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GLADYS SICKLER, APPELLANT, V. CITY OF BROKEN BOW ET AL., APPELLEES.

10 N. W. (2d) 462

FILED JULY 2, 1943. No. 31607.

1. **Action.** A joinder of causes of action is the uniting of two or more demands or rights of action in one action; misjoinder is the joinder in one complaint of plural causes which cannot lawfully be joined.
2. **Pleading.** Where misjoinder of causes of action is apparent on the face of the petition, the infirmity may be challenged by demurrer.
3. ———. Demurrer admits only facts that are well pleaded, and not conclusions of either law or fact.
4. ———. Where both general and specific allegations are made respecting the same matter the latter controls. General allegations and conclusions lend no support to a petition which contains specific statements and allegations inconsistent therewith.
5. **Action.** Causes involving different defendants cannot be joined unless each cause affects them all and they have a joint or common liability or interest; separate causes against separate defendants cannot lawfully be joined.

APPEAL from the district court for Custer county: ELDRIDGE G. REED, JUDGE. *Affirmed.*

E. F. Myers, for appellant.

Evans & Lee and *Frank Kelly, contra.*

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

CHAPPELL, J.

This is an action by plaintiff against defendants, city of Broken Bow, its mayor and councilmen individually, Broken Bow School District No. 25 and its school board members individually, for damages and injunctive relief. To plaintiff's amended petition defendants, city of Broken Bow and the school district and its officers, separately filed special demurrers alleging misjoinder of causes of action and of parties defendant; and that plaintiff has pleaded therein severable and different acts of tort without sufficient alle-

gations of fact in support thereof to establish a joint or common liability of defendants therefor. Defendant members of the city council and board members of the school district jointly and severally filed general demurrers. The trial court sustained each and all special and general demurrers; offered to permit plaintiff to amend her petition generally, or as provided by section 20-809, Comp. St. 1929, but plaintiff elected to stand upon her amended petition and refused to plead further. Whereupon the court dismissed the action. Plaintiff appeals to this court, and we affirm the judgment of the trial court.

Plaintiff is the owner of a residence property on certain lots in Broken Bow, Nebraska. She alleges, in substance, in her amended petition that on January 11, 1938, defendant city acting through its mayor and council sold certain blocks adjoining her property to defendant school district for use by it as an athletic field; that during the spring and summer of 1939 defendant school district through its contractor and employees created a nuisance thereon, tore up and obstructed the streets and alleys immediately adjoining the property; negligently built a cement-walled drainage canal 2 and 2/10 feet into the alley east of her lots, wrongfully appropriating her property; and by filling in the project for an athletic field negligently changed the topography of the streets and character of the neighborhood to the east and west of her property causing it to be flooded by rainfall, and trampled upon by boisterous crowds at athletic events. She then separately itemizes her damages caused by defendant school district No. 25 to be the sum of $86.

She further alleges that defendant city of Broken Bow through its employees and agents negligently removed two survey posts from her property; tore out one water drainage culvert, stopped up and buried another near-by; constructed a drainage ditch 4 feet on the north and 6 feet on the south of her property as a substitute for the culvert; unlawfully vacated the streets and alleys and appropriated her property without compensation. She alleges that on

October 16, 1939, she filed a claim with the city of Broken Bow for damages to herself and her property, but that the claim has never been allowed, paid or rejected. She then specifically itemizes her damages caused by defendant city of Broken Bow to be the sum of $91.

By general allegations plaintiff charges that the acts were done by defendants collusively and in concert, and specifically itemizes her damages caused "by all the defendants working together" to be the sum of $350, for changing the character of the neighborhood, filling up the streets and alleys higher than her property, and overrunning her property whenever a game or meet was in progress.

Wherefore plaintiff prays that an accounting be had of the damages done by the defendants and each of them, and that defendants be enjoined from allowing crowds at its athletic field to run over her property and be required for that purpose to erect a retaining fence, and that defendants be enjoined from taking her property without compensation, and for equitable relief.

We will not discuss plaintiff's contention in brief of counsel that defendants having answered over waived demurrer, for the reason that no answers appear in the transcript brought to this court by plaintiff on appeal. See *Western Seed & Irrigation Co. v. Morton*, 59 Neb. 579, 81 N. W. 616. Counsel for plaintiff concedes in open court, and careful examination of the amended petition discloses, that there are no statements of facts charging the individual members of the city council or the individual members of the school board with any negligent or wrongful acts. We, therefore, conclude that their general demurrers were each properly sustained.

We now consider the question of whether the trial court erred in sustaining the special demurrers. A joinder of causes of action is the uniting of two or more demands or rights of action in one action; misjoinder is the joinder in one complaint of plural causes which cannot lawfully be joined. See 1 C. J. S. 1181, sec. 61. "In determining whether more than one cause of action is stated, the main test is

whether more than one primary right or subject of controversy is presented, other tests being whether recovery on one ground would bar recovery on the other, whether the same evidence would support the different counts, and whether separate actions could be maintained for separate relief." 1 C. J. S. 1184, sec. 64.

Section 20-806, Comp. St. 1929, provides, in part: "The defendant may demur to the petition only when it appears on its face, * * * . Fifth. That several causes of action are improperly joined * * * ." In this connection we have said: "Where misjoinder of causes of action is apparent on the face of a petition, the infirmity may be challenged by demurrer." *Schultz v. Wise*, 93 Neb. 718, 141 N. W. 813.

Section 20-702, Comp. St. 1929, provides, in part: "The causes of action so united must affect all the parties to the action * * * ." The general rule is that causes involving different defendants cannot be joined, unless each cause affects them all and they have a joint or common liability or interest; separate causes against separate defendants cannot lawfully be joined. See 1 C. J. S. 1284, sec. 98a. See, also, 1 C. J. S. 1298, sec. 98d; 1 C. J. 1102; *Drainage District v. O'Neill*, 109 Neb. 552, 191 N. W. 685; *Radcliffe v. Lavery*, 100 Neb. 31, 158 N. W. 387; *School District v. De Long*, 80 Neb. 667, 114 N. W. 934.

