bulletin, 516; *Baldwin v. Burt*, 2 Neb. (Unof.) 377, 96 N. W. 401.

"To speak of the vacation or modification of a void judgment is a perversion of language. There being no judgment, but the mere form and counterfeit of a judgment, there is nothing to modify or annul. 'A void judgment,' says Mr. Freeman (Freeman, Judgments (4th ed.) sec. 117), 'is, in legal effect, no judgment. By it no rights are divested. From it no rights can be obtained. Being worthless in itself, all proceedings founded upon it are equally worthless. It neither binds nor bars any one. All acts performed under it and all claims flowing out of it are void.'" *Kaufmann v. Drexel*, 56 Neb. 229, 76 N. W. 559.

This court held in *Hassett v. Durbin*, 132 Neb. 315, 271 N. W. 867: "A void judgment is in reality no judgment at all. It does not bind the person against whom it is rendered. It may be impeached in any action, direct or collateral."

If upon a trial the evidence supports the allegations of appellant's petition, then a fraud was committed.

This court has reached the conclusion that the facts alleged bring the matter within the jurisdiction of the director of insurance, and the order of the district court sustaining the plea to jurisdiction and dismissing the appellant's appeal is therefore reversed and the case is remanded for further proceedings in accordance herewith.

REVERSED.

GUY OTTO, APPELLANT, V. L. L. CORYELL & SON ET AL., APPELLEES.

3 N. W. (2d) 915

FILED MAY 22, 1942. No. 31330.

1. **Contracts: Reformation.** In an action to reform a written instrument, the burden rests upon the plaintiff to overcome the strong presumption arising from the express terms of such instrument. If the proof is doubtful and unsatisfactory, so there is a failure to overcome this presumption by testimony entirely plain and convincing beyond reasonable controversy, the written instrument will be held to express correctly the real intention of the parties.
2. **Appeal.** When an action in equity is appealed, it is the duty of this court to try the issues of fact *de novo* upon the evidence in the bill of exceptions, and reach an independent conclusion as to what findings are required under the pleadings and evidence, without reference to the findings of the district court. Comp. St. 1929, sec. 20-1925.
3. ———. But when the evidence on the important and material issues so conflicts that it cannot be reconciled, this court will consider the fact that the trial court had an advantage over this court in carefully observing the witnesses while they were upon the stand, in noticing how they met cross-examination, and their manner of testifying, and must have adopted one version of the facts rather than the opposite.

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

C. L. Clark and *Webb Rice*, for appellant.

R. B. Travis, Tunison & Joyner and *Frank M. Johnson*, *contra.*

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

PAINE, J.

This is an equity action, brought to reform or cancel a written instrument, and for an accounting. After trial in the district court, a decree was entered, finding that the plaintiff was not entitled to the relief asked for in his petition, and the action was therefore dismissed, from which the plaintiff appealed.

The amended petition with the exhibits attached makes up 40 pages of the transcript, and is too long to be set out at length in this opinion. It is charged therein that the attorney for L. L. Coryell & Son drafted a written instrument which purported to evidence an oral agreement between the plaintiff and Coryell's attorney two days before, but that the writing failed to state the actual agreement of the parties; that such failure resulted either from the mutual mistake of the parties, or mistake on the part of the plaintiff and deceit and inequitable conduct on the part of said defendant's attorney.

The facts stated as ground for cancelation are that plaintiff did not understand that the writing would deprive him of all control over his property for a period of eight years from and after June 15, 1940, for a rental of only $35 a month, or that in signing it he was unconditionally surrendering the property to Coryell for that term, or for that rental for any term, but did understand it to entitle him to a rental of ¾ cent a gallon on all gasoline sold at the station and other rentals, the total of which was in excess of $70 a month for a term of one year, and for such additional time as the parties should thereafter agree upon; and that such was the substance of the oral agreement which the writing was intended to evidence.

The prayer of this amended petition asked that the instrument be corrected and reformed to make the rent reserved ¾ cent a gallon, as understood by the plaintiff, and to cancel the pretended lease from Coryell & Son to Chandler and Pierce, who had leased the Lexington station from plaintiff, and that the parties be required to execute a new lease in keeping with the agreement of the parties, and that Coryell & Son be required to account to the plaintiff for all moneys received by it under the lease, and that all the defendants be restrained and enjoined from interfering with plaintiff's possession of the two north rooms of the Lexington filling station, and for such other relief as is just and equitable, including the cancelation of said writing in its entirety, and the restoration of the respective parties to the respective

positions which they occupied prior to the leases signed in June, 1939.

It is admitted in the answer that L. L. Coryell & Son is a copartnership, with its principal place of business in Lincoln; that the defendants Sam Chandler and Roy Pierce are residents of Dawson county, Nebraska, doing business in the city of Lexington under the name of the S & R Service Station.

It is further admitted by the defendants that on July 22, 1939, the plaintiff and defendants executed a certain written agreement, and that the plaintiff is the owner of lots 7 and 8, block 31, MacColl & Leflang's second addition to Lexington, and of the filling station and equipment located thereon.

Defendants admit the execution of the Exclusive Coryell Franchise and Form No. 4 ten-year lease, exhibit A, and also No. 5 lease, exhibit B; admit that the plaintiff operated the station in Lexington until June 15, 1939; admit that Coryells have leased the premises to Chandler and Pierce, who are operating the filling station thereon under a distributor's agreement executed by Coryells to Chandler and Pierce, but deny the other allegations in the amended petition.

The evidence in the bill of exceptions discloses that the plaintiff was about 45 years of age, and had lived in Plainview, Nebraska, for 31 years, and at the time of the trial was engaged in farming; that in addition to farming he had been in the gasoline business, having run a truck for the Farmers Union Cooperative Association in Plainview, and later built a station there, which he ran for a couple of years, and then for three or four years was in a filling station in Plainview under a contract with the Coryell company; that at Plainview the plaintiff had purchased a station and entered into substantially the same kind of contract with Coryell as is involved at the Lexington station; that the plaintiff owned the station, leased it to Coryell, and this corporation leased it back to him; that about the year 1936 plaintiff sold the station in Plainview at a profit, and asked Coryell's field man where he could get another station, preferring to get one on the Union Pacific line, that is, on highway No. 30, and the

field man suggested that a station at Lexington was for sale, and the plaintiff went down and bought the station and at once entered into a lease with Coryell for a ten-year period, leasing the property which he had just purchased, and taking back a lease from them.

Paragraph 4 of the lease, marked exhibit No. 3, reads as follows: "For the use of said premises Coryell undertakes and agrees to pay, during the term of this lease, to the landlord at Lexington, Nebraska, the sum of $35 per month, payable monthly in advance between the first and tenth day of each month, except that it is specifically agreed that in lieu thereof Coryell shall pay to the landlord the sum of $1 per year in advance during such time or times as the landlord shall be in possession of said premises under any sublease made as of even date or hereafter by Coryell to the landlord." This paragraph just quoted is an important element of the controversy between the parties in this case.

The lease on the Lexington property between the plaintiff and Coryell provided that the plaintiff would sell Coryell products exclusively.

On June 15, 1939, plaintiff sublet the station at Lexington to Chandler and Pierce for a term of one year, reserving one-half of the building, which plaintiff rented out for $15. The rental for the year of this lease was to be ¾ cent a gallon on all gasoline sold by Chandler and Pierce, and in addition the $15 a month rent from a cafe proprietor. Soon after Chandler and Pierce took charge of the station they began the sale of Hudson gasoline, which was an active and vigorous competitor of Coryell gasoline, both of these companies being known as "cut-rate" companies, as distinguished from the major gasoline companies.

On July 17, 1939, Coryell's attorney, Richard B. Travis, drove to Grand Island and talked to the plaintiff, who was working as a harvest hand near Grand Island, but came in town, and Travis and the plaintiff talked the matter over, sitting in the plaintiff's car in front of the Stratton hotel, and Travis testified that it was agreed that he would go to Lexington and get Chandler and Pierce to make a new con-

tract, binding themselves to sell Coryell gasoline exclusively, which was not a provision in the plaintiff's one-year lease with them. Travis testified that he told plaintiff that he would have to go to Lexington and find out the situation and protect Coryell's interest.

Arriving at Lexington, Mr. Travis went with Frank Johnson, a local attorney, to see Chandler and Pierce, and discussed the whole matter, including their displaying Hudson signs and taking down Coryell signs, and thus pushing the sale of a competitor's gasoline, which was a violation of Coryell's exclusive franchise contract with the plaintiff, which contract was then shown to Chandler and Pierce by Travis.

Chandler and Pierce stated that they had no knowledge of the existence of the exclusive contract, and no mention thereof had been made in their lease with plaintiff, and they thought they had a perfect right to sell any merchandise they wished at the station, and after a full discussion a new contract was entered into, which provided that Chandler and Pierce should continue to pay the plaintiff ¾ cent a gallon rental, just the same as he was receiving under their contract with him for one year, and the agreement was that there would be a new contract, No. 4 lease, from plaintiff to Coryell, and the Coryell company would in turn sublease the station to Chandler and Pierce, with a franchise agreement for the period of one year, at the rate of ¾ cent a gallon to be paid to plaintiff, and thereafter the rent to be paid to plaintiff was to be $35 a month, according to the original lease between Coryell and plaintiff. Travis then drove back to Grand Island, telephoned to plaintiff, who came into town from the farm where he was working, and they went over the whole matter, and Mr. Travis gave him a full statement of the new arrangement which had been made with Chandler and Pierce, and explained that the next day in Lincoln they would draw up the necessary papers to carry out this understanding, and would mail all of them to Jack Smith, manager of the Coryell gasoline station in Grand Island, and that plaintiff could come in and read all the papers, and if

they were satisfactory he could sign them in the presence of a notary public, and Mr. Smith would forward them to attorney Johnson at Lexington to submit to Chandler and Pierce for their signature.

This was all completed in a day or so in accordance therewith, and the plaintiff came in town to the filling station, read over and signed the papers, and under the new contract he continued to and did receive until the end of the period ¾ cent rental for his property at Lexington. The rental for the period ran from as low as $38.51 in January, 1940, to a high of $79.98 in October, 1939, and varied each month.

On June 7, 1940, Coryell & Son notified plaintiff that the period for which the rental of ¾ cent a gallon under the lease was to expire on July 15, after which he would receive the $35 a month, as stipulated in the contract, the same to be paid direct from the office of Coryell & Son in Lincoln, Nebraska. Plaintiff insists that this is the first time that he knew that for the balance of the eight years of the 10-year lease he would only receive $35 a month for his station, and he at once went to Lincoln and was told that Coryell & Son relied upon the instrument which he had signed. He then went to Lexington and insisted that Chandler and Pierce continue to make the payments of ¾ cent a gallon or surrender possession of the station to him, which they refused to do, and this lawsuit resulted.

The plaintiff's evidence is entirely different than that of Mr. Travis on their conversations. The plaintiff testifies on direct examination that Travis agreed to go to Lexington and make a new contract with Chandler and Pierce so it would show they must sell the Coryell products; that Travis asked him if, after his year was up, he would not take just $35 a month rent, and plaintiff said no, because it would not pay 6 per cent. on the principal and taxes and upkeep, but that the ¾ cent on a gallon would amount to more than the required payments, and, in addition, plaintiff mentioned he was also getting $15 a month rent on the other half of the building. Plaintiff said he told Travis he did not ever expect to take over the station as long as he could get ¾ cent for each gallon of gas sold.

Plaintiff testifies that on July 22, 1939, between 8:30 and 9:00 p. m., Jack Smith handed him two copies of the new agreement, exhibit No. 7, and after he had read it he went before a notary public and signed and acknowledged it. He claims he did not take as much time to read it as he would have done if they had not been in a hurry to find a notary at that time of night.

On cross-examination by Mr. Tunison, the plaintiff admits he did not tell Chandler and Pierce about his contract providing for exclusive handling of Coryell products, but, the way they talked, plaintiff said his expectation was they would handle Coryell gas.

On cross-examination by Mr. Johnson, plaintiff was asked the question: "Q. And did you ever make any objection to Coryell and company that that lease which they had sent to you did not properly and correctly reflect your understanding of the terms? A. No. I thought it was just for one year, and at the end of that time it would be over."

Plaintiff testified that he subsequently received his copy of the agreement back from Lincoln, with a letter from Mr. Travis. "Q. At any rate, you received it,—you received that letter? A. Yes, sir. Q. And you read it over again after you got it back, I take it? A. I don't know as I did. Q. You wouldn't say you didn't, would you? A. Well, I was down there working in the harvest fields, and I don't know as I did."

After trial of the case in the district court, a decree was entered, showing that all parties were present in court and represented by counsel, the evidence was taken, the cause argued and submitted to the court on May 27, 1941; that thereafter briefs were filed with the court, and on June 21, 1941, the court finds and adjudges generally for the defendants and against the plaintiff, and finds that the plaintiff is not entitled to the relief prayed in his petition, and therefore the cause of action of the plaintiff was dismissed by the district court.

In rendering this decision the district court said that its decision was based upon the case of *Beideck v. National Fire*

Ins. Co., 139 Neb. 171, 296 N. W. 873, the two syllabus paragraphs reading as follows:

"In an action for reformation of a written instrument, the burden rests upon the moving party of overcoming the strong presumption arising from the terms of the written instrument. If the proofs are doubtful and unsatisfactory and if there is a failure to overcome this presumption by testimony entirely plain and convincing beyond reasonable controversy, the writing will be held to express correctly the intention of the parties.

"Where the evidence, in an action for reformation of a written instrument, is sharply and irreconcilably conflicting, it becomes necessary to apply the well-known rule of equity that the evidence must be clear, convincing and satisfactory, and, in consequence, deny a reformation."

An examination of the *Beideck* case shows that a Lincoln agency issued a three-year policy of fire insurance on household goods located in a residence in Lincoln, in the amount of $2,000; that the plaintiffs loaded a large portion of the household goods on a truck and moved them to a farm in Minnesota, which they had rented, and where they intended to reside. While en route to the Minnesota farm, and near Fairfax, Minnesota, the truck caught fire and the goods were completely destroyed. The policy, in the form it was issued, did not allow recovery for this fire. The district court for Lancaster county found that, by inadvertence, accident, mutual mistake, or fraud, the terms of the contract agreed upon were not fully set forth in the policy of insurance, as the plaintiffs claimed that they told the agent they were going to the beet fields of Wisconsin, and would be gone some months, and wanted the insurance to cover the household goods at the residence in Lincoln, or wherever the goods might be, and Susie Beideck said the agent told her that he could furnish such a policy, and upon the delivery thereof she paid the $14 premium for three years, and supposed that she had the protection demanded. The agent for the company testified that he never made any such statements, that such a policy was not available to the plaintiffs nor any one else, that

no such insurance was written, that no such terms were discussed by them relating to the policy, and the decision of the lower court was reversed, and Judge Yeager said that, in the light of the established rule of law, there was not sufficient evidence on the part of the plaintiff to warrant a reformation of the policy in question; that to warrant a reformation the proofs must not have been doubtful, but must be satisfactory; they must be of sufficient weight to overcome the presumption that the written instrument signed by both parties correctly expressed the intention of the parties.

In *Paine-Fishburn Granite Co. v. Reynoldson,* 115 Neb. 520, 213 N. W. 750, Judge Rose said that a mistake for which a written instrument will be reformed must be a mutual mistake, and that a mutual mistake is one common to both parties, each laboring under the same misconception; also, that the burden of proof is on the party interposing the plea.

In the case of *Home Fire Ins. Co. v. Wood,* 50 Neb. 381, 69 N. W. 941, it was said generally that the burden rests upon the plaintiff of overcoming the strong presumption arising from the terms of a written instrument, and that if there is failure to overcome beyond controversy, the writing will be held to express the intention of the parties.

"In order to secure a reformation of a written contract on the ground of mistake, the evidence must be clear, convincing and satisfactory that the contract as written was made by mistake and does not reflect the real contract and agreement of the parties." *Oft v. Dornacker,* 131 Neb. 644, 269 N. W. 418. See, also, *Slobodisky v. Phoenix Ins. Co.,* 52 Neb. 395, 72 N. W. 483; *Hallgren v. Becker,* 94 Neb. 415, 143 N. W. 467.

"The right to reformation of a written instrument must be established by clear, convincing and satisfactory evidence, sufficient to overcome the strong presumption arising from the terms of the instrument that it correctly expresses the intention of the parties." *Neary v. General American Life Ins. Co.,* 140 Neb. 756, 1 N. W. (2d) 908. See, also, *Sutherland State Bank v. Dial,* 103 Neb. 136, 170 N. W. 666.

In the case at bar, there is no attempt to show that there was a mutual mistake in these instruments, and the excuse given by the plaintiff—that he signed the instruments without carefully reading them—does not meet the requirements of the law that the evidence of a mistake or fraud be clear and convincing.

The evidence of the plaintiff is absolutely in conflict with the evidence of others on the points in litigation. There is no dispute that the plaintiff had full and complete opportunity to carefully examine, weigh and consider every feature of the instruments which he signed. They were sent to the manager of the Coryell filling station at Grand Island, who had no interest in the matter whatever. There is nothing to show that the plaintiff could not have taken all the time that he needed for a careful examination and understanding of the contract he was signing, and he undoubtedly could have taken it to an attorney if there was any part of it which he did not understand.

"In an action in equity, this court will take into consideration the fact that the trial court observed the witnesses and the manner in which they testified, and must have accepted one version, rather than the other, of disputed facts." *Neihart v. Ingraham*, 140 Neb. 818, 2 N. W. (2d) 28. See, also, *Hole v. Hamp*, 134 Neb. 259, 278 N. W. 480; *Robinson v. Williams*, 136 Neb. 253, 285 N. W. 574; *Greusel v. Payne*, 107 Neb. 84, 185 N. W. 336.

Under all the circumstances in this case, and because of the fact that the trial court had an advantage over this court in seeing the witnesses while they were upon the stand, in noticing how they met cross-examination, and in judging their credibility, that court reached the conclusion that, under the evidence and the law, a case had not been made requiring a reformation of the instrument, and from our examination of the record, and the arguments made to this court, and the briefs submitted, we have reached the conclusion that the judgment entered by the trial court should be affirmed.

AFFIRMED.

GUY A. THOMPSON, TRUSTEE, APPELLEE, V. FRED F. SHIELDS, APPELLANT.

4 N. W. (2d) 1

FILED MAY 22, 1942. No. 31321.

1. **Commerce.** The interstate commerce commission has power and authority, as directed and authorized by congress, to regulate interstate commerce. See 49 U. S. C. A. secs. 11, 12.
2. **Carriers.** A common carrier, having adopted, filed and published schedules of rates and regulations governing transportation, as contemplated by 49 U. S. C. A. sec. 6 (7), and abiding by an item of the tariff that the marked tare weight will be used to arrive at the net weight of the load, such weight being obtained from stenciled figures on the side of the car carrying the cargo, has fulfilled its obligation in obtaining such weight. And where the consignee fails to avail himself of the tariff regulations respecting the reweighing of the cargo at the place of destination, but instead offers evidence of the tare weight obtained by weighing the empty trucks over his private scales, and without sufficient competent evidence to show shortage caused by the negligence of the carrier from any source, such evidence of weights so offered was properly rejected by the court, and the method of obtaining the tare weight, as provided by the tariff, is, under such circumstances, conclusive.

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

Frederick L. Wolff, for appellant.

J. A. C. Kennedy, Yale C. Holland and *L. J. Tierney, contra.*

Heard before SIMMONS, C. J., ROSE, EBERLY, CARTER, MESSMORE and YEAGER, JJ.

MESSMORE, J.

The plaintiff, trustee for the Missouri Pacific Railroad Company in Nebraska, debtor, brought this action to recover for freight charges for the transportation of coal over such railroad to defendant, in the total amount of $1,164.48, with interest. The district court directed a verdict for the plaintiff. The defendant appeals.

The plaintiff's petition contains eight causes of action,

setting forth the dates, weights and freight charges of eight cars of coal, shipped over the Missouri Pacific railroad to the defendant, praying for judgment in the total amount of $1,164.48, with interest thereon. The pleadings admit the trusteeship. The defendant's answer, counterclaim and set-off contains a general denial, alleges affirmatively that the railroad company as a common carrier was an insurer of the safe transportation and delivery of all merchandise placed in the plaintiff's possession; that between the dates of August 29, 1939, and April 9, 1940, 102 cargoes, including the eight cargoes described in the plaintiff's petition, were shipped from Pittsburg, Kansas, over plaintiff's railroad to defendant in Omaha; that there was a net total of 250.635 tons of shortage; that is, smaller weights than those charged by the plaintiff in his petition for the eight cargoes, and collected by plaintiff and his railroad from the defendant; 22.93 tons of which plaintiff was charging in his petition, and the remainder of which was by plaintiff illegally collected from the defendant, all at the rate of $2.40 a ton; further, that the 250.635 tons of coal were of the reasonable value of $1.80 a ton; that the overcharge freight collected, with the addition of the coal shortage claimed, totaled the sum of $1,052.64, for which amount, less credits, the defendant prays judgment.

The plaintiff's amended reply and answer to defendant's answer, counterclaim and set-off contains a general denial; alleges that the shipments made were in interstate commerce, subject to tariff rules and regulations promulgated by the United States and by the interstate commerce commission, which commission has control over the carriers in interstate commerce; that the plaintiff, prior to any shipment, filed with the interstate commerce commission and published a tariff covering the shipment of coal; that the shipments in the instant case consisted of washed coal, and that proper freight rates were charged, in accordance with the tariff rules and regulations; denies that it collected illegally any moneys from the defendant by overcharge, but complied with the tariff rules and regulations as re-

quired. A further allegation states that the shipments consisted of washed coal, which was immediately loaded into box cars and, before all the water was drained, was shipped, and that any shortage caused was due to "evaporation, leakage, or otherwise leaving said coal car;" that defendant received the coal delivered to the railroad company for shipment. Defendant's reply to the foregoing pleading contains a general denial and alleges that plaintiff's employees negligently failed and neglected to weigh or ascertain the tare weight, to wit, the true empty weight of the cars described in defendant's answer.

The record discloses that the plaintiff, to make a *prima facie* case, confined his evidence to the eight cargoes of coal. The tipple superintendent, whose duty it is to see that the coal is loaded in the cars, testified to the washing of the coal and cleaning thereof by a flotation process, the loading of the coal into the coal cars, flat or hopper cars; that he saw to it that only cars suitable for hauling such coal were used; that five cars were loaded March 9, 1940, one March 2, and two March 16. With reference to shrinkage, he testified: "In winter time shrinking wouldn't be as much as it would be in dry weather," and "there would be as much as 5 per cent. shrinkage where the weather would be warm;" that there would not be any shrinkage where weather would be cool.

The agent and yardmaster of the Missouri Pacific Railroad Company at Pittsburg, Kansas, testified to receiving the manifests and handling the coal shipments, and that he was familiar with the eight cars, the dates thereof, and that the same were tendered for shipment by the Commercial Fuel Company; the numbers were telephoned to him, were given by him to a conductor, with instructions to bring the cars out of the mine to Cornell, to be left in the train yard, and subsequently shipped to Omaha to defendant. The weights are all shown by exhibits constituting the original weigh tickets. The date shipped was testified to, also the freight charges on the eight cars, and that they constituted interstate shipments. The rate of $2.40 a ton was charged, based on the Cornell scale weight.

The billing clerk and weighmaster of the Missouri Pacific Railroad Company testified to weighing personally the eight cargoes as they went across the scale at Cornell, Kansas. They produced the original scale tickets, showing the weight, tare, gross and net, which tickets were received in evidence. The tare weight is obtained from the stenciled figures on the cars; the gross weight from the weighing of the cars loaded with coal, and the difference between the two constitutes the net weight.

The defendant's evidence discloses that he has been engaged in the coal business at his present location for 20 years; that the only slack coal coming into his yards was the 102 cargoes in controversy here, which were to be delivered to the school board; that the mill or washed coal arrived in the yard on the Missouri Pacific trestle, which held mill coal only. The evidence described the facilities of the yard; the gate constitutes the only entrance and exit; the yard is constantly supervised during each 24-hour period, and the bins that hold the coal are made for such purpose, to exclude the possibility of shortage. The scales used by the defendant were 20-ton Fairbanks truck scales, duly inspected as required by law, and all coal delivered from the yard passed over the scales; the weights were obtained by first weighing the truck empty and then the truck loaded with coal, the difference constituting the net weight. No coal left the yard without being weighed, and there was kept an accurate, detailed account of the weight of each truck leaving the yard involving the 102 cargoes. There is some testimony that incrustation appeared, caused by freezing of water, and water ran off the coal in many instances when it was delivered. Each cargo of coal was personally checked, and the defendant saw the coal from each of the cars dumped into its bin and supervised the loading of the coal into the trucks.

The defendant's counterclaim is based on sections 20-812, 20-813, 20-816, Comp. St. 1929. The law permitting the filing of counterclaim and set-off in cases of this kind is established. See *Chicago & N. W. R. Co. v. Lindell,* 281 U. S. 14, 50 S. Ct. 200, followed by this court in *Indiana Harbor Belt R. Co. v. Alpirn,* 139 Neb. 14, 296 N. W. 158.

The evidence is wholly insufficient to establish a shortage of coal when it arrived at the defendant's yards. There is no evidence of theft; the coal was washed; there is no evidence of evaporation; there is merely a statement that incrustation appeared, due to freezing or to some other cause. There is no evidence that the defendant availed himself of the right to have the coal reweighed at place of destination, as provided for by the tariff. The shortage and the weights applied thereto are based solely upon the defendant's evidence with reference to the weight of the coal over his private scales.

The question to be determined here is with reference to the exclusion of the defendant's testimony of the 1,202 weigh tickets, as shown by the private scales, the slips evidencing the weights, and the shortage evidenced by comparison with the carrier's weights. The shipment of coal involved constituted interstate commerce. There can be no question that the interstate commerce commission has power and authority, as directed and authorized by congress, to regulate interstate commerce. See 49 U. S. C. A. secs. 11, 12, creating the commission and giving it regulatory powers. The transcript in the instant case contains copy of the tariff filed by the carrier as required by law.

49 U. S. C. A. sec. 6 (7) provides in part: "No carrier, unless otherwise provided by this chapter, shall engage or participate in the transportation of * * * property, as defined in this chapter, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this chapter; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of * * * property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time."

We make reference to the tariff in the instant case, item 50 of which reads: "The marked tare will be used to arrive at net weight of the load." Then two exceptions follow,

neither of which applies in the instant case. The marked tare, of which the defendant complains, was obtained by taking the stenciled numbers on the side of the coal cars carrying the cargoes, then the cars were weighed for the gross weight and the net weight was determined by the difference between the stenciled tare and the gross weight. The defendant complains that the stenciled weight so taken was placed, in the first instance, by one not called as a witness, and the mere fact that it was subsequently written and recorded constitutes hearsay evidence. With this contention we are unable to agree. The tariff specifically provided for using the marked tare weight of the carrier. The bill clerk and weighmaster weighed personally the eight cars for which the plaintiff claims recovery; produced the original scale tickets, showing the weight, gross and net, which were offered and received in evidence.

The tariff further provides for the reweighing of the coal at destination and for procedure with reference to loss caused by moisture. We will not set forth the separate items of the tariff with reference to reweighing of the cargoes at destination, because the defendant did not avail himself of such provisions. All freight charges had been collected by the carrier, except those as set forth in the petition.

We conclude that the court properly rejected the scale weigh tickets as offered by the defendant. The purpose of the interstate commerce commission is to regulate the transportation of commodities over the carrier lines to the consignee, and to provide regulations necessary to carry into effect rates, transportation and weighing. To repeat: The tariff provided that the carrier was privileged to take the marked tare weight; this was obtained from the stenciled figures on the side of the coal cars. The tariff further provided the method by which the defendant could have had the cargoes reweighed at the place of destination. This he did not do, but offered scale weights over his own private scales, to constitute the basis of his counterclaim and set-off, without proof of negligence on the part of the carrier in causing any shortage in the coal, and without proof of the

loss of coal by reason of transportation, except by defendant's scale weights over his private scales.

In the reasonable transaction of business of this kind, the regulations imposed by the interstate commerce commission for adopting and publishing tariffs with respect to the transportation of coal over the lines of common carriers serve a useful and necessary purpose. To permit evidence of weights over private scales, under circumstances as existed in the instant case, would lead to extreme difficulty and permit the raising of limitless contentions and confusion, as between common carriers and the consignees, and deny the effectiveness of the interstate commerce commission and the purpose for which it was created.

For the reasons given, the judgment of the trial court is

AFFIRMED.

PIERCE COUNTY, APPELLEE, V. ROY GOFF, APPELLEE: ELEANOR O. ANDERSON ET AL., APPELLANTS.

4 N. W. (2d) 222

FILED MAY 29, 1942. No. 31328.

1. **Trial.** Where the rules of court do not require plaintiff to notify defendant of the time for trial of an equity case at issue and defendant's counsel consents in writing to a trial in his absence at a regular session of the equity court and does not thereafter withdraw such consent, counsel for plaintiff may proceed to trial at a subsequent session without notice of his purpose to do so.
2. **Counties.** Under the Nebraska revenue law the court, in a suit to foreclose a tax sale certificate, may award to plaintiff an attorney's fee equal to 10 per cent. of the amount found due, which shall be taxed to defendant as costs.
3. ———. When petitioned by ten freeholders, the county board may appoint special counsel to foreclose tax sale certificates held by the county.

APPEAL from the district court for Pierce county: ADOLPH E. WENKE, JUDGE. *Affirmed.*

A. R. Oleson, for appellants.

Harold S. Salter, contra.

Heard before SIMMONS, C. J., ROSE, EBERLY, CARTER, MESSMORE and YEAGER, JJ.

ROSE, J.

The county of Pierce, plaintiff, as holder of a tax sale certificate and of other tax liens on the west one-third of lot 3, block 31, original town of Pierce, owned by Eleanor O. Anderson, defendant, brought this suit in the district court for Pierce county to foreclose the certificate and the other liens. The certificate included delinquent taxes for the years 1931 to 1936, both inclusive, and the other liens consisted of taxes on the same lot for the years 1937 and 1938. The entire claim for taxes, interest and advertising was $1,214.76. The petition stated the facts essential to foreclosure.

Defendant admitted ownership of the lot described. Otherwise the answer to the petition consisted of a general denial and of pleas that interest on the taxes was not allowable, and that the taxes were void on account of fraudulent and excessive valuation of the lot beyond actual value and beyond valuations by comparison with other property generally for purposes of taxation.

The district court found there was due to plaintiff from defendant $1,214.76 with interest and decreed foreclosure accordingly. Defendant appealed.

Counsel for defendant contends that the judgment below should be reversed on the ground that the district court heard the case June 10, 1941, in the absence of defendant and her counsel without previous notice there would be a trial on that date. This point is not well taken for the following reasons: The rules of the district court provide for sessions of the court of equity in Pierce county January 11, February 8, March 7, June 9, September 4 and December 8, but do not require notice to defendants of trials in equity cases. Counsel for defendant addressed special counsel for plaintiff as follows December 4, 1940:

"My arm is still taped and bandaged and it is likely to be a

couple of weeks yet before it will be safe for me to travel. But do not wait for me. Just go ahead with your case and all I wish to ask of you is to have the reporter take down the proof you offer which bears upon that part of your case against my client."

There is nothing in the record to show that counsel for defendant withdrew his consent to a trial in his absence or that he desired to appear personally in the future to make a defense. The case was not brought to trial until June 10, 1941. Consequently the time to prepare for a defense or to redeem the lot from the lien of the taxes was extended more than six months. A bill of exceptions containing the evidence adduced was allowed. Under the circumstances, failure to give notice of the hearing and trial of the case, in absence of defendant do not constitute error.

Excessive valuation of the lot for the purpose of taxation and illegal allowance of interest on delinquent taxes are also subjects of complaint, but the record fails to disclose error in these respects.

In the decree of foreclosure, the trial court allowed in favor of plaintiff an attorney's fee of $121.48 to be taxed against defendant as costs, and this allowance is challenged by defendant as being outside the pleadings and the proofs. The petition alleges that plaintiff is entitled to an attorney's fee equal to 10 per cent. of the sum due on its claim. The revenue law, authorizing foreclosure of tax sale certificates, provides that the court "shall award to the plaintiff an attorney's fee equal to ten per cent. of the amount found due, which shall be taxed as part of the costs." Comp. St. 1929, sec. 77-2043. When petitioned by ten freeholders, the county board may employ such additional counsel in civil matters as they may deem necessary. Comp. St. 1929, sec. 26-903. The proofs in the case at bar show that special counsel was appointed in the manner provided by law and that the amount due plaintiff was $1,214.76. On the evidence adduced the law fixed and the court allowed the attorney's fee at 10 per cent. thereof. Other assignments of error are also found to be without substantial foundation in the record.

AFFIRMED.

BEN F. CONKEY, APPELLANT, V. HANS KNUDSEN, JR., ET AL.: HENRY FRANCISCO, APPELLANT: JAMES P. GOODFELLOW ET AL., APPELLEES: JOHN MCGONIGLE ET AL., CROSS-APPELLANTS.

4 N. W. (2d) 290

FILED MAY 29, 1942. No. 31217.

1. Boundaries: NAVIGABLE STREAMS: CHANGE OF CHANNEL. "Where a stream which is a boundary from any cause suddenly abandons its old and seeks a new bed, such change of channel works no change of boundary; the boundary remains as it was in the center of the old channel, although no water may be flowing therein. *State of Nebraska v. State of Iowa*, 143 U. S. 359." *Iowa Railroad Land Co. v. Coulthard*, 96 Neb. 607, 148 N. W. 328.
2. ———: ———: ———. "If the change in the stream is violent and visible, and arises from a known cause, such as a freshet, or a cut through which a new channel has formed, the original thread of the stream continues to mark the limits of the two estates. Gould, Waters (3d ed.) sec. 159." *Iowa Railroad Land Co. v. Coulthard*, 96 Neb. 607, 148 N. W. 328.
3. Waters. Evidence examined, and *held* to establish that the present situation and condition of the lands in suit were primarily occasioned by an "avulsion," and were not the result of "accretions" to the real estate of claimants herein, created or formed by the waters of the Missouri river.

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

George W. Leamer, M. R. Smith and *S. W. McKinley, Jr.*, for appellants.

D. Van Donselaar, Nagelstead, Pizey & Johnson, W. P. Warner, W. V. Steuteville, P. F. Verzani, Richard Twohig and *McCarthy & McCarthy, contra.*

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

EBERLY, J.

In this cause are presented appeals by parties in interest from certain judgments entered by the district court for Dakota county, Nebraska, on the 6th and 7th days of January, 1941, determining certain lands in suit to be "an accretion area" and directing division thereof on that basis.

This is the second appearance in this court of an action to quiet title to certain real estate against the following named defendants: Hans Knudsen, Jr., Clara Knudsen, Hans Knudsen, Jack L. Hamp, Lewis W. Newman (who is the same person as L. W. Newman), Maggie Leedom, Pearl M. Sanford, Sene Knudsen, Maude Harris, Harry J. Goodfellow, Martha E. Goodfellow, Otis Wood, "and all persons having or claiming any interest in and to all that part of the accretion land to the southwest quarter of northeast quarter and northwest quarter of southeast quarter of section 13, township 29, range 7 East of the 6th P. M. in Dakota county, Nebraska, more particularly described as follows: (Here follows a description by metes and bounds of the land claimed.)" All parties defendant named in plaintiff's petition were duly summoned either by personal service of summons or duly notified as provided by our Civil Code. Plaintiff also duly filed a *lis pendens* in such proceeding. On February 10, 1938, default was entered against Hans Knudsen, Jr., Clara Knudsen, Lewis W. Newman, Pearl M. Sanford, Maude Harris, Harry J. Goodfellow, and Martha E. Goodfellow, and "all persons having or claiming any interest in and to (lands heretofore referred to), real names unknown." No appeal was ever taken from this judgment or decree determining that the parties last named were in default for pleading, and it has become final. It is also disclosed by the record that in due course of pleading the defendants Hans Knudsen, Sene Knudsen, Maggie Leedom, Otis Wood and Jack L. Hamp filed their respective answers to the petition of plaintiff, taking issue with the allegations thereof. On February 1, 1937, Will Brewer, as an intervener, filed his petition of intervention in this action. On December 31, 1937, Ralph George, as an intervener, filed his petition of intervention in said cause. Both interveners set up alleged rights in the premises in suit and challenged plaintiff's right to recover the premises claimed by him. Intervener Will Brewer, as his answer and cross-petition to the petition of plaintiff, in substance, (1) denies plaintiff's allegation as to plaintiff's actual, adverse pos-

session of the lands described in plaintiff's petition; (2) sets forth his claim of title to a portion of the lands described in plaintiff's petition as an accretion to certain land owned by this intervener, of which he also alleges continuous, open, notorious, adverse possession of the lands described in his cross-petition for more than ten years last past, and prays that title thereto may be quieted in such cross-petitioner. Intervener Ralph George in his answer and cross-petition, in substance, (1) expressly denies that plaintiff or his grantors have ever had continuous, open, notorious, exclusive possession of the lands described in plaintiff's petition; (2) sets forth his claim of title to certain lands described in the cross-petition of said George as and by virtue of the same being a lawful accretion to the lands owned by him and described in his cross-petition, and further alleges adverse possession of such lands so described for more than ten years last past. Each of the aforesaid interveners pray for appropriate relief.

To the pleadings of defendants and cross-petitioners, plaintiff joined issue by filing his replies and answers thereto, all of which in substance contained general denials. After joinder of issues a trial was had in the district court for Dakota county, in which plaintiff, the defendants, and both interveners appeared and participated. Evidence and proof were introduced separately by and in behalf of each and all in support of the allegations set forth and contained in their respective pleadings. On March 31, 1938, a judgment was entered in said cause, which recites:

"On this 31st day of March, 1938, it being a day of the regular February, 1938, term of this court, this cause came on for further hearing, the evidence having been submitted at a previous hearing, and the court being duly advised in the premises finds that as to the defendants Hans Knudsen, Sene Knudsen, Maggie Leedom, Otis Wood and Jack L. Hamp, they have no right to, interest in, or lien upon the property described in plaintiff's petition * * * ; that all the allegations of plaintiff's petition are true as to the above named or designated defendants, and the plaintiff is the

owner of the premises described in his petition and he is entitled to the relief prayed. * * * It is therefore ordered, adjudged and decreed by this court that the possession and title of said plaintiff in the following described real estate (specific description follows, which is identical with the lands described in plaintiff's petition) and that all and any part of the same be quieted and the same is hereby quieted and forever confirmed as against the above named and designated defendants and each of them and all persons claiming by, through or under them or any of them, and the plaintiff has the fee simple title in said premises (here follows provision of decree enjoining above named defendants from having or claiming any right to or interest in the above described property) * * * ."

From the judgment thus entered Hans Knudsen, Sene Knudsen, Maggie Leedom and Otis Wood prosecuted an appeal to this court. To that appeal all other defendants, plaintiff, Ben F. Conkey, and interveners Will Brewer and Ralph George were made appellees. This appeal was filed in this court on June 30, 1938. The plaintiff and appellees, including both interveners, cooperated in securing the allowance of the bill of exceptions containing the evidence on which the case was tried and presented to the district court, and appeared in this court in this pending appeal by stipulation duly executed by them. The case was in due course thereupon determined in the supreme court in an opinion by Carter, J., duly adopted by this court on March 10, 1939, and now reported in 135 Neb. 890, 284 N. W. 737, as *Conkey v. Knudsen*, and the judgment entered in the district court was in all respects affirmed.

It will be noted that the judgment thus entered is, as to parties thereto and their privies, final and conclusive, and the same as affirmed by this court was not subject to be reopened, modified or revised by the district court except as by law expressly provided. It was a judgment on the merits, and as such concluded the parties thereto, not only as to the things determined, but as to matters which might have been determined. *Triska v. Miller*, 86 Neb. 503, 125 N. W. 1070.

Indeed, the rule adopted in this jurisdiction appears to be: "A person not a stranger to a judicial proceeding is bound thereby, and the record of such proceeding is admissible in evidence against him. (1 Greenleaf, Evidence [14th ed.] sec. 522.)" *Dorsey v. McGee*, 30 Neb. 657, 46 N. W. 1018.

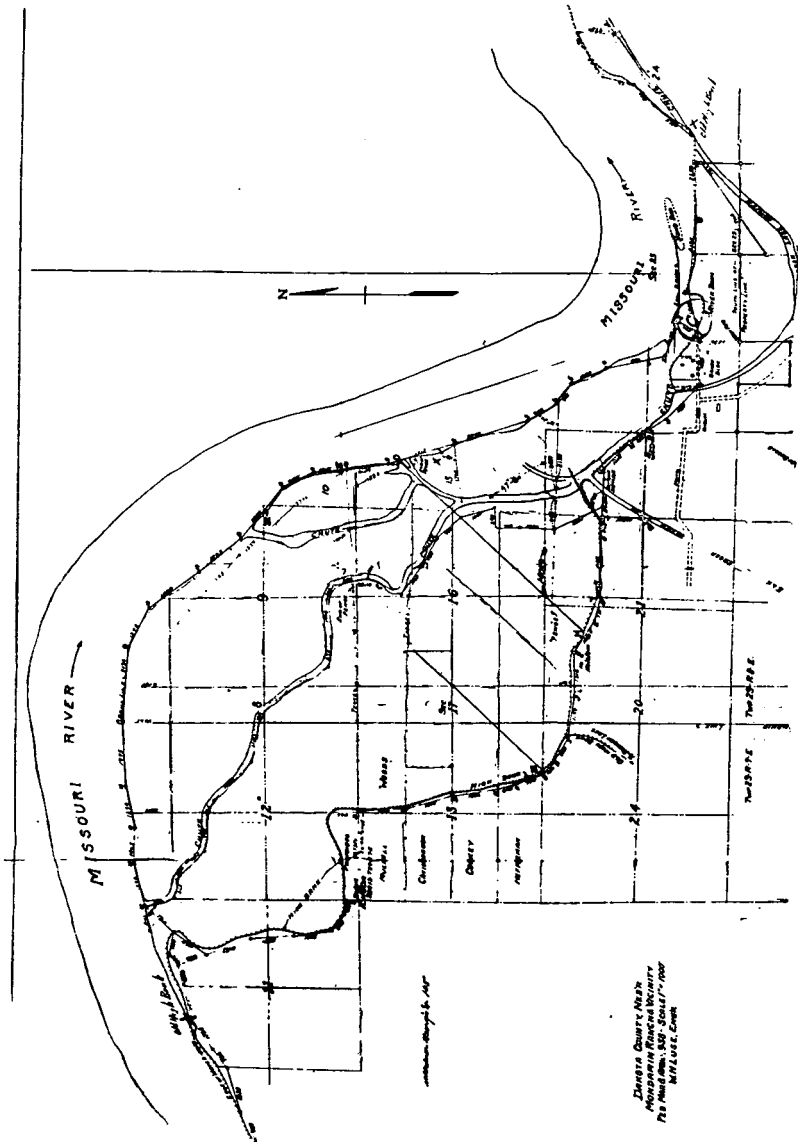
It thus appears that the determination of the issue of Conkey's adverse possession of the lands in suit was in necessary effect the controlling issue of the litigation. This title based on statutory adverse possession for the requisite period, so established, was necessarily hostile and superior to any right or title to the premises in suit possessed or claimed by the other parties to the judgment, whether as resulting from title deeds or as "accretions" to the real estate owned by them. The title by "adverse possession" adjudicated in Conkey by necessary implication is superior to and wholly invalidates all previously existing claims and titles opposed thereto on which the other parties defendant to the suit relied, and operated to adjudicate a superior title in fee simple vested in him. As to the appellants Hans Knudsen, Sene Knudsen, Maggie Leedom and Otis Wood, the judgment of March 31, 1938, of the district court for Dakota county quieting title to certain premises in Conkey, as against them, is final and conclusive. They are thereby precluded from claiming any rights whatever in or to such lands and may not invoke the powers of the district court in reference thereto.

However, the last paragraph of this decree of March 31, 1938, recites: "It is further ordered that the hearing, as pertaining to the interveners Will Brewer and Ralph George, be continued until April 18, 1938." But nothing further appears to have been done in this matter until after the decision of the case first herein referred to was announced by the supreme court. The mandate of the supreme court in the foregoing action was in due time transmitted to the district court for Dakota county and entered upon its records. The interrupted hearing pertaining to interveners Brewer and George was thereupon resumed, all of the evidence introduced in the case, which upon appeal had been

determined by the supreme court, was at least by tacit consent of all parties considered as then before the trial court and subject to its consideration. Thereupon on showing made that the lands involved in this proceeding constituted "one accretion area," which at the conclusion of this suit should be apportioned among the respective riparian owners in accordance with their respective ownership of riparian lands to which such accretion formed a part, certain parties were, upon order of the district court, made parties to the proceeding, and ordered served with process. To the making of this order plaintiff, Conkey, objected. However, the order of service of process was complied with. Without reciting the course of pleadings and the amendments thereto, the following in due time became parties to this proceeding and filed pleadings therein containing answers and cross-petitions, viz.: Cornelius K. Heffernan (who died testate after due service of summons made upon him and the action was duly revived and the interests owned and possessed by the deceased in his lifetime, by proper pleadings, presented by his successors in title to the consideration of the district court), James P. Goodfellow, Henry Francisco and Cora Francisco, his wife, Otis Wood, Peter E. Christensen, John McGonigle, Victor McGonigle, Bart McGonigle, Will McGonigle and Leo McGonigle. To the pleadings so filed there were duly filed such answers and replies as were required by the interests of the parties and the state of the pleadings. So it may be said that the issues were properly made up.

The situation presented may best be explained by the annexed map, which is made a part of this opinion. It is prepared from exhibit 105, introduced in evidence by intervener George. It covers the terrain involved in this law suit. The present course of the Missouri river is as delineated thereon. A "hatched line," identified by the letters A, B, C, D, etc., and marked "High Bank," extends from section 11 southerly to section 24, thence easterly in the direction of the present location of the Missouri river. Immediately prior to 1909 and the early days of 1910 the

"hatched line" referred to marked the western and southern bank of that river. The evidence is without substantial contradiction that this bank so indicated was then high, the



main or navigable channel of the river at this point was narrow, the current was swift, and the wash was along the western and southern banks. All interveners and other claimants base their claims of riparian rights in and to the so-called accretion area on their ownership of lands west and south of this "High Bank." Their contention is that the channel of the river after 1909 and the early days of 1910 gradually receded eastward and northward exposing the land between the "High Bank" and the present banks of the Missouri river, thus constituting it alluvium accreting to the lands of the defendants and interveners, of which such stream prior to its recession formed a boundary. In consideration of this contention, it may be said that the doctrine of accretion applies to states and nations as well as to individuals unless taken away or modified by treaties or stipulations. It applies to both navigable and nonnavigable streams, and it applies to large rivers like the Mississippi and the Missouri.

In reference to the question presented by this record this court was early committed to the doctrine: "What is an accretion to land? It seems to be a settled doctrine at common law, that an accretion to land is the imperceptible increase thereto on the bank of a river by alluvial formations, occasioned by the washing up of the sand or earth, or by dereliction as when the river shrinks back below the usual water mark; and when it is by addition, 'it should be so gradual that no one can judge how much is added each moment of time.' And when the formation of land is thus imperceptibly made on the shore of a stream, by the force of the water, 'it belongs to the owner of the land immediately behind it, in accordance with the maxim, *de minimis non curat lex.*' It is said that 'no other rule can be applied on just principles,' for the reason that 'every proprietor whose land is thus bounded, is subject to loss by the same means which may add to his territory, and as he is without remedy for his loss in this way, he cannot be held accountable for his gain.' In *Granger v. Swartz,* 1 Woolworth, C. C. R., 91, it is held that, if when the entry of

public land is made, the banks of the river, at any ordinary stage of water, was in fact where the meander line was represented by the survey, and land has since been formed by accretion, it will become the land of the person who has title to the land immediately behind it. *New Orleans v. United States,* 10 Peters, 717." *Lammers v. Nissen,* 4 Neb. 245.

In *Frank v. Smith,* 138 Neb. 382, 293 N. W. 329, the last case pertaining to this subject, we announced the applicable rules thus:

"Accretion is the process of gradual and imperceptible addition of solid material, called alluvion, thus extending the shore line out by deposits made by contiguous water, or by reliction, the gradual withdrawal of the water from the land by the lowering of its surface level from any cause.

"Where, by the process of accretion and reliction, the water of a river gradually recedes, changing the channel of the stream and leaving the land dry that was theretofore covered by water, such land belongs to the riparian owner. * * *

"Where the thread of the main channel of a river is the boundary line between two estates and it changes by the slow and natural processes of accretion and reliction, the boundary follows the channel. *Commissioners v. United States,* 270 Fed. 110."

All parties to this proceeding are in substantial agreement that as the Missouri river flowed in 1909 and the early days of 1910 the western and southern boundary of its main and navigable channel was marked by the line A, B, C, D, etc., as it appears on the annexed map, and which is also thereon marked as "High Bank," and that the thread of such channel as it then flowed with its western and southern limits thus situated constituted the true and common boundary lines of the lands situated west and south thereof, and of the lands situated east and north of such main channel. The question presented by this record is the nature and effect of the changes that occurred which resulted in the abandonment of the location of the main or navigable river channel, as last described, and its change to the north and

east so that it now flows as shown on the annexed map north and east of the area in this action alleged to be "an accretion area" and the subject-matter of this litigation.

Indeed, this case turns upon a disputed question of fact. However, a careful consideration of the evidence as an entirety convinces us beyond a reasonable doubt that this change was wholly caused by the formation of an ice gorge in the vicinity of Cisco Point during a season of high waters in the early spring of 1910 in the main or navigable channel then situated along the line A, B, C, D, etc. The result of this gorge was to substantially block and dam the original channel and to force the waters carried by the same to cut a new channel northerly and easterly for more than a mile, which waters then turned southerly and easterly and continued until they intersected the original channel of the Missouri river as it was then situated. As a result, when the freshet was over and the flood waters receded in the spring of 1910 to the ordinary stages of the river, the general situation of the main or navigable channel of the Missouri river was then flowing in a new channel as shown on the annexed map as its present location. At ordinary stages of the river the evidence fails to show that it ever returned to the main or navigable channel occupied in 1909. Really the evidence on this point is without substantial contradiction.

Willard Bacon, an engineer, testifying in reference to this alleged accretion, says, in part: "Q. You don't presume to say whether that is land made to the riparian banks by accretion or avulsion? A. No, I don't. I don't know definitely. Q. When you made this plat you placed on the plat a hatched line which you have designated as a high bank? A. Yes. Q. That, I assume, was the one time high bank of the Missouri river along what is known as the Conkey land? A. Yes. * * * Q. And at any time have you been able to vision any difference in accretion areas there in that vicinity? A. There are parts of the land that have been free from water erosion longer than others. In some places you find cottonwood trees that are pretty

old. In other places about all the timber you find is white willow growing up there a short time. * * * Q. Isn't it a fact, Mr. Bacon, that there were large trees and other evidence of vegetation east of the chute that gave indication of having been there for quite a while? A. There were trees, large trees west of the chute, but east of the chute was just yearling willows and there weren't any large trees."

The following constitutes an excerpt from the evidence of Henry Francisco: "Q. Do you know what year it was when the river was the fartherest west? A. The fartherest west? Q. Yes. A. It quit cutting there I think in 1909. Q. And it was in 1909 the river was right on the Conkey land, wasn't it? A. Yes, it was practically where the high bank is now. * * * Q. What way was the river running in 1909 in front of the Conkey land? A. Running south. * * * Q. Henry, when you say the river stopped cutting along the high bank in about 1909 that high bank was located just about where the high bank is located on exhibit 4? A. I didn't say started to cut in 1909. I said quit cutting in 1909. Q. And left the high bank? A. Yes. Q. And the high bank that was left at that time was in the same location as it is today? A. Practically the same as it is today. * * * Q. Are you sure that year was 1909, or was it thereabouts? A. I am pretty positive it was doing its last cutting in there in 1909. Q. That was perhaps in the spring, wasn't it? A. In the spring when the ice went out, in the June rise (1910). Q. When the ice went out in the spring? A. Yes. * * * Q. So then in 1910 the river changed its course and went off east? A. It went over east there. Q. The point at which it changed and started east was up around the north line of section 13, wasn't it? A. Above the north line of 13. Q. North of the north line of 13? A. Yes. * * * Q. When was that, in the year 1910? A. In the spring of 1910. Q. You mean to say in the spring of 1910 there was a great volume of ice against that west bank? A. You see it commenced to run slower—didn't have power enough and kind of blocked up. Q. During that period of ice gorge, the water was over that entire territory? A. Practically all.

Q. When the water went down the current of the Missouri river was way off to the northeast? A. The main current of the Missouri river was way over east, but there was a big bayou around on this south side. * * * Q. What was the general course of the main current of the stream after this ice gorge and the water had subsided and you found the current over to the northeast? A. It was practically straight south. Q. About how far east was it running then of its original, most westerly high bank? A. Must be close to a mile."

A part of the testimony of Will Brewer is as follows: (Brewer made a contract for the land in 1932 and closed the deal in 1934): "Q. You don't know any of the history of the river before you took the land, do you? Did you know where it was? A. No, I do not. Q. And the river hasn't run along the high bank since you got the land? A. No, sir, not that I know of. Q. In fact it wasn't in sight at all at the time you bought the land, was it? A. No, sir."

Birt Smith testified in part, as follows: "Q. That river went right south, didn't it, cutting off several miles? A. Yes, it went back quite a little bit. * * * Q. In 1909 wasn't the river on west of the Brewer land, is that right? A. No, that is not true. * * * Q. Where was the river in 1910? A. She moved back north and east again. * * * Q. It happened when, in 1909 or 1910? A. The spring of 1910. Q. Then the river run along this high bank and down along the Brewer land and on east in 1909, and then until 1910, is that right? A. She run down along there in 1909. Q. And then in 1910 you say it had an ice gorge? A. In the spring of the year; yes, sir. Q. Where was the ice gorge? A. Up near Cisco Point we always called it. Q. How far north of the farm that you farmed was that ice jam? A. About a mile and a half. Q. About a mile and a half north? A. About a mile and a half north; yes, sir. Q. And that ice jam, did it change the main channel of the Missouri river? A. Yes, sir. Q. And it caused the main channel to go off east? A. Yes, sir. Q. In 1910? A. Yes, sir, the spring of 1910. Q. Do you know how far east it went—did it go more

or less in an easterly direction toward the combination bridge? A. It was too muddy to see. Q. You know it did go on east? A. Yes. Q. Did it go north of section 16 when it jumped? A. I ain't positive, but I think it did. * * * Q. Was that the condition in 1909 when it was cutting in there? A. Yes. Q. More or less narrow along the high bank, was it? A. Yes. Q. And cutting fast? A. Yes, sir. Q. And that jammed in 1910, and has it ever been back along the high bank since 1910, Birt? A. No, sir. * * * Q. That was in the spring of 1910 that ice jam formed, was it? A. Yes, sir. * * * Q. At the time in 1910 when the ice gorge came near Cisco Point, as you have designated it, the river at the time was running along the west bank, is that true? That is along the Conkey land and toward the Brewer land as you have described? A. Yes, sir. Q. During that winter the river didn't erode any land in there or cut away any land? A. No. Q. Didn't recede or make any accretion, did it? A. No, sir. Q. When the ice gorge came in early 1910 the river was in the same channel as it was when it froze up in the fall? A. Certainly. Q. Then when the ice gorge came there was water over the entire territory? A. Yes. Q. The whole thing was covered with water? A. Yes, sir. Q. And when the ice gorge went out and the river again pursued its southeasterly course you found the river way off to the northeast? A. Yes, sir. Q. In an entirely different channel, is that true? A. Yes, sir. Q. And that happened in the spring of 1910? A. Yes, sir. * * * Q. Isn't it a fact, Birt, the river about that time, about 12 or 13 years ago, came back into that territory up there along the Brewer land and along this Mondamin section 21, and on east? A. No. Q. Did you say, Mr. Smith, the river has never been back in that vicinity since 1910? A. Yes, sir, I will say that. Q. You say that is a fact? A. Yes, sir. Q. Is your recollection that this high bank which has been described in the evidence as running east and west through the Brewer land was made by the erosion of the river about the year 1909? A. Yes, sir. Q. And then the river on account of an ice gorge left that territory entirely and went over to the

northeast, is that true? A. Yes, sir. Q. And has never been back in that territory since? A. No, sir. Q. Did you say in your direct testimony you lived on the Brewer land at one time, and that you fenced the Brewer land? A. Yes. Q. You of course then know the extent of that Brewer land? A. Yes, sir. * * * Q. Birt, you do know however the river in 1910 jumped from what you call the 'Cisco Point,' is that right? A. Yes, sir. Q. That Cisco Point was north of section 13, is that right? A. Yes, sir. Q. And then it went off to the northeast as far as you could see it? A. Yes. * * * Q. And left the high bank of the land east of the Conkey land and moved off in a jump? A. Yes, sir. * * * Q. Following this ice gorge in the spring of 1910 which you described in your testimony, and then the sudden change of the river, immediately after that change all of this land down northeast to the Conkey land and north of the Brewer land, etc., appeared there against those lands, is that true? A. Yes, sir. Q. So that the river was then to the north and east of this accretion land, that so-called accretion land, is that true? A. Yes, sir. * * * When it left Cisco Point, it started to the northeast. Q. Little to the northeast and then bent south? A. Yes, south and east, yes."

Hans Knudsen, testifying as to the condition of sections 16 and 17 of the so-called "accretion area" when he took possession thereof in 1933 and 1934, states: "Q. What was the character of the rest of the land that wasn't plowed? A. There was some good-sized cottonwood trees where they hadn't cut them up, but some fellows cut them off. They did that right there and cut them off in other places. There was willows. * * * Q. You say cottonwood trees—what is the size of these trees? How would they run? A. The biggest ones already cut, but some must be 2 feet in diameter, I think. * * * Q. And do you remember about the year that the river left that high bank, if it did? A. It left in 1910. Q. Do you remember the circumstances under which it left? A. Yes, I do. Q. Will you tell them to the court? A. I was in Jackson and the river was there, and there was a couple of fellows that was farming close to town, and we talked

about driving out. We drove out and picked up Joe Brennan north of Jackson a half a mile. Joe Brennan got in the wagon and we drove out to see the river probably a day or two after the river broke through to the east. Just what date it was I couldn't say, but it was 1910. Q. Did you observe anything else in the old river channel? A. The old river channel was full of ice. Q. There was what we call an ice jam in the old channel? A. Yes, sir. Q. About where did the river break away from the old channel and proceed east? A. Practically up there a little better than a quarter of a mile north of Wood's house. I think probably 10 or 15 rods farther north of his fence. Q. North of the north line of section 13 would it be? A. A little bit on the north line of 16, and of course that would be north of 13 too. * * * Q. And what is the general direction of the combination bridge from the point that it broke away? A. That combination is due east of the south line of 16. That would be a mile north of the combination bridge where it broke away. I would say about 8 miles straight east, perhaps a little better. That is about what it was. Q. So far as you could see it was proceeding almost east, was it, toward the combination bridge? A. Yes, it seemed that the ice gorge had thrown it out a little at that time, but after it got past the gorge it was going straight east. Q. And was that north of section 16 then or not? A. That would be 12 or 15 rods north of section 16 where that point is. Q. Did the river ever come back to this old high bank channel we have talked about in here? * * * Since 1910, I mean? A. No, sir. * * * Q. And when the river broke away from the point you have described in 1910 and proceeded east, did it leave this bar land remaining you have just talked of and described? A. Yes, sir. Q. And has it been there ever since, or do you know? A. The 'bar' has been there. * * * Q. What was the character of the river when it run along the high bank? Was it wide or narrow? A. Narrow, awfully narrow, and the high bank awfully high. Q. Still high, isn't it? A. Yes. * * * Q. The river was very deep and narrow? A. It must be deep, because it was narrow. * * * Q. The river was all

to the west of section 16 at that time? A. Yes, sir. Q. Was it to the west of section 17 also? A. Yes, sir. * * * Q. During the normal stages of the river was that land on sections 16 and 17 in about the year 1908 and 1909 dry or wet? A. It was dry. * * * Q. When this ice gorge gave way all this land was flooded, wasn't it? A. Last spring? Q. No, in 1910? A. No. Q. All this land wasn't flooded? A. No, sir. * * * Q. You have stated in your testimony you have been out all over this tract of accretion of bar land, or whatever it may be, and that you have examined the vegetation and growth on all of the 'bar' have you, isn't that true? A. I have been over that 'bar' a good many times; yes, sir. Q. You talked about there being some large trees? A. There is right now. Q. Where are they located, Mr. Knudsen? A. There are 4 pretty good-sized cottonwoods standing on the north half of the southwest quarter. Q. North half of the southwest quarter of section 16? A. Yes, sir. Q. Now where are there any other large trees on this tract? A. They are probably about the only 4 left standing. They were cutting them down and I told them they better leave those 4; the house was standing pretty close to them, and leave them for shade trees. * * * Q. At the time you observed the change of the river in the spring of 1910 was there the growth on this land which you are now occupying of cottonwood trees? A. Yes, there was cottonwood trees there. At that time I would say the willows were some of them 12 or 14 feet high, but there was cottonwood trees between them. Q. Were any willows at the time of the ice gorge and the change standing up above the water or ice in the river? A. There was some above them, above the water and the ice. Q. Could they be seen from where you were viewing the situation? A. Yes, sir. * * * Q. When this river made this change in the spring of 1910 along the new course which you have outlined in your testimony, was that down a former, abandoned channel of the river—the Missouri river—or was it entirely new territory? A. It was new territory it went across. * * * Q. Since 1910 it has never cut back into section 16 whatever? A. No, sir. Q.

Stayed at least a half a mile to the east of that section? A. Yes, sir. Of course when the water gets high there will be water running down this chute there, but as quick as the water going—goes down the river—(Interrupted) Q. From the spring of the years 1907, 1908 and 1910 to at least 1930 when the river would get high there would be water running along the high bank in front of Conkey's and Heffernan's, and along the Brewer land, isn't that a fact? A. Yes, when the river was high. Q. You have seen a lot of water north of the Brewer land in recent years, haven't you, between the high bank and the Brewer land in section 16? A. It backed up from the east. I haven't seen any running through there for 7 or 8 years probably. * * * Q. Mr. Knudsen, you were just asked if this land north of 21 had existed after 1910. Had it existed also before 1910? A. Yes, sir. Q. And was its character similar to its character as it is today? A. Yes, sir. Q. Before 1910? A. Yes."

Sophus Autzen testified in part as follows: "Q. And what, if any, action did the river take in 1910, if you know? A. Well, it changed off on the north side, and went down along on the north side of section 16, running north and east. Q. After 1910 did it continue running along the line between 'A' and 'B' or did it go east? A. It went east. Q. Did it leave its old channel as established between 'A' and 'B'? A. Yes. Q. And about where, if you know, did the river break away in 1910 and proceed east, break away from the old channel? A. Up along the north side of section 13. Q. North of the north line of section 13? A. Along the south line—along the north side of 13. Q. Do you know what, if anything, caused the change in the river at that time? A. An ice gorge. Q. Do you know whether the river since 1910 has ever come back to its old channel as exhibited between 'A' and 'B' on exhibit 'K'? A. No, never been back there since. * * * Q. When the river broke away from the point north of the north line of 13 and 16 what was the character of the land in section 17 and 16 at that time? A. It was willows and cottonwoods. Q. As compared with the way it exists today, was it different or about the same as it

exists today? A. Just about the same as it is now. * * * Q. Tell the court where this river bank ran east and west through section 21 in reference to the farm buildings. A. It run out from north on 13 and then east around 16 and hit over to where the ranch buildings are now."

The facts thus clearly established in the instant case invoke the application of the principles announced by the supreme court of the United States in *Nebraska v. Iowa,* 143 U. S. 359, 12 S. Ct. 396. The opinion of that court by Mr. Justice Brewer includes the following:

"It appears, however, from the testimony, that in 1877 the river above Omaha, which had pursued a course in the nature of an ox-bow, suddenly cut through the neck of the bow and made for itself a new channel. This does not come within the law of accretion, but of that of avulsion. By this selection of a new channel the boundary was not changed, and it remained as it was prior to the avulsion, the center line of the old channel; and that, unless the waters of the river returned to their former bed, became a fixed and unvarying boundary, no matter what might be the changes of the river in its new channel."

And, further: "It is equally well settled, that where a stream, which is a boundary, from any cause suddenly abandons its old and seeks a new bed, such change of channel works no change of boundary; and that the boundary remains as it was, in the center of the old channel, although no water may be flowing therein. This sudden and rapid change of channel is termed, in the law, avulsion. In Gould on Waters, section 159, it is said: 'But if the change is violent and visible, and arises from a known cause, such as a freshet, or a cut through which a new channel is formed, the original thread of the stream continues to mark the limits of the two estates.' 2 Bl. Comm. 262; Angell on Water Courses, sec. 60; *Trustees of Hopkins Academy v. Dickinson,* 9 Cush. 544; *Buttenuth v. St. Louis Bridge Co.,* 123 Ill. 535; *Hagan v. Campbell,* 8 Porter (Ala.) 9; *Murry v. Sermon,* 1 Hawks (N. Car.) 56.

"These propositions, which are universally recognized as

correct where the boundaries of private property touch on streams, are in like manner recognized where the boundaries between states or nations are, by prescription or treaty, found in running water. Accretion, no matter to which side it adds ground, leaves the boundary still the center of the channel. Avulsion has no effect on boundary, but leaves it in the center of the old channel."

In *Missouri v. Nebraska,* 196 U. S. 23, 25 S. Ct. 155, we have a case where it appears that prior to July 5, 1867, the bed and channel of the Missouri river were substantially the same as they had been continuously from the date of the admission of Nebraska into the Union. On that date and within a period of 24 hours, during a time of very high water, the Missouri river, which had for years passed around what is called McKissick's island, cut a new channel across and through a very narrow neck of land at the west end of Island precinct (of which McKissick's island formed a part), about a half mile wide, making for itself a new channel and passing through what was admittedly, at that time, territory of Nebraska. After that time the river ceased to run around McKissick's island. In the course of a few years, after a new channel was thus made, the old channel dried up and became tillable land, valuable for agricultural purposes, whereby the old bed of the river was vacated some 15 miles in length. The change in the bed or channel had become fixed and permanent; for, at the commencement of this suit it was the same as it was immediately after the change that occurred on July 5, 1867. On this state of facts the supreme court of the United States announced the rules:

"Accretion is the gradual accumulation by alluvial formation and where a boundary river changes its course gradually the parties on either side hold by the same boundary—the center of the channel. Avulsion is the sudden and rapid change in the course and channel of a boundary river. It does not work any change in the boundary, which remains as it was in the center of the old channel although no water may be flowing therein. These principles apply

alike whether the rivers be boundaries between private property or between states and nations.

"The boundary line between Missouri and Nebraska in the vicinity of Island precinct is the center line of the original channel of the Missouri river as it was before the avulsion of 1867 and not the center line of the channel since that time, although no water is now flowing through the original channel."

In *Kinkead v. Turgeon,* 74 Neb. 580, 109 N. W. 744, it appears that the case was submitted to this court upon a stipulation that in and since 1876 the plaintiff was the owner of riparian lands on the Missouri river, a navigable stream; that by a sudden change of the channel the waters receded from plaintiff's land and left an abandoned river bottom between the former high water mark of the river and the middle of its former channel which is now occupied by the defendants. The plaintiff prevailed in this court. In the opinion by Letton, J., the cases of *Nebraska v. Iowa,* 143 U. S. 359, 12 S. Ct. 396, and *Missouri v. Nebraska,* 196 U. S. 23, 25 S. Ct. 155, are cited with approval, and the controlling principle announced: "Where the Missouri river suddenly changes its course and abandons its former bed, the respective riparian owners are entitled to the possession and ownership of the soil formerly under its waters as far as the thread of the stream, and may maintain ejectment to oust squatters within such limits." See, also, *Stockley v. Cissna,* 119 Fed. 812.

And, again, in the still later Nebraska case of *Iowa Railroad Land Co. v. Coulthard,* 96 Neb. 607, 148 N. W. 328, the rule was reiterated in the following terms:

"Where a stream which is a boundary from any cause suddenly abandons its old and seeks a new bed, such change of channel works no change of boundary; the boundary remains as it was in the center of the old channel, although no water may be flowing therein. *State of Nebraska v. State of Iowa,* 143 U. S. 359.

"If the change in the stream is violent and visible, and arises from a known cause, such as a freshet, or a cut

through which a new channel has formed, the original thread of the stream continues to mark the limits of the two estates. Gould, Waters (3d ed.) sec. 159."

It is obvious that this so-called "accretion area" was not the result of the accumulation of alluvium occasioning a gradual and imperceptible change of the channel of the Missouri river. The cause of the change of this river channel was definite and certain, and due to an ice gorge created by a spring flood. The change thus effected thereby was not gradual and imperceptible, but definite, sudden and certain as to time and extent. This so-called "accretion area" had a definite and continued existence prior to the change of the channel in 1910 and its continuance thereafter was not affected thereby, nor were the legal rights thereto in any manner or to any degree terminated or impaired by its submergence from time to time occasioned by flood waters escaping from the ordinary channel of the Missouri river and passing over and across it, covering it in whole or in part and depositing on its surface silt, sand or other débris. *Widdicombe v. Rosemiller*, 118 Fed. 295.

It follows, therefore, that the designation of the lands in suit as a so-called "accretion area" is a misnomer; that the riparian rights of the owners of lands of which the Missouri river formed a boundary in 1909 and the early days of 1910 do not extend by virtue of riparian ownership beyond the thread of its channel as it then existed; that the rights to accretion beyond such boundary do not exist; and that the rights of adverse possession claimed or possessed by the parties to this litigation must be determined without reference to their claimed riparian rights or the fact that the premises to which such claims are made are alleged to be "accretion lands."

Thus, the decrees entered by the district court on the 6th and 7th days of January, 1941, are in all respects erroneous. These judgments are, therefore, reversed, and the cause is remanded for further proceedings in harmony with this opinion.

REVERSED.

EVELYN NOLLETT, SPECIAL ADMINISTRATRIX, APPELLANT, V. HOLLAND LUMBER COMPANY, APPELLEE.

4 N. W. (2d) 554

FILED MAY 29, 1942. No. 31414.

1. **Master and Servant:** INJURY TO EMPLOYEE: BURDEN OF PROOF. "The burden of proof is on the employee to prove by a preponderance of the evidence that personal injury was caused to the employee by an accident arising out of and in the course of his employment." *Bartlett v. Eaton*, 123 Neb. 599, 243 N. W. 772.
2. **Workmen's Compensation Law:** CONSTRUCTION. "Liberal construction of the workmen's compensation law to give effect to its purpose is a rule too well settled to admit of controversy, but the statute cannot be liberalized by judicial interpretation to allow noncompensable claims." *Burlage v. Lefebure Corporation*, 137 Neb. 671, 291 N. W. 100.
3. **Master and Servant:** EMPLOYEE: INDEPENDENT CONTRACTOR. In determining whether one is a servant or an independent contractor, the following facts may be considered: (a) The extent of control the master may exercise over the details of the work; (b) whether one is engaged in a distinct occupation or business; (c) whether the work is usually done under the direction of the employer, or by a specialist without supervision; (d) the skill required; (e) which one supplies the tools or equipment; (f) the length of employment; (g) the method of payment,—by the time, or by the job.
4. ———: INDEPENDENT CONTRACTOR. An "independent contractor" is one rendering service representing the wishes of the person for whom the work is done, only with respect to the result accomplished, not as to the means.

APPEAL from the district court for Douglas county: JOHN A. RINE, JUDGE. *Affirmed.*

Gray & Brumbaugh, for appellant.

Wear, Boland & Nye, contra.

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

PAINE, J.

This is a workmen's compensation case, to recover for the death of plaintiff's husband, who was accidentally killed when he fell from a roof upon which he was working. The

plaintiff secured an award from a judge of the compensation court, which award was set aside by the district court, from which judgment plaintiff appeals.

Defendant for its petition on appeal alleges that the plaintiff, Evelyn Nollett, filed petition in the Nebraska workmen's compensation court, alleging that she is the special administratrix of the estate of Felix O. Nollett, deceased; that Felix O. Nollett was an employee of the Holland Lumber Company, and as such employee sustained personal injuries, from which he died on June 13, 1941, and that at the time of his injuries and death he was earning $40 a week. Defendant alleges that thereafter it filed answer, admitting the injuries, but denying that Nollett was an employee of defendant, and alleging that said deceased and one Clyde Dirst formed a copartnership and as such were independent contractors, and that, while in the performance of said contract, and while acting as an independent contractor, deceased suffered the injuries from which he died.

The petition alleges that a hearing was had before the Nebraska workmen's compensation court, and on October 11, 1941, the court entered an award in favor of plaintiff and against defendant. Defendant states that the award and the findings of fact by said compensation court were not supported by the evidence, and that said court acted without or in excess of its power, and prays that the award be vacated and held for naught, and that the court enter a decree finding that Felix O. Nollett, deceased, was not an employee of defendant on June 13, 1941, but that he was an independent contractor, and that his injuries and death occurred while in the performance of an independent contract.

Attached to the petition as exhibit A is the award of the compensation court, granting plaintiff, Evelyn Nollett, compensation in the sum of $13.83 a week during a period of 325 weeks, and also the amounts of $150 for funeral expenses and $100 for medical expense, and to attorney Lawrence F. Welch the sum of $35 for legal services rendered to plaintiff.

Answer was filed by plaintiff, Evelyn Nollett, on October 23, 1941, admitting the filing of her petition in the Nebraska workmen's compensation court, in which she alleged that her husband, Felix O. Nollett, was on June 13, 1941, in the employ of defendant company as a roof applicator, and while so employed he fell and was killed in an accident which arose out of and in the course of his employment; that Nollett had been earning approximately $40 a week, and that because of such accident and death of her husband she is entitled, for the benefit of herself and two minor children, to be awarded the sum of $15 a week for 325 weeks, together with medical and funeral expenses. Plaintiff denies each and every allegation of defendant's petition on appeal except such as are admitted to be true.

On January 5, 1942, after trial, a judgment was entered by the district court, finding that plaintiff's decedent and one Clyde Dirst, who were operating as a roof applicating team, were applying a roof at 2226 Howard street, Omaha, on June 13, 1941; that decedent accidentally fell from said roof and received injuries from which he died on said date; that at the time of his injuries and his resulting death plaintiff's decedent was an independent contractor, and not an employee of defendant, but that Felix O. Nollett and Clyde Dirst were engaged in the performance of a contract entered into between the Holland Lumber Company and themselves, and while in the performance of said contract as such independent contractors plaintiff's decedent received the injuries from which he died.

The court further finds that the award of the compensation court is not supported by the evidence, and is contrary to law, and that plaintiff is not entitled to any benefits under the workmen's compensation act of Nebraska. It was therefore adjudged and decreed that the award of the compensation court be set aside and vacated, that the appeal by defendant to the district court be sustained, and the action of the plaintiff dismissed.

It appears from the briefs and argument that this is the first case of injury to a roof applicator which has come to

this court, and that the only question to be determined is whether the injured man was an employee or an independent contractor.

This court has held that whether one is an employee or an independent contractor, within the meaning of the workmen's compensation law, must be determined from the facts in the particular case, rather than from any particular feature of the employment or service. *Knuffke v. Bartholomew,* 106 Neb. 763, 184 N. W. 889; *Claus v. DeVere,* 120 Neb. 812, 235 N. W. 450; *Showers v. Lund,* 123 Neb. 56, 242 N. W. 258. Therefore, it will be necessary to set out briefly the facts in the case at bar.

On the following facts there is little dispute: Nollett was one of a roofing team, the other being Clyde Dirst. Nollett had been a carpenter, working on repairs to property, also he had worked for the Skaggs Store people. Dirst was not a carpenter by trade, but his experience had been confined to roofing. It is more satisfactory if two men work together in applying roofs, and the two of them applied to the Holland Lumber Company together for roofing work. These men each owned the necessary tools, ladders and scaffolding. Nollett owned a car, in which they hauled their equipment to the job. The second time they applied to the Holland Lumber Company for work, Mr. Ferriday, who had charge of the roofing department, sent them to a job on Burt street. In the conversation it was stated that they would receive a definite price per square. While the material was to be delivered there the next morning, these men went to the place with their ladders at about 4:00 p. m. the same day, found the material already there, and went right to work, and worked for two hours.

In putting on roofing, it is known to all that if it is very hot in the middle of the day some kinds of roofing will break in walking over it, and extra care must be taken, and on some jobs they could not work early in the morning if people were asleep in the house, so that hours of work would be determined by the conditions of the particular job.

When they reached a place on this first job where a val-

ley was to be applied, they waited for instructions from Ferriday, who told them that the Holland Lumber Company wanted a double thickness put on in the valleys, and he criticized the way they trimmed the roofing at the ridge, and wanted them to trim more carefully on other jobs, but he would let that first one go as they had trimmed it, as it was all right in that neighborhood. They were paid for this roofing work as each roof was finished.

The next job was on Spencer street, which they put on with no directions by Ferriday. They then went to a place on Howard street to work on a garage roof. On one job they received only 85 cents a square. When Nollett fell to his death, Dirst said he did not care to work any more on that job, and Ferriday hired some one else to complete the job.

The Holland Lumber Company was in the business of selling to its customers completed roofs, and they furnished all of the material, but the roofing was put on by regular applicators. This appears to be a general custom throughout the country, according to cases which will be cited later on. The money was paid to either Nollett or Dirst, and they split the money equally between them. The custom appears to be that such roofing teams get so much per square, varying with the kind of roof and the material applied, and the only understanding with the lumber company was that the work would be done in a workmanlike manner and in a reasonable time, and the prices they paid varied from 85 cents to $1.50 per square.

Much is made of the fact that Ferriday criticized the way the roof was trimmed on one of the jobs, but the lumber company only paid 85 cents a square for that particular job, but when they paid more on better jobs the trimming was done in a more satisfactory manner. These men did not go to work at any stated hour or time, but worked when they pleased.

"The burden of proof is on the employee to prove by a preponderance of the evidence that personal injury was caused to the employee by an accident arising out of and in

the course of his employment." *Bartlett v. Eaton,* 123 Neb. 599, 243 N. W. 772.

"Liberal construction of the workmen's compensation law to give effect to its purpose is a rule too well settled to admit of controversy, but the statute cannot be liberalized by judicial interpretation to allow noncompensable claims." *Burlage v. Lefebure Corporation,* 137 Neb. 671, 291 N. W. 100.

In determining whether one is a servant or an independent contractor, the following facts may be considered: (a) The extent of control the master may exercise over the details of the work; (b) whether one is engaged in a distinct occupation or business; (c) whether the work is usually done under the direction of the employer, or by a specialist without supervision; (d) the skill required; (e) which one supplies the tools or equipment; (f) the length of employment; (g) the method of payment,—by the time, or by the job.

The above items to be considered are based somewhat on statements found in 1 Restatement, Agency, 485-487.

It is shown by the evidence that this roofing team was told how the Holland Lumber Company wanted old valleys covered, and how they wanted the edges trimmed, which, it is contended, was the supervision of an employee, and yet this knowledge of a preference in these matters would not necessarily make these men employees under the facts.

It is always necessary that the final results of the work done shall meet the approval of those who pay for it.

The Holland Lumber Company knew nothing in advance about the tools or equipment to be used, and no directions were given about the kind of ladders, or how to attach or erect scaffolding, which things would contribute to the safety of the workmen, and if they had been employees, engaged in an admittedly dangerous work, the master would have doubtless directed such important operations very specifically.

An "independent contractor" is one rendering service representing the wishes of the person for whom the work is

done, only with respect to the result accomplished, not as to the means.

In *Hays v. Board of Trustees*, 86 Ind. App. 460, 158 N. E. 234, a roof repairer was held to be an independent contractor, and not entitled to compensation, when he fell from a ladder and received personal injuries, and a refusal to grant compensation was affirmed.

A lather was employed by a general contractor in New York state to lath a house at a stipulated price per thousand. Working hours were not prescribed. He paid his helpers, and furnished his own tools and scaffolds. In *Matter of Hurst v. Fehr & Sons*, 225 App. Div. 436, 233 N. Y. Supp. 393, such lather was held to be an independent contractor.

Another case, perhaps nearer the border line than the case at bar, was decided in a long opinion by the commission of appeals in Texas. T. J. Shannon worked in a planing mill, but owned an electric floor sanding and polishing machine. He earned $7 a day, but when using his surfacing machine charged $2.50 an hour, and did the work himself, sometimes having a helper. He had completed the work of fixing a floor in a bank directors' room when in detaching his machine he was electrocuted. It was held that he was an independent contractor, which is a person who, in the pursuit of an independent business, undertakes to do a specific piece of business, using his own means and methods, without submitting himself to their control in respect to all its details. *Shannon v. Western Indemnity Co.*, 257 S. W. (Tex. Com. App.) 522.

A late roofing case (1939) where the injured man was held to be an independent contractor is *Hart v. Kimball*, 122 N. J. Law, 217, 4 Atl. (2d) 493.

In a Michigan case, the written contract of a roofer provided that he should do the work according to specifications furnished by the defendant, and to make good any defects in workmanship. In short, it was a contract to do a job of roof-laying with full control of the work and means of accomplishing it. In doing this work he was an independent

contractor. *McCormick v. Sears, Roebuck & Co.*, 254 Mich. 221, 236 N. W. 785.

We have examined these and other cases from other states which involve roofing applicators. It appears to be a definite kind of work, which is performed in the same manner, and paid for at regular prices per square, the going price being higher in other states, but in each case we have found the courts of other states have often stated it was a close question, or a border-line case, but finally reach a conclusion that a roofer so engaged is an independent contractor, and no cases have been cited to the contrary.

Under the facts and the law, and in the light of the decisions of many other states, we have reached the conclusion that in the case at bar the plaintiff's deceased was an independent contractor, and that the judgment of the district court should be affirmed.

AFFIRMED.

LAWRENCE BROCK, ADMINISTRATOR, APPELLANT, V. HENRY C. LUETH, APPELLEE.

4 N. W. (2d) 285

FILED JUNE 5, 1942. No. 31361.

1. **Evidence.** Oral testimony may be received to show that the delivery of a promissory note was conditional or for a special purpose only.
2. ———. Facts showing that an indorsement on a note when executed is a substantive part of the note may be proved by parol evidence.
3. **Bills and Notes.** A memorandum on the back of a note *held* to be a part of the note, and where such a memorandum was made by agreement of the parties before signing, it will bind all the parties to it.
4. **Contracts:** CONSTRUCTION. "If a contract admits of more than one construction, one of which will render it inefficacious or nullify it, that construction should be adopted which will carry it into effect." *Horton v. Rohlff*, 69 Neb. 95, 95 N. W. 36.
5. **Wills.** The contention is made that an indorsement on the back of a note, signed by payee, which modified the terms of the note,

constituted an ineffective testamentary disposition of the property. *Held*, that such indorsement was not intended as a last will, but constituted only a part of the entire contract between parties possessing the capacity to contract.

APPEAL from the district court for Dixon county: ADOLPH E. WENKE, JUDGE. *Affirmed.*

Harry N. Larson and *Frederick S. Berry*, for appellant.

John E. Newton and *Richard E. Twohig*, *contra.*

Heard before ROSE, EBERLY, PAINE, CARTER, MESSMORE and YEAGER, JJ.

PAINE, J.

This is an action by administrator with will annexed to recover interest on a promissory note, in which Henry C. Lueth was the maker and his father, Andreas Lueth, was the payee. Jury waived and trial court found generally for the defendant and dismissed plaintiff's petition. Plaintiff appeals.

Petition was filed by Lawrence Brock, as administrator of the estate of Andreas Lueth, deceased, alleging that said Andreas Lueth died testate, and that plaintiff was on February 4, 1939, duly appointed administrator with will annexed of his estate; that on March 1, 1938, the defendant, Henry C. Lueth, executed and delivered to Andreas Lueth, deceased, a note in the sum of $3,000, payable on or before March 1, 1943, with interest at 4 per cent. payable semiannually from date, and if not paid when due principal and interest shall bear interest at the rate of 9 per cent. payable semiannually; that interest payments have been made on said note, viz., $60 paid September 5, 1938, as interest from March 1, 1938, to September 1, 1938, and $30 paid May 26, 1939, as interest from September 1, 1938, to December 1, 1938.

It is alleged that there is due and unpaid interest in the sum of $30, being balance of interest for the period of September 1, 1938, to March 1, 1939, and interest on said sum of $30 at the rate of 9 per cent. per annum from March 1, 1939, and plaintiff prays judgment accordingly.

Defendant for answer alleges that he is the son of A. W. (Andreas) Lueth, deceased, and resided with his father upon his farm in Dixon county, performing all kinds of farm work under the direction of his father from 1898 until about March 1, 1920, when he was about 32 years of age, with the exception of about six months when he was in the service of the United States government as a soldier; that he received no compensation for his work on the farm, excepting such small sums as his father gave him from time to time as spending money; that by reason of the services performed by defendant and Charles A. Lueth, another son of Andreas Lueth, the father was enabled to accumulate considerable property, part of said property being the two farms upon which plaintiff and his brother have resided as tenants immediately prior to March 1, 1938.

It is further alleged that on March 1, 1938, Andreas Lueth advised defendant that he desired to compensate his two sons for the services rendered by them in the accumulation of his property, and in pursuance thereof an oral agreement was entered into between them, whereby said Andreas Lueth should convey to defendant the 160-acre farm upon which defendant resided, and under which agreement defendant was to pay his father interest on the sum of $3,000 at the rate of 4 per cent. per annum during the lifetime of the father; that in fulfilment of the oral agreement the said Andreas Lueth went to the First National Bank of Emerson on said March 1, 1938, and requested F. A. Mieras, the cashier, to prepare the necessary deed and papers to consummate the agreement, and Mr. Mieras prepared the deed and the note hereinabove mentioned, placing on the back of the note the following indorsement:

"Emerson, Nebraska, March 1, 1938.

"The within note to be delivered to the maker Henry C. Lueth upon my death, and to be canceled by the Executor of my estate before his making delivery of same. No payment of any interest or principal to be made by maker after my death in any event.

"(Signed) A. W. Lueth

"F. A. Mieras, Witness."

In pursuance thereof, Andreas Lueth executed and delivered to defendant the warranty deed, and upon the statement of said Andreas Lueth that defendant would never be required to pay any part of the principal of the said note, but would only be required to pay the interest thereon so long as the said Andreas Lueth should live, defendant signed said note, and the father, Andreas Lueth, signed said indorsement.

The answer alleges that Andreas Lueth died on December 1, 1938, leaving a last will and testament, executed on October 27, 1938, and which will contains the following paragraph:

"I am also mindful of my sons Henry C. Lueth and Charles A. Lueth. As they have heretofore received their just share of my estate, represented by farm real estate, they shall receive no further share in the distribution of either real estate or personal properties which may be included in my estate, at the time of my demise."

Defendant alleges that the gross value of the real and personal property of the estate of Andreas Lueth at the time of his death, exclusive of the alleged promissory note of defendant and a similar note executed by Charles A. Lueth under a similar oral agreement, and exclusive of advancements made to the sons and daughters named in said will and their spouses, exceeds the sum of $18,000; that advancements made to the six daughters or their spouses, and to another son of said Andreas Lueth, exceeded the sum of $10,800; that the value of the land conveyed to this defendant did not exceed in value the sum of $8,000.

Defendant alleges that on September 5, 1938, he paid interest to his father in the sum of $60 to September 1, 1938, and on May 26, 1939, paid to plaintiff the sum of $30, being interest on said note from September 1, 1938, to December 1, 1938, the date of the death of Andreas Lueth.

Defendant claims that the transfer of the real estate to him was an absolute gift from his father in recognition for services rendered to him in the accumulation of his prop-

erty, and which the father considered to be due defendant, reserving to himself only an annuity equal to the interest on the sum of $3,000 at 4 per cent. per annum; that defendant was not then indebted to said Andreas Lueth in any sum whatsoever; that there was no consideration whatsoever for the execution and delivery of said $3,000 note from defendant to Andreas Lueth, and the only purpose of said $3,000 note was to insure to his father the payment of 4 per cent. interest on $3,000 so long as the father should live. Defendant alleges that he has complied with every part of the agreement with Andreas Lueth, and is not now indebted to plaintiff herein in any sum whatsoever for interest or principal on the note set forth in the petition.

Motion and demurrer being overruled, the plaintiff filed a reply, admitting the execution and delivery of the deed and the preparation of the note heretofore described, and admitting that Andreas Lueth died on December 1, 1938, leaving a last will and testament which has been duly admitted to probate, which will contained the paragraph in reference to defendant heretofore referred to, and plaintiff denies each and every allegation of new matter stated in said answer, except such as admit allegations of plaintiff's petition.