It is a well-established rule that demurrer admits only facts that are well pleaded, and not conclusions of either law or fact. *American Water-Works Co. v. State*, 46 Neb. 194, 64 N. W. 711; *Frontier County v. Lincoln County*, 121 Neb. 701, 238 N. W. 317; *Retail Section of Chamber of Commerce of Plattsmouth v. Kieck*, 128 Neb. 13, 257 N. W. 493; *Griffin v. Gass*, 133 Neb. 56, 274 N. W. 193.

We have held that where both general and specific allegations are made respecting the same matter the latter controls. General allegations and conclusions lend no support to a petition which contains specific statements and allegations inconsistent therewith. *Salsbury v. City of Lincoln*, 117 Neb. 465, 220 N. W. 827; 49 C. J. 119. While plaintiff alleges generally that the tortious acts were done collusive-

ly and in concert, such general allegations are mere conclusions, not supported by any well-pleaded facts which would legally impose a joint or common liability upon all the defendants. Further, such allegations are wholly inconsistent with the specific allegations of her petition.

It is readily apparent that plaintiff is asking for a judgment against defendant city of Broken Bow in the sum of $91, and against defendant school district in the sum of $86, for separable alleged tortious acts and resulting damages.

It is likewise discernible that plaintiff is seeking, in addition, a joint money judgment against both defendant city of Broken Bow and defendant school district in the sum of $350 because of alleged tortious acts specifically charged to defendant school district. These circumstances make the following rule particularly applicable: "If, in contemplation of law, the single tort cannot be committed by two or more together, and can only be a different tort by each, a separate action must be brought against each wrong-doer." Pomeroy, Remedies & Remedial Rights (2d ed.) sec. 281. See, also, 1 C. J. S. 1298, sec. 98d.

Plaintiff seeks to recover damages on the theory of an accounting in equity. The basic reason for equity jurisdiction in an action for accounting is inadequacy of remedy at law. *Dickerson v. Surety Nat. Farm Loan Ass'n,* 127 Neb. 67, 254 N. W. 679. When equitable relief is solely appropriate to the main issue or cause of complaint the equity court will ordinarily retain the case and take account of the damages growing out of or following from the wrong which is the basis of equitable relief. Damages which may be recovered in equity are compensatory and such only as are ancillary or auxiliary to the main relief. 21 C. J. 141, 142. Plaintiff does not bring an action for both legal and equitable relief in respect to the same cause of action but pleads independent, separable legal causes of action to recover unliquidated damages for tort. Under such circumstances they cannot be recovered in equity. 30 C. J. S. 354, sec. 28.

On an application for an extraordinary writ the petition will receive a strict construction; the rule that pleadings should be construed liberally applies only to ordinary actions. *School District v. De Long,* 80 Neb. 667, 114 N. W. 934; *Omaha Grain Exchange v. Spillman,* 118 Neb. 729, 226 N. W. 452; *Northport Irrigation District v. Farmers Irrigation District,* 125 Neb. 607, 251 N. W. 174. Bearing this rule in mind we find that the injunction feature of the case at bar is directed solely to and involves only the school district, except for the alleged taking and use of plaintiff's property without just compensation for which she has a claim filed and pending with defendant city of Broken Bow; thus, as to the latter, she has an adequate remedy at law. It is only where the act sought to be enjoined is threatened or being performed by more than one that all may be joined as defendants. *Nattinger v. Howard,* 102 Neb. 175, 166 N. W. 263; 32 C. J. 303. Applicable law hereinbefore stated requires us to find that misjoinder of causes of action and of parties defendant are apparent on the face of plaintiff's amended petition. The special and general demurrers were properly sustained, and the judgment of the trial court is affirmed.

AFFIRMED.

MASSEY-HARRIS COMPANY, APPELLEE, V. DOUGLAS COUNTY, APPELLANT.

10 N. W. (2d) 346

FILED JULY 2, 1943. No. 31600.

1. **Taxation.** Generally, the situs of intangible personal property under the principle of *mobilia sequuntur personam* follows the residence or domicile of the owner and unless the statute, seeking to tax such intangibles, expressly provides for the inclusion of the intangibles of nonresident owners, the same will not be held subject to taxation.
2. ———. Under the facts herein, the appellee is held to be a nonresident corporation with its domicile or principal place of business outside of the state of Nebraska and under the provisions

of our intangible tax statutes its class B intangibles are not subject to taxation.

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

Kelso Morgan, Clinton Brome, Walter R. Johnson, Attorney General, and *Edwin Vail,* for appellant.

Reed, Ramacciotti & Hruska, contra.

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

WENKE, J.

This is an appeal by the county of Douglas, herein referred to as appellant, from the district court for Douglas county, wherein that court held that the class B intangibles of the Massey-Harris Company, a corporation, appellee herein, were not taxable.

This action had its origin when the county assessor of Douglas county added to the personal tax schedule, returned by the appellee in the year of 1941, class B intangibles in the sum of $500,000. Objections were made thereto for the reason that the same were not taxable and, if taxable, they were taxed too high. From the Board of Equalization's ruling dismissing the objections the appellee appealed to the district court and from its holding that they were not taxable the appellant has appealed to this court.

The facts disclose that the Massey-Harris Company, the appellee herein, is a Maryland corporation engaged in the manufacturing and selling of farm machinery to dealers with its principal place of business in Racine, Wisconsin, but that it has a branch office in Omaha for use in the selling and distribution of its products and the collections therefor in cash, open accounts, dealer's notes or conditional sales contracts, which notes and sales contracts are payable to the home office in Racine, Wisconsin. All notes and conditional sales contracts received are immediately sent to the home office and all cash deposited to the account of the home office with no authority to check thereon. Payment of

salaries and expenses are all made by the home office except for a petty cash account with which the Omaha branch pays minor miscellaneous expenses. All supplies, advertising material, approval of hiring salesmen, their bonds, fixing prices and all matters of policy are directed from the home office.

The first question presented for our consideration is whether or not the appellee, as a nonresident foreign corporation with a business situs located in this state in Douglas county, is, under the statutes of Nebraska, subject to taxation as to its class B intangibles which, by stipulation, consist of open accounts, dealer's notes and conditional sales contracts.