The cause was tried to the court on July 8, 1941, and taken under advisement, and on September 27, 1941, judgment was rendered, finding generally for the defendant, and that the indorsement appearing upon said note was placed thereon and signed by payee prior to the execution and delivery of said note by the defendant, Henry C. Lueth; that said note was given by defendant to Andreas Lueth in consideration of the execution and delivery to defendant by Andreas Lueth of a deed to the real estate; that the execution and delivery of said note, the indorsement thereon, and the deed were all a part of the same transaction, and must therefore be considered and construed together; that the agreement entered into by the defendant and Andreas Lueth was an agreement solely for the payment of interest upon said note during the lifetime of the payee, and that all

liability of the defendant thereon ceased as of the time of the death of Andreas Lueth; that the indorsement does not constitute a testamentary disposition, but is a part of the original note, and must be considered as such.

The court further found that, the several instruments having been executed and delivered as a part of the same transaction, parol and extrinsic evidence is admissible to show their purpose, and that the parol evidence received at the trial was correctly admitted. It was therefore ordered and adjudged by the court that plaintiff's petition be dismissed, and judgment was entered against plaintiff for the costs of the action.

The plaintiff sets out 12 assignments of error, insisting that the motion and demurrer were both good, and should have been sustained, and

That the court erred in admitting in evidence over plaintiff's objections oral statements claimed to have been made by Andreas Lueth, the deceased, to the effect, or tending to show, that defendant was to pay only interest on the note sued upon as long as said deceased lived, and did not want defendant to pay the note, and the court erred in overruling plaintiff's objections to such testimony;

That the court erred in admitting in evidence over objection oral statements claimed to have been made by said deceased, to the effect that when he was dead the note sued upon was dead;

That the court erred in permitting the witness F. A. Mieras to testify over objection that said Andreas Lueth told him prior to the signing of said note that he never expected and never intended that the boys should ever pay the notes, but wanted to draw the interest from the notes;

That the court erred in admitting in evidence over objection oral testimony contradicting, varying and changing the promise of the defendant contained in said note to pay the amount at the time and as specified in said note.

In addition to these, the principal proposition of law relied upon for reversal is that the indorsement on the back of the note was an attempt by the payee to dispose of the

note following his death, and has all the elements of a testamentary instrument; it was not a valid disposition, because it was not executed in accordance with the statute (Comp. St. 1929, sec. 30-205), which specifically requires two witnesses to subscribe in the manner and form set out therein.

The evidence in this case is rather brief, as the bill of exceptions consists of but 80 pages, and the only witness called in support of the petition was the plaintiff himself, who testified, in brief, that Henry C. Lueth, the defendant, had first been appointed as special administrator, and upon plaintiff's appointment as administrator the said Henry C. Lueth had turned over to him the contents of the safety deposit box in the First National Bank of Emerson, which included the note, exhibit No. 1, which was received in evidence without objection, whereupon the plaintiff rested his case.

The defendant testified that he had lived on the quarter-section of land two and a half miles northwest of Emerson for 50 years, excepting when he was in the army in the first World War, and was 53 years old, and that this was the home place; that in 1918 he was married, and the next year the father had moved into the town of Emerson to reside.

The evidence of the witnesses shows generally that along in the spring of 1938 Andreas Lueth, an elderly gentleman, called his two sons and told them that he intended to turn two farms over to them, and he stopped at the bank and asked Mr. Mieras, the banker, to prepare deeds to the two farms to the two sons, and later the two sons went into the bank with their father, and he stated at the time that he wanted a note from each of the sons in the sum of $3,000, and they were so prepared by the banker. There was some talk at that time as to what Andreas Lueth expected from the sons, and he told the sons that he wanted a little money as long as he lived, and if they would each pay him $120 a year that was all he wanted, and he directed Mr. Mieras to fix up an agreement in that way, and he placed an indorse-

ment on the back of the note, which the father signed before the defendant signed his note.

F. A. Mieras testified that he had been cashier of the First National Bank of Emerson since 1926, and that Andreas Lueth did his banking business there; that about March 1, 1938, he came into the bank and asked the witness to draw two deeds to turn the two farms over to his two sons, Charles and Henry, which was done that date. Several months later, he brought his two sons into the bank, and he signed the deeds, and mentioned that he wanted each of the boys to give him a note for $3,000, "and asked me if I would draw those notes and I did. * * * He never expected, never intended that the boys should ever pay these notes, never wanted them to pay the notes but wanted to draw the interest as an income from the principal of the notes. He asked me if I would make some stipulation on the note reciting his request, which I did. * * * The indorsement on the back was signed after I had written it out. I handed it over and asked if that was what he wanted and he said it was and he signed it and then he handed the notes to the boys and they signed the notes. * * * Q. After the signing of the notes and deeds as you have recited, Mr. Mieras, what was done with the several papers? A. The notes were put in Mr. Lueth's box and the deeds given to the boys and they handed them to me for record and I sent them up for record."

The testimony of the brother, Charles, agrees with the testimony of Henry and the banker, and adds this information,—that Charles objected to signing his note, as he could pay the note, or part of it, in cash right then, but his father told him it never had to be paid, so he signed it, and the father also told Henry that his note was not supposed to be paid either.

It will thus be seen that, as the plaintiff was the only witness who testified in support of the petition, and his evidence was closed when he introduced the note, therefore there is no dispute between the parties in the evidence.

Objections were constantly made by counsel for the plain-

tiff at every step of the taking of the oral evidence on the ground that the testimony offered was for the purpose of altering, changing, or contradicting the instrument sued upon, or the indorsement on the back thereof, or both of them, and that any attempt to change and vary the terms by oral testimony was incompetent.

However, the negotiable instruments law specifically allows testimony to be given, "and in such case the delivery may be shown to have been conditional or for a special purpose only." Comp. St. 1929, sec. 62-116.

Parol evidence is generally admissible when it is offered for the purpose of explaining and showing the true nature of the transaction between the parties. Such evidence is not offered for the purpose of varying the terms of a written instrument between the parties. See *Gifford v. Fox*, 2 Neb. (Unof.) 30, 95 N. W. 1066; *Davis v. Sterns*, 85 Neb. 121, 122 N. W. 672; *Spangenberg v. Losey*, 116 Neb. 112, 216 N. W. 191.

"Effect must be given to a written memorandum and deed executed pursuant thereto as one transaction, in the light of the facts as they existed at the time of the execution and delivery of the deed." *Tate v. Kloke*, 93 Neb. 382, 140 N. W. 278.

"In an action on a promissory note between the immediate parties thereto, testimony tending to prove the purpose for which a note is given does not violate the 'parol evidence rule.' Such evidence is specifically admissible under the negotiable instruments law." *People's State Bank v. Smith*, 120 Neb. 29, 231 N. W. 141.

"The general rule is that, in the absence of anything to indicate a contrary intention, instruments executed at the same time, by the same parties, for the same purpose, and in course of the same transaction, are, in the eye of the law, one instrument, and will be read and construed together as if they were as much one in form as they are in substance." *Thompson v. Jost*, 108 Neb. 778, 189 N. W. 169. See, also, *Nebraska Hardware Co. v. Humphrey Hardware Co.*, 81 Neb. 693, 116 N. W. 659.

"Facts showing that an indorsement on a note when executed is a substantive part of the note may be proved by parol evidence." *Doll v. Getzschmann,* 90 Neb. 370, 133 N. W. 417.

A memorandum on the back of a note was held to be a part of the note, and where such a memorandum was made by agreement of the parties before signing, it will bind all the parties to it. *Polo Mfg. Co. v. Parr,* 8 Neb. 379, 1 N. W. 312. See, also, *Specht v. Beindorf,* 56 Neb. 553, 76 N. W. 1059; Annotation, 13 A. L. R. 251.

"It is a general rule, well supported by authority, that marginal notations or memoranda, placed on a bill or note at the time of the execution thereof with the intention of making them a part of the contract, constitute a part of the contract, and must be construed with the body of the instrument to arrive at the true agreement existing between the parties." 7 Am. Jur. 816, sec. 53. See, also, 12 Am. Jur. 518, sec. 22; 10 C. J. S. 480, sec. 44.

"A memorandum upon a note made contemporaneously with and delivered with it, and intended as a part of the contract, is a substantive part of the note, and qualifies it the same as if inserted in the body of the instrument, and with it constitutes a single contract. *Benedict v. Cowden,* 49 N. Y. 396." *Grimison v. Russell,* 14 Neb. 521, 16 N. W. 819.

It is clear from the very terms of the note, and the indorsement on the back, that this note was given solely as a matter of form to secure the payment of $120 annuity to the father so long as he lived, and the special indorsement specifically states that the note is not to be collected after the father's death, but returned to the maker. It may be admitted that a lawyer could have handled this in a better manner, yet in our opinion there is no doubt about the agreement or intention of the parties.

The appellant insists that, if the indorsement on the back of exhibit No. 1 is testamentary in character, then we are confronted with section 30-205, Comp. St. 1929, as amended, which provides, in substance, that no will shall be effectual

to pass any property, or in any way affect the same, unless attested and subscribed in the presence of the testator by two or more competent witnesses. Many authorities are cited in support of this proposition.

In the opinion of this court, the indorsement on the back of the note, signed by the father before he asked his son to sign it, and the note, and the delivery of the deed by the father to his son, the defendant, were all a part of one and the same transaction, and must rightly be construed together as a single contract between the parties. Such contract provided clearly that the son should pay the reserved annuity of $120 so long as the father lived. Having reached this conclusion, we reject the contention of plaintiff that the indorsement on the back of the note was a will or a testamentary disposition of any kind.

In *Horton v. Rohlff*, 69 Neb. 95, 95 N. W. 36, it was held: "If a contract admits of more than one construction, one of which will render it inefficacious or nullify it, that construction should be adopted which will carry it into effect." See 4 Neb. Law Bulletin, 226; *People v. Gosper*, 3 Neb. 285.

The following language in an opinion by this court seems in point: "Taking up first the claim of an attempted testamentary disposition of the property of the deceased, we find ourselves unable to agree with that contention. A testamentary disposition of property involves the act or will of a single individual, a condition that does not here exist. The question involved is rather one arising out of contracts between parties in every respect possessing the capacity to contract. The rights of the parties must, therefore, depend upon their contract obligations, and in the determination of those rights the contracts should be considered in the light of surrounding circumstances and the condition of the parties at the time of making them. Where the parties to a contract have, with a knowledge of its terms, given it a particular construction, such construction will generally be adopted by the courts in giving effect to its provisions. *Paxton v. Smith*, 41 Neb. 56; *Lawton v. Fonner*, 59 Neb. 214." *Fiscus v. Wilson*, 74 Neb. 444, 104 N. W. 856.

"Where the payee of a note carrying interest agreed to cancel the note in consideration of the maker's annual payment during the payee's lifetime of the amount of the interest reserved and the date of payment was changed, there was a sufficient consideration to support the agreement for the discharge of the note, though the payee was then over 90." *Diehl v. McKinnon,* 155 N. W. 259 (173 Ia. 32). See also, *Stroemer v. Van Orsdel,* 74 Neb. 132, 103 N. W. 1053; *Rice v. Lincoln & N. W. R. Co.,* 88 Neb. 307, 129 N. W. 425.

The court has examined all the other assignments of error, but, having discussed at some length the ones presented most vigorously, will not include a discussion of the other points.

We have reached the conclusion that the indorsement on the back of the note, signed by the father and payee before the maker signed the note, must be sustained as valid, and the judgment of the trial court is hereby

AFFIRMED.

STATE, EX REL. JAMES J. RALSTON, RELATOR, V. GEORGE H. TURNER, CLERK OF THE SUPREME COURT AND SECRETARY OF STATE BAR COMMISSION, RESPONDENT.

4 N. W. (2d) 302

FILED JUNE 5, 1942. No. 31279.

1. **Constitutional Law.** The character of police regulation, whether reasonable, impartial and consistent with the Constitution and the state policy, is a question for the court.
2. ———. When the legislature passes an act which plainly transcends the police power of the state, it is the duty of the judiciary to pronounce its invalidity.
3. **Courts.** Territorial courts are legislative courts, created in virtue of the national sovereignty, under clause 2, sec. 3, art. IV of the Constitution of the United States.
4. **Constitutional Law.** Establishment by Constitution of judicial department conferred authority necessary to exercise its powers as coordinate department of government. Const. art. V, sec. 1.
5. ———. "The term 'inherent power of the judiciary' means that power which is essential to the existence, dignity and functions

of the court from the very fact that it is a court." *In re Integration of the Nebraska State Bar Ass'n*, 133 Neb. 283, 275 N. W. 265.

6. **Attorney and Client.** "The supreme court is vested with the sole power to admit persons to the practice of law in this state and to fix the qualifications for admission to the bar." *State v. Barlow*, 131 Neb. 294, 268 N. W. 95.

7. ———. "The supreme court of this state has the inherent power to regulate the conduct and qualifications of attorneys as officers of the court." *In re Integration of the Nebraska State Bar Ass'n*, 133 Neb. 283, 275 N. W. 265.

8. ———. Section 25, art. V of the Constitution of Nebraska, contemplates that the supreme court may promulgate rules of practice and procedure for all courts, and does not limit the judicial power with respect to making rules setting forth the qualifications for applicants to take examinations for admission to the bar.

9. ———. Section 27-210, Comp. St. 1929, contemplates that the judges of the supreme court shall, during certain periods of time, revise general rules of the court and adopt additional rules, necessary or appropriate for the dispatch of business, and does not relate to the supreme court fixing qualifications for applicants to take examinations for admission to the state bar.

10. ———. Sections 27-231, 27-233, 27-235, Comp. St. Supp. 1939, provide in part that the supreme court shall have the power to promulgate general rules of practice and procedure, and do not relate to the supreme court fixing qualifications of applicants to take examinations for admission to the state bar.

11. **Constitutional Law.** The classification as contained in rule 3, adopted by this court, is not arbitrary, unreasonable and without rational basis and not violative of the relator's rights under the Constitution of the United States, in that such rule denies him the equal protection of the law, or deprives him of his property rights and liberty without due process of law.

12. ———. The Fourteenth Amendment to the Constitution of the United States does not grant the right to practice law; nor is the right to practice law in the courts a privilege or immunity, within the meaning of the Fourteenth Amendment.

13. ———. Where legislation from and after the adoption of the Constitution of 1875 until 1941 has not attempted in any manner to assert exclusive power to prescribe qualifications of applicants for admission to the bar, or to overrule any rule of the court relating to the qualifications of an applicant for admission to the bar, and the court has recognized that, within the limits of the police power, the legislature has prescribed minimum requirements for admission of an applicant to the bar; *held*, not to

constitute acquiescence by the court that the legislature alone has the power to prescribe the qualifications of an applicant for admission to the bar.

14. **Attorney and Client:** CONSTITUTIONAL LAW. Where a legislative bill constitutes an endeavor on the part of the legislature to go beyond the concept of minimum requirements of an applicant to take examination for admission to the bar and denies the judicial department the power to place higher qualifications than those specified in the act, and, in fact, usurps the power of the judiciary in such respect; *held,* such legislative act is unconstitutional.

15. ———: ———. Even if the subject of the legislation was a proper exercise of legislative power, the legislative bill in the instant case is unconstitutional and void in that it definitely freezes the class.

Original action by the state, on the relation of James J. Ralston, against George H. Turner, clerk of the supreme court and secretary of the state bar commission, to obtain a writ of mandamus to compel him, as an administrative officer, to accept and file the relator's application to take the state bar examination. *Writ denied.*

Elmer E. Thomas, John A. Ryan and *Samuel L. Winters,* for relator.

Hall, Cline & Williams, for respondent.

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

MESSMORE, J.

The relator brought this original action to obtain a writ of mandamus against the clerk of the supreme court and secretary of the state bar commission, to compel him, as an administrative officer, to accept and file the application of the relator to take the state bar examination.

It is not questioned that the relator possesses all of the qualifications and made the proper application to take the state bar examination, as provided for in L. B. 114, an amendment to section 7-102, Comp. St. 1929 (Comp. St. Supp. 1941, sec. 7-102). The application, together with a tender of the fee therefor, was rejected by the defendant (respondent), for the reason that the law school from which

the applicant graduated was not a reputable law school, within the meaning of rule 3 of the rules of the supreme court for admission of attorneys. Applicant entered the University of Omaha Law School in February, 1938, and graduated therefrom June 13, 1941,

Rule 3, adopted by this court June 5, 1937, is in part as follows: "A reputable law school within the meaning of this rule for admission to the bar is one on the approved list of the standardization agency of the American Bar Association, or, until July 1, 1940, any other law school now operating in the State of Nebraska receiving the approval of the Supreme Court."

L. B. 114 (Comp. St. Supp. 1941, sec. 7-102) reads in part as follows: "All resident law schools now organized, operating and existing within this state are hereby declared to be reputable law schools; and graduates of any such law school are hereby declared to be eligible to take and may take the bar examinations hereinbefore provided for without discrimination; and, upon passing such examinations, they shall be admitted to the practice of the law at the bar of this state." This law became effective March 12, 1941. It makes it unnecessary for the school to be on the approved list of the standardization agency of the American Bar Association, and gives the school legislative accreditment.

The issue to be determined is whether the court must acquiesce in the qualifications for admission to the bar as prescribed by the legislature. Does the legislative or judicial department have authority to prescribe rules for admission to the bar?

The relator contends: "The right of the legislature to pass laws for the admission of attorneys to the bar is founded in the police powers of the state, which powers can be exercised by the Legislature only."

The case of *State v. Drayton*, 82 Neb. 254, 117 N. W. 768, is cited, holding: "Within constitutional limits, the legislature is the sole judge as to what laws should be enacted for the protection and welfare of the people, and as to when and how the police power of the state is to be exercised." It is

said in the opinion that jurists and writers of texts have not adequately prescribed the true extent and limitations of the police power, and the following quotations from 22 Am. & Eng. Ency. of Law appear in the opinion:

"It has been found impossible to frame, and is indeed deemed inadvisable to attempt to frame, any definition of the police power which shall absolutely indicate its limits by including everything to which it may extend and excluding everything to which it cannot extend, the courts considering it better to decide as each case arises whether the police power extends thereto." 22 Am. & Eng. Ency. of Law, 915.

"The character of police regulations, whether reasonable, impartial, and consistent with the Constitution and the state policy, is a question for the courts, for the police power is too vague, indeterminate, and dangerous to be left without control, and hence the courts have ever interfered to correct an unreasonable exertion or a mistaken application of it." 22 Am. & Eng. Ency. of Law, 936. In the last analysis, the courts determine whether legislation is within the police power or exceeds it.

Our attention is directed to several statutory enactments, viz., Laws of 1855, sec. 1 (p. 199); Revised Statutes of 1866, ch. III, sec. 1 (p. 14); General Statutes of 1873, ch. V, sec. 1 (p. 94); Compiled Statutes of 1895, ch. VII, secs. 1 and 2 (p. 108). The contention is that the legislature throughout its history has enacted statutes which control the admission of persons to the bar. Without detailing the statutory provisions, all legislation with reference to applicants for admission to the bar from the act of March 9, 1855, to the inclusion of the state into the Union in 1867, was during the period of territorial courts. All of such courts were legislative, created in virtue of national sovereignty under clause 2, sec. 3, art. IV of the Constitution of the United States. See *O'Donoghue v. United States*, 289 U. S. 516, 535, 53 S. Ct. 740. From and after the inclusion of the state into the Union and the adoption of the state Constitution, the legislature has provided certain qualifications for applicants for admission to the bar, and in so doing used the following language: "No person shall be admitted * * * unless * * *"

(section 7-102, *supra*), which deviated from the mandatory language appearing in the acts of 1855 and 1857.

Section 1, art. II of the Constitution of 1875, provided: "The powers of the government of this state are divided into three distinct departments, the legislative, executive and judicial, and no person or collection of persons being one of these departments, shall exercise any power properly belonging to either of the others except as hereinafter expressly directed or permitted." The provision of the organic law (Laws 1854, sec. 9, p. 25) that "The jurisdiction of the several courts herein provided for, both appellate and original, and that of the probate courts and of justices of the peace, shall be as limited by law," was omitted.

Since the Constitution of 1875, until 1941, the legislature has not attempted in any manner to assert exclusive power to prescribe qualifications of applicants for admission to the bar, or to overrule any rule of the court relating to admissions. In 1937 this court, by rule, revoked the diploma privilege; likewise, requirements for two years of college education superseded section 7-102, *supra,* as it stood prior to 1941. Legislation has been consistent with the principle that, while the judiciary has the inherent power to admit and prescribe qualifications for attorneys, the legislature may impose minimum standards. This court has at all times recognized that, within the confines of the police power, the legislature has the right to prescribe the minimum requirements for admission to the bar. It is true that in the case of *In re Admission to the Bar,* 61 Neb. 58, 84 N. W. 611, the court accepted the legislative requirements for admission to the bar, but the power of this court to establish, by rule, higher qualifications for admission of applicants to the bar was not tested directly.

This court in *In re Disbarment Proceedings of Newby,* 76 Neb. 482, 107 N. W. 850, held: "This court alone can pass upon the qualifications of applicants for admission to the bar."

In *State v. Barlow,* 131 Neb. 294, 268 N. W. 95, this court held: "The supreme court is vested with the sole power to

admit persons to the practice of law in this state and to fix the qualifications for admission to the bar." In the body of the opinion it was said (p. 299): "This court has heretofore recognized and decided that it has the power to adopt rules fixing the qualifications for admission to the bar, and requires a higher standard of educational qualifications than does the statute," citing *In re Disbarment Proceedings of Newby, supra.* In the latter case it was said (p. 490): "It is a principle of general, if not uniform, application that the court which is entrusted with the power and the duty of determining the qualifications for admission to the bar has, by implication, the power and duty also to determine when those qualifications are wanting, and when the privilege of that high calling has been forfeited."

In *State v. Childe,* 139 Neb. 91, 295 N. W. 381, it was said in the opinion: "This court * * * is likewise invested with exclusive power to admit persons to the practice of law in this state and, except for the possible right of the legislature to make minimum requirements for the protection of the public by a proper exercise of the police power, to fix the qualifications for admission to the bar."

The foregoing cases use the definite and explicit language that this court has recognized the legislative function of making minimum requirements for admission to the bar, and likewise specifically states the power of the court with respect to qualifications for admission to the bar.

The relator contends: "Long acquiescence by the court in the power of the Legislature to legislate on this subject makes necessary a holding that L. B. 114 is constitutional, since it is in line with legislative practice since before the beginning of the state."

In support of the above contention relator cites 11 Am. Jur. 701, sec. 80, wherein it is said: "The general rule is that the exercise of powers and general acquiescence therein for a long period of years, especially if commencing with the organization of the government, may be treated as fixing the construction of the Constitution and as amounting to a contemporary and practical exposition of it." See, also,

In re Williams, 113 S. W. (2d) (Mo. App.) 353; *Myers v. United States,* 272 U. S. 52, 47 S. Ct. 21.

This court did acquiesce in the minimum standards imposed by the legislature and conceded that the legislature may prescribe minimum standards. There has been no interference on the part of the legislature where the court, by rule, has fixed higher standards for applicants for admission to the bar. See *In re Disbarment Proceedings of Newby, supra; State v. Barlow, supra; State v. Childe, supra.*

The relator contends: "The Legislature has power to regulate admissions to the bar by prescribing the standards therefor, and it is the duty of the court to give full effect thereto. If conditions prescribed are reasonable," citing *Vernon County Bar Ass'n v. McKibbin,* 153 Wis. 350, 141 N. W. 283, wherein the court said: "There is no question but that the legislature has power to regulate admission to the bar by prescribing a standard therefor, and it is the duty, as it should be the pleasure, of the court to give full effect to all reasonable efforts in that regard. Further, in case of the legislature having, as here, prescribed conditions of eligibility to admission to practice law, which are reasonable, want of such conditions should be regarded as insurmountable."

It is interesting to note in connection with this contention a later statement made by the Wisconsin court touching upon this subject, which, for comparison, is quoted as follows:

In *In re Cannon,* 206 Wis. 374, 240 N. W. 441, the court held: "The qualifications required of attorneys at law fixed by the legislature in order that public interests may be protected constitute only a minimum standard, and, while limiting the class from which the court must make its selection, do not constitute the ultimate qualifications beyond which the court cannot go in fixing additional qualifications deemed necessary by the courts for the proper administration of judicial functions."

The relator cites *In re Applicants for License,* 143 N. Car. 1, 55 S. E. 635, wherein the court held:

"Revisal, ch. 5, establishing the qualifications for applicants to practice law, is not unconstitutional as an unwarranted exercise of judicial power prohibited by sec. 8 of the Declaration of Rights, nor as an unlawful attempt to deprive the court of its inherent power to direct and control the conduct of attorneys who are its officers.

"The legislature has the right to establish the qualifications to be required of one to become a practicing member of the bar by virtue of the police power which is vested in that body."

The court said in the opinion (p. 6): "To hold, as we are requested to do here, that when a legislature has acted and established the qualifications which shall be required, the court can go on and superadd others, would, in effect, destroy the right admitted to be in the legislature and uphold the court in the exercise of legislative power." Further (p. 8): "If by inherent they intend to say—and this is all that most of them do say—that in the absence of legislation on the subject, the courts have the power to regulate and deal with the matters mentioned, this may be accepted. But if by inherent is meant that the power, to the extent claimed here, is one inherent because essential to the existence of the court and the proper exercise of its functions, we do not think the position can be maintained." Again, on the following page the court said: "The views we maintain on this question are supported, we think, by the best considered authorities."

The Massachusetts case of *Robinson's Case,* 131 Mass. 376, was cited in support of the North Carolina case. The statutes of Massachusetts failed to provide that a woman could be appointed to practice law in the state in the absence of such statute, and the application of a woman was rejected, and the question treated as one exclusively under legislative control. The *Robinson* case is at variance with the Massachusetts rule on this subject, as is best reflected by the following syllabi quoted from *In re Opinion of the Justices,* 180 N. E. 725 (279 Mass. 607):

"Establishment by Constitution of judicial department

conferred authority necessary to exercise of its powers as coordinate department of government."

"Judicial department has inherent power ultimately to determine qualifications of those to be admitted to practice in its courts."

"No statute can control judicial department in performance of its duty to decide who shall enjoy privilege of practicing law."

"Statutes specifying qualifications of applicants for admission to practice law will be regarded as fixing minimum, binding on applicants, and not as setting bounds beyond which judicial department cannot go."

The case of *State v. Foreman,* 3 Mo. 602, was cited in the North Carolina case as a supporting authority. To disclose a later holding of the Missouri court, we quote from the fourth paragraph of the syllabus in *Clark v. Austin,* 340 Mo. 467, 101 S. W. (2d) 977, as follows:

"Any effort on the part of the legislature to prescribe the qualifications of applicants for admission to the bar * * * would be an unconstitutional attempt on the part of the legislative department to encroach upon the powers and functions of the judicial department.

"As a part of the inherent power of the supreme court it may not only determine the educational and moral qualifications of applicants for admission to the bar but may also discipline and disbar attorneys for misconduct."

Without criticizing the North Carolina court, we conclude that the supporting authorities for the decision have been, in the main, changed in the later decisions cited.

The relator contends: "Authority to enact rules was given the court by the Constitution and the Statutes. No court in America has inherent powers to make rules for admission to the bar. They have certain other inherent powers such as in contempt and disbarment cases. The court's power is limited by section 25 of article V of the Nebraska Constitution and by statutes to the making of rules which are not inconsistent with law. No rule of court can contradict a statute. If a rule of court shall contradict

the provisions of a statute which is within the police powers, or if such statute shall make requirements which contradict those contained in a rule of court, the rule is subordinate to the statute and must yield to it."

Several authorities are cited under the foregoing proposition, which space does not permit us to set forth. The case of *State v. Kirke*, 12 Fla. 278, is relied on. The court in that case said (p. 281): "What was the law independent of the statute? At common law the courts had no power to admit attorneys or counselors, and it has been held that for this reason this is a power not inherent in a court, and in the absence of constitutional provisions a matter for regulation by the legislative department of the Government. It cannot be claimed as a part of the inherent power of courts, or as resulting necessarily from any power which they have. Indeed, barristers or counselors-at-law in England were never even appointed by the courts, but were called to the bar by the Inns of Court, which were associations not vested with even corporate powers, nor could the courts control the discretion of the Inns of Court as to whom they would call. In England the power of the courts to appoint attorneys has been from time to time regulated by statute. * * * The act which gave shape to the matter, and became a model, was the act of 4 Hen. IV., chapter 18, which, among other things, provided 'that all attorneys should be examined by the justices, and by their discretion their names shall be put upon the roll.'" See, also, *In Matter of Application of Cooper*, 22 N. Y. 67, and *People v. Justices of Delaware*, 1 Johns. Cases (N. Y.) 181.

The Florida court, speaking later in *Petition State Bar Association Re: Proposed Court Rules*, 134 Fla. 851, 862, 186 So. 280, said: "The inherent power of the court to prescribe rules is sound, but has some limitations. It may be defined by the Constitution and is so defined in some states. * * * If not defined by the Constitution, we approve the nigh universal doctrine that the power to regulate such matters by rule is inherent in the courts and cannot be taken from them by the legislature." Numerous cases are cited. On

page 863 the court said: "Dicta in *State v. Kirke,* 12 Fla. 278, and *Gould v. State,* 99 Fla. 662, 127 So. 309, may at first blush appear contrary to the general rule here approved, but careful examination discloses that the dicta in these cases were merely statements of the early common-law rule under which admission to the bar was deemed to be a legislative function, but that it was under the act of 4 Hen. IV, chapter 18, made a judicial function which it continued to be and was so when the common law of England was adopted by statute in this State * * * . Many of the cases cited in support of the general rule hold that the legislature may in the exercise of its police power prescribe rules and regulations for admission to the bar which the courts will respect, but that such rules and regulations have reference to minimum requirements and must not deprive the courts of their inherent power in the matter."

The relator cites *Ex parte Gregory Yale,* 24 Cal. 241, in which the court, in an attempt to show that the inherent power of the courts over admissions is derived from the Constitution, and is for that reason exclusive of the power of the legislature, said: "The manner, terms, and conditions of their admission to practice, and of their continuing in practice, as well as their powers, duties and privileges, are proper subjects of legislative control to the same extent and subject to the same limitations as in the case of any other profession or business that is created or regulated by statute. * * * There is no provision of the Constitution directly restricting the legislature from exercising plenary control over the qualifications, admission, oath, or duties of attorneys at law, and in our opinion no such restriction arises by implication; and it therefore follows that the legislature may lawfully require, as a condition to their admission to practice, or their continuance in practice, the taking of the oath prescribed in the Act under consideration, or, at their pleasure, may dispense with all conditions and oaths."

A complete answer to the foregoing case is found in *In re Cate,* 273 Pac. (Cal. App.) 617, wherein it was held:

"Power to admit applicants to practice law is judicial, not legislative, and invested in courts only, which means that they may weigh and deliberate, as well as make orders admitting to bar."

"Court's inherent power over admissions to bar is derived from Constitution, and hence exclusive of legislature's authority under police power to invade such field in disguise of regulation."

"A power in a court which the legislature does not give cannot be taken away by it."

"The judicial department should control the appointment, discipline, and removal of its officers, including attorneys."

"The legislature cannot destroy the constitutional functions of either the executive or judicial department of government under the guise of regulation."

"The courts have the power by rule to regulate the entire subject of admission of attorneys to the bar, and their discipline and disbarment."

This court, in speaking of inherent power of the courts, in *In re Integration of the Nebraska State Bar Ass'n*, 133 Neb. 283, 275 N. W. 265, said:

"The Constitution does not, by any express grant, vest the power to define and regulate the practice of law in any of the three departments of government. In the absence of an express grant of this power to any one of the three departments, it must be exercised by the department to which it naturally belongs because 'It is a fundamental principle of constitutional law that each department of government, whether federal or state, "has, without any express grant, the inherent right to accomplish all *objects naturally within the orbit of that department*, not expressly limited by the fact of the existence of a similar power elsewhere or the express limitations in the Constitution." 1 Andrews' American Law (2d ed.) sec. 182, p. 221.' *In Matter of Richards*, 333 Mo. 907, 63 S. W. (2d) 672. * * *

"There being no express grant of power in the Constitution to any of the three departments of government to define and regulate the practice of law, the question is—to what

department does that power naturally belong." And on page 287 this court said:

"The claim of inherent judicial power is no novelty. There are many cases in which it has been invoked over the membership of the bar. It has been invoked in the admission, suspension, discipline and disbarment of attorneys and in these no legislative permission is considered requisite, and, if a statute exists, it is regarded as declaratory of the inherent power of the judiciary and not exclusive in its provisions. The term 'inherent power of the judiciary' means that which is essential to the existence, dignity and functions of the court from the very fact that it is a court." See, also, *State v. Kirk,* 133 Neb. 625, 276 N. W. 380; *State v. Barlow, supra; State v. Childe, supra; State v. Daugherty,* 136 Neb. 490, 286 N. W. 783.

We quote from the body of the opinion in *In re Cannon,* 206 Wis. 374, 240 N. W. 441, at page 396: "If the courts and the judicial power be regarded as an entity, the power to determine who should be admitted to practice law is a constituent element of that entity. It may be difficult to isolate that element and say with assurance that it is either a part of the inherent power of the court, or an essential element of the judicial power exercised by the court, but that it is a power belonging to the judicial entity cannot be denied. Our people borrowed from England this judicial entity and made of it not only a sovereign institution, but made of it a separate, independent, and coordinate branch of the government. They took this institution along with the power traditionally exercised to determine who should constitute its attorneys at law. There is no express provision in the Constitution which indicates an intent that this traditional power of the judicial department should in any manner be subject to legislative control. Perhaps the dominant thought of the framers of our Constitution was to make the three great departments of government separate and independent of one another. * * * While the legislature may legislate with respect to the qualifications of attorneys, its power in that respect does not rest upon any power

possessed by it to deal exclusively with the subject of the qualifications of attorneys, but is incidental merely to its general and unquestioned power to protect the public interest. When it does legislate fixing a standard of qualifications required of attorneys at law in order that public interests may be protected, such qualifications constitute only a minimum standard and limit the class from which the court must make its selection. Such legislative qualifications do not constitute the ultimate qualifications beyond which the court cannot go in fixing additional qualifications deemed necessary by the courts for the proper administration of judicial functions."

We conclude that the power to admit a person to the practice of law is a judicial, and not a legislative, function.

The relator again calls attention to section 25, art. V of the Nebraska Constitution, which provides as follows: "For the effectual administration of justice and the prompt disposition of judicial proceedings, the supreme court may promulgate rules of practice and procedure for all courts, uniform as to each class of courts, and not in conflict with laws governing such matters. To the same end, the court may, and when requested by the legislature by joint resolution, shall certify to the legislature, its conclusions as to desirable amendments or changes in the general laws governing such practice and proceedings."

In addition to the foregoing, relator cites section 27-210, Comp. St. 1929, which provides that the judges of the supreme court, during certain periods, shall revise general rules of the court and adopt additional rules necessary or appropriate for the dispatch of business; and also sections 27-231, 27-233 and 27-235, Comp. St. Supp. 1939, providing, respectively, that the supreme court shall have power to promulgate general rules of practice and procedure; for report to the legislature and the right to change, amend, or modify the rules of the court, but that the same shall not change, amend or modify until the report has been made to the legislature by the court, and the right of the legislature to change, amend or repeal at any time any rule or amend-

ment promulgated and reported by the court; that such act does not empower the supreme court to exercise legislative power and shall not extend or enlarge the power of the supreme court beyond the authority found in section 25, art. V of the Constitution.

The relator's contention is that this court does not possess inherent power to make rules for admission to the bar; that the court's power is limited by the provisions of section 25, art. V of the Constitution, and by the statutes as to making of rules that are not inconsistent with the law.

Section 25, art. V of the Constitution, does not limit the judicial power with respect to making rules as to qualifications for applicants to take examinations for admission to the bar, but refers to practice and procedure relating to the manner of conducting cases in court and rules with reference thereto. See *In re Integration of the Nebraska State Bar Ass'n, supra.*

In 49 C. J. 1312, it is said: "The course of procedure in the courts, which, in a general sense, includes pleadings; the form, manner, and order in which proceedings have been and are accustomed to be had; the form, manner, and order of conducting and carrying on suits or prosecutions in the courts through their various stages, according to the principles of law, and the rules laid down by the respective courts; * * * Practice includes the formula by which jurisdiction is first asserted and afterward exercised in respect of any litigation in all its phases, until it is finally completed."

The relator further contends that the defendant has violated his rights, under section 1 of the Fourteenth Amendment to the Constitution of the United States, by denying him the equal protection of the law, by violating his privileges and immunities as a citizen of the United States, and by depriving him of his property rights and his liberty to be admitted to the practice of the profession of the law, without due process of law and without any process of law, and in violation of law. In this connection the relator states that rule 3 makes an unfair discrimination between appli-

cants for admission to the bar in the particular that law students must either have studied law in a reputable law school, as defined by the court, or in a law office of a practicing attorney, but cannot apply for admission if they have studied law in a school which is not included in the rule; that those who have attended law schools, which are accredited by the standardization agency of the American Bar Association, and those who have studied law in a law office are preferred as against those who have studied law in a school not included by such agency. Decisions announcing the following rule are relied on:

" '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." *Steinacher v. Swanson,* 131 Neb. 439, 268 N. W. 317.

It has not been shown by relator that the classification made by the court is arbitrary or without rational basis, or that it is actually and palpably unreasonable. See *Borden's Farm Products Co. v. Baldwin,* 293 U. S. 194, 55 S. Ct. 187; *New York, ex rel. Bryant, v. Zimmerman,* 278 U. S. 63, 49 S. Ct. 61.

We deem it unnecessary to set out the requirements of rule 3 with reference to law office students. Such students have had the benefit of long historical precedent. This court in *In re Admission to the Bar,* 61 Neb. 58, 84 N. W. 611, said: "Admission to the practice is a privilege and not a right, and the power which grants the privilege can annex the terms and conditions on which the same may be exercised."

It will be recalled that rule 3, heretofore set out in part, was adopted June 5, 1937. The relator commenced his study of law in the University of Omaha Law School in

1938, and with full knowledge that graduates of that school would not be permitted to take the bar examination after July 1, 1940, unless the law school became an approved law school, within the meaning of rule 3. The rules were not changed after relator commenced his study of law, and doubtless he could have fully met the requirements of the rule by studying in a law office, as prescribed therein. This he did not do and is in no position to now complain about applicants for admission to the bar having studied in law offices, as prescribed by the rule. The foregoing contention is not merited under the existing circumstances.

L. B. 114 constitutes an endeavor on the part of the legislature to go beyond the concept of minimum requirements for an applicant to take an examination for admission to the bar, and to dictate to the supreme court, in view of the authorities heretofore cited and accepted as law, that the judicial department shall be shorn of its power to place higher standards or requirements of applicants for admission to the bar than the legislature has provided; that the legislature shall exercise, from and after the passage of the legislative bill, a power which belongs to the judiciary, and that all decisions of this court announcing the concept of the judicial functions in reference to the subject-matter are a nullity.

L. B. 114 is unconstitutional in that it directly usurps the inherent power of this court to fix and determine the qualifications of an applicant for admission to the bar in this state on a subject which naturally falls within the orbit of the judicial branch of government. Even if the subject of the legislation was a proper exercise of legislative power, L. B. 114 is void and unconstitutional in that it freezes the class. This court has repeatedly held such legislation to be unconstitutional.

WRIT DENIED.

YEAGER, J., dissents.

ROSE, J., dissenting.

Without regard to the propriety or validity of the legislation under consideration, I am convinced that the rules of

court should be such as to permit relator to take the state bar examination and, in the event that he is successful in passing it, that he should be admitted to the bar, if found to be otherwise qualified.

ERNEST ROBISON, APPELLEE, V. UNION TRANSFER COMPANY, APPELLANT.

4 N. W. (2d) 558

FILED JUNE 5, 1942. No. 31336.

1. **Evidence** examined and *held* to constitute a jury question.
2. **Trial.** "Where two conflicting instructions are given on a question, one containing an incorrect, and the other a correct, statement of the law, the latter will not cure the former." *Koehn v. City of Hastings*, 114 Neb. 106, 206 N. W. 19.

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

Bernard R. Stone and *George C. Pardee*, for appellant.

James J. Fitzgerald, contra.

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

MESSMORE, J.

This is an action to recover damages for personal injuries sustained by reason of a collision between a Ford truck, which plaintiff was driving, and a tractor and semitrailer truck unit, belonging to the Union Transfer Company and driven by one of its employees. The jury returned a verdict in favor of the plaintiff from which defendant appeals.

The petition charges the driver of defendant's truck with negligence in the following particulars: In operating the truck at an excessive rate of speed; in failing to have it under proper control while negotiating a curve; in operating the truck on the wrong side of the highway and neglecting to turn back to the right side thereof; in failing to keep a proper lookout and to apply his brakes when he knew that

the rate of speed at which he was proceeding would result in an accident; and plaintiff alleges that he was free from any negligence which caused or contributed to the accident. The appropriate provisions of the Iowa statute are set out in the petition. The answer contains a general denial and alleges that the injuries sustained by the plaintiff, if any, were the direct and proximate cause of his own negligence, and not that of the defendant; pleads the same elements of negligence affirmatively as appear in the plaintiff's petition and the proper statutes covering the subject-matter under the Iowa law. The reply is a general denial.

The defendant's truck was approximately eight feet in width. Attached thereto by a sprocket, with a hole in the center through which a holding rod was inserted, was a trailer. The plaintiff was driving a one-and-a-half-ton Ford truck, with a grain body, the truck being about seven and one-half feet in width. The defendant was transporting a load of machinery from Minneapolis to Omaha, weighing from 12,000 to 14,000 pounds; the plaintiff was hauling a load of sweet corn.

Highway No. 188, on which the accident occurred, is a paved highway 20 feet wide. The center line is not marked but is shown in the concrete. The collision occurred approximately one mile west of Lake City, Iowa, opposite a place known as the Wernick Hatchery, into which there is a driveway from the pavement, and the gravel from such driveway was scattered over a part of the pavement. The morning was cloudy, foggy and damp. The point of impact was at the southwest end of a curve. The highway slopes to the southwest; the curve is banked on the north or outside thereof and is approximately one to two feet higher than on the south or inside of the curve. The plaintiff was proceeding northeast slightly uphill at a rate of speed of approximately 35 miles an hour, and as he approached the curve to the right he noticed headlights on a truck coming toward him around the curve at a distance of about 75 yards; the speed of the truck he estimated to be 45 to 50 miles an hour. After he noticed the headlights he kept his

truck close to the shoulder of the pavement on his own right, or south, side. His version of the accident is reflected by the following testimony:

"Well, I saw these lights coming around this curve, and he was cutting deep on the inside. The lights seemed to go over and come back a little bit, and then cut out just a little before they come to me, and they seemed to swing off. I let my eyes from his lights and watched my shoulder, and his lights were so bright I watched the shoulder down there. You can't watch those bright lights when they are approaching you too close; you've got to watch where your truck is on the shoulder." To the question, "What happened then?" the witness answered: "Well, the cab part of the truck passed, and the corner of the body collided, and that's the last I remember until I come to."

Defendant's driver testified that he was proceeding at a speed of 30 to 35 miles an hour, driving on the extreme north edge of the pavement, and as he proceeded around the curve he noticed the plaintiff's truck approaching at a distance of one-eighth to one-quarter of a mile to the southwest. As he was coming out of the curve the approaching truck was entering the curve. He did not judge the speed of the oncoming truck and was unable to tell whether it was on its proper side of the highway. At the time of the collision the witness started to apply the air brakes on his truck. In connection with this, testimony was sought from him to disclose that where the pavement was slippery a sudden application of the brakes would cause the attached trailer to "jackknife" across the road onto the plaintiff's side, presenting a hazard that would contribute to the accident.

The marshal of Lake City, Iowa, who arrived at the scene of the accident shortly thereafter, testified to seeing dirt, glass and pieces of board at the point of impact and on both the north and south side of the center line of the highway. The plaintiff's truck was facing west on the southeast side of the highway, with a part of its right front fender on the edge of the pavement. The defendant's truck was standing at a distance of 300 to 350 feet southwest of the point of

impact, on the left, or north, side of the highway; the trailer part was standing "practically straight" on the highway, but the tractor was facing southwest. At the point of impact the witness noticed tire and skid marks on the south side of the pavement. His version is that when the trucks came together the Ford truck was whirled around, and where the rear wheels went around they left their marks when striking the pavement, and then apparently left the paving and proceeded around the edge of the shoulder or the curb. These marks began three or four feet south of the center on the south, or plaintiff's, side of the highway; they were not continuous; "each wheel would hit as it bounced it around;" the first mark was not more than two feet in length, and as each wheel would hit the pavement it would leave a mark. There were also marks on the north, or defendant's, side of the highway which started two to two and a half feet north of the center line.

There was considerable testimony given by the father and son who operated the hatchery with reference to the tire marks and tire burns, all of which marks appeared on the north side of the highway and none of them on the south side. All of this evidence constitutes an endeavor on the part of defendant and his witnesses to show that the physical facts disclose the accident occurred solely through the plaintiff's negligence, and that at the time of the impact the defendant's truck was being driven with the outside dual wheels on the extreme north side of the pavement, the inside dual wheels two to two and a half feet north of the center of the paving. After the impact the course of the outside dual wheels could be followed for a distance of about 30 feet on the extreme north edge of the pavement, when they started to veer to the left over toward the south side. The inside dual wheels made skid marks two to two and a half feet north of the center of the pavement at the point of impact. The marks of the left dual wheels were traced to the position where the defendant's truck was standing after the accident. Defendant's truck was first struck on the left front fender; then on the left rear wheels, and the

attached trailer was struck on its left front corner. Under the defendant's version of the accident, these facts would definitely place its truck on its own right side of the highway at the time of the collision.

The plaintiff's testimony discloses that there were tire marks on the plaintiff's side of the highway three feet from the center line. The exhibits disclose that defendant's truck was struck a short distance up from the front end of the left fender, tearing the fender and part of the footboard, and showing a decided breaking of the body of the truck on the left side behind and above the cab part. One of the tires on the dual wheels is shown to be completely blown out, with a large hole in its right side near the top; and the other tire flat, with the rim severely twisted. The exhibits further disclose complete demolishment of the left front fender of the Ford truck, loss of the front wheels, later found some distance away astride the center line of the highway, and a large dent in the right front fender, just below the headlight. There was a red paint mark near the top of plaintiff's left front fender, which would indicate that the top of the red trailer had struck that part of plaintiff's truck, ripping off the box on the left side. The evidence clearly indicates that the trucks side-swiped each other.

Without further detailing the evidence, we conclude that it was sufficient to be submitted to the jury on the question of negligence and was not conclusive to the extent of verifying the defendant's version of the accident. The testimony offered with reference to intoxication of plaintiff while driving is wholly insufficient to prove such fact and was properly rejected by the trial court.

Error is predicated on the following instruction, given by the trial court: "Negligence is never presumed, but must be proved. The defendant having alleged, as an affirmative defense, that the plaintiff was guilty of negligence which proximately caused the accident, the burden is upon the defendant to establish by a preponderance of the evidence the negligence of the plaintiff, and that such negligence was the proximate cause of a contributing cause of the accident."

Other instructions given by the trial court properly placed the burden of proof, under the Iowa law, on the plaintiff, in that he must prove that he was free from negligence contributing to the accident. Such burden of proof, under the Iowa law, does not shift to the defendant, but remains always with the plaintiff. The instruction objected to is clearly a misstatement of the Iowa law, which is material to a determination of the case. There is no controversy, on the part of either the plaintiff or the defendant, as to the burden which the plaintiff must bear in a case such as the one at bar.

We conclude, as held in *Chicago, R. I. & P. R. Co. v. Sporer,* 69 Neb. 8, 94 N. W. 991, "Conflicting instructions are erroneous, and one which misstates the law upon a vital issue is not cured by another which states the law correctly."

"Where two conflicting instructions are given on a question, one containing an incorrect, and the other a correct, statement of the law, the latter will not cure the former." *Koehn v. City of Hastings,* 114 Neb. 106, 206 N. W. 19; *Brooks v. Thayer County,* 126 Neb. 610, 254 N. W. 413; *Bohmont v. Moore,* 138 Neb. 784, 295 N. W. 419.

We hold that instruction No. 5 given by the court, under the authorities herein set out, is confusing and prejudicially erroneous.

The verdict of the jury and judgment thereon are reversed and the cause remanded for further proceedings.

REVERSED.

RALPH WIEDEMAN V. STATE OF NEBRASKA.
4 N. W. (2d) 566

FILED JUNE 12, 1942. No. 31367.

1. **Rape.** "In a prosecution for rape, it is not essential to a conviction that the prosecutrix should be corroborated by the testimony of other witnesses as to the particular act constituting the offense. It is sufficient if she be corroborated as to material facts

and circumstances which tend to support her testimony, and from which, together with her testimony as to the principal fact, the inference of guilt may be drawn." *Fager v. State*, 22 Neb. 332, 35 N. W. 195.

2. **Criminal Law.** In the absence of an offer of proof and necessarily of a ruling thereon by the trial court, there is no basis upon which it can be charged that the trial court erred in refusing to admit testimony.
3. ———. "The rulings on the admission of testimony cannot be reviewed unless the same were either by general or specific assignments called to the attention of the trial court by the motion for a new trial." *Flower v. Nichols Bros.*, 55 Neb. 314, 75 N. W. 864.

ERROR to the district court for Madison county: ADOLPH E. WENKE, JUDGE. *Affirmed: sentence reduced.*

Carl H. Peterson, for plaintiff in error.

Walter R. Johnson, Attorney General, and *John H. Comstock, contra.*

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

SIMMONS, C. J.

Defendant was charged with and convicted of the crime of rape and sentenced to be confined in the reformatory for men for a period of five years.

Defendant appeals and presents here three assignments of error: First, the insufficiency of the evidence to sustain the conviction; second, the refusal of the court to admit evidence which might have explained the cause of the physical condition of the complaining witness; third, the refusal of the trial court to instruct the jury concerning the lesser crimes of assault and battery and simple assault. These will be considered in the order assigned.

There is no dispute about any of these facts. The alleged offense occurred on July 18, 1941. The defendant is a boy of about 18 years. He, on the evening in question together with two other boys (and the defendant says, his older brother), were riding in an automobile when they came

upon the complaining witness on her way to the roller skating rink in Norfolk. She had been acquainted with the defendant. They asked the complaining witness to get in the car with them and she refused.

That evening about 10 o'clock she was walking home alone when the same group of boys, including defendant's older brother, again saw her. The defendant on foot approached her and she got into the car, and they drove about Norfolk, during which time an unsuccessful effort was made to get another girl to join them in the car. They finally drove out to a meadow near the airport, where the offense allegedly occurred.

She testified that she was forced into the car; the defendant testifies she entered voluntarily. She testifies that she asked to be taken home; the defendant testifies that she agreed with them to go to his parents' home near the meadow to get something to eat. The defendant and his brother testify that they entered the meadow because the brother was sick and wanted to be off the highway. She testifies that when they were going to the meadow she was insisting on being taken home; that when they reached the meadow the three others got out of the car and the defendant made improper advances. Later a second boy held her head and shoulders while an attempt was made by the defendant to have intercourse with her while they were in the car; that then a third boy pulled her forcibly from the car and that, between the three boys, defendant and one other had intercourse with her; that she was screaming, crying, pleading and resisting to the full extent of her powers throughout.

The defendant testified that at the meadow after the three others left the car he sat for several minutes with one arm around her shoulders and the other across the lower part of her body; that one of the other boys then pulled her from the car and "rassled" with her on the ground. He specifically denies the act of intercourse of any of them or that he had any part in the wrestle except to attempt to protect the complaining witness.

The girl's testimony is corroborated throughout. The only material dispute is as to what occurred in the meadow. Her testimony there is corroborated by two persons who heard a girl screaming and men talking. There is also no dispute that after these events the defendant, driving the car, took the girl to the home of a friend where she spent the night. When she reached there her clothing was torn, her body lacerated, bruised and dirty. The next morning she reported the occurrence to the police, was examined by a physician who described in detail her physical condition as to bruises, scratches on various parts of her arms, legs and body, including an "old bruise five days to a week old." He further stated that his examination revealed a condition such as could have been caused by "forcible sexual intercourse" and which he would doubt "very much" could have been caused by a "rough and tumble fight." The long-established rule is: "In a prosecution for rape, it is not essential to a conviction that the prosecutrix should be corroborated by the testimony of other witnesses as to the particular act constituting the offense. It is sufficient if she be corroborated as to material facts and circumstances which tend to support her testimony, and from which, together with her testimony as to the principal fact, the inference of guilt may be drawn." *Fager v. State*, 22 Neb. 332, 35 N. W. 195. Without further discussing the evidence it is sufficient to state that there is ample evidence to sustain the conviction.

The next contention apparently is based on the theory that the old bruise indicated a previous assault and that had it been explained it would also have revealed that the physical condition, other than the scratches and new bruises, was of more ancient origin than the events of the night in question. The record discloses no offer to prove any fact of that kind by the defendant, either by cross-examination of the state's witnesses or by evidence in chief for the defendant. In the absence of an offer of proof and of a ruling thereon by the trial court, there is no basis upon which error can be predicated. This rule is too well established

to require citation of authority. Neither is there any assignment of error made in the motion for a new trial as to either the admission or rejection of evidence or the court's ruling thereon. It is obvious that this contention is without merit. The rule is: "The rulings on the admission of testimony cannot be reviewed unless the same were either by general or specific assignments called to the attention of the trial court by the motion for a new trial." *Flower v. Nichols Bros.*, 55 Neb. 314, 75 N. W. 864.

The third assignment goes to the refusal of the trial court to give a tendered instruction as follows: "The jury are instructed that the crime of forcible rape includes the crime of assault and battery and if you shall find from the evidence submitted in this case that the defendant is not guilty of rape but that said defendant is guilty of an assault then you should find the defendant guilty of assault and battery."

The trial court in overruling the motion for a new trial placed in his journal entry this statement, the accuracy of which is not questioned by the defendant. "That with reference to instruction No. 8 tendered by defendant at the time of trial that at the close of all the testimony and prior to the argument the defendant's counsel stated to the court that he did not desire any instruction upon the lesser crimes involved for the reason all the testimony pointed to either the guilt or innocence of the defendant as charged and that the court was of the same opinion and therefore prepared no instruction and that the instruction tendered was tendered just before the reading of the instructions by the court and after all of said instructions had been prepared."

The record sustains the position of the trial court. The evidence of the state supported and that of the defense denied guilt of the principal offense charged. The evidence is of such a nature that the offense of assault and battery should not have been submitted to the jury. It is not error for the trial court to refuse to instruct on the lesser included offenses under such circumstances.

Considering the age of the defendant and the facts of this record, we are of the opinion that the sentence of the trial

court is excessive. By virtue of the power given this court by section 29-2308, Comp. St. 1929, the sentence is reduced from five to three years, and as so modified the judgment of the trial court is

AFFIRMED: SENTENCE REDUCED.

ROSE and PAINE, JJ., concur in the opinion except as to the reduction of the sentence to three years.

INGEBORG A. NIELSEN, APPELLEE, V. CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, APPELLANT.

4 N. W. (2d) 569

FILED JUNE 12, 1942. No. 31331.

1. **Statutes.** "Statutes are not to be understood as effecting any change in the common law beyond that which is clearly indicated." 59 C. J. 1040.
2. **Carriers.** The statute providing that "Every railroad company shall be liable for all damages inflicted upon the person of passengers while being transported over its road" does not apply to a passenger who, at the end of the journey on the railroad, is injured on an escalator installed at the railroad station for the accommodation of persons entering and leaving trains. Comp. St. 1929, sec. 74-701.

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

Brown, Crossman, West, Barton & Fitch, for appellant.

Ellick, Fitzgerald & Smith, contra.

T. F. Hamer, G. C. Holdrege and *W. J. Schall, amici curiæ.*

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

ROSE, J.

This is an action brought by Ingeborg A. Nielsen, plaintiff, an unmarried woman 52 years of age, to recover from the Chicago, Burlington & Quincy Railroad Company, defendant, $3,000 in damages for personal injuries. For pre-

paid fare evidenced by a railroad ticket; defendant transported plaintiff as a passenger from Aurora to Omaha, June 27, 1940. Plaintiff alighted from the train at the station in Omaha, stepped onto an escalator from the floor level of the railroad track on her way up to the main floor of the station, lost her balance while the escalator was in motion, fell backward and injured her right hip and thigh. The foregoing facts are shown by the record without dispute. Negligence of defendant and resulting injury to plaintiff were not pleaded by her and were not issues in the case. Plaintiff bases her claim for damages on the following provisions of statute:

"Every railroad company shall be liable for all damages inflicted upon the person of passengers while being transported over its road, except in cases where the injury done arises from the criminal negligence of the persons injured, or when the injury complained of shall be the violation of some express rule or regulation of such road actually brought to his or her notice." Comp. St. 1929, sec. 74-701.

The petition, pleading liability alone under this statute on the ground that plaintiff was injured by defendant "while being transported over its road," was attacked by demurrer which was overruled and by answer alleging that plaintiff, while riding on the escalator, was not being transported over defendant's road. The answer alleged further that plaintiff's injury, if any, was due to her violation of an express rule or regulation of defendant actually brought to her notice.

The trial court instructed the jury in part as follows:

"Since the evidence establishes without dispute that the plaintiff was a passenger of the defendant and in the use of the escalator was being transported over defendant's road to the depot floor of the railroad, the following statute of the state of Nebraska applies to this case:

" 'Every railroad company shall be liable for all damages inflicted upon the person of passengers while being transported over its road, except in cases where the injury done arises from the criminal negligence of the persons injured,

or when the injury complained of shall be the violation of some express rule or regulation of such road actually brought to his or her notice.'

"Since no evidence of criminal negligence on the part of the plaintiff has been presented, that phase of the statute need not be considered by you, and therefore the burden of proof is as stated in the next following instructions. * * *

"The burden is upon the plaintiff to establish by a preponderance of the evidence the following propositions:

"1. That while ascending the escalator at the defendant's depot premises at the time mentioned in the petition the plaintiff was injured.

"2. The nature and extent of any such injuries and any loss consequent thereupon and the amount of the plaintiff's damages.

"If the plaintiff has so established all the foregoing numbered propositions, your verdict will be for the plaintiff, unless you find for the defendant on the next succeeding instruction. If the plaintiff has failed to establish any one of the foregoing numbered propositions by a preponderance of the evidence, or if the evidence is equally balanced on the subject, your verdict will be for the defendant. * * *

"The defendant claims that whatever injuries the plaintiff may have received, if any, were proximately caused by the violation of an express rule or regulation of the defendant railroad actually brought to plaintiff's notice, and the burden is upon the defendant to establish such claim by a preponderance of the evidence. If the defendant has so established the foregoing by a preponderance of the evidence then your verdict will be for the defendant."

The charge to the jury was clearly erroneous and prejudicial to defendant in stating as fact and law that the statute quoted applies to this case. The relative clause, "while being transported over its road," limits thereto the liability of the carrier for injury to a passenger. The word "road" in that clause means railroad as shown by the context. The liability of a common carrier as an insurer of the safety of its passengers under this statute goes beyond any liability

imposed by the common law and the restrictions for the protection of the insurer are as important as the terms imposing liability in absence of negligence. The following is a generally recognized rule applicable to statutes changing the common law:

"Statutes are not to be understood as effecting any change in the common law beyond that which is clearly indicated." 59 C. J. 1040.

Plaintiff's railroad ticket entitled her to safe transportation from Aurora to Omaha. Defendant performed that obligation. The court is not at liberty, in giving effect to the statute, to legislate into it a liability clearly beyond its terms. The injury on the escalator was not inflicted upon plaintiff while she was being transported over defendant's railroad from Aurora to Omaha. An escalator installed at a railroad station for the accommodation of persons entering or leaving trains is not the railroad or a part of the railroad over which passengers are transported, within the meaning of the statute. Plaintiff did not sue at common law to recover damages for personal injuries suffered by her as the result of defendant's negligence while she was on the escalator. There is no evidence that she was injured while being transported over defendant's railroad from Aurora to Omaha. Pleadings and proofs were insufficient to sustain a judgment in favor of plaintiff. There was therefore nothing to submit to the jury. The instructions permitting plaintiff to recover damages were erroneous. The judgment is reversed and the action dismissed.

REVERSED AND DISMISSED.

CLARENCE C. BROWN, APPELLEE, V. CITY OF OMAHA, APPELLANT.

4 N. W. (2d) 564

FILED JUNE 12, 1942. No. 31343.

Workmen's Compensation. Physical exertion and exposure to smoke and fumes ordinarily incidental to the work of a city fireman in

fighting fire does not constitute an accidental injury compensable under the workmen's compensation law, where it appears that the disability was due to a preexisting heart disease.

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

Harold C. Linahan, Edward Sklenicka, W. W. Wenstrand and *A. A. Raneri,* for appellant.

Hotz & Hotz, William J. Hotz and *William F. Dalton, contra.*

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

ROSE, J.

This is a proceeding under the workmen's compensation law. Comp. St. 1929, secs. 48-101 to 48-161.

Clarence C. Brown, plaintiff, a former fireman employed by the city of Omaha, defendant, presented to the workmen's compensation court a claim for permanent total disability. In his petition for compensation plaintiff pleaded that, as the result of an accident, he sustained an injury which arose out of and in the course of his employment while engaged in fighting a fire in the basement of a grocery store at Sixteenth and Locust streets, Omaha, September 28, 1939; that the accident consisted of a trauma from inhaling smoke and fumes and from severe physical exertion; that the injuries caused vomiting, severe pain in the arms and chest and developed into coronary occlusion or thrombosis, a permanent total disability. Plaintiff's salary at the time was $140 a month.

Defendant objected to the allowance of the claim on the ground that the disability of plaintiff was due to a preexisting heart disease and not to a compensable accidental injury which arose out of and in the course of his employment.

A trial before a judge of the compensation court resulted in an award for permanent total disability.

On appeal by defendant to the district court the award

was affirmed. Defendant appealed from the affirmance to the supreme court.

In support of the award counsel for plaintiff argue that the allegations of the petition were proved by the evidence; that unforeseen events occurred suddenly and violently at the fire, were accidental and resulted in compensable injury, while plaintiff was performing the duties of his employment as fireman. The proofs show the following facts: Plaintiff was an employee of the city at the time of the fire and performed the duties of his employment there; went into the basement of the grocery store at the fire with the hose and fought the fire as long as he could stand the exertion in the smoke and fumes; went out for fresh air and, when revived, went back to the basement; pursued this method for about three hours. He testified that he was immediately afflicted with severe pains in his head, arms and chest, which he suffered at intervals thereafter. The testimony of physicians shows that plaintiff was unable to work and was suffering from coronary thrombosis, a chronic heart trouble, December 1, 1939.

Counsel for defendant refer to evidence tending to prove that plaintiff suffered from previous chronic arthritis and heart disease and argue that physical exertion and exposure to smoke and fumes, ordinarily incidental to the work of a city fireman in fighting fire, even when combined with a preexisting heart disease producing coronary thrombosis at a later date, do not constitute an accidental injury compensable under the workmen's compensation law.

The record does not conclusively disclose that the coronary thrombosis was caused by excessive physical exertion and exposure to smoke and fumes. The workmen's compensation law provides that an award of the district court for compensation may be set aside on appeal upon the ground "That the findings of fact are not conclusively supported by the evidence as disclosed by the record, and if so found, the cause shall be considered *de novo* upon the record." Comp. St. Supp. 1941, sec. 48-174. Consequently the appeal calls for an independent conclusion on the record.

City of Lincoln v. Jordan, 131 Neb. 879, 270 N. W. 508; *Schmidt v. City of Lincoln*, 137 Neb. 546, 290 N. W. 250; *Schirmer v. Cedar County Farmers Telephone Co.*, 139 Neb. 182, 296 N. W. 875.

The evidence will not sustain a finding that plaintiff was disabled by coronary thrombosis on September 28, 1939, the date of the fire. He was not totally disabled on that date. His own testimony shows that, though suffering pains from exertion and exposure, he was on duty as a fireman until November 10, rested at home for three days, returned to his work and remained an employee in the same capacity until November 20 or later when he called a physician who examined him and procured an electrocardiogram. The tracings thereon, according to the more convincing testimony of experts, did not evidence coronary thrombosis November 29, 1939, or previously. Other tests of the same nature later, about November 30 or December 1, 1939, furnish conclusive evidence of disabling coronary thrombosis. There is evidence that plaintiff had an attack of chronic arthritis which lasted for five weeks in 1937 and that it reappeared after the incidents of September 28, 1939. There is also evidence of previous heart trouble.

An expert explained that "coronary occlusion" is the blocking of one of the arteries of the heart and testified: "I think it is fairly well recognized that no one can have a coronary occlusion * * * unless there has been a disease of the wall of the artery, in which there are scars." The proper inference from the evidence in its entirety is that plaintiff's permanent total disability is not traceable to excessive physical exertion and the inhaling of smoke and fumes while fighting fire September 28, 1939, but to a preexisting heart disease. In addition to evidence of the character outlined, plaintiff himself testified in substance: Other firemen worked alongside of him at the fire; all did practically the same; just took all we could stand; after being in smoke and fumes would come out and vomit, phlegm would come from nose and mouth; others were going out and throwing up like plaintiff.

This testimony of plaintiff indicates what is common knowledge—that the exertion in the handling of fire hose and exposure to smoke and fumes are ordinary incidents of a fireman's employment. When such incidents combine with a preexisting heart disease to produce a total disability in the form of coronary thrombosis, they do not constitute a compensable accidental injury within the meaning of the workmen's compensation law. *Shamp v. Landy Clark Co.*, 134 Neb. 73, 277 N. W. 802.

The conclusion on the entire record is that plaintiff did not make a case for an award of compensation. The judgment of the district court is therefore reversed and the action dismissed.

REVERSED AND DISMISSED.

VYO LYNN, APPELLEE, V. BERTHA LYNN, APPELLANT.
4 N. W. (2d) 561

FILED JUNE 12, 1942. No. 31340.

Divorce. Record examined in divorce action, and alimony, attorney's fees and other allowances made by court found adequate, and decree affirmed.

APPEAL from the district court for Douglas county: HERBERT RHOADES, JUDGE. *Affirmed.*

E. D. O'Sullivan, McKenzie & Dugan and *Edward J. Peterson,* for appellant.

G. H. Seig and *Frank C. Heinisch, contra.*

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

PAINE, J.

This is a divorce action in which no objection is made by either party to the decree of divorce, but the wife appeals from an allowance of only $240 as alimony, together with attorney's fees and costs.

The amended petition, filed June 24, 1940, alleged that

Vyo Lynn, plaintiff, and Bertha Lynn, defendant, were married May 11, 1935, at Tekamah, Nebraska, and have resided in Omaha ever since said marriage; that plaintiff has conducted himself properly in all respects toward defendant, but that defendant has been guilty of extreme cruelty toward plaintiff, and has caused the marriage relation existing between them to become unbearable and impossible. It is further alleged that on February 20, 1937, plaintiff filed a petition for divorce; that on March 1, 1937, defendant filed an answer and cross-petition, and that on April 2, 1937, hearing was had and defendant's cross-petition was dismissed. and an absolute divorce was granted to plaintiff.

The amended petition further stated that thereafter plaintiff and defendant were reconciled and resumed marital relations upon the oral promises of defendant that she would conduct herself toward the plaintiff as a kind, loving and dutiful wife, and that defendant filed a petition to set aside the decree of divorce, and a hearing was had, and the decree was vacated and set aside. It is charged that defendant effected such reconciliation through fraud and deceit upon plaintiff, in that within three days afterward defendant refused to live with plaintiff, and pursued a course of cruel and inhuman treatment toward plaintiff, and plaintiff prays for a decree of absolute divorce.

On January 3, 1941, defendant filed answer and cross-petition, alleging various acts of extreme cruelty, in which plaintiff threatened defendant with bodily injury and threatened her life; that ever since they resumed marital relations plaintiff has refused to support her, and has absented himself from home for months at a time. It is alleged that prior to the marriage of the parties plaintiff was the owner of certain real estate, amounting to 32.48 acres, in Douglas county, and that defendant owned certain lots in Florence, now a part of the city of Omaha; that defendant had owned another lot in Florence, and had sold same for $1,700, which she had used for her support and maintenance and for the partial support and maintenance of plaintiff, and for the purpose of improving the property

owned by herself and plaintiff. It is further alleged that on March 7, 1936, the parties by a reconveyance arrangement became joint tenants of their real properties with the right of survivorship, and not tenants in common; that the aforementioned real estate belonging to plaintiff prior to their marriage consisted of a farm near the Municipal Airport, which land has become very valuable, but was encumbered with a mortgage of $1,350; that during the married life of the parties they have made various improvements on said farm which have enhanced its value. Defendant asks for suitable alimony, and that both parties be required to convey to each other their respective interests in the real estate, and for other relief.

On January 31, 1941, plaintiff filed reply, alleging that he is employed as a truck driver, earning approximately $20 a week. He denies that improvements have been made on his farm of 32.48 acres which have enhanced its value; denies that at the time of their marriage defendant had $1,700, and alleges that she had an income from the property owned by her to the extent of $30 a month. Plaintiff alleges that in the spring of 1938, after the parties had become reconciled, the defendant sold a piece of property owned by her for $600, and used said sum to purchase insurance for herself and for her own personal benefit, and not for the benefit of plaintiff, nor for the purpose of improving any property owned by him. Plaintiff prays that defendant's cross-petition be dismissed, that plaintiff be given absolutely the real estate owned by him previous to the marriage, and that defendant be required to make the necessary conveyances.

The decree, entered May 8, 1941, found that the defendant had conducted herself properly towards the plaintiff, but that plaintiff had been guilty of extreme cruelty toward defendant, making their married life intolerable; that the parties at the time of the marriage were possessed of the real estate heretofore mentioned; that defendant had sold a lot in Florence on a land contract, and that the balance of the purchase price on said realty, in the sum of $610, was paid to defendant and expended by her during the married

life of the parties. It was decreed that an absolute divorce be granted to defendant, and that she should recover permanent alimony in the sum of $240, to be paid at the rate of $5 a week, without interest; that the parties should receive back their separate pieces of real estate owned by them before the marriage.

Neither attorney Edward J. Peterson for defendant nor attorney G. H. Seig for the plaintiff, who argued the case in this court, had appeared for the parties before this appeal.

The bill of exceptions shows that the plaintiff is a truck driver, and has been employed by the Engles Lumber Company for more than 15 years, and at the time of trial was receiving wages of $20 a week. It further shows that when they were married on May 11, 1935, at Tekamah, Nebraska, the husband was 53 years of age, and this was his first marriage, and she was 48 years of age, and had been married four times previous to this marriage. At the time they each owned some real estate. He owned some bottom, or river, land, to which there had been some accretion. In April, 1931, he had purchased of the state board of educational lands this 32.48-acre tract in East Omaha under a contract, and paid $450 down and was to pay $1,800, but in the ten years he had never been able to pay anything more on the principal, and still owes $1,350 on the principal, but has paid the interest, and has paid the taxes. There is danger that his contract will be canceled unless he pays immediately one-tenth of the amount in default, to wit, $135. While there have been some accretions, yet he could not sell it, for the title is not merchantable, as he only has a contract of purchase. If the Omaha airport should be extended farther to the north, which there is no evidence that they have any intention of doing at the present time, the land might be of more value, but whatever value it has at the present time is small, except for this speculative feature.

In regard to the financial situation of the parties, the testimony discloses that plaintiff built a brick veneer garage on this river tract, size 24 by 24, and finally converted this

into a four-room house; that he built a woven-wire fence around the property, and cleared off about 12 acres of the brush on the north side and about five acres on the south side; that these improvements were all made before he met the defendant.

The defendant owned two pieces of real estate in Omaha, one of which she sold on a contract before the marriage, and from the other she received rent of $30 a month, all of which the plaintiff claims she spent on herself, which she denies, and says she spent part of it on this acreage. She has two children by a former marriage who are adults. The defendant also spent some of her money on fortune tellers, who predicted an early death for the plaintiff, and she spent part of it on premiums on a $3,500 life insurance policy which the defendant took out on the life of the plaintiff against his wishes.

They only lived together about half of the time that they were married, as they almost continually quarreled, and the rest of the time he would sleep on a cot in the lumber yard where he worked. The defendant moved back into his place after the first divorce was granted, and rented out his land on shares, raised hogs and chickens, and supported herself after he left. She also received $7 a week board from a roomer who stayed there nearly two years. This roomer testified that he took the defendant to spiritualists and readers on many occasions, and heard her tell her husband that these readers had told her that he was going to die.

Much of the testimony in the case about their quarrels relates to events which occurred prior to the entry of the first decree of divorce, and in *Sutherland v. Sutherland,* 132 Neb. 558, 272 N. W. 549, it was held that testimony relating to such events antedating the original decree could not be considered by this court.

In this last decree of divorce, the defendant wife received the decree of divorce on her cross-petition, and alimony of $240, to be paid at the rate of $5 a week, and in addition she received certain household goods; in addition, she was given

certain poultry, rabbits, and live stock which she was raising on his place; then there were certain outstanding bills, all of which the plaintiff was required to pay. It also directed that the plaintiff should also pay to her all the temporary alimony allowances previously ordered to be paid to her by the court, and, in addition, that the plaintiff should pay her attorney, E. D. O'Sullivan, the sum of $150 as additional attorney's fees, and that the defendant should receive as her own separate property the real estate which she had owned, and which is described in the decree; that, in addition, the plaintiff should pay all of the costs of the action, including a $10 expert witness fee to O. L. Crumbliss and the same amount to Emil B. Hakel, real estate experts of the city of Omaha.

The records of this court show that on November 3, 1941, an order was made reading as follows: "On motion of appellant for allowance of temporary alimony, suit money and attorney fees, appellant allowed $20 docket fee; $5.25, cost of transcript; $125, cost of bill of exceptions; $35, for cost of briefs; $50, attorney fee; otherwise denied. All payments to be made to clerk district court by November 15, 1941;" said costs amounting to the sum of $235.25.

It is urged that the trial court was without authority to vacate the divorce decree, and that its order on February 25, 1938, was void. There is nothing in the record which indicates the grounds for its vacation. With the record in this condition, the presumption is that the order vacating the decree was valid. We must, therefore, in the consideration of this case, treat the order vacating the divorce decree as binding.

After a careful consideration of the pleadings and the evidence in this case, the decree of the district court and the alimony allowed therein, together with additional payments and the several allowances made in this court as hereinabove set out, are deemed sufficient, and that the defendant is not entitled to additional attorney's fees or alimony, and the decree entered by the district court is hereby affirmed, with all costs taxed to plaintiff.

AFFIRMED.

SIMMONS, C. J., dissenting.

The plaintiff appellee presents a question in this case which the majority opinion does not answer.

This record shows that the parties were married May 11, 1935. On April 2, 1937, the husband obtained a default divorce decree against the wife, a property settlement having been made. The parties went back to living together in November, 1937. January 22, 1938, the wife made application to set aside the divorce decree. Notice was served upon the husband. He did not appear. It does not appear that fraud in securing the order of April, 1937, was charged. On February 25, 1938, the trial court signed an order setting aside the decree of April 2, 1937.

This information is gathered from the oral testimony. The pleadings and evidence taken at the hearing on February 25, 1938, are not in the record. The plaintiff, not questioning the validity of the order of February 25, 1938, instituted this action for divorce. The legality of the 1938 proceeding was not questioned in the trial court. It is presented for the first time here, by counsel who was not in the case in the trial court. May the question properly be presented on appeal where it was not raised in the trial court?

The plaintiff husband contends that by the provision of section 42-340, Comp. St. 1929, the decree of April 2, 1937, "became final" six months thereafter and that the order of February 25, 1938, was a nullity, that the parties were not remarried by that order or otherwise, and there being no remarriage, there can be no divorce.

The defendant wife contends that the provisions of sections 20-2001 and 20-2008, Comp. St. 1929, authorize the action taken by the trial court. Which contention is correct?

This is not an ordinary lawsuit. The state has an interest in the matter of marriage and divorce. These questions should not be ignored but should be answered before the question of modification or affirmance of the decree of the trial court is determined.

CONSOLIDATED CREDIT CORPORATION, APPELLEE, V. JOHN M. BERGER ET AL., APPELLANTS.

4 N. W. (2d) 571

FILED JUNE 12, 1942. No. 31365.

1. **Courts.** Sections 20-1901 to and including 20-1910, Comp. St. 1929, provide effective procedure by petition in error to secure a review by the district court of a final order made by a county court.
2. ———. "A petition in error in the district court to review a judgment or order of an inferior tribunal is an independent proceeding, having for its immediate object a reversal of the judgment or order complained of." *Ribble v. Furmin*, 69 Neb. 38, 94 N. W. 967.
3. **Appeal.** The term "appeal" is a process of civil law origin and removes the cause entirely, subjecting the fact as well as the law to a review and retrial.
4. **Contracts.** Where plaintiff seeks to recover on an alleged contract, whereby it and the defendants respectively agree to do and perform certain acts, and the petition contains no allegation to the effect that plaintiff has kept and performed its part of the contract, such omission is fatal, and a demurrer to the petition should be sustained.
5. **Statutes.** The subjects of "Review on Petition in Error" and "Appeals" are so distinctively different and dissimilar that the provisions of the statute relating to each question cannot be taken together and construed as if they were one law and effect given to every provision.
6. **Courts.** Where a review on petition in error is filed in the district court to obtain a reversal of judgment of a county court, and, on review, it is manifest that the plaintiff's petition fails to state a cause of action, a demurrer thereto should be sustained. Under such circumstances, and within the contemplation of section 20-1910, Comp. St. 1929, the district court should reverse the judgment of the county court and retain the cause for trial.

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

O. M. Olsen, for appellants.

Dressler & Neely and *Hugo J. Lutz, contra.*

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

MESSMORE, J.

This is an appeal from the district court for Douglas county, overruling a motion for a new trial and denying a rehearing from an order affirming and remanding a judgment to the county court, which was brought to the district court by a proceeding in error.

The defendant in error (plaintiff below and designated as such in this opinion) brought the action originally in the county court, alleging that it is a corporation authorized to do business in the state of Nebraska, with its principal place of business at Omaha, and further alleging that the plaintiff entered into negotiations with the defendants for the paving of Fifty-third street, south of Blondo street, with a view of having defendants share the cost of paving a certain portion of said street, and as a result of such negotiations, under date of October 1, 1936, appears the following agreement:

"We, John M. Berger and Edith M. Berger (Edith M. Berger being the title holder of lots 14 and 15 Country Club Heights and intending to purchase lot 13 from the owner who now holds the title) agree to pay one-half or fifty per cent. of the cost of the paving that part of 53rd street which these three lots adjoin, approximately 146 feet in width or length for the three lots. The price to be governed by the proposal set forth in your letter of September 24th and the letter that you refer to at a later date. The proposition to include paving, curbing, grading and such engineering expenses as is incidental thereto.

"Respectfully yours,
"John M. Berger and
"Edith M. Berger."

Subsequent to the agreement, paving was laid by arrangement of the plaintiff with the Yant Construction Company. The proportionate share thereof due from defendants was $374.08, for which amount judgment is prayed. Motion to make the petition more definite and certain was filed, heard and overruled. A general demurrer was filed on the ground that the petition failed to state facts sufficient to constitute a cause of action, and that, under the facts stated in plain-

tiff's petition, it has no capacity to sue. This demurrer was overruled.

It is unnecessary to set out in this opinion the pleadings of the defendants to the plaintiff's petition. The counterclaim of defendant Edith M. Berger is, from the entire record, unsupported except that she is the owner of the fee simple title of lots 14 and 15 and the purchaser of lot 13. Defendants' pleadings disclose certain letters that led up to the agreement and with respect to the manner in which the defendants desired the grade to be made in front of the lots when the paving was laid. The bill of exceptions contains all of such letters in evidence, a plat, which was not in the original suit in the county court, and two pictures of the defendants' residence, showing the paving in front. The evidence adduced from the bill of exceptions falls far short of supporting defendants' contentions as pleaded.

That review on petition in error may be had is sustained by the following authorities:

Section 24, art. I of the Constitution of Nebraska, provides: "The right to be heard in all civil cases in the court of last resort, by appeal, error, or otherwise, shall not be denied." Article 19, ch. 20 of the Compiled Statutes of Nebraska for 1929, is entitled "Reversal or Modification of Judgments and Orders by Appellate Courts. (a) Review on Petition in Error," and sections 20-1901 to and including 20-1910, provide effective procedure by petition in error to secure a review by the district court of a final order made by the county court. *In re Estate of Berg,* 139 Neb. 99, 296 N. W. 460. Although the *Berg* case refers to a probate matter, the rule would be the same in a case such as the one at bar.

In *Ribble v. Furmin,* 69 Neb. 38, 94 N. W. 967, the court said: "A petition in error in the district court to review a judgment or order of an inferior tribunal is an independent proceeding, having for its immediate object a reversal of the judgment or order complained of."

The term "Appeal," as defined in *Western Cornice & Mfg. Works v. Leavenworth,* 52 Neb. 418, 423, 72 N. W. 592, is a

process of civil law origin and removes a cause entirely, subjecting the fact as well as the law to a review and retrial. It is, in fact, granting a new trial upon the same issue in a higher court. The court added: "There is a clear distinction made in the Code of Civil Procedure of this state between proceedings by petition in error and appeal." The foregoing authority and cases cited therein clearly distinguish between a review on petition in error and an appeal.

We refer to the amended petition in error wherein the defendants contend that before the plaintiff may recover on a contract it must plead that all the conditions precedent to the contract have been performed or waived; that failure to do so bars recovery, and the petition states no cause of action. In support thereof the case of *Deering & Co. v. Claypool,* 2 Neb. (Unof.) 520, 89 N. W. 373, is cited, wherein the court said:

"The defendants prosecuted error to the district court, asking a reversal of the judgment of the county court, assigning as error the ruling on their objection to the sufficiency of the petition. The district court reversed the judgment, and, from such judgment of reversal, the plaintiff brings the case here on error.

"There is no error in the judgment of the district court. The petition is fatally defective, in one particular at least. Plaintiff sought to recover on an alleged contract, whereby itself and the defendants respectively undertook and agreed to do and perform certain acts. There is no allegation to the effect that the plaintiff has kept and performed its part of such contract, nor of any fact showing a valid excuse for the nonperformance thereof. That such omission is fatal is elementary."

Section 20-836, Comp. St. 1929, provides: "In pleading the performance of conditions precedent in a contract, it shall be sufficient to state that the party duly performed all the conditions on his part; and if such allegation be controverted, the party pleading must establish on the trial the facts showing such performance."

Reviewing plaintiff's petition and applying the authorities

cited require us to hold that the demurrer to the petition should have been sustained.

Plaintiff filed a motion to strike the petition in error from the files, for the reason that defendants Berger failed to file an appeal bond within 10 days after the rendition of the judgment, May 8, 1940, as required by section 21-1302, Comp. St. 1929, which provides in part: "The party appealing shall, within ten days from the rendition of judgment, enter into an undertaking to the adverse party * * *." The undertaking for review in error was filed 82 days after rendition of the judgment. Secondly, defendants failed to file a transcript within 30 days from the rendition of judgment, as required by section 21-1303, Comp. St. 1929. The petition in error was filed 63 days after rendition of the judgment. The motion to strike was overruled. The court affirmed the judgment of the county court, acting under section 20-1909, Comp. St. 1929, "Review on Petition in Error."

The question presented by plaintiff is: Did the defendants properly bring the judgment of the county court before the district court for review? This requires an examination of the statutes. Sections 20-1901 to and including 20-1910, Comp. St. 1929, deal with "Review on Petition in Error." Sections 21-1301 to and including 21-1315, Comp. St. 1929, deal with "Appeals," as does section 27-540, Comp. St. 1929.

The authority relied on is *In re Estate of Mathews,* 125 Neb. 737, 252 N. W. 210. This case involved appeals only. The question was whether the appeal was taken from a final order; secondly, the administrator failed to furnish the bond ordered by the court. The cause was dismissed and the judgment affirmed in this court. In determining the case, this court construed section 20-1901, Comp. St. 1929, reading in part: "A judgment rendered, or final order made, by a county court, * * * may be reversed, vacated or modified by the district court," with sections 21-1301 to 21-1305, 21-1311, 21-1313, and 27-540, Comp. St. 1929, considering the same as one law and giving effect thereto, *i. e., in pari*

materia. The *Mathews* case is not authority for plaintiff's contention, as we have analyzed it. The only section of the statute appearing under "Review on Petition in Error" considered was section 20-1901, *supra.* The construing of the statutory provisions *in pari materia* related to appeals only.

The distinction and dissimilarity between a review on petition in error and an appeal have been heretofore pointed out, and we conclude that the provisions of the statute with reference to review on petition in error and appeals are not such as may be taken together and construed as if they were one law and effect be given to every provision. The plaintiff's contention in this respect must fail. The circumstances presented by this case make the following authorities applicable:

Section 20-1910, Comp. St. 1929, provides that, when a judgment of a justice court shall be reversed or set aside, "the court shall render judgment of reversal, and for the costs that have accrued up to that time, in favor of the plaintiff in error, and award execution therefor; and the cause shall be retained by the court for trial and final judgment, as in cases of appeal."

In *Maryott & McHurron v. Gardner,* 50 Neb. 320, 69 N. W. 837, this court held: "Where a judgment of a county court is reversed by a district court in a proceeding in error, the district court may retain such cause for trial." And in *Rogers v. Bodie,* 112 Neb. 672, 200 N. W. 799, it was held: "Where a judgment of a county court is reversed by a district court in a proceeding in error, on other than jurisdictional grounds, the district court should retain such cause for trial on the merits."

Other assignments of error are without merit.

For the reasons stated in the opinion, the case is reversed and remanded to the district court, with instructions to retain the case on proper pleadings for trial.

REVERSED.

IN RE GUARDIANSHIP OF ETHEL TIMPERLEY.
GERTRUDE KOBS, APPELLANT, V. HARRY F. TURNER, APPELLEE.
4 N. W. (2d) 603

FILED JUNE 19, 1942. No. 31348.

1. **Guardian and Ward.** The existence of interests of a guardian adverse to those of his ward is sufficient ground to warrant the removal of the guardian.
2. ———. "Where a guardian places himself in a position with respect to the estate which brings his interests in conflict with those of his ward, he should be discharged and his letters revoked." *Robertson v. Epperson*, 78 Neb. 279, 110 N. W. 540.

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

Coffey & Jorgensen, for appellant.

Max Fromkin, contra.

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

SIMMONS, C. J.

This action was brought to secure the removal of a guardian of an insane incompetent and the appointment of a suitable and competent person in his stead. The county court granted the prayer of the plaintiff. The district court denied it. Plaintiff appeals.

The controversy arises from the following facts: William R. Turner died in 1908, intestate, leaving his widow and six children as his heirs at law. In 1917 Harry F. Turner, a son, was appointed guardian of the estate and person of his sister, Ethel Timperley. It is not questioned that she then was and has since been insane and confined in an institution. The guardian's acts in dealing with his ward's property are questioned only in three particulars: First, there was a small amount of bank stock belonging to her which he did not report to the court until it was assessed for a stockholders' liability. He secured a court order to pay the assessment. He explains the failure to report this stock as an oversight. Second, there was some South Dakota real es-

tate belonging to his ward which he, the guardian, considered worthless. He refused to assume liability for it, paid no taxes on it, and did not report it to the court as property of his ward's estate. Third, the widow died in 1922 and the competent children (*i. e.*, the defendant and his four sisters) desired to have the real estate consisting of over 700 acres of land sold and the proceeds divided among them.

Harry F. Turner (defendant herein) and his four sisters as plaintiffs brought an action to partition the estate making parties defendant Ethel Timperley, the incompetent, and Turner as her guardian. Turner then, as guardian, filed an answer admitting the allegations of the petition and joining in the prayer for partition. A guardian *ad litem* was appointed for the incompetent, who filed a general denial and joined in the prayer for a partition. Hearing was had and a referee was appointed. He reported that the property could not be divided and it was ordered sold. At the referee's sale a part of the property was sold to one of the attorneys, a part was sold to a sister, and a third part consisting of 421 acres received a bid of $14,000 from an outside party. This Turner considered inadequate and he asked the referee to continue the sale to the following day. On the second day Turner bid for the property until it was sold to him for $24,100. The sales were confirmed, payments made, deeds issued, and Turner has been in possession of the property since that date. He accounted to his ward's estate for the proceeds. It appears that the same firm of attorneys represented the plaintiffs (Turner and others) and the defendant Turner as guardian throughout the partition action. It further appears that the guardian *ad litem* occupied office space with the attorneys, although no showing is made of connections with the firm otherwise.