The appellant's contention that the right to tax the class B intangibles of the appellee by reason of the provisions of section 77-201, Comp. St. 1929, which reads in part as follows: "*All property in this state,* not expressly exempt therefrom, shall be subject to taxation, and shall be valued and assessed at its actual value," cannot be sustained. (Italics ours.) "The general rule is that the situs of intangible personal property for the purposes of taxation is the domicile of the owner. This rule is usually bottomed on the legal maxim, '*mobilia sequuntur personam,*' i. e., 'moveables follow the person;' or, as sometimes stated, the situs of personal property is the domicile of the owner." *Crane Co. v. City Council of the City of Des Moines*, 208 Ia. 164, 225 N. W. 344, 76 A. L. R. 801. Which principle as to intangibles was stated in *Finch v. York County*, 19 Neb. 50, 26 N. W. 589, and followed in the cases of *Preston v. Harlan County*, 97 Neb. 667, 150 N. W. 1009; *Nye-Schneider-Fowler Co. v. Boone County*, 99 Neb. 383, 156 N. W. 773. Under this rule the class B intangibles which are here sought to be taxed are not "*property in this state,*" for the purpose of taxation.

This general provision of the statute is not applicable to the property here sought to be taxed for the reason that in 1921 the legislature passed statutes in regard to the taxation of intangible personal property, being chapter 77, art.

7, Comp. St. 1929, and these specific statutes on this subject-matter are controlling. *Joyce Lumber Co. v. Anderson,* 125 Neb. 886, 252 N. W. 394.

The manner in which the branch of the appellee was operated in Omaha does not bring it within that part of section 77-703, Comp. St. Supp. 1941, which reads in part as follows: "Every person or corporation having intangible property in his or its custody or under his or its control as agent, trustee, executor, administator, guardian or other representative capacity in this state shall on or before the last Monday in May of each year list the same for taxation as of April 1st next preceding."

Nor does the reference in section 77-710, Comp. St. 1929, which is as follows: "If any foreign corporation is taxed in this state upon any tangible or intangible property," control over the specific statutes giving the authority to tax such intangibles. These statutes in part are: Section 77-701, Comp. St. 1929, which provides: "All intangible property in Class B shall be taxed where said intangible property is assessed at the rate of eight mills on the dollar of the actual value thereof, the same to be assessed and collected *where the owner resides*" (Italics ours); section 77-703, Comp. St. Supp. 1941, which provides: "A return for intangible property shall be prepared and filed by all taxpayers of the state, whether owners of intangible property or not * * * . Returns shall be filed with the county assessor * * * of the county in which the taxpayer is *domiciled;*" section 77-704, Comp. St. 1929, which provides: "Returns for intangible property shall be compared with assessments for tangible property as well as the list of residents of the county, and where a taxpayer *domiciled* within the county has failed to file a return for intangible property, a notice by registered mail shall be sent to such taxpayer to appear at a designated place in the County in which he resides, before the State Tax Commissioner or his duly authorized agent within fifteen days for examination as to ownership of intangible property and the intangible property of such taxpayer shall thereupon be assessed at the rate of tangi-

ble property. In like manner any intangible property omitted from the taxpayer's separate intangible return shall be assessed at the rate for tangible property in his taxing district." These sections of the intangible tax law provide that the property is to be assessed and collected where the owner *resides* and in which the taxpayer is *domiciled,* and from a careful reading of the entire act class B intangibles are to be returned and assessed in the county where the taxpayer resides and has his or its domicile. Under the principle of *mobilia sequuntur personam,* which common-law principle we have adhered to by our decision with reference to intangible personal property, these class B intangibles were not taxable in Nebraska for the appellee had no residence or domicile in this state.

This principle of *mobilia sequuntur personam* as to intangible personal property has been the rule in force for so long in this state that if it is to be changed or modified as to taxation it should be by the legislature and then only by provisions plainly written in the statute, for the power of taxing this class of property in the hands of nonresidents must, if it exists, be clearly set forth.

The Nebraska cases of *Finch v. York County, supra,* and *Clay, Robinson & Co. v. Douglas County,* 88 Neb. 363, 129 N. W. 548, being decisions wherein the facts brought them within the provisions of specific statutes making the property taxable, are no longer in point in view of the legislative change in the definition and classification of intangibles and the place of their taxation. *Joyce Lumber Co. v. Anderson, supra.* Also in the case of *Clay, Robinson & Co. v. Douglas County, supra,* the court held that the partnership acquired a domicile in this state for all practical purposes and therefore became subject to taxation upon so much of its property as it employed and controlled within the state. This reasoning has no application here.

While those decisions from other jurisdictions, which find the facts to bring the party within the provisions of a statute which makes provision for taxing the intangibles of nonresidents on a basis often referred to as a "business

situs," and discussing their constitutionality with reference to double taxation, present some interesting propositions of law, they are in no way applicable here and we do not discuss that question for under the express provisions of our statutes taxing the intangibles of residents or those domiciled within this state the class B intangibles of the appellee are not included and therefore were not subject to taxation.

In view of our holding, other matters discussed in the brief of the appellant are not necessary for determination.

AFFIRMED.

LILLIAN T. TAYLOR, APPELLEE, V. MARGUERITE T. CLARK ET AL., APPELLANTS.

10 N. W. (2d) 495

FILED JULY 9, 1943. No. 31553.

1. **Statute of Frauds.** In the law of the statute of frauds, it is specifically stated: "Nothing in this chapter contained shall be construed to abridge the powers of the court of equity to compel the specific performance of agreements in cases of part performance." Comp. St. 1929, sec. 36-106.
2. **Specific Performance.** Where an oral contract has been performed by one party, and he cannot be placed *in statu quo* by an award of damages which would furnish full compensation, equity will afford a remedy by specific performance.
3. ———. Equity will grant specific performance where the terms of the contract are established by evidence that is clear, convincing, and satisfactory, and where it has been fully performed by one party and its nonfulfilment would amount to a fraud on that party.

APPEAL from the district court for Lancaster county: JOHN L. POLK, JUDGE. *Affirmed.*

Peterson & Devoe and *John Jacobson,* for appellants.

Stewart, Stewart & Whitworth, contra.

Davis & Vogeltanz, Herman Ginsburg and *Cline, Williams & Wright, amici curiæ.*

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

PAINE, J.

This is a suit in equity by Lillian T. Taylor, plaintiff, widow of Ira F. Taylor, deceased, for the specific performance of an oral contract made by her with her husband in his lifetime, under the terms of which the said Ira F. Taylor was to convey an apartment house in Lincoln to the plaintiff. The district court entered a decree for the plaintiff, and directed the specific performance of the agreement. Supersedeas bond fixed in the sum of $1,000, and each of the defendants appealed.