Plaintiff, as a daughter of the incompetent, brings this action seeking the removal of Turner as guardian on the grounds that he purchased the property for an inadequate consideration, that while the guardian of the incompetent he could not become the purchaser in his own right of the incompetent's property at the partition sale, and that he

failed to report the bank stock and the South Dakota land as property of his ward.

Turner, as defendant herein, contends that the sale was under orders of a court; that his individual interest was as great as that of his ward; that he had the right to buy to protect his own interest; and that he paid full value for the property; and resists his removal.

We have then presented this situation as to the sale of the land. The plaintiff contends that the sale is void, or at best voidable; the defendant contends it is valid. We are asked to determine that question in an action, initiated in county court, that has for its object the removal of the guardian and the appointment of another person in his place.

The following conclusions are apparent: (1) Turner recognizes no interest of his ward in the land. (2) If there is any merit in the contentions made by the plaintiff, they present questions in which the incompetent's estate has a direct and vital interest. (3) That interest, if it exists, is one which is in conflict with and antagonistic to the personal interest of Turner, the guardian. (4) The plaintiff in this action does not have authority to speak for and does not represent the incompetent. (5) The issues presented will not and cannot be properly determined in an action wherein Turner represents both his ward and himself. (6) The only way that these questions can be determined is by the removal of Turner as guardian and the appointment of a suitable and competent person as guardian who will have but one possible interest to serve, and that the interest of the incompetent and the conservation and protection of her estate. "Among grounds sufficient to warrant the removal of a guardian may be mentioned * * * existence of interests of the guardian adverse to those of the ward." 28 C. J. 1101.

This court has said: "Where a guardian places himself in a position with respect to the estate which brings his interests in conflict with those of his ward, he should be discharged and his letters revoked." *Robertson v. Epperson*, 78 Neb. 279, 110 N. W. 540. "When any guardian * * * shall become * * * incapable of discharging his trust, or evidently unsuitable therefor, the court, after notice to such

guardian and all others interested, may remove him." Comp. St. 1929, sec. 38-507. This court has said: "We think the word 'unsuitable' in the statute is very broad in its meaning, and applies to every case where the guardian for any reason is shown not to be capable of or *not in a situation to suitably protect his ward's interests.*" (Italics supplied.) *Crooker v. Smith,* 47 Neb. 102, 66 N. W. 19.

We do not here determine the questions presented, save to the extent of holding that the guardian is shown to have placed himself in a situation where he cannot now suitably protect his ward's interests in the controversies that have arisen, and because of that he should be removed as guardian and a suitable and competent guardian named in his stead.

The judgment of the district court is reversed and the cause is remanded for further proceedings in accord with this decision.

REVERSED.

ALFRED R. WATTERS, APPELLEE, V. GEORGE MCPHERSON ET AL., APPELLANTS.

4 N. W. (2d) 605

FILED JUNE 19, 1942. No. 31388.

1. **Automobiles.** In the absence of an ordinance prohibiting the same, a pedestrian has the right to cross a public street between intersections, and is not limited to regular crossings.
2. ———. The degree of care which a pedestrian should exercise in crossing a public street in a city, at a place other than an intersection, is greater than that required when he is crossing at an intersection.
3. ———. When the driver of an automobile is lawfully proceeding in the place and at a speed provided by law, but he sees a pedestrian ahead in the act of crossing the street between intersections, it is his duty to exercise ordinary care to prevent injuring such pedestrian.

APPEAL from the district court for Douglas county: HENRY J. BEAL, JUDGE. *Affirmed.*

Kennedy, Holland, DeLacy & Svoboda, for appellants.

Wear, Boland & Nye, contra.

Heard before ROSE, EBERLY, PAINE, CARTER, MESSMORE and YEAGER, JJ.

PAINE, J.

This is an action for personal injuries sustained by a pedestrian when struck by an automobile while crossing a street in Omaha. Judgment entered on verdict for $3,500. Defendants appeal.

The petition alleged that all parties are residents of Omaha; that defendant Baum Iron Company is a Nebraska corporation, and that George McPherson was an employee and acting for defendant Baum Iron Company.

It further alleged that on March 18, 1940, plaintiff, Alfred R. Watters, was walking from west to east across Sixteenth street, in front of 1430 North Sixteenth street, when a Studebaker sedan of the Baum Iron Company, and operated by George McPherson, defendant, struck the plaintiff and caused him to suffer severe and permanent injuries, which were the direct and proximate result of the negligence of defendants in the following particulars: In operating their automobile at a high, dangerous and excessive rate of speed, in excess of 40 miles an hour, in violation of a city ordinance and of the statutes of Nebraska; in failing to keep a proper lookout for pedestrians; in failing to have their automobile under proper control; in failing to sound the horn or give warning of their approach; in operating their automobile on the left and wrong side of the street; in failing to accord plaintiff the right of way across said street; in failing to seasonably apply their brakes and bring their automobile to a stop before colliding with plaintiff; in failing to divert the course of their automobile to have avoided a collision with plaintiff; in failing to use such means at their disposal to avoid injury to plaintiff when they saw, or in the exercise of ordinary care should have seen, plaintiff in a position of peril.

Plaintiff alleges that, as a result of the negligence of defendants, he received a fracture of the skull, fracture of the left zygoma, fractures of several ribs on the left side, severe bruises and contusions of the muscles, ligaments, tendons and nerves in the left shoulder, forearm and elbow, numerous lacerations, severe physical, mental and nervous shock, a severe concussion of the brain, resulting in an unconscious and semiconscious condition for six weeks following the injury. He alleges that he suffered dizziness, headaches, muscular incoordination, blurring of vision, shooting pains in the left forehead, pain in the chest, shoulder, elbow and ankle; that he was under the constant care of a physician and surgeon, was confined to his bed for many weeks, was under the care of special nurses for a long time, and became indebted for medical and nurse hire in the amount of approximately $150. Plaintiff claims that his injuries are permanent, and prays judgment against defendants in the sum of $15,000 and costs.

Defendants filed answer, admitting the corporate character of defendant Baum Iron Company and the employment of George McPherson by such company, and denying each and every other allegation in said petition. Defendants further state that any injuries sustained by plaintiff were the direct and proximate result of his own negligence in carelessly crossing Sixteenth street without keeping a proper lookout for cars coming from the north; in carelessly and negligently crossing at a place other than at an intersection; in negligently failing to accord defendant McPherson the right of way; in carelessly crossing through south-bound traffic and crossing in front of defendant's car at a time when a collision was unavoidable; in carelessly and negligently failing to look towards the north after passing in front of south-bound traffic.

Plaintiff filed reply, denying each and every allegation of new matter contained in the answer, and denying specifically that he was negligent in any manner, but alleging that his injuries were the direct and proximate result of the negligence of defendants.

Trial was had to a jury, commencing on November 3, 1941, and on November 6 a verdict was returned, finding for the plaintiff and assessing the amount of his recovery at $3,500, and judgment was entered accordingly.

The defendants set out 26 assignments of error. Among these are the refusal of the court to sustain defendants' motion for a directed verdict, and the refusal to give 14 instructions offered by the defendants, and the giving of five instructions by the court on its own motion. It is charged that the verdict was excessive, and that it should have been set aside and a judgment entered for the defendants, because the judgment entered was not sustained by the evidence or the law. The propositions of law set out by the defendants will be discussed later.

Many facts in the case are not disputed. Plaintiff was 80 years of age, but a very lively man, as he testified, "There wasn't any grass ever growing under my feet when I was going." He was a licensed real estate agent, and said he walked down to his office and back every day, which was about two miles.

About 4:30 on the afternoon of March 18, 1940, he had left the office in the Brandeis Theatre building, Omaha, and walked to the Potato Market and got a tenderized ham, then walking north on Sixteenth street he started to cross to the east side in the middle of the block to go to White's Market, the street being 50 feet 3 inches wide, and the middle door of the market being 134 feet from the nearest intersection. While on the curb he stopped and looked north, and saw cars parked on both sides and a large railway express truck coming slowly on the west side of the street about 200 feet away, and so he had plenty of time and started east across the street at his usual gait, and got across the lane the express truck was coming on. He testified: "Q. Well, how long did you continue to look up to the north? A. Oh, just a little after I passed the truck until I got to the middle of the street. Q. Then what did you do? A. I looked south and straight ahead. Q. Now, when you looked down to the south did you see any cars coming from the south?

A. Yes, I saw a car coming from the south. Q. And where was that? A. Oh, it was a long ways down; I couldn't tell you how far it was. It was more than a block, I should think." While looking to the south, he heard no horn at all, and the next thing he knew was that night when he woke up in the hospital, badly injured.

Joseph Buick, who drove the railway express truck, said the box of it was six to eight feet wide, and extended up 2½ feet higher than the cab, which was above the motor. He was driving south on Sixteenth street, and the traffic is usually heavy around there after the Union Pacific shop lets out at 4:30 p. m. He saw plaintiff standing on the curb with a bundle under his arm, then he saw him step down and start across the street, and he slowed his truck down to about 15 miles an hour, and the plaintiff passed 40 or 50 feet in front of him. Then he said: "As soon as I passed by where he crossed, I heard brakes squeak and a little commotion, and then I looked through the rear vision mirror of the truck and I saw this man lying in the street." But he drove right on to the Missouri Pacific freight house.

George King, who had operated a used car business at 1502 North Sixteenth street as sales manager for six years, was subpœnaed as a witness by plaintiff, and testified that he was over on the east side of the street appraising a car at the time of the accident, and noticed two cars trying to pass the truck, and that the speed of defendants' Studebaker sedan, which hit the plaintiff, was 40 to 50 miles an hour. He heard the brakes squealing, and ran down to the place of the accident.

It appears that defendants' automobile, coming up fast from behind the express truck, attempted to go around the truck, and when the plaintiff was within a short distance of reaching the far curb he was struck by defendants' automobile.

Max V. Woodward, a policeman in the traffic bureau, said he received the call at 4:45 p. m., and went right out with sergeant Timmins. He stated he had taken the special traffic course of nine months at Northwestern University.

These officers took pictures and measurements. Sergeant Timmins had also taken traffic courses at Northwestern University at Evanston, Illinois, and has since given instruction to Omaha policemen and also at the University of Nebraska school for traffic law enforcement officers. The plaintiff was still lying there when they first arrived, and the blood spot in the picture identified the place. The skid marks made by defendants' car were about 60 feet in length. The pavement was dry, and the picture shows that the outside of the paving was asphalt with brick paving in and between the two street car lines.

Sergeant Timmins then testified: "A car leaving a skid mark of that length would indicate a speed of between thirty-six and thirty-seven miles an hour, a minimum." He then testified that, when a driver sees an emergency and takes his foot off the gas and applies the brake, the best average of the elapsed time is five-eighths of a second. He then testified: "An automobile travels one and a half times its speed in feet per second. In other words, if he is traveling thirty-six miles an hour, in one second he would travel fifty-four feet. In five-eighths of a second he would travel a fraction over thirty-four feet. In other words, the reaction time driving at thirty-six miles an hour, he travels a fraction over thirty-four feet in five-eighths of a second. Q. That thirty-four feet that he travels is the distance he travels before the brakes are applied, if I understand you correctly? A. That is right."

The plaintiff's body was thrown so high in the air that Lee Jagers, a meat cutter in White's Market, saw it up in the air. Plaintiff was struck by the middle of the bumper while he was crossing the east rail of the north-bound street car track.

In *Belville v. Bondesson,* 130 Neb. 926, 266 N. W. 901, the opinion sets out a case where a pedestrian was struck crossing this same Sixteenth street in Omaha, and, paraphrasing what we then said, it is necessary to formulate some idea as to what an ordinarily cautious and prudent man would do under like circumstances.

So, in the case at bar, the plaintiff would pause and look to the right and left, and if he saw no cars which would endanger him in reaching the center of the street he would proceed that far; he would then devote the greater part of his attention to cars coming in the traffic lanes he was about to cross, being alert at all times to the possibility that a car might come from a place not to be expected.

Now, in the case at bar, the defendants' car was out of sight behind the large express truck, and upon reaching the center of the street plaintiff saw a car coming from the south, and was proceding across cautiously, not thinking that defendants' car would dash out from behind the truck and, crossing the middle of the street, proceed down the street, where it had no right to be under all the circumstances, and run him down while it was going at an excessive rate of speed.

The defendants, on the other hand, insist that they had the right of way under the law as stated in the last sentence of section 39-1148, Comp. St. Supp. 1939: "Every pedestrian crossing a highway within a business or residence district at any point other than a pedestrian crossing, crosswalk or intersection shall yield the right of way to vehicles upon the highway."

In addition, defendants call our attention to the case of *Doan v. Hoppe,* 133 Neb. 767, 277 N. W. 64, in which the fourth paragraph of the syllabus is as follows: "The driver of an automobile having the right of way between street intersections is not required to anticipate that pedestrians will violate an ordinance prohibiting them from crossing a street at a point other than a crosswalk;" and further defendants argue that, "Where the evidence shows beyond reasonable dispute that the plaintiff's negligence is more than slight, as compared with the defendant's negligence, if any, then the trial court, on motion of the defendant, should either dismiss plaintiff's case or instruct the jury to return a verdict for the defendant."

But, in the fifth paragraph of the syllabus in *Doan v. Hoppe, supra,* we also said: "When the driver of the car

has the right of way but the situation is such as to indicate to the mind of an ordinarily prudent person that to proceed would probably result in injury to a pedestrian, it is his duty to exercise ordinary care to prevent the injury, even if the pedestrian may have been negligent."

In this *Hoppe* case there was a specific ordinance, being No. 3357, of the city of Lincoln, received in evidence, and which read as follows: "Section 1201. Pedestrians Jay-Walking. No pedestrian shall cross any street at a place other than a cross-walk, nor cross any street intersection diagonally."

However, no such ordinance of the city of Omaha having been introduced, we will take it that there is no ordinance prohibiting such crossing of a street.

The plaintiff in the case at bar had a right under the common law to cross the street between intersections, as he was doing. If there was any negligence whatever to be charged to the plaintiff, it was properly submitted to the jury in connection with all the other facts in the case.

In instruction No. 5 Judge Beal instructed the jury that, if the negligence of the plaintiff was more than slight, he could not recover, and then followed a long instruction on comparative negligence, ending with the sentence: "If, on such comparison, you find that the defendants have not been guilty of gross negligence, plaintiff cannot recover; also, if plaintiff has been guilty of negligence in a degree more than slight, he cannot recover; but, if the defendants have been guilty of gross negligence, and the plaintiff has been guilty of only slight negligence, the plaintiff is still entitled to recover, but his recovery shall be reduced in the proportion that his negligence bears to the entire negligence as shown by the evidence."

"In an action by a pedestrian against the owner of an automobile for personal injuries sustained when she was struck by such automobile as she attempted to cross the street in the middle of the block, where it appears that the automobile was more than half a block away when she first started across the street, and that she looked a second time,

and no other automobiles were in sight, and where the driver of such automobile saw such pedestrian and, by the exercise of due care in the control thereof, could have stopped in time to avoid striking her, *held,* that the question of the comparative negligence of the parties is one for the jury." *Lustgarten v. Harris,* 122 Neb. 663, 241 N. W. 114.

"A person has a right in the absence of prohibition by statute or ordinance to cross a street at any point, and is not limited to regular crossings. The driver of a truck owes to one crossing a street at a point other than a regular crossing the duty of reasonable or ordinary care under the circumstances and must exercise more care toward a child of tender years crossing between blocks than toward an adult in same circumstances." *Kauffman v. Fundaburg,* 123 Neb. 340, 242 N. W. 658.

"Pedestrian lawfully on highway may rely on reasonable care of automobile drivers, and is not negligent, as a matter of law, in failing to anticipate driver's negligence." *Cotten v. Stolley,* 124 Neb. 855, 248 N. W. 384.

In the recent case of *Nichols v. Havlat,* 140 Neb. 723, 1 N. W. (2d) 829, this court said: "Pedestrians have the right to use the public street at any time day or night, and, in the absence of applicable statute or ordinance limiting the same, have the right to walk longitudinally in a street or highway, and are not, as a matter of law, guilty of contributory negligence in so doing."

While these last two cases involved pedestrians walking down the highway instead of across it, yet we believe the principles there stated are applicable to the case at bar, as showing that a pedestrian legally in the street cannot be wantonly run down.

The defendants charge that the recovery in this case is excessive. But the evidence discloses that plaintiff had a fractured skull, a fractured left cheek bone, an injury to his left shoulder, injury to his left forearm, his left hand was skinned and split between the fingers. His left hip bone was injured. He suffered an injury to the ribs and to his back, to his left knee and left ankle, his right knee and his

right leg from the knee to the ankle, and a long, jagged laceration in his left forehead. He was in bed and in a chair for a couple of months. He had special nurses for six or seven weeks, suffered pain all the time, had pains in his chest, shoulder and head, suffered dizzy spells. The sidewalk would seem to come up and he would stumble and had difficulty in walking. The doctor was in constant attendance on him for seven or eight weeks. He did not have his clothes on until some time in June, and at the time of the trial, which was a year and eight months after the accident, he had not had a night without pain, and had not been able to go to his office or transact business. We have reached the conclusion that the verdict of $3,500 was fully warranted.

The court has examined all of the assignments of error, but, having discussed the ones deemed most important, cannot discuss the others without unduly lengthening this opinion.

When we review the facts, that a pedestrian in a long block crosses near the middle to shop at a store, and looks carefully to the direction from which traffic is coming, sees a slow-moving truck, but nothing else close by, and gets to the center of the street, looks carefully again for traffic, and is struck when nearly across the street by an automobile proceeding on the wrong side of the center of the street at an excessive rate of speed, which facts are properly submitted to the jury, under proper instructions, we have reached the conclusion that there is no reversible error in the record, and the judgment is

AFFIRMED.

BANK OF BRULE, APPELLEE, V. ROBERT F. HARPER ET AL., APPELLANTS.

4 N. W. (2d) 609

FILED JUNE 19, 1942. No. 31396.

1. **Fraudulent Conveyances.** "A conveyance between relatives which has the effect of hindering or delaying a creditor in the collection of his claim is presumptively fraudulent and, in litigation between the creditor and the parties to the conveyance over its al-

leged invalidity, the burden is on the parties to the conveyance to establish the good faith of the transaction." *McBride v. Helmricks*, 140 Neb. 843, 2 N. W. (2d) 118.

2. **Creditors' Suit.** A court of equity possesses the power to compel the application of a debtor's unexempt property to the payment of his debts when the creditor has no other means of redress.

3. ———. A court of equity will, when all other remedies have failed, at the suit of a creditor, take the unexempt property wherever found and in whatever condition it may be and cause it to be applied toward the payment of his debt.

4. **Fraudulent Conveyances.** The question of fraudulent intent is a question of fact and not of law, when considered in the matter of a conveyance between husband and wife, charged to be made to hinder and delay creditors. *Hilton v. Clements*, 137 Neb. 791, 291 N. W. 483.

5. ———. "When the testimony relied upon to show good faith is given by interested relatives only, the reasonableness or unreasonableness of their evidence has considerable weight in arriving at a just conclusion." *Hilton v. Clements*, 137 Neb. 791, 291 N. W. 483.

6. ———. Where a husband and wife confederate to defraud creditors by transferring property of the husband to the wife, so that it cannot be reached by creditors of the husband, a personal judgment may be entered against the wife, provided it appears, or is clearly to be presumed, that she still retains the proceeds or her personal estate has had the benefit thereof. *Sheldon v. Parker* (on rehearing) 66 Neb. 634, 95 N. W. 1015.

7. **Exemptions.** "While, ordinarily, a policy of life insurance payable to the wife upon the death of her husband is not subject to be applied in payment of his debts, yet where the policy is in the form of an endowment, a certain sum to be repaid after a specified number of years, the transaction is in the nature of a loan, the insurance being a mere incident, and where the premiums have been paid by an insolvent debtor, the insurance money on such policy received by the wife during the lifetime of the husband is not transmuted so as to be hers as against creditors of the husband, but is subject to their claims." *Talcott v. Field*, 34 Neb. 611, 52 N. W. 400.

8. ———. Section 44-1130, Comp. St. Supp. 1941, does not contemplate that money received by an insured upon surrender of the insurance contract, wherein such amount is payable to the insured personally, and he subsequently gives the same to his wife, is exempt, either in the possession of the insured or the wife, from legal or equitable process and from claims of creditors of the insured and of the wife (beneficiary).

9. **Evidence** examined and *held* to sustain the findings and judgment of the trial court.

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

E. H. Evans and *G. F. Nye*, for appellants.

Beatty, Maupin, Murphy & Derry, contra.

Heard before ROSE, EBERLY, PAINE, CARTER, MESSMORE and YEAGER, JJ.

MESSMORE, J.

The plaintiff seeks to impress a trust upon proceeds realized from the sale of certain property by virtue of condemnation thereof. The corporate capacity of the plaintiff is admitted, and that it recovered a judgment on October 18, 1938, in the county court of Keith county against the defendants, A. O. Harper and his father, Robert F. Harper. Filena Harper, commonly known as Lena, not a party to the notes, is the wife of Robert F. and the mother of A. O. Harper. The judgment was transcripted to the district court. That the notes sued on, dated February 25, 1936, were renewals of previous indebtedness of A. O. Harper and Robert F. Harper and merged into the judgment is admitted.

The petition then alleged certain facts disclosing the transaction had between the husband and wife, wherein they confederated to cheat, defraud and delay the judgment creditor in the collection of its claim against the husband. We will not set forth the facts as pleaded in the petition, but those so pleaded relevant and material to a decision of this case will be found in the summary of the evidence. The ka Public Power and Irrigation District instituted condemnation proceedings against the real estate and leasehold petition further alleged: During 1938 the Central Nebras- interest therein and the buildings and improvements thereon, resulting in an award in favor of Lena Harper and Robert F. Harper in the sum of $1,900. Thereafter, Lena Harper, claiming to be the owner of all of said property and the leasehold interest, filed a petition on appeal, claiming to be the sole and unconditional owner thereof; that said action

was taken on her part in furtherance of a scheme and plan between her and her husband to divert and deceive the creditors of Robert F. Harper.

The prayer was for a temporary restraining order, to restrain defendants from disposing of moneys received from condemnor until such time as the action may be determined; that a decree be entered, setting aside the conveyance of said leasehold interest, finding and determining that the property was, in fact, the property of Robert F. Harper and subject to payment of plaintiff's judgment, and for general equitable relief.

In its decree the court found generally in favor of the plaintiff and against the defendants and each of them; that defendant Robert F. Harper, at the time he was indebted to the plaintiff, attempted to transfer all his property to his wife, for the purpose of placing it beyond the reach of his creditors, including the plaintiff; that such transfers were without consideration; that Lena Harper, from time to time, changed the form of the property so transferred to her; found that there was due and owing the plaintiff from Robert F. and A. O. Harper the sum of $1,224.92, and that Lena Harper, by reason of the transfer of the property to her and subsequent uses and changes thereof, attempted to enhance her personal estate, and that plaintiff is entitled to a judgment against Lena Harper personally for the amount due it. Lena Harper was restrained and enjoined from disposing of a part of the money, viz., $1,500, paid to her by the condemnor; this money to satisfy plaintiff's judgment in the event it became final and conclusive. Motion for a new trial was overruled, and defendants have appealed to this court.

The record discloses: In October, 1925, Herman E. Fairchild leased certain property to Thomas Eggers for the purpose of operating and maintaining a general merchandise store, filling station, garage, dwelling-house and buildings connected therewith. The property leased was a parcel or strip of land lying in the southwest quarter of the southwest quarter of section 6, township 15, range 40, in Keith county,

Nebraska. An assignment of this lease was made to A. O. Harper in 1927 and to Lena Harper in 1928, these assignments not appearing as such in the record. In 1928 A. O. Harper operated the store on the premises known as the Belmar store, and during the year he traded the stock of merchandise, fixtures, equipment and business to his father and mother for some live stock owned by his mother; the elder Harpers moving from a farm to operate and manage the store, and the son moving to the farm to carry on farming operations. When this exchange was made the original indebtedness to the plaintiff occurred, Robert F. Harper receiving a part of the money loaned to A. O. Harper, and signing as surety on the note. The indebtedness was renewed at different times, and the father signed the renewal notes as surety. During the time of the indebtedness, Robert F. Harper made certain financial statements to the plaintiff, which may be briefly summarized as follows:

February 21, 1931, he stated he was the owner of a stock of general merchandise, valued at $2,000; 160 acres of land, valued at $16,000, encumbered for $8,000; bills receivable, $500; accounts payable, $50, and declared he had no partners in the business. March 2, 1932, the statement was practically the same, but there appeared one item—notes indorsed for friends $2,017.95. A similar financial statement of June 22, 1933, showed indebtedness of A. O. Harper, $2,130. Another financial statement of February 17, 1934, was of the same nature as the others. The testimony of Robert F. Harper indicates some question as to whether he signed some of the financial statements. His signature, however, appears on them.

May 7, 1934, Robert F. Harper executed a bill of sale, transferring to his wife, Lena Harper, all of his title and interest in the store. Some question is raised about the notary's commission covering a period of more than six years from the date of execution and acknowledgment of the bill of sale on May 7 and the expiration date of the commission. Explanation of this discrepancy is attempted, and the true situation in this connection is not revealed in the record.

Lena Harper, acting under the bill of sale, took over the complete management and operation of the store. The bank account of Robert F. Harper was terminated, he having no further interest in the business. However, subsequent to the execution of the bill of sale, other financial statements were made by Robert F. Harper to the plaintiff. One dated June 18, 1934, showed stock of general merchandise, $1,400; store accounts due, $600; a sum of money borrowed from one Carl Beard; notes indorsed for friends, $2,216; bills receivable, $800, and a 5,000-dollar encumbrance on real estate. Another statement, dated December 15, 1934, showed cash on hand, $100; merchandise, $1,400; bills receivable, $250; accounts receivable, $500; bills payable, $350; open accounts payable, $100; town real estate, $1,500; country real estate, $7,500, and listing live stock. This statement also showed Harper to be a joint signer with A. O. Harper on paper at plaintiff bank, and a mortgage on country real estate of $5,000. He recited the cost of a store building in the sum of $1,600.

Nearly four years after the bill of sale was executed, Lena Harper wrote to the county clerk, stating that she was enclosing the bill of sale of the merchandise; that she wanted it filed away for safe-keeping, and for him to let her know if there was any fee connected with it. The record shows a note in the sum of $325, dated December 15, 1934, due January 15, 1936, signed by Robert F. Harper, for the purchase of scales placed in front of the store at Belmar; in addition, 12 checks, showing payments on the scales from January 14, 1935, to January 15, 1936, varying in amounts from $25.38 to $27.45, all signed by Lena Harper.

On June 29, 1934, Robert F. Harper surrendered a policy of insurance in which his wife Lena was named beneficiary. He received $651.55 cash surrender value and a guaranteed additional sum of $312, or a total of $963.55, paid direct to him. This amount and the sum of $219.70 on Robert F. Harper's bank account were turned over to Mrs. Harper, making a total of $1,183.25. The cost of the new store building was: Material, $1,247.20; labor, approximately $240,

and an additional $48, totaling $1,535.20, the labor being paid mostly with grocery orders at the store. The insurance money was used in the purchase of material and for the building of the store.

May 7, 1938, Clarence Fairchild leased to Lena Harper a tract of land, adjoining U. S. highway No. 26 on the south side, located in the southeast quarter of section 1, township 15, range 41, Keith county; the lease to run until May 7, 1958, payable $5 annually on October 1. The new store building was built on land distinct from that shown in the original lease; in fact, 300 feet west thereof. During the four-year interim there appears to have been an oral lease, and the amounts paid by Lena Harper are shown by receipts containing the same language, covering annual rental periods from October 1, 1934, to and including October 1, 1940. These receipts are all in the same handwriting, apparently written with the same pencil, all folded alike, and appear to have been made at about the same time.

In the fall of 1934, when the new store was completed, the stock of merchandise, one show case, candy scale and household goods were moved from the old location to the new. The transfer of merchandise and business, evidenced by the bill of sale, and the proceeds from the insurance policy were to reimburse Lena Harper for money she had received from her father's estate, he having departed this life in 1916, and she having converted all the property received from his estate into cash by 1921. The record contains a check, dated November 20, 1917, to her in settlement of her interest in the estate, in the sum of $702.02. Most of the money she received from her father's estate was put into land, and she testified that it was used for the benefit of the family. The amount of her interest in the estate is not definitely shown, and there is no written evidence of any kind or nature disclosing what amount of money, if any, her husband owed her. She kept no account of any indebtedness, but concluded the amounts she received from him would apply, as far as they would go, indicating that he might have owed her more than he had turned over to her.

The title to the land was in the husband's name; the personal property for assessment purposes was in the wife's name; she made the tax returns and made no returns showing any indebtedness owing by him to her. When the bill of sale was made, the mortgagee was pressing for an adjudication of the mortgage. Subsequently, the mortgage was foreclosed and the sale of the land confirmed, disposing of the defendant's interest therein.

In 1935 defendant Robert F. Harper was operated upon for appendicitis, suffered from pernicious anemia and has since remained under the care of a physician. He was 68 years of age and his wife 66 years. From the time of operating the Belmar store, he was also postmaster, received rent for the space in the store, and retained this position until at least 1940, when they removed from the premises, due to the condemnation proceedings in 1938 brought by the power and irrigation district on the real estate and leasehold interest therein, resulting in an award in favor of the defendants Lena and Robert F. Harper in the sum of $1,900. Thereafter Lena Harper, claiming to be the sole owner of the leasehold, appealed, and the condemnor paid her $5,000 in money in full satisfaction of her claim.

The foregoing constitute the material facts upon which the plaintiff bases its right of recovery.

The defendants predicate error on the refusal of the court to sustain defendants' motion to dismiss the case at the close of all the evidence. Defendants' contention is that the plaintiff seeks to subject a portion of the proceeds of the judgment obtained by Lena Harper in the condemnation proceedings to the satisfaction of a judgment obtained by this plaintiff against Robert F. Harper, wherein Lena Harper was in no sense a party; that Robert F. Harper never had an interest in the property leased to Lena, calling attention to the lease from Clarence Fairchild to Lena, dated May 7, 1938, and heretofore referred to in the summary of the evidence; that this lease was recorded May 9, 1938; that Lena Harper paid the rent and received the receipts therefor in her name; that the $5,000 paid to her was for the loss

of the land, and that nothing was said about the building. The following proposition of law is cited by the defendants:

A suit by a judgment creditor to receive assets of his debtor, not reachable by execution, can be maintained only where the debtor himself had an actionable demand at the time the suit was instituted. It is contended that plaintiff's petition does not disclose that Robert F. Harper had an actionable demand against the Central Nebraska Public Power and Irrigation District on October 7, 1940; that Robert F. Harper had disposed of and turned over all his interest of every kind and nature in a leasehold on property in section 6, as heretofore described; that the leasehold condemned was not in section 6 but in section 1, a separate, distinct and different lease; that, therefore, Robert F. Harper, judgment debtor, had no actionable demand in the parcel of land in section 1—citing *German Nat. Bank v. First Nat. Bank,* 55 Neb. 86, 75 N. W. 531; *Id.,* 59 Neb. 7, 80 N. W. 48.

The allegations of plaintiff's petition constitute an action in the nature of a creditor's bill, where the property of a debtor is followed into the hands of another and is obligated to the payment of the debtor's obligations; the petition does not plead the requisites of a case in aid of execution. In cases of this nature, this court has time and again announced the rule that a conveyance of property by a husband to his wife is presumptively fraudulent as to existing creditors and will be set aside unless the good faith of the transaction be established by a preponderance of the evidence. *Farmers Elevator Co. v. Peck,* 134 Neb. 305, 278 N. W. 499; *Riggs v. Hroch,* 133 Neb. 260, 274 N. W. 598.

"A conveyance between relatives which has the effect of hindering or delaying a creditor in the collection of his claim is presumptively fraudulent and, in litigation between the creditor and the parties to the conveyance over its alleged invalidity, the burden is on the parties to the conveyance to establish the good faith of the transaction." *McBride v. Helmricks,* 140 Neb. 843, 2 N. W. (2d) 118. See, also, *Lincoln Savings & Loan Ass'n v. Mann,* 129 Neb. 26,

260 N. W. 559; *Christensen v. Smith,* 123 Neb. 388, 243 N. W. 118; *Lincoln Trust Co. v. Sweeney,* 124 Neb. 686, 248 N. W. 67.

In *Arlington State Bank v. Paulsen,* 57 Neb. 717, 78 N. W. 303, this court said (p. 734): "It has always been one of the powers possessed by courts of equity to compel the application of a debtor's unexempt property to the payment of his debts when the creditor had no other means of redress; * * * In other words, when all other remedies have failed, a court of equity will, at the suit of a creditor, take the unexempt property of a debtor wherever found, in whatever condition it may be, and cause it to be applied towards the payment of his debt."

In *Hilton v. Clements,* 137 Neb. 791, 291 N. W. 483, it was said in the body of the opinion: "The question of fraudulent intent is a question of fact and not of law, when considered in the matter of an assignment charged to be made to hinder and delay creditors. When the testimony relied upon to show good faith is given by interested relatives only, the reasonableness or unreasonableness of their evidence has considerable weight in arriving at a just conclusion."

An analysis of the evidence shows that the indebtedness to the bank was a prolonged, continuous indebtedness, of which the husband and wife were well aware. The financial statements clearly indicate a claim of ownership in the merchandise and equipment of the Belmar store in Robert F. Harper, even though his wife claimed to manage the store, took over the bank account and terminated his bank account. He was at all times available, acted in the capacity of postmaster, received rent for post office space in the store, waited on customers, and took a general interest in business matters concerning the store. The fact that the store was moved to a new location and that the lease thereof was made only to Lena Harper does not destroy the evidence of the husband's interest in the operation of the store and ownership of merchandise therein.

We conclude, under the authorities cited, and considering

the nature of the plaintiff's action, that the transfer of defendant Robert F. Harper's property, as hereinbefore set out, was fraudulent as to the judgment creditor.

We need not discuss the question of whether or not the injunction was proper under the circumstances of this case. It is not attacked by the defendants.

With reference to the question of whether or not a personal judgment may be rendered in a creditor's bill against the defendant (in this instance, Lena Harper), who was a fraudulent transferee of the debtor's property, this court in the case of *Sheldon v. Parker* (on rehearing) 66 Neb. 634, 95 N. W. 1015, held:

"Where a husband and wife confederate to defraud creditors by transferring property of the husband to the wife, * * * so that it cannot be reached by the creditors of the husband, a personal judgment may be entered against the wife * * * provided it appears, or is fairly to be presumed, that she still retains such proceeds or her separate estate has had the benefit thereof."

In the instant case, Robert F. Harper attempted to place in his wife's name all property in the Belmar store, consisting of merchandise, fixtures, accounts receivable, and the lease upon the property on which the new store was built. This property, such as it may have been at the time of the attempted transfer, cannot be identified as the property actually transferred to the wife. The stock of merchandise would, by necessity, change. The money was converted to her use in his account in the bank, was spent and replaced by other funds. While the leasehold was initially taken in her name, the first disclosure of the lease was in 1938. Prior to that time, it had been an oral lease, the evidence disclosing that the building was paid for with money obtained from the proceeds of an insurance policy of the husband. Although all of such property was subsequently changed from its original status, the evidence does show that the wife was an active participant in the fraudulent designs of her husband in attempting to escape his creditors. Her personal estate was enhanced by virtue of the carrying

on of the business in her name. The evidence does disclose that the property had a value in excess of the amount due the plaintiff, and the judgment rendered against the wife is in an amount less than she benefited through the attempted conveyance.

Defendants contend that, under the rule in condemnation proceedings, as announced in *James Poultry Co. v. City of Nebraska City,* 135 Neb. 787, 284 N. W. 273; on rehearing, 136 Neb. 456, 286 N. W. 337: "Where a leasehold has been taken or damaged for a public use, the owner is entitled to recover as compensation the difference between the value of such leasehold immediately before and immediately after the completion of the improvement from which the injury results." The opinion quotes from *Lowell v. Buffalo County,* 119 Neb. 776, 230 N. W. 842, the defendants contending that the $5,000 paid to Mrs. Harper included the leasehold interest, and the interest in the land was the sole and only subject of the condemnation. The rule is correctly stated, but it is proper to consider the nature of the business, the fixtures and equipment, and the merchandise, not as independent elements of damage, but as proper items to be considered in determining the value of the leasehold interest. See *Lowell v. Buffalo County, supra,* and *James Poultry Co. v. City of Nebraska City, supra.* The defendants' contention is without merit.

Section 44-1130, Comp. St. Supp. 1941, is cited by defendants. It provides in part: "All moneys, avails, cash values and all and every benefit accruing under * * * any policy or certificate of life insurance payable to a beneficiary other than the estate of the insured * * * *shall be exempt from attachment, garnishment or other legal or equitable process* and from all claims of creditors of the insured and of the beneficiary. * * * " (Italics ours.)

The record does not disclose the terms, conditions, rights or options contained in the insurance contract, the policy not being contained therein, except that the insured, Robert F. Harper, carried the policy for 20 years; then surrendered it, receiving the amounts heretofore noted. This he elected

to do, taking payment in his own name and terminating any and all rights his wife might have in the policy, assuming she was the beneficiary. Therefore, the proceeds in his hands would not be exempt from the claims of creditors. The statutory provision is not so all-inclusive that it covers such a situation as here presented. We quote from the syllabus in *Talcott v. Field,* 34 Neb. 611, 52 N. W. 400, as follows:

"While, ordinarily, a policy of life insurance payable to the wife upon the death of her husband is not subject to be applied in payment of his debts, yet where the policy is in the form of an endowment, a certain sum to be repaid after a specified number of years, the transaction is in the nature of a loan, the insurance being a mere incident, and where the premiums have been paid by an insolvent debtor, the insurance money on such policy received by the wife during the lifetime of the husband is not transmuted so as to be hers as against creditors of the husband, but is subject to their claims."

Considering the state of the record on this phase of the case, the statutory provision cited by defendants is not applicable.

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

AFFIRMED.

GEORGE L. HAECKE ET AL., APPELLANTS, V. EASTERN SARPY COUNTY DRAINAGE DISTRICT, APPELLEE.
4 N. W. (2d) 744

FILED JUNE 26, 1942. No. 31318.

1. **Municipal Corporations.** "Statutory provisions authorizing assessments of special taxes against property benefited by public improvements are to be strictly construed, and it must affirmatively appear that the taxing authorities have taken all steps which the law makes jurisdictional; the failure of the record to show such proceedings will not be aided by presumptions." *Morse v. City of Omaha,* 67 Neb. 426, 93 N. W. 734.

2. Drains. Compliance with the provision of section 31-511, Comp. St. 1929, requiring the board of directors of a drainage district to have "first, with the aid of such engineer, surveyor and other assistants as they may have chosen, made detailed plans of the public work to be done," is a condition precedent to the apportionment of benefits to lands within the district.
3. ———. The question of compliance with this condition precedent and the sufficiency of plans adopted for that purpose may be presented to the district court on appeal from an order of apportionment of benefits.

APPEAL from the district court for Sarpy county: WILMER W. WILSON, JUDGE. *Reversed.*

John C. Barrett, for appellants.

William R. Patrick, contra.

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

SIMMONS, C. J.

This action involves an appeal from an affirmation of the apportionment of benefits to certain lands made by the Eastern Sarpy County Drainage District, which herein will be called the district. The appellants are the landowners and will herein be called the landowners.

The proper organization of the district under the provisions of chapter 31, art. 5, Comp. St. 1929, is not questioned. It appears that in 1909 the Papillion Drainage District was organized; did certain work in improving the channel of Papillion creek in a part of its channel and was then dissolved. The district involved in this litigation was organized in 1939 for the purpose of repairing a part of the work done by the Papillion Drainage District and improving the creek from its mouth on that part not formerly included in the Papillion Drainage District improvement.

Subsequent to its organization the board of directors of the district met on April 9, 1940, and adopted the following plans for work to be done in said district:

"The levees along the main ditch, where insufficient, damaged or destroyed by floods, to be repaired as soon as pos-

sible after the district acquires a dragline and necessary operators.

"Thereafter the construction, repair and maintenance of levees, removal of obstructions from ditches and creek, and improvement of out-let to the Missouri river, as may be necessary, to be carried on under the personal supervision of the board of directors, to the extent that funds become legally available for such purposes, but the cost of such improvement and maintenance work at no time to exceed the benefits received by property within said district, by reason of such work."

Thereafter the district purchased machinery and proceeded to do considerable work.

October 11, 1940, the board designated October 26, 1940, as the date for a meeting "for the purpose of hearing all parties interested in the apportionment of benefits by reason of the improvement to lands," etc. Notice was published, the meeting held and "all parties appearing" were heard. The board of the district then apportioned benefits and levied an assessment for money required "to meet the cost and expense of carrying on the contemplated repair and improvement work to dikes, levees and ditches therein, purchase of equipment, payment of interest, wages and incidental expenses, during the ensuing fiscal year."

Thereafter the landowners filed written complaints with the county clerk "against certain benefits fixed and determined" by the district; objected "to any assessments that may be levied against any or all" of their lands for the reason that they had at their own expense protected their lands by dikes and embankments, that "none of the work done by or contemplated to be done" by the district would be of benefit to them and therefore objected to "any assessments or benefits" being made against their lands.

Transcripts were then filed in the district court. Demurrers were filed by the district and overruled by the court. March 10, 1941, the landowners moved that the assessments "be declared void and further that it be declared that complainants received no benefits under and by virtue of said assessment for the following reasons.

"1. That said drainage district has failed to file a petition as required by law in this proceeding. 2. That the directors of said drainage district have not complied with the law as shown by the Compiled Statutes of the state of Nebraska for 1929 in the following particulars: (a) That no plan of the proposed improvement has been made. (b) That no engineer has been employed and made findings as required by law. (c) That no estimated costs of any proposed improvement has been made by the board of directors as required by law. (d) That the detailed plan with engineer's reports and a cost of the improvement is mandatory to substantiate any assessment."

A further reason given was that the district had not complied with several provisions of the statute. A ruling does not appear to have been made upon this motion.

On the same day the court began hearings on the questions involved.

At the close of the case the trial court took the matter under advisement and later entered its decree finding the lands benefited by "the improvement contemplated by the plan adopted" by the district, but reducing the units of benefit per acre. From this decree the landowners appeal and the district cross-appeals.

Section 31-511, Comp. St. 1929, provides: "The board of directors having first, with the aid of such engineer, surveyor and other assistants as they may have chosen, made detailed plans of the public work to be done in accordance with the first section of this article, shall apportion the benefits thereof accruing to the several tracts of land within the district which will be benefited thereby, on a system of units."

The landowners present generally two propositions. First, the failure of the district to have "made detailed plans of the public work to be done" before the apportionment of benefits. Second, the failure of the district to establish that the land would be benefited by the improvement. To these the district advances the contention that the question of "detailed plans" was not an issue, that the district court

was without jurisdiction to decide it and that the benefits apportioned were proved. In support of its cross-appeal the district contends that its demurrers should have been sustained and that the trial court erred in reducing the units of benefits apportioned to the appealing landowners.

The first question to be determined is whether or not the statutory requirement of the making of "detailed plans of the public work to be done" is a condition precedent to any valid apportionment of benefits. This court has long been committed to the rule: "Statutory provisions authorizing assessments of special taxes against property benefited by public improvements are to be strictly construed, and it must affirmatively appear that the taxing authorities have taken all steps which the law makes jurisdictional; the failure of the record to show such proceedings will not be aided by presumptions." *Morse v. City of Omaha,* 67 Neb. 426, 93 N. W. 734.

This court in considering the statute here involved has said: "While the statute does not provide for notice before the directors shall adopt a system of drainage, the property owner is given notice of the time when benefits will be apportioned to his land. At that time the engineer *must have prepared a detailed plan,* and, if the *expense* of carrying that scheme into execution will exceed the benefits that will accrue to the land within the district, a hearing upon the objections will develop that fact and the plan will not be adopted." (Emphasis supplied.) *O'Brien v. Schneider,* 88 Neb. 479, 129 N. W. 1002.

Section 31-512, Comp. St. 1929, provides that objections may be made to the apportionment of benefits at the hearing before the board of directors. Upon what intelligent basis may a landowner object if he does not have available for examination those detailed plans? By what yardstick may the board determine a "fair and just" apportionment of benefits if it does not have a detailed plan by which those benefits are to be measured? Section 31-513, Comp. St. 1929, provides that upon appeal the district court shall hear and determine such objections as a case in equity. Again,

by what yardstick may the district court measure such benefits in the absence of the "detailed plan" which the statute contemplates?

Section 31-514, Comp. St. 1929, provides that, "*if there is such a change of plans* or enlargement or extension of the work, as to make a different apportionment necessary, *then*" the board may make a new apportionment as provided in the section. Section 31-517, Comp. St. 1929, provides for the issuance of bonds under certain conditions, "not, however, exceeding the amount that the *engineer* of the district shall certify as being required." Section 31-522, Comp. St. 1929, with reference to borrowing money on the district's note, provides that the amount shall not exceed "the cost of the drainage improvement as estimated by the engineer." Section 31-526, Comp. St. 1929, provides: "The board of directors shall employ such engineer, surveyor and other help as to them may be deemed necessary," etc. Without determining the applicability of section 31-550, Comp. St. 1929, to the organization of the district, it is noted that that section, adopted subsequent to the original act, provides that the board of directors, "having first adopted detailed plans and specifications of the work proposed to be done, and made an estimate of the total cost of such contemplated improvement, and filed such plans, specifications and estimated cost," shall proceed as therein directed.

It is patent from a reading of the entire act, as it existed when the district was organized, that the legislature intended that the first step in the making of improvements should be the securing of the services of an engineer and the making and adoption of detailed plans of the public works to be done, all as a condition precedent to the apportionment of benefits. The act states that shall be done "first;" it is further patent that no valid apportionment of benefits can intelligently be made until that is done and that it is only for such improvements so planned that a lawful apportionment can be made.

In its case in chief the district offered evidence that it had employed a surveyor to make a map of the boundaries of its

district and a list of the legal descriptions of the land involved; that there were no engineering problems involved; that it had a man on its board of long experience in this type of work. It offered its resolution of April 9, 1940, heretofore set out. It produced the engineer who had prepared the detailed plans for the Papillion Drainage District in 1909 and showed that those plans had been made available to at least one member of its board. There, however, was no showing that those 1909 plans were adopted by the district as its detailed plans of the work to be done, nor that it was following or proposed to follow them. Its engineer witness indicated they would need to be "redesigned." The resolution of April 9, 1940, made no reference to those plans. It is apparent that that resolution of two sentences is merely a sketchy outline of a general policy. The first sentence as to repairing the levees along the main ditch is qualified with "where insufficient" without any indication as to what levees are deemed insufficient, or the extent or manner of the repair work necessary. The second sentence as to "construction, repair and maintenance" is limited by "as may be necessary" without indication as to what "may be necessary;" it is further limited by "the extent that funds become legally available" and the only reference to cost is that it shall not "exceed the benefits received by property within said district." This resolution cannot be held to be a compliance with the "detailed plan" provision of the statute.

From the evidence it may be gathered that the board of directors had a general plan of what they thought ought to be done, but other than as expressed in the resolution it existed entirely in the confines of their separate minds. One member of the board apparently held to the view that the first work to be done was the repairing of the levees on the creek in the upper portion of the district. That was the work which was apparently immediately undertaken. Another member held the view that the next work to be undertaken was the building of a levee along the south side of the creek from the upper part of the district to the creek's mouth, including the rebuilding of levees already construct-

ed by the appellant landowners; that when that should be done then a similar structure should be built along the north side of the creek. We find no satisfactory evidence that the board ever adopted such a plan, nor that it had the advice of a competent engineer on all the detailed problems that enter into the determination of the adequacy of such an improvement or the benefits to be derived from it. There appears to have been some question as to whether certain land on the north side of the creek was in Iowa or Nebraska with the resultant question of the right of the district to locate structures thereon.

It does not appear that any estimate was ever made of the total cost of the "plan of improvement," nor do we find any satisfactory evidence of a plan of procedure for the expenditure of the moneys to be raised by the assessment already made. Neither is there satisfactory evidence as to what the contemplated improvement involved sufficient to measure whether or not the work was being done according to plan, or when a landowner might know that the work had been completed for which his lands had been assessed.

This record contains no plans of any system of improvements which will be of benefit to the lands of the appealing landowners. The work may or may not be done down to their lands on the lower reaches of the creek. If this proceeding is approved they will be compelled to pay the assessments made without the assurance contemplated by the act that work will be done which will benefit their lands.

The necessity for the making of detailed plans as a condition precedent to the proper apportionment of benefits was established by the district's witness, the engineer who prepared the 1909 plans. He testified to the various elements that would have to be known, including the volume of water to be handled, before the height of the levees, the distance between the levees, the manner of their construction, or a "complete structure" could be designed; that the district faced two physical problems, "one of making repairs and adequate *redesign* of the existing ditch, and then the other part of the extension to the Missouri river" and that "you

have to determine the sizes that are necessary to carry the volume of water * * * and you do it by figuring or by experiments." He was then asked to assume the adoption by the board of the resolution of April 9, 1940, hereinbefore set out, and "regardless of whether that meets with engineering technique or not, is that in your judgment a workable program to accomplish the repair and maintenance necessary and essential to the objects and purposes of this district?" He answered: "Yes. I will answer yes, but I would like to explain that this doesn't express the figures and dimensions so that the plan could be related to the apportionment of benefits. The thing that we ordinarily have to have, by relying upon the adequacy of the improvement to accomplish the purpose of protecting the land from floods, then you could proceed to apportionment of benefits and with that, assume 100 per cent. perfect plan and no floods, you could determine how that plan affects all of the lands." In answer to another question he stated that "the apportionment of benefits is made over the district with respect to the plan; how it affects the land or increases its value."

The next question is whether or not the failure of the district to have such detailed plans made can be presented to the district court in this proceeding. Section 31-513, Comp. St. 1929, provides for an appeal by the landowner "claiming to be aggrieved" by the apportionment of benefits made by the board, and provides that the district court after hearing "shall increase or reduce the units of benefits * * * where the same may be required in order to make the apportionment equitable." From this the district argues that the district court has only the right to increase or decrease the units of benefits apportioned. We do not think that such a conclusion follows. It is clear that these provisions of the act presuppose a prior compliance by the district with the first sentence of section 31-511, Comp. St. 1929, to wit, "having first, with the aid of such engineer, surveyor and other assistants as they may have chosen, made detailed plans of the public work to be done." Obviously had that been done in this case then the question to be presented on appeal

would have been that of the correctness of the apportionments. We will not assume that the legislature intended to permit the district to ignore the plain provision of the statute and to deny the landowner any relief from the results of that violation.

This court in *White v. Papillion Drainage District,* 96 Neb. 241, 147 N. W. 218, had under consideration a number of questions concerning provisions of this same statute. It was there held: "If the detailed plans and estimate are insufficient they should be corrected upon the hearing of apportionment of benefits." It seems obvious, if the question of the sufficiency of the plans may be corrected at that hearing, that the absence of any such plans may likewise be considered at that hearing. The district's position is that the resolution of April 9, 1940, and the Papillion Drainage District's plans constitute the "detailed plans" of this district. If their contention is correct then the sufficiency of those plans was a proper question for consideration at the hearing on the apportionment of benefits. Of necessity it is a proper matter to be considered by the district court on appeal from the apportionment of benefits. We think there is a substantial defect in the proceedings leading up to the apportionment of benefits and that it may be presented as has been done here. This conclusion is in accord with the decision in *Scottsbluff Drainage District v. Scotts Bluff County,* 113 Neb. 187, 202 N. W. 455.

The statute, section 31-513, Comp. St. 1929, provides that the hearing in the district court shall be in a summary manner as a case in equity. While the landowners in their notices to the county clerk gave particular reasons for their objections, the fact remains that they did object to the apportionment of any benefits to their lands. The statute does not appear to contemplate the use of exact pleadings in these cases. In the district court the district carried the burden of establishing the correctness of its apportionment. In doing that it clearly recognized that whether or not it had "made detailed plans" with the aid of an engineer, surveyor or other assistants, was an issue and, as has been

pointed out, it offered evidence in its case in chief heretofore summarized as to that issue.

The judgment of the district court is reversed, and the apportionments of benefits appealed from are held to be void and are set aside.

REVERSED.

GEORGE F. WASHINGTON, APPELLEE, V. ANN BESELIN ET AL., APPELLANTS.

4 N. W. (2d) 753

FILED JUNE 26, 1942. No. 31224.

1. **New Trial.** "A motion for a new trial is indivisible, and when made jointly by two or more parties, if it cannot be allowed as to all, it must be overruled as to all." *Dutcher v. State*, 16 Neb. 30, 19 N. W. 612.
2. **Money Received.** "An action in the nature of one for money had and received lies wherever the defendant has obtained possession of money which *ex æquo et bono* he ought to refund; and it is proper to bring the action against the party who has received the money." *School District v. Thompson*, 51 Neb. 857, 71 N. W. 728.
3. ———. "An action for money had and received will lie to recover money secured from the plaintiff, without consideration, in reliance upon fraudulent representations made by the defendant." *Martin v. Hutton*, 90 Neb. 34, 132 N. W. 727.
4. **Payment.** "The plea of payment is an affirmative defense, and the burden of proving it rests on him who pleads it as a defense." *Farmers Cooperative Mercantile Co. v. Shultz*, 113 Neb. 801, 205 N. W. 288.
5. ———. Evidence examined, and *held* sufficient to support the verdict of the jury and the judgment entered thereon by the trial court.

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

Abrahams, McGrath & Frenzer, Gross & Crawford and *Harry L. Welch*, for appellants.

Vincent J. Murphy and *Edward F. Fogarty, contra.*

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

EBERLY, J.

This is an appeal by Ann Beselin and Ray L. Beselin from the judgment of the district court for Douglas county rendered against them in a law action, overruling their joint motion for a new trial after the return of a verdict of a jury, duly impaneled, against them in the above entitled cause. In this action George F. Washington, as plaintiff, seeks to recover from all the defendants the $3,000 evidenced by a check of that amount payable to his order. In his petition, in substance, it is alleged that he was employed by Beselin, Inc., as a delivery man, and while so employed a policy of insurance was taken on plaintiff in the Prudential Insurance Company of America, insuring against death and permanent total disability, the face of which policy was $3,000; that the disability benefits were payable to plaintiff; that the policy matured by reason of the total permanent disability of plaintiff on or about January 27, 1940, and that a check of $3,000 of the Prudential Insurance Company, the insurer under the policy, payable to the order of plaintiff, was delivered to the office of defendant Ann Beselin in Omaha, Nebraska, in payment of the disability claim of plaintiff. Plaintiff further alleges that all of the defendants, except the Omaha National Bank, were either related or associated; that Ann Beselin acting for herself and for all other defendants, except the Omaha National Bank, in pursuance of a conspiracy between the defendants other than the bank, and in pursuance of a common plan, secured the plaintiff's indorsement on such check, cashed the same and defrauded plaintiff of the money represented thereby. Plaintiff alleges that he did not voluntarily deliver the check to defendants, but through their artifices and false representations the check was obtained from him by defendants and appropriated to their own use. It is further alleged, in substance, that, after plaintiff had subscribed his signature on the back of said check, defendant Ann Beselin seized it by force and violence and made off with it, without consent of plaintiff, before he could make effective resistance and that he was unable to pursue her on account of his physical condition.

He further alleges that the purpose of the defendants was to enrich themselves at the expense of plaintiff without consideration to him. In his petition plaintiff prays: "Judgment against the defendants and each of them for Three Thousand Dollars ($3,000) as for money had and received, and for interest," etc.

The answer of the defendants Ann Beselin and Ray L. Beselin admits the employment of plaintiff as alleged, "and that while the plaintiff was so employed a policy of insurance with the Prudential Life Insurance Company of America was taken out by the plaintiff, whereby he was insured in the sum of Three Thousand Dollars ($3,000) against the risks of both death and permanent, total disability. * * *

"Defendants further allege that application was made by the plaintiff for the payment of permanent and total disability benefits in the amount of Three Thousand Dollars ($3,000) on said above mentioned policy. The defendants further allege that a check from the Prudential Insurance Company of America in the amount of Three Thousand Dollars ($3,000) was delivered to the plaintiff and after delivery of said check to the plaintiff said check was indorsed by the plaintiff and delivered to the defendant Ann Beselin in settlement of a previously existing indebtedness of the plaintiff to Ann Beselin; that said check in the amount of Three Thousand Dollars ($3,000) was delivered by the plaintiff to the said Ann Beselin as payment in full for money loaned to the plaintiff by Ann Beselin."

The defendants denied the other allegations of plaintiff's petition and expressly deny that plaintiff has been defrauded in any way.

The plaintiff joined issue by a reply. Trial was had to a jury. During the course of the trial, on motion, the Omaha National Bank was dismissed from the action, and the $3,000 held by it, which represented the $3,000 check in suit held by it in the account of Ray L. Beselin, was ordered paid to the district court, which was done, and said sum of $3,000 is now in the hands of the clerk of the district court subject to final disposition in this case. At the conclusion of plain-

tiff's evidence, Vincent Washington, Beselin, Inc., a corporation, and Washington Sales Company, were dismissed by the district court. The correctness of these dismissals is not questioned by any of the parties to the cause.

It is noted that Ray L. Beselin advances the contention that whatever may be the situation as to his codefendant, Ann Beselin, the evidence, so far as applicable to him alone, is insufficient to sustain the judgment against him. But we have here defendants who not only presented their defense in a law action by a joint answer, but challenged the verdict returned by the jury solely by a joint motion for a new trial. The rule which has long prevailed in this jurisdiction is: "A motion for a new trial is indivisible, and when made jointly by two or more parties, if it cannot be allowed as to all, it must be overruled as to all." *Dutcher v. State,* 16 Neb. 30, 19 N. W. 612.

And, "Where the verdict was against both defendants, and the one against whom there was but insufficient evidence made no motion for a new trial as to himself alone, and judgment was rendered against both, it will not be disturbed." *Long v. Clapp,* 15 Neb. 417, 19 N. W. 467. See, also, *Davey v. Aevermann,* 110 Neb. 62, 192 N. W. 956; *Thomas v. Fundum,* 135 Neb. 728, 283 N. W. 839.

We have here presented conflicting evidence as to the frauds alleged by plaintiff and denied by defendants. The action before us is substantially an action for money had and received. Under the facts and issues here presented, it must be conceded that the present action as to form is properly brought. We are committed to the doctrine: "An action for money had and received will lie to recover money secured from the plaintiff, without consideration, in reliance upon fraudulent representations made by the defendant." *Martin v. Hutton,* 90 Neb. 34, 132 N. W. 727.

Indeed, the true rule is even broader than above set forth. In *School District v. Thompson,* 51 Neb. 857, 71 N. W. 728, we announced the view: "An action in the nature of one for money had and received lies wherever the defendant has obtained possession of money which *ex æquo et bono* he

ought to refund; and it is proper to bring the action against the party who has received the money." See, also, *Nittler-Rhump v. Jones*, 112 Neb. 238, 199 N. W. 542.

The essential issues to be determined are narrowed by the terms of defendants' answer. The original ownership of the $3,000 in the plaintiff is admitted by the answer, and defendants' right thereto is predicated upon an allegation of the "payment" thereof to the defendant Ann Beselin, and that it was accepted and received by her as such. The general rule applicable to the situation here is that payment is a matter of affirmative defense and must be pleaded. 48 C. J. 664.

This jurisdiction has given full recognition to this principle: "The plea of payment is an affirmative defense, and the burden of proving it rests on him who pleads it as a defense." *Farmers Cooperative Mercantile Co. v. Shultz*, 113 Neb. 801, 205 N. W. 288.

And it is also true that the validity and extent of the claim the defendants have against plaintiff is immaterial in this case on the issue of whether it was agreed by the parties to deliver and apply the check of $3,000 as a payment on such claim. 48 C. J. 675; *Lewis v. South Shore Cooperative Ass'n*, 211 App. Div. 831, 209 N. Y. Supp. 428.

The determinable issue in this case is whether the parties involved actually agreed that the $3,000 check or the money derived therefrom was to be a payment made to Ann Beselin. A careful consideration of all the proof discloses that the evidence was in conflict, and the fact of nonpayment was fairly for the jury, and that their determination should be final if the matters involved were fairly submitted to them by the trial court.

It is claimed by the defendants that though Vincent Washington, Beselin, Inc., and the Washington Sales Company, a corporation, were dismissed by the district court, that court in fact submitted the case to the jury as to all the defendants named. The record does not support this contention. Instruction No. 4 given by the trial court is as follows: "You are instructed that the charge of conspiracy

has been withdrawn from your consideration for lack of evidence. You are also instructed that Vincent Washington, Beselin, Inc., Washington Sales Company, a copartnership, and the Omaha National Bank have been dismissed from this cause of action." A verdict consistent with this instruction was returned by the trial jury against "Ann Beselin et al."

It also appears that due to a clerical error the clerk of the court, after the return of the jury's verdict, entered a judgment against all of the defendants named, in violation of the instructions given by the district court. This error was subsequently corrected by order of the trial court, and thus the rights of the defendants were not in any manner adversely affected or impaired.

A careful examination of the evidence and an analysis of the instructions given by the trial court clearly disclose that the several instructions so given are not vulnerable to the attacks made upon them, or any of them; that no prejudicial error appears in the record; and that, in view of the issues presented by the pleadings of the parties, the jury's verdict is amply supported by the proof adduced at the trial.

The judgment of the district court is, therefore

AFFIRMED.

WESLEY T. WILCOX, APPELLEE, V. VICTOR H. HALLIGAN ET AL., APPELLANTS.

4 N. W. (2d) 750

FILED JUNE 26, 1942. No. 31271.

1. **Partition.** "Where a cause is fairly within the law authorizing a partition, the right to partition is imperative and absolutely binding upon courts of equity. In such a case the right of partition is a matter of right and not one of mere grace." *Oliver v. Lansing*, 50 Neb. 828, 70 N. W. 369.
2. ———. "One of several tenants in common has an absolute right to a partition of their real estate, in absence of an agreement or other impediment to the contrary." *Windle v. Kelly*, 135 Neb. 143, 280 N. W. 445.

3. ———. "Where partition proceedings are amicable and for the benefit of all the parties in interest, the court may allow a reasonable attorney's fee to be paid by the parties in proportion to their interest in the property involved." *Mabry v. Mudd*, 132 Neb. 610, 272 N. W. 574.
4. ———. Questions in no manner involving the right to partition real estate between tenants in common as provided by law, but merely involving matters of procedure relating to the purchaser at a partition sale, do not deprive the partition proceeding of its amicable character, which, under the issues determined by the pleadings filed therein, it otherwise possesses.
5. Appeal. Under the facts in this case, the taxing of costs was within the sound discretion of the trial court and, no abuse of discretion being shown, will not be set aside in this proceeding.

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

Halligan, McIntosh & Halligan, for appellants.

Shuman & Overcash, contra.

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

EBERLY, J.

This is an appeal from an award of attorneys' fees to Shuman & Overcash, attorneys at law, and also from an order assessing the costs of the second sale had in a partition proceeding carried on under sections 20-2170 to 20-2199 and 20-21,100 to 20-21,111, Comp. St. 1929.

As to the first contention of the appellants, it is, substantially, that "attorneys' fees allowable under the statutes in partition actions for plaintiff's counsel are those in amicable proceedings," and that within this principle the attorneys' services performed by plaintiff's attorneys were not performed in an "amicable proceeding."

The parties to the action were Wesley T. Wilcox, plaintiff, and Victor H. Halligan, Louise Halligan, his wife, Victor H. Halligan, trustee of the estate of John J. Halligan, deceased, Carrie S. Halligan, Kathleen D. Halligan and Nancy Jane Halligan, a minor, defendants. The defendants had succeeded, upon the death of John J. Halligan, to all the title

and interests possessed by the deceased at the time of his death.

The appellants' brief describes the property interests involved in the following terms: "In the property involved in this action at the time of J. J. Halligan's death, Wilcox and Halligan (deceased) each had a one-half interest, with the exception of the Rose place. At that time there was a mortgage on the north quarter of the Rose place that Wilcox and Halligan had sold to Rose. The mortgage was for $4,000, but no interest had been collected for six years, and no rent had been collected from Rose for three years on the Hughes quarter which Rose rented. On the pasture south of Hershey, no rent had been collected for a couple of years. The Scottsbluff land was a year behind in rent. Mr. Rose came in and gave a mortgage upon the whole half-section for the amount then due. On the south quarter was a mortgage to the Lincoln Joint Stock Land Bank, and our mortgage was then a second mortgage on that quarter, and a first mortgage on the north quarter. Mr. Rose then got a Federal Land Bank loan on the south quarter with improvements on to take up the Lincoln Joint Stock Land Bank mortgage, and several years of taxes. Foreclosure was instituted against Mr. Rose, who eventually gave a deed to W. T. Wilcox and Victor H. Halligan, trustee of the estate of John J. Halligan, deceased. The mortgage to the Federal Land Bank of around $3,500 was then paid off."

Accepting the statement of facts above set forth as true, and, indeed, fully sustained by the proof, they disclose a cause fairly within the law authorizing partition, and necessarily invoke the rule: "Where a cause is fairly within the law authorizing a partition, the right to partition is imperative and absolutely binding upon courts of equity. In such a case the right of partition is a matter of right and not of mere grace." *Oliver v. Lansing*, 50 Neb. 828, 70 N. W. 369. See, also, *Windle v. Kelly*, 135 Neb. 143, 280 N. W. 445.

The pleadings disclose that the petition filed by Wesley T. Wilcox, as plaintiff, fully complies with the requirements of

sections 20-2170 and 20-2171, Comp. St. 1929. To this petition the defendants Carrie S. Halligan, widow of John J. Halligan, deceased, Victor H. Halligan and Louise Halligan, his wife, Victor H. Halligan, trustee of the estate of John J. Halligan, deceased, Kathleen D. Halligan, and Nancy Jane Halligan filed their respective answers in said cause, each setting forth the amount and nature of their respective interests. None of the defendants denied the interest of plaintiff in the premises sought to be partitioned. No replies were filed to such answers by plaintiff, and the allegations thereof were in no manner contradicted by any documentary proof of title filed by the respective parties therein. Under such circumstances, the statements in the petition, and in the answers so filed, are required to be taken as true. It follows that, so far as the pleadings are concerned, this proceeding in partition may not be deemed adversary in character, and plaintiff's right to partition is conceded by all parties and cannot be made an issue in this case.

The record discloses that this case, after completion of the issues, proceeded in the regular manner. On November 14, 1940, judgment in partition was entered without contest, and George B. Dent was appointed referee. On November 16, 1940, the referee so appointed reported that said property would have to be sold, and on the same date the court ordered the referee to sell the property which was the subject of the partition action. This was consistent with defendants' pleadings and the relief prayed for therein. No objections were made by any of the parties to the order thus entered. The sale was held by the referee on January 18, 1941, at which plaintiff was the highest bidder for all of the property, his bid being $3,650. It appears that defendants Victor H. Halligan and Louise Halligan, his wife, Victor H. Halligan, trustee of the estate of John J. Halligan, deceased, and Carrie S. Halligan filed a motion to set aside this sale, which for the purpose of this opinion will be said to have been based on the proposition that the price bid upon said land was less than one-half of its fair value, and that a resale would bring a larger amount. A hearing was had on

said motion to set aside this sale, at which William E. Shuman appeared as attorney for plaintiff and moved that the sale be confirmed as made. Evidence was introduced by defendants, but no evidence was introduced by plaintiffs. At the close of this hearing, the district court entered an order on February 15, 1941, providing that if defendants "shall pay into court within 10 days from this date the costs which would be incurred by another sale which this court fixes at the sum of $102, that a new sale is hereby granted." The $102 was paid into court by the defendants as required by this order, and the referee's second sale was had on March 29, 1941. The entire property involved in the partition suit was bid in by Victor H. Halligan, trustee of the estate of John J. Halligan, deceased, for the sum of $8,400, the purchaser to assume the taxes for the year 1940. On April 10, 1941, the district court entered its judgment confirming said sale and ordering a distribution of the proceeds thereof. This judgment further recited, in part: "That at the time the objections to the first sale which was held herein were heard before this court January 15, 1941, this court ordered that the defendants should be given a new sale if they would pay the expenses of the same," etc., and thereupon, in legal effect, taxed the costs of the second sale, to wit, $44.24, to the defendants. The court also allowed the firm of Shuman & Overcash, as attorneys in his proceeding, the sum of $320. From the overruling of the motion directed against the court's order as to attorneys' fees and $44.24 costs taxed to the defendants, this appeal is taken.

This jurisdiction is quite committed to the doctrine that in an amicable proceeding under our statutes the plaintiff is entitled to have his reasonable attorneys' fees taxed as costs to be paid out of the proceeds of the sale of the partitioned property, where a sale is had. Here we have a proceeding which the record discloses was wholly without contest and strictly amicable in all respects, up to and including the decree of partition, the appointment of the referee, the approval of his report, and the order of the district court directing the sale of the premises. All of the services of plain-

tiff's attorneys up to this point were clearly for the benefit of all parties to the proceeding, and the compensation for such attorneys in equity should be shared by all the parties to the proceeding. The confirmation of the first sale was alone contested by the defendants. This contest did not relate to any issues in the partition case nor change its essential character. After the first sale was set aside, the attorneys for plaintiff completed the proceedings; a second sale was had and confirmed, and an order of distribution was made and entered. All these services thus performed were likewise for the benefit of all parties interested in the proceeding.

We are quite of the opinion that the doctrines of the following cases clearly support the action of the trial court in its allowance of attorneys' fees in this case. *Johnson v. Emerick,* 74 Neb. 303, 104 N. W. 169; *Harper v. Harper,* 89 Neb. 269, 131 N. W. 218; *Smith v. Palmer,* 91 Neb. 796, 137 N. W. 843; *Mabry v. Mudd,* 132 Neb. 610, 272 N. W. 574.

The defendants challenge the taxation to them of the costs of the second sale, amounting to the sum of $44.24. This is based on the fact that at the second sale the premises were purchased by the defendants, or some of them, for $8,400, subject to taxes, so that the amount of the second sale exceeds the amount of the first sale by $4,750. The defendants concede in their brief that in this case the district court, governed by equitable principles, possessed a certain discretion in taxing costs to the parties to the proceeding, but contend that its action in the present case constituted an abuse of discretion. We accept, but do not determine, the basis of submission of this question before us by both parties as being controlled by equitable principles. The origin of this controversy relates back to the order of the trial court of February 15, 1941, conditionally sustaining the motion to set aside the first sale. Defendants' motion because of its substance was at most efficient only as invoking the discretion of the district court. It was not based upon a clear, statutory right. The district court, as a condition precedent and prerequisite to sustaining this motion pre-

sented by defendants, by its order then entered required them to assume the burden of the payment of the costs of the second sale then fixed by the court at $102, which amount the defendants were required to advance and pay into court by a day certain. So the district judge with full knowledge of the situation prescribed his own conditions, which the defendants accepted and fully complied with and thus secured a second sale. The conditions prescribed by the district court did not in any manner involve or contemplate the results of the second sale, if such was actually had. In fact, it presented to the defendants the alternative, to pay the costs of the second sale when had, or their motion to set aside the first sale would be denied. The transcript in this case was not filed until June 16, 1941, more than four months after the action of the district court now questioned was taken. However, this court order has been by the defendants fully accepted and complied with, and this, in turn, secured the setting aside of the first sale of the premises involved in the partition proceeding.

Query: Are these questions involved in these transactions now properly before this court for determination?

But, aside from this situation, to justify relief against this order of the trial court of February 15, 1941, and its enforcement by the district court's order of April 10, 1941, it must, as apparently conceded by all parties to this appeal, clearly appear that there has been an abuse of discretion in the premises by the district court. *In re Estate of Nielsen,* 135 Neb. 110, 280 N. W. 246; *Woodard v. Baird,* 43 Neb. 310, 61 N. W. 612; *In re Clapham's Estate,* 73 Neb. 492, 103 N. W. 61. This the record as an entirety fails to disclose.

It follows that the judgment of the district court, as to the two questions presented by this appeal, is correct, and it is affirmed.

AFFIRMED.

ARTHUR J. WHALEN, ADMINISTRATOR, APPELLEE, V. FRANK J. SWIRCIN ET AL., APPELLANTS.

4 N. W. (2d) 737

FILED JUNE 26, 1942. No. 31324.

1. **Trusts.** A declaration or creation of a trust of property, except an interest in land, is not required to be in writing.
2. ———: BAILMENT. Whether a trust or a bailment is created upon the delivery of personal property to another for the benefit of a third person depends upon the manifestation of intention of the parties. If the manifested intention is that the person to whom delivery is made shall thereby acquire the title to the property, the transaction creates a trust. 1 Restatement, Trusts, sec. 5, Comment f.
3. ———. "The settlor of a trust can reserve to himself any power which he desires with respect to the property, if the power is not illegal, and the reservation of the power will not of itself make the trust invalid." 1 Restatement, Trusts, sec. 37, Comment a.
4. **Wills.** Where a person transfers the title to a fund to another with directions to place it in a safety deposit box in his own name and to pay the same to third persons on the death of the transferor, a trust is thereby created.
5. **Trusts.** The reservation of the power to revoke the trust is not inconsistent with the creation of the trust.
6. ———. The reservation of the use of such part of the trust fund as the settlor may need is not inconsistent with the creation of the trust, and withdrawals made in the exercise of the reserved power will be treated as revocations *pro tanto* as to the amounts so withdrawn.
7. **Wills.** The essential difference between a valid trust and a testamentary disposition of property is that the former acts at once to vest the interest of the beneficiaries and to pass title to the trustee, defeasible only in the event the settlor exercises a reserved power of revocation, even though the enjoyment of such interest is postponed until the death of the settlor, while a will does not take effect until the death of the testator, and his legal title and control of the property are not affected during his lifetime.
8. **Trusts.** The trust described in the opinion is not invalidated by the reservation therein made by the settlor, nor is it invalid as being testamentary in character and a violation of the statute governing the execution of wills.
9. **Executors and Administrators.** The power of an equity court to allow attorney's fees against one bringing a suit which was vex-

atious, oppressive and without foundation, *held* not applicable in the case at bar.

APPEAL from the district court for Douglas county: JOHN A. RINE, JUDGE. *Reversed.*

Duncan M. Vinsonhaler and *J. W. Weingarten,* for appellants.

Samuel L. Winters, contra.

Heard before SIMMONS, C. J., ROSE, EBERLY, CARTER, MESSMORE and YEAGER, JJ.

CARTER, J.

This is an appeal from a decree in favor of plaintiff as administrator of the estate of Agnes Johnson, deceased, holding that a purported trust arrangement did not exist and decreeing that the trustee, Frank J. Swircin, should account for the funds constituting the subject of the purported trust. A distribution of the funds having been made before this suit was commenced, judgment was entered against the trustee for $16,712.39, the amount distributed, and jointly with him against the beneficiaries of whom the court had jurisdiction in the several amounts paid them. Judgment was also entered against the surety on Swircin's executor's bond for $500, the amount of such bond. All defendants against whom judgments were entered have appealed.

The record discloses that Agnes Johnson died on February 20, 1940, leaving a will dated February 25, 1938, and a codicil thereto under date of March 1, 1939, by which she devised her estate equally to her brothers and sisters, or their representatives. The will appointed Swircin as her executor and requested that he serve without bond. The will and codicil made no provision for any bequest to the brothers and sisters of her deceased husband.

Giving the evidence a construction most favorable to appellee, the situation is as follows: About a week after making the last codicil to her will, Agnes Johnson withdrew her funds from various building and loan associations and other sources not disclosed by the record in the amount of $18,-

167.39, and delivered them to Swircin, with instructions for him to place them in a safety deposit box in his own name. According to Swircin's own testimony, the money was to be retained by him until her death and at that time distributed in varying amounts to beneficiaries named by her, including the relatives of her deceased husband, conditional only that the money was held subject to her use as she desired during her lifetime and that if any of the beneficiaries were in immediate need the trustee was to advance money to them from the trust fund. The record is clear that Agnes Johnson never had possession of the funds again. The trustee did not reinvest the funds, but kept them in currency in the safety deposit box as directed. Subsequently, Agnes Johnson informed Swircin to withdraw $1,000 from the trust fund for Elva Brown, a sister of Agnes Johnson's husband, for the reason that she was in need. This was done. Later she requested $400 to pay medical and doctor bills and at a still later date she requested $50 to pay another doctor bill. These amounts were paid to her out of the trust fund. At her suggestion, Swircin reimbursed himself with $5 for the rental of the safety deposit box. A total sum of $1,455 was consequently withdrawn during the lifetime of Agnes Johnson, leaving a balance of $16,712.39 in the possession of Swircin at her death. The question for determination is whether this constitutes a valid trust or a testamentary disposition of the property which is void for noncompliance with the statute governing the execution of wills.

The essential difference between such a trust and a will is that the former acts at once to vest the interest in the beneficiaries, although enjoyment is postponed until the death of the settlor, while the latter does not take effect until death and until then no interest can vest. 1 Perry, Trusts (7th ed.) 119. There is also the further distinction that under the trust the legal title to the property, with its incidents, and the control and management of it pass to the trustee, whereas, in the case of a will, legal title and full control are in no way affected during the life of the testator. *Lewis v. Curnutt,* 130 Ia. 423, 106 N. W. 914.

It is not disputed, and it must be conceded, that a trust can be orally established. The evidence in this case clearly shows that the funds were delivered to Swircin at the time the trust was created, that the possession of the funds in question remained with the trustee at all times thereafter and that the settlor parted with her title to the funds at that time and vested it in the trustee.

As a general rule, a power of revocation of the trust may be reserved and such power of revocation is consistent with a valid trust. The great weight of authority is to the effect that a reservation by the settlor of the income from the trust does not invalidate it. *Cramer v. Hartford-Connecticut Trust Co.*, 110 Conn. 22, 147 Atl. 139; *Windolph v. Girard Trust Co.*, 245 Pa. St. 349, 91 Atl. 634. It was clearly the intention of the settlor to part with the legal title, and the reservation to herself of a part of the principal amount did not of itself invalidate the trust. In *Van Cott v. Prentice*, 104 N. Y. 45, 10 N. E. 257, the court analyzed the situation in the following language:

"Neither the power of revocation nor the provisions determining the trust in the event of a legal interference, or the death of the trustee in the life of the settlor, are in the least inconsistent with the trust as completely and perfectly constituted. They both assume its separate and effective existence, and provide merely for its termination upon the happening of specified contingent events. But attention is called to the clauses in the deed which require the trustee to hold and manage the fund subject to the direction and control of the settlor, and deny to the beneficiaries any legal or equitable right to either principal or interest. The latter provision is plainly but an amplification of the idea involved in the power of revocation, for the grantor adds that the beneficiaries shall take what they receive as proceeding from his bounty and subject to his right to revoke at any moment. * * * Since he intended to create an effective trust, and declared that he had done so, and delivered the possession and passed the title of the fund to the selected trustee, we are bound to understand his denial of an equitable right

to the beneficiaries as meaning only to emphasize his own control flowing from the voluntary character of his act and his reserved power of revocation; as a supposed and actual result of his own right to end his bounty at any moment; and not as a denial of the right of the beneficiaries to enforce the trust, as against the trustee, while it should remain in existence, and the settlor, withholding his power of revocation, should permit it to stand. His meaning undoubtedly was, that as against himself and his own freedom of action, the beneficiaries should possess no legal or equitable right, and not that as against the trustee, while the settlement stood unrevoked, there should be no equitable recourse. * * *

"What has just been said is also quite applicable to the other provisions which have been the subject of comment and which require that the trustees shall hold the fund subject to the direction and control of the settlor until his death. That language only repeats in another form the effect of the reserved power of revocation. The existence of that inevitably leaves in the settlor an absolute control, since at any moment he may end the trust and resume possession of the fund as his own. The trustee is directed to hold the fund and invest and reinvest and pay over as ordered, but is to do all this subject to the settlor's absolute control. This cannot mean that the trustee is to have no title and the trust no effective existence, and the property remain the settlor's, but that the trust and the title, good and effectual while it stands, is, nevertheless, to continue and exist only at the will and pleasure of the settlor. Its continued existence was to be absolutely subject to the direction and control of Prentice, a result always inevitable where a power of revocation is reserved." See, also, *Keck v. McKinstry*, 206 Ia. 1121, 221 N. W. 851; *Kelley v. Snow*, 185 Mass. 288, 70 N. E. 89.

In *Kelly v. Parker*, 181 Ill. 49, 54 N. E. 615, an instrument in the form of a deed of trust conveying land in trust for certain persons was held to give rise to a valid trust, and not to be testamentary in nature, although the settlor reserved to himself during his lifetime the right to use, occu-

py, control, improve and lease the property for any term of years, and to use and enjoy the rents and profits thereof in the same manner as if he were the owner in fee simple, to mortgage, sell and convey the property or any part thereof for his own benefit, and to revoke the trust altogether, the court stating that the deed had the effect of conveying the property absolutely to the trustees at the time it was executed, subject to the reservations, conditions, and trusts incorporated therein.

A case very much in point is *Jones v. Old Colony Trust Co.*, 251 Mass. 309, 146 N. E. 716, where a transfer of bank deposits and securities passing the legal title and possession of the property to a trustee, who was to hold, manage, invest and reinvest the property in its sole discretion, to pay the income to the settlor or according to her directions during her lifetime and at her decease to liquidate and distribute the fund among named beneficiaries, was held to be valid, notwithstanding a reservation by the settlor of the power to alter or amend the trust instrument in writing and to require the trustee to pay over to her "at one time or from time to time such portion or all of the principal of the trust fund as may be requested" by her in writing.

In *Rosenburg v. Rosenburg,* 40 Hun (N. Y.) 91, the court made this significant statement: "Trusts may be created by will or *inter vivos* with the power in the trustee to pay and a right in the *cestui que trust* to receive, not merely the income but the principal of the fund, as needed or called for. It is true that all the funds may have been drawn for the support and maintenance of the creator of the trust, but that did not affect the legal title to the property in the hands of the trustee * * * ."

The record indicates a clear intent on the part of the settlor to create a trust. The settlor did everything that she could do to divest herself of title by transferring it to the trustee and delivering the possession of the trust property to him. There is nothing in the record to indicate an intent to make a testamentary disposition of the fund under the guise of a trust. The reservation of the principal of the

trust fund, if needed, is nothing more than a reserved power of revocation. The withdrawals of principal amount to a revocation *pro tanto* of the trust to the extent of the withdrawals. The fact that withdrawals of principal may be made by the settlor does not mean that the trustee has no title to the fund and the trust no effective existence, but that the trust is to continue and exist at the will of the settlor. But if the fund, or any part thereof, is permitted by the settlor to remain in existence, it does not work a denial of the right of the beneficiaries to enforce the trust as against the trustee. See 1 Restatement, Trusts, sec. 58.

We conclude that the record demonstrates that Agnes Johnson intended to and did create a trust fund with Swircin as trustee. Any other conclusion under the facts of this case would require an assumption that Agnes Johnson was doing a vain thing in placing the title and possession of these funds with Swircin. The mere fact that settlor may have desired to avoid a compliance with the statute pertaining to the execution of wills, or to avoid the necessity of probate administration, will not void the trust. 1 Restatement, Trusts, sec. 57, Comment d. We think the trial court was in error in holding that the trust failed because of its testamentary character. The trust was valid to the extent of the funds in the hands of the trustee at the death of the settlor.

Appellants ask this court to make an allowance of attorney's fees to be taxed against the plaintiff as administrator by invoking the equitable power to so do where the suit was without foundation and was vexatious and oppressive. The questions raised by the administrator are not in our judgment subject to the charge of being vexatious and oppressive. Matters were presented by his suit which had not been previously determined by this court. The creation of a trust without the formality of writing is a frequent source of litigation in the determination of its validity and the ascertainment of its true terms. This leads us to the conclusion that the cases cited by appellants, *Gazan v. Vadsco Sales Corporation*, 6 Fed. Supp. 568, and *Sprague v. Ticonic Nat. Bank*, 307 U. S. 161, 59 S. Ct. 777, are without application to the case at bar.

Other matters raised are not necessary to a decision of the case in view of the conclusion reached.

For the reasons stated, the judgment of the district court is reversed and the cause remanded to the district court for further proceedings made necessary by the levy of executions upon the property of some of the appellants notwithstanding the appeal. *Anheuser-Busch Brewing Ass'n v. Hier*, 55 Neb. 557, 75 N. W. 1111.

REVERSED.

EVELYN BEKELSKI, APPELLEE, V. O. F. NEAL COMPANY, APPELLANT.

4 N. W. (2d) 741

FILED JUNE 26, 1942. No. 31360.

1. **Workmen's Compensation.** A claim for benefits under the workmen's compensation law for disability resulting from shock and nervousness caused by an accident arising out of and in the course of employment is not sustainable unless accompanied by violence to the physical structure of the body of claimant.
2. ———. The workmen's compensation law should be liberally construed to carry out its beneficent purposes, but under the guise of a liberal construction it should not be extended to cases which by plain language are excluded from its scope.

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

Gross & Crawford and *James J. Gleason*, for appellant.

Votava & McGroarty and *Eugene F. Fitzgerald, contra.*

Heard before SIMMONS, C. J., ROSE, EBERLY, CARTER, MESSMORE and YEAGER, JJ.

CARTER, J.

This is an appeal from an award of compensation made in favor of the plaintiff and against the O. F. Neal Company, a corporation, under the Nebraska workmen's compensation law.

The evidence shows that Evelyn Bekelski, the plaintiff,

was employed on August 14, 1940, by the defendant as an elevator operator in the Farm Credit Building in Omaha at a wage of $15 a week. On that day, while plaintiff was operating the elevator, a passenger riding therein was caught between the floor of the elevator and the second floor of the building and killed. The record shows that plaintiff was lodged in the elevator with the dying man for some 30 minutes before the doors were broken in and his body removed. Plaintiff claims that the sight of this terrible accident and her proximity to it when it occurred resulted in an injury to her nervous system which constitutes permanent total disability, entitling her to benefits under the workmen's compensation law.

The record shows that plaintiff suffered shock so great to her nervous system that her recollection was hazy as to what happened, that she was in a state of extreme excitement when she was removed from the elevator and had lost all control of her emotions, that her heart beat was rapid and her blood pressure considerably higher and that it was necessary for her to remain in the hospital for several days thereafter. The evidence shows that she is still under a doctor's care and that further hospitalization is to be desired. Plaintiff suffered no physical injury to her person as a result of the accident, but has suffered pains in the head and back since the accident. The evidence is conclusive that plaintiff is unable to perform the work of an elevator operator, or similar work. We think the record establishes that plaintiff was totally disabled within the meaning of the compensation law when this case was heard.

Defendant contends, however, that plaintiff did not sustain a disabling injury within the meaning of the workmen's compensation law. Our statute defines an accident as follows: "The word 'accident' * * * shall * * * be construed to mean an unexpected or unforeseen event happening suddenly and violently * * * and producing at the time objective symptoms of an injury. The term 'injury' and 'personal injuries' shall mean only violence to the physical structure of the body * * * ." Comp. St. 1929, sec. 48-152.

That there was an unexpected or unforeseen event happening suddenly and violently cannot be successfully questioned. We think the record shows that objective symptoms of injury were present. The evidence conclusively shows that plaintiff was irrational and hysterical after the accident, her blood pressure was considerably higher and her pulse more rapid. Medical experts testified that, when examined, the pupils of her eyes were dilated, her posture was abnormal and she had tremors and an inability to walk in her usual manner. These are objective symptoms within the definition of that term as laid down by this court in *Manning v. Pomerene*, 101 Neb. 127, 162 N. W. 492, wherein we said: "Defendant's idea is that by objective symptoms are meant symptoms of an injury which can be seen, or ascertained by touch. We are of opinion that the expression has a wider meaning, and that symptoms of pain, and anguish, such as weakness, pallor, faintness, sickness, nausea, expressions of pain clearly involuntary, or any other symptoms indicating a deleterious change in the bodily condition may constitute objective symptoms as required by the statute." See, also, *Van Vleet v. Public Service Co.*, 111 Neb. 51, 195 N. W. 467.

In determining whether there was violence to the physical structure of the body, as required by the compensation law, we are confronted with a more perplexing problem. The primary purpose of the workmen's compensation act is to insure an employee against accidental injury arising out of and in the course of his employment. To accomplish this purpose the act should be liberally construed, not to find that liability exists without the required quantum of proof, but to include within the protection of the act by liberal interpretation all injuries arising out of and in the course of the employment which the act does not clearly exclude. A strict interpretation should not be resorted to in order to accomplish such exclusion. With this rule of construction in mind, can it be said that disabling shock and nervousness, when unaccompanied by an impairment of the physical structure of the body, is compensable under our compensation law?