Plaintiff's amended petition in equity alleged that she was married to Ira F. Taylor on June 5, 1929, and lived with him until his death on July 24, 1941; and sometime prior to February 28, 1938, Ira F. Taylor commenced remodeling an apartment building at 219 South Fifteenth street in Lincoln, and a short time prior to said date desired to obtain a loan on the property to secure additional money for such remodeling; that on the above date he entered into a verbal agreement with plaintiff to convey to her such property if she would sign a note for $3,300 to First Federal Savings & Loan Association, and would sign a mortgage and assignment of rents covering such property to the First Federal Savings & Loan Association, securing such note, it being a part of such agreement that the income from the property should be used for the payment of interest and principal on such loan and taxes, repairs and maintenance of such property, and after the loan was paid the income not required for such purposes should be plaintiff's, but would be used by her for the living expenses of Ira F. Taylor and plaintiff during his lifetime. It is alleged that on February 28, 1938, plaintiff signed such note, mortgage and assignment of rents, but that Ira F. Taylor failed to execute a conveyance of the property to plaintiff, as he had agreed to do. Ira F. Taylor was killed in an automobile accident in New Jersey on July 24, 1941. He left no last will and testament.

Plaintiff further alleges that defendant Marguerite T. Clark claims to be the owner of an undivided three-fourths interest in his property as his child by a prior marriage. In order to vest the entire record title to such property in plaintiff by reason of the aforesaid agreement, plaintiff has requested defendant Clark to execute and deliver to plaintiff a proper conveyance of her record interest in such property, but defendant Clark has failed and neglected to comply with such request. It is alleged that the Continental National Bank of Lincoln is administrator of the estate of Ira F. Taylor, deceased, and as such administrator is in possession of the aforesaid property and has been receiving the income therefrom, and should be required to apply such income as provided by the above described agreement, or to account to plaintiff therefor.

Plaintiff prays that defendant Clark be ordered to execute and deliver to plaintiff a proper conveyance of said property, or in the alternative that the title of plaintiff to the entire fee title to such property be quieted and confirmed in her, and that defendant, the Continental National Bank of Lincoln, as administrator, be required to apply all income from the property according to said agreement, or to account to plaintiff therefor, and for other relief.

Thereafter, objections to jurisdiction and a plea in abatement were filed by the Continental National Bank as administrator of Ira F. Taylor's estate, alleging among other things that the plaintiff's amended petition undertakes to invade the province of the county court, and asking that said action be abated and dismissed. Said objections were overruled, as were demurrers by each of the defendants.

Thereafter defendant Marguerite T. Clark filed an amended answer, admitting that Ira F. Taylor died intestate July 24, 1941, leaving as one of his heirs at law the answering defendant, she being his only child and the issue of a marriage between said Taylor and the mother of defendant prior to the marriage of the said Taylor to the plaintiff, and that at all times mentioned in the petition Taylor was the owner of the property described, and that upon his death a

three-fourths interest therein descended to the answering defendant, and that she is now the owner and holder thereof, subject to the payment of claims, debts and expenses of the administration of said estate; that the Continental National Bank of Lincoln is the duly qualified and acting administrator of said estate, and as such is in possession of the property and receiving the income therefrom.

Defendant admits that on February 28, 1938, plaintiff signed a note for $3,300 to First Federal Savings & Loan Association and a mortgage of and assignment of rents therefrom, but alleges that such signing and execution of said documents were not pursuant to any agreement set forth in plaintiff's petition, did not bind her separate estate to pay said note or any part thereof, and said documents were only for the purpose of waiving any rights she might otherwise have in and to said property in the event that said note was not paid, and only to enable said Taylor to obtain money to pay off debts and taxes owing by him which were about to ripen into liens against said property, and only to preserve any inchoate interest she might have therein as his spouse.

Defendant expressly denies that plaintiff and said Ira F. Taylor ever entered into any agreement or contract as alleged in plaintiff's amended petition, and alleges that had any such contract as alleged by plaintiff been entered into by the said Taylor the said contract would at all times have been, and would now be, without consideration, in effect an agreement to convey real estate wholly void and unenforceable under the laws of Nebraska, and particularly under section 36-202, Comp. St. 1929.

Defendant further alleges that, assuming that any agreement was entered into as alleged by plaintiff, which defendant denies, plaintiff at all times failed and neglected to make any claim of right thereunder against the said Taylor, or to demand performance by him, but at all times until long after his death acquiesced in the title and possession of the said Taylor in and to said property, and waived any rights she may have claimed under any such contract until by the

death of Taylor, and the inability to produce him as a witness to rebut the claims of plaintiff and the loss and death of other witnesses, the conditions had changed to an extent to which it would be inequitable for her to make such claims, and she should be estopped to assert any right in said property by reason of the alleged agreement. Defendant finally alleges that plaintiff has an adequate remedy at law upon any claim alleged in her petition, and denies every allegation not specifically admitted, and prays that said amended petition may be dismissed.

The Continental National Bank of Lincoln filed answer as administrator of the estate of Ira F. Taylor, deceased, admitting that the record title to the building at 219 South Fifteenth street was in Ira F. Taylor, who died July 24, 1941; admitting that as such administrator it is in possession of the said property, and has been receiving the income therefrom; that the principal assets of the estate consisted of the apartment properties at 219 South Fifteenth street and at 944 H street, and the household furniture therein; also the premises occupied by decedent as his home at 1514 Washington street, which property, together with the fixtures and furniture therein, is in the possession of and occupied by plaintiff; that all of the real estate of decedent is encumbered by mortgage. Defendant bank alleges that the said apartment properties have since the death of Ira F. Taylor constituted the only income-producing assets of the estate; that decedent had only about $50 in cash at the time of his death, and had no property producing income, or which could be converted into cash, other than the said property. Defendant prays that it be dismissed from said action.

Plaintiff's reply, aside from a general denial, alleges that she fully performed her part of the said agreement of February 28, 1938, and has at all times since said date relied upon such agreement and the performance thereof by said Ira F. Taylor, and that the benefits accruing to deceased from such performance on her part were retained by him to the time of his death, and that by reason thereof defend-

ants are estopped to question the validity of such agreement or to assert any right or claim in or to said property. For further reply plaintiff denies that the assets of the estate, exclusive of the property which Ira F. Taylor agreed to convey to plaintiff, are insufficient to pay all of the debts and reasonable expenses of the administration of his estate, but that if the court finds otherwise plaintiff offers to subordinate her claim for unpaid widow's allowance and statutory allowance to those of any creditors whose claims are duly allowed against such estate.

The decree of the court is very long, and entered findings in detail on all of the issues. Briefly, the court found for the plaintiff and against each of the defendants, and entered decree for plaintiff as prayed, finding that the agreement alleged by plaintiff was valid and enforceable and plaintiff was entitled to the specific performance thereof.

The motions of defendants for new trial each set out some 25 alleged errors of the trial court, which are covered in 16 assignments of error, but in the brief and argument the discussion was limited to the five propositions of law which embody the defendants' principal contentions for reversal. These propositions of law are as follows:

(1) Specific performance of an oral contract to convey land or an interest in land will not be granted unless the acts performed by the promisee, in themselves, unequivocally indicate the existence of such contract relating to the subject-matter in dispute and are acts referable solely to the contract alleged and such as would not have been done except with a view to the performance of the contract and cannot be accounted for on any other reasonable hypothesis.

(2) In order to warrant the specific enforcement of a parol agreement for the sale and conveyance of land on the ground of part performance, the contract, with all its essential terms, must be established by evidence which is clear, convincing, definite, unequivocal, and free from ambiguity.

(3) Acts relied upon as part performance of a parol contract for the conveyance of land must be such as change

the plaintiff's position and which would result in a fraud or injustice upon him if the contract were not enforced.

(4) Acts relied upon to take an oral contract for the conveyance of land out of the operation of the statute of frauds must be such that the plaintiff could not be fully and adequately compensated at law by a recovery of damages or otherwise.

(5) Payment or delivery in full of the consideration is not part performance of an oral contract to convey land which will suffice to take it out of the statute of frauds.

The evidence of the many witnesses found in the bill of exceptions has been carefully considered, but cannot be abstracted in this opinion.

The plaintiff had two daughters, aged 12 and 13 years, when she married the deceased on June 5, 1929. On this date the defendant Marguerite T. Clark, the only daughter by deceased's first marriage, was living with her husband, O. B. Clark, in their home in Lincoln, and was appointed and served as special administratrix for the first three months following the death of her father.

In 1932 deceased obtained a loan on his H street property, with which to remodel the same. In 1937 he secured a loan of $2,500 on his Washington street property to assist in remodeling operations. In February, 1938, the deceased needed additional funds, and asked plaintiff to sign the necessary papers to secure $3,300 to pay county taxes, $542.33, city taxes, $347.29, plumbing bill, $960.89, lumber and planing mill bills of $981.94, electrician's bills of $295.16, and smaller bills, amounting to a total sum of $3,300. The whole plan of deceased for remodeling would be jeopardized unless he secured the money to meet these bills which were pressing for payment, and the plaintiff was not very keen about signing papers for this third loan.

The plaintiff and deceased discussed this matter on several occasions, and finally he entered into an oral agreement with his wife that he would convey to her the Fifteenth street apartment if she would sign a note and mortgage for this $3,300 and the assignment of the rents as additional

security, and the plaintiff also specifically bound her separate estate and her own property of every kind to the payment thereof. It was also further agreed between them on this 28th day of February, 1938, that the income should be used to pay off the loan, taxes, and repairs, and the balance should belong to plaintiff, but would be used for living expenses of herself and her husband. These terms were reached after at least a half dozen conversations between the principals and other parties. It was not a secret matter; it was in no sense a gift, for the deceased in all his conversations referred to it as an agreement with his wife. The papers were signed, the money secured from the First Federal Savings & Loan Association, and the bills were at once paid off with the funds thus secured.

Immediately after the plaintiff and her husband entered into this verbal agreement, Taylor went to the office of Edward H. Schroeder, who conducted a real estate and insurance business in Lincoln, and told Schroeder that he wanted a deed prepared, conveying the Fifteenth street property to plaintiff, and asked him to prepare such a deed. Schroeder told Taylor his stenographer was out, but that he would prepare the deed, and Taylor said he would return in a short time and sign the deed. Taylor left with Schroeder the deed which he had received to the property so that he might get the correct description from it, and Taylor paid Schroeder for preparing the deed and taking his acknowledgment thereto. Taylor did not return to sign the deed. Schroeder put the deeds in his safe and forgot about them until he discovered them in his safe after Taylor's death.

The evidence discloses that plaintiff suggested to Taylor that the deed which he agreed to execute should not be recorded, but should be placed in a safety deposit box, to which they both had access, and be recorded after the loan on the property was paid. Plaintiff did not know until after Taylor's death that such deed had not been executed as agreed and placed in the safety deposit box. Taylor did not, at any time after the agreement, say anything indicat-

ing that he had not complied with his agreement to execute the deed, or that he would not comply, or that he had changed his mind, but on the contrary on numerous occasions made statements showing that he recognized that the agreement was in full force and effect, and was to be fully carried out.

The testimony shows that the agreement was valid, with adequate consideration therefor. The plaintiff has at all times relied upon said agreement, and the deceased retained all benefits therefrom up to his death, therefore the defendants are estopped to question plaintiff's right to enforce such agreement.

The evidence shows that, when this agreement was entered into, the plaintiff was 47 years of age and deceased 69 years old. The testimony discloses that the plaintiff was a good business woman, having been employed by the First Trust Company for eight years and for the last five years as superintendent of its safety deposit vaults. After she married the deceased, he took his insurance business away from witness Schroeder and placed it with the First Trust Company.

The defendants cite many cases to support their contentions, such as *Overlander v. Ware,* 102 Neb. 216, 166 N. W. 611, in which it was found that no contract had been made to convey more than 80 acres, and the first paragraph of the syllabus reads as follows: "In an action for specific performance of an oral agreement with a deceased person to convey land, *held,* that not only must the terms of the contract be established by evidence that is clear, satisfactory and unequivocal, but the work constituting the performance required under the statute of frauds must be such as is referable solely to the contract sought to be enforced, and not such as might reasonably be referable to some other and different contract or relation. Nothing will be considered as part performance which does not put the party into a situation which is a fraud upon him unless the agreement be fully performed. Equity interferes only to prevent fraud or unconscionable advantage."