The point here raised does not seem to have been passed on directly by this court. In referring to the decisions of other jurisdictions it must be borne in mind that the compensation laws of the various states differ widely in many essential respects. The diversity of public policy demonstrated by the differences in the various laws must be considered before decisions of other jurisdictions can be accepted as controlling precedents.

Our law defines the terms "injury" and "personal injuries" as meaning "only violence to the physical structure of the body." Many of the laws of other states do not include this provision and require only that the disability result from an accident arising out of and in the course of the employment. Such are the cases cited by appellee. We think that such cases are not applicable here.

It seems to us that the legislature required, not only that there should be an accident attended by objective symptoms arising out of and in the course of the employment, but that the accident must be accompanied by violence to the physical structure of the body. The language indicates a clear distinction between physical and bodily injury on the one hand and mental, nervous and psychiatric injury unaccompanied by violence to the physical structure of the body on the other. The plain import of the words used eliminates from the operation of the law disabilities resulting from mental disturbances, nervousness and psychiatric ailments when violence to the physical structure of the body cannot be established.

This question has been discussed by the Texas court of civil appeals in a case involving the workmen's compensation law of that state which requires that "harm or damage to the physical structure of the body" exist in order to make the disability compensable. The court in denying a similar claim said: "Whether the cases in the two lines as last above discussed may be entirely reconciled on principle, they all appear to proceed upon the theory that actual physical injury, internal or external, must be shown in a proper way before an inference legally may be drawn that the final re-

sult (in respect to which compensation is claimed) is attributable to an 'injury' originating in the employment. And, as indicated, most, if not all, of the cases from other jurisdictions include that postulate. In the present case there is absent the proof of 'injury' which was actually or assumedly present in the other cases." *Southern Casualty Co. v. Flores*, 1 S. W. (2d) (Tex. Com. App.) 260.

In *Industrial Commission v. O'Malley*, 124 Ohio St. 401, 178 N. E. 842, the court said in holding against the claimant: "If O'Malley's death was caused by excitement merely, it was not caused by any physical injury contributing to his death." See *Fesenbek v. City of Philadelphia*, 144 Pa. Super. 99, 18 Atl. (2d) 448.

It is clear to us that to be compensable an accident arising out of and in the course of the employment must be accompanied by damage to the physical structure of the body of the claimant. No damage to the physical structure of the body having been shown, the claim is not within the scope of the act. While the act should be construed liberally, as we have many times held, it should not be extended to cases which by plain language are excluded from its scope. We hold, therefore, that claimant, under the record before us, has no cause of action against the defendant.

REVERSED AND DISMISSED.

ROSE, J., dissenting.

The record and the opinion adopted properly show every element of a case for compensation, unless the claim of plaintiff is without merit because she failed to prove violence to the physical structure of her body as a result of the appalling accident. She was an employee of defendant. There was an accident while she was performing the duties of her employment. She was taken to a hospital as soon as she was extricated from the elevator. As a result of the accident she was instantly and permanently disabled from pursuing in the future the duties of her only occupation, the one in which she was engaged at the time of the accident, as shown by the testimony of experts. A purpose of the workmen's compensation law has been defined as follows:

"An outstanding purpose of the workmen's compensation law is to shift from the employee to modern industry the burden of economic waste or loss 'arising out of and in the course of his employment' as a result of his injury or death." *Tralle v. Hartman Furniture & Carpet Co.*, 116 Neb. 418, 217 N. W. 952.

In the present instance, the claim of plaintiff is clearly within the purposes of the workmen's compensation law, if not within its terms. It is rejected on the sole ground that she did not prove "violence to the physical structure of the body." It seems to me there is reason to question this conclusion. I am inclined to think that the lawmakers, by the use of the term "violence to the physical structure of the body," meant an animate body with a directing brain containing blood, sensitive nerves, fibers and convolutions. The brain is part of the physical structure of the body. Without it there could be no performance of an employee's duties. Accidental violence to the brain and resulting disability may be difficult to prove, but plaintiff was rational before the accident and irrational afterward. Her blood pressure was higher and her pulse more rapid. The pupils of her eyes were dilated and her posture abnormal. She had tremors and was unable to walk in her usual manner, all as properly indicated by the majority opinion, but it seems to me these results of the accident evidence "violence to the physical structure of the body," within the meaning of the compensation law.

JOE CUEVAS, ADMINISTRATOR, ET AL., APPELLEES, V. YELLOW CAB & BAGGAGE COMPANY, APPELLANT.

4 N. W. (2d) 790

FILED JULY 3, 1942. No. 31293.

Automobiles. When one, being in a place of safety, sees or could have seen the approach of a moving vehicle in close proximity to him and suddenly moves from the place of safety into the path of such vehicle and is struck, his own conduct constitutes contribu-

tory negligence more than slight in degree, as a matter of law, and precludes recovery.

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

Gaines, McLaughlin & Shoemaker, for appellant.

Ralph Bremers and *George H. Merten,* for appellee Cuevas.

Alfred A. Fiedler, pro se.

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

SIMMONS, C. J.

This is an action, brought under the Lord Campbell's Act, sections 30-809 to 30-810, Comp. St. 1929, to recover damages for the death of Sabino Rivera, aged 32 years, as a result of being struck by a cab of the defendant. The plaintiff sues as administrator of his estate. The intervener sues as the representative of the father of the deceased.

The defendant appeals from a judgment against it and presents 14 assignments of error which it reduces in the argument to the propositions that there was no evidence of negligence on its part which was the proximate cause of the accident, that the contributory negligence of deceased was more than slight and barred recovery as a matter of law, and that the evidence of the earnings of the deceased was inadmissible and inadequate. The first two propositions were presented by motions for directed verdict at the close of the plaintiff's case in chief and again when all parties had rested.

There is little dispute about the facts of this case. For the purpose of considering these motions, where dispute exists it will be noted and resolved in favor of the plaintiff.

The accident took place on March 1, 1940, about 8:50 p. m. in the city of Omaha. The deceased died as a result thereof early the following morning. The location of the accident was at Thirteenth and Mason streets. Thirteenth

street runs north and south, and at the point of the accident is 60 feet wide between the curbs and provides a parking lane on either side and four lanes for moving vehicles, two lanes in either direction. The street has a 3 per cent. down grade to the north. Mason street runs east and west. It is 60 feet wide east of Thirteenth and 30 feet wide west of Thirteenth, with the center of the street a continuing straight line. The pedestrian lanes across Thirteenth street are not marked, but are so located that the one across Thirteenth from the south side of Mason runs slightly northwest to southeast. There are street lights on Thirteenth at the southwest and northeast corners of the intersection.

At the time of the accident the night was dark; the street lights were burning. There had been some rain; the air was misty or foggy and the pavement was wet or "greasy."

At the time and place of the accident there were cars going south in both lanes, and two witnesses testify that the lights of the car on the lane nearer the center of the street were very bright. There were also cars going north in both lanes. The defendant's cab was going north in the lane nearer the east curb or moving into that lane, and no car was ahead of it. It was traveling on that part of Thirteenth street that is paved with brick. There was a second car, some 10 or 15 feet behind the defendant's cab, but to its left or in the lane nearer the center of the street.

The eyewitnesses to this accident were the drivers of these two north-bound cars, who testified for the defendant, and the driver of a car that was approaching Thirteenth on Mason from the east and whose car was just stopping before entering Thirteenth. This latter driver testified as plaintiff's witness.

Plaintiff's witness testified that he saw what he thought "was an old man step into the street and come across, and there was south-bound traffic, two lanes, coming from the north, and I could see they were just under the viaduct when he started to cross the street, and he kind of had his head down a little, and, oh, I don't know what you would say—kind of half running or a half walk, kind of hurrying

to get out of the way of that traffic, which he did. He cleared that traffic in plenty of time. Then he kept on coming where the cars were—there is a kind of a little raise there where they come over the hill, and they swamped right on down upon him without any horns blowing or anything." The "viaduct" referred to above was some 200 feet to the north of the intersection. He further testified that he saw the defendant's cab when it was about 100 feet to the south, and recognized it as a Yellow Cab when it was about 20 feet "away from the man that was running across the street." He described the deceased's movements as "a hurry-up walk or a slow run; he was in a hurry." On cross-examination he testified that deceased had "his head down when he came out from the curb" and "continued crossing the street with his head down." He further testified that the south-bound traffic reached the intersection first.

The defendant's driver testified that he first saw the deceased when he was 15 to 20 feet ahead of him and that at that time his back was bent over and his head down, that he did not look up and that the deceased took about two steps before the cab struck him. The driver of the car following the defendant's cab to its left testified that he first saw the deceased "as he passed in the line of my lights," that he was at that time "near the middle of the intersection; he was traveling to the northeast in a kind of a crouch and a run," "was bent way over, kind of toe-hopping, bent over in a kind of a half run and half walk" and did not "look to the south at all." The deceased was dressed in dark clothes.

The left front light of defendant's cab was built in the fender. The lens was broken, the rim bent, and the bumper crushed. There does not seem to be any dispute but that that fixes the point of impact of deceased's body with the cab. The dispute in the evidence is as to the point of impact with reference to its location on the street. Plaintiff's witnesses testified that defendant's driver pointed out the place of the impact at a point about 18 feet west of the east curb line of Thirteenth street and within the pedestrian lane. This puts the defendant's cab in the east of the two driving

lanes and in a lane where he had a right to be. The deceased's arm was caught in the bumpers. He was carried by the car to the point where it stopped on Thirteenth street, across Mason street. The plaintiff's witnesses fix the distance from this point of impact to the place where deceased's body was after the cab stopped as 96 feet, 6 inches. Plaintiff's witness testified that the speed of the cab was not slackened nor its course changed during the 20 feet it traveled before the impact and testified to a conclusion that the brakes were applied at the time of impact. Defendant's witness testified that he applied the brakes when he first saw deceased and that his cab slid thereafter to the right.

The only direct evidence admitted in plaintiff's case in chief as to the speed of defendant's cab before the impact was that of plaintiff's witness who testified on direct examination that the driver said he was not going very fast, and that brought out on the cross-examination of a police officer that he asked the cab driver as to his speed and that he said he was going between 20 and 23 miles. Defendant's two witnesses testified that the cab and the car going north were traveling at from 20 to 25 miles an hour. There was no expert testimony offered as to the probable speed of the cab based on the distance it traveled after the impact under the conditions then existing, nor is there evidence as to how quickly the cab could have been stopped under the existing conditions.

The ordinance of the city of Omaha requires a driver of a vehicle to yield the right of way to a pedestrian crossing the street within any marked cross-walk or within any unmarked cross-walk at the end of a block, except where traffic officers or signal lights are in control. For the purpose of considering defendant's motion for a directed verdict, deceased must be held to have been within that unmarked cross-walk at the point of the impact and defendant's driver was required to yield the right of way. See, also, Comp. St. Supp. 1939, sec. 39-1148. The ordinance also provides: "No person shall drive or operate a vehicle or street car upon a street at a rate of speed greater than is reasonable

and proper, having regard for the traffic and use of the road and the condition of the road, nor at a rate of speed such as to endanger life or limb of any person." These provisions go to the question of the negligence or lack of negligence of the defendant.

We do not determine the question of the sufficiency of the evidence to establish a jury question as to the negligence of the defendant.

We have here this situation from the undisputed evidence. The deceased was in a place of safety on the west curb of Thirteenth street. He left that place of safety and started across the street in front of on-coming traffic from the north. "He cleared that traffic." He was again in a place of comparative safety in the center of the street. He did not stop there; "he kept on coming where the cars were" that were going north, bent over, head down, not looking to the south; "half running or half" walking he placed himself in the path of the cars coming from the south. The point of impact of deceased with the left front fender of defendant's cab clearly shows that, so far as defendant's cab was concerned, the deceased was in a place of safety up until the last two steps which he took. The evidence is clear that he was not on the east half of the street until he came within the lights and vision of the defendant's driver and the driver of the other north-bound car, which was only a moment before the fatal impact. The evidence of the plaintiff establishes that the lights of defendant's cab were visible for at least 100 feet south of the point of impact, and at a time when deceased was in no danger from the defendant's cab.

The case of *Belville v. Bondesson,* 130 Neb. 926, 266 N. W. 901, was the case of a pedestrian crossing a street when he was struck by an automobile. There this court said: "In examining the question of plaintiff's contributory negligence, it is necessary for us to formulate some idea as to what an ordinarily cautious and prudent man would do under like circumstances. We think he would act about as follows: On reaching the intersection, he would look both to

his right and to his left. Seeing that no cars were coming from the right that would endanger him before reaching the center of the street and determining that he could safely cross in front of cars coming from his left, he would proceed, being watchful of the cars whose traffic lanes he was crossing. Arriving in the center of the street, he would devote the greater part of his attention to cars coming from the south whose traffic lanes he would cross in reaching the other side of the street, being alert, however, at all times, to the possibility that a car might appear where normally it would not be expected."

Here the deceased looked neither to the right nor the left after starting to cross the street; he was not "watchful of the cars whose traffic lanes he was crossing" nor did he at the center of the street "devote the greater part of his attention to cars coming from the south." In short, he did not do the things that "an ordinarily cautious and prudent man would do under like circumstances."

This court has said: "'Contributory negligence is conduct for which plaintiff is responsible, amounting to a breach of the duty which the law imposes upon persons to protect themselves from injury, and which, concurring and cooperating with actionable negligence for which defendant is responsible, contributes to the injury complained of as a proximate cause.' 45 C. J. 942. See *Eaton v. Merritt*, 135 Neb. 363, 281 N. W. 620. Want of ordinary care, and not knowledge of the danger, is the test of contributory negligence. *Welsh v. City of South Omaha*, 98 Neb. 148, 152 N. W. 302." *Klement v. Lindell*, 139 Neb. 540, 298 N. W. 137.

In *Travinsky v. Omaha & C. B. Street R. Co.*, 137 Neb. 168, 288 N. W. 512, this court said: "We think that, as a matter of law, the last movement of the deceased constituted more than slight negligence contributing to cause the accident, and that the case is controlled by the decisions of this court in *Troup v. Porter*, 126 Neb. 93, 252 N. W. 611, and *McDonald v. Omaha & C. B. Street R. Co.*, 128 Neb. 17, 257 N. W. 489. In each of these cases the pedestrian suddenly stepped from a place of safety in close proximity to a moving

vehicle directly into its path, and this court held that, as a matter of law, such act was negligence which was more than slight, justifying the trial courts in refusing to submit the cases to the jury."

In *Doan v. Hoppe,* 133 Neb. 767, 277 N. W. 64, we cited with approval the following rule from *White v. Davis,* 103 Cal. App. 531, 284 Pac. 1086: "There seems to be a general rule running through the cases where a pedestrian, or one standing on a highway, is injured by an automobile, which usually determines whether the question of contributory negligence is one of law, or of fact. Where the injured party fails to look at all, or looks straight ahead without glancing to either side, or is in a position where he cannot see, or in other words, when he takes no precaution at all for his own safety, it is usually a question for the court. Where he looks but does not see an approaching automobile, or, seeing one, erroneously misjudges its speed or distance, or for some other reason assumes he could avoid injury to himself, the question is usually one for the jury."

Plaintiff contends that a proper conclusion may be drawn from the evidence that the deceased was looking. We find nothing in the evidence upon which such an inference or conclusion may be properly based. However, assuming that deceased looked, that contention also has been answered in the *Travinsky* case, where this court discussed the rule just quoted from *White v. Davis, supra,* and said:

"The negligence does not arise from the single circumstance of whether the pedestrian looks or does not look. The determining element in this type of case is the sudden movement into the path of the vehicle followed by almost instantaneous collision.

"In the instant case we think the fact that plaintiff's deceased looked and saw the car and was conscious of its motion and proximity made his act of suddenly stepping into its path negligence of a higher degree than if he had done so without looking."

Plaintiff further argues that excessive speed is shown by the distance the cab traveled after the impact. It should be

noted that the evidence is that the brakes were applied and that the car "slid" and that there is no evidence as to the effect sliding on wet pavement would have on the distance a car would travel. That contention was also answered in the *Travinsky* case, as follows: "Conceding excessive speed to have been proved, it would seem that since the deceased observed the approach of the car he must have had some relative impression of its speed and that the higher that impression the greater his negligence in suddenly moving from a place of safety into its path."

The conclusion is inescapable that the negligence of the deceased contributed to, if it was not the proximate cause of, the accident, and that he was guilty of such contributory negligence that any recovery is barred as a matter of law. The trial court erred in refusing to direct the jury to render a verdict for the defendant at the close of all the evidence. The judgment of the district court is reversed and the cause dismissed.

REVERSED AND DISMISSED.

PAINE, J., dissenting.

This case presents to this court for determination the question of the relative rights of a pedestrian and an automobile, when the pedestrian is proceeding across an arterial highway at the proper place for making such crossing.

If there is no electric signal light, or traffic officer momentarily stopping traffic, which rushes on in the arterial without end, under what conditions can the estate of a pedestrian recover if our holding stands in this case that, having proceeded from a place of safety, and being killed in attempting to cross such arterial, his own conduct in leaving such place of safety precludes his recovery? When could a pedestrian ever safely cross such a busy arterial street?

Sabino Rivera, a Mexican, was walking across an intersection in Omaha, and was killed by being struck by a Yellow Cab of defendant corporation. Joe Cuevas, administrator, brought action under Lord Campbell's Act for the benefit of widow and children. Verdict of $5,000 and $304 for funeral expenses was returned for the administrator. De-

fendant appeals from judgment of $5,304 entered thereon.

The third amended petition filed in this case alleged that on March 1, 1940, at about 8:50 p. m., Sabino Rivera as a pedestrian was crossing Thirteenth street in Omaha at its intersection with Mason street, proceeding from west to east on the south side of Mason street; that when he had reached a point about 15 feet from the east curb of Thirteenth street he was struck by a taxicab, driven by Francis D. Morlan, with great force and violence, and was pinioned upon the left front part of the taxicab, so that he was dragged a distance of 96 feet; that he sustained a fracture of the skull and numerous other fractures, bruises and abrasions, from which injuries he died the following day.

Plaintiff further alleges that the negligence of defendant in the operation of said taxicab was the direct and proximate cause of Rivera's death; that said carelessness and negligence consisted of the following: That defendant drove said taxicab at a high, dangerous, and unlawful rate of speed, taking into consideration the wet and slippery condition of the street, the rainy and foggy condition of the weather, and the traffic on said street at that time and place; in failing to keep a proper lookout, and failing to observe said Rivera while he was crossing Thirteenth street; in failing to have said taxicab under proper control; in failing to sound any signal or warning; in failing to yield to said Rivera the right of way while he was crossing said street. Generally these allegations were proved by the evidence.

Without setting out instruction No. 9, as given by the court, in full, we find it set out sections from the ordinances of the city of Omaha, as received in evidence, providing in section 16 that the driver of any vehicle *shall yield the right of way to a pedestrian crossing the street* within any marked cross-walk or *within any unmarked cross-walk* at the end of the block, except at intersections where the movement of traffic is regulated by police officers or traffic control signals; and section 40 of the city ordinances, providing a restriction as to speed, that no person shall drive or operate a vehicle at a rate of speed greater than is reasonable and

proper, having regard for the traffic and the use of the road and the condition of the road, nor at such a rate of speed as to endanger life and limb of any person. After giving these two sections from the ordinance, the court, as the final part of instruction No. 9, said: "The right given to pedestrians in the foregoing City Ordinance is not an absolute right which may be exercised under all conditions and hazards, but if to a reasonably prudent person in the exercise of ordinary care it would appear that to enforce his right of way would probably result in an accident, it would then be the duty of such person to use ordinary care to avert an accident, even to the extent of foregoing his right of way, and his failure under those conditions so to forego his right of way when he reasonably could so do, would be evidence of negligence on his part, as the law demands that everyone use reasonable care for their own safety."

Arthur W. Johnson, a witness for the plaintiff, who was a Ford mechanic for the past ten years, was driving in his car west on Mason street, and while making the required stop at Thirteenth street he saw the deceased step from the curb into the street on the west side of Thirteenth street and come across the street. He further testified that he first saw the car which struck the man when it was about 100 feet south of where he had stopped his car, but did not recognize it as a Yellow Cab taxi until it was within 20 feet of the pedestrian, so he waited and watched the cab as it struck the man.

Under the subheading, "Matters Relating to Use of Streets and Highways," in the topic "Evidence," 20 Am. Jur. 130, sec. 124, it says: "Judicial notice is taken of matters commonly and generally known with reference to automobiles and their operation. Such notice will be taken also of the congested traffic conditions upon main highways and the well-known streets in certain districts; the use of the streets and highways during all hours of the day and the night; the frequent violation of traffic laws, particularly the speed laws."

Cases on speed violations are before this court constantly.

In the recent case of *Watters v. McPherson, ante*, p. 607, 4 N. W. (2d) 605, released only on June 19, 1942, it is said in the opinion that sergeant Timmins, who had taken the special traffic course of nine months at Northwestern University, testified that skid marks 60 feet long on a dry pavement indicated a speed of 36 to 37 miles an hour. This fact, taught in a leading university, would not apply exactly to the case at bar, where the pavement was wet and it was raining, for if the wheels skid when the brakes are applied the car will go much farther; but he also testified that an automobile travels one and a half times its speed in feet per second.

In the case at bar, the skid marks were over 96 feet long, on a wet pavement, and certainly indicated that the speed far exceeded what it should have been under all the conditions.

In *Bragdon v. Kellogg*, 118 Me. 42, 105 Atl. 433, 6 A. L. R. 669, it was said: "It is a matter of common knowledge that automobiles are more often driven without any reference to legal speed than in observance of it." (6 A. L. R. 669.)

While the law, as stated in the annotation in 47 A. L. R. 599, supported by many citations, is that, "As a general rule, it may be stated that the rights of pedestrians and automobiles at intersections are mutual and coordinate, neither having superior rights," yet in the case at bar the ordinance just quoted required this taxi to yield the right of way to this pedestrian.

In *McCulley v. Anderson*, 119 Neb. 105, 227 N. W. 321, the plaintiff on a motor-cycle came to a full stop before entering Leavenworth street in Omaha, which was an arterial highway. He then entered the street, and was run down and seriously injured by an automobile proceeding at an unlawful and dangerous speed and on the wrong side of the road, and Judge Rose in writing the opinion said: "Where a motorist on a nonfavored street stops at an intersecting arterial highway when the intersection is clear of traffic, looks to the right and left for approaching vehicles, acting as a reasonably prudent person in the exercise of due care

would act in the belief that he has time and opportunity to safely cross, he is not liable for negligence merely because he attempts to do so."

Where there is evidence tending to prove both negligence and contributory negligence in an action to recover damages for causing an injury, by wrongful act, the duty of making the comparison under the comparative negligence law is imposed upon the jury.

Judge Eberly stated the law to be: "A verdict of the jury based upon sufficient evidence to support it, and which cannot be said by the court to be clearly wrong, will not be set aside merely because it appears to be against the weight or preponderance of the evidence, as the weight of testimony is for the jury, and not for the appellate court." *Bosteder v. Duling*, 117 Neb. 154, 219 N. W. 896. See, also, *Russo v. Omaha & C. B. Street R. Co.*, 98 Neb. 436, 153 N. W. 510; *Central Granaries Co. v. Nebraska L. M. Ins. Ass'n*, 106 Neb. 80, 182 N. W. 582; *Brown v. Omaha & C. B. Street R. Co.*, 98 Neb. 613, 153 N. W. 588; *Churchill v. Pennsylvania Co.*, 103 Neb. 528, 172 N. W. 366.

"A verdict of a jury in a law action based upon conflicting evidence will not be disturbed unless clearly wrong." *Schindler v. Mulhair*, 132 Neb. 809, 273 N. W. 217.

The evidence discloses that, when the deceased started across this street, he walked out under the street light at that corner, so he could easily be seen. The deceased's first concern was that he should not be struck by the very heavy traffic going south in this arterial street. He hastened to avoid it and safely reached the center of the street. One or two witnesses testify that his head was down, but when a man is walking in the rain he does not hold his head up high, as he glances to the right or left, but glances with his eye under his hat brim. The defendant's taxi was far to the south as he continued on across, and he was in plain sight of the taxi driver, for there was no car between them. The taxi driver's story was that he only saw him just before he struck him. He told the policeman that "the man just loomed up in front of him," and he "didn't see him until he was right on top of him."

Now, let us analyze this driver's evidence. He says the man just loomed up in front and he hit him, but what did he testify that he saw in that instant (?) of time? He testified that he first applied the brakes instantly and slid to the right; that he noticed the man was "bent over," and was "on a slow run or trot," that "his back was bent over," that "his head was down," that "he did not look up," that "his clothes were dark," and that he "had a hat on his head."

To make all of such observations would require several seconds of time, and in the case of *Watters v. McPherson, supra,* it is shown that an automobile travels one and a half times its speed in feet per second. In other words, if the taxi was moving 40 miles an hour it would travel 60 feet in one second.

The jury would be justified in rejecting the evidence of the taxi driver entirely, and in deciding that there was nothing whatever to prevent his seeing the pedestrian a long ways back if he had been paying the required attention to the approaching crossway and the rights of pedestrians thereon.

The jury, in returning their verdict for the plaintiff, were doubtless convinced that the plaintiff's charges of negligence were true, and that (1) the driver drove his taxi at a high, dangerous, and unlawful rate of speed, taking into consideration the wet and slippery condition of the street, the rainy and foggy condition of the weather, and the traffic on said street at that time and place; (2) that the driver did not have his car under proper control; (3) that he did not maintain the proper lookout; (4) that he did not sound any signal horn, nor give any warning; and (5) that he did not yield the right of way, as required by ordinance, to a pedestrian crossing this intersection at the proper place.

Can any one deny that, when a pedestrian is lawfully proceeding on a street crossing at the proper place, and no obstacle intervenes between such person and the driver of an approaching taxi, the duty is imposed on such driver not to run down the pedestrian?

In *Sgroi v. Yellow Cab & Baggage Co.,* 124 Neb. 525, 247

N. W. 355, this court held: "The existence of negligence and contributory negligence in an action for personal injuries is, ordinarily, a question of fact, and where the evidence in relation thereto is such that minds may reasonably reach different conclusions as to their existence, such question should be submitted to the jury."

In my opinion, this case should be ruled by the law stated in these last two paragraphs, and the verdict of the jury and the judgment based thereon should be affirmed.

ROSE, J., concurs in this dissent.

MINOSUKE NAGAKI, APPELLEE, V. ROBERT C. STOCKFLETH, APPELLANT.

4 N. W. (2d) 766

FILED JULY 3, 1942. No. 31346.

1. **Bailment.** "When a bailment is reciprocally beneficial to both parties, the law requires ordinary diligence on the part of the bailee, and makes him responsible for negligence." *Mattern v. McCarthy*, 73 Neb. 228, 102 N. W. 468.
2. **Automobiles.** The sign, "Not liable for loss occasioned by fire or theft," over the entrance to a garage where automobiles are repaired, does not exempt a repairman, or bailee, from negligence resulting in his failure to remove a bailor's automobile to a place of safety after discovery of a fire which destroyed the garage.
3. **Bailment.** In Nebraska, the right of a bailee to limit his liability as such by contract does not extend to exemption from the consequences of his own negligence, if resulting in damages to bailor.

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

Neighbors & Danielson, for appellant.

Bertrand V. Tibbels and *Dwight Elliott, contra.*

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

ROSE, J.

This is an action to recover $800, the alleged value of an automobile owned by Minosuke Nagaki, plaintiff, and entrusted by him to Robert C. Stockfleth, defendant, for repairs. The relation of the parties with respect to the automobile was that of bailor and bailee. In Scottsbluff, defendant operated a garage in which he was engaged in selling, storing and repairing automobiles. The garage was destroyed by fire February 10, 1940, and with it plaintiff's automobile. In the petition it was alleged that the destruction of the automobile was due to the negligence of defendant in failing to remove it from the garage to a place of safety after discovery of the fire.

Defendant admitted he operated the garage, but otherwise his answer to the petition was a general denial.

The case was first tried in the county court of Scotts Bluff county and resulted in a judgment in favor of plaintiff for $575. Defendant appealed therefrom to the district court where a jury was waived. Upon a trial of the cause the judgment of the district court was the same as that of the county court. Defendant appealed to the supreme court.

The uncontradicted evidence shows that plaintiff entrusted his four-door Oldsmobile sedan to defendant in his garage for repairs and that it was destroyed therein by fire. On appeal defendant contends that the judgment against him for damages should be reversed on the ground that plaintiff did not prove his allegation that the loss of his automobile was due to the negligence of defendant in failing to remove it to a place of safety after discovery of the fire or prove that defendant did not exercise ordinary care as bailee. In this connection it is argued on behalf of defendant that all the cars in the burning building could not be removed in time to save them and that defendant is not chargeable in the existing emergency with the standard of care required of a person having time for reflection. The following is a pertinent general rule:

"A repairman with whom a motor vehicle is left for repairs is, under the rules applicable generally to bailees for

mutual benefit or bailees for hire, required to exercise ordinary care for its safe-keeping, and is liable to the owner for any loss resulting from his negligent acts or omissions, or those of his agents or employees while acting within the scope of their employment." 42 C. J. 814.

This is in harmony with the Nebraska rule which has been stated as follows:

"When a bailment is reciprocally beneficial to both parties, the law requires ordinary diligence on the part of the bailee, and makes him responsible for negligence." *Mattern v. McCarthy*, 73 Neb. 228, 102 N. W. 468. See, also, *Sulpho-Saline Bath Co. v. Allen*, 66 Neb. 295, 92 N. W. 354; *Campbell v. Missouri P. R. Co.*, 78 Neb. 479, 111 N. W. 126; *Davis v. Taylor & Son*, 92 Neb. 769, 139 N. W. 687.

Plaintiff would have been entitled to the benefit of repairs and defendant to compensation for making them upon performance of the contract of bailment. The bailment therefore was one for hire or for the mutual benefit of the parties. The record contains evidence tending to prove the following facts: When the fire started, a mechanic in the employ of defendant was at work on plaintiff's car as it stood with the front end toward an open 12-foot door within six to ten feet of an alley in the rear of the building. The motor was running at the time and by a slight turn of the wheel the mechanic in charge of the car could have driven it out of the garage to a place of safety in about a minute. Instead of doing so and of thus preventing its destruction, he abandoned it and went to the stairway to a balcony where the fire was burning among tires and other supplies. Other employees were using a fire extinguisher without success and the mechanic went back to plaintiff's car for his tools, could then have driven the car out, had he thought of it, but went to the office, a distance of 75 or 80 feet, and removed the files containing accounts. In the exercise of ordinary care, there was no emergency to prevent him from saving the car upon which he was at work for the benefit of his employer and plaintiff. Automobiles on which other mechanics had been working at the same time were taken to

places of safety. This with other evidence of similar import is sufficient to sustain the judgment of the district court on the issue of defendant's negligence and resulting liability.

It is insisted, however, that the bailment by contract protected defendant from liability for plaintiff's loss. This proposition is based on the fact that plaintiff's car was driven into defendant's garage through a door above which was a large sign, "Not liable for loss occasioned by fire or theft." The better view on this subject has been stated as follows:

"The liability of one in whose custody an automobile was left for repairs as a bailee for hire is not affected by knowledge of the owner as to the manner in which or the place where the property was kept. The repairman cannot avoid liability for a loss occasioned by lack of ordinary care upon his part by having posted a notice or by having given notice to the owner that he will not be liable, as, for example, where the vehicle is destroyed by fire or is stolen." 42 C. J. 814.

In Nebraska the right of a bailee to limit his liability as such by contract does not extend to exemption from the consequences of his own negligence, if resulting in damages to bailor. *Gesford v. Star Van & Storage Co.*, 104 Neb. 453, 177 N. W. 794; *Keifer & Keifer v. Reconstruction Finance Corporation*, 97 Fed. (2d) 812.

Error in the proceedings and judgment of the district court has not been found.

AFFIRMED.

NEBRASKA CENTRAL BUILDING & LOAN ASSOCIATION, APPELLEE, V. YELLOWSTONE, INC., ET AL., APPELLEES: STATE OF NEBRASKA, APPELLANT.

4 N. W. (2d) 762

FILED JULY 3, 1942. No. 31177.

Nebraska Central Bldg. & Loan Ass'n v. Yellowstone, 140 Neb. 422, 299 N. W. 474, examined and adhered to.

APPEAL from the district court for Lancaster county: FREDERICK E. SHEPHERD, JUDGE. Opinion on motion for rehearing of case reported in 140 Neb. 422. *Former opinion and judgment of affirmance adhered to.*

Walter R. Johnson, Attorney General, and *Robert A. Nelson,* for appellant.

Field, Ricketts & Ricketts, contra.

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

EBERLY, J.

This cause is now before us on motion for rehearing. The opinion heretofore adopted is reported in 140 Neb. 422, 299 N. W. 474, reference to which is made for a statement of the issues and facts involved.

In construing statutes this court must first determine whether the legislation is prohibited by the Constitution, and must then determine the intention of the legislature. The constitutionality of the controlling enactments is not here challenged, so we are concerned only in ascertaining the legislative intent. *Updike v. City of Omaha,* 87 Neb. 228, 127 N. W. 229.

The basic contention of the appellant's motion for rehearing is that to secure a valid dissolution of a corporation in default for payment of its occupation tax imposed by section 24-1703, Comp. St. 1929, a judicial proceeding instituted by the attorney general on request of the secretary of state, as provided by section 24-1717, Comp. St. 1929, is necessary.

This legislation was originally enacted in 1913. It formed chapter 240 of the session laws of that year, which was entitled "An Act to require corporations to file annual reports with the secretary of state and to pay annual fees therefor," and to repeal certain sections enumerated. It contained 25 sections exclusive of the repealing clause. This act so passed remained in full force and effect, so far as the transactions involved in this suit are concerned, save and except section 6 (Comp. St. 1929, sec. 24-1706) which was amended in

1933 (Laws 1933, ch. 32) and in 1935 (Laws 1935, ch. 47), and sections 22 and 23 (Comp. St. 1929, secs. 24-1722, 24 1723) which were amended in 1921 (Laws 1921, ch. 173).

With the provisions of section 6 of this original act we have no concern, and it will not be further referred to. But it is otherwise with sections 22 and 23.

As originally enacted in 1913, section 17 (Comp. St. 1929, sec. 24-1717), embraced the only power or authority to forfeit or annul the charter of a defaulting corporation for profit, for failure to pay the occupation tax imposed by the terms of the act. The remedy provided was "an action in the district court of Lancaster county, or any county in this state in which such corporation is located," to be brought by the attorney general, on the request of the secretary of state, and then only if "such default is wilful and intentional."

However, in 1921, sections 22 and 23 of this 1913 act were amended by chapter 173, Laws 1921. This act was entitled "An Act to amend sections 782 and 783, Revised Statutes of Nebraska for 1913, in relation to the dissolution of domestic corporations by the secretary of state, and to the forfeiture of the right of a foreign corporation to do business in Nebraska and making delinquent occupation taxes a lien upon the assets of the corporation, and to repeal said original sections 782 and 783, Revised Statutes of Nebraska for 1913." It added to section 22 (Comp. St. 1929, sec. 24-1722), as previously existing, by amendment the words:

"Upon the failure of any domestic corporation to pay occupation tax within one year after it becomes due, the secretary of state shall send by registered mail a letter correctly addressed to the last named address of the corporation, which letter shall contain a notice of the occupation tax which is due, and a declaration bearing the great seal of the state of Nebraska, stating that if the delinquent occupation tax is not paid within ninety days after the mailing of the letter the corporation will be dissolved according to law; and that if the delinquent occupation tax is not paid within ninety days after the mailing of the registered letter the de-

linquent occupation tax shall be a lien upon the assets of the corporation, subsequent only to state, county and municipal taxes. Upon the failure of any domestic corporation to pay its occupation tax within ninety days after the mailing of the registered letter correctly addressed to the last known address of the corporation, the secretary of state shall dissolve the corporation and make such entry and showing upon the records of his office. Upon the failure of any domestic corporation to pay its occupation tax within ninety days after the mailing of the registered letter correctly addressed to the last known address of the corporation, all delinquent occupation taxes of the corporation shall be a lien upon the assets of the corporation, subsequent only to state, county and municipal taxes." (Laws 1921, ch. 173).

And, similarly, the 1921 act added to section 23 (Comp. St. 1929, sec. 24-1723), as previously existing, the provision that, in the event of foreign corporations defaulting in a similar manner, by complying with similar procedure prescribed, "The secretary of state shall bar the corporation from doing business in the state of Nebraska under the corporation laws of the state and make such entry and showing upon the record." (Laws 1921, ch. 173).

It will be noted that, while the act of 1921 was amendatory in its nature, its title was broadened and made explicit by the words embraced therein: "An Act * * * in relation to the dissolution of domestic corporations by the secretary of state," etc.

The title to a legislative act is a part thereof. *Wayne County v. Steele*, 121 Neb. 438, 237 N. W. 288. And where the title to the amendatory act sufficiently indicates the nature of the legislation in it contained or the nature of the changes or additions by it made, it is immaterial whether or not the provisions of the act are covered by the title of the act amended. *Miller v. Iowa-Nebraska Light & Power Co.*, 129 Neb. 757, 262 N. W. 855.

From this principle of construction it follows that, in determining its legal effect, resort may be had to the title of this amendatory act of 1921 as a part thereof to discover

the legislative intent therein expressed. *State v. City of Lincoln,* 101 Neb. 57, 162 N. W. 138.

And again, "In order to determine the meaning of the language of an act of the legislature, it is proper to examine the course of legislation upon the same general subject, and to consider in what connection and with what context it has theretofore been employed." *State v. Cosgrave,* 85 Neb. 187, 122 N. W. 885.

When chapter 240 of the Laws of 1913 was adopted, section 555 of the Revised Statutes of 1913 (later Comp. St. 1929, sec. 24-107), pertaining to "Affairs of dissolved corporations—how settled," "upon the dissolution, by the expiration of the term of its charter, *or otherwise,*" was and still remains in full force and effect. Its operation was necessarily connected with article 17, ch. 24, Comp. St. 1929, entitled "Occupation Tax," and particularly with section 24-1717 thereof relative to revocation and annulment of the charter of corporations organized for profit at the suit of the attorney general. Thereafter until the adoption of the act of 1921 the whole power to forfeit and annul charters for nonpayment of occupation taxes was exercisable by the attorney general "on request of the secretary of state." In the instant proceeding the attorney general insists that not only does this power continue, but that it remains exclusive in its nature. But the fact that the amendment of 1921 was adopted by the legislature certainly indicates a legislative intent that a "change" in the law should be thereby effected. For, had no change been legislatively intended, no amendment would have been enacted. The fact that the laws existing prior to 1921 vested the attorney general with the only existing power to prosecute an action to forfeit and annul the charter of a corporation organized for profit defaulting in payment of its occupation tax, wherein such default was wilful and intentional, and revoking its charter upon the establishment of such allegations, is neither an express or implied denial of the right of future legislatures to vest such power in other officials, or to broaden the base upon which such forfeitures of charters might be sustained, or to

provide a different procedure to secure the same. When the act of 1921 was enacted the legislature of 1921 must be presumed to have had in mind all previous legislation upon the subject, so that in the construction of this statute we must consider the preexisting law and any other acts relating to the same subject-matter. *Nebraska District of Evangelical Lutheran Synod v. McKelvie,* 104 Neb. 93, 175 N. W. 531; *Chicago & N. W. R. Co. v. Bauman,* 132 Neb. 67, 271 N. W. 256.

So considered, it is obvious that the amendatory act of 1921 was by the legislators necessarily connected with section 555, Rev. St. 1913 (Comp. St. 1929, sec. 24-107) as an appropriate means and method of completing or supplementing the executive action revoking the charter of the corporation involved, authorized thereby. It must be conceded that section 555, Rev. St. 1913, was by its terms equally applicable to and connected with both enactments now being considered. The necessary effect of the act of 1921, construed in the light of the foregoing principles, was (1) to create a new method of dissolving a corporation organized for profit; (2) to vest the power for that purpose in the secretary of state alone; (3) to establish as the essential basis of such action of the secretary of state "the failure of any domestic corporation to pay its occupation tax" within the time prescribed by law. This new power thus conferred was definite, certain and complete. It in no manner affected, nor was it in turn in any manner affected by, the powers created and vested by section 24-1717, Comp. St. 1929. Both provisions continued in full force and effect. The use of one or the other was merely an option to be exercised by the secretary of state. Indeed, if they were to be regarded as conflicting in any manner or to any degree, the act of 1921 as the last word of the legislators will control. Now, whether the dissolution of a corporation be accomplished by and pursuant to section 24-1717, Comp. St. 1929 (a judicial proceeding instituted by the attorney general at the request of the secretary of state) or under section 24-1722, Comp. St. 1929 (by the secretary of state on his own motion as an ex-

ecutive officer), both are properly authorized, and if carried out with due compliance with the statutory provisions applicable to each result in the "dissolution" of the corporate body to which applied, and the complete revocation of its charter. It then becomes subject to the application of the provisions of section 24-107, Comp. St. 1929 (then unrepealed) under the conditions therein enumerated and set forth.

It follows that the motion for a rehearing should be, and is hereby, overruled, and the former opinion of this court is adhered to.

AFFIRMED.

MILO G. DIER, APPELLEE, V. MARJORIE F. DIER, APPELLANT.
4 N. W. (2d) 731

FILED JULY 3, 1942. No. 31222.

1. **Divorce**: APPEAL. It is the duty of this court in its hearings of appeals in divorce cases to retry the issue or issues of fact involved in the finding or findings of fact complained of upon the evidence preserved in the bill of exceptions. We are simply required to try and independently decide only such issues in the case as are presented by the appeal.
2. **Appeal.** When the evidence on material questions of fact is in irreconcilable conflict, this court will, in determining the weight of the evidence, consider the fact that the trial court observed the witnesses and their manner of testifying, and must have accepted one version of the facts rather than the opposite.
3. ———. In a trial *de novo* in this court, the issues of fact involved must be determined in accordance with the ordinary rules governing the burden of proof and the competency and materiality of evidence.
4. **Divorce.** "'Jurisdiction relative to divorce and alimony is given by statute, and every power exercised by the court with reference thereto must look for its source in the statute, or it does not exist.' *Cizek v. Cizek*, 69 Neb. 800, 99 N. W. 28." *Brown v. Brown*, 130 Neb. 487, 265 N. W. 556.
5. ———. "'Extreme cruelty, to justify a decree of divorce, where there is no physical injury or violence, must be of such a character as to destroy the peace of mind or seriously impair the

bodily health of the unoffending party, or such as destroys the legitimate ends and objects of matrimony.' *Chipperfield v. Chipperfield*, 121 Neb. 204, 236 N. W. 440." *Brown v. Brown, supra.*

6. **Evidence.** "Hearsay may be defined to be any statement, verbal or written, the persuasiveness or probative value of which depends partly or wholly upon something other than the credit to be given to the witness who utters the statement or the instrument which contains it, and renders necessary a resort to and belief in the veracity and competency of some other person." 6 Ency. of Evidence, 443.
7. **Appeal.** Upon appeals in equity actions, this court will not consider incompetent evidence received by the trial court.
8. **Evidence.** Exhibit No. 4 examined, and *held* incompetent, and, as hearsay, not to be considered by this court in the review of the record on appeal here presented.
9. **Divorce.** Evidence examined, and *held* to establish by a preponderance of the evidence a charge of extreme cruelty committed by defendant.
10. ———. In divorce actions, in making disposition of the custody of a child of tender years, the policy of the law as declared by the courts is to look to the welfare and best interests of the child.
11. ———. Evidence examined, and *held* that the welfare and best interests of the minor child require that its custody be committed to its mother.

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

C. M. Skiles and *Frederick J. Patz*, for appellant.

Richard O. Johnson, contra.

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

EBERLY, J.

This is a proceeding for divorce and custody of an eight-year-old son, instituted by Milo G. Dier, as plaintiff, against Marjorie F. Dier, his wife, as defendant, in the district court for Lancaster county.

In his amended petition plaintiff charges generally, first, that defendant was guilty of gross, wanton and extreme cruelty towards plaintiff; second, that in 1937 the defendant committed adultery with two men named by him, and that thereafter defendant "consorted" and "associated" with a third person also named in plaintiff's amended petition.

The defendant, in her answer and cross-petition, denies generally the allegations of plaintiff's amended petition; admits residence, date and place of marriage, and birth of the child; and denies specifically the charges of adultery made. Further, in such cross-petition defendant sets forth and charges with particularity a course of cruel treatment of her by the plaintiff during the continuance of their married life, which was "such as to destroy her happiness, injure her health and make it impossible for the plaintiff and defendant to again live together as husband and wife."

By agreement of parties in open court it was stipulated that this case be tried as if plaintiff filed a general denial to the defendant's answer and cross-petition.

A trial to the court resulted in a general finding in favor of plaintiff upon his amended petition, and against the defendant upon her cross-petition. However, the district court found specially "that defendant has been guilty of extreme cruelty of such a nature as to destroy the legitimate objects of matrimony, * * * although this court does not find that she is guilty of adultery;" and also that the defendant is not a fit and suitable person to have the care, custody and control of their minor child. The district court awarded the defendant the sum of $300 "in lieu of all other alimony or support money." The care, custody and control of the nine-year-old son of these parties were awarded to the plaintiff until the further order of the court.

The trial court overruled the defendant's motion for a new trial, and she appeals. The plaintiff prosecuted no cross-appeal.

The appellant (defendant) presents three issues for our consideration: Was the trial court justified, first, in granting a divorce to the plaintiff; second, in limiting the amount of permanent alimony granted to appellant to the sum of $300; and, third, in awarding custody of the child to the plaintiff.

The effect and purpose of this appeal is governed by section 20-1925, Comp. St. 1929, which provides:

"In all appeals from the district court to the supreme

court in suits in equity, wherein review of some or all of the findings of fact of the district court is asked by the appellant, it shall be the duty of the supreme court to retry the issue or issues of fact involved in the finding or findings of fact complained of upon the evidence preserved in the bill of exceptions, and upon trial *de novo* of such question or questions of fact, reach an independent conclusion as to what finding or findings are required under the pleadings and all the evidence, without reference to the conclusion reached in the district court or the fact that there may be some evidence in support thereof." See *Westphalen v. Westphalen*, 115 Neb. 217, 212 N. W. 429; *O'Reilly v. O'Reilly*, 120 Neb. 720, 234 N. W. 916.

It is the duty of this court "to retry the issue or issues of fact involved in the finding or findings of fact complained of upon the evidence preserved in the bill of exceptions." We are simply required to try and independently decide only such issues in the case as are presented by the appeal. *Northwestern Mutual Life Ins. Co. v. Mallory*, 93 Neb. 579, 141 N. W. 190.

"The usual presumptions, in favor of a finding of the trial court, do not obtain, on appeal in an equity case." *Michigan Trust Co. v. City of Red Cloud*, 69 Neb. 585, 592, 96 N. W. 140, 98 N. W. 413. See *Colby v. Foxworthy*, 80 Neb. 244, 115 N. W. 1076.

However, when the evidence on material questions of fact is in irreconcilable conflict, this court will, in determining the weight of the evidence, consider the fact that the trial court observed the witnesses and their manner of testifying, and must have accepted one version of the facts rather than the opposite. *Magill v. Magill*, 114 Neb. 636, 209 N. W. 241; *Peterson v. Winkelmann*, 114 Neb. 714, 209 N. W. 499; *Enterprise Planing Mill Co. v. Methodist Episcopal Church*, 100 Neb. 29, 158 N. W. 386; *Sherman v. Great Western Sugar Co.*, 127 Neb. 505, 255 N. W. 772; *Olson Construction Co. v. Commercial Bldg. & Investment Co.*, 127 Neb. 609, 256 N. W. 22.

In a trial *de novo* in this court, the issues of fact involved

must be determined in accordance with the ordinary rules governing the burden of proof and the competency and materiality of evidence. *Beckman v. Lincoln & N. W. R. Co.*, 79 Neb. 89, 112 N. W. 348.

"Upon appeal in actions in equity, this court will not consider incompetent evidence received by the trial court." *Jones v. Dooley*, 107 Neb. 162, 185 N. W. 307.

It is to be noted that the plaintiff, as a ground for divorce, expressly charges the defendant with the commission of adultery with parties named in his amended petition. These charges the defendant expressly denied both in pleading and in evidence. She is presumed to be innocent. The burden of proof was, by the nature of the issue, imposed on the plaintiff. The judgment of the trial court that "this court does not find that she (defendant) is guilty of adultery" is a decision of this issue in favor of the defendant, and is tantamount to an express finding that adultery was not committed by her. No cross-appeal has been taken from this determination by the plaintiff.

The sole remaining issues of fact involved in the findings of fact complained of by the defendant are: First, was defendant guilty of extreme cruelty; second, whether the defendant is a fit and suitable person to have the care, custody and control of her son, a minor child; and, third, the amount of alimony to which the defendant is entitled.

We are committed to the doctrine:

" 'Jurisdiction relative to divorce and alimony is given by statute, and every power exercised by the court with reference thereto must look for its source in the statute, or it does not exist.' *Cizek v. Cizek*, 69 Neb. 800, 99 N. W. 28." *Brown v. Brown*, 130 Neb. 487, 265 N. W. 556.

We define the statutory term, "extreme cruelty" as follows:

" 'Extreme cruelty, to justify a decree of divorce, where there is no physical injury or violence, must be of such a character as to destroy the peace of mind or seriously impair the bodily health of the unoffending party, or such as destroys the legitimate ends and objects of matrimony.'

Chipperfield v. Chipperfield, 121 Neb. 204, 236 N. W. 440." *Brown v. Brown, supra.*

Recurring to the petition on which the case was tried in the district court, we are confronted with a violation of the general rule of pleading governing this cause of action, which is: "Cruelty or extreme cruelty within the meaning of the statute must, of course, be alleged where a divorce is sought on this ground, but an allegation that defendant has been guilty of cruelty or extreme cruelty in the language of the statute generally is not sufficient; the particular facts relied on as constituting the cruelty should be set forth in detail, unless it is otherwise provided by statute." 27 C. J. S. 698, sec. 108c.

Still it appears that, no objections to the pleadings having been presented in the trial court, they will be deemed waived on appeal, and the evidence adduced will be considered so far as applicable to the controversy presented, in view of the terms of the governing statute.

"As a general rule, adultery does not of itself constitute cruelty as a ground for divorce." 27 C. J. S. 558, sec. 28c. See, also, *Lanyon's Detective Agency v. Cochrane,* 240 N. Y. 274, 148 N. E. 520, 41 A. L. R. 1432; *Hofmann v. Hofmann,* 232 N. Y. 215, 133 N. E. 450.

It follows that the charges of adultery made in plaintiff's amended petition and the evidence adduced in support thereof are not necessary for our consideration in the determination of the question of "extreme cruelty," in view of the unchallenged adjudication of that issue by the trial court.

It now becomes the duty of this court to retry *de novo* the issues of fact involved in the charge of "extreme cruelty" upon the evidence preserved in the bill of exceptions.

It is to be borne in mind that this issue must be determined here in accordance with the ordinary rules governing the burden of proof and the competency and materiality of evidence introduced at the trial, as disclosed by the bill of exceptions duly settled and allowed by the trial court. This record discloses that after both plaintiff and defendant had finally rested, the trial judge announced from the bench:

"I will direct that Exhibit No. 4, the report of the investigator, be placed in evidence and made a part of the record in this case. If counsel for either or both parties care to cross-examine any of the persons who furnished information to the probation officer contained in this report, or if counsel desire to cross-examine the probation officer upon the report, the Court will forthwith bring said parties before the court for the purpose of cross-examination."

Exhibit No. 4 is an unsigned, typewritten report containing purported statements as to facts by the parties to this controversy relative to the merits thereof, and by other persons purporting to be familiar with them, and also, in part, the conclusions of the "investigator" thereon. It was not subscribed to by its author, or officer preparing the same; neither was it sworn to by the investigator or by the parties whose statements were taken by him; nor did it come from the witness-stand during the trial from the mouth of a testifying witness under the sanction of an oath. We infer that it was originally prepared pursuant to section 42-307, Comp. St. 1929, which is, in part as follows:

" * * * Provided, that it shall be the duty of the court to make independent investigations of the merits of all default cases (for divorce) and cases where minor children are involved through a probation officer or county superintendent of child welfare or other agency." But the statutes in no place direct that such report so made shall be deemed or considered as competent evidence, and, as such, binding upon the parties to the litigation.

Section 20-1237, Comp. St. 1929, provides: "Before testifying the witness shall be sworn to testify the truth, the whole truth, and nothing but the truth. The mode of administering an oath shall be such as is most binding upon the conscience of the witness."

Not only were the unsworn statements contained in this report, exhibit No. 4, thus received as proof, but the parties were deprived of their right of cross-examination. True cross-examination involves the presence of the cross examiner when and where the direct evidence is adduced. "The

basis upon which the right of cross-examination is founded has been said to be that *ex parte* statements are too uncertain and unreliable to be considered in the investigation of controverted facts, and should not therefore be received in evidence." 3 Ency. of Evidence, 807. Indeed, this *ex parte* statement or report, introduced in evidence as exhibit No. 4, is mere hearsay, and wholly incompetent.

"Hearsay may be defined to be any statement, verbal or written, the persuasiveness or probative value of which depends partly or wholly upon something other than the credit to be given to the witness who utters the statement or the instrument which contains it, and renders necessary a resort to and belief in the veracity and competency of some other person." 6 Ency. of Evidence, 443. See, also, 1 Greenleaf, Evidence (13th ed.) 121; *Hopt v. Utah,* 110 U. S. 574, 4 S. Ct. 202.

Exhibit No. 4, therefore, is incompetent and wholly inadmissible, so far as review of the proceedings is concerned, must be disregarded, and will not be considered. *Jones v. Dooley,* 107 Neb. 162, 185 N. W. 307.

This disposition of Exhibit No. 4 must not be deemed as a judicial modification or curtailment of section 42-307, Comp. St. 1929, or as a violation of the legislative intent thereby expressed.

It may well be said that "The apportionment of the task of adducing evidence is one of the most characteristic features of the Anglo-American system. It is placed wholly upon the *parties* to the litigation; it is not required or expected of the *judge.*" 9 Wigmore, Evidence (3d ed.) sec. 2483.

While the judge in ordinary civil and criminal cases is vested with ample power to call forth evidence, "That he has no burden or duty of doing so is plain in the law. But the general judicial power itself, expressly allotted in every state Constitution, implies inherently a power to investigate as auxiliary to the power to decide; and the power to investigate implies necessarily a power to summon and to question witnesses." 9 Wigmore, Evidence (3d ed.) sec. 2484.

In the instant case we are dealing with a form of pro-

ceeding in which the state or society has an actual interest. Section 42-307, Comp. St. 1929, imposes the mandatory duty to have investigations made where minor children are involved. Under these circumstances, it would seem that the power to summon and question witnesses in open court on the trial of the merits, on the court's own motion but subject to the right of cross-examination by the parties to the proceeding, is necessarily implied and should be unquestioned. That method alone secures "due process" in the proceedings in courts of original jurisdiction and renders possible the right to be heard in courts of last resort which our state Constitution guarantees. Indeed, Wigmore lays down the principle: "The trial judge, then, may *call a witness* not called by the parties, or may consult any source of information on topics subject to *judicial notice,* or may *put additional questions* to a witness called by the parties, or may 'ex mero motu' *exclude inadmissible evidence,* or may *take a view* of a place or thing." 9 Wigmore, Evidence (3d ed.) sec. 2484.

It is equally clear, however, and upon the same principle, under section 42-307, Comp. St. 1929, that neither a judge, a juror, a judge's representative investigator, nor the party whose statement such investigator secures may lawfully contribute any competent testimony for the consideration of a jury or court, unless he take the stand as a witness, is sworn, and is subjected to the usual test of cross-examination. 6 Wigmore, Evidence (3d ed.) sec. 1805.

We have carefully considered the evidence as an entirety, excluding from consideration exhibit No. 4. It would accomplish no good purpose to set forth the details of the proof. Both of these parties are clearly at fault, but weighing all the facts disclosed by the record, in the light of the further actuality that there is clearly an irreconcilable conflict in the evidence, and bearing in mind that the trial court heard the conflicting testimony, observed the witnesses and their manner of testifying, accepted one version of the facts rather than the other, and adjudged that plaintiff's charge of extreme cruelty was established by a preponderance of

proof, we conclude that the evidence requires a finding for the plaintiff on his charge of extreme cruelty committed by the defendant.

However, we are not in agreement with the trial court on the subjects of the custody of the minor son and the amount of alimony to which defendant is entitled in her own right, and in these respects its decree will be modified.

In divorce actions, in making disposition of the custody of a child of tender years, the policy of the law as declared by the courts is to look to the welfare and best interests of the child. *Hammond v. Hammond*, 103 Neb. 860, 174 N. W. 865; *Nathan v. Nathan*, 102 Neb. 59, 165 N. W. 955; *Boxa v. Boxa*, 92 Neb. 78, 137 N. W. 986; *Wilkins v. Wilkins*, 84 Neb. 206, 120 N. W. 907; *Feather v. Feather*, 112 Neb. 315, 199 N. W. 533.

While the plaintiff doubtless has, as he testifies, a tender regard for his son, the nature of his work is such that he could not give the child his personal care and attention during the greater part of the day, because the duties of his employment would keep him away from the presence of the child. The testimony in the record is that the defendant has been an industrious, loving, and careful mother. It must be conceded that while these parties were living together this son showed every evidence of good care. We think it generally conceded that the best interests and welfare of a child of tender years will be best subserved by placing him in the custody of his natural mother, if she is a fit and proper person. The record does not disclose anything that would justify denying to this mother the care and custody of her nine-year-old son. Indeed, the welfare and best interests of the child demand that its custody be committed to the mother, which is hereby awarded and ordered. But the plaintiff will be permitted to visit the child at all reasonable times and to have the child visit him at reasonable intervals.

The plaintiff is a man of good health, and is employed at this time at a guaranteed salary of $30 a week. Further, his contract of employment gives him a bonus in addition

to the regular salary guaranteed by his employer. His total recompense admittedly amounts to from $35 to $40 a week. The parties were married when the defendant was still in high school. Since her marriage her time has been taken up by her household duties and care of her child, and she has never been able to fit herself as a wage-earner. The parties have accumulated very little property, excepting an automobile and a small amount of household effects.

Under the facts disclosed, we find that defendant is entitled to an allowance of $500 as her permanent alimony; also, to a reasonable allowance for the support of the minor child, which we fix at $25 a month, and, in addition, the sum of $100 as attorney fees in this court.

It is therefore ordered and adjudged that the plaintiff pay to the clerk of the district court for Lancaster county within 60 days from the date of this judgment the sum of $500 for defendant as her permanent alimony; and in addition plaintiff shall pay to such clerk for the support of the minor child the sum of $25 a month during its minority; and further plaintiff shall pay the sum of $100 as attorneys' fees for defendant's attorneys to be taxed as costs. Leave is given either party to apply to the district court for a modification of the order here made, with respect to custody of the minor child and allowance for its support, upon showing made of changed conditions.

The judgment of the district court, as thus modified, is

AFFIRMED.

HARLEY L. GADWAY, APPELLEE, V. ESTHER GADWAY, APPELLANT.

4 N. W. (2d) 765

FILED JULY 3, 1942. No. 31335.

Divorce. Evidence examined and *held* to sustain the findings of the trial court in apportioning common property between the husband and wife in divorce decree.

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

Beckman & Beckman, for appellant.

Frank L. Burbridge, contra.

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

CARTER, J.

This is a suit for divorce. The trial court awarded the defendant a divorce on her cross-petition and divided the property of the parties. Defendant appeals.

No complaint is made as to the award of the divorce. No children were born as the result of this marriage. The only question raised is the correctness of the property settlement.

The evidence shows that the parties were married on June 26, 1921. For many years the plaintiff husband was engaged in the live stock commission business in South Omaha. Until 1929 he was employed at a salary ranging from $125 to $175 a month, all of which went into the common family bank account. After 1929 he purchased a membership on the live stock exchange and engaged in business for himself. In 1935 he sold his membership at a considerable loss and quit the business, due to adverse business conditions. Thereafter he operated a beer tavern, a restaurant and a rooming-house, without much financial success. Subsequently he became ill and was placed in the county hospital for treatment for inebriacy. His domestic troubles thereafter increased, culminating in divorce.

The evidence shows that each of the parties had some money at the time of their marriage. Their accounts were merged into a joint account and used by them as the occasion demanded. Defendant drew out funds the same as plaintiff did, and in 1936 she also purchased a rooming-house, the source of the purchase price of $1,500 being somewhat in dispute. Plaintiff, some time after his marriage to the defendant, purchased a home for $1,725, which later was conveyed to the defendant. The evidence shows that plaintiff is 50 years of age, is without employment and has no

property. Defendant has a rooming house, which she is successfully operating, and the residence which plaintiff conveyed to her. Plaintiff has two policies of endowment insurance which defendant has in her possession.

The trial court awarded defendant the residence property, hereinbefore referred to, and the rooming-house business which she is operating, including the furniture, furnishings and household goods therein belonging to the parties hereto. To the plaintiff the trial court awarded the two life insurance policies subject to all liens and encumbraces thereon and ordered defendant to deliver them to the plaintiff.

We have concluded from an examination of the record that the property adjustment made by the court was in all respects proper and divides the common property of these parties in a manner required by the evidence. There was no error in not allowing an attorney's fee to defendant. There being no error in the record, the decree of the district court is affirmed.

AFFIRMED.

CHARLES M. THOMSON, TRUSTEE, APPELLANT, V. NEBRASKA STATE RAILWAY COMMISSION, APPELLEE.

4 N. W. (2d) 756

FILED JULY 3, 1942. No. 31429.

1. **Railroads.** To determine whether a railroad company may dispense with the services of a part-time agent at a station and substitute therefor a caretaker, all of the facts and circumstances peculiar to such station and attendant thereon must be considered, such as the volume of the business done at the station, its proximity to other stations, the accessibility thereof, the cost of maintaining the station with a part-time agent, the financial loss, if any, to the railroad company, all with due regard for the welfare of the public and the cost of operating such station.
2. ———. "It is not reasonable to require the maintenance of a full-time agency station when the cost of such service is out of proportion to the revenue derived from that portion of the * * * public benefited thereby, especially where a substitute service may be provided which will afford the same essential service but is less convenient." *Atchison, T. & S. F. Ry. Co. v. State*, 189 Okla. 485, 118 Pac. (2d) 202.

3. ———. Evidence examined, and found insufficient to sustain an order of the Nebraska state railway commission, denying the application of railroad company requesting the right to dispense with part-time agent and substitute therefor a caretaker; *held*, such action on the part of the railway commission is arbitrary and unreasonable under all the circumstances.

APPEAL from the Nebraska State Railway Commission. *Reversed.*

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

Walter R. Johnson, Attorney General, Edwin Vail and *James C. Quigley, contra.*

Heard before ROSE, EBERLY, PAINE, CARTER, MESSMORE and YEAGER, JJ.

MESSMORE, J.

This is an appeal from an order of the Nebraska state railway commission, denying the Chicago & Northwestern Railway Company authority to discontinue the station agent at Nenzel, Nebraska, and substitute therefor a caretaker. On October 18, 1941, the appellant filed with the Nebraska state railway commission an application, containing certain facts with reference to the business at the Nenzel station and the revenues collected and expenses of maintaining an agent, and praying for the right to discontinue the services of the agent and substitute therefor a caretaker. The matter was heard at Valentine, Nebraska, before the railway commission on December 4, 1941. On January 2, 1942, the commission entered an order denying the application. On January 12, 1942, the applicant filed a motion for rehearing, which was denied January 28, 1942, and on February 18, 1942, applicant filed with the commission notice of intention to appeal and a cost bond which was duly approved. The case comes here for review on the record.

The record discloses that the incorporated village of Nenzel, with a population of 125, is 7.6 miles east of Cody, Nebraska, and 8 miles west of Kilgore, Nebraska, in Cherry county. The chief traveling auditor of the railroad prepared exhibits containing statistics as to revenues and traf-

fic expenses of the station, which are found in the record as exhibits 1 to 6, inclusive. The exhibits were prepared on the basis first of gross revenue. They likewise contain the subject of the traffic received and forwarded, and show items and the expense of operating the station with an agent; then a comparison of such expense with that of the average station on the whole system. Exhibit 1 is a statement of the gross revenue as follows: In 1937, $14,899.27; in 1938, $10,415.19; in 1939, $7,699.52; in 1940, $10,987.88; in the first eight months of 1941, $3,211.55. Exhibit 1-A shows gross revenue $833.58; local revenue $387.36; gross passenger revenue $70.21, for the period of September and October, 1941.

Exhibit 2, having to do with the traffic involved, shows the following: 1937, 132 carloads received, 79 of which contained gravel for road-building; 1938, 47 carloads received consisting of corn, coal, cotton seed cake, feed, etc.; 1939, 43 carloads received, consisting of cotton seed cake, coal, posts, feed, etc.; 1940, 84 carloads received, of which 34 cars contained gravel and 15 cars asphalt for road-building; the first eight months of 1941, 14 carloads received, of which seven were coal, two posts, four cotton seed cake, and one gravel. Outbound movement of L. C. L. (less carload lots) and carload traffic: 1937, 20 cars of cattle, one car of hay; 1938, five cars of cattle; 1939, eight cars of cattle; 1940, two cars of cattle; and the first eight months of 1941, one car of cattle; September and October, 1941, three cars of cotton seed cake and four cars of cattle received. Exhibit 2 shows L. C. L. to average less than one shipment per day on the "received" and one shipment every four days on the "forwarded."

Exhibit 3 is a statement of the station expenses from 1937 to and including August, 1941, under the heading "Station Labor," which means the agent's salary: 1937, $982.64; 1938, $1,047.61; 1939, $1,067.94; 1940, $1,396.50; first eight months of 1941, $882.89. Social security and railroad taxes: 1937, $58.96; 1938, $62.86; 1939, $64.08; 1940, $83.79; first eight months of 1941, $52.97. The exhibit also contains the fuel items, cost of handling the social security, and railroad

taxes, building maintenance, again social security and railroad tax, stationery and supplies, making a total amount for all: 1937, $1,197.87; 1938, $1,154.73; 1939, $1,161.70; 1940, $1,615.07; first eight months of 1941, $956.03, and for the months of September and October, 1941, total expense, as shown by items above, $273.93.

Exhibit 4 is a comparison of the station expenses with the average station expense on the system, as follows: Revenues assigned to station: 1937, $6,657.98; 1938, $4,600.32; 1939, $3,437.54; 1940, $4,600.09; first eight months of 1941, $1,463.54. Per cent. station expense to revenues: 1937, 17.99; 1938, 25.10; 1939, 33.79; 1940, 35.11; first eight months of 1941, 65.32. (For example, it required the above percentages of the gross revenues at Nenzel to pay the agent's salary.) As compared with the per cent. station expense to revenues system: 1937, 8.30; 1938, 8.89; 1939, 8.62; 1940, 8.27; first eight months of 1941, 7.52.

Exhibit 5 shows revenues assigned to the station at Nenzel: Local freight (50%); interline freight (75%); miscellaneous freight (100%): 1937, total $10,531.22, assigned $6,262.54; 1938, total $6,651.52, assigned $4,150.06; 1939, total $4,787.71, assigned $3,045.29; 1940, total $6,267.17, assigned $4,210.80; January to August, 1941, inclusive, total $1,601.57, assigned $1,136.51. The exhibit further shows passenger (100%): 1937, total $297.32, assigned same amount; 1938, total $316.11, assigned same amount; 1939 total $294.74, assigned same; 1940, total $289.87, assigned same; January to August, 1941, inclusive, total $261.31, assigned same. Express (22%): 1937, $446.02, assigned $98.12; 1938, $609.78, assigned $134.15; 1939, $443.22, assigned $97.51; 1940, $451.89, assigned $99.42; January to August, 1941, inclusive, $298.71, assigned $65.72. Leases (0%): 1937, total $70; 1938, $12; 1939, $10; 1940, $10; January to August, 1941, inclusive, $10. Total revenues: 1937, $11,344.56, assigned $6,657.98; 1938, $7,589.41; assigned $4,600.32; 1939, $5,535.67, assigned $3,437.54; 1940, $7,018.93, assigned $4,600.09; January to August, 1941, inclusive, $2,171.59, assigned $1,463.54.

Due to the fact that there are two stations involved in every shipment, it is necessary that each station be credited with one-half of the gross revenue; the interline revenue assigned on the basis of 75 per cent. for the reason that 25 per cent. should be assigned to the junction point, since that requires work in handling the shipment. The 100 per cent. of passenger revenues is assigned to the station for the reason that it is thought the return trip will give to the other destination its correct proportion. The express earnings are assigned on the actual basis. The express agency is an independent agency owned by the railroad and 22 per cent. of its earnings was paid to the railroad.

Exhibit 6 shows the number of days per carload shipment and less than carload shipments received and forwarded to Nenzel under carload number of days per shipment: 1937, 2.0; 1938, 5.87; 1939, 6.0; 1940, 3.57; January to August, 1941, inclusive, 13.60; and under less carload, number of days per shipment: 1937, .89; 1938, .74; 1939, .80; 1940, 1.03; January to August, 1941, inclusive, 1.15. (This exhibit shows the number of days required to accumulate a carload shipment and also an L. C. L. shipment. For example: In 1940 it took a trifle over three and one-half days to get a carload shipment and a little more than one day to get an L. C. L. shipment throughout the year. In 1941 it took 13.60 days to get a carload or forward a carload, and 1.15 days for the L. C. L. shipment.)

Referring to exhibit 1, the railroad revenue is broken down into carload and L. C. L., which shows: 1937, the carload business was $1,306.58, while the L. C. L. was $55.21, that is, for freight forwarded; for freight received, the carload was $8,340.22 and L. C. L. $804.50, about 90 per cent. carload. In 1940, freight received amounted to $5,350.38 à carload, while L. C. L. was $693.34, or about 88 per cent. carload. The freight forwarded amounted to less than $100 on either account. The first eight months of 1941 show revenue from freight forwarded $42.90 carload, and $15.11 L. C. L. This is all the outgoing business for this period. The freight received shows $1,176.93 carload, and $364.15 L. C. L.

If the agent's services are terminated and a caretaker substituted, freight will be received prepaid; patrons will communicate with the station agent at either Cody or Kilgore; telephone communications will remain from Nenzel to such other stations, and the agents thereof, depending upon the direction of the movement, will sign the bill of lading or live stock contract as the case may be. Most business is inbound and in carloads. The cars could be spotted by a caretaker as well as by an agent. Road-building material is usually handled on spur tracks, where there is no agent or station; the train crews spot the cars each day when loading is desired, and in the evening they pull the cars away. With reference to coal, the freight charges would be paid by the dealer in his invoice, rather than to the local agent. If stock feed, such as cotton seed cake, is received, with draft attached, the car would be hauled to the next station, and upon surrender of the bill of lading it would be spotted in the usual way. As to the express, the train crew would put it in the warehouse which is kept locked, and it would be delivered to the customer by the caretaker. With reference to government shipments, if such shipments were received collect, they would be held at the last open station before reaching Nenzel, and the consignee notified, and shipments delivered in the usual way. If there is telephone connection, the consignee would be notified. In the event of receipt of cotton seed cake C. O. D., the shipment would be billed to the last open station, and the party receiving the shipment would do business with the agent at such station, or the shipment could be billed to Nenzel and the agent at the next station east would notify the consignee, and when the bill of lading was taken up, the shipment would then be forwarded to the station at Nenzel for unloading. This is not an uncommon practice in large cities. Inspection, if authorized, could be made at the last open station before reaching Nenzel.

The division superintendent testified: Nenzel has a population of 125, a general store, another grocery, a poultry and egg concern, and a filling station which receives its oil and

gas by truck. The patrons are mostly ranchmen. Nenzel is on paved highway No. 20, which runs across the state. The railroad facilities consist of a depot, without living quarters; farming in the community is negligible; just enough feed is grown for the horses; grain is not shipped out. The stockyards consist of two or three pens and a loading chute and lack water facilities; cattle constitute the only live stock shipped. There are some privately owned coal bins on leased ground. The railroad tracks consist of the main line, a passing track and a house track. If the agent is removed, a caretaker can be employed for about $10 a month, annual expense thereof being $120, as compared with $1,400 at present. The stations of Cody and Kilgore are heavier stock-shipping points; the stockyards in each town are provided with other facilities, and scales are provided at Cody. Freight is calculated on destination weight, as far as live stock is concerned; there are no scales at Nenzel. Passenger service consists of one train each way daily, going west in the morning and back at night. The passengers can pay their fare on the train from Nenzel. They do so now on the east-bound train, because there is only a part-time agent, who is not a telegraph operator, and he is not on duty when the east-bound passenger train goes through. All Western Union messages are now sent either to Kilgore or Cody and telephoned to the ranchers. The agent serves six hours a day, from 8 to 11 and 12:30 to 3:30 o'clock.

The protestants offered the testimony of Edward Arnold, a rancher, who, with his father, had operated a ranch for 30 or 40 years in the vicinity of Nenzel. The witness testified that he shipped a load or two of cattle each year out of Nenzel; that they probably had 35 carloads a year, the greater part of them going into central and eastern Iowa and some into Illinois, and they are shipped from Cody and Kilgore, because the scales are available at such places; that, if the same facilities existed at Nenzel, it would obtain 75 per cent. of the business; that the cause for the reduction in revenue at Nenzel was the agent who preceded the one now in charge, in not attending to business. This witness favored

rail shipping, but testified: "We've been shipping practically everything by truck. At the present time, we have some orders in Omaha, I don't know what their weight will amount to—probably 10,000 or 15,000 pounds; they were ordered to be filled at the company's convenience, whenever they could get them filled; probably amount to 20,000 or 25,000 pounds by the time we get it all together." Witness stated he expected to have six or seven cars in, consisting of feed, in the next 30 days; that last year his concern paid $1,700 in freight to trucks. He lives 11 miles north of Nenzel, and his ranch is 14 miles from Kilgore. In the past year he has paid $25 or $50 to the railroad. The cattle going to Iowa are delivered to the purchaser at Cody; cattle to go to market are shipped from Cody or Kilgore and "once in a while from Nenzel." The truckers come to the ranch and pick up the stock, thus doing away with driving the stock to the railroad stockyards. Stock shipped from Cody by rail is driven in. Truckers solicit business; they ship into Iowa and sometimes into Illinois, going a distance of 800 or 900 miles; in such case the purchaser pays the freight. The truckers usually take four or five trucks. The trucker comes to the ranch, the cattle are weighed at the town scales; when shipped by rail the cattle are not weighed at the ranch.

The witness John G. Lord, a forest ranger, lives 19 miles south of Nenzel on the Nebraska National Forest. He receives some shipments, consisting mostly of creosote, which comes in each year, posts and wire, government shipments. The witness testified that if the services of the agent at Nenzel were terminated he would have to go to Cody or Kilgore to handle the bills of lading. This would amount to about a 20-mile trip each time. In going to Cody or Kilgore he goes to Nenzel first and then takes the highway. He is paid mileage by the government.

Witness Graydon D. White lives in Nenzel and is employed by the Joe Satterlee general merchandise store, having a stock of about $15,000 to $18,000. He testified that, if the agent were removed at Nenzel, people would go elsewhere to trade; he believed he would get credit from the

mines for the invoice of the coal, but doubted if the mines would want to give credit for the freight charge which he paid to the agent at Nenzel. He admitted he could pay the agent at Kilgore just as well. His banking business is done at Kilgore, and if the coal comes prepaid it would not inconvenience him very much. He stated that if they had had the right kind of agent at Nenzel there would have been less trucking and more railroad business; that the store ships by truck to some extent.

Another witness, Elvin Adamson, lives 22 miles south of Nenzel; has been in the ranching business since 1913. He stated it would be inconvenient to receive cotton seed cake at Nenzel if there were no agent there; they would have to go to Cody or Kilgore to take up the draft; that his shipments were mostly made from Cody, but if they had better facilities at Nenzel he thought they would be made from there. On cross-examination, he testified that when he received a shipment of cotton seed cake, with sight draft attached, it goes to the bank at Cody; that before he obtains the shipment he has to arrange by telephone with the bank at Cody to take care of it. His testimony was to the effect that if Nenzel had better facilities business would go there instead of to Cody.

Exhibit 7 shows station revenues at Nenzel, freight and passenger, for the years from 1917 to 1936, inclusive, making a grand total for 20 years of $253,384.41, with a 20-year average revenue of $12,669.22. The items for each year are: "Freight Forwarded," "Revenue L. C. L.," "Revenue C. L.;" "Freight Received," "Revenue L. C. L." "Revenue C. L.;" "Ticket Sales," "Conductors Cash Ticket Collections;" state and interstate, by authority of the N. S. R. C.

The only assignment of error necessary to a determination of this case is whether or not the order of the railway commission is arbitrary and not sustained by sufficient evidence. In determining whether the railroad should be allowed to discontinue its agent at a particular station, each case is dependent on its own facts and circumstances.

In *New York Central R. Co. v. Public Utilities Commis-*

sion, 123 Ohio St. 560, 176 N. E. 219, the court held: "In determining the question whether a railroad company may change one of its stations from an agency to a nonagency or prepay station, each case must be determined upon the peculiar facts attendant thereon. The volume of business done at such station, its proximity to other stations, the accessibility thereof, the cost of maintaining such agency station, the financial loss, if any, to the railroad company, due regard for the welfare of the public and the cost of operating such service, and probabilities of future development are all circumstances to be taken into consideration."

It is apparent that the volume of business transacted at Nenzel is such that the agent may be readily dispensed with; the protestants showing that the necessity for an agent is based on the proposition that the former agent was unsatisfactory in that he did not attend to business, and, further, that if the facilities of the station were improved by retaining the agent now serving the business would improve. This, of course, is founded upon pure speculation. As to the future business to be conducted at this station by virtue of the war, it is too speculative to be considered and too perplexing to be analyzed at this time.

It is a matter of common knowledge that the highway transportation facilities throughout the state and nation make the accommodations for shipment by trucks easy and delivery of freight by truck much simpler than by rail. The trucks make the loading at the home of the shipper, thus dispensing with considerable extra labor on the part of the shipper; especially is this true where live stock deliveries are made direct to the home. Bus travel on the highway is such that a bus is ordinarily obtainable more readily than passenger service on trains. Railroads are subject to strict regulation, and highway competition is not so subjected. Common-carrier trucks compete with the railroads for L. C. L. and short-haul business, and manufacturers and wholesale houses have, in many instances, put on their own fleet of trucks and compete not only with the railroads, but with the common-carrier trucks as well. The decline of business

on the railroads for the last decade can be easily accounted for.

An analysis of the record, in conformity with the holding in *New York Central R. Co. v. Public Utilities Commission, supra,* makes the following decisions applicable in the instant case:

In *Atchison, T. & S. F. Ry. Co. v. State,* 189 Okla. 485, 118 Pac. (2d) 202, the court held:

"The facilities to be furnished at any station need only be adequate to the requirement of said station, and should be in a measure commensurate with the patronage and receipts from that portion of the public to whom the service is rendered.

"It is not reasonable to require the maintenance of a full-time agency station when the cost of such service is out of proportion to the revenue derived from that portion of the * * * public benefited thereby, especially where a substitute service may be provided which will afford the same essential service but is less convenient." See, also, *Lowden v. State,* 189 Okla. 491, 118 Pac. (2d) 238, and *Lowden v. State,* 189 Okla. 495, 118 Pac. (2d) 242. The court in the latter case held:

"Where upon consideration of all of the pertinent circumstances there appears to be no necessity for the maintenance of a regular agent at a particular railroad station and the cost thereof is so great as compared with the additional convenience thereby afforded the public and the revenue derived therefrom that it clearly appears unreasonable to require the railroad to continue the agent's services, an order of the Corporation Commission making such a requirement will be vacated."

We conclude that in the instant case the order of the state railway commission is arbitrary and not sustained by sufficient evidence. It is hereby vacated and the application of the appellant trustee sustained. As to any future considerations demanding the services of an agent at Nenzel, this matter may be properly determined when the occasion arises.

JUDGMENT ACCORDINGLY.

ELMER M. MCCOY, APPELLEE, V. MINEY CUNNINGHAM ET AL., APPELLANTS.

4 N. W. (2d) 835

FILED JULY 10, 1942. No. 31363.

1. **Appeal.** The rule of this court which requires appellant to cite evidence by page and question is for the purpose of enabling the court to better understand appellant's argument and to make certain that essential evidence is not overlooked in determining questions on appeal. These rules should be observed in presenting appeals.
2. ———. Where there is a prayer for general relief as well as for special relief, an equity court may give such relief as the case warrants, consistent with the general frame and purpose of the petition.
3. **Deeds.** Where a grantor conveys land in consideration of an agreement of the grantee to support, maintain and care for the grantor during his lifetime, and the grantee neglects or refuses to comply with the contract, the deed may be set aside and title quieted in the grantor.
4. ———. The neglect or refusal of the grantee to comply with his contract raises a presumption that he did not intend to comply with it in the first instance, and that the contract was fraudulent in its inception.
5. **Equity.** Where a case calls for the application of principles of equity in the solution of questions presented, it is the duty of an equity court to determine all issues presented including the right of possession.

APPEAL from the district court for Scotts Bluff county: CLAIBOURNE G. PERRY, JUDGE. *Reversed, with directions.*

F. J. Reed, for appellants.

Auburn H. Atkins, contra.

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

SIMMONS, C. J.

This is an action brought to reform or cancel a deed to real estate, wherein one Whitnack and wife conveyed certain property in Mitchell, Nebraska, to the plaintiff and defendant Miney Cunningham, as joint tenants with right of survivorship. Plaintiff prayed for a decree that he was ab-

solute owner of the property, for a judgment for rents, possession, and equitable relief. The defendants prayed that the prayer of the plaintiff's petition be denied and that they have equitable relief.

The trial court entered a decree finding generally for the plaintiff, quieted title in the defendant Miney Cunningham and granted plaintiff a money judgment for all moneys invested in the land. From this decree, defendants appeal and by argument present two propositions: First, that the evidence fails to show fraud, collusion or misconduct upon which relief to the plaintiff may be based; and, second, that the court, by its decree, compelled defendants to become purchasers of the property and in effect wrote a new contract for them, contrary to all the evidence as to what the parties intended to do.

No question of pleadings is presented.

Defendants in their brief state: "The record is voluminous and evidence on essential matters is widely scattered in the record and we think it would serve no useful purpose to encumber this brief by specific citations of all of the numbers of the questions and answers as they appear in the record." Defendants then make an extended statement of their version of the evidence with but three citations to the bill of exceptions. Rule 14 a 2 of this court requires the appellant to support his contentions as to the evidence by citation to page and question in the bill of exceptions where the testimony relied upon may be found. This rule is not for the purpose of relieving the court of the duty of examining the entire record, but to enable a better understanding of appellant's argument and to make more certain that "essential matters" are not overlooked in determining the questions presented in the appeal. Counsel should observe these rules in presenting appeals.

The evidence forms in general a fairly clear pattern, although the details are in conflicting confusion.

The plaintiff, an elderly bachelor, owned a farm, free of debt, in Sioux county. The defendants, husband and wife, somewhat younger than plaintiff, owned a farm a mile or so

away. For a number of years the parties to this action resided on their lands, exchanging work and neighborhood courtesies, and lived as good friends.

The plaintiff was afflicted with "shaking palsy." Mrs. Cunningham, throughout these years, rendered many kind services to the plaintiff in helping care for him and furnishing him meals, etc. This the plaintiff appreciated and on occasion suggested that the defendants move to his farm and care for him. There were general discussions that his farm or a part of it would become theirs. Nothing came of those discussions.

In 1939 the defendants were confronted with the loss of their farm by foreclosure. They attempted to trade their equity in the farm for the acreage in Mitchell, Nebraska, that is involved in this action. One Whitnack owned the acreage, and it was also under foreclosure. The defendants and Whitnack were unable to work out a trade and nothing came from those negotiations. Plaintiff knew of the negotiations and of the Whitnack property.

In the fall of 1939 plaintiff sold his farm for a cash consideration of $3,400 and placed the money on deposit in a Scottsbluff bank. Thereafter the plaintiff and Mr. Cunningham inspected two or three pieces of property with the idea of the plaintiff purchasing the property and the defendants living with him. In early November Mr. Cunningham wrote Whitnack and told him that plaintiff might be interested in buying the acreage and suggested that he, Whitnack, come and see them about it. Cunningham testified that McCoy asked him to write this letter. Immediately thereafter Whitnack, accompanied by a Mr. Alexander, came to the defendants' farm. Cunningham also brought the plaintiff to the farm and negotiations were started. In the meantime the plaintiff and Mrs. Cunningham had been to Scottsbluff and were advised of the amount of mortgage indebtedness against the Whitnack property. Whitnack and the plaintiff drove to Mitchell, inspected the property and returned to the defendants' farm. There discussions continued between the plaintiff and Whitnack. They were

$400 apart on the price at dinner time. Cunningham, in the absence of the plaintiff, inquired of Whitnack about the negotiations and, being advised of the situation, Cunningham told Whitnack that he would pay the $400 difference and for Whitnack to accept the plaintiff's offer. That Whitnack did without any one advising the plaintiff of the promise to pay the $400. A memorandum of this agreement was then drawn up by Cunningham and signed that day by the parties. This memorandum was not produced at the trial.

Thereafter, the parties met by agreement in Scottsbluff on November 13, 1939, and the contract of purchase was entered into with Mrs. Cunningham and the plaintiff named as purchasers. Plaintiff that day placed in escrow, with the attorney who prepared the contract, the amount necessary to pay the mortgage indebtedness. $700 additional was needed. The question came, where could that be borrowed? It was immediately suggested that Mr. Alexander would probably loan it to them. Mrs. Cunningham and Whitnack drove to Minatare, consulted Alexander and, without any further examination of the property or consultation with the plaintiff, Alexander agreed to make the loan. The deed of conveyance named plaintiff and Mrs. Cunningham as grantees as joint tenants with right of survivorship. Plaintiff understood the nature of this deed and approved it. The mortgage was executed by plaintiff and defendants. These three instruments all bear the same date, November 13, 1939. The title was approved and the transaction completed within the next two or three weeks. Also, the $400 was paid to Whitnack in cash about that time. The defendants did not tell plaintiff of it, quite clearly intended to keep knowledge of that payment from him, and he did not learn of that payment until this litigation began.

Plaintiff testified that the day following the signing of the papers Mr. Cunningham for the first time became disrespectful and insulting and continued that course of conduct. There also is evidence that shortly thereafter the Cunninghams told others, in effect, that the papers were signed, they had the property and were going to keep it. Those state-

ments were not retold to the plaintiff until some time later.

The plaintiff and the defendants returned to their Sioux county farms. Plaintiff collected the rents on the acreage until March 1, 1940. The defendants went to Texas, and the plaintiff cared for their stock. Upon the defendants' return from Texas they began to move personal property from the Sioux county farm to the acreage. They repaired the buildings, changed the improvements, placed new ones thereon, and took complete charge of the acreage, and apparently did not consult or consider the plaintiff as to his wishes in the matter. Mr. Cunningham testified that the cost of these improvements was several hundred dollars. The amount that they increased the value of the property is not clear.

About February 13, 1940, plaintiff was injured in an automobile accident. Defendants had knowledge of the injuries and that plaintiff was treated by a doctor at Morrill, and testify that they drove to Scottsbluff to a hospital to inquire about him, did not find him there, did not go to the near-by town of Morrill to try to find him, were advised that the accident was not serious, and assumed that he had gone to visit relatives. Some two weeks later they were advised that the plaintiff was in Morrill. Mr. Cunningham later saw plaintiff there and talked to him about coming to the acreage. Plaintiff told him that he, plaintiff, was not coming, that they had not hunted him up when he was sick, that he had been insulting, etc. The Cunninghams treated it as a childish irritability and apparently decided to let him get over it and come to them, and testify that they saw no reason for looking him up. They take the position here in their brief that "They were under no more obligation to hunt him up and care for him than they would be for any other neighbor." This attitude after the conveyance in question is in marked contrast to that which they showed to him prior to this transaction.

The defendants moved to the acreage March 3, 1940, and proceeded to occupy and improve it as though they were complete owners. Weeks passed. They apparently became aware of the fact that the plaintiff was not placated. Plain-

tiff became convinced that he had been "framed." He sent a lawyer to see the Cunninghams. They sent an old neighbor to see him, who advised reconciliation and cautioned about the costs and dangers of litigation. August 21, 1940, and again on September 17, 1940, Mr. Cunningham wrote letters to plaintiff urging him to come and make his home with them (keeping and producing carbon copies of the letters). Mrs. Cunningham, knowing that plaintiff was in the nearby town of Morrill, made no effort to see him or contact him until June.

The defendants failed to pay the taxes on the property or keep it insured. They agreed to pay the $700 mortgage. They did not pay the interest on it and have allowed it to go to foreclosure. That action was pending when this case was tried.

The record is clear that there was no consideration which passed from Mrs. Cunningham to Whitnack or to the plaintiff in payment for this property. The $400 secretly paid Whitnack was an inducement to Whitnack to accept plaintiff's offer. So far as the plaintiff is concerned, he paid the entire consideration recited in the instruments for the conveyance of the property.

So far as a consideration moving to the plaintiff from the defendants or either of them is concerned, the most favorable view of this evidence is that there was an implied agreement on their part to furnish the plaintiff a home and care. There were no discussions about it at the time the transaction was consummated. There is no other possible consideration to be inferred. No other consideration is claimed. This home and care were never furnished to the plaintiff.

Plaintiff bases the allegations of his petition on fraud, deceit and conspiracy to deprive him of his property.

The trial court made an extended finding of fact, and found generally for the plaintiff and against the defendants and that they had by deception, fraud, evasion and inequitable conduct received an interest in and possession of the property. We reach the same conclusion. On its face this transaction has the appearance of honesty, as most fraudu-

lent transactions do. Defendants argue that plaintiff did not know of the deceit as to the $400 payment or of the statements made to others until long after he refused to come to the property and make his home there, and that therefore he could not have been moved by those things when he refused to come to the Mitchell property to live. However, this evidence shows the attitude and purposes of the defendants. Those who start out to defraud do not proclaim their purposes to the world. Fraud is generally a wrong perpetrated by secrecy and circumvention. It is usually established by uncovering hidden tracks and studious concealments. The entire transaction shows the consummation of a studied plan to secure title to and possession of the property purchased with the plaintiff's money. It is clear that defendants wanted this property and were unable to purchase it with their own money. The secret payment of the $400 to Whitnack to make certain that the deal would not fail speaks loudly of their desires and purposes. To this is added their admission that they knew that, had plaintiff been advised of the payment, he would not have purchased the property. Thereafter they either ignored or slighted the plaintiff; they did not tender him, when he was injured, that solicitous care for which he had bargained; they were going to let him come to them after their ignoring him had cured him of what they considered to be a childish irritability; they ignored his interest in the property as they prepared it for their own use. It was not until the storm signals of litigation arose that they became solicitous that he come to the home that his money had purchased in order that he might be given their care. Plaintiff was entitled to something more than meals and shelter. Plaintiff was entitled to a home with that affectionate care that theretofore the defendants had given to him and which he had every reason to expect would be given to him by the defendants in return for his bounty. They remained indifferent when action would have been some evidence of good faith. They acted only after it was impossible for them to fully perform and for plaintiff to accept performance. Any performance

which the Cunninghams could have made after March 1, 1940, would not have been that for which plaintiff bargained. It is clear that, had he entered the home and accepted board and lodging, the plaintiff would not have been in the position of one occupying his own property with the rights of decisions and conduct that follow that status. There is a total failure of consideration shown.

The trial court decreed that title to said premises should be quieted in Mrs. Cunningham, that the plaintiff have no interest therein, and entered a personal judgment against the Cunninghams for the purchase price paid by plaintiff less rents received, and that said judgment should be a lien, prior to any homestead right or exemptions of the defendants. There is no basis for a finding that Mrs. Cunningham should become the purchaser of the property for a money consideration or that the defendants should become indebted to the plaintiff for the purchase price thereof. It is clear that they contemplated that they would become the owners of the property. It is just as clear that they did not expect to pay money for it. That feature of the trial court's decree is erroneous.

This case is before this court for trial *de novo,* subject to the general rule that, "If there is a prayer for general relief, as well as for special relief, the court may extend the relief specially prayed for and give such other relief as the case warants, consistent with the general frame and purpose of the petition." *Hilton v. Clements,* 137 Neb. 791, 291 N. W. 483.

Here the conveyance, while actually from Whitnack to plaintiff and Mrs. Cunningham, was in equity a conveyance to her of the interest of the plaintiff. The consideration moved from plaintiff and the conveyance to Mrs. Cunningham was by his direction. The prevailing general rule is stated by the authorities as follows: "According to many authorities, a grantor who conveys land in consideration of an agreement by the grantee to support, maintain, and care for the grantor during his lifetime, may, upon the neglect or refusal of the grantee to comply with the contract,

have a decree setting aside the deed and reinvesting him with the title to the real estate. The intervention of equity in such cases is sanctioned on the theory that the neglect or refusal of the grantee to comply with his contract raises a presumption that he did not intend to comply with it in the first instance, and that the contract was fraudulent in its inception, wherefore a court of equity will not permit him to enjoy the conveyance so obtained." 9 Am. Jur. 376, sec. 31. The rule is stated in 9 C. J. 1185, as follows: "In the majority of jurisdictions the courts recognize contracts of the character of those under consideration as constituting a class by themselves in matters pertaining to their interpretation and enforcement * * * . The courts of these jurisdictions hold, without qualification, that nonperformance by the grantee of his covenant to furnish support and maintenance to the grantor constitutes sufficient ground for the rescission and cancelation of the conveyance, and the reasons advanced in support of this doctrine conclusively demonstrate its correctness. Furthermore it has been said in a well considered decision: 'Courts are not so much concerned as to the proper theory upon which such contracts may be avoided, as they are that they must be set aside in order to prevent grave injustice and the imposition upon aged people, by unscrupulous persons, who pretend love, devotion, and friendship, where no one of such elements exists.'" See 12 C. J. S. 986, sec. 30.

This court has largely disposed of the questions here presented. In *McIntire v. McIntire*, 75 Neb. 397, 106 N. W. 29, a conveyance was made in consideration of care and a home. Within two months the grantor was "turned out of doors and compelled to seek refuge elsewhere." The conveyance was set aside and the "widow's mite" restored to her. In *Tomsik v. Tomsik*, 78 Neb. 103, 110 N. W. 674, conveyance was made in consideration of support and care of the grantor and his wife. Support was given the plaintiff for almost four years, when defendants "drove him from the premises" and refused further support. The plaintiff was decreed to be the equitable owner of the premises, and accounts arising

as the result of transactions subsequent to the conveyance were adjusted. In *Wilcox v. Wilcox,* 138 Neb. 510, 293 N. W. 378, a mother conveyed property to her son, who later, apparently with the mother's approval, sold it, and with the money purchased other property. About that same time the son made a written statement that "because of indebtedness to my mother" she was to have a home with him so long as she lived. The son later asked his mother to leave the property and attempted to sell it. We there held that a constructive trust was created and that the son would be unjustly enriched if he were permitted to retain the property. In *Copass v. Wilborn,* 139 Neb. 124, 296 N. W. 565, an action was brought to set aside the conveyance of real and personal property on the ground of fraudulent representations and lack of consideration. Plaintiff prayed for equitable relief. Conveyances of real estate were made by plaintiff and his wife to defendant, reserving a life estate. Similar conveyances were made of personal property, including rents. The grantee was a niece of the wife who was brought into the home to care for plaintiff and his wife. Disagreements arose following the conveyances, that, in the language of this court, "taken separately, were not of a very serious nature, but * * * is * * * evidence of a situation that would make it practically impossible for plaintiff to return to his home and receive the fruits of this oral agreement. In transactions, such as exist here, an element of confidence is reposed by the old people in the grantee, sacred in its nature, a breach of and retention of the benefits of which no court should tolerate by a refinement upon technical rules and principles of law. * * * To state that the foregoing acts of defendant, as testified to and complained of by the plaintiff, were trivial and insignificant in their nature and that she has not refused to conform to or perform the obligations of the oral contract would be to place a too-narrow construction on the contract, in that such a construction ignores a most important element of a contract of this kind, viz., that the plaintiffs were to receive the affectionate care that they fully believed the defendant could and would give

to them. Defendant was bound, under the circumstances, to have anticipated the idiosyncrasies of old age." The trial court had sustained a demurrer to plaintiff's evidence. That judgment was reversed.

Title to the premises involved in this action is of right exclusively in the plaintiff. Title being in the plaintiff, he is entitled to the possession thereof, as against the defendants or either of them. This court has long followed the rule that, in a case in equity, "Where the right to the possession of the real estate involved depends upon principles of equity that must necessarily be determined by the court, it is the duty of the court to determine all the issues including the right of possession." *Albin v. Parmele,* 70 Neb. 746, 99 N. W. 646.

The trial court in its decree of July 11, 1941, found "that the rental value of said premises equals the improvements placed thereon." Neither the plaintiff nor the defendants complain of that finding, and it accordingly will not be disturbed. The rental value of the property is fixed by the evidence in this case at from $30 to $35 a month. The property was rented prior to March 1, 1940, at $30 a month. Plaintiff shall have judgment against the defendants for the rental value of the premises at the rate of $30 a month from and after July 11, 1941.

The decree of the district court is reversed and the cause remanded, with directions to enter a decree, in accord with this opinion, quieting title to said premises in the plaintiff and denying the defendants any right, title or interest therein or right of possession thereto, placing the plaintiff in possession of the premises and awarding plaintiff judgment for rents as herein provided. All costs are to be taxed to the defendants.

REVERSED.

AMERICAN SURETY COMPANY OF NEW YORK, APPELLANT, V. SMITH, LANDERYOU & COMPANY, APPELLEE.

4 N. W. (2d) 889

FILED JULY 10, 1942. No. 31278.

1. **Corporations.** Corporate checks, payable to a firm of brokers with which the drawer has no business relations, when tendered to the brokers by an agent or employee of the drawer for his own stock transactions, import ownership of the checks and their proceeds to be in the corporation-drawer.
2. ———. The duty to make proper inquiry as to authority to make use of such checks for such purposes is imposed upon the payee thereof, where the latter, having no dealings with the corporation-drawer, receives these instruments from the employee of the corporation-drawer for the payment of the employee's individual obligations or indebtedness.
3. **Principal and Agent.** One who is placed on inquiry as to an agent's or employee's authority, and who has reasonable means of making inquiry, occupies the same position in law as if he had actual knowledge of the employee's lack of authority, because he is charged with knowledge of the facts which the inquiry would have developed.
4. **Corporations.** Under the circumstances of this case, the defendant, having imposed upon it the duty of inquiry, and having failed to make such inquiry, which, if made, would have disclosed defects and infirmities in the title and ownership of the party from whom the negotiable paper payable to its order was by it received, will be liable to the drawer for failure to hold the proceeds of such paper by it accepted, cashed and disposed of as payee, and cannot avoid the liability so incurred through its default by claiming to be a holder thereof in due course.
5. **Conversion.** In an action for conversion, such as is here presented, defendant's care or diligence is not necessarily involved, and plaintiff's negligence, if any, is not material except in so far as it may bear upon the question of estoppel.
6. **Estoppel.** "To constitute an equitable estoppel, there must exist a false representation or concealment of material facts; it must have been made with knowledge, actual or constructive, of the facts; the party to whom it was made must have been without knowledge or the means of knowledge of the real facts; it must have been made with the intention that it should be acted upon; and the party to whom it was made must have relied on or acted upon it to his prejudice." *Walker v. Ehresman*, 79 Neb. 775, 113 N. W. 218.
7. **Insurance.** A defendant, in an action for conversion, even though not guilty of moral turpitude or intentional wrong-doing, other

than such as was involved in its failure to perform a legal duty of inquiry, which, if made, would have disclosed the illegality of the transaction, has no equities or rights which preclude recovery by the plaintiff as assignee, even though plaintiff was a compensated surety.

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

Young & Williams, for appellant.

Ritchie, Swenson & Welpton and *M. J. Flannigan, contra.*

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

EBERLY, J.

This is an action by the American Surety Company of New York, as assignee, to recover from the defendant, Smith, Landeryou & Company, a corporation, stock brokers, the sum of $10,320, the amount of funds of the Fairmont Creamery Company, a corporation, received by such stock brokers from and in connection with Harold George Gould. Gould, a trusted employee of the Fairmont Creamery Company for more than 25 years, taking advantage of his situation, had unlawfully abstracted this sum from the moneys of his employer without the latter's knowledge or consent, and had used the same in his speculative investments with the defendant company as stock brokers. The principal place of business of the Fairmont Creamery Company, as well as the defendant, was in Omaha, Nebraska. At the times the defalcations in suit herein occurred, Gould, by virtue of his employment, together with other duties, was charged with securing the payment of the premiums accruing on the policies of various kinds of insurance taken out and carried by the Fairmont Creamery Company on its property and personnel, as well as on the property and personnel of some forty subsidiary organizations which were operated in connection with it. The general course of business followed may be said to be as follows: Each check issued by the creamery company's cashier was obtained by Gould on presentation of a voucher, or a request for a

voucher, signed by himself and to be approved by certain officials of the creamery company, setting forth briefly the nature of the insurance premium to be paid, to whom due, the amount thereof, and a direction that such amount in payment be charged to a certain insurance account set up by the creamery company. Thereupon such checks were duly issued in favor of such creditors, delivered to Gould, and by him transmitted to the party entitled thereto. Taking advantage of his situation and the confidence reposed in him by his employer, Gould had signed and presented false vouchers setting forth that certain sums were due to Smith, Landeryou & Company of Omaha, Nebraska, as insurance premiums, and secured the issuance of "general checks" of his employer, payable to defendant company's order, which the payee named therein disposed of as follows:

Check Number	Date of Check	Amount of Check	Date Rec'd by Defendant	Application Credit Gould's Account	Application Cash or Check to Gould
2346	3/16/35	$2865.00	3/16/35	$2690.00	$175.00
2339	5/7/36	$2845.00	5/7/36	$2450.00	$124.80
					$270.00
8291	4/6/37	$2985.00	4/6/37	$2822.70	$162.30
24583	8/20/37	$1625.00	8/20/37	$1375.00	$250.00

These checks, duly drawn, were, in the usual course of business, delivered to Gould for transmission, and each by him delivered to Smith, Landeryou & Company in Omaha, Nebraska, as purchase price of stocks by him purchased therefrom, and as part of these transactions he received a portion of the moneys represented by such checks in cash as above stated. It may be said that while Smith, Landeryou & Company accepted these checks payable to its order in payment of stocks purchased by Gould as an individual and for his individual profit and advantage, and knew he was an employee of the corporate maker of such checks, it had no knowledge at such times of the course of business which led up to the issuance of the checks so received by it, or of the general methods of the Fairmont Creamery Company in the transaction of its affairs, or of the rules prescribed for its government, or of the method followed by it in keeping its

accounts. Defendant company did know that it had had no stock transactions with the creamery company and that the latter was not indebted to defendant stock brokers in any sum whatever.

The plaintiff as surety for said Gould, having given the Fairmont Creamery Company its fidelity bond insuring that company against fraud and embezzlement of said Gould, accordingly by the terms of such bond paid to the creamery company the amount of the loss occasioned by Gould's peculations herein set forth, to the extent of $10,000, and received in consideration thereof an assignment from the creamery company in writing of "its claim or claims and all the right, title and interest" which it has in and to any claim or claims against Harold George Gould and against Smith, Landeryou & Company created by the transactions hereinbefore referred to. Demand is alleged to have been made on defendant for reimbursement for the amounts thus received by it.

To the petition of plaintiff setting forth at length and with particularity the transactions hereinbefore referred to, defendant joined issue. A trial in the district court, a jury being waived, resulted in findings and judgment for defendant. From the order of the trial court overruling its motion for a new trial, plaintiff appeals.

The checks here involved are the usual bank checks which are within the terms of the statutory definition. They are negotiable instruments, each signed by the Fairmont Creamery Company, a corporation, as maker, containing an unconditional order to pay a certain sum of money to the order of Smith, Landeryou & Company, a corporation, as payee, and addressed to the drawee named therein, the Omaha National Bank, Omaha, Nebraska.

A similar question presented to the supreme court of Washington in *Bowles Co. v. Clark*, 59 Wash. 336, 109 Pac. 812, was answered as follows: "The question presented by the record is indeed somewhat novel, but it has seemed to us that it cannot be solved by reference to the laws relating to negotiable instruments. The respondent was in no sense

a purchaser of the check, nor was it a holder thereof in due course, as that phrase is defined in commercial law; it was the payee named in the check, and its obligations to the drawer of the check were like those of payees in checks generally, it was obligated to account to the drawer for the check or for its proceeds. The general rule in this respect was not changed by the fact that the respondent was a stranger to the drawer and did not know the purposes for which the check was forwarded to it. If it did not care to assume the responsibility of accounting, it should have refused to receive it. By doing this it could have relieved itself of any liability whatsoever, but when it accepted the check, even though it did not know the purposes for which it was drawn, it obligated itself to account therefor. It owed no voluntary duty of accounting, perhaps, but certainly a duty to account when called upon by the drawer. To so hold is not, as the respondent's counsel seem to argue, making the respondent the drawer's debtor against its will. On the contrary, the respondent assumed that relation voluntarily. It accepted the check instead of refusing it, and it was this act that gives rise to its liability."

The applicable rule supported by the weight of authority invoked by the undisputed facts in the instant case, is: Corporate checks, payable to a firm of brokers with which the drawer has no business relations, when tendered to the brokers by an agent or employee of the drawer for his own stock transactions, import ownership of the checks and their proceeds to be in the corporation-drawer. *Sims v. United States Trust Co.*, 103 N. Y. 472, 9 N. E. 605; *Hathaway v. Delaware County*, 185 N. Y. 368, 78 N. E. 153, 13 L. R. A. n. s. 273; *Apostoloff v. Levy*, 170 N. Y. Supp. 930 (affirmed in 186 App. Div. 767, 174 N. Y. Supp. 828).

In *Apostoloff v. Levy*, 170 N. Y. Supp. 930, Weeks, J., says in part: "It is clear that the defendants, on receiving plaintiff's check drawn to their own order, had no authority to open an account in the name of any other person without instruction from him, and they were required to keep his funds until they received directions from him in regard to

them. Montgomery had no apparent title to the check, and there was no authority shown for the transfer of plaintiff's funds to him, and the defendants were therefore liable to the plaintiff for the funds represented by the check. *Sims v. United States Trust Co.*, 103 N. Y. 472, 9 N. E. 605; *Hathaway v. Delaware County*, 185 N. Y. 368, 373, 78 N. E. 153, 13 L. R. A. n. s. 273, 113 Am. St. Rep. 909; *Bristol Knife Co. v. First Nat. Bank*, 41 Conn. 421, 19 Am. Rep. 517; *Camp v. Sturdevant*, 16 Neb. 693, 21 N. W. 449."

This court was early committed to this doctrine, for in *Camp v. Sturdevant*, 16 Neb. 693, 21 N. W. 449, we announced the following: "The possession by A.H. of a bank check payable to the order of P.D.S. was no evidence to P.D.S. that said check had been drawn by the drawer and delivered to said A.H. to enable him, A.H., to obtain money or credit thereon, nor is such possession evidence to go to the jury of such fact."

See, also, as supporting the doctrine thus announced, *Wisconsin General Finance Corporation v. Park Savings Bank*, 208 Wis. 437, 243 N. W. 475, in which *Camp v. Sturdevant, supra*, is cited with approval.

Certainly, in view of the principles long established in this jurisdiction by the *Sturdevant* case, the duty to make inquiry is here imposed on the payee of the corporation checks. Such payee, having no dealings with the corporation, but receiving these instruments from an employee of such corporation for the payment of his individual obligation, is put upon inquiry as to the latter's authority to make such use of the checks. *Sheer v. Hall & Lyon Co.*, 36 R. I. 47, 88 Atl. 801; *Bowles Co. v. Clark*, 59 Wash. 336, 109 Pac. 812, 31 L. R. A. n. s. 613; *Apostoloff v. Levy*, 170 N. Y. Supp. 930; *Id.* 186 App. Div. 767, 174 N. Y. Supp. 828; *McCullam v. Buckingham Hotel Co.*, 198 Mo. App. 107, 199 S. W. 417; *Smoltz v. North Waterloo Meat Co.*, 224 N. W. (Ia.) 536; *Robbins v. Passaic Nat. Bank & Trust Co.*, 109 N. J. Law, 250, 160 Atl. 418, 82 A. L. R. 1368; *Diamant v. Keane, Higbie & Co.*, 260 Mich. 261, 244 N. W. 467; *Redfield v. Wells*, 31 Idaho, 415, 173 Pac. 640.

In the instant case, the possibilities of making inquiry were at hand in the usual desk telephone. The information complete was available from a source clearly indicated by the known facts. Of this defendant failed to avail itself. A correct statement of the applicable rule is as follows: One who is placed on inquiry as to an agent's or employee's authority, and who has reasonable means of making inquiry, occupies the same position in law as if he had actual knowledge of the employee's lack of authority, because he is charged with knowledge of the facts which the inquiry would have developed. See *Marshall v. Rowe*, 126 Neb. 817, 254 N. W. 480; *Baxter v. National Mtg. Loan Co.*, 128 Neb. 537, 259 N. W. 630; *Kuhns v. Live Stock Nat. Bank*, 137 Neb. 459, 472, 289 N. W. 893; *Forchione v. Rome Trust Co.*, 253 App. Div. 113, 300 N. Y. Supp. 1306; *Chas. A. Hill & Co. v. Belmont Heights Baptist Church*, 17 Tenn. App. 603, 69 S. W. (2d) 612; *Martin v. Federal Surety Co.*, 58 Fed. (2d) 79; *Fourth Nat. Bank of Tulsa v. Board of Commissioners*, 186 Okla. 102, 95 Pac. (2d) 878.

Under the circumstances, the defendant, having imposed upon it the duty of inquiry, and having failed to make such inquiry, which, if made, would have disclosed defects and infirmities in the title and ownership of the party from whom the negotiable paper was by it received, will be liable to the drawer for failure to hold the proceeds of such paper by it accepted, cashed and disposed of as payee, and cannot avoid the liability so incurred through its default by claiming to be a holder thereof in due course. *Redfield v. Wells*, 31 Idaho, 415, 173 Pac. 640; *Union Bank & Trust Co. v. Girard Trust Co.*, 307 Pa. St. 488, 161 Atl. 865; *State Bank of Binghamton v. Bache*, 162 Misc. 128, 293 N. Y. Supp. 667; *Norristown-Penn Trust Co. v. Middleton*, 300 Pa. St. 522, 150 Atl. 885; *Paine v. Sheridan Trust & Savings Bank*, 342 Ill. 342, 174 N. E. 368.

Nor is the defense sought to be interposed based upon the alleged negligence of the Fairmont Creamery Company in the drawing of the instruments involved, and its reliance upon and confidence in Gould in their transactions, available to the defendant.

The proximate cause of this entire adverse situation is wholly the lack of care and diligence of the defendant in accepting the checks here involved. Defendant was put on inquiry by the very forms employed. The Fairmont Creamery Company was not negligent in reposing confidence in Gould as a trusted agent and in continuing to do so until it received knowledge or information that the agent was untrustworthy. *Santa Marina Co. v. Canadian Bank of Commerce,* 242 Fed. 142; *Wheeler v. McGuire, Scoggins & Co.,* 86 Ala. 398, 5 So. 190, 2 L. R. A. 808; *Los Angeles Investment Co. v. Home Savings Bank,* 180 Cal. 601, 182 Pac. 293, 5 A. L. R. 1193; *Detroit Piston Ring Co. v. Wayne County & Home Savings Bank,* 252 Mich. 163, 233 N. W. 185; *Haswell v. Standring,* 152 Ia. 291, 132 N. W. 417; *Chismore v. Marion Savings Bank,* 221 Ia. 1256, 268 N. W. 137; *Outlook Farmers Elevator Co. v. American Surety Co.,* 70 Mont. 8, 223 Pac. 905.

Besides, in an action for conversion, such as is here presented, defendant's care or diligence is not necessarily involved, and plaintiff's negligence, if any, is not material except in so far as it may bear upon the question of estoppel. *Edwards v. Jenkins,* 214 Cal. 713, 7 Pac. (2d) 702; *Poggi v. Scott,* 167 Cal. 372, 139 Pac. 815, 51 L. R. A. n. s. 925; *United States Zinc Co. v. Colburn,* 124 Okla. 249, 255 Pac. 688; *Pine & Cypress Mfg. Co. v. American Engineering & Construction Co.,* 97 W. Va. 471, 125 S. E. 375.

"To constitute an equitable estoppel, there must exist a false representation or concealment of material facts; it must have been made with knowledge, actual or constructive, of the facts; the party to whom it was made must have been without knowledge or the means of knowledge of the real facts; it must have been made with the intention that it should be acted upon; and the party to whom it was made must have relied on or acted upon it to his prejudice." *Walker v. Ehresman,* 79 Neb. 775, 113 N. W. 218. See, also, *Peters Trust Co. v. Cranmore,* 114 Neb. 491, 208 N. W. 635; *State v. Burrows,* 136 Neb. 691, 287 N. W. 178.

But the defendant was put on inquiry by the form of the

instruments and the circumstances under which they were received and the use it made of the proceeds derived therefrom. This invokes the application of the rule that plaintiff's estoppel by negligence does not arise in favor of a defendant who has himself been guilty of negligence. 21 C. J. 1169, 1170; *Conway Nat. Bank v. Pease,* 76 N. H. 319, 82 Atl. 1068; *Sterling Leather Works v. Liberty Trust Co.,* 88 N. J. Eq. 378, 102 Atl. 841; *Rugg Co. v. Ormrod,* 198 N. Y. 119, 91 N. E. 366; *Ward v. Trustees Methodist Episcopal Church,* 27 R. I. 262, 61 Atl. 651; *Macomber v. Kinney,* 114 Minn. 146, 128 N. W. 1001.

The conclusion follows that a defendant, in an action for conversion, even though not guilty of moral turpitude or intentional wrong-doing, other than such as was involved in its failure to perform a legal duty of inquiry, which, if made, would have disclosed the illegality of the transaction, has no equities or rights which preclude recovery by the plaintiff as assignee, even though plaintiff was a compensated surety. Courts generally are largely of the view that the paid surety, having paid the debt and satisfied the default of his principal, and also having received from the assured an assignment of all his rights and claims created and originating in and from such default, should be made whole if possible without injustice to others, and that there is no injustice in permitting him to resort to claims which the principal could have enforced against third persons and to which he might rightfully have resorted had there been no surety. See *Martin v. Federal Surety Co.,* 58 Fed. (2d) 79; *Staples v. Central Surety & Ins. Corporation,* 62 Fed. (2d) 650; *Richfield Nat. Bank v. American Surety Co.,* 39 Fed. (2d) 387; *Fidelity & Deposit Co. v. Queens County Trust Co.,* 226 N. Y. 225, 123 N. E. 370; *United States Fidelity & Guaranty Co. v. United States Nat. Bank,* 80 Or. 361, 157 Pac. 155.

We find from all the evidence that the judgment entered in the district court is not supported by the proof; that the uncontradicted facts in the record entitle the plaintiff to a judgment in its behalf as prayed. Therefore, the judgment

of the district court is reversed, and the cause remanded, with directions to enter judgment for the plaintiff as prayed.

REVERSED.

CITY OF SCOTTSBLUFF, APPELLEE, V. MAGGIE KENNEDY ET AL., APPELLANTS.

CITY OF SCOTTSBLUFF, APPELLEE, V. MATTIE FRANK ET AL., APPELLANTS.

CITY OF SCOTTSBLUFF, APPELLEE, V. MATTIE FRANK ET AL., APPELLANTS.

CITY OF SCOTTSBLUFF, APPELLEE, V. MARY C. CORNELL ET AL., APPELLANTS.

4 N. W. (2d) 878

FILED JULY 10, 1942. Nos. 31310, 31311, 31312, 31313.

1. **Taxation.** A description of real estate is sufficient to sustain a tax if it does not mislead, and identifies or designates with reasonable certainty the property intended to be taxed.
2. ———. Property described for taxation purposes and carried on the county records as "Pt E^2 SE^4; SE^4 NE^4 Sec. 23, Twp. 22, R. 55," is not void for indefiniteness and uncertainty of description; the abbreviations, letters and figures indicating a plain meaning, expressed in a manner commonly used.
3. ———. The use of initial letters, abbreviations and figures in describing real estate for assessment and taxation purposes is expressly authorized by section 77-2042, Comp. St. 1929.
4. ———. Property described for taxation purposes as a "part" of a described tract is not void for indefiniteness and uncertainty of description where the part sought to be taxed is subject to taxation and the other part is not subject to taxation because of its use as a street.
5. **Municipal Corporations.** A tract of land within the city limits of a city is subject to taxation for special benefits received to pay the costs of local improvements, even if it is not subdivided or platted.
6. **Dedication.** A street may be established by an implied dedication. To constitute an implied dedication there must be an intent by the owner to appropriate the land for public use.
7. ———. An acceptance of an offer of dedication may be made by

the public by its entering upon the land and enjoying the privilege tendered by the owner.

8. **Municipal Corporations.** A compliance with statutory requirements for notice in the levying of special assessments is jurisdictional, and without compliance therewith no valid special assessment can be levied.

9. ———. The proof of notice required to give jurisdiction, in the absence of a specific provision of statute to the contrary, may consist of any competent evidence which tends to establish compliance with the statute.

10. ———. As evidence of compliance with the statute requiring the publication of notice, the trial court properly admitted proofs of publication sworn to by the publisher of the newspaper in which they were printed, which were found among the city's records, and the testimony of the publisher as to the fact of publication.

11. ———. Statutes purporting to authorize the levy of special assessments upon abutting property for street improvements are to be strictly construed both as to the grant of power to levy the assessments and the procedure to be followed in so doing.

12. **Taxation.** In a suit to foreclose a tax sale certificate, including general taxes and special assessments, the certificate is *prima facie* evidence of the validity of the taxes and assessments it represents.

13. ———. In a suit to foreclose a tax sale certificate which includes unpaid special assessments, unless the invalidity of the assessments is particularly pleaded and affirmative evidence adduced to sustain such pleading, no issue is raised which overcomes the presumption of validity which attaches to such tax sale certificate.

14. ———. Where it appears that a tax sale certificate is void on account of irregularities, or for want of authority of the county treasurer to sell, the holder becomes subrogated to the right of the public in the lien of the tax for the nonpayment of which the tax sale certificate was issued.

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

Morrow & Miller, for appellants.

Floyd E. Wright, contra.

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

CARTER, J.

This is an appeal from four decrees entered in suits brought for the foreclosure of tax sale certificates on certain real estate in the city of Scottsbluff.

The record shows that the city of Scottsbluff commenced three suits for the foreclosure of tax sale certificates. Two appeals were taken from decrees entered on four causes of action in City of Scottsbluff v. William and Mattie Frank et al., an appeal from a decree entered on one cause of action in City of Scottsbluff v. Maggie Kennedy et al., and an appeal from a decree entered on two causes of action in City of Scottsbluff v. Mary C. Cornell et al. For the purposes of appeal all were briefed, argued and submitted together. It appearing that the appeal in City of Scottsbluff v. Maggie Kennedy et al., No. 31310, raises all questions involved in the other three cases, this opinion will be written on the facts of that case and as determinative of all questions raised in all the appeals hereinbefore enumerated.

The record shows that William and Mattie Frank were the owners of tax lot 17 in section 23, township 22 north, range 55 west of the sixth P. M. It is bounded on the south by Twentieth street, which constitutes a part of paving district No. 9 in Scottsbluff, and on the west by Fourth avenue, which constitutes a part of paving district No. 15 in said city. General taxes and special assessments in each of the paving districts were levied against tax lot No. 17, which for many years remained unpaid. On May 15, 1938, plaintiff city purchased the taxes due on this tract in the amount of $9,857.16, and received a tax sale certificate as evidence thereof. On June 12, 1940, taxes and assessments for 1937 and 1938 were paid by the city and indorsed on the tax sale certificate, so that there was due thereon on that date the sum of $12,143.94. This amount represented general taxes, special drainage taxes, paving assessments in district No. 9 and paving assessments in district No. 15. Defendants question the validity of these taxes and special assessments levied against tax lot No. 17, although as to all other properties involved in these appeals the validity of the general taxes is not an issue.

The general taxes assessed against tax lot No. 17 are claimed to be void for the reason that the description in the assessment books and tax lists was too indefinite and uncertain to identify the property. Prior to 1930 tax lot No. 17 was described as "Tax Lot 4 Pt E^2 SE^4; SE^4 NE^4 Sec. 23, Twp. 22, R. 55, Total Acres 5." We think that this description is plain and that it has but one meaning, to wit: Tax lot No. 4, part of the east half of the southeast quarter of the southeast quarter of the northeast quarter of section 23, township 22, range 55, containing five acres. Our statute, section 77-2036, Comp. St. 1929, provides: "Irregularities in making or equalizing assessments, or in making the returns thereof, shall not invalidate the sale of any real estate when sold by the county treasurer for delinquent taxes due thereon, nor in any manner invalidate the tax levied on any property or charged against any person." Section 77-2037, Comp. St. 1929, provides, in part, "and any irregularity, informality or omission in any such assessment book, tax collector's book, or other record of any real or personal property assessed for taxation, or upon which any tax is levied, or which may be sold for taxes, provided such description be sufficiently definite to enable the county treasurer or other officer, or any person interested, to determine what property is meant or intended by the description * * *." And in section 77-2042, Comp. St. 1929, we find the following: "It shall be sufficient in the petition and in all proceedings in such foreclosure suit, to designate the township, range, section, or part of section and also the number and description of any lot or block by initial letters, abbreviations and figures * * * ." We think that the claimed indefiniteness and uncertainty of the description can be nothing more at most than an irregularity in no way affecting the validity of the assessment, when considered with these provisions of the statutes.

Appellants contend that the description was fatally defective for the reason that there was no plat on record which described the property contained in tax lot 4. It is true that there is no evidence of the origin of this part of the de-

scription. It appears that, when petitioning for paving in paving district No. 9, the then owner described the land as tax lot 4 in section 23. It is evident, therefore, that owners of the property were not misled by the description used. Regardless of this point, the evidence shows that, during the times herein mentioned, tax lot No. 17 consisted of all of the east half of the southeast quarter of the southeast quarter of the northeast quarter of section 23, except the south 33 feet thereof which were a part of the street. The south 33 feet, being a part of the street, were not subject to taxation and, consequently, no difficulty would be experienced in determining that the part referred to in the description was all of the property described by the initial letters, abbreviations and figures, except that part used as a street. This conclusion is sustained in *Spiech v. Tierney*, 56 Neb. 514, 76 N. W. 1090, *Concordia Loan & Trust Co. v. Van Camp*, 2 Neb. (Unof.) 633, 89 N. W. 744, and *Kershaw v. Jansen*, 49 Neb. 467, 68 N. W. 616, cases very much in point. Under the holdings of these cases the description of the tract as a part of the recognized governmental subdivision, when the only part of the designated governmental subdivision not owned by defendants was the part used as a street, is a sufficient description to sustain the tax.

Appellants seek to avoid this conclusion by disproving that the south 33 feet are a part of the street. There is no evidence that this strip of ground was ever formally dedicated as such. It appears, however, that for 40 years it had been used as a road and that for 20 years it had been used as a full-width street. The street is now paved and is within the boundaries of paving districts Nos. 9 and 15. We think the use of the south 33 feet as a road for 40 years, its use as a street for 20 years, and the subsequent paving of the street without objection on the part of the owner imply a dedication by the owner of its use as a public street within the rule announced in *Burk v. Diers*, 102 Neb. 721, 169 N. W. 263, and *City of McCook v. Red Willow County*, 133 Neb. 380, 275 N. W. 396. The contention advanced that the south 33 feet constituted a private road and not a public street is without merit.

It is further contended that the addition of the words and figures "tax lot 17" to the description makes it indefinite and uncertain. While the description used prior to the addition of the words "tax lot 17" was sufficient to sustain the tax, the addition of this description tended to make it more certain. The record shows that the register of deeds has in his office an Irregular Tracts Book Record which was compiled by the county surveyor by authorization of the county commissioners. In this record is a plat showing tax lot 17 and a description of it as described in the government survey, less tax lot 17 B which is that part used as a street and is described therein by metes and bounds. We think this meets all requirements for describing irregular tracts as tax lots for convenience in the assessment of taxes as required by sections 26-701 to 26-703, inclusive, Comp. St. 1929.

The record also shows that after 1930 certain of the county records carried the description solely as tax lot 17 in section 23, township 22 north, range 55. For the reasons hereinbefore stated, this is a good and valid description of the property for taxation purposes.

Defendants also urge the invalidity of the special assessments levied by the paving districts. It is contended that tax lot 17 is unplatted and not subdivided and therefore not subject to special assessments for paving. Defendants ask the court to construe sections 16-614, 16-623 and 16-626, Comp. St. 1929, to mean that lots and subdivided real estate only are subject to the levy of special assessments for the payment of public improvements. Construing these sections together by considering the words "shall be assessed upon the lots and lands specially benefited thereby" in section 16-614, the words "shall have power and authority to levy and collect special taxes and assessments upon the lots and pieces of ground adjacent to or abutting upon the street" contained in section 16-623, and the language "the word 'land' shall mean any subdivided real estate" in section 16-626, lead us to the conclusion that an unplatted or nonsubdivided tract of land in a city may be subjected to assessment for special benefits. While it is true that a special

definition has been accorded to the word "land" by section 16-626, no attempt was made to define the expression "pieces of ground" contained in section 16-623. We are of the opinion that the legislature intended that irregular tracts within a city, such as tax lot 17, should be subject to assessment for special benefits. This court seems to have decided this point previously in the case of *Medland v. Linton,* 60 Neb. 249, 82 N. W. 866, wherein we said: "An unplatted tract of land within the limits of a city is subject to taxation for special benefits received to pay costs of local improvements, the same as though it were platted into lots and blocks."

Defendants contend that the assessments levied by the paving districts are void for the reason that the publication of certain notices required by law to be published do not appear by the minutes of the city clerk to have been so published. As to the assessment of benefits by paving district No. 9, it is pointed out that the ordinance creating the district and the ordinance fixing the benefits are not shown by the minutes of the city council to have been published. Neither does it appear from the minutes that notice of the organization of the district was given or that any notice of the equalization meeting was given or published. That all of these notices were actually given and published is proved in the record by proofs of publication and the testimony of a newspaperman familiar with the fact of publication. Defendants contend that such proof is not competent and that the only proof by which such facts may be established is the minute record of the city council. Such is not the law. To make the work of a city clerk in recording the minutes of a city council so technical and meticulous as to require the recording of events and acts extraneous to a council meeting and not specifically required by statute would subject bondholders, creditors and all persons interested in the affairs of the municipality to the carelessness and indifference oftimes evidenced in the records of public officials. The presumption is, of course, that all requirements of statute have been complied with and, unless specifically required to be shown by the minutes, we think it is entirely proper to show

the fact by whatever competent proof of the fact that is available. We have examined the cases cited by the defendants and, while the rules of law stated therein are undoubtedly correct, they have no application here. Such cases deal with the minutes of a city council pertaining to the passage of ordinances. We have repeatedly held that the minutes of the city council must show that all acts of the council required by statute to effectuate the passage and adoption of a valid ordinance must be shown by the minutes to have been done by the council. But we know of no statute or rule of law that requires a proof of publication, a matter extraneous to the official acts of a city council, to be copied into, or noted in, the minute record. We think that any competent proof of the fact of the publication which the statute requires is admissible and that the evidence tendered by plaintiff met all requirements as to competency.

It is contended also that similar proofs of publication are not affirmatively shown by the minute record as to the organization of paving district No. 15 and the levy of special assessments within that district. Plaintiff offered in evidence a collection of documents in the nature of a history of the organization of paving district No. 15 and the levy of the special assessments herein contested, which were found among the records of the city council. Original proofs of publication of the notices, which defendants claim were not published, are attached thereto. We think, as we heretofore said, that this is competent proof of the publication of the notices and sufficient to empower the city council to act.

It is urged that the equalization meetings were not held as required by statute. It appears that the city council fixed the hour of the day that it would meet to equalize the benefits to be assessed in each of the two paving districts. The minutes of the city council show that such meetings were held on the designated days, but that the hour at which the transition from a city council to a board of equalization took place is not shown and, as a result, defendants contend that the meeting could have been held several hours before or after the hour designated. The presumption must be, in

the absence of proof to the contrary, that the meetings were held as noticed. There is no evidence in the record that the meetings were not so held. Defendants rely solely upon the proposition that the minutes must affirmatively show the hour of meeting. While we agree that a properly kept record should show the hour at which the board of equalization convened, yet in the absence of competent proof that it did not lawfully convene, the presumption of regularity is sufficient to sustain the action of the city council.

Defendants have cited cases supporting the rule that statutes purporting to authorize the levy of special assessments upon abutting property for street improvements must be strictly construed, not only with reference to the grant of power to levy the assessments, but also with reference to the procedure to be followed. In *Hutchinson v. City of Omaha,* 52 Neb. 345, 72 N. W. 218, it was said: "It is familiar law that in order to sustain an assessment of this character the record must show affirmatively a compliance with all the conditions essential to the valid exercise of the taxing power. *Smith v. City of Omaha,* 49 Neb. 883. It is no less familiar that statutes authorizing the exercise of such power are to be strictly construed. Expressing his individual opinion only, the writer will say that he believes that such grants of power hold out temptations and opportunities for the confiscation of property to such an extent that the protection of property rights demands that they should receive the very strictest construction, and that the courts should be insistent that the proceedings should be of the utmost regularity." With this rule we fully agree, but it is not helpful to the defendants in this case. Irrespective of the rule quoted, in a suit to foreclose a tax sale certificate, a legal presumption of the validity of the general taxes and special assessments included therein exists. The rule is stated in *Ure v. Reichenberg,* 63 Neb. 899, 89 N. W. 414, as follows: "In an action of foreclosure upon a tax sale certificate, and for prior and subsequent taxes and special assessments paid by the holder of the certificate, the certificate and receipts of the proper officer for prior and subsequent taxes and special assessments

are *prima facie* evidence of the validity of the taxes which they represent."

By this rule, the origin of which is statutory (Comp. St. 1929, sec. 77-2017), the legislature has relieved the holder of the tax sale certificate of the necessity, in the first instance, of proving that every requirement of statute had been followed to prove that the property was subject to the lien of his certificate. Any claim that the tax or assessment was void or unenforceable must be pleaded and evidence adduced thereon before the holder of the certificate is required to prove the validity of his lien in respect to the matters contained in the attack made upon it. A failure to produce evidence that a pleaded requirement to the validity of the assessment or tax had not been met is not sufficient. There must be affirmative evidence to sustain the invalidity of the tax or assessment in the respects pleaded in the answer. To a large extent, the defendants in the present case rely upon a silent record to sustain their claim that the lien of the tax sale certificate is unenforceable because of a failure of statutory compliance. This they cannot do. The presumption of validity proclaimed by our statute is a sufficient answer to all such attacks upon the enforceability of plaintiff's certificate.

It appears that the paving assessment in paving district No. 9 was levied only on the south 150 feet of tax lot 17, but was included in the tax sale certificate to the whole of tax lot 17. The trial court correctly held the tax sale certificate void and decreed a foreclosure of the tax lien to which plaintiff, by subrogation, was entitled. *Adams v. Osgood,* 42 Neb. 450, 60 N. W. 869; *John v. Connell,* 61 Neb. 267, 85 N. W. 82. The court in its decree ascertained the amount of taxes due on the south 150 feet of tax lot No. 17 and the amount due on the remaining portion of the tract, and ordered separate sales. It being a foreclosure of the tax lien rather than the tax sale certificate, an attorney's fee was denied and a redemption period of two years allowed after the sale. This was a correct determination of these questions.

We conclude that all taxes and special assessments are

valid and that the decrees entered by the trial court in all four appeals hereinbefore enumerated are in all respects correct.

AFFIRMED.

HENRY STANDER, APPELLANT, V. CHARLES J. PANKONIN ET AL., APPELLEES.
4 N. W. (2d) 895

FILED JULY 10, 1942. No. 31345.

1. **Executors and Administrators.** A suit to foreclose a real estate mortgage executed by a deceased person in his lifetime is not barred as to the property which it covers by a failure to present it to the probate court for allowance against the estate.
2. ———. But where the holder fails to present it for allowance against the estate he is confined to the mortgaged property, and the order of the probate court barring claims is a complete bar to his sharing in the general assets of the estate.
3. **Husband and Wife.** A deficiency judgment, procured in a real estate mortgage foreclosure against a married woman on a mortgage note executed during coverture and binding her separate estate, is enforceable only against property which she possessed at the time the note was executed.
4. ———. A deficiency judgment against a married woman in the form of a general money judgment is *res adjudicata* only as to the liability and the amount thereof.
5. ———. The question as to what property is subject to levy by execution to satisfy a judgment against a married woman is a collateral matter which arises subsequent to the entry of the judgment and may be determined by proof aliunde.
6. **Fraudulent Conveyances.** Property of a judgment debtor not subject to the payment of claims of creditors cannot be fraudulently conveyed as against such creditors.

APPEAL from the district court for Cass county: WILMER W. WILSON, JUDGE. *Affirmed.*

C. S. Wortman and *A. L. Tidd,* for appellant.

Albert S. Johnston, contra.

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

CARTER, J.

This is a creditor's bill brought to reach certain real estate conveyed by the defendant Mary D. Pankonin to her son Charles J. Pankonin on March 15, 1940. The trial court found for the defendants and plaintiff appeals.

The record shows that on January 3, 1930, Herman E. Pankonin procured a loan from the plaintiff, Henry Stander, in the amount of $2,000 and gave a note and mortgage on a quarter-section of land to secure it. The mortgage was subject to a first mortgage for $7,000 in favor of the Mutual Benefit Life Insurance Company on the same land. On July 26, 1931, Herman E. Pankonin died, leaving a will by which he devised all his property to Mary D. Pankonin, his wife, subject to his debts. In the probate of the estate, notice to creditors was given and an order barring claims duly entered on January 5, 1932. The plaintiff filed no claim based on his note. A final decree assigning all of the estate property to Mary D. Pankonin was entered by the probate court on May 17, 1932.

The evidence shows that the Mutual Benefit Life Insurance Company subsequently commenced a foreclosure of their mortgage and on April 3, 1939, a decree of foreclosure was duly entered decreeing that the insurance company had a first lien for $9,223.52, and that plaintiff had a second lien for $2,030. The property was sold to the insurance company for less than the amount of its lien. Plaintiff then obtained a deficiency judgment against Mary D. Pankonin for $2,262.82.

The property assigned to Mary D. Pankonin by the final decree of the probate court included some lots and parts of lots in the village of Louisville, Nebraska. On March 15, 1940, Mary D. Pankonin conveyed these lots to her son Charles J. Pankonin without consideration. Plaintiff alleges that the deed was fraudulent and made for the purpose of hindering and delaying him in the collection of his judgment. On this issue the trial court found for defendants, and the correctness of this finding is before us for review.

Plaintiff contends that he has a right to proceed against the property in question as that of Herman E. Pankonin, deceased. In this he is in error for the reason that any and all claims against the estate of Herman E. Pankonin were barred by the order barring claims in the probate proceeding. In *Null v. Jones*, 5 Neb. 500, this court said:

"Such mortgage is not barred, as to the property which it covers, by a failure to present it to the court for allowance as a claim against the estate.

"But unless so presented the holder is confined to the mortgaged property, and cannot share in the general assets of the estate."

It is clear, therefore, that the failure of the plaintiff to file a claim in the probate proceeding will not affect his right to subject the mortgaged property to the payment of his lien. Comp. St. 1929, sec. 30-609. But his failure to so do is a complete bar to any attempt to collect a deficiency from other assets of the estate.

Plaintiff further contends that the property, if retained by Mary D. Pankonin, would have been subject to levy for the payment of the deficiency judgment obtained against her personally. We think plaintiff is also in error in this contention. The evidence shows that Mary D. Pankonin signed the note on January 3, 1930, on which the deficiency judgment was based. She acquired the property in question by will on the death of her husband on July 26, 1931. It was, therefore, after acquired property which was not a part of her separate estate at the time she signed the note. "The law is well settled in this state that the contract of a married woman can only be enforced against the separate estate which she possessed at the date of the contract." *Curley v. White*, 129 Neb. 829, 263 N. W. 134. "Authority to contract with reference to, and upon the faith and credit of, the separate estate of a married woman does not include an inheritance acquired after the making of a contract by her." *Kocher v. Cornell*, 59 Neb. 315, 80 N. W. 911.

It is the contention of plaintiff, however, that the award of the deficiency judgment from which no appeal was taken

is a bar to this defense for the reason that Mary D. Pankonin pleaded coverture in her objections to the motion for deficiency judgment. It is a rule well settled in this state that a general judgment against a married woman determines only the liability of the debtor and the amount thereof. To this extent the deficiency judgment rendered in the case at bar is *res adjudicata* as to Mary D. Pankonin. But the question as to the property subject to levy by execution to satisfy the judgment is a matter which arises subsequently and may be determined by matters aliunde regardless of the general form of the judgment. *Giltner State Bank v. Talich,* 115 Neb. 236, 212 N. W. 536. The defendant Mary D. Pankonin is not, therefore, attempting to relitigate her liability for a deficiency judgment, but, on the contrary, she is contending only that the property sought to be reached is not subject to the payment of the judgment validly entered. This she has a right to do.

It appearing, therefore, that plaintiff may not subject the property in question to the payment of his judgment, either as assets formerly belonging to the estate of Herman E. Pankonin, or as property of Mary D. Pankonin, a married woman, acquired after the creation of the obligation, the conveyance to Charles J. Pankonin was not in any respects fraudulent as to plaintiff. Property of a judgment debtor not subject to the payment of claims of creditors cannot be fraudulently conveyed as against such creditors.

AFFIRMED.

MARY B. MCDONALD, APPELLEE, V. LINCOLN COUNTY, APPELLANT.

4 N. W. (2d) 903

FILED JULY 10, 1942. No. 30917.

1. **Limitation of Actions.** The limitation of the right of action to recover money paid for void taxes under the provisions of section 77-2054, Comp. St. 1929, is the general statute of limitations, and action may be instituted for the recovery of money so paid at any time within four years after the date that such taxes are declared void by a court of competent jurisdiction.

2. ———. Right of action does not accrue under section 77-2054, Comp. St. 1929, until it shall be determined by a court of competent jurisdiction that the tax sale which is the basis of the certificate is void.
3. **Action.** Cumulative within the meaning of the act of which section 77-2054, Comp. St. 1929, is a part means only that a new right was created with a remedy to enforce the right.
4. **Limitation of Actions.** "An action for relief not hereinbefore provided for can only be brought within four years after the cause of action shall have accrued." Comp. St. 1929, sec. 20-212.
5. **Taxation.** The county, under rules of interpretation long established, is liable for all taxes which entered into the sum paid by the taxpayer without regard for whose benefit they were levied.

APPEAL from the district court for Lincoln county: J. LEONARD TEWELL, JUDGE. Opinion on motion for rehearing of case reported in 139 Neb. 188. *Former judgment of reversal and dismissal vacated and judgment of district court affirmed.*

S. S. Diedrichs, R. H. Beatty and *Milton C. Murphy,* for appellant.

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

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

YEAGER, J.

The former opinion in this case is reported in 139 Neb. 188, 296 N. W. 892. Following an argument for rehearing, we have arrived at a different conclusion than that announced in the former opinion.

For the purposes of this opinion we adopt and quote the statement of the case from the former opinion as follows:

"This action is an appeal from a judgment of the district court for Lincoln county, Nebraska, in favor of Mary B. McDonald and against the county of Lincoln for $12,271.64, with interest and costs made and entered by it on an appeal from the disallowance by the county board of that county of a claim for a refund of money paid to the county treasurer for a tax sale certificate and subsequent taxes paid by Mary

B. McDonald, as owner thereof, on the Masonic Temple Craft building in North Platte.

"The material facts are not in dispute. It appears that the tax sale certificate was issued to the appellee, Mary B. McDonald, on November 3, 1930, and the payments of the taxes subsequently assessed against the premises were made when and in the amounts as alleged in her petition. The original petition was filed on June 19, 1935, by Mary B. McDonald in the district court for Lincoln county in a case wherein she was plaintiff and the Masonic Temple Craft of North Platte, Nebraska, *et al.*, were defendants, the object and prayer of which were the foreclosure of the lien of the tax sale certificate and of subsequent taxes paid by the plaintiff. Service of summons issued thereon was made on all parties on June 20, 1935. After trial on the merits on September 23, 1936, a decree of foreclosure and sale was awarded the plaintiff in the sum of $7,433.65 and interest, as provided by law. An appeal was thereupon presented from this judgment of the district court to the supreme court, wherein, after due hearing, judgment was entered directing that the judgment of the district court, made and entered on September 23, 1936, be reversed and the plaintiff's action be dismissed, and mandate so directing was duly issued from the supreme court on November 7, 1938; and such mandate was received and filed in the district court for Lincoln county on November 8, 1938. See *McDonald v. Masonic Temple Craft,* 133 Neb. 589, 276 N. W. 176; *Id.,* 135 Neb. 48, 280 N. W. 275.

"Thereafter on December 10, 1938, Mary B. McDonald filed with the county board of Lincoln county, Nebraska, a claim in writing for a refund of the moneys thus paid by her to the county treasurer of Lincoln county. This claim was disallowed in full on December 19, 1938. An appeal was prosecuted by Mary B. McDonald from this disallowance to the district court for Lincoln county. Her petition on appeal, in proper form, set forth the facts of the transaction and the adjudication by the supreme court of the state of Nebraska of the invalidity of the taxes in suit, with appropriate prayer.

"The answer may be summarized as an admission of the levy of the taxes in suit, the purchase by plaintiff at tax sale, and subsequent payment of taxes as alleged in the petition, but it alleges that the major part of these taxes were levied by other municipal subdivisions of the state of Nebraska (the city and school district of North Platte), and that the proceeds so collected by the county treasurer were by him distributed to such municipal subdivisions according to their respective interests and rights thereto, and are not now in the hands of the county treasurer. Further, this answer admits the entry of judgment determining the illegality of the taxes in suit, and alleges that Lincoln county was not a party in that proceeding, and, in addition, pleads that plaintiff's action was not instituted within five years from the date of issuance of tax sale certificate, and therefore is barred.

"To this answer, a reply in the nature of a general denial was filed.

"The result of the trial on the merits in the district court was the judgment referred to at the commencement of this opinion. From the order of the trial court overruling its motion for a new trial, the defendant county appeals."

On this record the appellant contended, and in the former opinion it was held, that the plaintiff was barred of her action by the limitation contained in section 77-2049, Comp. St. 1929, as follows:

"If the owner of any tax sale certificate shall fail or neglect to demand a deed thereon, or to commence an action for the foreclosure of the same within five years from the date of the sale, such tax sale certificate shall cease to be valid or of any force or effect whatever, and the real estate covered thereby shall be forever released and discharged from the lien of all taxes for which the same was sold. And it is hereby made the duty of each and every county treasurer of the state of Nebraska to enter on the tax sale records of his or her office a cancelation of all tax sales on which five years have elapsed since date of sale, with date of entry affixed, in language substantially as follows: 'Canceled by section 6569, Revised Statutes of Nebraska for 1913 (77-

2049).' No county treasurer or bonded abstractor shall be held responsible on his bond or otherwise on account of such entry being made in accordance with this section. All land covered by tax sales that comes within the provisions of this act shall from the time of this entry be considered to stand of record as though no tax sale had ever been made."

In this connection we have arrived at the conclusion that the former opinion is incorrect, and that section 77-2054, Comp. St. 1929, is controlling with the application of the general statute of limitations applying in the determination of the time within which plaintiff was required to bring action to recover back money paid on a tax sale which had been declared void by a court of competent jurisdiction. The section is the following:

"Whenever, for any reason, real estate has been sold or shall hereafter be sold for the payment of any tax or special assessment levied by any county, municipality, drainage district or other political subdivision of the state, and it shall thereafter be determined by a court of competent jurisdiction that said sale was void, it shall be the duty of said county, municipality, drainage district, or other political subdivision of the state which levied the tax or special assessment to hold said purchaser harmless by paying him the amount of principal paid by him at the sale with interest thereon at the rate of 6% *per annum* from the date of sale."

It will be noted that under the plain and unambiguous terms of section 77-2049, the only subject under legislative contemplation and consideration was the limitation upon the preservation of a *valid tax lien obtained by purchase of a tax sale certificate.* Two methods of preserving the lien are provided. They are, either demand for deed, or action to foreclose. The limitation of this section does not apply directly or indirectly or by implication to a *void tax* or any other subject other than *valid tax* lien. Moreover, until by the enactment of section 77-2054 in 1915 (Laws 1915, ch. 228, sec. 2), there was no statutory provision for the recovery back of money paid for void tax certificate unless the

certificate for void tax was the result of mistake or wrongful act of a treasurer or other officer. Comp. St. 1929, sec. 77-2030.

An examination of the statutes discloses that section 77-2049 is part of an act adopted in 1903 (Laws 1903, ch. 73, sec. 241), whereas section 77-2054 is part of an act which was adopted in 1915 and without any reference to the limitation contained in section 77-2049. As the language plainly imports, the limitation of action under section 77-2054, depends upon two things, one, the accrual of the right of action, and, two, the general statute of limitations. Under the specific terms of this section the right of action does not, cannot, accrue *until it shall be determined by a court of competent jurisdiction that the tax sale which is the basis of the certificate is void.*

It cannot be that the legislature, in the adoption of section 77-2054, contemplated the granting of a right and the cutting off of the remedy to secure the right before the right ever accrued, yet, that is the thing for which the defendant contends, and the effect of the former opinion in this case.

The tax sale here was not determined to be *void* by *a court of competent jurisdiction* until it was so held in *McDonald v. Masonic Temple Craft,* 135 Neb. 48, 280 N. W. 275, in 1938. Within three months the plaintiff had her action on file in the district court of Lincoln county.

It is urged that, by reason of the legislative declaration in the act of which section 77-2054 is a part, the act is cumulative and not amendatory, that the limitation of section 77-2049 must be read into section 77-2054. Cumulative within the meaning of the act as applied to the plaintiff means only that the legislature created a right and remedy which did not previously exist. 25 C. J. S. 27. The right created was to recover back taxes paid by a tax purchaser in case the taxes were void for reasons other than those set forth in section 77-2030. The remedy is by action instituted after declaration that the tax is void by a court of competent jurisdiction. Can it be that the legislature intended to create a right and a corresponding remedy without at the same time

allowing a party an opportunity to pursue the remedy and protect the right? This obviously could not have been the legislative intent.

It may be that, if this statute had the effect of providing an alternative remedy for the enforcement of a right in being and was silent as to the time when action could be instituted, then the limitation upon the original action would be properly applicable, but that is not the situation here. Section 77-2054 creates a right which did not previously exist and it states the time when the action accrues, and, further, is silent as to limitation.

No cases have been cited under the title of cumulative right or remedy, or any other title, and we think there are none, which hold under such circumstances as these that a statute of limitations in the act of which the later act is cumulative, which limitation bears no relation to the new right or remedy, may bar a recovery for the new right before right of action comes into being.

Let us see what was the probable reason for the adoption of section 77-2054. From 1903 to 1915 the tax purchaser who obtained a certificate for a tax which was void was without a remedy, unless it was void because of mistake or wrongful act of the treasurer or other officer. Comp. St. 1929, sec. 77-2030. Such a situation was not only unfair and unjust to the tax purchaser, but it had the obvious effect of discouraging purchases of certificates for delinquent taxes because of the peril involved and, of course, this caused, for long periods of time, properties to be nonproductive of taxes to the injury of the tax-using political bodies. No doubt it was to correct this situation that section 77-2054 was adopted by the legislature. Clearly the legislature intended by the act to tell purchasers of tax certificates that they no longer were required to purchase delinquent tax sale certificates at their peril. Likewise clearly it meant to tell them that they might recover money back, with interest at 6 per cent. per annum, which had been paid for void tax certificates, but that before they might do so and as a condition precedent to that right there must be an *adjudication by a*

court of competent jurisdiction that the tax is void.

If, as contended in the former opinion, from the fact that the legislature declared that the act of which section 77-2054 is a part is cumulative, the limitation of 77-2049 must be applied to section 77-2054, then the only logical conclusion would be a holding that the plaintiff had five years from the date that her tax certificates were held void by a court of competent jurisdiction within which to bring action to recover the money paid out, five years being the period of limitation named in section 77-2049. We think, however, that the better rule as to limitation is the one set forth in our general statutes of limitation as follows: "An action for relief not hereinbefore provided for can only be brought within four years after the cause of action shall have accrued." Comp. St. 1929, sec. 20-212.

In support of the interpretation placed on section 77-2054 in the former opinion, certain previous decisions of this court are cited. We will consider them in the order that they made their appearance. The first is *Gibson v. Dawes County*, 129 Neb. 706, 262 N. W. 671. In the opinion in that case appears the following: "The liability of a county for a refund of taxes paid by the purchaser of real estate at a county treasurer's sale for delinquent taxes, where the title fails, is statutory and does not exist at common law. * * * A petition for such a refund is demurrable, if it does not state facts sufficient to show the statutory conditions which make the county liable. * * * There are two sections of statute imposing upon a county the duty to hold the purchaser of real estate at a tax sale harmless by refunding the amount of the payment made by him to the county treasurer, where the title fails." The two sections referred to are 77-2030 and 77-2054, Comp. St. 1929, and are quoted in the opinion.

The appeal was from an order sustaining a general demurrer to the petition. This court said on the question of whether or not a cause of action had been stated under section 77-2030: "The petition for a refund in the present instance does not contain specific allegations of fact showing

that the county treasurer or any other officer by mistake or wrongful act sold the land on which no tax was due at the time or that the land was sold in consequence of error in describing it in the tax receipt, a mere conclusion by the pleader not being sufficient. It follows, therefore, that the petition is not sufficient to show, when attacked by demurrer, that plaintiff is entitled to relief under the section first quoted."

As to section 77-2054 the opinion states: "The decree in the former action to foreclose the tax sale certificate is attached to the petition herein and adjudges that the taxes for the years 1920, 1921 and 1922 were liens on the entire tract of 320 acres; that subsequent taxes paid by the holder of the tax sale certificate for the years 1923 to 1926, both inclusive, were valid liens on 18/320 of the land and invalid as to 302/320 thereof. The former decree, being pleaded herein in the petition as part of plaintiff's cause of action, prevails over allegations which the decree contradicts, if any. * * * From the standpoint of the demurrer and of invulnerable pleading, therefore, *the petition does not show that the taxes which plaintiff seeks to recover back were all void or that his tax sale certificate was invalid.*" (Italics ours.) In other words, the opinion points out that the plaintiff had not stated a cause of action under section 77-2054, since he had not shown that a tax certificate had been declared void by a court of competent jurisdiction. We think that for this reason the further discussion in the opinion relative to the statute of limitations is *dicta* and should not be considered as a precedent here, and if it may be considered as precedent it should be and is expressly overruled.

In most, if not all, respects, the same situation is presented in *Wetzel v. Dawes County,* 129 Neb. 711, 262 N. W. 674, as in *Gibson v. Dawes County, supra.* What we have said there with regard to the statute of limitations we consider equally applicable here.

The case of *Kennedy v. Dawes County,* 130 Neb. 227, 264 N. W. 452, is very similar to the two cases previously discussed and in it, without any very specific recital of facts

and circumstances, a like conclusion is arrived at. In this case as in the other two the language of section 77-2054, which makes clear that the cause of action does not arise until there shall have been a declaration by a court of competent jurisdiction that the tax was void, seems never to have been considered.

On the question of when the statute began to run the case of *Monteith v. Alpha High School District,* 125 Neb. 665, 251 N. W. 661, has been cited. This case has no bearing whatever. The fourth paragraph of the syllabus in that case is as follows: "As between a taxpayer and a school district or county, from which a recovery is sought, the statute of limitations begins to run from the time of the payment of the tax, and it is not postponed until the illegality of the tax has been judicially decided." Obviously and specifically this court had in mind when that pronouncement was made the limitation contained in subdivision "second" of section 77-1923, Comp. St. 1929, the applicable portion of which is the following: "If such person claim the tax or any part thereof to be invalid for the reason that it was levied or assessed for an illegal or unauthorized purpose, or for any other reason except as hereinbefore set forth, when he shall have paid the same to the treasurer, or other proper authority, in all respects as though the same was legal and valid, he may, at any time within thirty days after such payment, demand the same in writing * * * and if the same shall not be refunded within ninety days thereafter, may sue * * * ." The holding in that case was that, the plaintiff not having brought himself within the conditions and limitations of this particular section of the statute, and not having shown that he was otherwise entitled to relief, the demurrer to the petition was properly sustained.

On the question of whether or not the entire void tax is recoverable against the county, since portions of it were taxes levied for the benefit of the city of North Platte and the school district, we adopt the view that the county, under rules of interpretation long established, is liable for all taxes which entered into the sum paid by the taxpayer without

regard for whose benefit they were levied. *Roberts v. Adams County,* 18 Neb. 471, 25 N. W. 726; *Roberts v. Adams County,* 20 Neb. 409, 30 N. W. 405; *Richardson County v. Hull,* 24 Neb. 536, 39 N. W. 608; *Norris v. Burt County,* 56 Neb. 295, 76 N. W. 551.

Furthermore section 77-2054, Comp. St. 1929, makes it clear that the liability is that of the political subdivision which levied the tax. The political subdivision which levied the entire tax in question was Lincoln county, Nebraska, through its county board of equalization or its county board pursuant to the requirements of section 77-1801, Comp. St. 1929. The portion of the section of importance here is the following:

"The county board of equalization shall adjourn from time to time until the action of the state board of equalization and assessment shall have been had and certified to the county clerk, and, on the last day of sitting as a board of equalization, the county board shall levy the necessary taxes for the current year, including all county, township, city, school district, precinct, village, road district and other taxes required by law to be certified to the county clerk and levied by the county board * * * ."

It is not pointed out that any of the taxes paid by plaintiff were not certified either to the county clerk or the county board.

In so far as the city of North Platte is concerned, it being a city of not less than 5,000 and not more than 25,000 population, section 16-702, Comp. St. 1929, required that its levy should be certified to the county clerk for levy by the county agreeable to section 77-1801.

Under the specific provisions of section 79-2522, Comp. St. 1929, the school district is required to certify its estimate to the county board, and the board is required to levy and collect the tax.

Section 26-259, Comp. St. 1929, provides for certification by the township and levy of taxes for township purposes by the county board.

As to precincts taxation is a matter of allocation by the

supervisor or county clerk after equalization by the county and state boards of equalization in the manner provided by sections 77-1804 and 77-1805 as these sections have been amended, the levy having been made by the county board.

As to road districts all funds to be raised for construction and maintenance by taxation are dependent upon levy by the county board. Comp. St. 1929, secs. 39-201, 39-202, 39-203, 39-210, 39-221 and 39-222.

It being clear that the ultimate levies which were the basis of the payments of taxes made by the plaintiff were made by the political subdivision, the county, and properly so under section 77-1801, the action was properly maintainable against that political subdivision.

It is urged in argument that, since the county was not made a party to the tax foreclosure action wherein the taxes were adjudged to be void, such judgment is not binding and has no force and effect as against the county. This proposition requires no consideration here. No such defense was pleaded. Certainly, if the defendant desired that this matter should be given consideration by the court, attention should have been called to it by appropriate pleading.

The former opinion in this case is hereby set aside. For the reasons herein set out, the judgment of the district court is hereby

AFFIRMED.

ROSE, EBERLY AND MESSMORE, JJ., dissenting.

Having an abiding conviction that the judgment of the district court is without any foundation whatever in fact, law or justice, we solemnly protest against the adoption of the opinion directing the affirmance of it.

The claim resulting in the affirmed judgment against Lincoln county for $12,271.64, is a demand for a refund of void taxes levied on the Masonic Temple Craft building and lots in North Platte, the ostensible liens of which were purchased by plaintiff with money paid by her to the county treasurer.

The claim of plaintiff for a refund of the void taxes included $4,124.56 levied by the school district of North Platte

and certified to the county treasurer for collection. Comp. St. 1929, sec. 79-2522. The county did not levy these void school taxes or receive the money paid by plaintiff therefor to the county treasurer.

The claim of plaintiff for a refund of the void taxes included also $3,203.51 levied by the city of North Platte against the same property and certified to the county treasurer for collection. Comp. St. 1929, sec. 16-702. The county did not levy these void city taxes or receive the money paid by plaintiff therefor to the county treasurer. The county treasurer, as trustee, received from plaintiff the school taxes for the school district and the city taxes for the city and he was required by statute to hold them for refund to plaintiff, pending litigation, if found to be void. Comp. St. 1929, sec. 77-1705.

While the litigation to test the validity of the taxes levied against the Masonic property was pending, the county treasurer unlawfully turned over to the school district the money received by him from plaintiff for the school taxes and to the city the money received by him for city taxes. It was his statutory duty to retain these funds in his hands pending litigation for the purpose of returning them to plaintiff if the taxes should be adjudged void. Comp. St. 1929, sec. 77-1705. Since the county did not levy these void taxes or receive payment therefor from plaintiff, it cannot refund what it never received and is not liable to her therefor. By violation of law the person holding the office of county treasurer could not create an obligation of the county. The failure of the treasurer, as trustee, to retain these trust funds pending litigation was not the act of the county but the wrong and the trespass of the individual occupying the office of county treasurer. This is the law of Nebraska. In a former case the rule was stated thus:

"In dealing with taxes certified by city authorities to the county clerk, neither the county clerk nor county treasurer acts as agent of the county." *Kelley v. Gage County*, 67 Neb. 6, 93 N. W. 194. See, also, *School District No. 2 v. Saline County*, 9 Neb. 403, 2 N. W. 877; *Lancaster County v.*

State, 74 Neb. 211, 215, 104 N. W. 187, 107 N. W. 388.

The district court and the supreme court were in law as powerless as the county treasurer to bind the county for a refund having no existence in fact and never having been authorized by law. Citizens having their residences and their taxable property in Lincoln county outside the school district and outside the city of North Platte were not benefited by the trust funds received by the county treasurer from plaintiff and illegally turned over to the school district and to the city. Enforcement of the erroneously affirmed judgment against the county will result in the taxation of property outside the school district and outside the city to pay the debts of the school district and to pay the debts of the city, in plain violation of the due-process clause of the Fourteenth Amendment of the Constitution of the United States.

The lawmakers themselves were without power to authorize taxation in Lincoln county outside the school district and outside the city to be applied alone to the debts of the city and of the school district. The law has been stated as follows:

"Should the legislature order that money be raised by one district and paid to another district, to be used for the sole benefit of that other district, that would be an exaction of money for the benefit of others than those who are taxed and clearly beyond what could be justified as taxation. 26 R. C. L. 72, sec. 51." *State v. Board of County Commissioners*, 109 Neb. 35, 189 N. W. 639.

The affirmed judgment not only requires unlawful taxation, but is a sentence imposed on property owners in Lincoln county outside the school district and outside the city, without indictment, notice or day in court, to pay fines or tribute for the benefit of the school district and the city. 1 Cooley, Taxation (4th ed.) sec. 186; 26 R. C. L. 72, sec. 51; *Robinson v. City of Norfolk*, 108 Va. 14, 60 S. E. 762; *Sharpless v. Mayor of Philadelphia*, 21 Pa. St. 147, 168.

In addition, the entire claim of plaintiff for a refund was outlawed by the five-year statute of limitations inserted by

the legislature in the revenue law of Nebraska. The validity of these taxes was in litigation August 30, 1930, with the public records charging plaintiff with notice thereof when speculating in delinquent taxes. The claim of plaintiff for a refund was based on a tax sale certificate for delinquent taxes issued to her November 3, 1930, and on payment of subsequent taxes on the same Masonic property. All were adjudged void before the present action was commenced. *North Platte Lodge, B. P. O. E., v. Board of Equalization,* 125 Neb. 841, 252 N. W. 313; *Masonic Temple Craft v. Board of Equalization,* 129 Neb. 293, 261 N. W. 569; *Masonic Temple Craft v. Board of Equalization,* 129 Neb. 827, 263 N. W. 150; *McDonald v. Masonic Temple Craft,* 133 Neb. 589, 276 N. W. 176; *McDonald v. Masonic Temple Craft,* 135 Neb. 48, 280 N. W. 275.

The claim of plaintiff for a refund was not presented to the county board for allowance until December 10, 1938, a period of more than five years from the date of the tax sale certificate. The claim for a refund was therefore barred by the revenue law which declares:

"If the owner of any tax sale certificate shall fail or neglect to demand a deed thereon, or to commence an action for the foreclosure of the same within five years from the date of the sale, such tax sale certificate shall cease to be valid or of any force or effect whatever, and the real estate covered thereby shall be forever released and discharged from the lien of all taxes for which the same was sold." Comp. St. 1929, sec. 77-2049.

By unanimous opinion the supreme court ruled pursuant to this statute as follows:

"A claim or an action against a county by the holder of a tax sale certificate for a refund of taxes assessed against the real estate sold is barred by the statute of limitations, unless presented in some form to the county for allowance within five years from the date of the sale." *Gibson v. Dawes County,* 129 Neb. 706, 262 N. W. 671.

This was unanimously recognized as law and cited in *Wetzel v. Dawes County,* 129 Neb. 711, 262 N. W. 674, in *Ken-*

nedy v. Dawes County, 130 Neb. 227, 264 N. W. 452, and in *McDonald v. Lincoln County*, 139 Neb. 188, 296 N. W. 892. Since the plain letter and spirit of the five-year revenue statute of limitations was thus enforced as enacted, the legislature has been in session from time to time without changing it and has thus permitted it to remain as the true expression of the legislative will.

Moreover, a supreme court ruling reads as follows:

"Section 77-2030, Comp. St. 1929, does not require a foreclosure action to be begun or a demand for a deed to be made on a void tax sale certificate before instituting proceedings before the board of county commissioners for reimbursement, provided the proceedings are begun within five years from the date of the certificate." *Farm Investment Co. v. Scotts Bluff County*, 125 Neb. 582, 251 N. W. 115.

It requires more legislation than the statutes contain to justify affirmance of the judgment requiring Lincoln county to refund to plaintiff money it never received and to pay a claim barred by the five-year revenue statute of limitations. On the undisputed facts and the law applicable thereto, we cannot allow the opinion of the majority to go unchallenged. The judgment of the district court should be reversed and the action dismissed.

FIRST TRUST COMPANY OF LINCOLN, GUARDIAN, APPELLANT, V. MAUD HAMMOND, APPELLEE.

4 N. W. (2d) 874

FILED JULY 10, 1942. No. 31006.

APPEAL from the district court for Lancaster county: JEFFERSON H. BROADY, JUDGE. On motion of appellant that the original and supplemental opinions, reported in 140 Neb. 330, 339, be modified to conform to revivor order, and on motion by substituted appellees that supplemental opinion be set aside. *Appellant's motion sustained and motion of appellees overruled, with leave to file motion for rehearing.*

Woods, Aitken & Aitken, for appellant.

Beghtol, Foe & Rankin, Walter E. Nolte, Boehmer & Boehmer, R. M. Anderson and *Claude S. Wilson, contra.*

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

YEAGER, J.

This case was before this court, and on July 29, 1941, an original opinion was filed and released which appears as 140 Neb. 330, 299 N. W. 496. Thereafter a petition and application was filed by the appellant for modification of the opinion. After the filing of the application for modification, and before ruling thereon, Maud Hammond, the appellee, died. After the death of the said Maud Hammond and on November 21, 1941, a supplemental opinion was filed and released, modifying the original opinion. This supplemental opinion appears as 140 Neb. 339, 300 N. W. 808. Thereafter, on March 2, 1942, on application of the appellant in regular form, and on proper notice, the action was revived in this court in the names of Sewell A. Sanderson, administrator of the estate of Maud Hammond, deceased, and Hazel O'Conner, heir at law and devisee of Maud Hammond, deceased, as appellees.

Thereafter, on March 13, 1942, the appellant filed its motion in this court praying that the original and supplemental opinions and judgments hereinbefore referred to be modified so as to conform to the revivor order entered herein.

Also the substituted appellees moved that the supplemental opinion be set aside and that mandate be issued in accordance with the original opinion, or in the alternative that the substituted appellees be given opportunity to file briefs and to have oral argument before order modifying, changing or enlarging the original opinion.

After hearing but before determination upon said motions, Sewell A. Sanderson, administrator, died. Following his death Claude S. Wilson qualified as administrator, and he has been duly substituted for the said Sewell A. Sanderson in this action.

On consideration it is the opinion of the court that the motion of the appellant should be sustained, and that the original opinion as modified by the supplemental opinion should be and it is declared to be in full force and effect against the parties in whom the action was revived, that is, Claude S. Wilson, administrator of the estate of Maud Hammond, deceased, and Hazel O'Conner, heir at law and devisee of Maud Hammond, deceased, as appellees, to the same extent and with like effect as it would be as to Maud Hammond if she were alive.

It is further the opinion of the court that the motion of appellees should be overruled, but that they should be and are granted 40 days from the release of this opinion within which to file in this court motion for rehearing touching and bearing upon all matters and issues determined in the original opinion, the supplemental opinion and in this second supplemental opinion.

JUDGMENT ACCORDINGLY.

STATE, EX REL. NEBRASKA STATE BAR ASSOCIATION, RELATOR, V. CLIFFORD L. REIN, RESPONDENT.

4 N. W. (2d) 829

FILED JULY 10, 1942. No. 31186.

1. **Attorney and Client.** Where an attorney has commingled with his own and used for his own purposes trust funds of a client and surety for the client is called upon to make good the shortage, later reimbursement of the surety by the attorney does not settle the accountability of the attorney to the court, the bar and the public.
2. ———. A false and fraudulent representation made to a surety company by an attorney for the purpose of procuring the company to become surety on a bond is a matter proper for consideration in a disciplinary proceeding against the attorney, where the surety bond was procured upon such fraudulent representations, even though the surety sustained no damage.
3. ———. All moneys received by an attorney in payment of a judgment due to a client are trust funds, including the portion against which the attorney claims a lien for his fees, and they so remain until proper distribution is made.

4. ———. A conversion or use of trust funds by an attorney which renders him unable to make an accounting and delivery thereof to the person entitled to accounting and delivery is a violation of the solemn and sacred duty imposed by the oath of the attorney.
5. **Champerty.** A contract between an attorney and his client whereby the attorney agrees to bear the expense of litigation is champertous and a violation of the code of ethics controlling the members of the Nebraska bar.

Original disciplinary proceeding by the state, on the relation of the Nebraska State Bar Association, against Clifford L. Rein. *Judgment of disbarment.*

Walter R. Johnson, Attorney General, and *Rush C. Clarke,* for relator.

Chambers, Holland & Locke, for respondent.

Heard before ROSE, EBERLY, PAINE, CARTER, MESSMORE and YEAGER, JJ.

YEAGER, J.

This is a disciplinary action instituted by the state of Nebraska on relation of the Nebraska State Bar Association against Clifford L. Rein, a duly licensed attorney at law, whereby it is sought to bring about his disbarment because of illegal, improper and unethical practices and conduct engaged in by him. A complaint containing the specifications of the claimed practices and conduct was filed in this court on which issues were joined, whereupon the matter was referred to the Honorable Jean B. Cain as referee whose province it was to make findings of fact and conclusions of law and report them to this court. The proceeding is now before the court on the findings and the report of the Referee that the respondent has violated his oath as an attorney and counselor at law and has engaged in unprofessional, unethical and improper conduct, and the exceptions of the respondent thereto.

The complaint contains ten separate specific charges of improper conduct in the relations of Rein with clients, three charges of unethical and improper provisions contained in contracts used in the attorney and client relationship and

five general charges which amount to a summary of the elements involved in the specific charges.

In the report of the referee four of the first ten charges are sustained, and the three relating to contractual provisions are sustained. As to the last named five the referee reports that they have been covered under other headings. As to the remaining six charges the referee found that they were not sustained, but in three of them he pointed out substantially that while wrong-doing was not shown the practices there outlined were not ethically above criticism.

The details of all of the separate charges will not be set forth in this opinion.

The first charge to which reference will be made is the one referred to by the parties as the Lewis matter. As to this matter the details need not be recited. The respondent admits that what he did in this matter was a violation of the duty that he owed to the people represented by him, and of his duties and obligations as an attorney at law.

He argues that the matter is lacking in seriousness and that severe disciplinary action should not be imposed since he claims no one suffered because of the infraction.

The facts are, however, that he took, and for a period of years used as his own, funds belonging to a guardianship estate for which he was attorney, and for which funds he has never to this day accounted directly to the guardian or to the estate. It became necessary for the surety on the bond of the guardian to make the estate whole. He seeks to minimize the enormity of his defection by the assertion that he has since reimbursed the surety. This cannot be accepted in absolution or in mitigation of the enormity of this kind of wrongful conduct on the part of an attorney at law.

In the recent case of *State v. Hendrickson,* 138 Neb. 846, 295 N. W. 892, it was stated: "Settlement with the principal by payment of the claim evidenced by the assigned judgment, under the circumstances, after exposure and investigation by the State Bar Association, did not settle respondent's accountability to the court, to the bar and to the public." See, also, *State v. Priest,* 123 Neb. 241, 242 N. W. 433; *State v. McGan,* 138 Neb. 665, 294 N. W. 430.

The facts which brought forth the foregoing statement were somewhat different from the ones we are examining here, but since in both cases the question of accountability for misuse of funds of a client was involved the principle there stated applies here. Here settlement was not even made with the principal, but was made with the surety of the principal after the surety was required to respond. Here the acts justify even more severe condemnation.

The next charge to which attention is directed is the one referred to as the Wasenmiller matter. The details necessary to a consideration of this matter are the following: In April, 1931, respondent entered into a contract with one Amalia Wasenmiller by the terms of which he and another attorney were employed to institute action against Robert E. McDonnell and others for damages for the wrongful death of Alexander Wasenmiller, the deceased husband of Amalia Wasenmiller. By the terms of the contract respondent was to receive a fee equal to 50 per cent. of any judgment recovered. Action was instituted in the district court for Lancaster county, Nebraska, which action was transferred to the United States district court at Lincoln, Nebraska. The case was tried and on December 9, 1933, a verdict and judgment were obtained for $20,000. Nothing was paid on the judgment until December 24, 1934, when $17,554.16 was paid into court. Of this amount $13,412.41 was paid to respondent, $188.32 was retained as clerk's fees and the remaining amount was held pending a dispute between the defendant and the University of Nebraska, this remaining amount being the equivalent of the sum which had been paid as compensation benefits by the University of Nebraska for the injury and death of Alexander Wasenmiller. The University of Nebraska claimed right of subrogation to the judgment in that amount. The balance of the judgment was paid in February, 1935, and in consequence respondent received an additional $3,651.75, and the University of Nebraska received $4,006.72. Thus respondent received on behalf of his client as the avails of the judgment with interest the total sum of $17,064.16, and the University of Nebraska

by virtue of its right of subrogation received therefrom $4,006.72.

Respondent claimed as his proper fee under the contract one-half of the entire recovery with interest, including the $4,006.72 which was paid to the University of Nebraska, or $10,612.90.

On December 31, 1934, a petition for distribution was prepared by respondent and signed by Amalia Wasenmiller which showed the total distributive share of the widow and minor children as $4,432.81. This obviously was based on the partial payment of the judgment.

Amalia Wasenmiller objected through another attorney to the distribution which was after final and full payment of the judgment. To this objection respondent filed, on August 15, 1935, an answer in which he set forth that $1,944.27 had been paid, and that there was still due $3,531.94, and that the total distributive share of the widow and minor children out of the entire recovery with interest was $5,476.21, after deducting as fees in the case $10,612.90 and expenses. It was also stated in the answer that the amount remaining due was $3,624.40, and that respondent was entitled to $250 fees for other or extra services.

On May 29, 1936, the county court of Lancaster county, Nebraska, entered an order of distribution finding the balance due the estate to be $3,614.40. From this order an appeal was taken to the district court which is still pending.

The appeal came on for hearing in the district court on April 26, 1937. It was never tried. However, at that time certain most singular steps were taken. Respondent announced that he did not have the money which he admitted to be due the estate, notwithstanding that he had received all of the avails of the judgment and did not claim to have paid any sum except $1,944.27.

It was then stipulated in the presence of the district judge that respondent was to become administrator of the estate of Alexander Wasenmiller and furnish a bond of $5,000 as such administrator. It was further stipulated that on appointment respondent was to pay $1,000 in cash, and an ad-

ditional $100 a month, begining June 1, 1937, until he had paid $4,000 in addition to the cash payment of $1,000, or a total of $5,000.

Why this was done we are not able to say, but from the record we can say with certainty that the trial judge and the representatives of the Wasenmiller estate were confronted with a defalcation on the part of the attorney for the estate amounting to at least $3,614.40, and claimed by Amalia Wasenmiller to be much in excess of that amount, with no ability on the part of the attorney to make good his default. Also, they were confronted with a situation wherein Amalia Wasenmiller as administratrix was liable for the default of respondent although none of the money with which she was chargeable had ever come into her hands, except $1,944.27.

It doubtlessly appeared that the agreement and stipulation for appointment of respondent as administrator of the estate was a scheme and a device, but apparently the only discernible method whereby the liability of the administratrix could be protected, and the estate to the extent of $5,000 could be made whole.

Respondent was appointed administrator and gave the $5,000 bond with St. Paul Mercury Indemnity Company as surety on his bond.

In his application to the surety company for the bond, clearly on the basis of the record respondent practiced a fraud on that company. In his application to the company he stated, among other things, that he was not indebted to the estate.

It is clear that respondent never complied with the terms of the foregoing stipulation and that he was in default on April 1, 1940, when in an effort to obtain the money agreed to be paid by him a new stipulation was entered into, reducing the amount of monthly payments to $50 a month. At the time of the hearing before the referee, respondent still owed under the stipulation, according to the admission contained in his brief, the sum of $980.

There are other details concerning this transaction which could be set out, but we think those that are set forth are

sufficient to furnish a fair understanding of this phase of the charge against the respondent.

In addition to the charge of commingling of funds and defalcation, there is a complaint that the contract for fees is unconscionable and excessive.

As to this charge it is our opinion that the matter is not properly before the court in this disciplinary action. The matter was presented to and passed upon by the county court of Lancaster county, Nebraska, and from the action appeal was taken to the district court where the proceeding is still pending. In the light of these facts it appears that this matter should not at this time be considered here.

That the funds in question in the hands of the respondent were trust funds, there can be no doubt. This proposition is so well settled that citation of authority is not necessary. Also that they remained such and that no act of the attorney with reference to them could change or convert the relationship into one of debtor and creditor is equally well settled. *State v. Goldman,* 127 Neb. 340, 255 N. W. 32.

The question of what constituted or made up the trust fund is a pertinent one. The question answered is that all of the money received in payment of the judgment constituted the trust fund, not only that which the respondent laid no claim to but also that portion which he claimed as a fee under his contract. The judgment was hers as were also the avails of the judgment. The most that respondent had prior to settlement of his fee was a lien upon the money which came into his hands. Comp. St. 1929, sec. 7-108. *Van Etten v. State,* 24 Neb. 734, 40 N. W. 289; *Burleigh v. Palmer,* 74 Neb. 122, 103 N. W. 1068.

That respondent in the handling of this money violated the solemn and sacred duty imposed upon him by his oath as an attorney and his statutory duty with regard to these funds in his hands is proved beyond question. Also, to any and all lawyers who are sensible of their professional duties and obligations, such practices are readily recognizable as transgressions meriting withdrawal of the right to practice law from any and all who are found to have engaged in such practices.

There are two other charges somewhat similar in character to the two already described that we find are sufficiently proved by the evidence; however, we deem it unnecessary to do more than to refer to them as they are designated in the briefs. They are the Walker matter and the Griggs matter.

As to the so-called Gleason, Schmidt and Gotchall-Mahaney matters the respondent is proved to have engaged in practices which are not free from question, but taken alone, on the record, would hardly justify disciplinary action.

As to the so-called Hill, Selders and Maney v. Hamer matters we agree with the referee that these charges have not been sufficiently proved.

Respondent is charged with having engaged in champertous practices by the use of contracts containing the following provision: "In the event that the said ——— recovers nothing in said compensation action, or upon said compensation claim, he shall owe the said Clifford L. Rein nothing for his services and disbursements, pursuant to this agreement."

In *Omaha & R. V. R. Co. v. Brady,* 39 Neb. 27, 57 N. W. 767, the practice contemplated by the contract, a part of which is quoted, is condemned as champertous. The following is found in the opinion: "It will be observed that one of the essential elements of the vice of champerty is that the champertor must carry on the litigation at his own expense."

This court in *In re Integration of Nebraska State Bar Ass'n,* 133 Neb. 283, 275 N. W. 265, adopted the Canons of Professional Ethics of the American Bar Association as the canons to which the ethics of the lawyers of Nebraska shall conform. Canon 42 is as follows:

"A lawyer may not properly agree with a client that the lawyer shall pay or bear the expenses of litigation; he may in good faith advance expenses as a matter of convenience, but subject to reimbursement."

That practices conformable to quoted provision of the contract used by respondent are in violation of our code of ethics can hardly be questioned.