Judge Cornish, in writing the opinion, discusses the evidence and shows that deceased was on good terms with all his relatives, but that the testimony was more or less indistinct and inconsistent with the existence of a contract to convey all the property claimed by John L. Clark; that it never amounted to direct proof of the facts alleged.

In the case of *Hunt v. Lipp,* 30 Neb. 469, 45 N. W. 632, cited by defendants, we have a case originally brought to quiet title to a lot in Omaha. On page 485 there is a long quotation from Pomeroy, Contracts, sec. 107, to the effect that to warrant the court in enforcing a verbal contract by specific performance the agreement itself must be proved, and then the acts of part performance necessary to take it out of the statute of frauds.

Defendants also cite other Nebraska cases holding that specific performance will not lie unless the proof is clear, convincing, satisfactory, and unequivocal that the contract was made and substantially performed by the parties seeking its enforcement. See *Remaly v. Sweet,* 106 Neb. 327, 183 N. W. 663; *Sower v. Wells,* 111 Neb. 334, 196 N. W. 693; *Smith v. Raubach,* 121 Neb. 703, 238 N. W. 314; *Ward v. Hislop,* 122 Neb. 15, 238 N. W. 769; *Goodlett v. Banning,* 127 Neb. 325, 255 N. W. 9; *Petersen v. Hitchcock,* 128 Neb. 381, 258 N. W. 669; *Rau v. Rau,* 79 Neb. 694, 113 N. W. 174; *Young v. Gillen,* 108 Neb. 311, 187 N. W. 900.

The defendants set out a discussion of the case of *Goodwin v. Freadrich,* 135 Neb. 203, 280 N. W. 917, in which the trial court was reversed, and it was held that the evidence was insufficient to establish an oral contract between Charles H. Freadrich and Edith Freadrich, in consideration of which he promised to leave at his death his entire estate to the daughter, then seven years of age, excepting what his wife would receive under the law. This oral contract was alleged to have been made January 15, 1912.

Judge Eberly in writing the opinion quoted Felix Arnold, a noted psychologist, to the effect that one ordinarily forgets four-fifths of all new matter within a month, and that it was more than 25 years before the trial when this conver-

sation took place. He also says the conversation lacks the certainty and definiteness to constitute a binding contract, and in the last page of the opinion says that the evidence fails to show that Charles H. Freadrich was in Galesburg, Illinois, between January 12 and 16, 1912, and therefore plaintiff has failed to establish the allegations of her petition by evidence clear, convincing and unequivocal.

We will now consider the citations in opposition to the position of the defendants. In the chapter on statute of frauds, it is said: "Nothing in this chapter contained shall be construed to abridge the powers of the court of equity to compel the specific performance of agreements in cases of part performance." Comp. St. 1929, sec. 36-106. See *Mack v. Swanson,* 140 Neb. 295, 299 N. W. 543.

In the case at bar, the full performance by plaintiff of her part of the agreement is sufficient to render the statute of frauds inapplicable, and nonfulfilment of the agreement would be a fraud upon plaintiff in depriving her of the apartment which it was agreed she should have, for the law is that, where an oral contract has been performed by one party, and he cannot be placed *in statu quo* by an award of damages which would furnish full compensation, equity will afford a remedy by specific performance. See annotation, 69 A. L. R. 14, and 106 A. L. R. 744.

This court has held in two rather recent cases that "Equity will grant specific performance of a parol contract to leave property to another, where the terms of the contract are established by evidence that is clear, convincing and satisfactory, and where it has been wholly performed by one party and its nonfulfilment would amount to a fraud on that party." *Craig v. Seebecker,* 135 Neb. 221, 280 N. W. 913, opinion written by Judge Carter, and *Lennox v. Anderson,* 140 Neb. 748, 1 N. W. (2d) 912, opinion written by Judge Messmore.

The plaintiff contends that there was a full performance of the contract in the case at bar, and that the deceased accepted all the benefits in his lifetime, and that by his retaining those benefits the defendants are now estopped.

Jorgensen v. Crandell, 134 Neb. 33, 277 N. W. 785; 20 Neb. Law Review, 191; *Harbine Bank of Fairbury v. McCune,* 131 Neb. 419, 268 N. W. 358.

The court, after a careful examination of the bill of exceptions, believes there is no evidence which disputes the making of this contract, established by the several witnesses, and entirely corroborated by other clear and convincing evidence.

The evidence does not show a gift of the property to plaintiff, but the testimony sets out statements of the conversations where Taylor said that he had agreed to do this exact thing and deed the property to her. The law is clear that performance in full of the agreement takes it out of the statute of frauds. Plaintiff did everything on her part; she signed all of the loan papers to pay off debts owed by her husband, and the fact that the income has been sufficient so that she has not had to pay the obligations is not important.

It is the opinion of the court that there was sufficient testimony to sustain this oral agreement, and the findings of the trial court are supported by the evidence. The plaintiff, by signing the note and mortgage for $3,300, specifically bound her own estate and her own property of every kind to the payment thereof, and the evidence shows that at that time she had a separate estate of her own of substantial value.

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

AFFIRMED.

The following opinion on motion for rehearing was filed March 10, 1944. *Former judgment of affirmance vacated and set aside and the cause reversed and dismissed.*

1. **Statute of Frauds.** "No estate or interest in land, other than leases for a term of one year from the making thereof, nor any trust or power over or concerning lands, or in any manner relating, thereto, shall hereafter be created, granted, assigned, surrendered, or declared, unless by operation of law, or by deed of

conveyance in writing, subscribed by the party creating, granting, assigning, surrendering or declaring the same." Comp. St. 1929, sec. 36-103.