It is charged that a further provision in contracts of re-

spondent with clients is improper. The provision is as follows: "Upon the security of this cause of action with the signature of all the parties to this agreement, Clifford L. Rein may borrow the sum of not to exceed $100 to be used for costs and expenses of litigation."

If given the interpretation claimed for it by the respondent, that is, that the pledge itself must be signed by the client, then the provision is harmless. If, however, the provision may be interpreted to mean that the signature to the agreement by the client gives the right to Rein to pledge the cause of action, then it ought to be condemned.

From a careful consideration of this record, parts of which we have pointed out in this opinion, we have concluded that over a period beginning as early as 1927, and carrying over to the date of hearing before the referee herein, the respondent has engaged in practices violative of his oath of office as an attorney and that his conduct has been such that he should no longer be permitted to retain his license to practice law.

The order of admission of Clifford L. Rein to the bar of this state is therefore annulled, and his name is ordered stricken from the roll of attorneys and counselors at law.

JUDGMENT OF DISBARMENT.

WALLACE VANCE, APPELLEE, V. HAROLD HENDERSON, APPELLANT.

4 N. W. (2d) 833

FILED JULY 10, 1942. No. 31427.

1. Injunction. "The remedy by injunction is not available to enforce a bare legal right, when there is a plain and adequate remedy at law." *Mohat v. Hutt*, 75 Neb. 732, 106 N. W. 659.
2. ———. Where the effect of the extraordinary remedy of injunction is to obtain possession of real estate, such remedy is not available unless the facts and circumstances are such that the ordinary legal remedies are inadequate.

APPEAL from the district court for Webster county: FRANK J. MUNDAY, JUDGE. *Reversed.*

Clifford H. Phillips, for appellant.

Ralph E. Adams, contra.

Heard before SIMMONS, C. J., ROSE, EBERLY, PAINE, CARTER and YEAGER, JJ., and ELLIS, District Judge.

ELLIS, District Judge.

This action was brought September 12, 1941, by the plaintiff to enjoin the defendant from planting winter wheat on 55 acres of a quarter-section of land in Webster county. The trial court granted the injunction and the defendant has appealed.

Plaintiff alleged that the quarter-section was leased to defendant from March 1, 1941, to March 1, 1942; that during July, 1941, plaintiff notified defendant he was not to "farm, hold or possess said land beyond the period of his lease;" that on September 3, 1941, plaintiff notified defendant he was not to sow any wheat or other fall crop, and that notwithstanding said notices defendant was sowing wheat.

Plaintiff's evidence was very brief. He testified the land was rented to defendant from March 1, 1941, to March 1, 1942; that lease arose out of letters; that defendant did not follow his instructions as to use of the land; and his oral notice to defendant in July, 1941, that he wanted possession on March 1, 1942. Another witness testified that defendant had started to sow wheat. Another witness testified to service of written notice on defendant on September 3, 1941. This was a notice to quit on March 1, 1942, and also not to sow wheat or other fall crop.

To this evidence defendant interposed a demurrer which was overruled. It seems clear that this proof was insufficient to justify injunctive relief and that the demurrer should have been sustained.

The defendant's evidence disclosed a letter, dated December 17, 1940, in which plaintiff said: "I want about (figure either 1/4 or 1/3) of land summer fallowed and small patches farmed to keep weeds down. All rented for 1/3 of crop delivered * * * ."

Under date of December 26, 1940, defendant wrote: "Your letter of the 17th at hand and in regards to the land your terms are O.K. with me."

Under date of January 19, 1941, plaintiff wrote: "You can go ahead and farm the place this year, putting in all that is allowed, and summer fallow the rest." He also made some suggestions as to crops to be planted and asked defendant to write him once in a while as to how things looked.

Defendant's evidence discloses two additional letters from plaintiff under dates of April 10 and May 2, 1941. They can hardly be said to have formed any part of the lease and furthermore do not lend any support to plaintiff's claim for injunctive relief.

The defendant also testified as follows: "Q. Was there anything said about who was going to put in the wheat? A. He said to summer fallow this ground and that we would put in the wheat this fall, meaning him and I."

The defendant testified to summer fallowing 42 acres of the land, the operations incident thereto and the reasonable value of the same; that he started to drill wheat on this land also testified to expenses incurred incident to his defense of and was stopped by the temporary restraining order. He the action and effort to have the injunction dissolved.

On the record the defendant challenges the correctness of the trial court's judgment as unsupported by the evidence and contrary to law.

In view of the allegations of plaintiff's petition and testimony, as well as from the notice which he served, it seems clear that defendant's lease ran until March 1, 1942. The defendant was in actual and peaceable possession of the land. In the absence of reservations or restrictions, a tenant is entitled to the exclusive possession and use of the demised premises and may even maintain trespass against his landlord. There is nothing in this record to create a bar to the defendant planting wheat on the premises if he saw fit to do so. If, as plaintiff contends, the defendant's lease expired on March 1, 1942, and he had not used or otherwise disposed of the wheat, he ran the risk of losing his labor and

seed. This gave the plaintiff no right to accelerate the expiration of the lease and certainly no right to injunctive relief. There is no evidence of circumstances or anything that the defendant had done or was threatening to do that could constitute irreparable injury to the land or the plaintiff.

The plaintiff seeks to justify the injunction on the ground that the plaintiff did not have grounds for either an action for ejectment or forcible entry and detention or forcible detention and therefore that the remedy of injunction was made available. This is a *non sequitur.*

It seems to us quite clear that the plaintiff did not have grounds for the remedies stated, and further that he had no grounds for interfering with defendant's possession by way of injunction. What the plaintiff sought was to deprive the defendant of possession of a part of the land. This necessarily involved assertion of a right in plaintiff to such possession. The extraordinary remedy of injunction is not ordinarily available to try questions of the right to possession of real estate and certainly not in the situation before us.

Our view of the case is expressed in the language of this court in *Mohat v. Hutt,* 75 Neb. 732, 106 N. W. 659: "It is clear to us that this suit is simply an attempt to employ the extraordinary writ of injunction to enforce what, at most, is a mere legal right, and one which the ordinary remedies at law are amply adequate to protect. In other words, it is an attempt to substitute the remedy by injunction for ejectment, and forcible entry and detainer, and the prayer for an injunction for that purpose should have been denied."

The plaintiff argues that if denied injunctive relief he would have been required to retain a tenant whom he did not want and a tenancy from year to year would have been created and thus he would have sustained irreparable injury. The plaintiff cites no authority to sustain this contention.

We need not agree or disagree with this contention as to the nature of the tenancy. Remedies do not create rights, neither do they make or alter contracts. The remedy of injunction could not alter the character of the tenancy and

other remedies afforded adequate means for determining and enforcing the rights of the parties whatever they were.

The judgment in favor of plaintiff must be reversed and plaintiff's action dismissed. The cause is remanded for such action by the trial court and disposition of defendant's claim herein for damages according to law.

REVERSED.

EMIL FRITZ, APPELLEE, V. SYLVIA JUNGBLUTH, APPELLANT.
4 N. W. (2d) 911

FILED JULY 17, 1942. No. 31350.

Equity. "The doctrine that a plaintiff who comes into a court of equity with unclean hands will be denied relief has no application, unless his wrong-doing has some proximate relation to the subject-matter sought to be litigated." *Northwest Ready Roofing Co. v. Antes*, 117 Neb. 121, 219 N. W. 848.

APPEAL from the district court for Douglas county: JOHN A. RINE, JUDGE. *Affirmed.*

Bolus J. Bolus, for appellant.

Gilbert S. Brown, contra.

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

SIMMONS, C. J.

Plaintiff in this action sought (1) a decree determining that he was the owner of two commercial trucks, title to which is held by the defendant, and an order transferring title to him; (2) an accounting of moneys received and disbursed by the defendant from the leasing to a transfer company of these trucks and other commercial equipment and a judgment for the same; (3) a judgment for money loaned to the defendant; (4) a release or cancelation of a chattel mortgage on a truck owned by the plaintiff, executed by the plaintiff and delivered to the defendant; (5) an order restraining the defendant from selling or encumbering the trucks or mortgage; and (6) for equitable relief.

Defendant alleged that the trucks and moneys received were her own and that plaintiff was indebted to her for moneys loaned and paid for his benefit. She prayed for a dissolution of the restraining order, the dismissal of plaintiff's petition, for judgment for money due her, and for equitable relief.

The trial court found for the plaintiff on all of his contentions and entered decree accordingly, including a money judgment for funds of plaintiff held in trust by the defendant and for moneys loaned by plaintiff to defendant. From this decree the defendant appeals, questioning the sufficiency of the evidence to sustain the decree and in any event seeking application of the equitable maxim that one who seeks equity must come into court with clean hands.

The evidence in most respects is in direct conflict. The trial court was presented with the determination of disputed questions of fact. This court faces that same situation. The defendant does not question the amount of plaintiff's recovery, but rather challenges his right to recover any amount and challenges the denial of a money judgment to her.

Plaintiff and defendant, a trained nurse aged 30 years, were friends. There is no dispute that plaintiff in 1939 was the purchaser and the owner of two commercial trucks, the title to one being in his own name and the title to the other being carried in the name of the transfer company. Plaintiff was the driver of one of these trucks. He was also a member of the truckers' union at Omaha. This local union had an oral rule that prohibited a driver from owning and operating more than one truck. This apparently was the reason why the title to the second truck was in the name of the transfer company. Plaintiff purchased a third truck, and, in order to avoid trouble with his union, proposed to quit driving and spend his time managing and caring for the trucks and his business accounts. Plaintiff discussed the situation with defendant. He says that she suggested he transfer title to one of the trucks to her, that she would keep an account of his business, and he could continue driving, and that that is what he did, without any consideration

passing. She says she purchased the trucks. It is agreed that the purpose of the transfer, known to defendant, was to enable plaintiff to avoid the rule of the union. Defendant testified that she bought the first truck in August, 1939, for an agreed consideration of $800, paying $400 down and $100 a month thereafter. Receipts are in evidence for these payments. Plaintiff had paid about $1,300 for this truck shortly before that time. Plaintiff testified that the receipts were all written and delivered at one time in order to show them to the union, if inquiry was made, and that no money was ever paid to him. Defendant testified that she had no idea of the value of the truck, had no knowledge of the trucking business, and relied on plaintiff's statement that it would be a profitable venture for her. Defendant testified that she made these payments out of a fund of $2,500 that she had accumulated from her earnings as a nurse in either six or eight years, which she kept in currency in her apartment, because she had lost some money in a bank in 1930 and was fearful of them. She, however, shortly thereafter opened up a bank account where the earnings of all of this equipment were deposited, amounting to several thousand dollars, and she issued checks against those deposits, apparently without any fear of the safety of the banking institution. Defendant testified that plaintiff was to pay to her the earnings on this truck; that he did not do so and made no accounting to her; that nevertheless she continued to pay the purchase price instalments, and that when the purchase price was fully paid, still without an accounting as to the earnings on the first truck, she purchased the second truck from plaintiff, paying $400 down thereon from her cash funds and took a receipt therefor. He testified that this transfer also was without consideration and to avoid the rule of the union. Plaintiff closed out his bank account and directed that the earnings of the trucks be paid to defendant. She deposited these funds in a bank account in her own name, paid therefrom costs of repairs, operating expenses, instalment payments due on equipment, etc. Plaintiff also purchased two refrigerator trailers, and the earnings from these were paid

to defendant and placed in the bank account. Some time thereafter two of the three original trucks were traded for the two more valuable trucks involved in this litigation, upon which deferred payments were to be made. Plaintiff says that he arranged and approved the trades. Defendant says that she made the transfers on her own initiative. It appears that she conducted at least a part of the negotiations. The earnings of these new trucks were also paid to defendant. In these transactions plaintiff kept title to one of the trucks in his own name (although not always the same truck). Plaintiff executed the note and chattel mortgage upon the truck held in his own name payable to the defendant; this is the note which is involved in this litigation. He says that the note was without consideration and made at defendant's suggestion to protect her from any liability that might not be covered by insurance. She says that the amount of the chattel mortgage ($800) covered $450 estimated earnings on the first truck which she claims to have purchased, some $260 which she says she overpaid plaintiff in these transactions and $90 (estimated) which she says was for small cash loans she made the plaintiff from time to time. If defendant's story is to be believed, in less than two years plaintiff changed his position from that of being the owner of trucks, profitably operated and with a cash surplus, to that of being the owner of one used truck, subject to an $800 indebtedness to defendant, two refrigerator trailers (status of payments not shown) and in addition owing the defendant some $700 unsecured, and defendant from an original investment of $1,300 became the owner of two valuable trucks, subject to unpaid instalments, became the plaintiff's creditor in the sum of over $1,500 and was the owner of a bank account which in March, 1941, is shown to have had a balance of $2,640. We see no reason to further recite details of the evidence. We reach the same conclusion on the facts as that arrived at by the trial court.

Defendant here argues that, notwithstanding a finding in favor of the plaintiff, she is entitled to keep title and possession of plaintiff's property and money and enforce the chat-

tel mortgage because his purpose of placing it in her hands was to enable him to avoid the application of the union rule that a truck driver could not continue to drive if he were the owner of more than one truck. The union is not here complaining; it is not a party to this transaction; neither it nor its members are shown to have been damaged or prejudiced by what plaintiff did. It is not shown that the union objected to plaintiff's handling of his property in the way that he handled it or that it ever investigated the matter of the title or ownership of the trucks. Plaintiff did not by this transfer seek to place his property beyond the reach of his creditors nor to avoid any order of court, etc. He sought merely to so place the title that his right to drive a truck, as a union member, would not be disturbed. This affected his personal status as a union member. The union had no right to object to the transfer of the property. It had no property right therein or claim of any kind that could attach to the property. The arrangement between the plaintiff and the defendant, whereby she held title to his property, received his funds and paid them out for his benefit, is not shown to be illegal, immoral, or against public policy.

The maxim "He who comes into equity must come with clean hands" is "merely the expression of one of the elementary and fundamental conceptions of equity jurisprudence." 1 Pomeroy, Equity Jurisprudence (4th ed.) sec. 398. "Broad as the principle is in its operation, it must still be taken with reasonable limitations; it does not apply to every unconscientious act or inequitable conduct on the part of a plaintiff. The maxim, considered as a general rule controlling the administration of equitable relief in particular controversies, is confined to misconduct in regard to, or at all events connected with, the matter in litigation, so that it has in some measure affected the equitable relations subsisting between the two parties, and arising out of the transaction; it does not extend to any misconduct, however gross, which is unconnected with the matter in litigation, with which the opposite party has no concern. When a court of equity is appealed to for relief it will not go outside of the subject-

matter of the controversy, and make its interference to depend upon the character and conduct of the moving party in no way affecting the equitable right which he asserts against the defendant, or the relief which he demands." 1 Pomeroy, Equity Jurisprudence (4th ed.) sec. 399. See, also, 21 C. J. 187; 30 C. J. S. 491, sec. 98 c.

"The question to be resolved is whether the complainant's wrongful conduct is connected with, or related to, the dispute between the complainant and the defendant, and not whether the complainant has been guilty of wrong-doing from which he has benefited." 19 Am. Jur. 327, sec. 473. "If the wrong is shown to be merely collateral to the complainant's cause of action, it does not constitute matter of defense." *Ibid,* 328, sec. 475. "In the absence of any other equity arising against plaintiff, the general rule is that the misconduct must be so connected with the subject-matter as to affect the equitable relations between the parties." 21 C. J. 188.

In *Blondel v. Bolander,* 80 Neb. 531, 547, 114 N. W. 574, this court said: "It is to be observed that the conduct which will deprive the plaintiff of a right to resort to a court of equity for the relief to which he would otherwise be entitled must be in connection with the same matter or transaction." "The doctrine that a plaintiff who comes into a court of equity with unclean hands will be denied relief has no application, unless his wrong-doing has some proximate relation to the subject-matter sought to be litigated." *Northwest Ready Roofing Co. v. Antes,* 117 Neb. 121, 219 N. W. 848. See, also, *Weaverling v. McLennan,* 116 Neb. 466, 217 N. W. 956; *Citizens Nat. Bank v. Polski,* 122 Neb. 658, 241 N. W. 110; *Langley v. Devlin,* 95 Wash. 171, 163 Pac. 395, 4 A. L. R. 32; *Carpenters Union v. Citizens Committee,* 333 Ill. 225, 164 N. E. 393, 63 A. L. R. 157; *Teuscher v. Gragg,* 136 Okla. 129, 276 Pac. 753, 66 A. L. R. 143.

Defendant in effect asks an equity court to decree that she is the owner of plaintiff's chattels and money, because he, the plaintiff, sought to avoid the rigors of a union rule, a matter with which this defendant had no concern, and, while

it may have prompted him to act, it did not in any wise affect the property rights existing between the plaintiff and the defendant or the equities that arose from the arrangement that was made. We see no basis for the application of the maxim to the issues here presented.

The trial court on its own motion allowed defendant a credit of $500 for her services to the plaintiff. About this the plaintiff does not complain. The defendant has been justly and generously treated by the trial court's decree. It is

AFFIRMED.

WOODMEN OF THE WORLD LIFE INSURANCE SOCIETY, APPELLEE, V. O. M. OLSEN, COMMISSIONER OF NEBRASKA STATE DEPARTMENT OF LABOR, APPELLANT.

4 N. W. (2d) 923

FILED JULY 17, 1942. No. 31356.

1. **Master and Servant.** A compensable claim for benefits under the Nebraska unemployment compensation law must have some relation to, or connection with, the employment which employee has lost.
2. ———. A wife who voluntarily leaves her employment for "the sole and only reason of being with her husband" in another city, to which he has been transferred by his employer, does so "without good cause" and thus disqualifies herself as a claimant for unemployment benefits, within the meaning of that term as used in the Nebraska unemployment compensation law.

APPEAL from the district court for Douglas county: JOHN A. RINE, JUDGE. *Affirmed.*

John E. Sidner and *Ray W. McNamara,* for appellant.

Rainey T. Wells, J. M. Sturdevant, George Yeager, John F. Futcher and *Albert F. Wahl, contra.*

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

ROSE, J.

This is a proceeding under the unemployment compensa-

tion law. Comp. St. Supp. 1939, secs. 48-701, 48-724. Grace Radloff was employee and claimant for unemployment benefits. Woodmen of the World Life Insurance Society was employer and its plea was disqualification of employee as claimant for benefits. The deputy commissioner and the appeal tribunal allowed the claim. The employer appealed from the decision of the appeal tribunal to the district court for Douglas county where the claim was disallowed. O. M. Olsen, commissioner of the Nebraska state department of labor, appealed to the supreme court. A motion to dismiss the appeal, on the ground that the commissioner was not a party having an appealable interest in the controversy, was overruled. *Woodmen of the World Life Ins. Society v. Olsen, ante,* p. 12, 2 N. W. (2d) 353.

The cause was heard below on the following stipulation of facts:

"The claimant was employed by the employer from November 1, 1931, until May 27, 1939; that during the year 1933 claimant was married to her present husband but continued to work for the employer; that on or prior to May 27, 1939, claimant's husband was transferred by his employer to Davenport, Iowa, to which city he was to continue his employment; that claimant voluntarily left her work with the employer for the only reason of being with her husband; that she on or about May 27, 1939, went to Davenport, Iowa, for that purpose; that her leaving her work was not in any way induced or caused by any act or conduct of the employer; that on June 3, 1940, she registered for work at a public employment office at Davenport and made her claim for benefits against the Nebraska unemployment compensation fund; that any benefits which might be paid under her claim would be charged to the reserve account of the employer."

On these facts the employer contends that employee is disqualified as a claimant for unemployment benefits by the following provisions of the legislative act:

"An individual shall be disqualified for benefits: (a) For the week in which he has left work voluntarily without good cause, if so found by the commissioner, and for not more

than the five weeks which immediately follow such week, as determined by the commissioner according to the circumstances in each case: Provided, that such individual shall be disqualified from benefits for any week of unemployment when he does not report in person to a Nebraska State Employment Service Office." Comp. St. Supp. 1939, sec. 48-705.

Within the meaning of this legislation, did claimant leave the work of her employment voluntarily "without good cause?" Both parties agree that this is the question for solution. The commissioner of the department of labor argues that the unemployment compensation law is remedial in its nature and should be liberally construed to give effect to its beneficent purposes; that the husband of employee had a right to select the domicile for himself and his wife; that it was her duty to live with him; that when she voluntarily left her employment to go with him to their new home in a different city she did so with "good cause." On the other hand, the employer contends that the law cannot be extended by construction to noncompensable claims and that employee voluntarily left her work "without good cause."

It was a legislative purpose to ameliorate ills growing out of labor troubles and unemployment. Protection of the public from pauperism and from other burdens created by unemployment was also in the minds of the lawmakers. The legislature considered these subjects and acted directly on them. Provision was made for the creation, conservation and distribution of funds to make the law effective. These funds were not intended for disqualified claimants for benefits. Disqualification as well as eligibility of claimants must be considered in giving effect to the words "without good cause." The legislative act does not deal directly with domestic relations. Of course it is the duty of a wife to live with her husband while the marital relation exists, if conditions permit, but the unemployment compensation law does not relieve the husband from his duty to support his wife. Her employer did nothing to prompt her decision to leave her work. The cause of her voluntary action had no connection with the abandoned relation of employer and employee.

The purposes and import of the unemployment compensation law in its entirety indicate that a compensable claim for benefits must have some connection with, or relation to, the employment which the employee has lost. As stated in a recent opinion:

"Disqualification under the act depends upon the fact of voluntary action and not the motives which brought it about. * * *

"The unemployment compensation act does not purport to grant benefits to workmen who leave their work voluntarily." *Deshler Broom Factory v. Kinney*, 140 Neb. 889, 2 N. W. (2d) 332.

A compensable claim for benefits under the Nebraska unemployment compensation law must have some relation to, or connection with, the employment which employee has lost. The views of the law herein expressed, when applied to the stipulated facts, lead to the conclusion that claimant left her employment "without good cause" within the meaning of that term as used in the statute, and that her claim was properly disallowed by the district court.

AFFIRMED.

ANNA SULLIVAN, APPELLEE, V. MICHAEL J. SULLIVAN, APPELLANT.

4 N. W. (2d) 919

FILED JULY 17, 1942. No. 31358.

1. **Divorce.** In a decree granting a wife a divorce and the custody of minor children, monthly instalments of alimony and support become vested as they accrue, and unpaid, past-due portions thereof are final judgments beyond the power of the court to reduce by modification of the original decree.
2. ———. Evidence *held* insufficient to prove that instalments of alimony and support were subsequently reduced by modification of the decree of divorce and paid as modified.

APPEAL from the district court for Douglas county: HERBERT RHOADES, JUDGE. *Affirmed.*

Gross & Crawford and *James J. Gleason,* for appellant.

Brown, Crossman, West, Barton & Fitch and *Edward A. Nelson, contra.*

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

ROSE, J.

This is a proceeding to modify a decree in a suit for a divorce and to release defendant from further payments of alimony and from further support for his children.

Anna Sullivan, plaintiff, recovered a decree in the district court for Douglas county November 12, 1929, granting her a divorce from her husband, Michael J. Sullivan, defendant, the custody of their children, Bernice, age 10, and Michael, age 8, and, in addition to other relief, alimony for plaintiff and support for the children at the rate of $65 a month.

The petition of defendant for relief from his pecuniary obligations under this decree alleges in substance that it was subsequently modified from time to time and that he made all payments required by the original decree and by the modifying orders; that he is not now indebted to plaintiff; that his daughter Bernice is now 21 years of age and that defendant is no longer liable for her support; that defendant's son Michael is now 18 years of age, is employed and is self-supporting and is not entitled to further support from his father; that defendant's health is impaired; that he is out of employment and in dire need for his own sustenance.

The answer of plaintiff puts in issue the alleged modifications of the original decree and the alleged payments satisfying alimony and support for the children, and alleges that defendant owes plaintiff for unpaid alimony and for support of the children $4,846.48; that his daughter Bernice is a permanent invalid, unable to minister to or care for herself and will remain so for life and will be dependent upon her father for support.

Upon a trial of the issues the district court found and decreed that there had been no modification of the original decree reducing the instalments of $65 a month and that the

unpaid balance due plaintiff was $4,296.52, with interest from March 12, 1940. By further findings and decree defendant was released from payments for alimony and from support for the children subsequent to March 12, 1940. The original decree was modified accordingly. Defendant appealed from the judgment against him for $4,296.52.

In attacking as erroneous the judgment for unpaid portions of the instalments for alimony and for support, counsel for defendant argued that the allowance of $65 a month by the decree of November 12, 1929, was subject to modification, owing to changed condition of the parties; that defendant stripped himself of all his property for the benefit of plaintiff and their children; that he was subsequently out of employment and income at times; that his earnings decreased until he was unable to pay the monthly instalments in full; that by order of the judge by whom the divorce was granted November 12, 1929, the instalments of $65 a month were reduced to $50 a month July 24, 1933; that, under orders from the juvenile court or from officers thereof, defendant paid plaintiff from his earnings less than the instalments specified in the original or modified decree; that he made payments to the utmost of his ability until he commenced this proceeding for release from further liability March 12, 1940; that he thus satisfied the decree for alimony and support.

In this argument there is a fallacy. Defendant did not prove any modification of the original decree. The monthly instalments for alimony and support vested in plaintiff by judgment as they matured. Thereafter the unpaid portions could not be taken away by order of court. The law has been stated as follows:

"The law is well established in this state that instalments of alimony become vested as they accrue, and that past-due instalments become final judgments, and courts have no authority to cancel or reduce the amount of such accrued payments. *Wharton v. Jackson,* 107 Neb. 288, 185 N. W. 428; *McIlwain v. McIlwain,* 135 Neb. 705, 283 N. W. 845; *Was-*

sung v. Wassung, 136 Neb. 440, 286 N. W. 340." *Clark v. Clark,* 139 Neb. 446, 297 N. W. 661.

The cases cited show that the law stated applies to support for children as well as to alimony.

The order of July 24, 1933, upon which defendant relies to show a reduction in the monthly instalments, recites:

"That heretofore an order issued out of the court ordered said Michael J. Sullivan to pay in to the clerk of the district court of Douglas county, Nebraska, the sum of $50 per month for the support and maintenance of his three minor children."

Defendant did not produce any record or other evidence of an order such as that to which reference is thus made, or any petition therefor or any notice to plaintiff who was without knowledge of any modification of her decree for divorce and alimony. Orders to pay less than vested, past-due monthly instalments were not modifications of the original decree and amounted to no more than directions to make or impound partial payments from defendant's earnings. The evidence is found insufficient to sustain a judgment in favor of defendant on his plea that the monthly instalments required by the original decree were reduced in amount by subsequent modifications and fully paid. The district court properly found that the amount due plaintiff March 12, 1940, was $4,296.52, with interest from that date.

Owing to changed condition of the parties the district court released defendant from liability for payments of alimony and support subsequent to March 12, 1940. From this order there is a cross-appeal by plaintiff. The release was justified by the evidence. The proofs show that the earnings of defendant at the time of the trial herein, if any, did not exceed what was necessary for his own livelihood and that he had no other income. Plaintiff then had, free from encumbrance, the home she had acquired from defendant at the time of the divorce. At the time of the trial herein plaintiff was able to support herself and her invalid daughter by the aid of her son, by her own earnings while employed and by the income from roomers and boarders. Relief on the

cross-appeal is therefore denied, but this will not preclude further modification of the original decree to order defendant to support his invalid daughter, if required by further changed condition of the parties.

Error in the record has not been found. The judgment below is therefore affirmed at the costs of defendant, including attorneys' fees of $250 for services of counsel for plaintiff in the supreme court.

AFFIRMED.

IN RE ESTATE OF WARNER AUGUST PIEL.
EMMA L. M. PIEL, EXECUTRIX, APPELLANT, V. DOUGLAS COUNTY, APPELLEE.
4 N. W. (2d) 875

FILED JULY 17, 1942. No. 31283.

1. **Appeal.** "The transcript of a record filed in this court for the purpose of appeal imports absolute verity, and in considering the appeal must be treated as the sole and exclusive evidence of the facts." *Grand Island Savings & Loan Ass'n v. Moore*, 40 Neb. 686, 59 N. W. 115.
2. **Taxation.** In the assessment of inheritance taxes, appeal lies from the order of the county judge determining from the appraiser's report duly made and filed the then cash value of the estate and the tax to which same is liable to the county court of the county, which court, on such appeal, is vested with jurisdiction to determine all questions in relation to the inheritance taxes. This appeal does not in the first instance lie to the district court of the county.

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

Hotz & Hotz, William J. Hotz and *William F. Dalton*, for appellant.

James T. English and *Oscar T. Doerr, contra.*

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

EBERLY, J.

As stated by the appellant, "This is an appeal from the district court of Douglas county involving the question of the legality of including in the property of an estate certain municipal bonds claimed by the executrix to be erroneously included by the appraiser, but which bonds the county court, over the objection of the executrix, held were the property of the estate and upon which property was based the inheritance tax liability, and judgment rendered against the executrix therefor by the county court. On the appeal from the county court to the district court, the district court sustained a motion filed by the appellee county of Douglas to strike the transcript there lodged by the executrix. It is from that order striking the transcript that the executrix now appeals."

In this case, "The transcript of a record filed in this court for the purpose of appeal imports absolute verity, and in considering the appeal must be treated as the sole and exclusive evidence of the facts." *Grand Island Savings & Loan Ass'n v. Moore,* 40 Neb. 686, 59 N. W. 115. See, also, *Lewis Investment Co. v. Boyd,* 48 Neb. 604, 67 N. W. 456.

The transcript on appeal discloses: (1) The appointment of Emma L. M. Piel as executrix of the last will of Warner August Piel, deceased; (2) the inventory of said estate as returned by Emma L. M. Piel; (3) report of receipts and disbursements of such executrix from May 13, 1932, to April 4, 1933; (4) report of J. C. Travis as the duly appointed appraiser of said estate, filed August 10, 1933; (5) "Protest" filed by Emma L. M. Piel, as executrix of the estate of Warner August Piel, to the report of the appraiser, filed August 31, 1933; (6) written tender by the executrix of the sum of $1,200 and interest as inheritance tax and statement of facts on which same is based, filed April 3, 1939; (7) withdrawal of offer of inheritance tax by Emma L. M. Piel, filed August 3, 1939; (8) motion of James T. English, county attorney of Douglas county, "to assess inheritance tax due in the above captioned estate pursuant to the report of the appraisers herein filed," filed March 14, 1940; (9) answer of execu-

trix to the motion to assess inheritance tax, which appears to have been filed March 18, 1940; (10) "Inheritance Tax Decree," which provides:

"This matter coming on for hearing this 19th day of March, 1940, on the report of the appraiser and on examination of said report and the files in said estate, I find that the said deceased departed this life on April 14th, 1932, possessed of personal property located in Douglas county, Nebraska, of the value of $382,234.88; that after deducting claims, costs and fees in the sum of $8,467.78 there remains property of the value of and subject to tax in the sum of $373,767.10; that by the terms of the will of said deceased the following received bequests of the value and subject to tax as set out below:

Name	Relation	Bequest	Exemption	Tax
Carl E. Lundstrom	Legatee	$ 1,000.00	None	$ 40.00
Emma L. M. Piel	Widow	248,511.40	$196,883.55	516.28
Ethel Piel Jack	Daughter	124,255.70	10,000.00	1,142.56
		$373,767.10		$1,698.84

"It is, therefore, ordered, adjudged and decreed that the Executrix of said estate pay to the County Treasurer of Douglas county, Nebraska, the sum of $1,698.84 together with interest at the rate of seven per cent. per annum from April 14th, 1932, until paid.

"The appraiser's fee has been paid as per order of this Court entered on May 5th, 1934.

"Bryce Crawford, County Judge.

"Filed—March 19, 1940."

The proceedings thus outlined are a substantial compliance with section 77-2211, Comp. St. 1929, relative to appraisement of a decedent's estate for the assessment of inheritance tax by the appointed appraiser. This section provides in part, after the making of an appraisal of a decedent's estate and the filing of the report thereof in the county court, and after direction as to notices to be given in certain events, "and from such * * * report made by the appraiser, the county judge shall forthwith determine and fix the then cash value of all estates, annuities and life estates

for terms of years growing out of said estates, and the tax to which the same is liable, and shall give immediate notice through the mails to all parties known to be interested therein."

The directions of this statute just quoted appear to have been fully performed by the order of the county judge made in this case on the 19th day of March, 1940, which we have quoted in full. Up to and including the entry of this last order the proceeding is to be deemed *ex parte* or administrative in its inherent nature. However, section 77-2211, Comp. St. 1929, further provides: "Any person or persons dissatisfied with the appraisement or assessment may appeal therefrom to the county court of the proper county within sixty days after the making and filing of such appraisement or assessment, conditioned upon the giving of security to the court to pay all costs," etc. In this connection, section 77-2213, Comp. St. 1929, provides, as follows: "The county court in the county in which the real property is situated of a decedent who was not a resident of the state, or in the county of which the deceased was a resident at the time of his death, shall have jurisdiction to hear and determine all questions in relation to all taxes arising under this article, and the county court first acquiring jurisdiction hereunder shall retain the same to the exclusion of every other."

From the above sections, which are emphasized by other sections of this act, it is clear that while the procedure was at first *ex parte,* upon the appeal being taken by "any person or persons dissatisfied with the appraisement or assessment" therefrom "to the county court of the proper county," which was given "jurisdiction to hear and determine all questions in relation to all taxes arising under this article," it then and there became a controversy *inter* parties, and the action of the county court was thereafter not merely administrative but judicial. *Smith v. Douglas County,* 254 Fed. 244.

Under section 77-2213, Comp. St. 1929, the county court, as such, on appeal "therefrom" to it duly prosecuted, is vest-

ed with complete, exclusive jurisdiction to judicially determine in the first instance "all questions in relation to" inheritance taxes, etc.

In the instant case, as shown by the transcript before us, no appeal was prosecuted from the order entered on March 19, 1940, fixing and assessing inheritance tax, *to the county court of Douglas county,* as required by section 77-2211, Comp. St. 1929. But a transcript of the proceedings disclosing this defect was lodged in the district court for Douglas county. Obviously, at that time the district court for Douglas county had no jurisdiction of the subject-matter which by express statute was then vested in the county court of Douglas county.

In this view of the case, the action of the district court in striking the transcript was in all respects correct and is

AFFIRMED.

R. A. BLEICHER, APPELLEE, V. WILLIAM C. HEETER, APPELLANT.

4 N. W. (2d) 897

FILED JULY 17, 1942. No. 31315.

1. **Insurance.** "Any person * * * who shall in any wise make or cause to be made any contract or contracts of insurance, for or on account of such company (insuring company) aforesaid, shall be deemed to all intents and purposes an 'agent' * * * of such company." Comp. St. 1929, sec. 44-307.
2. ———. An agent authorized to solicit and receive applications for insurance and to countersign and issue policies entrusted to him for that purpose is a general agent.
3. ———. An agent of the insurer advancing premiums for the assured is entitled to recover all sums so advanced as money paid out, or on the principle of subrogation.
4. ———. If, however, the insurer exercises his option under section 44-342, Comp. St. 1929, to terminate and cancel the insurance contracts on which such advancements have been made by his agent, the obligation of the insured to pay premium is thereby reduced to the premium earned while the risk was being carried.

5. ———. Where policy is canceled by insurer for nonpayment of premiums, insurer is entitled to recover premiums earned while risk was being carried, determinable on the *pro rata* basis.
6. **Estoppel.** "Where one, by his words or conduct, wilfully causes another to believe in the existence of a certain state of facts, and induces him to act on that belief or to alter his previous condition, the former is concluded from averring against the latter a different state of things as existing at the same time." *Cain v. Boller*, 41 Neb. 721, 60 N. W. 7.

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

G. E. LaViolette, for appellant.

C. E. Walsh, contra.

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

EBERLY, J.

This is an action by Bleicher, an insurance agent, doing business as R. A. Bleicher & Company, against Heeter, the defendant, to recover certain premiums advanced by the former upon three certain policies of fire insurance issued by him to Heeter covering property owned by the defendant, and in which policies the latter is the assured. It is alleged that the total premiums, according to the terms of the three policies, amounted to $57.26; that no part of the same has been paid by Heeter, except the sum of $4.40 paid on October 2, 1939, and $10 paid on December 30, 1939. The plaintiff asks judgment for the balance due.

Heeter's defense includes the claim that he paid to plaintiff an additional $10 for which no credit was given, making the total deduction the sum of $24.40 to which he was entitled; that the three policies were duly canceled by the companies issuing the same on February 23, 1940, effective February 28, 1940, on the *pro rata* basis and defendant was entitled to credit for unearned premium on the policies as of the date of cancelation; that, excluding the disputed item

of $10, there was due to plaintiff on the date of cancelation the sum of $19.81, and no more, and that this amount was duly tendered to plaintiff and the tender kept good.

The answering claim of the plaintiff is that the canceled policies were never turned in or delivered to plaintiff, and no cancelation was effected by defendant because of such failure.

It may be said that this case was originally tried in the municipal court of Omaha, and by stipulation it was tried in the district court on the pleadings as filed in the municipal court. The contentions of the respective parties were necessarily gleaned from the record as an entirety. The trial in the district court resulted in a judgment for the plaintiff in full of the demands made. From the order of the district court overruling his motion for a new trial, the defendant appeals.

Preliminary to a discussion of the merits of the appeal, we note that the petition alleges that "plaintiff is engaged in the insurance business as an insurance broker," etc. From the evidence in the record, including the policies of insurance from which this litigation arises, and the indorsements thereon, the facts appear that plaintiff takes applications for insurance, and writes policies covering the same which are signed and issued by him at his Omaha office. He thus appears as operating a recording agency. He is, therefore, an "agent" within the provisions of section 44-307, Comp. St. 1929, providing that, "Any person * * * who shall in any wise make or cause to be made any contract or contracts of insurance, for or on account of such company aforesaid, shall be deemed to all intents and purposes an 'agent' * * * of such company." See *Rhoads v. Columbia Fire Underwriters Agency*, 128 Neb. 710, 260 N. W. 174.

Furthermore, it fairly appears that plaintiff obtained the business and signed each policy issued thereon as agent of the company insuring. Obviously, he must be treated in this proceeding as an "agent," and, for the purposes of this action, as representing the companies and not the assured.

Robinson v. Union Automobile Ins. Co., 112 Neb. 32, 198 N. W. 166.

An agent authorized to solicit and receive applications for insurance and to countersign and issue policies entrusted to him for that purpose is a general agent. 26 C. J. 42, and cases cited.

Where a policy issued by a foreign company is not valid until countersigned by a local agent, such agent will be deemed to be an officer having power to issue the policy, although it contains a provision that it shall not be valid until countersigned by certain officers of the company. 26 C. J. 42, and cases cited. See, also, 26 C. J. 287.

All parties admit that the defendant failed to completely pay the premiums on the three policies of fire insurance issued to him. The defendant's claim is that his payments thereon amounted to $24.40. Plaintiff's assertion is that such payments amounted to $14.40, and no more. As to the events that led up to the cancelation of these policies, we find a decided conflict in the evidence.

Bleicher testifies: "Q. Now, referring to the exhibits as to the purported cancelations, did you have any conversation before February the 23d with Mr. Heeter? A. On the morning of the 23d I saw Mr. Heeter, and he got kind of hostile, and I told him there was no need of doing anything like that, 'We are either going to get paid the account or we will be through.' So he requested cancelation of the policies, and I granted him the request. Q. Did you ask at the time for the return of the policies? A. Oh, yes; and he promised to bring those policies in. Q. And did he ever bring the policies in? A. No, sir."

This evidence, except as to nondelivery of the policies, is clearly and unqualifiedly denied by defendant. He testifies that he never made any request for the cancelation of any of the policies. It must be said, however, that plaintiff's case is largely presented here on the theory that defendant requested the cancelation of the policies of insurance and then failed to deliver the policies or to pay the amount of premium due, computed at the short rate. But this theory is not de-

terminative of the real issues of the case without reference to the condition of the record on the matters to which this conflicting evidence relates.

In 1885 our legislature enacted chapter 57 of the session laws of that year, entitled, "An Act to provide for canceling insurance policies." Its provisions were devoted wholly to creating and defining the rights of the assured to a cancelation of any policy of insurance, and the return of the unearned premium at any time upon such request by him made, less certain deductions therein specified. In 1913 (Laws 1913, ch. 154, sec. 72) this law of 1885 was reenacted verbatim by our Insurance Code of 1913, it now appearing as section 44-342, Comp. St. 1929, and there was then added thereto the sentence: "Any company or association also reserves the right to cancel any policy or any part thereof by tendering to the assured the paid unearned premium." In the policies herein involved, as issued to the defendant, are the following provisions: "This policy shall be canceled at any time at the request of the insured; or by the company by giving five days' notice of such cancelation. If this policy shall be canceled as hereinbefore provided, or become void or cease, the premium having been actually paid, the unearned portion shall be returned on surrender of this policy or last renewal, this company retaining the customary short rate; except that when this policy is canceled by the company by giving notice it shall retain only the *pro rata* premium."

If, therefore, we have actually here presented a cancelation made by the insurer as above authorized, the conflict in the evidence as to the promise to return the policies becomes wholly immaterial.

However, the facts here presented invoke the application of the rule that, "The agent advancing premiums is entitled to recover all sums so advanced as money paid out and expended, or on the principle of subrogation; and he has a lien on the policy therefor whenever it comes into his hands, unless he has abandoned it." 26 C. J. 62.

Nevertheless, notwithstanding the remittance of premi-

ums by R. A. Bleicher & Company, three contracts of insurance, as to all their terms, rights and incidents, still remain in full force and effect as the contracts of the insurer and the insured. The advancement of premium by the agent of the insurer in no manner affects the rights of a cancelation exercisable by the parties to the insurance contract, and the amount of his recovery is necessarily affected by the rights actually exercised by either party to the same. In the instant case, if the insurer terminated the contract by cancelation, the obligation of the insured to pay premium was thereby reduced to the premium earned while the risk was being carried. This is determinable on the *pro rata* basis of the premium charged for the entire term insured and the possible recovery must be limited accordingly.

However, plaintiff challenges the sufficiency or validity of the registered notice of cancelation of the three policies, the unpaid premiums on which form the basis of his causes of action in the instant case. For various reasons he now claims the service of these notices of cancelation did not terminate the existence of the policies to which these notices were directed, but that such insurance contracts remain in full force and effect. The facts as to this service of notice include the following: In February 23, 1940, there was transmitted to Heeter by R. A. Bleicher & Company (R. A. Bleicher), who operated the agency that issued the three policies, by registered mail, a notice and statement in writing that these instruments had been canceled on the *pro rata* basis "as of February 28, 1940," which further recited, "The reason we have canceled this policy on the 28th of February is that you are entitled to five days before we cancel the policy." A separate statement was transmitted for each policy involved. Transmitted with these statements was a communication signed by R. A. Bleicher & Company, which contained the following declaration: "These policies are canceled for nonpayment of premium and they are canceled on a *pro rata* basis and we are giving you five days' notice as required by law to take care of these elsewhere and you will note these policies are effective until the 28th of February,

1940." The intent to accomplish a complete cancelation is clearly and unconditionally expressed. Also, it appears with equal clearness that the cancelations thus made by the insurers were fully justified and authorized under the provisions of the several policies hereinbefore quoted, and as provided by the 1913 amendment contained in our Insurance Code, now carried as the last sentence in section 44-342, Comp. St. 1929.

It will be remembered that, had the cancelation been made at the request and option of the assured under section 44-342, Comp. St. 1929, it would have involved a determination of the amount due insurer on the short rate basis which was not contemplated by the notices of cancelation actually given and served upon the insured by the insurers in this case. The cancelations here sought must be deemed to have been made by the insurers on their own motion, and not as a requirement of the insured. It follows that the Nebraska cases decided by this court prior to 1913 on the subject of cancelation of insurance policies upon the request of the assured, cited by appellee in his brief, are not controlling in the instant case. The law authorizing the present proceeding was not enacted when the cases last referred to were determined.

Under the terms of section 44-342, Comp. St. 1929, cancelation of fire policies is accomplished by the insurer by service of a notice to that effect upon the insured, and "by tendering to the assured the paid unearned premium." In each of the three policies here canceled, there being no "paid unearned premium," no moneys were required to be paid or tendered, and the sole duty resting on the insurers was the service of notice as here made. The return of the canceled policies by the assured under these circumstances was not made a requirement of a valid cancelation, nor may it be demanded by the insurers as a condition to cancelation.

It seems well established, however, that, "On cancelation of a policy (by insurer) for nonpayment of premiums insurer is entitled to recover premiums earned while the risk was being carried." 26 C. J. 112. This amount is determinable on a *pro rata* basis of the full term rate and obviously the

insurance company can receive no more. True, none of the insurance companies whose policies were thus canceled are parties to this proceeding. The undisputed evidence is that all the premiums on the policies here involved were remitted to the insurers therein named by R. A. Bleicher & Company who as local agent of each of the insuring companies secured the risk, wrote, countersigned and issued such policies. There is no evidence that the defendant had knowledge of the fact of such payment. However, the rights secured by the terms of these policies as between the insured and the insurers were in no manner changed by this voluntary advancement of premiums made by R. A. Bleicher & Company. The right of cancelation by the insurers provided for by section 44-342, Comp. St. 1929, was still effective and in no manner modified or impaired thereby, and the requirement to return "paid unearned premium" remained in full force and effect where such premium had been actually paid by assured, but limiting recovery of unpaid premiums to such as were earned while the risk was being carried, where payment of such premium had not been made by the assured.

But the plaintiff now challenges the validity of the notices of cancelation transmitted by him, as agent of the insurers, to the defendant Heeter, and claims the policies were never canceled but remain in full force and effect. In this relation, it is to be remembered that he was at all times the lawful agent of the insuring companies; that as such he obtained the insurance from the defendant, wrote, signed, and issued each policy, and delivered the same to the defendant; that as such agent he prepared, signed, and issued the notice of cancelation hereinbefore referred to, and caused the same to be served on the defendant by registered mail. By necessary implication he vouched for the truth of the statements in each of the notices and statements then served therein contained. It now appears that, as to the sum now claimed by him for premiums advanced, he is, and was at the time of the service of notices of cancelation, the owner thereof and the real party in interest.

The evidence is without contradiction that these notices of

cancelation thus prepared and served on the defendant were by him accepted, and by him believed to be true as the terms thereof purported to express, and to legally accomplish their declared purpose. Further, that relying thereon, on the 28th day of February, 1940, defendant secured new policies of insurance covering his property, formerly insured by the policies purported to have been canceled by plaintiff's notices, and thereby necessarily represented to the new insurer that the canceled policies ceased to be effective on and after February 28, 1940.

This new situation, in view of the surrounding circumstances including the acts and positive representations of the plaintiff, invokes this well-established principle of estoppel: "Where one, by his words or conduct, wilfully causes another to believe in the existence of a certain state of facts, and induces him to act on that belief or to alter his previous condition, the former is concluded from averring against the latter a different state of things as existing at the same time." *Cain v. Boller*, 41 Neb. 721, 60 N. W. 7. See, also, *Lydick v. Gill*, 68 Neb. 273, 94 N. W. 109; *Preston v. Mann*, 25 Conn. 118, 128; *Graham Ice Cream Co. v. Petros*, 127 Neb. 172, 254 N. W. 869.

It follows that, under the circumstances of this case, as between the parties to this proceeding, the three policies involved must be deemed as canceled by the insurers, and that thereby the recovery of premium was limited to the premium earned to the 28th day of February, 1940. We note that the evidence in this record tends to show that this limited amount was tendered to the plaintiff by the defendant prior to the trial in the district court, and the tender by plaintiff refused. We, therefore, find that the district court erred in the amount of the judgment entered by it from which the defendant appealed.

The judgment of the trial court is, therefore, reversed, and the cause remanded for further proceedings in harmony with this opinion.

REVERSED.

BEULAH E. OWENS, APPELLEE, V. DAISY G. REED ET AL., APPELLANTS.
4 N. W. (2d) 914

FILED JULY 17, 1942. No. 31372.

1. **Witnesses.** A party who has a direct legal interest in the result of a suit is precluded by section 20-1202, Comp. St. 1929, from testifying against the representative of a deceased person as to any transaction or conversation between the witness and such deceased person, except as specified in the statute.
2. ———. A written transaction with, or statement by, a deceased person may not be testified to by an adverse party with a direct legal interest in the result of the suit, there being no distinction made between written or verbal transactions or statements by the statute.
3. ———. In a suit between the grantee of a deed and a devisee of a will involving the question of the delivery of the deed, the grantee has a direct legal interest in the result of the suit, and the devisee under the will is the representative of a deceased person.
4. **Deeds.** Whether or not a deed was delivered is ordinarily a question of the intent of the grantor to be determined from all the facts and circumstances.
5. ———. The burden of proving the delivery of a deed rests upon the party asserting that the delivery was made.
6. ———. Where an unrecorded deed is retained in a safe-deposit box belonging to the grantor with a legal right of access in the grantee, the grantor retaining control of the property, collecting the rents, making the repairs and paying the taxes thereon, the evidence is insufficient to sustain a finding that delivery was made in the absence of evidence of an intent on the part of the grantor to divest himself of title to the property.

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

William R. Patrick and *Charles E. O'Brien,* for appellants.

Jackson B. Chase and *William H. Thomas, contra.*

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

CARTER, J.

This was a suit to quiet the title to certain real estate in Omaha claimed by plaintiff under a deed executed on Janu-

ary 23, 1920, by her brother and placed on record after his death on April 15, 1936. The trial court quieted the title in plaintiff, and defendant appeals.

The evidence shows that plaintiff was the only sister of George E. Reed who was, at the time the deed was executed, an unmarried man. On March 18, 1930, George E. Reed married the defendant, Daisy G. Reed, and they lived together until Reed's death. On May 27, 1932, Reed executed a will in which he devised certain described real estate to his wife and "also all other property, both real, personal and mixed wherever found that I may die possessed of except that hereinafter mentioned." The property in question is not specifically described in the will and is claimed by defendant by virtue of the residuary clause hereinbefore quoted.

The record further shows that the will of George E. Reed was probated and the property in question duly assigned to defendant by the will. This decree of the probate court of Douglas county is alleged by plaintiff to constitute a cloud on her title which she asks to have quieted in this suit.

After the death of Reed the two contesting parties, together with members of their respective families and others, met in the City National Bank in Omaha and opened a safe-deposit box in which Reed kept his papers and other valuables. The record is clear that Reed rented the safe-deposit box for his own use. The evidence is, however, that he sent his sister, the plaintiff, a key to the safe-deposit box and had her name included as a corenter. There is no evidence that plaintiff ever used it for her personal use, or that she had ever had occasion to open it for any purpose prior to her brother's death.

Upon opening the safe-deposit box there was found an envelope containing the last will of George E. Reed, together with the deed here involved, three other deeds and a letter written to him by Lois Owens, plaintiff's daughter. Laying on the envelope was a memorandum written by George E. Reed. Plaintiff claims that exhibit No. 20 appearing in the record was the memorandum found there. It was addressed

to "My Dear Sister Beulah" and was in part as follows: "A letter for you is in this box, also your papers are in the envelope. Take all the papers that are in the box, and go over and see Mr. George B. Lasbury room 759, Omaha Natl. Bank Bldg. He will tell you just what to do, and how to look after my business and your own. * * * Your Brother George." Below the signature appears the following: "9:30 a. m. May 28-32. I opened this box this morning. George E. Reed."

Defendant denies that exhibit No. 20 was the memorandum in the safe-deposit box and testifies that the memorandum in the box when it was opened was as follows: "To be delivered to my sister Mrs. Beulah E. Owens after my death." Three other witnesses, all relatives of defendant, corroborate this statement. Defendant and her witnesses testify that everything was put back into the safe-deposit box, except the letter written by Lois Owens, with the understanding that no one was to open the safe-deposit box unless others were present. Plaintiff returned to her home in Wisconsin and immediately authorized one Wheeler to come to Omaha and take possession of the contents of the safe-deposit box, which he did. Wheeler thereupon caused the deed to the property in question to be recorded, and delivered the will to the proper court for probate. It is claimed by defendant that the memorandum actually in the safe-deposit box, when it was first opened, disappeared during the time plaintiff and Wheeler were in possession of its contents.

There is considerable evidence in the record to the effect that Reed continued, after making the deed to plaintiff, to collect the rents from the property, pay the taxes and make the repairs thereon. Most of this was actually done by rental agents who accounted to George E. Reed. Plaintiff contends that Reed looked after the property for her during his lifetime.

Defendant produces evidence that tenants in the property never heard of plaintiff and never saw her about the premises during the 16 years intervening between the execution of the deed and the death of the grantor. There is no direct evidence by any one other than by plaintiff and her daughter

that plaintiff ever asserted ownership to the property prior to the death of Reed. Plaintiff's daughter, Lois Owens, testifies that Reed personally delivered the deed to Mrs. Owens in the spring of 1924 and that Mrs. Owens had him put them in the safe-deposit box in Omaha. There are many conflicting details in the evidence which we shall not attempt to recite here.

Defendant contends that certain exhibits were erroneously received in evidence for the reason that they constituted a transaction between a deceased person and one having a direct legal interest in the result of the suit in which the adverse party is the representative of the deceased and that the evidence of plaintiff was consequently incompetent to lay the foundation for their admission under the provisions of section 20-1202, Comp. St. 1929. There can be no question that plaintiff as the grantee in the deed to the property involved herein has a direct legal interest in the result of the suit and that the defendant as devisee under the will of her husband is a representative of the deceased within the purview of this statute. Exhibit No. 3 is a receipt for the rental of the safe-deposit box in Omaha and purports to show George E. Reed and Mrs. Beulah E. Owens as corenters. The proof of this relationship is very essential to the establishment of her claim and her evidence is therefore incompetent to lay the foundation for its admission as evidence for the reason that it constitutes a transaction with the deceased.

Defendant also complains of the trial court's ruling admitting in evidence exhibit No. 20, the memorandum hereinbefore quoted, for the same reason. The foundation for the admission of this exhibit was laid by the testimony of Lois Owens, the daughter of plaintiff. She testified that it was in the handwriting of George E. Reed and that she saw it first when the deposit box was opened on April 21, 1936. We think the exhibit was properly admitted.

Defendant claims error in the admission of exhibit No. 72, a letter dated May 28, 1932, from Reed to his sister. The letter was identified and the foundation for its admission as

evidence was laid by Lois Owens, the daughter of the grantee in the deed. The letter was admissible for the reason that the statute has no application where the transaction is shown by evidence other than that of one having a direct legal interest in the result of the suit. A similar objection is made to exhibit No. 75, a letter under date of October 21, 1923, from Reed to his sister. The foundation for the receipt of this letter in evidence was laid by the testimony of Lois Owens. It also was properly received.

The question was continually raised as to the competency of Beulah E. Owens to testify as one having a direct legal interest in the result. We are obliged to say that she was incompetent to testify, upon proper objection being made, to any transaction or conversation with the deceased bearing upon the result of this suit. *Kroh v. Heins*, 48 Neb. 691, 67 N. W. 771; *Broeker v. Day*, 124 Neb. 316, 246 N. W. 490. In some instances the testimony was received and the ruling reserved. In others, the objections were overruled. We shall therefore assume that the trial court disregarded all incompetent evidence. In considering the record *de novo*, we shall likewise disregard all incompetent evidence to which objection was timely made.

The deed to the property in suit was executed on January 23, 1920. Three deeds to other properties were also executed on different dates subsequent thereto, the last one being on March 21, 1924. There is evidence in the record that Reed was not in good health, a letter under date of October 21, 1923, indicating that he had had a stroke some time previously. In a letter in the record, received by Beulah E. Owens some time in 1924, Reed said: "It looks to me now like you would have to be troubled with them most any time. You will find Mr. Lasbury will give them as good care for you as I do." These words were written on a diagram showing the property involved in this case and the house where he lived some distance away. The inference is present that he thought his health was such that Mrs. Owens would soon have the properties in her care. The evidence of Lois Owens is to the effect that Reed visited them in the spring of 1924

at their home in Wauwatosa, Wisconsin, and delivered all of the deeds to her mother. It is worthy of note that the deed in question was at that time more than four years old and that the last deed to other property alleged to have been conveyed was dated March 21, 1924. These transactions occurred several years prior to the marriage of Reed to the defendant, Daisy G. Reed, on March 18, 1930, and consequently there is no way in which the wife can dispute the transaction except by putting the plaintiff on strict proof. The deeds were found in a safe-deposit box in an Omaha bank. It is evident that Reed first rented the box and on or about January 28, 1920, he requested the name of Beulah E. Owens to be added. This date being only five days after the execution of the deed in question leaves a strong inference that there was a causal relation between the two events. To us it seems apparent that Reed executed the deed, probably because of his fear for his own health, placed it in his safe-deposit box, and caused the name of his sister, the grantee in the deed, to be added as a corenter of the box. The evidence is clear that Mrs. Owens never made any use of the box and had never opened it until after the death of Reed. If Reed was content to have this undelivered deed remain in the safe-deposit box for four years, it seems rather strange to us that he should suddenly change his mind and take the deed to plaintiff and deliver it as testified to by Lois Owens, the only competent witness on the subject. The coincidence becomes greater when the delivery is alleged to have been made immediately following the execution of the last of the four deeds found in the safe-deposit box. There is no evidence that Mrs. Owens ever claimed the property prior to the death of Reed. In fact, Reed continued to collect the rents, make the repairs and pay the taxes. If the deeds had been delivered personally to Mrs. Owens by Reed with intent to divest himself of the title, it would seem that in the ordinary course of events they would have been filed for record. We think the circumstances are such that the evidence of actual delivery testified to by Lois Owens is insufficient to sustain the burden of proof cast upon the plaintiff. In the mem-

orandum found in the safe-deposit box and identified as such by Lois Owens, Reed directs Mrs. Owens to take them to George B. Lasbury for advice. Unless the death of Reed affected the nature of the transaction, there would have been no reason for this direction. If Mrs. Owens was the owner of the property before the death of Reed, his death could take nothing from, nor add anything to, her title. We think the record shows an intent on the part of Reed from the very inception of the transaction to make the deeds effective only at his death. This is further evidenced by a statement in a letter dated May 28, 1932, addressed to Mrs. Owens, in which he said: "I want you to open the box first if possible when I am gone." Unless he had expected her to receive something of value after his death, there could be no reason for his expressed desire for her to be the first to open the safe-deposit box. The inference is clear that he wanted her to get the deeds which he thought would effectively convey the title at his death. The contents of the memorandum laying in the box substantiate this view. The record indicates that Reed had no great amount of property and it hardly appears likely that he would absolutely divest himself of it under the circumstances shown. Much is made of the fact that Reed left a will in which he particularly described certain properties which he devised to his wife, and that none of the four covered by the deeds was included. We think that Reed did intend to convey the title to the properties to Mrs. Owens at his death, but if delivery was not made, his purpose simply was not legally consummated. On the other hand, the property in Missouri on which Reed lived with the defendant was not described in the deed and passed to the wife under the residuary clause contained in his will.

The placing of the deeds in the safe-deposit box was not of itself a delivery. The fact was that the safe-deposit box was used only by Reed and the rental thereof paid by him. Mrs. Owens apparently treated it as the property of Reed. While she may have had a legal right of access to it, no inference can be drawn that she was in possession of the contents of the safe-deposit box. We cannot say from the rec-

ord before us that the depositing of the deeds in the safe-deposit box evidenced an intent on the part of Reed to part with their possession, or to deliver them to Mrs. Owens as a conveyance of the title. *Haecker v. Haecker*, 113 Neb. 587, 204 N. W. 72. This court has held that the delivery of a deed is purely a question of intent to be determined from all the facts and circumstances and that the burden of proof rests upon the party asserting that delivery was had. *Ehlers v. Seip*, 136 Neb. 722, 287 N. W. 202. We think the evidence shows an intent on the part of Reed to retain the possession of the deed, as well as the possession and title of the property which it purported to convey, until after his death. His attempt to convey in this manner being ineffective, the plaintiff has no title and is not entitled to a decree quieting the title in her. We think the trial court erred in holding to the contrary.

REVERSED AND DISMISSED.

GRAND ISLAND BAKING COMPANY, APPELLEE, V. WAYNE C. FRANTZ, APPELLEE: O. M. OLSEN, COMMISSIONER OF LABOR OF THE STATE OF NEBRASKA, APPELLANT.

4 N. W. (2d) 921

FILED JULY 17, 1942. No. 31437.

1. **Master and Servant.** An employee who has been discharged for ordinary misconduct is entitled to maximum benefits under the provisions of the unemployment compensation law, Comp. St. Supp. 1941, sec. 48-705, subdivision (b), the payment of such benefits to commence after the additional waiting time, not exceeding five weeks, has elapsed.
2. ———. It is the evident purpose of the unemployment compensation law to erect a barrier to the payment of benefits for a period not exceeding five weeks where the employee has been discharged for misconduct connected with his work. There is nothing in the act indicating a legislative intent to reduce the maximum benefits where the disqualifying condition was a discharge from his employment because of such misconduct.

APPEAL from the district court for Hall county: ERNEST G. KROGER, JUDGE. *Affirmed as modified.*

John E. Sidner and *Ray W. McNamara,* for appellant.

Lloyd W. Kelly, contra.

Heard before SIMMONS, C. J., ROSE, EBERLY, PAINE, CARTER and YEAGER, JJ., and ELLIS, District Judge.

CARTER, J.

This is an appeal from a judgment of the district court for Hall county awarding benefits under the unemployment compensation law.

The claimant, Wayne C. Frantz, was employed by the Grand Island Baking Company as a truck driver and route salesman. He was authorized to extend credit to new customers for three days, within which period the company furnished the credit rating to which the customer was entitled. Extensions of credit in excess of the company's authorization were at the risk of the employee. Merchandise was checked out and in each day, and a daily record kept of the sales made by each route salesman.

It appears that on December 18, 1940, claimant extended credit to one P. Sorahan, 522 East Division, and failed to advise the company and obtain a credit rating thereon. On January 11, 1941, the account reached the sum of $6.20, and deliveries were discontinued. During a brief illness another salesman performed claimant's work, and as a result the P. Sorahan account was discovered in the back of claimant's route book and that there was no P. Sorahan at the address given. Upon his return to work claimant was advised that the manager desired to see him, whereupon he quit his job on the assumption that he was about to be fired.

The employer contended that claimant's misconduct was gross, flagrant, wilful, or unlawful and that claimant's wage credits should, under the unemployment compensation statute, be canceled. The trial court found that claimant voluntarily quit his employment to avoid discharge for having extended unauthorized credit and that the misconduct shown was not gross, flagrant, wilful, or unlawful. The court thereupon awarded benefits for the period commencing after

the first five weeks of unemployment and for a period not exceeding eleven weeks.

The record sustains the finding of the trial court that claimant quit his employment to avoid being discharged for extending unauthorized credit to a customer and that it had not been established that the misconduct was gross, flagrant, wilful, or unlawful. No fault is found with the trial court's judgment in allowing benefits for a period commencing after the first five weeks of unemployment. The limitation of benefits to a period not exceeding eleven weeks is assailed, however, as contrary to the statute and the result of an incorrect interpretation thereof.

Applicable provisions of the unemployment compensation act are as follows: "(d) Duration of Benefits. Any otherwise eligible individual shall be entitled during any benefit year to a total amount of benefits equal to whichever is the lesser of (1) sixteen times his benefit amount, and (2) one-third of the wages for insured work paid during his base period * * * ." Comp. St. Supp. 1941, sec. 48-703.

"Disqualifying Conditions. An individual shall be disqualified for benefits: * * * (b) For the week in which he has been discharged for misconduct connected with his work, if so found by the commissioner, and for not more than the five weeks which immediately follow such week, as determined by the commissioner in each case according to the seriousness of the misconduct: Provided, that if the commissioner finds that such individual's misconduct was gross, flagrant and wilful, or was unlawful, the commissioner shall totally disqualify such individual from receiving benefits with respect to wage credits earned prior to such misconduct * * * ." Comp. St. Supp. 1941, sec. 48-705.

It will be noted in that part of section 48-703, Comp. St. Supp. 1941, which we have quoted, that the benefits to be received are limited only in the amount to be received in any benefit year. Where an employee is discharged for misconduct, as in the case at bar, a disqualifying condition is interposed by section 48-705 (b). The effect of this disqualification is not that the amount of benefits which he may re-

ceive in any benefit year is reduced, but that the commencement of benefit payments is deferred for an additional period not exceeding five weeks. There is clearly no intent to reduce the maximum amount of benefits to be received in a benefit year in a case of ordinary misconduct as is provided where the misconduct was found to be gross, flagrant and wilful, or was unlawful. We conclude therefore that the disqualification for ordinary misconduct consists of a deferment of benefits for a number of weeks, not exceeding five, in addition to the normal waiting period, after which the payment of maximum benefits is to begin.

The wording of the statute is undoubtedly based on the assumption that unemployment resulting from the fault of the employee cannot be attributed indefinitely to the individual. It is assumed therefore that, after an additional waiting time, the continued unemployment is due to a want of jobs. Consequently, if continued unemployment after the additional waiting time has passed is not to be attributed to the employee, no sound reason exists why he should not receive the same benefits as an employee not subject to disqualifying conditions.

We think the trial court was in error in limiting the maximum benefits to eleven weeks following the additional waiting time of five weeks. Claimant is entitled to maximum benefits for sixteen weeks after the additional waiting time of five weeks has elapsed. In all other respects the judgment is correct. The judgment of the district court is hereby modified in accordance with this opinion.

AFFIRMED AS MODIFIED.

EDWARD F. ARON ET AL., APPELLEES, V. MID-CONTINENT COMPANY, APPELLANT.

4 N. W. (2d) 884

FILED JULY 17, 1942. No. 31334.

1. **Rescission.** "A contract cannot be rescinded in part and a part remain executed. If rescinded at all, it must be *in toto*, and the

parties thereto placed *in statu quo* so far as the circumstances will permit." *Alfree Mfg. Co. v. Grape*, 59 Neb. 777, 82 N. W. 11.

2. ———. "The general rule is that a party who seeks to rescind a contract entered into on fraudulent representation must return or offer to return the property acquired by such contract within a reasonable time, so as to place the property and the adverse party substantially in the same condition as at the time the property was received." *Symns & Co. v. Benner*, 31 Neb. 593, 48 N. W. 472.

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

Littrell & Patz, for appellant.

Ira D. Beynon and *J. R. Dudgeon, contra.*

Frank D. Eager, amicus curiæ.

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

MESSMORE, J.

This is an action to rescind a contract for the purchase of capital stock, charging defendants with fraud. The jury returned a verdict against defendant Mid-Continent Company in the sum of $3,728.50. Motion for a new trial was overruled, judgment entered in accordance with the verdict, and the Mid-Continent Company (hereinafter referred to as defendant) appeals.

The petition sets forth certain evidentiary facts disclosing fraud practiced upon the plaintiffs, all of which is denied by defendant's answer.

The principal assignment of error is: The court erred in holding that the offer made by the plaintiffs on January 6, 1940, to return their stock certificate and one dividend check for $15, as pleaded in plaintiffs' petition, was a sufficient tender and pleading to support an action at law in rescission.

The plaintiffs' petition with reference to the tender is, in substance, as follows: That plaintiffs did not learn of the fraud practiced upon them by the defendant until some time after the 21st day of September, 1939, at which time a re-

ceiver for defendant was appointed; that plaintiffs were informed through counsel that an opportunity would be given them to file their claim in the receivership action, but, by stipulation of the officers of the company, the receiver was discharged December 16, 1939, "without leave for creditors to file claims;" that during the pendency of the receivership plaintiffs informed the receiver and his counsel of their demand for return of their money, and, upon the discharge of the receivership and return of the company to its officers, plaintiffs demanded of the officers a return of the funds invested by them for the stock; that on January 6, 1940, plaintiffs made a formal tender back to the defendant of the shares of stock that had been heretofore delivered to them by the defendant company, with a dividend check in the sum of $15, and at said time demanded payment of $3,000 (plaintiffs paid $3,000 for 300 shares of the capital stock of the defendant, the purchase being made as of May 7, 1937), which was refused and plaintiffs "now again tender back in court certificate No. 270 for 300 shares of the Mid-Continent Company together with check No. 4701 for $15 issued by said company on the 20th day of December, 1939, as a dividend; that the plaintiffs have thus elected to and have rescinded their subscription to the stock" of the defendant, and that by reason of the foregoing there is due from defendant to the plaintiffs the sum of $3,000, with interest at 6 per cent. from the 6th day of January, 1940 (the petition was later amended to include interest at 6 per cent. from May 11, 1937), which sums the defendant has entirely neglected and refused to pay. Plaintiffs pray judgment against the defendant in the sum of $3,000 with interest at 6 per cent. from the 11th day of May, 1937.

The amended separate answer of the defendant contains a general denial of the allegations of the plaintiffs' petition; admits the incorporation of defendant, and alleges that the plaintiffs at all times since the purchase of their stock have received and retained and are now receiving and retaining the regular *pro rata* monthly share of the distribution of the assets and earnings of said company; that plaintiffs have at

all times acquiesced in the management and operation of the company and made no objection concerning the same; that plaintiffs have ratified and confirmed their purchase and are now estopped. To simplify the discussion, we will hereinafter refer to the plaintiffs in the singular.

The error complained of is: (1) That, in order to support an action in rescission, the party attempting to rescind must do so *in toto* and offer to return all benefits received by him under the contract as a condition precedent to said action; (2) that the plaintiff did not offer to restore the parties to their relative positions which they would have occupied if no contract of purchase had been made. The facts in reference to the tender are, in substance, as follows:

The plaintiff purchased 300 shares of the capital stock of the defendant corporation on May 7, 1937. From that time until January 6, 1940, when the plaintiff gave notice of his election to rescind because of the alleged fraud, he received from the company under his contract $580; this amount constituted dividends. The plaintiff's offer was to return the certificate of stock, evidencing the 300 shares of stock of the value of $3,000 and the last dividend check received by him in the amount of $15, leaving a cash benefit in the plaintiff's possession of $565 received under the contract. Plaintiff's demand was for the return of $3,000 and interest, as hereinbefore stated. If the $3,000 had been returned, constituting the purchase price of the stock, plaintiff would then have had $3,565, the amount of his stock plus the dividends, minus the 15-dollar dividend which he offered to return. He prayed for interest at 6 per cent. on the $3,000 to January 6, 1940. The defendant's contention is that plaintiff would be entitled to $3,480, had his offer been accepted, thus leaving him $85 more than he would have a right to have, and consequently neither of the parties would be restored to their former positions; that the proper tender to be made on January 6, 1940, would be to return the certificate of stock, the $580 in dividends plus interest received under the contract, and then demand the payment of $3,000 with interest at 6 per cent. The evidence is undisputed that the plaintiff received 6 per cent.

return on the 3,000-dollar certificate of stock since the time of its purchase. Later, during trial, plaintiff tendered, in addition to the foregoing, the $565 in dividends. Objection was made to the tender, in part, as follows: "We object to the tender at this time: First, there is no sufficient and proper foundation laid for the same, and in an action for rescission as a condition precedent it is necessary that the party electing to rescind return or offer to return all that he has received under and by virtue of his contract before bringing any action; * * * The tender is further insufficient in that it is not all the plaintiff has received under and by virtue of his contract. The amount does not include any interest upon money which he had in his possession for over two years." This objection was overruled.

Before the plaintiff rested, a tender was made of the certificate of stock, of the dividends and the interest on the dividends in the sum of $103.84, and amounts constituting the same sufficient to make the defendant whole and place the parties *in statu quo,* or in the same position as before the contract was made and the purchase of the stock was consummated, except costs charged to or paid by defendant to the time of such tender. This tender was objected to for the reason that it was not made within a reasonable length of time; that no offer was made to return the sum of money represented by the check thus tendered on or prior to this date, May 27, 1941, or prior to the time of the filing of the lawsuit; and "The Mid-Continent Company was not given an opportunity to elect as to whether it would accept the same or not prior to the institution of the lawsuit." This objection was overruled. The question presented has never been directly passed upon by this court.

There is a distinction between rescission, as applied to a law action, and that designated as equitable rescission. In a law case, the rescission is by the act of the party and is a condition precedent to bringing an action at law for the recovery of the purchase price, whereas in equity the rescission is effected by the decree of the equity court which en-

tertains the action for the express purpose of rescinding the contract and rendering a decree granting such relief.

A court of law entertains an action for the recovery of possession of chattels or personal property after the party to the contract has pleaded the rescission thereof by his own act. The recovery in a law action is based on the fact of such rescission and could not have been granted unless the rescission had taken place. See 12 C. J. S. 945, sec. 5.

In a law action the plaintiff "must have the legal title to the thing sued for, if it be a chattel, or a legal right to the sum demanded, at the time of the institution of the suit. If he has parted with his property by reason of the fraud of * * * the seller, the legal title or right has passed out of him and into the other party. * * * Since the law permits him to reacquire this legal right, by his own act, it puts upon him the necessity of restitution of the thing received by him as a condition of the exercise of the right to avoid the contract." 9 C. J. 1215, note 89 (a).

The case of *Loomis v. Pease,* 234 Mass. 101, 125 N. E. 177, was based on rescission of a contract for purchase of stock. Plaintiff offered to return the stock before filing suit but did not offer to return the dividends received. In the body of the opinion the court said (p. 107):

"To recover under this count (rescission) the plaintiff must have disaffirmed the contract and restored to the defendant the benefits derived therefrom. He must have done everything within his power to return to the defendant the property received and restore him to the same condition as before the contract was made. Citing a number of decisions of the Massachusetts court.

"The ownership of the certificate carried with it the right to the dividends; and the offer to return the certificate while retaining the dividends was not a complete restoration of the benefits received and did not amount to a rescission of the contract."

In *Cummings v. Hotchkin Co.,* 292 Mass. 78, 197 N. E. 473, the plaintiff sought to recover the purchase price of stock. Prior to bringing suit, no offer was made to return

the dividends received. At the close of the evidence, upon motion, plaintiff was permitted to reopen the case and make a tender of the dividends. The court held such tender to be too late, in the opinion saying: "The plaintiff did not tender the whole or any part of the dividends received by him on the stock until after the case was reopened for that purpose." On page 81 the court said: "Every consideration of equity and fair dealing requires the plaintiff to return the stock and the profits realized on it to the defendant before seeking to recover from the defendant the price paid for the stock." On page 82 the court further said: "It is plain that no sufficient tender was made by the plaintiff, either before action was brought or at the conclusion of the evidence. * * * It did not put the parties *in statu quo.*" Citing Massachusetts cases, including *Loomis v. Pease, supra.*

In *Americanized Finance Corporation v. Yarbrough,* 223 Ala. 266, 135 So. 448, in an action brought for money had and received, plaintiff sought to recover, on the ground of fraud, the purchase price of stock in defendant's company without tendering the dividends. The court held:

"Offer to rescind sale of stock for fraud *held* insufficient, where purchaser retained dividends but made offer of stock.

"Contract cannot be rescinded in part.

"Purchaser's failure to offer to return and keep good offer of stock and dividends received precluded recovery from corporation on theory of rescission."

The pertinent decisions in Nebraska follow: In *Building & Loan Ass'n of Dakota v. Cameron,* 48 Neb. 124, 66 N. W. 1109, the court said: "It has been often held, and may be regarded as elementary law, that one who seeks to rescind a contract on the ground of fraud must offer to return the property or consideration received therefor by him, provided it be of any value, within a reasonable time." Citing *Clark v. Tennant,* 5 Neb. 549; *Brown v. Waters,* 7 Neb. 424; *Babcock v. Purcupile,* 36 Neb. 417, 54 N. W. 675. The court held: "One who seeks to rescind a contract on the ground of fraud must, within a reasonable time, offer to return the property or consideration therefor received by him, provid-

ed it be of any value." And in the fourth paragraph of the syllabus it was held:

"The plaintiff, a subscriber to the stock of a foreign building and loan association, sued to recover money paid for such stock, alleging a rescission of his contract of subscription on account of the false and fraudulent representations of the defendant's agent. *Held,* in the absence of evidence to the contrary, that said stock is presumed to be of some value and its surrender is a condition precedent to the right to rescind."

The above holding would indicate that in a law action in this state a tender of the stock, if it has any value, must be made as a condition precedent to the bringing of an action. This would then be true with reference to dividends or interest accumulations on the stock. In the opinion (p. 126) the following quotation from *Snow v. Alley,* 144 Mass. 546, 11 N. E. 764, appears: "The right to rescind or avoid a contract proceeds upon the ground that a party has been fraudulently betrayed into making it, and, having thus been induced to part with his own property, may resume possession of it on returning that which he has himself received, and thus placing the other party in the same position that he was before the contract was made. * * * Where property is entirely worthless, it need not indeed be returned; but so strictly has this rule been held, that articles which are of the slightest value, or the loss of which may be a disadvantage in any way, must be returned, even if they have no intrinsic or no market value." And this court added: "The stock issued to the plaintiff and his fellow-subscribers is personal property * * * presumably of some value, and the surrender thereof, or an offer to surrender it to the defendant association, is an essential condition to the right to rescind." Citing several Massachusetts cases. The above Nebraska decision follows the decisions of the Massachusetts court in respect to tender of stock. It will be noted that this court in the syllabus used the language "Said stock is presumed to be of some value and its surrender is a condition precedent to the right to rescind."

In *Rasmussen v. Hungerford Potato Growers Ass'n,* 111 Neb. 58, 195 N. W. 469, the court held: "One who rescinds for fraud must act promptly upon discovery of the facts, announcing his intention to his adversary and returning what he has received. This should be done before he begins his action, nor should he fail to allege in his petition that he has so rescinded." In the opinion it was said (p. 62): "Immediately upon learning the facts he should announce to his adversary that he does not intend to be bound by the terms of the agreement made, and tender back what he has received under it. To maintain rescission at law, he must do this at or prior to the time of the commencement of his action. Due allegation of his acts of rescission should be made in the petition. *Alfree Mfg. Co. v. Grape,* 59 Neb. 777; *Pollock v. Smith,* 49 Neb. 864; *First Nat. Bank v. McKinney,* 47 Neb. 149; *American Bldg. & Loan Ass'n v. Rainbolt,* 48 Neb. 434; *Baker v. Thomas,* 102 Neb. 401; *First Nat. Bank v. Yocum,* 11 Neb. 328; *Symns & Co. v. Benner,* 31 Neb. 593."

Plaintiff cites *Collins v. Hughes & Riddle,* 134 Neb. 380, 278 N. W. 888, which was an action at law to recover damages for personal injuries received by the plaintiff on account of an automobile accident. The defendant's answer pleaded that negotiations were entered into between the parties for a compromise settlement, in the amount of $15, which was made. The verdict was for $15,000. The trial court directed a remittitur of $10,000. The cause was reversed on account of the excessive verdict. The court held, with reference to the settlement, as follows:

" 'An exception to the rule requiring the restoration of the consideration as a condition precedent to rescission exists in those cases in which the party rescinding would be entitled to retain the money or property received, even though the compromise be set aside * * * . An offer to return is also unnecessary if the judgment asked for will accomplish that result, or where plaintiff is not suing to rescind the new agreement, but his action is on his original demand.' 12 C. J. 356."

We have examined this authority, and Restatement, Con-

tracts, sec. 480, as cited by the plaintiff, to determine whether or not the plaintiff's contention that the tender made in the instant case comes within the exception. It is obvious that a different situation exists in *Collins v. Hughes & Riddle, supra,* from that in the case at bar. The settlement in the former case was for the complete adjudication of an action for damages. The instant case is one in rescission originally, to repudiate the purchase of stock, wherein the purchase was induced by fraud. We have set forth the authorities governing this situation, and, from an analysis thereof, have stated the rule to be applied in rescission. The instant case is definitely not one in which the exception contended for may be applied.

Plaintiff cites *Langdon v. Loup River Public Power District,* 139 Neb. 296, 297 N. W. 557, an action in equity for rescission, wherein this court held: "The failure to return or offer to return the consideration will not preclude relief, where the consideration is merely money paid, the amount of which can be credited in partial cancelation of the injured party's claim, and where it is patent that a tender, if made, would be rejected, an equity court having jurisdiction to award relief to both the plaintiff and defendant, and to specify the conditions under which relief will be granted." The foregoing case presents a distinctively different proposition, with reference to tender, than in the case at bar.

Plaintiff also cites the rule regarding tender in 6 R. C. L. 936, sec. 319, as follows: "The whole doctrine of refund upon repudiation of a contract of settlement is not technical, but equitable, and requires merely that the practical rights of the other party shall not thereby be prejudiced; that he shall be no worse off than if he had never made the contract of settlement."

Plaintiff cites several cases, and certain language from the case of *Prime v. Squier,* 113 Neb. 507, 203 N. W. 582, wherein the proper tender of the stock and dividends was made. The court said: "Plaintiff did not manually offer the certificate to the defendant and did not produce and hand

him any money. * * * This court has many times held that under similar circumstances such a tender was sufficient, it being unnecessary to press the thing tendered upon a party when the party declares that he will not receive it. And in all of the Nebraska Building & Loan Association cases, practically without exception, though the dividends were not produced and tendered back, it was held by the court that such tender was not required. That which the attitude of the party to whom tender is due unmistakably shows to be vain and useless may be dispensed with in rescission cases of this kind."

In 9 C. J. 1215, it is said: "The courts of many states have held, in numerous well considered cases, that no offer of restoration before bringing suit is necessary. And this rule is not affected by the provisions of the codes of procedure. In the opinions in many of those cases the courts advert to the distinction, so often lost sight of, between the equitable remedy of rescission or cancelation, where the avoidance of the contract, with its indispensable adjunct of restoration, is accomplished by the decree of the court, and legal rescission, where the act of plaintiff in avoiding the contract reinvests him with his legal title or right to sue, and must therefore be accompanied with restitution of the thing received by him. In estimating the comparative value of the conflicting rules on the subject the fact should not be overlooked that the decisions opposed to the rule laid down in this section show on a careful reading that the courts rendering them did not have their attention directed to this distinction between the legal and equitable aspects of rescission."

The instant case is a law action to rescind a contract for the purchase of capital stock wherein the plaintiff was induced to purchase the stock by the alleged fraud of the defendant. The rule announced in Nebraska cases has been heretofore stated in the opinion.

This court held in *Alfree Mfg. Co. v. Grape*, 59 Neb. 777, 82 N. W. 11: "A contract cannot be rescinded in part and a part remain executed. If rescinded at all, it must be *in toto*, and the parties thereto placed *in statu quo* so far as the cir-

cumstances will permit." And in *Symns & Co. v. Benner*, 31 Neb. 593, 48 N. W. 472, the court held: "The general rule is that a party who seeks to rescind a contract entered into on fraudulent representation must return or offer to return the property acquired by such contract within a reasonable time, so as to place the property and the adverse party substantially in the same condition as at the time the property was received."

The rescission in the instant case did not comply with the rules of law governing the same, was incomplete, and, as finally made, was not within a reasonable time after the discovery of the fraud. The cases cited by the defendant are, primarily, equitable actions in rescission. Under the circumstances, discussion of other assignments of error is not required.

The defendant's assignment of error is well taken. The judgment of the trial court is reversed and the cause dismissed.

REVERSED AND DISMISSED.

STATE, EX REL. RUDOLPH BRAZDA ET AL., RELATORS, V. FRANK MARSH, SECRETARY OF STATE, RESPONDENT.

5 N. W. (2d) 206

FILED JULY 20, 1942. No. 31509.

1. **Elections.** Section 32-1129, Comp. St. 1929, includes a provision for a judicial review of proceedings had before the secretary of state and of his determination therein made, as to the validity of certificates of nomination and of nomination affidavits required by law to be filed in his office, when and as challenged by qualified objectors as in such section provided.
2. ———. "The statute is valid, and confers power upon the county court and upon the judges of the district and supreme courts to summarily review the action of the officer with whom the original certificate of nomination is filed, and to make such order therein as the law requires." *State v. Hallowell*, 77 Neb. 610, 110 N. W. 717.
3. ———. Upon institution of this proceeding before the secretary of state, the record discloses that due notice thereof was by him

forthwith mailed to Harry R. Swanson, he being the only candidate affected thereby, addressed to him at his place of residence as given in his nomination affidavit on file in the office of the secretary of state. Such notice approved as sufficient.

4. ———. The statute involved containing no requirement that notice of the summary review of the determination made by the secretary of state be served upon the candidate whose filing is challenged, and it further appearing that due notice of such review was given the secretary of state whose order was to be reviewed, in a proceeding appellate in its nature, the proceedings are sustained as within the principles announced in *Schuyler v. Hanna*, 28 Neb. 601, 44 N. W. 731, viz., "A notice of appeal is not necessary to confer jurisdiction." The challenge to the jurisdiction, overruled.

5. ———. The procedure provided by this statute, so far as the summary review is concerned and the jurisdiction exercised thereunder, is inherently appellate in nature. "It is the essential criterion of appellate jurisdiction that it revises and corrects the proceedings in a cause already instituted, and does not create that cause." 2 Am. Jur. 849, sec. 9.

6. ———. No transcript of the proceedings before the secretary of state is required to be filed under the terms of section 32-1129, Comp. St. 1929, as a prerequisite of the statutory review therein provided.

7. ———. While subject to a liberal construction, the objections to the validity of the candidate's certificate of nomination or his application to be placed on the primary ballot presented to the secretary of state must be essentially the same as presented to the reviewing tribunal.

8. **Officers.** The term "default," as employed in section 2, art. XV of our Constitution, implies more than a mere civil liability. A wilful omission to account and pay over must exist, with a corrupt intention, or such a flagrant disregard of duty as to fairly justify the inference that the conduct complained of was wilful and corrupt.

9. **Domicile.** "The question of what is residence is one of law to be determined by the consideration of the intention and overt acts of the person whose acts are being examined. A legal residence once acquired by birth or habitancy is not lost by a temporary absence for health, business, or pleasure, or while attending to the duties of a public office." 46 C. J. 938.

10. ———. Evidence examined, and *held* to establish the legal residence of Harry R. Swanson at the time of the filing of his affidavit of nomination to be in the state of Nebraska.

11. **Officers.** In absence of either constitutional or statutory provi-

sion, residence within the district or state over which the jurisdiction of the office extends is unnecessary to eligibility.

12. **States.** The conclusion follows that, there being no constitutional or statutory provision requiring a stated period of residence in this state as a prerequisite to lawful candidacy for the office of secretary of state, none exists, and the questions here presented by the evidence set forth in the opinion must be resolved in favor of Harry R. Swanson.

Original proceeding by the state, on the relation of Rudolph Brazda *et al.*, against Frank Marsh, secretary of state, for review of determination of secretary of state regarding validity of certificate of nomination for office of secretary of state. *Petition of objectors dismissed, and application requesting that name of Harry R. Swanson be placed on official ballot approved.*

G. E. Price, for relators.

Walter R. Johnson, Attorney General, Robert A. Nelson and *Charles S. Reed*, for respondent.

Heard before EBERLY, J.

EBERLY, J.

This is a summary proceeding before a justice of the supreme court under section 32-1129, Comp. St. 1929. So far as applicable to the case here presented, this section reads:

"All certificates of nomination or nomination statements, which are in apparent conformity with the provisions of this article, shall be deemed to be valid, unless objections thereto shall be duly made in writing within ten days after the filing of the same. In case such objection is made, notice thereof shall forthwith be mailed to all candidates who may be affected thereby, addressed to them at their respective places of residence as given in the certificate of nomination or in the nomination affidavits of such persons, on file in that office: * * * The officer with whom the original certificate was filed, or who made an affidavit to the original nominating statement, shall, in the first instance, pass upon the validity of such objection, and his decision shall be final, unless an order shall be made in the matter by the county court, or

by a judge of the district court, or by a justice of the supreme court at chambers, on or before the second Wednesday preceding the election. Such order may be made summarily upon application of any party interested, or political party committee as herein provided, and upon such notice as the court or judge may require. The decision of the secretary of state, or the order of the judge or supreme court justice, shall be binding on all other county, municipal or other officers with whom certificates of nomination are filed."

It appears that on the 18th day of June, 1942, Harry R. Swanson filed his application in writing with the secretary of state of the state of Nebraska purporting to be duly verified, requesting that his name "be placed on the official ballot of the Democratic party for the primary election to be held on the 11th day of August, 1942, as a candidate for nomination to the office of secretary of state of the state of Nebraska." On the 27th day of June, 1942, objections were filed thereto by two qualified voters of the state of Nebraska, setting forth as grounds thereof:

"1. That the said Harry Swanson was not at the time of his filing and is not now a citizen of the state of Nebraska.

"2. That the said Harry Swanson formerly served as secretary of state and upon his retirement from that office an audit of his accounts showed him to be short in his accounts."

On the 7th day of July, 1942, it appears that a hearing was had before the secretary of state upon such objections, the answer thereto filed by Harry R. Swanson, and the evidence, "petitioners appearing by G. E. Price, their attorney, and Harry R. Swanson appearing by Charles S. Reed, his attorney," and a finding was entered and made "that there is insufficient evidence to establish the allegations of the petition," and it was ordered that the same be dismissed.

Thereafter on the 11th day of July, 1942, Rudolph Brazda and Andy Anderson, objectors heretofore referred to, presented their written petition to a justice of the supreme court of Nebraska, setting forth a history of the proceedings

had in this cause, alleging in substance that said Swanson, at the time of filing his application to have his name placed on the primary ballot as a candidate of the Democratic party, etc., was not a resident of the state of Nebraska and had not been a resident of the state of Nebraska for some time prior to June 17, 1942; that for some time prior to said date Swanson was and still is a resident of the state of Oregon; that the oath attached to his application was not sworn to in the presence of the notary public as required by law; that Harry R. Swanson formerly served as secretary of state of the state of Nebraska, and upon his retirement from that office an audit of his accounts showed him short in his accounts, the amount of which was not paid by such Swanson but was collected by the state of Nebraska from his bondsmen who were his sureties. Notice was thereupon issued and served upon the secretary of state of the filing of such petition, and he was required to make answer to the petition at a time certain.

The cause coming on to be heard as per notice given, a motion was presented by the secretary of state to strike paragraphs IX and X relative to the oath appended to the application made by Swanson, and also all allegations in reference to his shortage. A challenge to the jurisdiction of this court was also made in behalf of Swanson by the secretary of state. In addition, an answer was filed by the respondent Marsh as secretary of state.

As was stated by Sedgwick, C. J., in *State v. Hallowell*, 77 Neb. 610, 110 N. W. 717, in reference to the powers exercisable under the statute, "We think that the statute is valid, and confers power upon the county court and upon the judges of the district and supreme courts to summarily review the action of the officer with whom the original certificate of nomination is filed, and to make such order therein as the law requires."

The record discloses that the secretary of state upon the filing of objections by Brazda and another forthwith mailed to Swanson notice thereof by registered mail, addressed to him at his place of residence as given in his nomination af-

fidavit. This notice to Swanson was returned uncalled for, and not received by him. Nevertheless, he appeared at the hearing by the secretary of state, and was represented by an attorney thereat. It will be noted that the statute requires no notice of the institution of the proceedings to be given any party in interest by the objectors, save the objections which they file with the secretary of state. The statute involved contains no affirmative requirement that notice of the summary review shall be given to the candidate whose nomination papers are under attack. It merely provides that it shall be made upon such notice as the court or judge may require. The only notice required by the judge in the instant case was service of notice upon the secretary of state whose order was to be reviewed, and which was done. Under the circumstances disclosed by the record, service by mail upon Swanson as contemplated by the statute having failed, and the original notice having been returned undelivered and uncalled for, and in view of the summary character of the proceedings for review, in principle the rule announced in *Schuyler v. Hanna,* 28 Neb. 601, 44 N. W. 731, as applicable in appellate proceedings, would be controlling: "A notice of appeal is not necessary to confer jurisdiction." It follows that the motion of the secretary of state to dismiss the review proceedings was necessarily overruled.

It appears, however, that no transcript of the proceedings before the secretary of state is required to be filed under the terms of section 32-1129, Comp. St. 1929. We are not justified in implying what is not expressed in this statute. It is obvious that the party seeking the review necessarily carries the burden of setting forth the errors upon which he relies, and in so doing he must set forth the substance of what a transcript, if filed, would ordinarily contain. Any omission is suppliable by the opposing pleading. However, when presented to a judge or court, the proceeding, being in the nature of a summary review, is essentially appellate. It is subject to the necessary limitations of appellate procedure which would include the following: "It is the essential criterion of appellate jurisdiction that it revises and corrects

the proceedings in a cause already instituted, and does not create that cause." 2 Am. Jur. 849, sec. 9. While subject to a liberal construction, the objections to the validity of the candidate's certification or application presented to the secretary of state must be essentially the same as presented to the reviewing tribunal. It follows that the motion to strike directed against the allegations of objectors' petition charging the invalidity of the oath of the candidate because improperly taken by the notary in absence of Swanson, not having been presented to the secretary of state, must be sustained.

As to the disqualification of Swanson which the objectors contend arises by virtue of section 2, art. XV of the Constitution of the state of Nebraska, which reads as follows: "Any person who is in default as collector and custodian of public money or property shall not be eligible to any office of trust or profit under the Constitution or laws of this state; nor shall any person convicted of felony be eligible to office unless he shall have been restored to civil rights," we are committed to the following construction of the language above employed: "The term 'default,' as used in said section of the Constitution, implies more than a mere civil liability. There must exist a wilful omission to account and pay over, with a corrupt intention, or such a flagrant disregard of duty as to fairly justify the inference that his conduct was wilful and corrupt." *State v. Moores*, 52 Neb. 770, 73 N. W. 299.

The language of paragraph V of objectors' petition wholly fails to charge the alleged "default" within the terms of the constitutional provision as interpreted by this court. At most, as charged in the petition, the default might amount to a civil liability which would be insufficient to disqualify. As in the form presented the facts alleged were wholly immaterial, the motion to strike the same was necessarily sustained.

The matter was finally submitted as a question of fact upon the objectors' charge that at the time of filing his application Harry R. Swanson was not a resident of the state

of Nebraska, and had not been a resident of the state of Nebraska, and that such Swanson at the time of his filing was not, and is not now, a citizen of Nebraska.

Objectors' testimony establishes that when Harry R. Swanson's term as secretary of state expired in January, 1941, he removed to Council Bluffs, Iowa, where he resided for a time; that then he removed with his wife to the state of Oregon; that on the 12th day of September, 1941, he subscribed and swore to an "agent's qualification report" addressed to the "Insurance Commissioner of the state of Oregon" which was an application for issuance of an insurance agent's appointment, essential under the laws of Oregon; that his reply and statements therein are as follows: "4. Residence 2685 S. W. Chelmsford, Portland, Oregon. 5. Principal Place of Business 337 Pittock Blk., Portland, Oregon;" that there was issued to Mr. Swanson agent's license No. 3 5892, dated September 18, 1941, and also issued to him on same application his license No. 3 2023 for the fiscal year 1942 issued April 1, 1942. The sections of the Oregon law were also introduced in evidence which in effect limit appointments as insurance agents to residents of the state of Oregon. Objectors also introduced evidence that Harry R. Swanson was not the owner of the residence situated at 3189 Meredith avenue, Omaha, Nebraska; that one Kenneth C. Baker, with his wife, had lived in that property since 1936; that Harry R. Swanson is not living at that address; that Baker has not seen Swanson for "approximately two years ago—a year and a half ago," he does not know the exact time; that Mr. Swanson has had no household property at 3189 Meredith avenue since 1936; that Baker (on cross-examination) testified that he had purchased the property "directly from Harry R. Swanson through them (Conservative Investment Company)."

The witness Baker further testified: "Q. Did you have any agreement with Harry R. Swanson with reference to him retaining his residence there and returning to that place? A. Yes, I did; I had a verbal agreement with Harry at the time I took the place over. Q. What was the nature of

that agreement? A. Well, the nature was that he was in Lincoln and should he get out at any time, or any place else, that he come there and stay until such a time as he found a permanent location in Omaha, and that was at the time that I purchased the property from him. Q. Harry R. Swanson was at that time secretary of state of the state of Nebraska? A. He was. * * * Q. And when and where was the conversation? A. The conversation was in the office—the last conversation was in the office perhaps two or three years ago, the last time. Q. Was that after Harry R. Swanson was defeated for the office of secretary of state? A. I believe it was. Q. And what was the nature of that conversation? A. Well, the same thing as previously stated, that he could still come there and stay and maintain that as his home until he got a permanent location here in Omaha. That was the extent of the conversation. Q. Was that prior to him leaving for Oregon. A. Evidently it was. I didn't know when Harry left for Oregon."

Harry R. Swanson testified in part, as follows: That he was secretary of state from January, 1933, to January, 1941; that prior to his service as secretary of state he lived at 3189 Meredith avenue, Omaha, Nebraska; that he owned his home at the Omaha address; that when he became secretary of state he lived in Lincoln, but never changed his residence for voting purposes from Omaha; that he continued registered in Omaha from 3189 Meredith avenue; that he mortgaged the Omaha property and later it was sold to Kenneth Baker.

This witness testified further: "Q. Did you have any agreement with Kenneth Baker with reference to maintaining that place as your legal residence? A. Yes, sir. Q. And what was that agreement? A. Kenneth says, 'Any time you want to come out to the house and stay when you are here in Omaha, that is all right,' and I told him I wished to vote from that address, and he said that was all right. Q. You never voted in the city of Lincoln at any time? A. Never did." He further stated that he has been in Oregon "a little over a year, perhaps thirteen months;" that as his work

he has been representative of the Multnomah Medical Service Bureau; that he holds "a license to sell insurance in the state of Oregon;" that he made a written application for the same, and exhibit A in the deposition of W. F. Leary, deputy insurance commissioner of the state of Oregon, is a correct copy of the application he signed. Further, that the words "2685 S. W. Chelmsford, Portland, Oregon" written in such application as his residence, were written by himself, and he was then staying at that address because it was his son's address and he was staying there with him, and stayed there until November, 1941, and then moved to 2210 N. W. Everett, apartment 415, and stayed there with his son and daughter-in-law until the son left for the navy; that he owns no furniture there or in the state of Oregon; that he went to Oregon in response to his son's request that he come to assist him in determining whether the son should go into active military duty. Mr. Swanson testified that he registered for the draft on April 27, 1942, and produced and identified his official registration certificate, wherein he registers "3189 Meredith avenue, Omaha, Nebraska," as "place of residence."

He further testified that at the time he went to Oregon he had plans for coming back to Nebraska this year, 1942; that he went to Oregon on a vacation and visit with his son, and to take rest, with full intentions of returning to Nebraska; that he accepted the position with the medical association and at that time he did not change his plans regarding returning to Nebraska; that he intended to return to Nebraska in the summer of 1942 to file for secretary of state and to campaign, and had that intention at all times; that his son left Seattle in September, 1941, for Dutch Harbor, Alaska, and the son's wife is now living in Portland, Oregon, with her sister; that witness filled out an affidavit for civil service examination on an application form and stated therein that his residence was 3189 Meredith avenue, Omaha, Nebraska; that he had no intention whatsoever to change his residence from Omaha, Nebraska; that he never voted in Oregon or any other place outside of Nebraska; that he has

no furniture in the state of Nebraska or anywhere else, and has had none since 1936 or 1937; that after completing his service as secretary of state he went to Omaha, and then got an apartment in Council Bluffs and they were there about six weeks, and then they went to Portland, Oregon, to please his son, and intended to come back to Omaha late this July (1942) or first of August. Further this witness knew that the request was filed April 1, 1942, for continuance of his insurance license in Oregon, but stated that when he quit work the license would be revoked. This witness stated that he had not lived at 3189 Meredith avenue, Omaha, Nebraska, since January, 1933, when they left there to come to Lincoln, but he still claims that address as his mailing address; that when he came to Lincoln he had the post office department send his mail to Lincoln. This witness further testifies that, while he stated in his application to the insurance commissioner of Oregon that his address was 2685 S. W. Chelmsford, Portland, Oregon, he did not intend that to be his permanent residence; and that while he stated that his present address was 2210 N. W. Everett, he never intended to make that his legal residence, but intended to return to Omaha, Nebraska, and make his residence in Nebraska.

Joseph A. Vojir, the election commissioner of Douglas county, Nebraska, testifies that he is familiar with the registered voters of Douglas county; that he has investigated the records with reference to Harry R. Swanson at 3189 Meredith avenue, Omaha, and that such Swanson last voted on November 5, 1940, and has not voted at the last three elections held since that time; that Swanson's name is not found in the present city directory of Omaha.

These records referred to by witness Vojir are the records of his office which show that Mr. Swanson voted the last time on November 5, 1940, and the three elections held since that time were not general elections. This witness further testified: "Q. Mr. Vojir, according to your present records, then, is Harry R. Swanson a registered voter of Douglas county? A. He is. Q. And at what street address? A. At

the street there indicated in the register as 3189 Meredith avenue."

From the evidence epitomized on the foregoing pages is to be gleaned the facts which establish Harry R. Swanson's legal residence at the time of filing his application with the secretary of state.

"The question of what is residence is one of law to be determined by the consideration of the intention and overt acts of the person whose acts are being examined. A legal residence once acquired by birth or habitancy is not lost by a temporary absence for health, business, or pleasure, or while attending to the duties of a public office." 46 C. J. 938.

The fact of Swanson's legal residence prior to his first election as secretary of state being at 3189 Meredith avenue, Omaha, Nebraska, is not even the subject of attack in this record. The arrangement entered into orally by him with the party who succeeded him in actual possession to retain it while in Lincoln as his "voting residence," while attending to the public duties at Lincoln, was strictly within the rule above quoted. The recognition of the situation by the public authorities of Douglas county, and their continuing his registration at that place, was strictly within the authority conferred upon them by law. The exercise of the rights of suffrage as registrant from that address involved no fraud nor concealment, but was in all respects eminently proper.

We note that the judiciary of a neighboring state announces the applicable principle in the following terms:

"Under the Constitution and at common law, absence from one's voting residence resulting from acceptance of employment with state or federal government does not work a change of residence for purpose of holding office, when person involved does not so intend." *Wilson v. Hoisington*, 98 Pac. (2d) 369 (110 Mont. 20).

It is quite obvious that, in view of the evidence as to Swanson's method of life, the Omaha address was still his legal voting residence when his last term as secretary of state expired in 1941. It is true that thereafter he and his wife lived temporarily in Council Bluffs; then proceeded to the

state of Oregon and lived temporarily with their son and daughter-in-law in Portland of that state, and thereafter in a rented apartment wherein none of the furniture was owned by them. The evidence of the application for an insurance agent's license and the statements therein contained as to "residence" and "business residence," considered alone, tend to establish a change of legal residence of such applicant. But that must be considered in the light of the entire record relating to the subject of the intention of Swanson.

Under the facts in this case a temporary absence by Swanson for the purposes of business alone, unaccompanied by an actual intent to permanently change his residence, would not operate to change his voting residence, and especially the continuance of the latter was actually maintained and accorded due recognition by the established authorities where located. The evidence clearly preponderates to establish the fact that Swanson's legal residence continued in Nebraska unimpaired. Obviously, there can be no disqualification established by the record before us unless the facts so proved bring the case within some rule of exclusion established by an express provision of our Constitution or statutes passed pursuant thereto.

As to these, a peculiar situation forms the foundation of the present controversy. The office of "Secretary of State" of the state of Nebraska was originally created by section 1, art. III of the Constitution of 1866, which provided: "The executive department shall consist of a governor, secretary of state, auditor and treasurer, who shall be chosen by the electors of the state," etc. Section 4 of this article provided: "No person except a citizen of the United States, and a qualified elector of the state, shall be eligible to any office provided for by this Constitution." Our state Constitution of 1875, duly adopted in that year, contained the following as section 18, art. XVI thereof: "If this Constitution be adopted, the existing Constitution shall cease in all its provisions on the first day of November, A. D. 1875." The Constitution of 1875 was duly adopted and the provision last quoted thus became in full force and effect.

Section 1 of article V of the Constitution of 1875, as well as section 1, art. IV of the present Constitution as amended in 1920, each, in effect, provides that "The executive department of the state shall consist of a governor, lieutenant-governor, 'secretary of state,' " etc. Their election is also provided for therein. Section 2 of this article IV of our present Constitution also provides that "No person shall be eligible to the office of governor, or lieutenant-governor * * * who shall not have been for five years next preceding his election a resident and citizen of this state," etc. We find no similar provision applicable to the office of secretary of state. We note that section 8, art. III of this Constitution, prescribes that "No person shall be eligible to the office of senator, or member of the House of Representatives, who shall not be an elector and have resided within the district from which he is elected for the term of one year next before his election," etc. Section 7, art. V of the Constitution, prescribes as a necessary qualification of the chief justice and of associate justices of the supreme court that each "shall have resided in this state at least three years next preceding his election." But no similar constitutional provisions are applicable to the secretary of state. By the express terms of section 18, art. XVI of the Constitution of 1875, the constitutional requirement of the Constitution of 1866 that "No person except a citizen of the United States, and a qualified elector of the state, shall be eligible to any office provided for by this Constitution" became deprived of all legal force and effect "on the first day of November, A. D. 1875." As to the office of "secretary of state," this provision of the Constitution of 1866 has since that date never been constitutionally replaced.

In consideration of the history of this situation, and in view of the rule almost universally recognized by the courts that, when a state Constitution creates an office and names the qualifications of the incumbent, the legislature has no authority to prescribe additional qualifications or to remove any of the requirements provided for by the Constitution, the question in the instant case is, is it competent for the

legislature to require, in addition to the constitutional requirements, the qualifications of an elector, or residence within the state, as a prerequisite to candidacy for the office of secretary of state? We, in principle, are clearly committed to the negative.

We held in *Laverty v. Cochran,* 132 Neb. 118, 271 N. W. 354:

"A constitutional officer can only be removed by impeachment as provided in the Constitution. Const. art III, sec. 17.

"It is beyond the power of the legislature to provide for the removal or suspension of a constitutional officer, where the Constitution creates the office, fixes its terms, and the grounds and manner of removal."

See, also, *Conroy v. Hallowell,* 94 Neb. 794, 144 N. W. 895; *State v. Brown,* 131 Neb. 239, 267 N. W. 466.

But in the argument of the present case we have been cited to no affirmative statute that in terms or necessary effect prescribes as a prerequisite to lawful candidacy for the office of secretary of state that such candidate shall be a resident of the state or possess the qualifications of a lawful elector at or prior to the election at which such office is to be filled, and we are advised by counsel at the bar that no such statute is in existence.

It is also true that "In the absence of a constitutional or statutory provision residence within the district over which the jurisdiction of the office extends is unnecessary to eligibility." 46 C. J. 938. See, also, *State v. Payne,* 57 Nev. 286, 63 Pac. (2d) 921. Further, "All persons are equally eligible to office who are not excluded by some constitutional or legal disqualification." *People v. McCormick,* 261 Ill. 413, 103 N. E. 1053.

It is suggested, however, that the issues in this case are controlled by section 23, art. III of the Constitution, which reads as follows: "All offices created by this Constitution shall become vacant by the death of the incumbent, by removal from the state, resignation, conviction of a felony, impeachment, or becoming of unsound mind." Obviously, this provision has no possible application except to a present

incumbent of a public office. True, it mentions "removal from the state," but it is only the removal of an incumbent of an office that creates the situation which requires application of the provisions. It is the absence of a public officer and his inability by reason thereof to discharge the duties of his office in which the public has an interest that invokes the remedy which this constitutional provision supplies. Therefore, it provides no basis from which the eligibility of a candidate may be determined prior to his election.

The conclusion follows that, there being no constitutional or statutory provision requiring a stated period of residence in this state as a prerequisite to lawful candidacy for the office of secretary of state, none exists, and the questions here presented by the evidence hereinbefore set out must be resolved in favor of Harry R. Swanson.

Therefore, the petition of the objectors will be dismissed, and the application of Harry R. Swanson is hereby approved.

ANNA B. GAVER, APPELLEE, V. CITY OF COLUMBUS, APPELLANT.

4 N. W. (2d) 924

FILED JULY 24, 1942. No. 31412.

1. **Municipal Corporations.** A traveler along a street or highway is under a duty to keep a general lookout to observe dangers directly in his path.
2. ———. "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." *Hupfer v. City of North Platte*, 134 Neb. 585, 279 N. W. 168.
3. ———. Along with the above rule is a reciprocal one which requires that persons using the sidewalks of a city shall exercise ordinary care and caution for their own safety.

APPEAL from the district court for Platte county: LOUIS LIGHTNER, JUDGE. *Reversed and dismissed.*

H. D. Hunter and *Emil F. Luckey,* for appellant.

Joseph L. Jiranek and *Wagner & Wagner, contra.*

Heard before SIMMONS, C. J., ROSE, EBERLY, PAINE, CARTER and YEAGER, JJ., and ELLIS, District Judge.

SIMMONS, C. J.

This is an action to recover damages for personal injuries. The defendant appeals from a judgment against it.

The plaintiff alleges that at the place of the accident there were trees growing between a public sidewalk and the curb so that the "boughs crossed said walk and so low that they hung in line of the plaintiff's face as she walked on said sidewalk;" that she had no knowledge "that said limbs hung low enough to contact her eyes or head;" that while wearing glasses and "walking in the ordinary and normal manner" and "without observing that the branches of said trees hung in line with her approach" and "without fault or neglect on her part" she collided with the branches in such a manner that her glasses were broken and that glass particles entered her right eye. The defendant is alleged to have been "careless" (1) in permitting the branches to grow across the walk at a distance from the walk so as to contact plaintiff's eyeglasses, (2) in failing to keep the branches trimmed so that people could walk beneath them without coming in contact with them, and (3) in permitting them to hang within five and one-half feet of the floor of the walk for over a year without trimming them. Notice of injuries to the city was alleged.

Defendant by answer denied generally, and alleged that said accident resulted from plaintiff's own carelessness and negligence and occurred without fault or negligence of the defendant.

The accident occurred July 25, 1940, about 6:10 or 6:15 p. m. Plaintiff was walking west; the sun was shining. She wore a small hat with a little brim in front. She described

"what happened" as follows: "I got hit by a limb is all I know." "I walked into a limb." "It hit my hat and the glass went into my eye and that is all I can remember." When the glass went into her eye "It just felt like someone shot me." This is all the evidence there is as to how the accident occurred. On cross-examination plaintiff testified that "it must have been an awful big branch" and that there was nothing to obstruct her view nor to distract her attention at the time.

The plaintiff was somewhat nearsighted and wore glasses to correct her vision. So far as appears from the record her vision with glasses was normal. She was wearing her glasses at the time of the accident.

The sidewalk was of brick and was one of the public walks of the defendant city. It appears to have been in good repair. The trees were Chinese elms, planted about 1937, in the parking between the sidewalk and the curb. The pictures in evidence indicate a heavy foliage at the time of the accident. The branches are shown to have been "as big as a thumb." The evidence of one of plaintiff's witnesses is that the branches hung to within three and one-half to four feet of the sidewalk. Another of plaintiff's witnesses testified that they were "just about low enough to strike a pretty tall man." The evidence of plaintiff's husband is that he examined the trees immediately after the accident and that the leaves and branches hung down to his shoulders. He is shown to be two and five-eighths inches taller than his wife. The husband did not know his exact height; it was "something" like "five feet six or seven." The plaintiff's height is not shown.

The plaintiff had been along this sidewalk six months to a year before this accident happened and apparently passed under the trees without difficulty, although one of her witnesses testified that since 1938 "they would strike any one over four feet tall."

That plaintiff received a severe and painful injury requiring protracted medical and surgical attention, and that she has not recovered are established by the evidence.

Defendant assigns and discusses many alleged errors. The basic one is the insufficiency of the evidence to sustain a judgment against it. We have reviewed the evidence from the viewpoint most favorable to the plaintiff and have recited that given by plaintiff and her witnesses. Assuming, but not deciding, that the city had notice of the condition of the trees, the conclusion is inescapable that the accident happened because of the lack of care of the plaintiff for her own safety. Plaintiff does not testify that the sun in any way affected her vision. She does not testify that she did not see the branches, nor that she could not have seen them had she looked, nor where she was looking at the time of the accident. The obstruction caused by the branches was not one which was hidden nor which could be seen only for an instant before the accident. It is patent from the pictures in evidence and from the testimony that the branches were visible from some distance and that a mere glance ahead would have disclosed their presence. Plaintiff alleges that they hung "in line of" her face.

Is the city liable to respond in damages to one who is injured under such circumstances? We do not think so. The rule is stated as follows: "A person using or traveling on a street or public way is required reasonably to exercise his faculties to discover and avoid dangerous defects and obstructions, the care required being commensurate with the danger or appearances thereof; and he is guilty of contributory negligence if by reason of his failure to exercise such care he fails to discover and avoid a defect or obstruction which is visible and obvious; or where the surrounding circumstances indicate danger; as where he fails to pay attention to signals of danger, or fails to notice such structures as the necessities of commerce or the convenient occupation of dwelling-houses may require; where he recklessly drives over rough streets, or where he drives in one direction while looking in another." 43 C. J. 1087.

A traveler along a street or highway is under a duty to keep a general lookout to observe dangers directly in his path. 43 C. J. 1089. Here the plaintiff's attention was not

diverted; her vision was not obscured; in the full possession of her senses, in broad daylight, in her own language, she "walked into a limb."

In *Hupfer v. City of North Platte,* 134 Neb. 585, 279 N. W. 168, the plaintiff was walking along a sidewalk looking at a parade and paying no attention to the place where she was walking. She fell at a point where the sidewalk was sunken. In that case the plaintiff's attention was distracted by the parade; here nothing caused her to look away from the course of her travel. In that case it was uncertain as to the extent of the defect or how patent it was. Here the obstruction was obvious. This court there held: "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. * * * 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. * * * 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." A judgment against the city was there reversed and the action dismissed.

Here plaintiff failed to exercise ordinary care and caution for her own safety under the circumstances and that failure was the proximate cause of the accident from which she received serious injuries. We see no basis in law for holding the defendant city liable.

The judgment of the trial court is reversed and the cause dismissed.

REVERSED AND DISMISSED.

HENRY LANGENBERG ET AL., APPELLANTS, V. ERNEST A. LANGENBERG ET AL., APPELLEES.
5 N. W. (2d) 138

FILED JULY 24, 1942. No. 31353.

Gifts. Evidence summarized in the opinion *held* sufficient to prove a gift *inter vivos*.

APPEAL from the district court for Wayne county: ADOLPH E. WENKE, JUDGE. *Affirmed.*

Burr R. Davis and *Ralph W. Slocum*, for appellants.

H. D. Addison and *Russell W. Bartels, contra.*

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

ROSE, J.

This is a suit in equity to foreclose a duly-recorded 6,000-dollar mortgage on a quarter-section of land in Wayne county. The payee in the secured note and the mortgagee was Louis Langenberg, a widower who died intestate May 20, 1939, leaving four sons and four daughters, all adults: W. F. Langenberg, Minnie Sonnenberg, Henry Langenberg, Lena Langenberg, Louisa Langenberg, Ernest A. Langenberg, Anna Fleer, George Langenberg. One of the sons, Henry Langenberg, as administrator, settled the estate of his deceased father and in that capacity was directed by the county court of Wayne county to assign to each of the eight children of decedent one-eighth interest in the note and the mortgage, both instruments having been executed by the son Ernest A. Langenberg and his wife. The assignments were made as directed and the administrator discharged.

Later, five of the assignees brought this action against Ernest A. Langenberg and Lydia Langenberg, his wife. Lena Langenberg and Louisa Langenberg, unmarried twin daughters of Louis Langenberg, were also sued as defendants because they declined to join as plaintiffs.

It was alleged in the petition to foreclose the mortgage that plaintiffs, during and subsequent to the settlement of

decedent's estate, searched for, but were unable to find, the note and the mortgage.

The substance of the defense to foreclosure was that payee and mortgagee, in his lifetime, gave the note and the mortgage to his son, Ernest A. Langenberg, the maker and mortgagor, as a gift, with directions to burn them, thus discharging the debt; that the donee did as requested.

The facts pleaded in defense were put in issue by a reply.

Upon a trial of the cause the district court found the issues in favor of defendants, directed release of the mortgage and dismissed the suit. Plaintiffs appealed.

It is argued as ground for reversal that the evidence adduced by defendants was insufficient to prove a gift *inter vivos*.

Some of the facts proved and not disputed are: The note and mortgage were executed February 9, 1931. Neither stipulated annual interest nor debt was paid. The father of the eight children named gave each a quarter-section of land. Other gifts of property and money were bestowed by him on different children. The note was in possession of Ernest late in November or early in December, 1938, and the mortgage prior to the death of the father May 20, 1939. The mother of the children died in 1933. Thereafter the father resided with his unmarried daughters, Louisa and Lena, at their home in Hoskins, Wayne county. The father lost his sight and these twin daughters took care of him thereafter.

Louisa testified in substance directly and positively as follows: Her father kept his valuable papers in a safe in her bedroom. No one used the key to the safe but herself. While the father, Ernest, Lena and herself were present in the kitchen and talking about the note, her father told her to get it and give it to Ernest. She took it from the safe and brought it to the kitchen. Her father asked her if she gave the note to Ernest and she answered, "Yes." Her father then told Ernest to burn it and Ernest took it with him when he left for home. Lena testified to the same effect. The testimony of these two daughters shows further: At a later date Ernest, in the presence of his father and the

twins, at the same place, expressed some misgiving as to the effectiveness of the surrender and destruction of the note to extinguish the debt and satisfy the mortgage and was told by his father that would make no difference. Subsequently when the same four persons were present at the same place, the father told Louisa to get the mortgage and, when she produced it, he told her to give it to Ernest. She did so and Ernest left with it. Ernest testified he destroyed both instruments. The trial court saw and heard these witnesses as they testified and gave credence to their testimony. Other circumstances and remarks of the father appearing in evidence indicate a definite, fixed purpose to make a gift of the note to his son. The twins would have been entitled to two-eighths of the net proceeds of a foreclosure sale had one been ordered. There is no reason to discredit their testimony, believed as it was by the trial judge. Considered from every standpoint, the evidence in its entirety is found sufficient to prove all the elements of a valid gift *inter vivos*.

AFFIRMED.

CARL V. SIMON ET AL., APPELLEES, V. ELSIE SIMON, APPELLANT.

5 N. W. (2d) 140

FILED JULY 24, 1942. No. 31393.

1. **Trusts.** Contracting parties may create by parol a trust in personal property.
2. ———. In a suit in equity to require an accounting for the remainder of a trust fund in possession of defendant, facts alleged in the petition and summarized in opinion *held* sufficient to state a cause of action in favor of plaintiffs.
3. ———. Every person is a trustee who lawfully holds funds of others for the purposes of a trust.
4. ———. Mutual promises and equal contributions of all contracting parties for a common fund for the benefit of all alike are sufficient consideration for an oral contract creating a trust.
5. **Statute of Frauds.** Where a contract is fully performed by some of the contracting parties and partially performed by the others, it is not void under the statute of fraud because it is oral.

APPEAL from the district court for Richardson county: VIRGIL FALLOON, JUDGE. *Affirmed.*

Gerald M. Mullen and *John C. Mullen,* for appellant.

J. H. Falloon, contra.

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

ROSE, J.

This is a suit in equity by Carl V. Simon, Leonard E. Simon and Clarence A. Simon, plaintiffs, against Elsie Simon, defendant, to require the latter to account for a fund of $4,263.84, to which plaintiffs and Harry F. Simon, deceased husband of defendant, contributed in equal amounts for mutual purposes. The contributors to the fund were four brothers who were sons of Frank Simon. They were his sole heirs. Defendant was the only heir of her deceased husband, Harry F. Simon.

The father and his sons, Harry F. Simon, Clarence A. Simon and Leonard E. Simon, had conducted at Falls City a wholesale grocery business in the name of the Falls City Mercantile Company.

The petition alleges that a fund of $4,263.84 was established by each brother contributing one-fourth of it; that it was put into the hands of Harry F. Simon; that the four brothers orally agreed the money in the fund should be used to pay any federal inheritance tax levied against them or any of them and to pay any charities, upon which they agree among themselves, until such time as by mutual agreement the fund or the remainder thereof should be divided equally among them; that Harry F. Simon, to whom the fund had been entrusted by his brothers, died January 10, 1940, while in possession of it or of the remainder thereof; that defendant, the widow and sole heir of Harry F. Simon, took possession of the fund or of the money remaining therein, not as executrix of her deceased husband's estate, nor did she account therefor to his estate as executrix, but took possession of the fund, or the remainder thereof, as an individual

and retains the money as her own and refuses upon demand to account therefor; that defendant made payments under the original agreement of the four brothers to the extent of $543.02 and is indebted for the remainder, or for $3,720.82; that plaintiffs are entitled to three-fourths of this sum and the estate of their deceased brother to one-fourth. There is a prayer for an accounting and for a distribution.

The answer to the petition contains a general denial. Other defenses pleaded in detail may be summarized as follows: It is alleged that defendant herein previously brought an action against Clarence A. Simon, Leonard E. Simon and the Falls City Mercantile Company for an accounting wherein the claim of plaintiffs herein was settled; that Frank Simon died December 1, 1938, and that Harry F. Simon was appointed executor of his will; that he qualified as such, settled his father's estate and received from the estate $4,263.84 as his lawful fees for his services as executor; that he never signed any instrument in writing agreeing to pay his fees for services as executor or any part thereof to any one else and that any such agreement, if made, was without consideration and void under the statute of frauds; that the estate of Harry F. Simon was settled in the county court of Richardson county and that an order therein barring claims included the claim of plaintiffs herein, which was never filed therein against his estate, plaintiffs being thus estopped to prosecute this action.

In a reply to the answer, unadmitted allegations therein were denied, and it was alleged by plaintiffs that their claim herein was not settled in the former action and that the parties to the two actions were not the same; that by agreement among the four sole heirs of Frank Simon, deceased, no charges were to be made for any one acting as executor of his will; that all the heirs agreed to and did perform services in settling their father's estate; that the $4,263.84 was by agreement placed in a fund to pay obligations of all, any remainder to be divided among them; that this fund was not listed as an asset of the estate of Harry F. Simon, deceased, in the settlement of his estate.

Upon a trial of the cause the district court found the issues in favor of plaintiffs; found that plaintiffs and Harry F. Simon created the fund of $4,263.84, belonging in equal shares to all of them; that payments therefrom were properly made by defendant to the extent of $543.02, leaving in the fund retained by her a remainder of $3,720.82 belonging to the three plaintiffs and defendant; that plaintiffs are entitled to recover from defendant three-fourths of the remainder, or $2,790.62. From judgment therefor defendant appealed.

In an elaborate brief and by oral argument counsel for defendant presented the defenses pleaded in her answer as grounds for reversal of the judgment below. It is contended that the pleadings and proofs are insufficient to show the establishment of a trust or that Harry F. Simon bound himself by a valid contract to divide with his brothers his compensation for his services as executor of his father's will, but this position does not seem to be well taken. There is a rule of equity that "A trust in personal property may be created by parol." *Estate of Devries v. Hawkins*, 70 Neb. 656, 97 N. W. 792. See, also, *Wolf v. Haslach*, 65 Neb. 303, 91 N. W. 283. Within the meaning of this rule, the facts detailed in the petition and already summarized herein are sufficient in equity to plead the creation of a trust, though the "fund" in controversy was not called a "trust fund."

Summarized, the following facts are shown or properly inferred from the testimony of witnesses or from documents: Frank Simon, father of the four sons who were his only heirs, died December 1, 1938. Before making his will, he called before him, one at a time, his four sons and asked each whom he wanted for executor. The result was the selection of the oldest son, Harry F. Simon. The four sons orally agreed among themselves that all of them would perform services in the settlement of their father's estate and that fees for the appointee would not be retained by him. They agreed that a fund of $4,263.84 should be contributed in equal amounts by each and put in the hands of Harry to meet any unpaid federal income taxes assessed against

them and monthly contributions to their father's sister who resided in New York City and any other expenses common to all the sons. It was further agreed that the fund or any remainder thereof should be distributed equally among them. All performed services in the settlement of their father's estate. The fund was deposited by Harry in a bank in Falls City in a joint account subject to check by himself or his wife, the defendant. The property of the Falls City Mercantile Company passed to the four sons. The estate of the father was settled. Harry F. Simon died January 10, 1940, and defendant, his widow, as executrix of his will, settled his estate, but there was not listed therein the fund in controversy. For years the sister of Frank Simon had been paid from the cash drawer of the mercantile company $15 a month. To reimburse some of such payments, defendant, the widow of Harry F. Simon, paid by check at one time $120 from the fund of $4,263.84, and by another check at another time, for the same purpose, $105. She also paid from the same fund by check for federal taxes $318.02, making a total of $543.02.

In these views of the pleadings and the proofs, the interests of plaintiffs in the remainder of the common fund of $4,263.84 did not belong to Harry F. Simon or to his estate. He held the interests of plaintiffs in the trust property for them for the purposes of the trust. Every person is a trustee who lawfully holds funds of others for the purposes of a trust. *Wright v. Smith,* 23 N. J. Eq. 106; *Nebraska Power Co. v. Koenig,* 93 Neb. 68, 139 N. W. 839. Harry F. Simon was trustee for plaintiffs. He could not and did not transfer their trust property to his wife or to his widow and she could not and did not lawfully take possession of plaintiffs' trust property as her own. She recognized the trust by properly checking part of the trust fund out of the bank for the benefit of all four of the beneficiaries. It follows that plaintiffs did not lose their trust property by failing to file in the county court a claim therefor against the estate of the trustee.

It seems clear that the mutual promises and the equal con-

tributions to the common fund for the benefit of all alike were sufficient consideration for the oral contract creating the trust.

Besides, as shown by a preponderance of the evidence, plaintiffs fully performed the contract on their part by making their contributions to the trust fund and by assisting in the settlement of their father's estate. It was also performed in part by the trustee who made a contribution to the fund and acted as executor of his father's will. It was therefore not void under the statute of frauds.

The evidence is found insufficient to support the defense that the claim of plaintiffs herein was settled in a former action.

The judgment of the district court conforms to the views of the pleadings, proofs and law herein expressed and is

AFFIRMED.

NELLIE M. KRAUSE, APPELLANT, V. PACIFIC MUTUAL LIFE INSURANCE COMPANY, APPELLEE.

5 N. W. (2d) 229

FILED JULY 24, 1942. No. 31327.

1. **Insurance.** Parties to insurance contracts have the right and power to contract for what accidents and risks insurer shall and shall not be liable, and courts may not make new or different contracts for them.
2. ———. An insurance policy is a contract and, if couched in unambiguous and clear language, should be construed as other contracts.
3. ———. Where there is no uncertainty as to the meaning of an insurance contract, and the same is legal and not against public policy, it will be enforced as made.
4. ———. Evidence in the record examined, and *held* to establish that the deceased at the time of the accident which caused his death was not actually riding as a "fare-paying passenger."
5. ———. Section 44-322, Comp. St. 1929, *held* inapplicable to the terms of the policy in suit.

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

Beghtol, Foe & Rankin, Walter E. Nolte and *Phil L. Sidles,* for appellant.

Peterson & Devoe and *Chauncey E. Barney, contra.*

Heard before SIMMONS, C. J., ROSE, EBERLY, CARTER, MESSMORE and YEAGER, JJ.

EBERLY, J.

This is an action by Nellie M. Krause to recover $10,000 upon an accident insurance policy issued by the defendant company upon the life of Victor Walton Krause, who died in the crash of a T. & W. A. transport plane at Buena Vista Peak in California on March 1, 1938.

The petition, in proper form and appropriate language, alleges the issuance by the defendant of its "Accidental and Total Loss Benefits policy * * * assuring * * * Victor Walton Krause against loss of his life from bodily injuries effected solely through external, violent and accidental means." Further, that while such policy was in full force and effect, "on the 1st day of March, 1938, the said Victor Walton Krause was actually riding as a fare-paying passenger in a licensed commercial aircraft provided by an incorporated common carrier for passenger service, and while said aircraft was operated by a licensed transport pilot and was flying in a regular civil airway between definitely established airports," the airplane crashed, and in such accident the insured "was killed from bodily injuries thereby effected and solely through external, violent and accidental means resulting directly and independently of all other causes." Full compliance with all applicable terms of the policy, including the furnishing of due proof of loss, and the refusal of defendant to pay as required by the terms of the contract of insurance, is set out in due form.

The defendant in an amended answer practically admits the allegations of plaintiff's petition, save in one respect, and, as the sole defense, alleges, in substance, that at the time of the occurrence of the accident Victor Walton Krause was not riding in the aircraft as a fare-paying passenger, but as the donee of a "trip pass" without payment by him of

any tariff or fare for said transportation or for said privilege.

For her reply plaintiff, in substance, alleges that the trip pass did not entitle Victor Walton Krause to ride upon the aircraft, but that prior to granting permission for embarkation said Krause was required to pay a consideration to the company, to wit, to purchase a flight coupon for the sum of $5; that prior to embarking Krause delivered such trip pass and flight coupon to the persons in charge of the aircraft and the same were accepted as payment of fare of such Krause. Plaintiff further alleged that Victor Walton Krause was entitled to receive, and did receive, the same accommodations and conveniences and rode in the airplane in the same manner as all of the other passengers then being transported.

A trial of these issues resulted in a finding generally in favor of the defendant, and a judgment of dismissal of plaintiff's action. From denial of her motion for a new trial, plaintiff appeals.

The plaintiff's reply sets forth the ultimate facts upon which, eliminating the conclusions of the pleader, the parties are in practical agreement. The evidence in the record is not conflicting. The general terms of this insurance contract are embodied in the instrument in suit in the usual form and substance. The provision of the policy out of which the instant dispute arises is the following: "21. This policy does not cover loss resulting directly or indirectly, in whole or in part from * * * (D) bodily injury sustained by the insured while in or on any vehicle or mechanical device for aerial navigation, or in falling therefrom or therewith, or while operating or handling any such vehicle or device, unless the insured is actually riding as a fare-paying passenger in a licensed commercial aircraft provided by an incorporated common carrier for passenger service, and while such aircraft is operated by a licensed transport pilot and is flying in a regular civil airway between definite established airports * * * ."

It will be noted that air travel, as such, is, by the terms

of the policy, made a strictly excluded risk, save and except when it is carried out in compliance with the words framing the exception to the contractual inhibition on that subject set forth in the policy.

The controlling question in this case is, whether, under the circumstances surrounding this fatal accident, Victor Walton Krause was then within the limitations created by the language of the exception above set forth.

"Of course, as is true of parties to insurance contracts generally, the parties to accident insurance contracts have the right and power to contract for what accidents and risks the company shall and shall not be liable, and the courts may not make new or different contracts for them." 29 Am. Jur. 706, sec. 930. See, also, *Hawkeye Commercial Men's Ass'n v. Christy*, 294 Fed. 208, 40 A. L. R. 46; *Kirkby v. Federal Life Ins. Co.*, 35 Fed. (2d) 126; *Commonwealth Casualty Co. v. Aichner*, 18 Fed. (2d) 879.

This jurisdiction is committed to these principles:

(1) "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; *Howie v. Cosmopolitan Old Line Life Ins. Co.*, 132 Neb. 367, 272 N. W. 207.

(2) "Where there is no uncertainty as to the meaning of an insurance contract, and the same is legal and not against public policy, it will be enforced as made." *Rye v. New York Life Ins. Co.*, 88 Neb. 707, 130 N. W. 434; *Howie v. Cosmopolitan Old Line Life Ins. Co., supra.*

The parties to this litigation apparently do not challenge the legality of the general exclusionary clause denying accident coverage to all injured in the course of aerial transportation. They differ solely upon the question of the proper interpretation of the descriptive words which identify the class of persons which constitute the exception to the rule of exclusion as agreed upon by the parties to this contract. To come within the contractual exception to this exclusionary rule, and to entitle one to coverage under the terms of

this policy, five essential elements of requirements must be complied with, as expressed in a single sentence of the policy heretofore quoted, viz., "Unless the insured (1) is actually riding as a fare-paying passenger (2) in a licensed commercial aircraft (3) provided by an incorporated common carrier for passenger service, (4) and while such aircraft is operated by a licensed transport pilot (5) and is flying in a regular civil airway between definitely established airports."

The sole question to be determined, made by the pleadings and appearing in the evidence, is, "Was deceased at the time of the accident actually riding as a 'fare-paying passenger'?"

The evidence discloses that the accident occurred while Victor Walton Krause was en route from Mills Field, San Francisco, California, to the Kansas City Airport in Kansas City, Missouri. He had paid $8 in cash and was riding on a "trip pass" at the time his injuries were received. The $8 so paid was pursuant to the following regulations relative to "nonrevenue transportation:" "1. Effective December 21, 1937, all passengers traveling on non-revenue transportation forms shall be charged nominal amounts to defray cost of ticketing, passenger supplies, etc. 2. Service charges shall be determined by length of trip in accordance with chart on page 5153, which is computed on basis of following scale," etc.

The so-called trip pass on which the deceased was riding on its face contained the following stipulation: "Passholder agrees herewith to leave plane at any point at request of authorized representative of T. & W. A. Passholders are not permitted to reserve space on plane." On the obverse side of the pass are conditions set forth in print to be signed by the holder of the pass. They include, among others, the following: "The user expressly assumes all risk of accidents, and of personal injury, and loss or damage to property, regardless of their causes, and absolves the company from all liability therefor."

It also appears that at the time of the accident the regu-

larly scheduled tariff or fare for the transportation of a passenger from Mills Field, San Francisco, California, to the Kansas City Airport at Kansas City, Missouri, was the sum of $94.03, which sum was then regularly being charged and collected by the transporting company.

We are very doubtful whether a passenger who was deprived of the right of reserving space on the plane before going on board, whose present continuance therein was a matter of the carrier's option, who voluntarily assumed the obligation to leave the plane upon being so requested, who had expressly assumed all risk of accident and of personal injury, and any loss or damage to property regardless of their causes, and who also had absolved the company from all liability therefor, may be said in any event to be in the situation that it could justly be said that he was "actually riding as a fare-paying passenger."

The word "as," as employed in the policy provision quoted, we know is dependent on context and variously defined in accordance therewith. The Century Dictionary and Cyclopedia affords us numerous examples of the proper use of this word under various definitions by it given. A sentence by it quoted from Macaulay illustrates the situation which is here presented: "This gentleman was known to his contemporaries as a man of fortune, and *as* the author of two successful plays."

Applying the rule that terms of contracts are to be taken and understood in their plain, ordinary and popular sense, the words "unless the insured is actually riding as a fare-paying passenger" do not, in the light of the example quoted, present any question of ambiguity, but the ordinary and popular sense of the term conveys the meaning of "being a fare-paying passenger." The "fare-paying passenger" is the passenger who pays the legal fare. This in the present case was $94.03. The traveler can pay no other amount as "'fare," and the payment of no other than the legal fare will be a discharge of his obligation to make such payment. "Fare," as used in connection with interstate transportation, we define as a rate of charge for the carriage of passen-

gers, as approved by the proper governmental agency. In this sense of the term the deceased was not a "fare-paying passenger" as that term was employed in the contract in suit.

Nor do we find that the provisions of section 44-322, Comp. St. 1929, are invoked by the case here presented. What we have here is not a forfeiture of a policy upon conditions broken, but an excepted risk never assumed by the insurer. That was the express contract made. Courts are not empowered to make new contracts for its suitors. It is not intended or contemplated by the policy in suit that aeronautic activities of the kind disclosed by the evidence in the instant case shall avoid or annul such policy, but its provisions amount merely to an express agreement that the insurance coverage should not extend to an accident sustained in that way. *Wendorff v. Missouri State Life Ins. Co.*, 318 Mo. 363, 1 S. W. (2d) 99; *Hawkeye Commercial Men's Ass'n v. Christy*, 294 Fed. 208; *Head v. New York Life Ins. Co.*, 43 Fed. (2d) 517; *Matter of Metropolitan Life Ins. Co. v. Beha*, 226 App. Div. 408, 235 N. Y. Supp. 501.

Again, the policy of insurance in the instant case, as an entirety, wholly excludes coverage so far as airplane accidents are involved, but provides as an exception thereto, upon conditions stated, the case of an insured "actually riding as a fare-paying passenger." If this be deemed a condition, and the exception to which it is limited and of which it forms an elemental part is invalidated thereby, the general clauses of the policy would then still remain in full force and effect. This would necessarily exclude coverage from all airplane accidents of any kind or nature. So, it appears, in view of the entire record, that the action of the district court in denying plaintiff relief was in accordance with the facts in the record and the law of the case.

The judgment of the district court is, therefore,

AFFIRMED.

MYRTLE M. JOHNSON, ADMINISTRATRIX, APPELLEE, V. ANOKA-BUTTE LUMBER COMPANY ET AL., APPELLANTS.
5 N. W. (2d) 114

FILED JULY 24, 1942. No. 31403.

1. **Appeal.** The submission of a material issue to the jury, where there is no evidence to sustain a finding thereon, ordinarily constitutes prejudicial error.
2. **Automobiles.** A pedestrian has equal rights with the operator of a vehicle in the use of public highways, and each must use reasonable care for his own safety and the safety of others.
3. ———. Where a pedestrian, clad in dark clothing, upon the background of a dark road, is walking at night on the left-hand side of the highway and is struck by a vehicle approaching from his rear, it is for the jury to determine if the operator of the vehicle was negligent in not seeing the pedestrian in time to avoid the accident.
4. ———. Under such circumstances, the pedestrian had the right to assume that the driver of a vehicle approaching from the rear would exercise ordinary care in keeping a lookout for him and others using the highway.
5. ———. A pedestrian so walking along the highway is not guilty of contributory negligence in failing to look back to observe the approach of vehicles from the rear, or in failing to anticipate the negligence of the driver of a vehicle approaching from that direction.

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

Gaines, McLaughlin & Shoemaker, for appellants.

William H. Lamme, contra.

Heard before SIMMONS, C. J., ROSE, EBERLY, PAINE, CARTER and YEAGER, JJ., and ELLIS, district Judge.

CARTER, J.

This is an action brought by plaintiff as administratrix of the estate of Carl H. Johnson, deceased, against the defendants to recover damages for the death of Carl H. Johnson. A verdict for $10,000 was returned for plaintiff and defendants appeal from the judgment entered thereon.

It appears that on the night of April 9, 1941, Carl H. Johnson was killed when struck by an oil transport truck

owned by the Anoka-Butte Lumber Company and operated by its employee, Celestine Reiman. The accident occurred south of a viaduct on highway No. 275 near the town of Waterloo, Nebraska, at about 10:00 p. m. The record shows that, as one approaches the viaduct from the south, the highway runs practically straight north until it reaches a point 150 feet south of the steel structure constituting the viaduct proper as distinguished from its approaches. When this point is reached the highway curves slightly to the west. The deceased was walking south on the left-hand side of the highway at a point 786 feet south of the south end of the steel portion of the viaduct when he was struck by the oil transport, which was also traveling south.

There is very little conflict in the evidence. The defendant Reiman left Fremont with the empty oil transport shortly after 9:00 p. m., en route to Topeka, Kansas. The night was dark and cloudy. The pavement was dry, but the shoulders were wet due to a rain that fell during the day. He had not been driving during the day, prior to his taking over the operation of the oil transport at Fremont. His testimony is that his truck, including brakes and lights, was operating properly. As he approached the viaduct from a northerly direction he passed a loaded cattle truck being driven by Reynold Ditter, which followed him up the incline of the approach to the viaduct at a distance of 250 feet behind him. As the oil transport came up the approach to the viaduct it followed another cattle truck being operated by John Nansel. As the Nansel truck left the steel portion of the viaduct the oil transport started around him. The evidence is that Nansel was not driving over 30 miles an hour and that Reiman was not exceeding 35 miles an hour during the passing operation. The paving at this point was 18 feet wide and the highway had a gradual downgrade for some distance. Just as the oil transport cleared the Nansel truck at a point approximately 786 feet south of the steel part of the viaduct, it was turned suddenly to the right, causing Nansel some difficulty in avoiding a collision. Reiman almost lost control of the transport, it running down

the right shoulder of the highway and coming to a stop off the highway almost perpendicular to it at a point 147 feet south of the place where the body of the deceased lay on the pavement. The evidence of Reiman is to the effect that just as he cleared the Nansel truck he suddenly observed the deceased on the pavement only four to six feet ahead of him and that he turned the transport to the right in an attempt to avoid the accident. The evidence shows that the truck proper missed the deceased, but that he was struck by the front end of the tank of the transport. The evidence of both Nansel and Reiman is that the highway was straight, that the lights on their trucks were on and that each could see the pavement within the full range of his lights. The witness Nansel never saw the deceased until after he was struck. The body of the deceased was found crosswise on the pavement with the head to the east within a few inches of the curb.

Before passing the Nansel cattle truck, Reiman blinked his lights as a signal that he was going to pass. Nansel observed the signal and the fact that the lights on the transport were on. Reiman did not sound his horn or give any other audible signal of his intention to pass.

The witness Roessler, a surveyor, testifies that the highway south from the viaduct forms a vertical curve, making a gradual grade. He also testified that there is a lateral curve requiring a super elevation of the pavement on the left-hand side for a distance of 310 feet.

The witness Ditter, the driver of the first cattle truck, testifies that when he was on the viaduct proper, Nansel was beyond it. His evidence is to the effect that the transport was also over the viaduct when he saw the lights on the transport blinked and the transport then start around the Nansel truck at a point 200 feet south of the steel section of the viaduct.

Defendant Reiman testifies that when he saw the deceased first he was walking about two feet from the east or left-hand side of the pavement. Deceased did not turn his head and evidently did not hear the approach of the vehicles behind him.

On this evidence the jury returned a verdict for plaintiff in the amount of $10,000. Defendants urge that the evidence is insufficient to sustain a verdict and that defendants' motion for a directed verdict should have been granted, that the court erred in the giving of instructions and that the judgment is excessive.

It is urged that the oil transport was negligently operated on the left-hand side of the highway while on a curve, said alleged operation being contrary to statute. Comp. St. Supp. 1941, sec. 39-11,103. The testimony is somewhat in conflict as to the point where the oil transport started to pass the Nansel cattle truck. The evidence most favorable to plaintiff is that the start was made on the viaduct proper. The undisputed evidence is, however, that deceased was struck 786 feet south of the viaduct and that from a point 310 feet south of the viaduct the road was straight. For 476 feet, therefore, before striking the deceased, the oil transport had been traveling on a straight road. Any violation of the rules of the road back on the overpass, therefore, had no causal connection with the accident. We think this evidence is too remote to have any force in establishing negligence on the part of the operator of the oil transport. We are of the opinion that the trial court was in error in submitting this issue to the jury when there was no evidence offered sufficient to sustain a finding of negligence for passing another truck on a curve. Such error is prejudicial to the rights of the defendants. *Knoche v. Pease Grain & Seed Co.*, 134 Neb. 130, 277 N. W. 798; *McClelland v. Interstate Transit Lines*, 139 Neb. 146, 296 N. W. 757.

It is contended by plaintiff that the operator of the oil transport drove at an excessive speed and that he was unable to stop within the range of his vision. There is no evidence to sustain this conclusion in the record. The maximum rate of speed of the oil transport testified to by any witness was 35 miles an hour. This certainly was not excessive speed on a straight, arterial state highway outside the territorial limits of any village, town or city, under the circumstances shown. Reiman had no reason to attempt a stop

within the range of his vision. The first time he saw the deceased he was from four to six feet from him. The situation does not call the rule cited into operation. As a general rule it is negligence as a matter of law for a motorist to drive an automobile so fast on a highway that he cannot stop in time to avoid a collision with an object within the area lighted by his lamps. *Roth v. Blomquist,* 117 Neb. 444, 220 N. W. 572. But this rule has no application where the object struck was not seen until the driver was close upon it. The rule that it is negligence to drive a car so fast that you cannot stop it within the distance you can see is based upon the reckless speed that such a situation implies. In the case at bar an ability to stop within the range of the oil transport's lights would not have averted the accident. The evidence indicates that the transport was being driven at a reasonable rate of speed. The rule contended for, although correct, has no application to the facts before us. The negligence of Reiman must, if any exists, be predicated on some other theory.

It is argued, however, that the operator ought to have seen the deceased on the highway in ample time to have averted the accident. This raises a different question than that last before considered. It cannot be questioned that deceased had a legal right to walk along the highway on the pavement. The transport likewise had a right to travel the highway at the speed it was traveling and to pass other cars or trucks at the point where it passed the Nansel stock truck. The deceased, though he had a legal right to walk on the highway, is also required to use reasonable care for his own safety. The driver of the transport, in the exercise of his legal rights, was required to exercise due care for the safety of others who might reasonably be expected to be on the highway. Such driver is likewise required to anticipate that pedestrians may be using the highway and to use due care to protect any such which may be using it at the time. *Holler v. Lowery,* 175 Md. 149, 200 Atl. 353; *Poole v. Twentieth Century Operating Co.,* 121 N. J. Law, 244, 1 Atl. (2d) 389.

In passing, the driver of the oil transport did not sound his horn nor make any audible warning of his approach. It

is true that he blinked his lights, a custom often used but unrecognized by the rules of the road, to indicate his intention to pass. The driver of the stock truck recognized the signal and gave effect to it. But there is, of course, no evidence that the deceased saw or understood such a signal.

It is claimed that the lights on the oil transport were defective and the jury were instructed with reference thereto. The proof offered was the evidence of Alfred Pattavina, who tested the lights and brakes at Omaha on the day following the accident. His testimony was that the bright beam of the left headlight was out. The evidence of Reiman, Ditter and Nansel was that the lights were properly operating at the time of the accident and after. Two deputy sheriffs investigated the accident immediately after it occurred, and neither observed that a headlight was out. A picture taken by a deputy sheriff during the investigation shows the oil transport in the background with both lights burning. The testimony of Pattavina as to the condition of the lights was too remote and without sufficient foundation to have any evidentiary value. There was no evidence sufficient to warrant the submission of the question of defective headlights to the jury, and it was error for the court to so do.

The evidence shows that deceased was wearing a blue suit and a dark overcoat. That a pedestrian so dressed would be more difficult to see goes without saying. The operator of a truck equipped with headlights as required by statute, who does not observe a pedestrian until just before striking him, is not conclusively guilty of negligence. Under such circumstances it is clearly a question for the jury. The question whether Reiman should have seen the deceased, and the inferences to be drawn from the evidence adduced, are matters of evidence which a jury must decide.

In *Schmeiske v. Laubin,* 109 Conn. 206, 145 Atl. 890, the court in a similar case said: "It is a matter of common knowledge that a pedestrian, clad in dark clothing, upon the background of a dark road, and walking in the same direction in which an automobile is proceeding which is overtaking him from the rear, will not under all circumstances be

picked up by the headlights of a car at a distance of two hundred feet. In the present case it was not alleged or claimed by the plaintiff that there was any violation by the defendant of the statute requiring a motor vehicle to be equipped with headlights throwing sufficient light ahead to show an object upon the roadway two hundred feet distant. On the contrary, the plaintiff offered evidence to prove and claimed to have proved that the defendant's car was equipped with proper headlights in compliance with the statute, and contended that, the car being thus equipped, its driver was negligent as a matter of law in failing to see plaintiff's intestate in time to avoid striking him. Because a dark object, resting upon a dark background, may not be clearly visible under all conditions at a distance of two hundred feet in front of a motor vehicle equipped with headlights which meet the statutory requirements, the failure of the operator of such a vehicle to see such object at that distance may not conclusively establish a lack of due care on his part. The court did not err in submitting to the jury the question of the negligence of the operator of the defendant's car."

And in *Booth v. Meagher,* 224 Mass. 472, 113 N. E. 367, the court said: "Whether the principal defendant was negligent in not sooner seeing the plaintiff and in not so operating his automobile with reference to the concurrent right of the plaintiff and himself to travel upon the public way as to avoid a collision, was for the jury."

Defendants contend that the question of the contributory negligence of the deceased should have been submitted to the jury. It must be borne in mind that the deceased had a right to walk down the paved portion of the highway that was equal to that of the oil transport. Deceased was walking on the left-hand side of the pavement, facing the direction in which traffic occupying that side of the highway usually approached. This is recognized as the safest method for a pedestrian to travel longitudinally on a public highway. He had the right to assume that vehicles approaching from the rear would exercise ordinary care in keeping a lookout for him. He was under no duty to maintain a lookout to the

rear to avoid a charge of negligence. *Brenning v. Remington,* 136 Neb. 883, 287 N. W. 776; *Nichols v. Havlat,* 140 Neb. 723, 1 N. W. (2d) 829. We do not think that the evidence shows any act of the deceased which would warrant the submission of contributory negligence to the jury. The trial court properly refused to do so.

The only question properly determinable was whether Reiman was negligent in failing to see the deceased in time to avoid the accident.

This court has often pointed out that it is error to submit issues upon which there is no evidence to sustain an affirmative finding. It is the duty of trial courts to determine the issues upon which there is competent evidence and submit them, and them only, to the jury. The submission of issues upon which the evidence is insufficient to sustain an affirmative finding is generally very prejudicial and invariably results in a second trial. It is for this reason that this court discourages the copying of pleadings in the instructions, for they ofttimes contain allegations which have been abandoned or which have become nugatory for want of sufficient proof to sustain them.

For the reasons stated, the judgment of the district court is reversed and the cause remanded for a new trial.

REVERSED.

IN RE GUARDIANSHIP OF PETER HERGENROTHER. PETER HERGENROTHER, APPELLANT, V. FRED HERGENROTHER ET AL., APPELLEES.

5 N. W. (2d) 118

FILED JULY 24, 1942. No. 31341.

1. **Insane Persons.** The provisions of sections 30-1601 to and including 30-1610, Comp. St. 1929, relating to probate matters, apply to actions involving the appointment of guardians and administration of their wards' estates, as well as the administration of estates of deceased persons.
2. ———. A district court does not acquire jurisdiction of an ap-

peal from an order in a probate proceeding unless, within 30 days from the date of such order, the bond upon appeal required by section 30-1603, Comp. St. 1929, has been executed and filed.

3. **Courts.** The right to appeal from the county court to the district court is statutory. Statutory requirements relating to appeals and especially to appeal bonds are mandatory.
4. **Insane Persons.** Appellant in the instant case is not an administrator, executor, guardian or guardian *ad litem*, and is not excepted from giving bond on appeal, as contemplated by section 30-1603, Comp. St. 1929.

APPEAL from the district court for Clay county: EDMUND P. NUSS, JUDGE. *Affirmed.*

George W. Miller, for appellant.

August C. Krebs and *D. B. Massie, contra.*

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

MESSMORE, J.

On March 28, 1941, a proceeding was brought in the county court of Clay county, Nebraska, for the appointment of a guardian, pursuant to section 38-201, Comp. St. 1929, which provides: "When the relatives or friends of * * * any person who, by reason of extreme old age, * * * is mentally incompetent to have the charge and management of his property, shall apply to the county court to have a guardian appointed for him," etc. The court gave the proper 14-day notice, as provided by said section, hearing was had, a guardian appointed, and bond given by the guardian April 16, 1941, as provided by sections 38-202 and 38-203, Comp. St. 1929.

The petition was brought by six nephews and nieces of Peter Hergenrother, a man 83 years of age, who, just prior to the bringing of the proceedings, deeded 160 acres of land, of the assessed valuation of $6,000, for the consideration of one dollar, to one Willard Anderson. Peter Hergenrother was also possessed of personal property situated in Clay county, the value of which was not known to the petitioners. The ward gave notice of appeal on April 16, 1941, and a cer-

tified transcript of the proceedings had in the county court was filed with the clerk of the district court on the 19th of April, 1941. On the 21st of May, 1941, the guardian filed two motions to dismiss the appeal in the district court, for the reason that no appeal bond had been filed within 30 days from the date of the order, as required by the statutes of this state, and that the appellant is not an administrator, an executor, a guardian or guardian *ad litem* in said case; the time for the filing of the appeal bond has expired, and the court has no jurisdiction to hear the case. The district court sustained the motion to dismiss the appeal and remanded the case to the county court for further proceedings. From that order of the district court, the ward appeals to this court.

Sections 30-1601 to and including 30-1610, Comp. St. 1929, provide procedure for appeals in probate matters from the county court to the district court.

In 1 Bouvier's Law Dictionary (Rawle's 3d Rev.) p. 712, appears the following: "Court of Probate. In American Law. A court which has jurisdiction of the probate of wills and the regulation of the management and settlement of decedents' estates, as well as a more or less extensive control of the estates of minors and other persons who are under the especial protection of the law." And in 34 Words & Phrases (Perm. ed.) p. 59, the word "probate" is thus defined: "Probate originally meant merely relating to proof, and afterward relating to the proof of wills. Yet in the American law it is now a general name or term used to include all matters of which probate courts have jurisdiction, which are usually the estates of deceased persons and all persons under guardianship."

This court, in *In re Guardianship of Strelow*, 116 Neb. 873, 219 N. W. 387, held that the provisions of section 1471, Comp. St. 1922 (now section 30-1601, Comp. St. 1929) are "applicable to actions involving the appointment of guardians and the administration of their wards' estates, as well as to the administration of estates of deceased persons." By the decision of the court in the *Strelow* case, it is obvious

that appeals from orders in guardianship matters from the county court to the district court are governed by article 16, ch. 30, Comp. St. 1929, "Appeals in Probate Matters."

Section 30-1601, Comp. St. 1929, which is the same as section 1471, Comp. St. 1922, above referred to, provides: "In all matters of probate jurisdiction, appeals shall be allowed from any final order, judgment, or decree of the county to the district court by any person against whom any such order, judgment or decree may be made or who may be affected thereby."

That the words "probate jurisdiction," as used in section 1471, Comp. St. 1922, and in section 30-1601, Comp. St. 1929, above quoted, were by the legislature intended to and do include appointment of guardians and the administration of their wards' estates, as well as the administration of estates of deceased persons, is evidenced by reference to section 1473, Comp. St. 1922, which is analogous to section 30-1603, Comp. St. 1929, providing, in part, as follows: "Every party so appealing shall give bond in such sum as the court shall direct, with two or more good and sufficient sureties, to be approved by the court, conditioned that the appellant will prosecute such appeal to effect without unnecessary delay, and pay all debts, damages and costs that may be adjudged against him. *The bond shall be filed within thirty days from the rendition of such decision.* But an executor, administrator, guardian or guardian *ad litem* shall not be required to enter into bond in order to enable him to an appeal." (Italics ours.)

In the instant case, no objections to the appointment of the guardian were filed by the ward or his attorney in the county court. The guardian did not appeal; neither was counsel for the ward appointed guardian *ad litem.* Therefore, the exceptions to the filing of a bond on appeal, as required by section 30-1603, *supra,* were nonexistent. No bond was filed in the district court to appeal from the county court as required by section 30-1603. This was the only question before the court and is the only question to be determined by this court. The following decisions are likewise applicable:

In *Jones v. Piggott,* 68 Neb. 140, 93 N. W. 1000, this court held: "A district court does not acquire jurisdiction of an appeal from an order in a probate proceeding unless within forty days from the date of the order a transcript thereof and of the proceedings relative to it is filed with the district court clerk, nor unless within thirty days from the date of such order the bond upon appeal, required by the statute, has been executed and filed." See, also, *In re Estate of Powers,* 79 Neb. 680, 113 N. W. 198; *In re Estate of Nelson,* 108 Neb. 296, 187 N. W. 916; *In re Estate of Runyon,* 111 Neb. 635, 197 N. W. 417.

The right to appeal from the county court to the district court is statutory. Statutory requirements relating to appeals and especially to appeal bonds are mandatory. See *Greb v. Hansen,* 123 Neb. 426, 243 N. W. 278.

Appellant, having failed to comply with the provisions of the applicable statutes, viz., sections 30-1601 to and including 30-1610, Comp. St. 1929, cannot prevail in this appeal. The decision of the district court in sustaining the motion on the part of the guardian to dismiss the appeal from the county court to the district court was correct.

Having determined this issue, other assignments of error need not be considered.

AFFIRMED.

GEORGE BOURLIER, APPELLEE, V. W. K. KEITHLEY ET AL., APPELLANTS.

5 N. W. (2d) 121

FILED JULY 24, 1942. No. 31366.

1. **Execution.** The proceeding to obtain order for examination of judgment debtor under section 20-1567, Comp. St. 1929, is *ex parte.*
2. ———. Section 20-1567, Comp. St. 1929, contemplates that the order for examination shall issue on proof by affidavit or other proof *ex parte* furnished by the judgment creditor.
3. ———. The court in a proceeding in aid of execution under section 20-1567, Comp. St. 1929, is without power to make any order

having binding force upon the judgment debtor, unless and until the order for appearance has been served or the judgment debtor has voluntarily appeared in response to the order.

4. **Appeal.** Until there is a final order in a proceeding in aid of execution under section 20-1567, Comp. St. 1929, no appeal may be taken by the judgment debtor.
5. **Execution.** A showing which conforms in form and substance to the requirements of section 20-1567, Comp. St. 1929, is sufficient to require a judgment debtor to appear for examination.
6. ———: COSTS. A proceeding in aid of execution is a special proceeding made upon a summary application in an action after judgment, and is not an action within the meaning of section 20-1701, Comp. St. 1929, requiring a nonresident of a county in which action is brought to furnish security for costs.

APPEAL from the district court for Otoe county: WILMER W. WILSON, JUDGE. *Appeal dismissed.*

Lloyd E. Peterson, for appellants.

William Niklaus and *Tyler & Frerichs, contra.*

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

YEAGER, J.

This is an appeal by W. K. Keithley and Beulah H. Keithley, defendants, from the action of the trial court, in a proceeding in aid of execution, first, in refusing to require the judgment creditor, George Bourlier, plaintiff and appellee herein, to give security for costs, he being a nonresident of the county in which the proceeding was pending; second, in refusing to require the judgment creditor to make his affidavit more definite and certain, which affidavit was the basis for order requiring appearance and submission to examination by the defendants who are the judgment debtors; and, third, from the order itself.

The record on appeal discloses that the appellee on February 15, 1938, obtained a judgment against the defendants in the amount of $2,784.86, with interest and costs, of which amount on March 10, 1941, there remained unpaid $1,434.86, plus interest and costs. On March 10, 1941, appellee by motion invoked the remedy provided by section 20-1567, Comp.

St. 1929, and sought an order requiring that appellants appear before the court and submit to examination as to property owned by them. The motion was supported by the affidavit of appellee. The affidavit set forth the statutory essentials necessary to the issuance of an order for the appearance of the appellants.

On March 13, 1941, without the court having issued the order sought by appellee, the appellants filed motion for security for costs. This motion was overruled on April 26, 1941, at which time the appellants were allowed ten days within which to plead.

On May 6, 1941, and again before issuance of order, the appellants filed motion to require appellee to make his affidavit more definite and certain. This motion was overruled on August 8, 1941.

On the same day, on the original motion of appellee, the court entered an order requiring the appellants to appear for examination on August 23, 1941, at 10 o'clock a. m. The order was duly served August 11, 1941; however, the appellants have never appeared in response to the order.

On August 14, 1941, and again on November 3, 1941, the appellants gave notice of appeal. The transcript was filed November 5, 1941.

To say the least, the proceedings as disclosed by the foregoing chronology of events and in the light of the intent and purpose of the statutes requiring examination here were unusual. We can say also that they were irregular and doubtless calculated to hinder and delay orderly processes under the legislative grant of authority for proceedings in aid of execution.

One needs but to read the statute to ascertain that the application and the furnishing of evidence by affidavit or otherwise is an *ex parte* presentation. The issuance of the order for appearance and examination is dependent solely on the *ex parte* presentation.

The court was without power or jurisdiction over, or to make any order having binding force upon, appellants, unless and until the *ex parte* order was served, or unless they

voluntarily made some character of general appearance in response to the order.

The order was served, but no appearance was made unless it be said that notice of appeal was an appearance, but, however that be, the district court entered no order of any kind affecting the substantial rights of appellants after it had jurisdiction to enter such order. Nothing was done which gave appellants any right of appeal. At the time the appeal was taken there had been no final order from which an appeal could be taken. See *Clarke v. Nebraska Nat. Bank,* 49 Neb. 800, 69 N. W. 104.

On the issues sought to be presented it may be stated that in due course and at the proper time the appellants would have had the right to attack the legal sufficiency of the application for order for appearance and examination and the supporting evidence, but they did not permit pursuance of the instituted proceeding to the point where the opportunity to raise these questions became available to them.

The showing was made agreeable in form and substance to and in the manner required by statute *ex parte* to a court or judge. *Clarke v. Nebraska Nat. Bank,* 57 Neb. 314, 77 N. W. 805. See, also, *Estey v. Fuller Implement Co.*, 82 Ia. 678, 46 N. W. 1098. Therefore, by way of declaration to avoid further useless litigation it may be stated that the affidavit in question here was a sufficient showing for the purpose of requiring examination of the judgment debtor under the provisions of section 20-1567, Comp. St. 1929.

A proceeding in aid of execution is a special proceeding made upon a summary application in an action after judgment. *Clarke v. Nebraska Nat. Bank,* 49 Neb. 800, 69 N. W. 104. It is not an action within the meaning of section 20-1701, Comp. St. 1929, requiring a nonresident of a county in which action is brought to furnish security for costs.

For the reasons stated, the appeal is dismissed.

APPEAL DISMISSED.

CECIL E. SHEPARD ET AL., APPELLANTS, V. CITY OF FRIEND, APPELLEE.

5 N. W. (2d) 108

FILED JULY 24, 1942. No. 31385.

1. **Judgment.** The defense of *res adjudicata* becomes available when a question of fact has been put directly in issue in an action between the same parties or their privies and an adjudication is had thereon.
2. ———. Under the doctrine of *res adjudicata*, when a question of fact is once determined on the merits, that question is settled, so far as the litigants and those in privity are concerned. Such question when decided cannot be relitigated between the same parties.
3. ———. Where a party mistakenly chooses a remedy that is not available to him, he is not under the doctrine of *res adjudicata* barred from availing himself of the proper remedy.
4. ———. The doctrine of *res adjudicata* does not preclude a party from resorting to a remedy which he is entitled to by an attempt to avail himself of one to which he is not entitled.
5. ———. Where there is no mistake of remedy but a choice between available remedies, and the facts upon which the chosen remedy depends fail, the same facts may not be asserted in a later action between the same parties or their privies with the other remedy as the basis for the later action.
6. ———. Where there is a finding of fact in an action in equity or in law, such finding is *res adjudicata* in any other action on the same issues of fact between the same parties or their privies, whether the action be in equity or law.

APPEAL from the district court for Saline county: STANLEY BARTOS, HARRY D. LANDIS and CLOYDE B. ELLIS, JUDGES. *Affirmed.*

Albert S. Johnston, for appellants.

Joseph Ach, contra.

Heard before SIMMONS, C. J., ROSE, EBERLY, PAINE, CARTER and YEAGER, JJ.

YEAGER, J.

This is an action by Cecil E. Shepard, Cora M. Hall, H. F. M. Hall and Lulu Kreiling, plaintiffs and appellants, against the city of Friend, a municipal corporation, defendant and

appellee, whereby plaintiffs seek to recover damages from the defendant on account of claimed injury to the real estate belonging to the plaintiffs, and interference with the use of such real estate.

The determination of the case before this court is dependent solely and alone on whether or not the action here is barred by a previous adjudication; therefore, it becomes necessary to set forth the substance of a large part of the petition.

In the petition it is stated that the defendant is a city of the second class situated in Saline county, Nebraska; that the plaintiffs have for more than 15 years been the owners of the east one-half of the southwest quarter of section 24, and the northwest quarter of section 25, all in township 8, range 1 east of the 6th P. M., in Saline county, Nebraska, which lands comprise a single farm unit of 240 acres more or less; that this real estate is southeastward from the city of Friend, and that the described northwest quarter is traversed by a draw or slight depression, which draw extends onto the southwest quarter of section 25; that during 1925 the city of Friend put into operation a sewerage system by which sewage is collected from the city, and is conducted through tiles to a point on the highway about 40 rods north of the northwest quarter of section 25 above described, and from that point the sewage is allowed to flow on the surface into and through the draw on plaintiffs' lands; that the volume of sewage for a year or two was negligible, but that since the volume has increased from year to year until 1928 when the flow became continuous and has attained a flow of 40,000 gallons a day, all of which flows upon and across the lands of plaintiffs; that prior to the flow of sewage across the lands the draw carried no continuous stream, but only the natural surface run-off waters and that the draw was tilled and produced luxuriant crops and grasses for pasture; that since the sewage flow across the lands foul and nauseous odors and exhalations emanate and are carried over the land and permeate the atmosphere, thus rendering the land and the dwelling-house thereon of little value; that a wide

strip along the bottom of the draw has become water-soaked to the degree that it cannot be crossed in regular farming operations, and thus it has been rendered unfit for farming and greatly destroying the value of the adjacent land for farming; and other damage to the land and its use is alleged which we deem unnecessary to set out here. The prayer is for damages.

The defendant filed an answer in which it set forth in substance as a defense, among other defenses, that in an equity action filed in the district court for Saline county, Nebraska, in March, 1937, between the same parties, the same issues and subject-matter as are presented by the petition herein were adjudicated on the merits in favor of the defendant herein, which adjudication was affirmed by this court, and that such adjudication is binding on the plaintiffs; that in that action it was adjudicated that plaintiffs sustained no damage other than from odors, which condition was corrected by the defendant.

This issue of former adjudication or *res adjudicata* was, by stipulation of the parties, the only one presented to the district court and is the only one for consideration here.

For the purpose of presenting this issue the parties have incorporated into the bill of exceptions herein from the former action the pleadings, the judgment or decree, the pertinent orders, the bill of exceptions on appeal, the briefs of the parties and the opinion and mandate of this court. They have also stipulated that the plaintiffs here, together with Frank Olmsted and Bert Cain, were the plaintiffs in the former action.

Frank Olmsted was the tenant in possession and Bert Cain was the owner of real estate not involved in the action here.

It is clear that for the purposes of our consideration here the parties to the former action were the same as here and the same real estate was involved.

The former action was not an action for damages but was for an injunction on account of damages. The petition there set forth the construction of the sewerage system and the

collection and flow of sewage in substance the same as is set forth in the petition herein; also it contained substantially the same allegations as to injury and damage to land and buildings and their use; it concludes with the following paragraph: "That the plaintiffs have no adequate remedy at law, and unless the defendants are restrained from continuing to empty such sewage in the manner above described, said defendants will continue so to do, and unless said defendants are required by order of court to abate said nuisance the same will continue to the irreparable damage of the plaintiffs and the public in general."

The prayer was for injunction and for such other, further and different relief as to the court may seem just and equitable.

After conclusion of the trial, decree containing the following was entered:

"Now on this 20th day of July, 1937, the same being one of the days of the regular May 1937 term of said court, this cause having been taken under advisement until this date comes on for judgment of the court, and the court finds that no injunction should issue against the defendant, city of Friend, at this time, and the court further finds that noxious odors emanate from the low places on the plaintiffs' land and that the defendant, city of Friend, should be granted a period of ninety days to correct such odor by chemical treatment or other sufficient treatment as may be recommended by competent engineers and within the prescribed time upon correction of said odor on written motion said action will be dismissed. City of Friend et al., granted exception. And the court further finds that there are no other elements of damage; that the flow of water does not constitute damage to plaintiffs. Cora M. Hall et al., granted exception. The court further finds that the costs of said action be assessed to defendant, city of Friend.

"It is therefore ordered, adjudged and decreed by the court that no injunction issue against the defendant, city of Friend, and that the city of Friend be granted ninety days from date hereof to correct the noxious odors that emanate

from the low spots on the plaintiffs' land, and that upon correction thereof said action be dismissed upon motion; that there are no other elements of damage; that the costs of said action be assessed against the city of Friend."

From this decree the plaintiffs appealed and their first assignment of error, which was exhaustively argued in the brief, was the following:

"That the findings of the court that there were no elements of damage other than the odors is not supported by and is contrary to the evidence."

In the opinion of this court, which is reported as *Hall v. City of Friend,* 134 Neb. 652, 279 N. W. 346, the following is found:

"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."

Further in the opinion the facts bearing on the question of damages are discussed at length.

Finally in the opinion it is stated:

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

A motion was duly made to dismiss the action in pursuance of the decree which was affirmed by this court.

This motion came on for hearing finally on May 1, 1939. At that time the plaintiffs moved the court as follows:

"Come now the plaintiffs and, pursuant to oral request made in open court subsequent to the departure of the court

reporter, hereby pray the court for orders in this matter as follows:

"1. In the event of a finding by the court that the defendants have corrected the noxious odors which were found by the previous order of the court to emanate from the effluent from the sewage disposal plant of the defendants, such correction having been made largely by the manner in which said plant is operated and the sewage treated, that the court by order require said defendants to continue to operate said sewage disposal plant in the manner found to have resulted in the correction, and not permit the same to be neglected and inefficiently or improperly operated as it had theretofore been.

"2. Plaintiffs further pray that in the event the court finds that the defendants have sufficiently corrected the operation of said sewage disposal plant so that no injunctive relief may be granted to the plaintiffs, that the plaintiffs be allowed to amend their pleadings to set forth their causes of action for damages sustained by reason of the burden cast upon their lands by the discharge of the effluent from the defendants' sewage disposal plant in such manner that the same is caused to continuously flow upon and across the lands of the plaintiffs where no continuous stream previously flowed, and that plaintiffs be permitted to introduce evidence in support of such causes of action for damages, and that judgment be rendered on the issues joined on such causes of action for damages."

The several motions were finally ruled upon on September 25, 1939, and that portion of the rulings having a bearing on the issue of *res adjudicata* in this case and the dismissal therein is as follows:

"With reference to the motion of defendants for dismissal of this action on the ground of compliance with the provisions of the decree of this court, dated July 20, 1937, and granting the defendants 90 days in which to correct noxious odors, the court finds from the evidence presented that the defendant has sufficiently complied with the provisions of said decree; that as a result of the action taken by the de-

fendant, the effluent from its disposal plant has been rendered unobjectionable so far as inherent odor therefrom is concerned; and that in consideration of said action on the part of the defendant, pursuant to the decree of the court, the defendant is entitled to an order of this court dismissing this action at the cost of the defendant, including all costs accrued herein subsequent to the decree. * * *

"With reference to the request of plaintiffs for leave to amend their pleadings to seek recovery of damages for flowage of effluent on their lands, the court finds that an issue of damages is properly within the scope of this action, but that the request of plaintiffs should be denied for the following reasons, to wit: This court in its decree dated July 20, 1937, expressly found that the flow of water emanating from defendants' plant across lands of plaintiffs did not constitute damage to the plaintiffs. Said decree was more than a judgment that no enjoinable nuisance existed. It was, in effect, a determination that the defendants had a legal right to flowage and that no liability for damage therefrom existed in favor of the plaintiffs. This decree disposed of the primary issue of any claim for damages, namely, liability for damages, and therefore made it wholly immaterial and unnecessary to go into the matter of the quantum of the alleged damages.

"Said decree was a final and appealable order from which an appeal was actually taken and said decree wholly affirmed.

"The negation of liability for damages set forth in said decree was specifically assigned as error on the appeal and said assignment was not sustained, but on the contrary said decree and the negation therein contained were affirmed. * * *

"It is further by the court considered and ordered that the request of the plaintiffs for leave to amend their pleadings to seek recovery of damages for flowage be and the same is hereby denied.

"It is further by the court considered and ordered that this action be dismissed, with prejudice, at the costs of de-

fendants, including all costs accrued herein to date.

"To all of which the plaintiffs except."

No appeal was taken from these rulings, the order denying leave to amend the petition as prayed or the order of dismissal.

From this sequence of events and the proceedings disclosed by the record here we are called upon to determine whether or not the action of plaintiffs has been previously adjudicated. The district court held that it was and entered judgment accordingly.

The defense of *res adjudicata* becomes available when a question of fact has been put directly in issue in an action between the same parties or their privies and an adjudication had thereon. *Wilch v. Phelps*, 16 Neb. 515, 20 N. W. 840; *Morgan v. Mitchell*, 52 Neb. 667, 72 N. W. 1055; *Wittenberg v. Mollyneaux*, 60 Neb. 583, 83 N. W. 842; *State v. Savage*, 64 Neb. 684, 702, 90 N. W. 898, 91 N. W. 557.

Under the doctrine of *res adjudicata*, when a question of fact is once determined on the merits, that question is settled, so far as the litigants and those in privity are concerned. Such question when decided cannot be relitigated between the same parties or their privies. *State v. Savage, supra.*

Examination discloses without question that in the case at bar the same facts are pleaded as ground for relief as were pleaded in the former action. The pleadings in the former action were supported by evidence. On the facts as pleaded and sought to be proved in the former action a finding was made adverse to the plaintiffs there who are the plaintiffs here. The plaintiffs there pleaded damage as the ground of relief in all respects the same as here. The only differences between the two actions is that in the former injunctive relief was sought by reason of damage, whereas in the latter recovery of a money judgment for damages was sought; the former was an action in equity and the latter in law.

In the former action there was a specific finding on the facts pleaded that there was no damage except on account of odors. The court allowed correction in this respect and

made confirmation of the fact that correction had been effected. The finding in respect to damage was affirmed by this court. So therefore the finding of fact with reference to damage in the former action became final and binding upon all of the parties thereto and their privies.

At the time this finding became final the action was still pending in the district court on the matter of dismissal in accordance with the terms of the original decree.

When it came on for dismissal the plaintiffs moved for leave to amend their petition in such manner as to allow them to recover a money judgment for the damage to the land. This motion was denied and the action dismissed on a specific finding that there had been a factual adjudication which was final that no damage had been proved. From this finding and judgment of dismissal no appeal was taken.

It, therefore, is apparent that in the former action there are two adjudications on the factual questions presented by the pleadings and proof in the former action that no damage other than on account of odors had been proved.

It then becomes necessary for us to sustain the judgment of the district court unless it may be said, as plaintiffs contend, that this case comes within the rule that, where a party mistakenly chooses a remedy that is not available to him, he is not under the doctrine of *res adjudicata* barred from availing himself of the proper remedy.

In support of their contention in this regard the plaintiffs cite, from this jurisdiction, the cases of *Grand View Bldg. Ass'n v. Northern Assurance Co.*, 73 Neb. 149, 102 N. W. 246, and *Henley v. Live Stock Nat. Bank*, 127 Neb. 857, 257 N. W. 244.

The case of *Grand View Bldg. Ass'n v. Northern Assurance Co., supra,* was a suit on a fire insurance policy. The policy contained a clause declaring that it should be void if concurrent insurance should be obtained without the consent of the company in writing indorsed thereon. There was concurrent insurance. A fire occurred and suit was instituted on the policy. The supreme court of the United States in *Northern Assurance Co. v. Grand View Bldg.*

Ass'n, 183 U. S. 308, 22 S. Ct. 133, held that there could be no recovery on the policy. Thereafter, the plaintiff instituted action for reformation to include the indorsement allowing concurrent insurance and for recovery on the policy as reformed. Reformation was allowed and recovery had on the policy as reformed.

The effect of the holding was that the doctrine of *res adjudicata* does not preclude a party from resorting to a remedy which he is entitled to by an attempt to avail himself of one to which he is not entitled.

In the case of *Henley v. Live Stock Nat. Bank, supra,* it was held that a party is not precluded from asserting a remedy to which he is entitled under the law because he has attempted to avail himself of one to which he is not entitled. See *Stone v. Snell,* 86 Neb. 581, 125 N. W. 1108.

These cases are in no wise in point here. On the facts pleaded in the former action the plaintiffs had available two remedies, namely, injunction and damages, provided, of course, that they sustained the allegations of fact. They sought only injunction. They failed to sustain their allegations of fact, hence, there having been no mistake of remedy, under the doctrine of *res adjudicata* they are estopped to assert the same facts in support of an additional and concurrent remedy which is dependent solely upon those facts.

The fact that the plaintiffs did not seek to recover damages in the former action is not a matter to be considered of consequence here. The rule is that a party should not be vexed more than once for the same cause of action, and the doctrine of *res adjudicata* includes not only the things which were determined in the former suit, but also any other matter properly involved which might have been raised and determined therein. *State v. Broatch,* 68 Neb. 687, 94 N. W. 1016; *Triska v. Miller,* 86 Neb. 503, 125 N. W. 1070; *State v. Newman Grove State Bank,* 128 Neb. 422, 259 N. W. 170; *Blum v. Truelsen,* 139 Neb. 282, 297 N. W. 136.

The fact that the former action was in equity and this one is in law can make no difference. In *Triska v. Miller, supra,* the court said: "In the instant case the proceedings and

judgments in the foreclosure suit, in the action in equity and in the ejectment action, are pleaded in bar to the plaintiffs' petition. The court heard evidence upon the merits, as well as upon the pleas in bar. The finding is general in favor of the defendants, so that the record does not disclose whether the decree is based upon the merits or upon the judgments referred to, but if the evidence sustains any defense pleaded the decree should be affirmed." In the light of the question before the court this language was tantamount to a holding that, if there was a finding of fact in either the foreclosure action, the equity action, or the action at law on the same issues of fact as were presented in the action then before the court, such finding would be *res adjudicata.* See, also, *Williamsburgh Savings Bank v. Town of Solon,* 136 N. Y. 465, 32 N. E. 1058.

The proposition that in an equity suit for injunction where the court finds that the facts presented do not constitute a ground of equity jurisdiction for the remedy sought and no equitable relief is granted, such an adjudication is not an adjudication of any issue except that of jurisdiction, has no application here.

The former case did not turn on a question of jurisdiction. The court entertained jurisdiction, and in one respect found in favor of the plaintiffs and as to all others found against the plaintiffs.

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

AFFIRMED.

PAINE, J., dissents.