2. ———. "Every contract for the leasing for a longer period than one year from the making thereof, or for the sale of any lands, shall be void unless the contract or some note or memorandum thereof be in writing and signed by the party by whom the lease or sale is to be made." Comp. St. 1929, sec. 36-105.
3. ———. "Nothing in this chapter contained shall be construed to abridge the powers of the court of equity to compel the specific performance of agreements in cases of part performance." Comp. St. 1929, sec. 36-106.
4. **Specific Performance.** Specific performance of an oral contract to convey real estate may not be decreed on the basis of part performance unless the acts of part performance by the promisee, in relation to the subject-matter, in and of themselves unequivocally indicate the existence of the contract alleged and cannot be accounted for on any other reasonable hypothesis.
5. **Statute of Frauds.** An oral contract to convey real estate is void and unenforceable as within the statute of frauds unless there has been part performance by the promisee which is solely referable to the contract sought to be enforced and not such as might be referable to any other contract or hypothesis.
6. ———. Payment of the consideration of an oral contract is not part performance which will take it out of the statute of frauds.
7. ———. The joinder in the execution of a note and mortgage which is the consideration for an oral contract to convey real estate is not part performance which will take the contract out of the statute of frauds.

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

YEAGER, J.

This action was before this court previously and in it an opinion was released which appears, *ante*, p. 552, 10 N. W. (2d) 495. The principles upon which the former opinion is based having been challenged by motion for rehearing it now appears necessary to make a reexamination of the case and to render another opinion.

The action is by Lillian T. Taylor, plaintiff, and widow of Ira F. Taylor, deceased, against Marguerite T. Clark, daughter and only heir of Ira F. Taylor, deceased, except

the plaintiff, and the Continental National Bank of Lincoln, administrator of the estate of said Ira F. Taylor, defendants. The action is in equity to compel specific performance of an oral contract claimed to have been entered into by and between the plaintiff and Ira F. Taylor by the terms of which said Ira F. Taylor in his lifetime agreed to convey to plaintiff certain real estate in Lincoln, Lancaster county, Nebraska. From a decree granting specific performance in favor of the plaintiff, defendants have appealed.

In her petition, to the extent necessary to refer to it here, the plaintiff substantially alleged that she was married to Ira F. Taylor June 5, 1929, and that she lived with him as his wife until his death which occurred on July 24, 1941; that Ira F. Taylor in his lifetime was the owner of the south 47 feet of lot 1, block 64, in the city of Lincoln, Lancaster county, Nebraska, otherwise known as 219 South Fifteenth street, and the building situated thereon; that on or about February 28, 1938, plaintiff and Ira F. Taylor, her husband, entered into an oral contract whereby in consideration of plaintiff joining with her husband in the execution of a note and mortgage encumbering the said real estate in the amount of $3,300 he, the said husband, would transfer title thereto to the plaintiff; that plaintiff in performance of the oral agreement joined in the execution of the note and mortgage whereby the real estate was encumbered; that during his lifetime no such transfer was ever made; that Ira F. Taylor died intestate leaving as his heirs at law the plaintiff and the defendant, Clark; that this real estate was not a homestead; that as heirs of Ira F. Taylor, and subject to the oral contract, plaintiff was entitled to a one-fourth interest in the real estate in question and the defendant, Clark, was entitled to a three-fourths interest, as daughter and heir by a former marriage; that demand was made that defendant, Clark, execute a transfer of title to said real estate to plaintiff, with which demand the said defendant has failed and refused to comply.

The prayer is that the defendant, Clark, be ordered to execute and deliver a proper conveyance of title to plaintiff,

or in the alternative that title be quieted and confirmed in plaintiff. The prayer as to the adminstrator is that it be required to apply the proceeds from this real estate to the purposes of the alleged oral contract. That portion of the petition dealing with this subject and the related portion of the prayer need not be discussed since, in the light of the attitude taken herein, they have no bearing on the decision of the case.

In her answer to the petition the defendant, Clark, claimed ownership of a three-fourths interest in the real estate as heir of the deceased Ira F. Taylor; she admitted the execution of the note and mortgage but denies the alleged oral contract; she says that if any such contract was entered into it was without consideration and was void and unenforceable for the reason that it was in violation of the statute of frauds; she says further that if plaintiff had any rights under the alleged agreement she has waived any right to have them enforced.

The defendant, Continental National Bank, administrator, filed its answer setting up its capacity and relation to the estate and property and the condition of the estate and a denial of the allegations of the petition and prayed for a dismissal of the action.

By reply plaintiff renewed and reiterated the allegations of her petition, denied the allegations of the answers inconsistent with the allegations of the petition, and affirmatively alleged that the defendants were estopped to assert the invalidity of the contract.

The evidence sufficiently shows that in February, 1938, Ira F. Taylor required about $3,300 for remodeling the building on the premises in question and for the payment of due and delinquent taxes, also that plaintiff orally agreed to join with him in a note and mortgage encumbering the property to that extent and that as a part of the agreement Ira F. Taylor agreed, again orally, to execute a deed conveying title to the property to plaintiff. It appears also that it was agreed that the income from the property was to be used first for retirement of the indebtedness and go-

ing charges and the balance for the uses of the parties. It further sufficiently appears that on February 28, 1938, the note and mortgage agreed upon were duly executed and that on the same day Ira F. Taylor had a deed of conveyance drawn which was never executed.

The trial court, on the evidence thus briefly summarized, found that an oral contract for the conveyance of real estate had been established and decreed specific performance in accordance with the prayer of the petition.

For the purposes of this case weight of evidence is of little or no concern. The question of primary importance is that of whether or not, considering the facts outlined as true, an enforceable contract has been proved, it being the contention of defendants that the contract is unenforceable for the reason that it is in violation of the statute of frauds.

The sections of the statute which must be considered in the determination of this question are sections 36-103, 36-105 and 36-106, Comp. St. 1929, as follows:

Section 36-103. "No estate or interest in land, other than leases for a term of one year from the making thereof, nor any trust or power over or concerning lands, or in any manner relating, thereto, shall hereafter be created, granted, assigned, surrendered, or declared, unless by operation of law, or by deed of conveyance in writing, subscribed by the party creating, granting, assigning, surrendering or declaring the same."

Section 36-105. "Every contract for the leasing for a longer period than one year from the making thereof, or for the sale of any lands, shall be void unless the contract or some note or memorandum thereof be in writing and signed by the party by whom the lease or sale is to be made."

Section 36-106. "Nothing in this chapter contained shall be construed to abridge the powers of the court of equity to compel the specific performance of agreements in cases of part performance."

Beyond question there was no deed of conveyance within the meaning of section 36-103, nor was there a contract,

note or memorandum signed by Ira F. Taylor within the meaning of section 36-105. It follows therefore that to obtain specific performance plaintiff must prove part performance within the meaning of section 36-106. This the defendants contend the plaintiff has failed to do.