CHRIS SCHINSTOCK, APPELLEE, V. GORDON B. BUTTERFIELD, APPELLANT.

5 N. W. (2d) 86

FILED JULY 24, 1942. No. 31406.

1. **Brokers.** The right of a real estate agent to recover his commission cannot be defeated by mutual abandonment of an executed contract of sale before the due date of payment of the commission.
2. ———. Where the due date of real estate agent's commission is dependent upon a contingency, and the arrival of the contingency is prevented by the act of the promisor in the agreement to pay commission, the failure of the contingency may not be set up as a defense to action for the commission.
3. **Contracts.** "If a promisor prevents or hinders the occurrence of a condition, or the performance of a return promise, and the condition would have occurred or the performance of the return promise been rendered except for such prevention or hindrance, the condition is excused * * * ." 1 Restatement, Contracts, sec. 295.

APPEAL from the district court for Madison county: ADOLPH E. WENKE, JUDGE. *Affirmed.*

Frederick M. Deutsch, for appellant.

George W. Dittrick and *Jack Koenigstein, contra.*

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

YEAGER, J.

This is an action by Chris Schinstock, plaintiff and appellee, against Gordon B. Butterfield, defendant and appellant, for the recovery of a commission as real estate broker.

There is no dispute as to the material facts in the case. A summary of the facts necessary to be considered here are the following: Prior to October 10, 1939, the defendant by oral agreement engaged the plaintiff to procure for him a purchaser for certain real estate in Cherry county, Nebraska. The plaintiff procured as a purchaser one Carl H. Neitzke, and by contract of sale dated October 10, 1939, signed by Carl H. Neitzke and defendant, defendant sold the real estate to Neitzke for the consideration of $8,000. The pur-

chaser by the terms of the contract agreed to assume the balance of payment on federal land and land commissioner loans due subsequent to November 1, 1939. Further conditions were that the purchaser was to give to defendant a note for $1,000 due within ten days after the date of the contract, and he was to pay the balance of the purchase price in amounts of not less than $500 on each succeeding April 1. In performance of the contract the $1,000 note was given and in due course paid.

On October 18, 1939, following the execution of the real estate contract the defendant paid to plaintiff $200 as part of his commission, and at that time the following instrument was executed and signed by plaintiff and defendant and delivered to plaintiff:

"Norfolk, Nebraska
"October 1, 1939

"Received of Gordon B. Butterfield Two Hundred and No/100 Dollars, as one half commission due on sale his ranch to Carl H. Neitzke.

"Balance of the commission is to be paid from second ranch payment received from Carl H. Neitzke.

"G. B. Butterfield
"C. Schinstock."

On or about March 18, 1940, before the first payment of $500 was due under the terms of the contract, by mutual agreement and payment of $150 by defendant to Neitzke the parties abandoned the contract of sale of the real estate.

The defendant failed to pay the balance of the commission amounting to $200. Thereupon plaintiff filed a petition in which he set forth the oral agreement, the payment of $200 and the foregoing quoted written instrument, and prayed judgment in the amount of $200.

To the petition the defendant demurred generally and demurred further on the ground that there was another action pending. The demurrer was overruled, whereupon the defendant answered by way of general denial.

A trial was had to a jury which resulted in a verdict and

judgment in favor of plaintiff and against the defendant for the amount prayed in the petition.

From this judgment the defendant has appealed. Five errors are assigned as grounds for reversal.

The first error assigned is the ruling on the demurrer. This assignment is without merit in the light of the contents of the petition, and in any event from comments in the brief we conclude that it is the purpose of defendant to abandon it.

The other four errors relate to the sufficiency of the evidence for submission of the case to the jury and to sustain the verdict and judgment.

As we view the record the only question presented is as to whether or not the quoted agreement to pay the balance of commission may, under the evidence, be enforced.

The contract of sale of real estate was unquestionably a valid one and binding on the parties thereto. It was duly executed and delivered, and Neitzke had made all payments required of him up to the time it was mutually abandoned, so therefore all questions of a purchaser ready, willing and able to buy are eliminated.

The sole controversial question presented by the pleadings and evidence, the instructions to the contrary notwithstanding, was that of whether or not T. J. Adams brought about the contingency which prevented the further performance of the real estate contract and that plaintiff was chargeable with the acts of Adams, and that thereby the written obligation sued upon was not permitted to mature. No error is predicated on the giving or refusing of instructions so that matter requires no consideration.

The evidence of defendant discloses that in February, 1940, Adams gave information to defendant that Neitzke did not intend to further perform the real estate contract, and that it was on this information that defendant acted when he negotiated and obtained its mutual abandonment.

Defendant contends that Adams was a joint adventurer with plaintiff by reason of his interest in the commission, and that therefore defendant had a right to rely on the in-

formation received from Adams and bring about an abandonment of the contract, and that in so relying and in bringing about the abandonment before maturity of the obligation sued upon a recovery could not be had by plaintiff.

To support his contention defendant cites many authorities, but none of them support his position here. They support a contention that the acts of one joint adventurer may defeat a right of recovery by another with regard to a subject-matter in which both are concerned, but that is not the case here.

Here the plaintiff and his joint adventurers had fully performed each and every act that their engagement called upon them to perform. They had produced a purchaser who had in fact been accepted by defendant, and an agreement for the sale of the real estate was entered into and a part of the purchase price was paid. A contract was entered into which was valid and enforceable and from whose obligations neither party could withdraw without the consent of the other.

Mere information, even coming from one of the agents who brought about the sale, in the absence of fraud, and no fraud is charged here, leading the seller to the belief or knowledge that the purchaser would not make the further payments required of him under the terms of his contract would not defeat the right to recover the agency commission. No authorities are cited holding to the contrary.

In *Reasoner v. Yates*, 90 Neb. 757, 134 N. W. 651, it is stated:

"The fact that the contract is canceled afterwards by mutual consent of the vendor and the vendee can in nowise affect the right of the agent to recover the agreed compensation for procuring a purchaser, where the vendee has at all times been in such a position that performance could have been enforced."

This is a statement of legal principle made where the contract was executory and sale had not actually been made. In the case at bar the contract of sale had been executed and the sale consummated, and from the situation thus presented the question of whether or not performance by the vendee

could have been enforced is not before us. He had already performed the contract to which the commission agreement related.

We are brought to the conclusion that, the sale having been consummated for which the services of plaintiff had been engaged and for which defendant had agreed to pay, plaintiff is entitled to recover unless that right is defeated by the condition contained in the agreement for payment.

It is true that the stated condition upon which the right to payment under the instrument pleaded depended never occurred, that is, that the balance of commission was to be paid from the second ranch payment. This second payment was never made, but it was prevented by the mutual abandonment of the contract by the acts of the parties to the contract.

The occurrence of the condition was prevented by the act of the defendant who was the promisor in the agreement to pay the balance of commission. The applicable rule in relation thereto is found in 1 Restatement, Contracts, sec. 295, as follows:

"If a promisor prevents or hinders the occurrence of a condition, or the performance of a return promise, and the condition would have occurred or the performance of the return promise been rendered except for such prevention or hindrance, the condition is excused * * * ."

The defendant may not here assert the failure of the condition as a defense in view of the fact that by his own voluntary act the performance of the condition was not required.

The judgment of the district court is

AFFIRMED.

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Action.

1. The doctrine of laches cannot be invoked to defeat justice, and it will be applied only where the enforcement of the right asserted will work injustice. *Platte Valley Bank v. Lemke* 218
2. Laches does not grow out of the mere passage of time, but is founded upon the inequity of enforcing a claim where there has been a change in the condition or relation of the property or parties. *Platte Valley Bank v. Lemke* 218
3. Under the statute imposing upon the county the duty to hold the purchaser of real estate at void tax sale harmless and providing that the act shall be construed as cumulative only, the use of the word "cumulative" means only that a new right was created with a remedy to enforce the right. *McDonald v. Lincoln County* 741

Appeal. SEE CRIMINAL LAW. TRIAL.

1. It is reversible error to submit an issue to the jury where the evidence is insufficient to sustain it. *Pollat v. Wray* 9
2. Under the rule that equity cases are triable *de novo* on appeal, the only purpose of motion for new trial is to call attention of the court to errors occurring during the trial. *Weller v. Valley County* 69
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4. All matters decided absolutely or by necessary implication in an opinion reversing a judgment become the law of the case. *Bohmont v. Moore* 91
5. Questions raised by a motion for a rehearing are adjudicated by a ruling on that motion and cannot again be litigated. *Bohmont v. Moore* 91
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17. Under statute requiring transcript certified by the clerk of the district court, containing the judgment or final order sought to be reversed, to be filed in the supreme court within three months after rendition of final order or decree in district court, failure to file such transcript within three months is ground for dismissing the appeal when no valid excuse is shown for failure to file it, inexcusable negligence not being ground for such failure. *Glissmann v. Bauermeister* 288
18. A party will be restricted in the supreme court to the theory on which the case was tried in the district court. *Bronnenkant v. Kucera* 408

19. On appeal in equity, the supreme court must try the issues of fact *de novo* upon the evidence in the bill of exceptions, and reach an independent conclusion on the issues. *Otto v. L. L. Coryell & Son* 498
20. Where evidence in an equity suit on important and material issues so conflicts that it cannot be reconciled, the supreme court will consider that the trial court observed the witnesses and their manner of testifying. *Otto v. L. L. Coryell & Son* 498
Dier v. Dier 685
21. An "appeal" is a process of civil law origin and removes the cause entirely, subjecting the fact as well as the law to a review and retrial. *Consolidated Credit Corporation v. Berger* 598
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23. The usual presumption in favor of findings of the trial court do not obtain on appeal in an equity suit. *Dier v. Dier* 685
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30. Until there is a final order in a proceeding in aid of execution, no appeal may be taken by the judgment debtor. *Bourlier v. Keithley* 862

Assault and Battery.

1. Where evidence is conclusive that accused shot with intent to wound, it was not error for the court to fail to instruct the jury with reference to the offense of simple assault, or assault and battery. *Mantell v. State* 15
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5. A party adverse to attorney's client cannot, after attorney's lien has attached, destroy it by voluntary settlement made without attorney's knowledge. *Spethman v. Hofeldt* 83
6. If all services have been performed by an attorney for his client, the amount due the attorney is determined by his contract or, if there is no contract, by the reasonable value of his services. *Spethman v. Hofeldt* 83
7. The supreme court is vested with the sole power to admit persons to practice of law in Nebraska and to fix qualifications for admission to the bar. *State, ex rel. Ralston, v. Turner* 556
8. The supreme court has the inherent power to regulate the conduct and qualifications of attorneys as officers of the court. *State, ex rel. Ralston, v. Turner* 556
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courts does not limit the judicial power with respect to making rules setting forth qualifications for applicants to take examinations for admission to the bar. *State, ex rel. Ralston, v. Turner* 556

10. The statute providing that the supreme court judges shall periodically revise rules of court and adopt additional rules necessary for the dispatch of business does not relate to the supreme court fixing qualifications for applicants to take examinations for admission to the bar. *State, ex rel. Ralston, v. Turner* 556
11. The statute providing in part that the supreme court shall have power to promulgate general rules of practice and procedure does not relate to its power to fix qualifications of applicants to take examinations for admission to the bar. *State, ex rel. Ralston, v. Turner* 556
12. Where a statute constitutes an endeavor on the part of the legislature to go beyond the concepts of minimum requirements of an applicant to take examination for admission to the bar and denies the judicial department the power to place higher qualifications than those specified in the act, it usurps the power of the judiciary in such respect and is unconstitutional. *State, ex rel. Ralston, v. Turner* 556
13. Where an attorney used for his own purposes trust funds of his client and the surety for the client was called upon to make good the shortage, later reimbursement of the surety by the attorney did not settle the accountability of the attorney to the court, so as to preclude disbarment. *State, ex rel. Nebraska State Bar Ass'n, v. Rein* 758
14. A false and fraudulent representation made to a surety company by an attorney for the purpose of procuring the company to become surety upon a bond was a matter for consideration in a disciplinary proceeding against the attorney, even though the surety sustained no damage. *State, ex rel. Nebraska State Bar Ass'n, v. Rein* 758
15. Moneys received by an attorney in payment of a judgment due a client were trust funds, including the portion against which the attorney claimed a lien for his fees, and they so remained until proper distribution was made. *State, ex rel. Nebraska State Bar Ass'n, v. Rein* 758
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The business of an auctioneer and of selling merchandise at auction is a lawful and useful business. *Webber v. City of Scottsbluff* 363

Automobiles.

1. The term "gross negligence," as used in the automobile guest statute, means a degree of negligence greater than want of ordinary care or slight negligence, but not necessarily extending to wanton or wilful or intentional disregard for the guest's safety. *James v. Krebeck* 73
2. In an automobile guest's action against his host for personal injuries, the issue of gross negligence must be determined from the facts and circumstances of each case and must be submitted to the jury, if the pleadings and proofs are sufficient to support a verdict for the guest. *James v. Krebeck* 73
3. Drivers of motor vehicles proceeding in opposite directions should pass each other to the right, each giving to the other one-half of the main traveled portion of the roadway. *James v. Krebeck* 73
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5. In an automobile guest's action against his host for personal injuries, evidence supported a verdict in favor of the guest. *James v. Krebeck* 73
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9. In absence of ordinance prohibiting the same, a pedestrian may cross a public street between intersections. *Watters v. McPherson* 607

10. A pedestrian must exercise greater care in crossing city streets between intersections than when crossing at an intersection. *Watters v. McPherson* 607
11. A motorist proceeding lawfully, upon seeing a pedestrian crossing a street between intersections, must exercise ordinary care to prevent injuring such pedestrian. *Watters v. McPherson* 607
12. When one, being in a place of safety, sees or could have seen the approach of a vehicle in close proximity to him and suddenly moves from the place of safety into the path of such vehicle and is struck and injured, his own conduct constitutes contributory negligence more than slight, and precludes recovery for such injury. *Cuevas v. Yellow Cab & Baggage Co* 662
13. The sign, "Not liable for loss occasioned by fire or theft," over the entrance to a garage where automobiles are repaired, did not exempt a repairman, or bailee, from negligence resulting in his failure to remove bailor's automobile to a place of safety after discovery of fire which destroyed the garage. *Nagaki v. Stockfleth* 676
14. A pedestrian has equal rights with operator of a motor vehicle in the use of public highways, and each must use reasonable care for his safety and the safety of others. *Johnson v. Anoka-Butte Lumber Co* 851
15. Where a pedestrian clad in dark clothing, upon the background of a dark road, was walking at night on the left-hand side of the road and was struck by a truck approaching from his rear, whether driver of truck was negligent in not seeing the pedestrian in time to avoid accident was a question for the jury. *Johnson v. Anoka-Butte Lumber Co* 851
16. A pedestrian walking at night on the left-hand side of the highway had the right to assume that a truck approaching from the rear would exercise ordinary care in keeping a lookout. *Johnson v. Anoka-Butte Lumber Co.* 851
17. A pedestrian walking along the highway is not guilty of negligence in failing to look back to observe the approach of automobiles from the rear, or in failing to anticipate the negligence of the driver of a truck approaching from that direction. *Johnson v. Anoka-Butte Lumber Co* 851

Bailment.

1. The right of bailee to limit his liability by contract does not extend to exemption from the consequences of his own negligence. *Nagaki v. Stockfleth* 676

2. When a bailment is reciprocally beneficial to both parties, the law requires ordinary diligence of the bailee and makes him responsible for negligence. *Nagaki v. Stockfleth* 676

Bills and Notes.

Where a memorandum on the back of a note is made by agreement of the parties before signing, the memorandum is a part of the note and binding on all parties to the note. *Brock v. Lueth* 545

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1. Where a boundary stream suddenly seeks a new channel, such change of channel works no change of boundary, although no water may be flowing in the old channel. *Conkey v. Knudsen* 517
2. In a suit to quiet title, evidence established that the present situation and condition of the lands in suit were primarily occasioned by an "avulsion," and were not the result of "accretions," and, therefore, riparian rights of adjoining landowners were not altered by the change in the channel of the stream. *Conkey v. Knudsen* 517

Brokers.

1. The right of a real estate agent to recover his commission cannot be defeated by mutual abandonment of an executed contract of sale before the due date of payment of the commission. *Schinstock v. Butterfield* 877
2. Where the due date of real estate agent's commission was dependent upon a contingency, and the arrival of the contingency was prevented by an act of the promisor in the agreement to pay the commission, failure of the contingency may not be set up as a defense in action for commission. *Schinstock v. Butterfield* 877

Carriers.

1. In an action by a railroad company against consignee to recover freight charges for transportation of coal, wherein consignee counterclaimed for alleged shortage in weight of coal delivered, consignee's evidence of tare weight obtained by weighing empty trucks on his private scales, and without evidence to show shortage caused by railroad's negligence, was properly rejected. *Thompson v. Shields* 508
2. The statute providing that "every railroad company shall be liable for all damages inflicted upon the person of passengers while being transported over its road" does not apply to a passenger who, at the end of the jour-

ney, is injured on an escalator installed at the railroad station for the accommodation of persons entering and leaving trains. *Nielsen v. Chicago, B. & Q. R. Co.* 584

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A contract between attorney and his client whereby the attorney agrees to bear the expense of litigation is champertous. *State, ex rel. Nebraska State Bar Ass'n, v. Rein* 758

Commerce.

A shipment of coal from one point to another constitutes interstate commerce which the Interstate Commerce Commission has power to regulate. *Thompson v. Shields* 508

Constitutional Law.

1. A constitutional provision is not self-executing if it merely indicates a line of policy or principles, without supplying the means by which such policy or principles are to be carried into effect, or if the language of the Constitution is directed to the legislature, or it appears from the language used and the circumstances of its adoption that subsequent legislation was contemplated to carry it into effect. *State, ex rel. Walker, v. Board of Commissioners* 172
2. The Constitution imposes an obligation on the state to replace shortages in the permanent school fund, but the constitutional provision fixing the obligation not being self-executing, courts are powerless to compel performance of the obligation. *State, ex rel. Walker, v. Board of Commissioners* 172
3. A regulatory provision of an ordinance having some relation to public health, safety and welfare, but which arbitrarily interferes with private business and imposes unreasonable restrictions, will not be upheld. *Webber v. City of Scottsbluff* 363
4. Although it is competent for a city by ordinance to classify, the classification must rest on some reason of public policy, some substantial difference of situation or circumstances that will naturally suggest the justice or expediency of diverse legislation with respect to the objects classified. *Webber v. City of Scottsbluff* 363
5. Where legislation classifies persons for purpose of operation of rules provided therein, persons in the same class, or those who should be included within the relations and circumstances provided for, must be governed by the same rules. *Webber v. City of Scottsbluff* 363

6. A city ordinance regulating auction sales business and specifically exempting auction companies doing business in the city creates arbitrary, illegal and unconstitutional classification and is void. *Webber v. City of Scottsbluff* 363
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9. A legislative act within the legitimate exercise of legislative power is valid, unless some express limitation can be found in the Constitution. *State, ex rel. Quinn, v. Marsh* 436
10. In the determination of legislative power, it is the declared doctrine of Nebraska that the Constitution confers plenary legislative power on the legislature. *State, ex rel. Quinn, v. Marsh* 436
11. The reasonableness of a legislative restriction upon eligibility to hold a constitutionally created office is a proper subject of judicial review. *State, ex rel. Quinn, v. Marsh* 436
12. Establishment by state Constitution of judicial department conferred authority necessary to exercise its powers as coordinate department of government. *State, ex rel. Ralston, v. Turner* 556
13. The term "inherent power of the judiciary" means that which is essential to the existence, dignity and functions of the court. *State, ex rel. Ralston. v. Turner* 556
14. The character of police regulation, whether reasonable, impartial and consistent with the Constitution and state policy, is a question for the court. *State, ex rel. Ralston, v. Turner* 556
15. When the legislature passes an act which plainly transcends the police power of the state, the judiciary should pronounce it invalid. *State, ex rel. Ralston, v. Turner* 556
16. The classification as contained in supreme court rule requiring applicant for admission to the state bar to be a graduate of a reputable law school as defined by the rule is neither arbitrary nor unreasonable. *State, ex rel. Ralston, v. Turner* 556
17. The Fourteenth Amendment to the federal Constitution does not grant the right to practice law, nor is the right to practice law a privilege or immunity, within the meaning of the amendment. *State, ex rel. Ralston, v. Turner* 556

18. That the supreme court has recognized that the legislature has prescribed minimum requirements for admission of an applicant to the bar does not constitute acquiescence by the court that the legislature alone has the power to prescribe the qualifications of an applicant for admission to the bar. *State, ex rel. Ralston, v. Turner*.... 556

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1. A contract for the performance of services or for the continuous furnishing of commodities not specifying period of termination is terminable, upon reasonable notice, at the will of either party. *Barish v. Chrysler Corporation* 157
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3. Where a loan association gave receipts upon the full payment of so much of debt to association as was not represented by new notes and second mortgage given the association by the debtor, the notes and mortgage remain valid obligations. *Murphy v. Omaha Loan & Bldg. Ass'n* 230
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7. If a contract admits of more than one construction, one of which will nullify it, that construction should be adopted which will carry it into effect. *Brock v. Lueth*.... 545
8. Where plaintiff sought to recover on an alleged contract whereby plaintiff and defendants respectively agreed to do certain acts, and the petition contained no allegation to the effect that plaintiff had performed its part of the contract, a demurrer to the petition should have been sustained. *Consolidated Credit Corporation v. Berger*.... 598

9. If a promisor prevents or hinders the occurrence of a condition, or the performance of a return promise, and the condition would have occurred or the performance of the return promise been rendered except for such prevention or hindrance, the condition is excused. *Schinstock v. Butterfield* 877

Conversion.

In an action for conversion, defendant's care or diligence is not necessarily involved, and plaintiff's negligence, if any, is not material except so far as it may bear upon the question of estoppel. *American Surety Co. v. Smith, Landeryou & Co* 719

Corporations.

1. The secretary of state has authority to dissolve a domestic corporation for nonpayment of occupation taxes due to the state. *Nebraska Central Bldg. & Loan Ass'n v. Yellowstone* 679
2. A corporation's checks, payable to brokerage firm, with which the drawer has no business relations, when tendered to the broker by drawer's agent for his own stock transactions, import drawer's ownership of the checks and their proceeds. *American Surety Co. v. Smith, Landeryou & Co* 719
3. A payee of checks received by him from an employee of a corporate drawer, with which payee has no dealings, in payment of such employee's individual obligations, is put on inquiry as to the employee's authority to make such use of checks. *American Surety Co. v. Smith, Landeryou & Co* 719
4. A brokerage firm, failing to make inquiry which would have disclosed defects in a corporation employee's title to the corporation's negotiable checks, in payment of the employee's individual indebtedness, is liable to the corporation for failure to hold the proceeds of such checks, and cannot avoid liability by claiming to be a holder thereof in due course. *American Surety Co. v. Smith, Landeryou & Co* 719

Costs. SEE EXECUTION, 5.

Counties.

1. Where the legislature imposes additional duties on a county clerk by statute and provides no additional compensation therefor, the clerk must perform those duties without additional compensation. *Hoctor v. State* 329

2. The statute contemplates that a county clerk, chargeable with money belonging to the county by collection of fees, shall render accounts and settle with the county board. *Hoctor v. State* 329
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4. The statute providing that all claims against a county must be filed with the county clerk within 90 days after the date on which the last item was furnished to the county is reasonable. *Consolidated Chemical Laboratories v. Cass County* 486
5. Petition for allowance of claim against a county is demurrable where it shows on its face that the claim was not filed with the county clerk within the time limited by a mandatory statute. *Consolidated Chemical Laboratories v. Cass County* 486
6. In a suit by a county to foreclose a tax sale certificate, the court may award plaintiff's attorney a fee of 10 per cent. of the amount found due. *Pierce County v. Goff* 514
7. The county board had authority under the statute, when petitioned by ten freeholders, to appoint special counsel to foreclose tax sale certificates held by the county. *Pierce County v. Goff* 514

Courts.
1. Territorial courts were legislative courts created in virtue of the national sovereignty under the federal Constitution. *State, ex rel. Ralston, v. Turner* 556
2. A final order of a county court may be reviewed by the district court on petition in error. *Consolidated Credit Corporation v. Berger* 598
3. A petition in error in the district court to review a judgment or order of an inferior tribunal is an independent proceeding having for its object a reversal of the judgment or order complained of. *Consolidated Credit Corporation v. Berger* 598
4. Where a review on petition in error is filed in the district court to obtain a reversal of a judgment of a county court and on review it is manifest that plaintiff's petition fails to state a cause of action, a demurrer thereto should be sustained and the district court should reverse the county court's judgment and retain the cause for trial. *Consolidated Credit Corporation v. Berger* 598

5. The right to appeal from the county court to the district court in probate matters is statutory and statutory requirements relating to appeals and appeal bonds are mandatory. *In re Guardianship of Hergenrother* 858

Creditors' Suit.

1. A court of equity has power to compel the application of a debtor's unexempt property to the payment of his debts when the creditor has no other means of redress. *Bank of Brule v. Harper* 616
2. A court of equity will, when all other remedies have failed, at the suit of a creditor, take a debtor's unexempt property and apply it toward the payment of his debt. *Bank of Brule v. Harper* 616

Criminal Law.

1. Where a young man of good reputation killed one whom he was attempting to rob, the supreme court reduced death sentence for first degree murder to life imprisonment. *Rogers v. State* 6
2. Voluntary statements of accused to officers while under arrest tending to show his connection with alleged crime are admissible. *Mantell v. State* 15
3. Where in a criminal case the evidence is circumstantial, the circumstances established must, to warrant a conviction, be such as to exclude every reasonable hypothesis except that of defendant's guilt. *Watson v. State* 23
4. To justify conviction on circumstantial evidence, facts essential to the conclusion sought must be proved beyond a reasonable doubt, and be inconsistent with any reasonable hypothesis of innocence. *Watson v. State* 23
5. The trial judge must abstain from any expression of opinion or comment on the facts or evidence in his charge to the jury, and on examination of witnesses or otherwise during the trial. *Hansen v. State* 278
6. The trial judge must avoid partial remarks during trial, since juries are alert to discover its attitude respecting the merits of the case. *Hansen v. State* 278
7. Positive declarations made by the trial judge in an emphatic, argumentative, or sarcastic manner cannot be dislodged from the minds of the jury by later giving a formal instruction that the jury are the sole judges of all questions of fact. *Hansen v. State* 278
8. Comments which a trial judge may add to his rulings on objections to the introduction of evidence must always be fair to accused. *Hansen v. State* 278
9. The statute providing that no judgment in a criminal

case shall be set aside for error in pleadings or procedure if the supreme court shall consider that no substantial miscarriage of justice has occurred does not prevent a reversal of a conviction if defendant has not had a fair trial because of questionable rulings on admission or rejection of evidence. *Hansen v. State* 278

10. The *corpus delicti* is the body or substance of the crime; it is the fact that a crime has been committed. *Andersen v. State* 306
11. *Corpus delicti* may be proved by either direct or circumstantial evidence. *Andersen v. State* 306
12. In prosecution for grand larceny where *corpus delicti* was sufficiently proved, defendant's confession alone was sufficient to prove defendant's connection with the criminal act. *Andersen v. State* 306
13. One may not be convicted of a felony on his unsupported extrajudicial confession that a crime has been committed, but the confession may be sufficient to prove his connection with the criminal act. *Andersen v. State* 306
14. Where an information charging embezzlement was filed and a copy thereof served on the defendant, and subsequently the information was amended by changing the date of the alleged embezzlement, and no copy of the amended information was served on defendant, but the case was tried on the original information, defendant could not complain that he was not served a copy of the amended information and that he did not have 24 hours in which to prepare a defense. *Hoctor v. State* 329
15. Instructions in prosecution for embezzlement taken as a whole properly stated the issues involved. *Hoctor v. State* 329
16. The statute relating to embezzlement of fees by a county clerk is not invalid by reason of the omission of the word "if" in the 1913 revision of the statutes. *Hoctor v. State* 329
17. The statute relating to illegal retention of fees by a county clerk is sufficient to define the offense of embezzlement. *Hoctor v. State* 329
18. In prosecution for incest, defendant's wife was not a competent witness against defendant. *Toth v. State* 448
19. In absence of offer of proof and ruling thereon, there was no basis on which it could be charged on writ of error that the trial court erred in refusing to admit testimony. *Wiedeman v. State* 579
20. Rulings on admission of testimony cannot be revised on writ of error where the rulings were neither by general nor specific assignments of error called to the trial

court's attention by motion for new trial. *Wiedeman v. State* 579

Dedication.

1. A street may be established by an implied dedication. *City of Scottsbluff v. Kennedy* 728
2. Acceptance of an offer of dedication may be made by the public by its entering upon the land and enjoying the privileges tendered by the owner. *City of Scottsbluff v. Kennedy* 728

Deeds.

1. A neglect or refusal of grantee to comply with his contract to support a grantor during his lifetime in consideration for conveyance of land raises a presumption that grantee did not intend to comply with the contract, and that the contract was fraudulent in its inception so as to warrant cancelation thereof. *McCoy v. Cunningham* 708
2. Whether a deed was delivered is ordinarily a question of intent to be determined from all the circumstances pertaining thereto. *Owens v. Reed* 796
3. The burden of proving delivery of a deed rests on the party asserting that delivery was made. *Owens v. Reed* 796
4. Where an unrecorded deed was retained in a safety deposit box belonging to the grantor with a legal right of access in the grantee, the grantor retaining control of the property, collecting rents, making repairs and paying taxes thereon, and there was no evidence of intent on the part of the grantor to divest himself of title, the finding that the deed had been delivered was unwarranted. *Owens v. Reed* 796

Divorce.

1. In determining alimony, the trial judge must consider every fact and circumstance relating to the situation of the parties. *Lippincott v. Lippincott* 186
2. The function of permanent alimony is to provide support to the wife. *Lippincott v. Lippincott* 186
3. An appeal suspends the decree of divorce and the marriage relation continues unchanged until final determination of the appeal. *Lippincott v. Lippincott* 186
4. The parties marrying and society are parties to a marriage contract, and the contract cannot be dissolved either by agreement or by collusive proceedings in court. *Lippincott v. Lippincott* 186
5. A judgment of divorce rendered in another state may be collaterally attacked by showing that the court was without jurisdiction of the subject-matter of the suit or of

the person of defendant, without violating the full faith and credit clause of the Constitution. *Lippincott v. Lippincott* 186

6. Generally, courts permit foreign divorce decrees to be impeached for want of jurisdiction, even though other judgments could not be similarly attacked. *Lippincott v. Lippincott* 186
7. A state has authority over its citizens concerning the marriage tie and its dissolution and will not allow them to perpetrate a fraud by temporarily sojourning in another state and there procure a divorce decree without acquiring a legal residence. *Lippincott v. Lippincott* 186
8. Where husband and wife are legal residents of Nebraska, a divorce decree procured in Nevada by wife who falsely swore that she had been a resident of Nevada for six weeks was void for lack of jurisdiction. *Lippincott v. Lippincott* 186
9. Generally, a wife procuring a divorce decree in another state will be estopped from setting up the invalidity of the decree for lack of jurisdiction in a suit for divorce in the state of her legal residence. *Lippincott v. Lippincott* 186
10. Where evidence showed that a wife in procuring a void divorce decree in Nevada was under the husband's duress, there arises an estoppel against an estoppel and the wife was not barred from setting up the invalidity of the Nevada decree in a divorce suit in Nebraska, the state of legal residence. *Lippincott v. Lippincott* 186
11. In a suit for divorce on the ground of adultery, it is not always necessary to show the overt act; the charge may be sufficiently proved by evidence of such circumstances as will lead a reasonable man's mind to the conclusion of guilt. *Cook v. Cook* 294
12. In a divorce suit, alimony, attorney's fees and allowances made to the wife *held* adequate. *Lynn v. Lynn* 591
13. On appeal in a divorce suit, the supreme court is required to try and independently decide only issues in the case which are presented by the appeal. *Dier v. Dier* 685
14. Jurisdiction relative to divorce and alimony is given by statute, and a decree of divorce can be granted only for a cause prescribed by statute. *Dier v. Dier* 685
15. Extreme cruelty as a ground for divorce, where there is no physical injury or violence, must be of such a character as to destroy the peace of mind or seriously impair the bodily health of the unoffending party and destroy the legitimate ends and objects of matrimony. *Dier v. Dier* 685

16. In a suit for divorce, evidence sustained charge of extreme cruelty. *Dier v. Dier* 685
17. In a suit for divorce, in making disposition of custody of a minor child, courts look to the welfare and best interests of the child. *Dier v. Dier* 685
18. Evidence sustained decree apportioning common property between husband and wife. *Gadway v. Gadway* 695
19. In a decree granting a wife a divorce and custody of minor children, monthly instalments of alimony and support become vested as they accrue, and unpaid, past-due portions thereof are final judgments which a court may not reduce by modification of original decree. *Sullivan v. Sullivan* 779
20. Evidence was insufficient to prove that instalments of alimony and support under divorce decree were subsequently reduced by modification of the decree and paid as modified. *Sullivan v. Sullivan* 779

Domicile.

1. The question of what is "residence" is a question of law to be determined by consideration of the intention and acts of the individual. *State, ex rel. Brazda, v. Marsh* 817
2. A legal residence once acquired is not lost by temporary absence while attending to the duties of public office. *State, ex rel. Brazda, v. Marsh* 817

Drains.

1. Review of county board's assessment of costs of construction of drainage ditch is by petition in error to the district court. *Loup River Public Power District v. Platte County* 29
2. Appeal to the district court does not lie from county board's assessment for cost of construction of drainage ditch. *Loup River Public Power District v. Platte County* 29
3. Land that is benefited by proposed drainage ditch may be assessed for payment of its construction, even though it may not abut the line of the ditch. *Loup River Public Power District v. Platte County* 29
4. Compliance with statutory provision requiring the board of directors of a drainage district to first make detailed plans of public work to be done is a condition precedent to the apportionment of benefits to lands within the district. *Haecke v. Eastern Sarpy County Drainage District* 628
5. The question of compliance by drainage district board with statute requiring making of detailed plans of public work to be done may be presented to the district court on

appeal from an order of apportionment of benefits resulting from such work. *Haecke v. Eastern Sarpy County Drainage District* 628

Elections.

1. The statute prohibiting persons under the age of 30 years from holding the office of railway commissioner does not annex qualifications expressly or impliedly prohibited by the Constitution. *State, ex rel. Quinn, v. Marsh* 436
2. The statute prohibiting persons under the age of 30 years from holding the office of railway commissioner does not have the effect of granting to one class of voters powers in governmental affairs in excess of those granted to others. *State, ex rel. Quinn, v. Marsh* 436
3. Objections to the validity of a candidate's certificate of nomination presented to the reviewing tribunal must be essentially the same as those presented to the secretary of state. *State, ex rel. Brazda, v. Marsh* 817
4. The statute providing for judicial review of proceedings on objections to certificate of nomination and affidavit before the secretary of state is valid and confers authority to summarily review such officer's determination. *State, ex rel. Brazda, v. Marsh* 817
5. Notice of proceedings on objection to certificate of nomination mailed to candidate at his place of residence as given in his nomination certificate was sufficient. *State, ex rel. Brazda, v. Marsh* 817
6. Notice of appeal to review proceedings of secretary of state on objections to certificate of nomination is not necessary to confer jurisdiction. *State, ex rel. Brazda, v. Marsh* 817
7. The procedure provided by statute authorizing judicial review of determination of official on objections to certificate of nomination is appellate in nature. *State, ex rel. Brazda, v. Marsh* 817
8. No transcript of the proceedings before the secretary of state on objections to nomination affidavit of candidate is required to be filed as a prerequisite to review thereof. *State, ex rel. Brazda, v. Marsh* 817

Embezzlement.

Where a statute provides for collection of fees by a public official for purposes designated, and a certain portion of the fees is directed to be retained for administering the statute, and the official converts the portion of fees designated for administering the statute to his own use, he is guilty of embezzlement. *Hoctor v. State* 329

Equity.

1. Where the right to possession of realty involved in a suit to reform or cancel a conveyance of realty depended upon principles of equity, it was the duty of the court to determine all the issues, including the right to possession. *McCoy v. Cunningham* 708
2. The doctrine that a party with unclean hands will be denied relief in equity does not apply unless his wrong-doing has proximate relation to the subject-matter in litigation. *Fritz v. Jungbluth* 770
3. That a truck driver without consideration transferred title to trucks to friend in order to evade labor union rule prohibiting truck driver from owning and operating more than one truck did not preclude the truck driver from obtaining equitable relief in a suit for accounting against the friend. *Fritz v. Jungbluth* 770

Estoppel.

1. In order to establish "an estoppel *in pais*," there must be a false representation or concealment of material facts without the knowledge or means of knowledge of the person alleged to have been misled, made with intent that it should be acted upon and relied on by such person to his prejudice. *Pickens v. Maryland Casualty Co.* 105
2. Estoppel does not arise where the representation or conduct of the party sought to be estopped is due to ignorance founded upon an innocent mistake. *In re Estate of Bremer* 251
3. To constitute an equitable estoppel, there must have been false representations or concealment of material facts with actual or constructive notice thereof by the party estopped, and the party claiming the estoppel must have been without knowledge of the real facts, and the representations must have been made with intention that they should be acted on, and the party to whom they were made must have relied or acted upon them to his prejudice. *American Surety Co. v. Smith, Landeryou & Co.* 719
4. Where one by his words or conduct wilfully causes another to believe in the existence of a certain state of facts and induces him to act on that belief or to alter his previous condition, the former is concluded from averring against the latter a different state of facts as existing at the same time. *Bleicher v. Heeter* 787

Evidence.

1. Circumstantial evidence is insufficient to sustain a verdict or to require a submission of a case to a jury depending solely thereon for support, unless the circum-

stances proved by the evidence are of such a nature and so related to each other that the conclusion reached is the only one that can fairly and reasonably be drawn therefrom. *Jones v. Union P. R. Co.* 112

2. Spontaneous exclamations closely connected with a transaction are admissible as *res gestæ* evidence. *Callahan v. Prewitt* 243
3. Defendant's statements made one-half hour or an hour after an accident were improperly admitted as *res gestæ* statements. *Callahan v. Prewitt* 243
4. A party pleading a material fact has the burden of proving its existence. *Fairchild v. Fairchild Clay Products Co.* 356
5. Oral evidence is admissible to show that delivery of a note was conditional or for a special purpose. *Brock v. Lueth* 545
6. Facts showing that an indorsement on a note when executed is a substantive part of the note may be proved by parol evidence. *Brock v. Lueth* 545
7. In husband's suit for divorce and custody of minor child, an unsigned, typewritten report containing conclusions of an investigator was hearsay and incompetent. *Dier v. Dier* 685
8. "Hearsay" is any statement, oral or written, the persuasiveness or probative value of which depends partly or wholly on something other than the credit to be given to the witness who utters the statement or the instrument which contains it and renders necessary a resort to and belief in the veracity and competency of some other person. *Dier v. Dier* 685

Execution.

1. Proceeding to obtain an order for examination of a judgment debtor in aid of execution is *ex parte*. *Bourlier v. Keithley* 862
2. An order for examination of judgment debtor in aid of execution may issue on proof by affidavit or other proof *ex parte*. *Bourlier v. Keithley* 862
3. The court in a proceeding in aid of execution is without power to make an order binding upon the judgment debtor unless the order for appearance has been served on the judgment debtor or he has voluntarily appeared in response to the order. *Bourlier v. Keithley* 862
4. A showing which conforms to the requirements of the statute relating to proceedings in aid of execution is sufficient to require a judgment debtor to appear for examination. *Bourlier v. Keithley* 862

5. A proceeding in aid of execution is a special proceeding made upon a summary application in an action after judgment, and does not require a nonresident of the county in which the action is brought to furnish security for costs. *Bourlier v. Keithley* 862

Executors and Administrators.

1. The power of an equity court to allow attorney's fees against one bringing a suit which is vexatious was not applicable in a suit by an administrator for decree holding that a purported trust did not exist. *Whalen v. Swircin* 650
2. A suit to foreclose a mortgage executed by a decedent was not barred as to the realty which it covered by failure of mortgagee to present the claim to the probate court for allowance against the estate, but because of such failure the mortgagee was confined to the mortgaged realty, and the probate court's order barring claims was a complete bar to sharing in the general assets of the estate. *Stander v. Pankonin* 738

Exemptions.

1. An endowment policy payable to insured's wife is an investment rather than insurance, and where the premiums have been paid by an insolvent debtor any money received on the policy by the wife during the husband's lifetime is not transmuted so as to be hers as against the husband's creditors. *Bank of Brule v. Harper* 616
2. Under the statute exempting proceeds of a life insurance policy from claims of insured and the beneficiary, money received by insured on surrender of the policy made payable to his wife is not exempt from claims of creditors of the husband and wife. *Bank of Brule v. Harper* 616

False Pretenses.

1. The gist of the offense of obtaining money under false pretenses consists in obtaining money of another by such pretenses, with the intent to cheat and defraud. *Brennan v. State* 205
2. To constitute the crime of obtaining money under false pretenses, the pretenses relied upon must relate to a past event or an existing fact; representations in relation to a future transaction are not within the meaning of the statute. *Brennan v. State* 205
3. In a prosecution for obtaining money under false pretenses, evidence was sufficient to justify the submission to the jury of the question of defendant's intention. *Brennan v. State* 205

Fraud.

1. To maintain an action for damages for false representations, plaintiff must allege and prove what representation is made, that it was false and so known to be by defendant, or was made without knowledge as a positive statement of known fact, and that the plaintiff relied on and acted upon it to his injury. *Platte Valley Bank v. Lemke* 218
2. Fraud is never presumed, but must be proved by a preponderance of the evidence by the person alleging it. *Ralston Purina Co. v. Cox* 432

Fraudulent Conveyances.

1. The question of fraudulent intent is a question of fact. *Bank of Brule v. Harper* 616
2. Where testimony relied on to show good faith is given by interested relatives, the reasonableness or unreasonableness of their evidence bears considerable weight in arriving at a just conclusion. *Bank of Brule v. Harper* 616
3. Where a husband and wife confederate to defraud creditors by transferring property of the husband to the wife, a personal judgment may be entered against the wife, provided it appears that she still retains the property or the proceeds thereof. *Bank of Brule v. Harper* 616
4. A conveyance between relatives which has the effect of hindering a creditor in collection of his claim is presumptively fraudulent and, in litigation between the creditor and the parties to the conveyance over its alleged invalidity, the burden is upon the parties to the conveyance to establish the good faith of the transaction. *Bank of Brule v. Harper* 616
5. Property of judgment debtor not subject to payment of claim of creditors cannot be fraudulently conveyed as against such creditors. *Stander v. Pankonin* 738

Gifts.

Evidence that deceased father to whom the son was indebted had told the son to burn a note and mortgage representing son's indebtedness to the father established a gift *inter vivos*. *Langenberg v. Langenberg* 837

Guardian and Ward.

1. A guardian is not required to apply to the probate court for direction in handling every detail of the ward's affairs. *Metropolitan Life Ins. Co. v. Cull* 390
2. If wards, after becoming of age and employing an attorney, have received and retained the benefit of the transactions made by the guardian, with full knowledge of

any irregularity therein and their rights in the premises, they will be presumed to have ratified the guardian's acts. *Metropolitan Life Ins. Co. v. Cull* 390

3. The existence of interests of a guardian adverse to those of his ward is sufficient ground to warrant removal of the guardian. *In re Guardianship of Timperley* 604
4. Where a guardian places himself in a position with respect to a ward's estate which brings his interests in conflict with those of his ward, he should be discharged. *In re Guardianship of Timperley* 604

Homicide.

A homicide committed in the perpetration of a robbery is murder in the first degree, the turpitude of the act supplying the element of deliberate and premeditated malice. *Rogers v. State* 6

Husband and Wife.

1. The question as to what property is subject to levy by execution to satisfy a judgment against a married woman is a collateral matter which arises subsequent to rendition of the judgment and may be determined by proof aliunde. *Stander v. Pankonin* 738
2. A deficiency judgment procured on a mortgage foreclosure of realty against a married woman on a mortgage note executed during coverture and binding her separate estate is enforceable only against property which she possessed when the note was executed, and not against property subsequently acquired by a will. *Stander v. Pankonin* 738
3. A deficiency judgment against a married woman in the form of a general money judgment is *res adjudicata* only as to the liability and amount thereof. *Stander v. Pankonin* 738

Incest.

1. The corroboration of prosecutrix for incest may be either by direct testimony or by circumstantial evidence. *Toth v. State* 448
2. In a prosecution for incest, the evidence of the prosecutrix need not necessarily be corroborated by an eyewitness to the particular act, but she must be corroborated as to the material facts which tend to support her testimony. *Toth v. State* 448
   Wiedeman v. State 579

Injunction.

1. Generally, injunction to stay proceedings in a court of law is not directed against the court, but against the parties to the proceedings. *Massman Construction Co. v. Nebraska Workmen's Compensation Court* 270
2. Since injunction restraining proceedings at law acts on the parties to the cause, neither the judge nor the parties' attorneys should be made parties defendant to the suit. *Massman Construction Co. v. Nebraska Workmen's Compensation Court* 270
3. A party seeking injunction must establish by competent evidence every controverted fact necessary to entitle him to relief. *Gering Irrigation District v. Mitchell Irrigation District* 344
4. The remedy by injunction is not available to enforce a bare legal right when there is a plain and adequate remedy at law. *Vance v. Henderson* 766
5. Where the effect of an injunction is to obtain possession of realty, the remedy is not available unless the circumstances are such that ordinary legal remedies are inadequate. *Vance and Henderson* 766

Insane Persons.

1. The statutory provisions relating to probate matters apply to actions involving appointment of guardians and administration of incompetent wards' estates, as well as the administration of estates of deceased persons. *In re Guardianship of Hergenrother* 858
2. A district court does not acquire jurisdiction of an appeal from an order in a guardianship proceeding unless within 30 days from the date of the order an appeal bond has been executed and filed. *In re Guardianship of Hergenrother* 858
3. Where an alleged incompetent attempting to appeal from an order of the county court appointing a guardian did not file an appeal bond within 30 days from the date of order appointing the guardian, the district court properly dismissed the appeal. *In re Guardianship of Hergenrother* 858

Insurance.

1. When an unusual, unexpected and unforeseen injury results from an intentional act of the person injured, the ensuing injury is caused by accidental means, even though no mischance occurred in the doing of the act. *Murphy v. Travelers Ins. Co.* 41
2. Evidence that insured dentist acquired X-ray burns on

index finger by continuous use of X-ray, and that he was thereby totally disabled from performing his professional duties, was sufficient to sustain recovery on accident policy insuring against loss from bodily injuries through external, violent and accidental means. *Murphy v. Travelers Ins. Co.* 41

3. Provisions of insurance policy should be construed as used in their ordinary and popular sense, and insurers will not be permitted to avoid liability by application of strict definitions or a resort to legal adroitness. *Murphy v. Travelers Ins. Co.* 41
4. Total disability exists "from the date of accident" within the meaning of an insurance policy when it results within the time required by the process of nature for the injury to produce the effect. *Murphy v. Travelers Ins. Co.* 41
5. When strict enforcement of a provision of an insurance policy will result in unreasonable and unjust forfeitures, or an absurd result, the courts will refuse to enforce the strict meaning of the language of the policy. *Murphy v. Travelers Ins. Co.* 41
6. In a suit to recover benefits under provisions of an accident insurance policy, evidence was sufficient to establish that plaintiff was wholly and continuously disabled as a result of the accident within the meaning of the policy. *Murphy v. Travelers Ins. Co.* 41
7. A contractor's public liability policy, which by its terms does not cover an accident unless it shall occur on the premises owned by or under the control of the assured, or on a public way immediately adjacent thereto, does not cover an accident occurring more than eight miles from assured's operating location. *Pickens v. Maryland Casualty Co.* 105
8. Where no ambiguity exists, terms used in an insurance policy will be considered in their usual and ordinary sense. *Pickens v. Maryland Casualty Co.* 105
9. The words "immediately adjacent," used in a contractor's public liability policy were construed to mean contiguous or adjoining. *Pickens v. Maryland Casualty Co.* 105
10. A public liability policy insuring automobile accidents on premises owned by or under the control of assured, or on public ways immediately adjacent thereto, is not enlarged as to its coverage provisions by describing the assured's location of operation as near a designated village. *Pickens v. Maryland Casualty Co.* 105
11. A clause in a public liability policy that insurer will de-

fend suits for personal injuries brought against insured although they may be wholly groundless, false or fraudulent is generally construed to obligate the insurer to defend only suits upon claims for which it has assumed liability under the policy. *Pickens v. Maryland Casualty Co.* 10b

12. A contract for reinsurance and merger of a mutual insurance company must be submitted to the members at an annual meeting, or special meeting called for that purpose, with 30 days' notice to the members, which notice must contain all statements required by statute, and such steps are jurisdictional requirements. *Risk v. Director of Insurance* 488
13. An order of the director of insurance approving reinsurance and merger of a mutual insurance company with a foreign insurance company which lacks statutory jurisdictional requirements is void. *Risk v. Director of Insurance* 488
14. In an action for conversion, defendant, though not guilty of moral turpitude or intentional wrong-doing, other than that involved in failure to perform a legal duty to make inquiry, has no equities which preclude recovery, even if plaintiff was a compensated surety. *American Surety Co. v. Smith, Landeryou & Co.* 719
15. Any person who shall make any contract of insurance for an insurance company shall be deemed an agent of such company. *Bleicher v. Heeter* 787
16. An agent authorized to solicit and receive applications for insurance and to countersign and issue policies is a general agent. *Bleicher v. Heeter* 787
17. An agent of the insurer advancing premiums for the assured is entitled to recover all sums so advanced as money paid out, or on the principle of subrogation, but if the insurer exercises the option to terminate the insurance contract on which such advancements have been made, the obligation of the insured to pay premium is thereby reduced to the premium earned while the risk was being carried. *Bleicher v. Heeter* 787
18. Where an insurance policy is canceled by insurer for nonpayment of premiums, the insurer is entitled to recover premiums earned while the risk was being carried, determinable on a *pro rata* basis. *Bleicher v. Heeter* 787
19. Parties to insurance contracts have the right to contract for what accidents and risks insurer shall be liable, and courts may not make new or different contracts for them. *Krause v. Pacific Mutual Life Ins. Co.* 844

20. An insurance policy is a contract and, if couched in unambiguous language, should be construed as other contracts. *Krause v. Pacific Mutual Life Ins. Co.* 844
21. Where there is no uncertainty as to the meaning of an insurance contract, and the same is legal and not against public policy, it will be enforced as made. *Krause v. Pacific Mutual Life Ins. Co.* 844
22. Under an exclusionary clause of an accident policy denying coverage to insured if injured in aerial transportation unless actually riding as a fare-paying passenger, a passenger traveling on a "trip pass" was not covered by the policy. *Krause v. Pacific Mutual Life Ins. Co.* 844

Judgment.
1. Any right, fact, or matter in issue and directly adjudicated upon, or necessarily involved in an action in which judgment is rendered on the merits is conclusively settled and cannot again be litigated between the parties and privies, regardless of whether the claim or demand of the two suits is the same. *Morrell v. Towle* 370
2. Where a judgment is indisputable and drawn only from certain premises, the premises and judgment are equally indisputable in a subsequent action between the same parties. *Morrell v. Towle* 370
3. Where the judgment determines the title or right under which the party claims, it is decisive as to any other property or right claimed under the same title. *Morrell v. Towle* 370
4. When a decree is entered by consent of the parties, the court does not inquire into the merits of the case, and, therefore, such a decree is not a decree upon the merits. *Risk v. Director of Insurance* 488
5. The defense of *res judicata* becomes available when a question of fact has been put directly in issue in an action between the same parties or their privies and an adjudication had thereon. *Shepard v. City of Friend* 866
6. Under the doctrine of *res judicata*, when a question of fact is once determined on the merits, such question is settled so far as the litigants and those in privity are concerned, and it cannot be relitigated between the same parties. *Shepard v. City of Friend* 866
7. A party who mistakenly chooses a remedy which is not available to him is not, under the doctrine of *res judicata*, barred from availing himself of the proper remedy. *Shepard v. City of Friend* 866
8. Where there is no mistake of remedy but a choice between available remedies, and the facts upon which the

chosen remedy depends fail, the same facts cannot be asserted in a later action between the same parties and their privies with the other remedy as a basis for the later action. *Shepard v. City of Friend* 866

9. Where there is a finding of fact in an action in equity or in law, such finding is *res judicata* in any other action on the same issues of fact between the same parties or their privies. *Shepard v. City of Friend* 866

Landlord and Tenant.

Where there was no showing that lessee had done or threatened to do anything that would constitute irreparable injury to land, lessor was not entitled to an injunction to gain possession of the land. *Vance v. Henderson* 766

Limitation of Actions.

1. Where a bank purchases assets and assumes the liabilities of a failed bank, an action against the purchasing bank to recover on a certificate of deposit issued by the failed bank, being an action on a contract for the benefit of a third person, brought fifteen years after issuance of the certificate of deposit, was barred by the statutes of limitation. *Diss v. State Bank* 146
2. An action on an account is barred in four years. *Pankau v. Boyer* 310
3. The time limit within which action may be brought to enforce statutory right for refund of money paid for property at a void tax sale is controlled by the general statute of limitations. *McDonald v. Lincoln County* 741
4. The right of action to enforce statutory right to a refund for money paid for property at a tax sale does not accrue until it is determined by a court that the tax sale which is the basis of the certificate is void. *McDonald v. Lincoln County* 741

Malicious Prosecution.

1. In an action for malicious prosecution, an indispensable element for plaintiff to establish is absence of probable cause for such proceeding. *Bronnenkant v. Kucera* 408
2. In an action for malicious prosecution, a verdict should be directed for defendant where there is sufficient undisputed evidence to show probable cause, even though some of the facts supporting probable cause were disputed by plaintiff's evidence. *Bronnenkant v. Kucera* 408
3. In a malicious prosecution action, whether there was probable cause is to be determined in the light of facts and circumstances as they existed and were known at the time the prosecution was commenced and not from

the viewpoint of subsequently appearing facts. *Bronnenkant v. Kucera* 408

Marriage.

The federal Constitution confers no power on the federal government to regulate marriage, or its dissolution. *Lippincott v. Lippincott* 186

Master and Servant.

1. Under the unemployment compensation law, the commissioner of labor is an interested party in any action arising under the law, and may appeal, even if the appeal be from an order denying benefits to claimant, and from which claimant has not appealed. *Woodmen of the World Life Ins. Society v. Olsen* 12
2. If injury and preexisting disease combine to produce disability, an employee, to recover compensation, need not prove that the injury aggravated the disease. *Palmer v. Sample* 36
3. The term "stoppage of work," as used in the unemployment compensation law, means a substantial curtailment of work in an employing establishment, not the cessation of work by the claimants. *Magner v. Kinney* 122
4. A "strike" is cessation of work by employees in an effort to get more desirable terms of employment, while a "lockout" is a cessation of furnishing of work to employees in an effort to get more desirable terms for the employer. *Magner v. Kinney* 122
5. Evidence established that cessation of work by employees was the result of a "strike," and not a "lockout," as regards right of claimants to unemployment compensation benefits. *Magner v. Kinney* 122
6. Evidence established that "stoppage of work" in an employer's business resulted from a labor dispute, barring employees from unemployment benefits under the unemployment compensation law. *Magner v. Kinney* 122
7. Employee of contractor who was injured while working on the residence property of the contractor's employer was not an employee of the owner of the property within the workmen's compensation act. *Retzlaff v. Dickinson* 136
8. A person who contracted to unload a car of coal, employed his own assistants and directed the work was an independent contractor within the workmen's compensation law. *Peterson v. Christenson* 151
9. Whether a workman is an "employee" within the workmen's compensation act, or is an "independent contractor," can only be established by consideration of the facts and circumstances of the case. *Peterson v. Christenson* 151

10. On appeal in workmen's compensation case, a judgment on findings based on substantially conflicting evidence will not be reversed unless clearly wrong. *Lange v. Department of Roads and Irrigation* 167
11. Where medical evidence indicates that a somewhat permanent condition of disability might be removed or lessened by an operation, the fact that the employee is willing to have an operation performed but the employer has not availed itself of the offer may be considered in awarding compensation. *Lange v. Department of Roads and Irrigation* 167
12. Where any finding of fact on which the award of the district court in a compensation case depends is not conclusively supported by the evidence, it is the duty of the supreme court on appeal to consider the entire cause *de novo* on the record. *Kucera v. Village of Prague* 180
13. On application to modify an award under the compensation act, petitioner has the burden to establish by a preponderance of the evidence that the disability has increased, decreased or terminated as alleged. *Kucera v. Village of Prague* 180
14. Evidence in application to modify a compensation award did not support judgment that disability had decreased since date of original award. *Kucera v. Village of Prague* 180
15. Where the workmen's compensation court in an action pending before it is empowered to do complete justice to the parties and to the matters in dispute, courts of equity will not interfere. *Massman Construction Co. v. Nebraska Workmen's Compensation Court* 270
16. Where an injury sustained by an employee destroyed the sight of his right eye for industrial purposes, and vision of the eye with extra artificial means could be restored to nearly normal but not to such extent that employee would have coordination of both eyes, employee was entitled to compensation for loss of an eye. *Otoe Food Products Co. v. Cruickshank* 298
17. Where employer alleged that a second injury constituted the proximate cause of loss of sight of employee's eye, such allegation was an affirmative allegation and the employer had the burden of proving the allegation with reasonable certainty. *Otoe Food Products Co. v. Cruickshank* 298
18. Generally, where parties have contracted for performance of certain services for a definite period at a fixed salary, and the employment continues beyond period

agreed upon, in absence of a new contract it will be presumed that the employment continues under the same contract and upon the terms originally fixed. *Fairchild v. Fairchild Clay Products Co.* 356

19. An applicant for compensation has the burden of establishing that the accident arose out of and in the course of employment. *Nollett v. Holland Lumber Co.* 538
20. The workmen's compensation law cannot be liberalized by judicial interpretation to allow noncompensable claims. *Nollett v. Holland Lumber Co.* 538
21. In determining whether a compensation claimant is a servant or an independent contractor, the court may consider the extent of the master's control over the details of the work, whether the claimant is engaged in a distinct occupation or business, whether the work is usually done under direction of the employer or by a specialist without supervision, the skill required, whether claimant or alleged employer supplied the tools or equipment, the length of employment and the method of payment, whether by time or by the job. *Nollett v. Holland Lumber Co.* 538
22. An "independent contractor" is one rendering service representing the wishes of the person for whom the work is done, only with respect to the result accomplished, not as to the means. *Nollett v. Holland Lumber Co.* 538
23. Physical exertion and exposure to smoke and fumes incidental to work of city fireman do not constitute accidental injury compensable under the workmen's compensation law, where it appears that the disability was due to a preexisting heart disease. *Brown v. City of Omaha* 587
24. A claim for benefits under the compensation law for disability resulting from shock and nervousness caused by an accident arising out of and in the course of employment is not sustainable unless accompanied by violence to the physical structure of plaintiff's body. *Bekelski v. Neal Co.* 657
25. The compensation act should not under the guise of liberal construction be extended to cases which by plain language are excluded from its scope. *Bekelski v. Neal Co.* 657
26. A compensable claim for benefits under the compensation law must have some relation to or connection with the employment which the employee has lost. *Woodmen of the World Life Ins. Society v. Olsen* 776
27. Where a wife voluntarily left her employment for the sole reason of being with her husband in another locality, she thereby disqualified herself as claimant for un-

employment benefits under the compensation law. *Woodmen of the World Life Ins. Society v. Olsen* 776

28. An employee who has been discharged for ordinary misconduct is entitled to maximum benefits under the unemployment compensation law, the payment of such benefits to commence after the waiting time prescribed by the commissioner of labor, not exceeding five weeks, has elapsed. *Grand Island Baking Co. v. Frantz* 803
29. The purpose of the unemployment compensation law is to erect a barrier to the payment of benefits for a period not exceeding five weeks in addition to normal waiting period where an employee has been discharged for misconduct connected with his work, and not to reduce maximum benefits where disqualifying condition exists. *Grand Island Baking Co. v. Frantz* 803

Money Received.

1. An action in the nature of one for money had and received lies against the person obtaining possession of the money which *ex aequo et bono* he ought to refund. *Washington v. Beselin* 638
2. An action for money had and received will lie to recover money secured from plaintiff without consideration in reliance upon fraudulent representations made by defendant. *Washington v. Beselin* 638

Monopolies.

1. Injuries to corporate business are not injuries to the business of an officer or stockholder within the meaning of the Junkin act, and the corporation alone may pursue the statutory remedy for such injuries. *Barish v. Chrysler Corporation* 157
2. Where an automobile corporation and dealers' corporation entered into dealers' agreement which contained provision for termination thereof by mutual consent, the president of a dealers' corporation securing treble damages for conspiracy under the statute was not entitled to recovery based on loss of profits or salaries after termination of the contract. *Barish v. Chrysler Corporation* 157

Mortgages.

An obligation which a debtor in equity should pay is a sufficient consideration for execution of note for amount of debt and mortgage securing it. *Krause v. Swanson* 256

Municipal Corporations.

1. A home rule charter must be consistent with and subject to the Constitution and laws of the state. *Axberg v. City of Lincoln* 55

2. Under a home rule charter, a city may provide for the exercise of every power, not contravening constitutional inhibitions, connected with the proper and efficient government of the municipality. *Axberg v. City of Lincoln* 55
3. A statute affecting municipal affairs, but which is of state-wide concern, takes precedence over any action taken by a home rule city under its charter. *Axberg v. City of Lincoln* 55
4. Preservation of order, enforcement of law, protection of life and property, and suppression of crime are attributes of state sovereignty, and when the legislature enacts a general law on any of these subjects with respect to cities of a particular class, such law applies to all cities of the class, including home rule cities. *Axberg v. City of Lincoln* 55
5. Cities which have adopted home rule charters are subject to the general laws of the state, except as to municipal matters of strictly local concern. *Axberg v. City of Lincoln* 55
6. Whether an act of the legislature pertains to a matter of state-wide or strictly local concern becomes a question for the courts when a conflict of authority arises. *Axberg v. City of Lincoln* 55
7. The statute providing for pensions for superannuated and disabled firemen in metropolitan and first-class cities is a matter of state-wide concern applicable to home rule cities within the class. *Axberg v. City of Lincoln* 55
8. A legislative act providing for pensions for superannuated and disabled firemen in metropolitan and first-class cities "except any city of the first class that has heretofore adopted a charter for its own government" is unconstitutional. *Axberg v. City of Lincoln* 55
9. A valid classification of cities for purposes of legislation must not be so constituted as to preclude addition to the numbers included within it. *Axberg v. City of Lincoln* 55
10. Legislation alleged to be void as class or special legislation is subject to judicial review. *Axberg v. City of Lincoln* 55
11. Municipal corporations are *prima facie* the judges of the necessity and reasonableness of ordinances, and a presumption obtains in their favor unless the contrary appears on the face of the ordinance or is established by clear evidence. *Webber v. City of Scottsbluff* 363
12. Municipal corporations have statutory power to enact ordinances regulating auction sales within their limits. *Webber v. City of Scottsbluff* 363

13. A city ordinance must respond to the same tests as would be required of a statute to meet constitutional requirements. *Webber v. City of Scottsbluff* 363
14. Auctioneer who is charged with violating a city ordinance could maintain a suit to enjoin enforcement of the ordinance and have it declared void. *Webber v. City of Scottsbluff* 363
15. The regulatory provisions of an ordinance under the police power must have some relation to the public health, safety or welfare. *Webber v. City of Scottsbluff* 363
16. If ordinances enacted under a city's police power do not bear some relation to the public health, safety and welfare, they are void as an invasion of property rights of persons affected by their enforcement. *Webber v. City of Scottsbluff* 363
17. Statutory provisions authorizing assessment of special taxes against property benefited by public improvements must be strictly construed, and it must affirmatively appear that all steps which the law makes jurisdictional have been taken, and failure to show such proceedings will not be aided by presumptions. *Haecke v. Eastern Sarpy County Drainage District* 628
18. An unplatted tract of land in a city may be subject to taxation for special benefits for local improvements. *City of Scottsbluff v. Kennedy* 728
19. A compliance with statutory requirements for notice in levying special assessments is jurisdictional. *City of Scottsbluff v. Kennedy* 728
20. Proof of statutory notice required to levy special assessments may consist of any competent evidence which tends to establish compliance with the statute. *City of Scottsbluff v. Kennedy* 728
21. As evidence of compliance with statute requiring publication of notice in levying of special assessments, proofs of publication sworn to by the publisher of the newspaper in which they were printed and the testimony of the publisher as to the facts of publication are admissible. *City of Scottsbluff v. Kennedy* 728
22. Statute authorizing levying of special assessments for street improvements on abutting property will be strictly construed both as to grant of power and the procedure. *City of Scottsbluff v. Kennedy* 728
23. When traveling along a street or highway one must keep a lookout to observe dangers directly in his path. *Gaver v. City of Columbus* 832

24. A municipal corporation is not an insurer of the safety of travelers along its streets and is required to employ only reasonable diligence to keep its sidewalks in a reasonably safe condition for persons passing over them. *Gaver v. City of Columbus* 832
25. Persons using sidewalks must exercise ordinary care for their own safety. *Gaver v. City of Columbus* 832

Negligence.
1. Negligence consists of doing what a reasonable, prudent person would not have done, or in not doing what a reasonable, prudent person would have done, under the circumstances. *Greco v. Shaver* 1
2. A person is answerable only for the natural and probable consequences of his own acts, and where some new efficient cause intervenes, not set in motion by him nor flowing from any act of his, which causes the injury, it is the proximate cause. *Greco v. Shaver* 1
3. In an action for personal injuries, evidence was insufficient to warrant submitting of question of plaintiff's contributory negligence to the jury. *Pollat v. Wray* 9
4. In an action for injuries resulting from closing of electrically operated door, evidence supported verdict for plaintiff. *Alles v. White Motors Co* 78
5. To recover under the doctrine of last clear chance, the plaintiff must have been in a position of peril which was known or, by the exercise of ordinary care, ought to have been known to defendant in time to avoid injury by the exercise of ordinary care. *Alles v. White Motors Co* 78
6. A truck driver who, approaching a narrow bridge in daylight and seeing another truck approaching the bridge from the opposite direction, fails to slacken his speed and collides with the other truck just after it has crossed the bridge is guilty of contributory negligence greater than slight, precluding recovery for injuries sustained in the collision, notwithstanding that the driver of the other truck was also negligent. *Chana v. Mannlein* 312
7. Where in an action for damages for death resulting from collision between two trucks the evidence showed that plaintiff's negligence was more than slight as compared with defendant's negligence, the jury should be instructed to find for the defendant. *Chana v. Mannlein* 312

New Trial.
1. The words "unavoidably prevented" in the statute respecting when a motion for a new trial must be filed do not cover an unusual press of other law business, but

mean circumstances entirely beyond the control of the moving party. *Power v. Federal Land Bank* 139
2. A motion for a new trial must be filed at the term of court at which a decision was rendered and, except for newly discovered evidence, within three days thereafter, unless unavoidably prevented. *Power v. Federal Land Bank* 139
3. Generally, there is a presumption that a judgment was entered on the date of its rendition, but if these dates are different, the date of rendition alone is to be considered in determining the time within which a motion for new trial must be filed. *Power v. Federal Land Bank* 139
4. The statutory provision respecting when a motion for new trial must be filed is mandatory. *Power v. Federal Land Bank* 139
5. A motion for new trial is indivisible, and when made jointly by two or more parties, it must be overruled as to all if it cannot be allowed as to all. *Washington v. Beselin* 638

Officers.

1. A public officer must perform all duties of his office for the compensation allowed by law and if none is authorized the services are gratuitous. *Johnson v. Johnson* 239
2. In absence of either constitutional or statutory provisions, residence within the district or state over which the jurisdiction of the office extends is unnecessary to eligibility. *State, ex rel. Brazda, v. Marsh* 817
3. The term "default" in the constitutional provision that any person who is in default as collector and custodian of public money or property shall not be eligible to any office of trust or profit implies more than a mere civil liability. *State, ex rel. Brazda, v. Marsh* 817

Parent and Child.

1. While the statute and demands of nature commit young children's custody to their parents, rather than to strangers, courts should deprive a parent of a child's custody on showing of parent's unfitness to retain custody of the child. *Towle v. Towle* 21
2. Evidence in an action by husband to recover damages for the wrongful act of defendant in causing the death of plaintiff's wife was sufficient to support a verdict that a son as administrator of decedent's estate acted as agent of plaintiff with authority from the latter in making previous settlement of plaintiff's claim. *Boell v. Overbaugh* 264

Partition.

1. Questions involving matters of procedure relating to the purchaser at a partition sale do not deprive the partition proceeding of its amicable character. *Wilcox v. Halligan* 643
2. Where a cause is within the law authorizing partition, the right to partition is imperative and binding upon equity courts, not a matter of mere grace. *Wilcox v. Halligan* 643
3. The statute gives one of several tenants in common the right to partition of their real estate. *Wilcox v. Halligan* 643
4. Where partition proceedings are amicable and for the benefit of all parties in interest, the court may allow a reasonable attorney's fee to be paid by the parties in proportion to their interest in the property involved. *Wilcox v. Halligan* 643

Payment.

1. A payment or other performance of a debtor's contract by a third person, accepted by the creditor as full or partial satisfaction of his claim, discharges the debtor's duty in accordance with the terms on which the third person offered it. *Tarascio v. Mancuso* 225
   Murphy v. Omaha Loan & Bldg. Ass'n 230
   Krause v. Swanson 256
2. Money paid under a mistake of fact is recoverable. *Tarascio v. Mancuso* 225
3. Where there is a continuing contract of employment with no time fixed for termination and no time fixed for payment, and there is no substantial lapse in continuity of employment, any payment of salary, in absence of a contrary intent, will be presumed to be payment on the delinquent salary. *Fairchild v. Fairchild Clay Products Co.* 356
4. The burden of proving payment rests upon the party pleading it as a defense to an action. *Washington v. Beselin* 638

Pleading.

1. Where a bank purchased assets and assumed liabilities of a failed bank, including a certificate of deposit, and the depositor sued the purchasing bank alleging that the bank was liable on contract for the benefit of a third person, and thereafter sought to amend his petition by alleging that the purchasing bank was a trustee for the benefit of the plaintiff, the court properly denied the application to amend. *Diss v. State Bank* 146

2. A demurrer admits the truth of all material facts well pleaded and inferences that reasonably may be drawn therefrom. *State, ex rel. Walker, v. Board of Commissioners* 172

Principal and Agent.

1. Agency may be proved by circumstantial evidence. *Boell v. Overbaugh* 264
2. One placed upon inquiry as to an employee's authority, and who has reasonable means of making inquiry, occupies the same position in law as if he had actual knowledge of the employee's lack of authority, because he is charged with knowledge of the facts which inquiry would have developed. *American Surety Co. v. Smith, Landeryou & Co.* 719

Prohibition.

Generally, courts of equity do not issue writs of prohibition. *Massman Construction Co. v. Nebraska Workmen's Compensation Court* 270

Public Service Commissions.

1. The statute prohibiting persons under the age of 30 years from holding the office of railway commissioner is constitutional. *State, ex rel. Quinn, v. Marsh* 436
2. The constitutional provisions containing prohibitions on the question of age of certain constitutional officers do not create the presumption of intent to prohibit the legislature from requiring that railway commissioners should possess reasonable qualifications as a condition of eligibility to hold office. *State, ex rel. Quinn, v. Marsh* 436
3. The statutory restriction as to minimum age of railway commissioner is not unconstitutional. *State, ex rel. Quinn, v. Marsh* 436

Railroads.

1. Evidence in action against a railroad company for negligence was insufficient to sustain a verdict for plaintiff. *Benes v. Chicago, St. P., M. & O. R. Co.* 479
2. Whether a railroad company may substitute a caretaker for an agent at a designated station depends on the facts of the particular case. *Thomson v. Nebraska State Railway Commission* 697
3. The railway commission should not require maintenance of full-time agency station by railroad company at a cost out of proportion to the revenue derived from the station, especially where a substituted service would afford the same essential service. *Thomson v. Nebraska State Railway Commission* 697

4. On application by a railroad company to substitute a caretaker for a regular agent at a designated station, evidence established that volume of business at the station did not justify an agent. *Thomson v. Nebraska State Railway Commission* 697

Rescission.

1. A contract cannot be rescinded in part and a part remain executed, and if rescinded, it must be *in toto* and the parties placed *in statu quo*. *Aron v. Mid-Continent Co.* 806
2. One who seeks to rescind a contract for fraud must return or offer to return all property acquired under such contract within a reasonable time. *Aron v. Mid-Continent Co* 806
3. In a suit to rescind a contract for the purchase of capital stock on the ground of fraudulent representations, plaintiff's failure to tender dividends declared and received by him on the stock in addition to tender of the stock was an insufficient tender. *Aron v. Mid-Continent Co.* 806

Schools and School Districts.

All funds belonging to the state for educational purposes, the interest and income whereof only are to be used, are trust funds in the hands of the state. *State, ex rel. Walker, v. Board of Commissioners* 172

States.

1. The state as trustee of public school funds cannot be sued without its consent. *State, ex rel. Walker, v. Board of Commissioners* 172
2. The lieutenant governor is not entitled to the emoluments of the governor's office on account of the governor's absence from the state, unless the absence creates a disability which prevents the governor from holding the office. *Johnson v. Johnson* 239
3. In absence of constitutional or statutory provision making a stated period of residence in state a prerequisite to lawful candidacy for office of secretary of state, none exists, and one who was resident of state at time of filing of his affidavit of nomination as candidate for office of secretary of state was entitled to have his name placed on ballot for primary election. *State, ex rel. Brazda, v. Marsh* 817

Statutes.

1. A state by adopting the statute of another state adopts the construction which has been given the statute so adopted by such other state, and in the absence of a judicial decision determining the construction of such foreign statute, the practical interpretation given to it by those whose duty it was to administer it affords the best means of ascertaining its true construction, and such construction must be followed unless it is clear that such officers have misinterpreted it. *Magner v. Kinney* 122
2. The word "must" in a statute will not be construed to mean "may" when the context shows that it was used in a mandatory sense. *Consolidated Chemical Laboratories v. Cass County* 486
3. Statutes are not to be understood as effecting any change in the common law beyond that which is clearly indicated. *Nielsen v. Chicago, B. & Q. R. Co.* 584
4. A "Review on Petition in Error" and "Appeals" are so distinctively different that the provisions of the statute relating to each cannot be taken together and construed as if they were one law and effect given to every provision. *Consolidated Credit Corporation v. Berger* 598

Taxation.

1. On appeal to the district court from county board of equalization, the court hears the appeal as in equity and without a jury. *Weller v. Valley County* 69
2. A taxpayer who appeals from action of a board of equalization in fixing value of his property has the burden of showing that the action of the board is erroneous. *Weller v. Valley County* 69
3. The presumption that a board of equalization in making an assessment acted upon sufficient competent evidence to justify its action disappears when there is competent evidence on appeal to the contrary, and from such point reasonableness of valuation fixed by the board becomes one of fact based upon evidence, unaided by presumption, with the burden of showing such value to be unreasonable resting on appellant. *Weller v. Valley County* 69
4. The fixing of valuations of property for taxation purposes is prescribed by the Constitution and legislative enactments supplementary thereto. *Homan v. Board of Equalization* 400
5. Taxes must be levied by valuation uniformly and proportionately upon all tangible property. *Homan v. Board of Equalization* 400

6. Individual discrepancies and inequalities with respect to fixing valuation of land for equalization purposes must be corrected and equalized by the county board of equalization; the duties of the state board of equalization having no direct relationship to the duties of a county board of equalization. *Homan v. Board of Equalization* 400
7. One aggrieved by action of county board of equalization with respect to fixing valuation of land for taxation purposes may appeal to the district court, while one aggrieved by action of the state board of equalization may prosecute a writ of error to the supreme court. *Homan v. Board of Equalization* 400
8. Evidence was sufficient to sustain the district court's judgment fixing the value of real estate for taxation purposes. *Hess v. Board of Equalization* 405
9. The county board of equalization has authority to hear and determine controverted issues on ownership of personal property for purposes of taxation. *Minneapolis Dredging Co. v. Reikat* 470
10. One who appears before the county board of equalization and pleads that personal property assessed in his name is owned by another has the burden of proof. *Minneapolis Dredging Co. v. Reikat* 470
11. Decision of the county board of equalization on issues of ownership and value of personal property for purposes of taxation is not reversible on appeal unless it appears from clear and convincing proof that it is erroneous. *Minneapolis Dredging Co. v. Reikat* 470
12. Decision of the county board of equalization approving an assessment of dredges as property of contractors who purchased them for operation in construction of dam, *held* not shown by the evidence to be erroneous on the ground that the dredges were owned by the owner of the dam. *Minneapolis Dredging Co. v. Reikat* 470
13. Evidence of complainant did not show assessment of two dredges at $142,000 was excessive. *Minneapolis Dredging Co. v. Reikat* 470
14. A county assessor has power to add to the assessment rolls property omitted therefrom for the current year. *Minneapolis Dredging Co. v. Reikat* 475
15. A denial by the county board of equalization to cancel or reduce an assessment of personal property is a final determination of the issue. *Minneapolis Dredging Co. v. Reikat* 475
16. Appeal from the action of the county board of equalization in refusing to cancel or reduce an assessment of per-

sonal property is an adequate remedy at law and failure to appeal precludes injunction to prevent the enforcement of the assessment. *Minneapolis Dredging Co. v. Reikat* 475

17. Complainants who invoke the jurisdiction of the county board of equalization to cancel or reduce an assessment of personal property do not lose their statutory right to appeal from an adverse ruling on the complaint by failure of the county clerk to make a record of the decision; the board's final order being provable by parol evidence. *Minneapolis Dredging Co. v. Reikat* 475
18. A description of real estate is sufficient to sustain a tax if it does not mislead, and identifies with reasonable certainty the property intended to be taxed. *City of Scottsbluff v. Kennedy* 728
19. Property described for taxation purposes as "Pt E2 SE4; SE4 NE4 Sec. 23, Twp. 22, R. 55," is not void for indefiniteness and uncertainty of description; the use of initial letters, abbreviations and figures in describing real estate for taxation purposes being expressly authorized by statute. *City of Scottsbluff v. Kennedy* 728
20. Property described for taxation purposes as "part" of a described tract is not void for indefiniteness and uncertainty of description where only the part sought to be taxed is subject to taxation. *City of Scottsbluff v. Kennedy* 728
21. In a suit to foreclose a tax sale certificate including general taxes and special assessments, the certificate is *prima facie* evidence of the validity of the taxes and assessments it represents. *City of Scottsbluff v. Kennedy* 728
22. In a suit to foreclose a tax sale certificate which includes unpaid special assessments, unless the invalidity of the assessments is particularly pleaded and proved, no issue is raised which overcomes the presumption of validity which attaches to such tax sale certificate. *City of Scottsbluff v. Kennedy* 728
23. Where it appears that a tax sale certificate is void on account of irregularities, or for want of authority of the county treasurer to sell, the holder becomes subrogated to the right of the public in the lien of the tax for nonpayment of which the tax sale certificate was issued. *City of Scottsbluff v. Kennedy* 728
24. Where a tax sale is adjudged void, the county is liable for all taxes which entered into the sum paid by the taxpayer without regard for whose benefit they were levied. *McDonald v. Lincoln County* 741

25. In proceeding respecting assessments of inheritance taxes, appeal lies from the order of the county judge determining from the appraiser's report the value of the estate and the tax to which the same is liable to the county court of the county, and that court on appeal has jurisdiction to determine all questions relating to the taxes, and appeal does not lie in the first instance to the district court. *In re Estate of Piel* 783

Torts.

A person causing intended or unintended harm to another by refusing to continue a business relation with him which is terminable at his will is not liable for that harm. *Barish v. Chrysler Corporation* 157

Trial. SEE APPEAL. CRIMINAL LAW.

1. Where several inferences opposed to each other but consistent with the facts proved are deducible from the facts, plaintiff does not sustain his position by reliance alone on the inference which would entitle him to recover. *Jones v. Union P. R. Co.* 112
2. Where undisputed physical facts demonstrate that a collision out of which injuries arose was not caused by defendant's negligence, a verdict should be directed for defendant. *Jones v. Union P. R. Co.* 112
3. Where only one inference may be arrived at in the minds of reasonable men from an examination of the physical facts in an automobile accident case, that inference must be accepted, but if with equal force an opposite inference may be drawn a question is presented for the jury. *Jones v. Union P. R. Co.* 112
4. Physical facts may not be accepted as ground for refusal to submit a case to a jury as against the testimony of a witness on a controverted question of fact, unless they are demonstrable to a degree that reasonable minds cannot disagree as to their existence, and unless the results flowing therefrom are demonstrable to the same degree agreeable to the laws of physics, mechanics and mathematics. *Jones v. Union P. R. Co.* 112
5. Where rules of court do not require plaintiff to notify defendant of time of trial of an equity suit at issue and defendant's counsel consents in writing to a trial in his absence at a regular session of the court, counsel for plaintiff may proceed to trial at a subsequent session without notice of his purpose to do so. *Pierce County v. Goff* 514
6. Giving of conflicting instructions is error. *Robison v. Union Transfer Co.* 574

Trusts.

1. The mere fact that settlor of a trust desired to avoid a compliance with the statute pertaining to execution of wills, or to avoid the necessity of probate administration, would not void the trust. *Whalen v. Swircin* 650
2. A declaration or creation of a trust of personalty is not required to be in writing. *Whalen v. Swircin* 650
3. Whether a trust or a bailment is created upon delivery of personalty to another for the benefit of a third person depends upon manifestation of the intention of the parties, and if that intention is that the person to whom delivery is made shall thereby acquire title to the property, a trust is created. *Whalen v. Swircin* 650
4. The settlor of a trust can reserve to himself any power he desires with respect to the property delivered in trust, if the power is not illegal and the reservation of the power will not of itself invalidate the trust. *Whalen v. Swircin* 650
5. The reservation by the settlor of the power to revoke the trust is not inconsistent with the creation of the trust. *Whalen v. Swircin* 650
6. The fact that settlor delivered money to a trustee subject to settlor's use during his lifetime did not invalidate the trust. *Whalen v. Swircin* 650
7. A trust in personalty may be created by parol. *Simon v. Simon* 839
8. In a suit for an accounting of a trust fund in possession of defendant, facts alleged in the petition *held* sufficient to state a cause of action. *Simon v. Simon* 839
9. Every person is a trustee who lawfully holds funds of others for the purposes of a trust. *Simon v. Simon* 839
10. Mutual promises and equal contributions of all contracting parties for a common fund for the benefit of all alike are sufficient consideration for an oral contract creating a trust. *Simon v. Simon* 839
11. Where an oral contract is fully performed by some of the contracting parties and partially performed by the others, it is not void under the statute of frauds. *Simon v. Simon* 839

United States.

Regulations promulgated under the Home Owners Loan Act for the guidance of the agents and agencies of the Home Owners Loan Corporation in making loans have no force or effect on other persons or agencies. *Krause v. Swanson* 256

Vendor and Purchaser.

1. A merchantable title need not be free from every technical defect, the test being whether a man of reasonable prudence, familiar with the facts and questions of law involved, would, in the ordinary course of business, accept such a title as one which could be sold to a reasonable purchaser. *Campagna v. Home Owners Loan Corporation* 429
2. Generally, a purchaser of real estate can make no valid objection to a judgment which is not enforceable against the land purchased. *Campagna v. Home Owners Loan Corporation* 429
3. A judgment, patently unenforceable, is not a lien or encumbrance within the meaning of a contract provision obligating one to convey property free and clear of all encumbrances. *Campagna v. Home Owners Loan Corporation* 429

Waters.

1. An upper proprietor may not accumulate surface water into a drain and discharge it in volume on land of a lower proprietor, nor can he divert water so it goes in a different direction. *Hengelfelt v. Ehrmann* 322
2. Surface water may be controlled by landowner, and he may appropriate to his own use all that falls or comes on his land and refuse to receive any that originates on adjoining property. *Hengelfelt v. Ehrmann* 322
3. A landowner who is not guilty of negligence may accelerate surface water in the natural course of drainage without liability to a lower proprietor, though the quantity of water thus discharged on adjoining property may be increased. *Hengelfelt v. Ehrmann* 322
4. A continuous wrongful diversion of irrigation water will be restrained at the instance of one who is deprived of the rightful use of the water so diverted, notwithstanding no actual damage is alleged or proved. *Gering Irrigation District v. Mitchell Irrigation District* 344
5. Where two irrigation districts receive water diverted under separate appropriations through a joint canal, injunction will lie to prevent one of the districts from receiving water to which it is not entitled, which comes through its inlet, under the guise of transportation loss. *Gering Irrigation District v. Mitchell Irrigation District* 344
6. Where two irrigation districts receive water diverted under separate appropriations through a joint canal, maintenance of checks in the canal which had the effect of reducing the velocity of flow of water will be enjoined. *Gering Irrigation District v. Mitchell Irrigation District* 344

Wills.

1. In a will contest, evidence of undue influence was insufficient to submit the case to the jury. *In re Estate of Bremer* 251
2. After a will has been admitted to probate and time for appeal therefrom has passed, the county court properly admitted to probate a codicil written on the back of the same paper on which the will was written, where the codicil was overlooked at the time of the probate of the original will. *In re Estate of Bremer* 251
3. The cardinal rule of testamentary construction is to ascertain the testator's intention as expressed in his will, and to give it effect, unless the testator attempts to accomplish a purpose or to make a disposition contrary to some rule of law or public policy. *In re Estate of Dimmitt* 413
4. In construing a will, the purpose of the court is to carry out the testator's intention, as shown by the will, in the light of attendant circumstances under which it was made. *In re Estate of Dimmitt* 413
5. The testator's intention may be ascertained from a liberal interpretation and comprehensive view of all the provisions of the will. *In re Estate of Dimmitt* 413
6. No particular words and no conventional forms of expression are necessary to enable one to make an effective disposition of his property. *In re Estate of Dimmitt* 413
7. A testator is required by statute to express his commands in writing, and hence his words must be sufficient for the purpose when taken in the sense in which they would be used normally by one in his circumstances. *In re Estate of Dimmitt* 413
8. Generally, parol evidence of a testator's declarations is not admissible, but the rule is confined to cases in which there is no ambiguity. *In re Estate of Dimmitt* 413
9. Parol evidence is not admissible to show what a testator intended to write, but it may be admitted where its effect is merely to explain or to make certain what he has written. *In re Estate of Dimmitt* 413
10. In ascertaining the testator's intention, the words of the will are to be read in the light of the circumstances under which the will was made. *In re Estate of Dimmitt* 413
11. An undelivered deed may be incorporated in a will by reference, if the terms of the will, assisted, if necessary, by the surrounding circumstances, are sufficient to identify the deed and to show the intention of giving effect to it. *In re Estate of Dimmitt* 413
12. An indorsement on the back of a note signed by payee

and modifying the terms of the note, *held* not intended as a last will, but only a part of the entire contract between the parties. *Brock v. Lueth* 545

13. The essential difference between a trust and a will is that the trust acts at once to vest the interest of the beneficiaries and to pass title to the trustee, defeasible only in the event the settlor exercises a reserved power of revocation, even though the enjoyment of such interest is postponed until the settlor's death, while a will does not take effect until the testator's death. *Whalen v. Swircin* 650

14. Where a person transfers the title to a fund to another with directions to place it in a safety deposit box in his own name and to pay the same to third persons on the transferor's death, a trust is thereby created. *Whalen v. Swircin* 650

Witnesses.

1. Permitting stenographer, who recorded in shorthand statements of one accused of crime, to read the shorthand notes from witness-stand is not error, if such notes, when extended to script, would be admissible. *Mantell v. State* 15

2. Where a state's witness before trial makes voluntary statements as to who shot him, and at the trial testifies that he does not remember who shot him, the state may impeach such witness, such impeaching testimony being admissible only as it affects his credibility. *Mantell v. State* 15

3. Incest is not a crime against the wife of defendant within the statute prohibiting one spouse from testifying against the other except in criminal proceedings for a crime committed by one against the other. *Toth v. State* 448

4. One having a direct legal interest in the result of a suit is precluded by statute from testifying against the representative of a deceased person as to any transaction or conversation between the witness and such deceased person, except as specified in the statute. *Owens v. Reed* 796

5. A written transaction with, or statement by, a deceased person may not be testified to by an adverse party with a direct legal interest in the result of the suit, the statute making no distinction between written and oral transactions and statements. *Owens v. Reed* 796

6. In a suit between the grantee in a deed and a devisee involving the question of the delivery of the deed, the grantee has a direct legal interest in the result of the suit, and the devisee under the will is the representative of the deceased person. *Owens v. Reed* 796