In this respect plaintiff contends that her compliance with the requirement that she join in the execution of the note and mortgage encumbering the real estate was part performance within the meaning of the statute.

The defendants contend on the other hand that this cannot be considered as part performance within the meaning of the statute for several reasons. The first ground of their contention in this respect is that specific performance of an oral contract to convey real estate may not be decreed on the basis of part performance unless the acts of part performance by the promisee, in relation to the subject-matter, in and of themselves unequivocally indicate the existence of the contract alleged and cannot be accounted for on any other reasonable hypothesis, and that the alleged acts of performance in this case do not fulfill this essential requirement.

The rule contended for in this respect by defendants without doubt obtains in this jurisdiction as well as other jurisdictions and it finds substantial support in what are generally considered authoritative texts.

The rule of this jurisdiction is clearly stated in *Overlander v. Ware,* 102 Neb. 216, 166 N. W. 611, in the following: "In considering cases of this character, where one is claiming the estate of a person deceased under an alleged oral contract, the evidence of such contract and the terms of it must be clear, satisfactory and unequivocal. Such contracts are on their face void as within the statute of frauds, because not in writing, and, even though proved by clear and satisfactory evidence, they are not enforceable unless there has been such performance as the law requires. The thing done, constituting performance, must be such as is referable solely to the contract sought to be enforced, and not such as might be referable to some other and different contract

—something that the claimant would not have done unless on account of the agreement and with the direct view to its performance—so that nonperformance by the other party would amount to a fraud upon him." Other cases sustaining the rule are *Powers v. Norton,* 103 Neb. 761, 174 N. W. 223; *Remaly v. Sweet,* 106 Neb. 327, 183 N. W. 663; *Fischer v. Fischer,* 106 Neb. 477, 184 N. W. 116, 21 A. L. R. 306; *Young v. Gillen,* 108 Neb. 311, 187 N. W. 900; *Sower v. Wells,* 111 Neb. 334, 196 N. W. 693; *Goodlett v. Banning,* 127 Neb. 325, 255 N. W. 9. Cases from other jurisdictions adhering to this principle are *Harmonie Club v. Smirnow,* 106 Conn. 243, 137 Atl. 769; *Scheerer v. Scheerer,* 287 Mo. 92, 229 S. W. 192; *Meigs v. Morris,* 63 Ark. 100, 37 S. W. 302; *Mann v. Mann,* 159 Va. 240, 165 S. E. 522; *Thomas v. Francis,* 76 S. W. (2d) (Tex. Civ. App.) 575.

The rule announced in Pomeroy, Contracts, sec. 108, and quoted with approval in *Hunt v. Lipp,* 30 Neb. 469, 486, 45 N. W. 632, is the following: "He must first prove acts done by himself, or on his behalf, which point unmistakably to a contract between himself and the defendant, which cannot, in the ordinary course of human conduct, be accounted for in any other manner than as having been done in pursuance of a contract, and which would not have been done without an existing contract; * * * ."

Assuming then for present purposes the execution of the note and mortgage may be considered as part performance by plaintiff of the oral contract alleged we are called upon to determine under the rule whether or not this act in and of itself unaided by other evidence points unequivocally and without question to such a contract as is alleged in the petition and to no other reasonable hypothesis.

This is the theory upon which the determination of this question must be approached since before evidence is admissible in proof of the contract itself there must be evidence of performance, or part performance, referable unequivocally or as stated in *Hunt v. Lipp, supra,* unmistakably to the contract pleaded. See, also, *Young v. Gillen, supra; Overlander v. Ware, supra;* Pomeroy, Contracts, sec. 107; 101 A. L. R. 997.

The answer in the light of common knowledge of ordinary business relation is not difficult to find. We do not hesitate to say that this act of executing the note and mortgage does not exclude every other reasonable hypothesis and it may not reasonably be said that it could be referable only to the contract alleged. As illustrations, it could have been referable to a requirement by the mortgagee that the spouse of the holder of the title join in the execution of the instruments creating the encumbrance or it could be referable alone to a joint purpose and desire of Ira F. Taylor and his wife to bring about an improved condition of the real estate without regard to thought of conveyance of title thereto.

On this ground we are required to hold that the contract alleged is unenforceable.

Another contention of the defendants is that the joinder of plaintiff in the execution of the note and mortgage in question may not be considered as such part performance of an oral contract as would remove it from the operation of the statute of frauds and empower a court of equity to decree specific performance.

In this connection it may be noted that the note and mortgage obligated the makers to the payment of the secured indebtedness and in addition plaintiff bound her separate estate for the payment. The obligation of plaintiff was the possibility that she would be required to pay the obligation. We are unable to perceive any difference in principle in a committment to pay when and if required than the payment of the actual consideration of a contract.

This court has held that the payment in full of the consideration of an oral contract is not part performance which will take it out of the statute of frauds. *Bloomfield State Bank v. Miller*, 55 Neb. 243, 75 N. W. 569; *Riddell v. Riddell*, 70 Neb. 472, 97 N. W. 609; *Barkhurst v. Nevins*, 106 Neb. 33, 182 N. W. 563; *Herring v. Whitford*, 119 Neb. 725, 230 N. W. 665. See, also, Browne, Statute of Frauds (5th ed.) secs. 461-465; 58 C. J. 999. This rule has application in most jurisdictions and it is predicated on sound reason-

ing. In 58 C. J. 1001, it is stated: "Despite the almost universal recognition of the rule that payment alone is not sufficient part performance, the authorities are not agreed as to the basis upon which it rests. Thus by some courts it has been founded upon the view that payment is not an unequivocal act, or referable solely to the contract. A reason more commonly given is that where the only act in pursuance of the contract is payment the remedy at law is adequate, since it restores the promisee to the exact position he occupied before the payment, and nonperformance by the promisor accordingly does not work a fraud; * * * ." In 101 A. L. R. 1079, it is stated:

"It is well settled at the present day that the mere payment of the purchase money by the vendee, without other acts, is not generally sufficient as an act of part performance.

"The reason most frequently advanced why payment of the purchase money is not sufficient is that the money can be recovered back by action at law, and so no fraud or injustice will result to the vendee if the contract is not enforced."

The stated reasons underlying the rule appear particularly applicable in the case at bar. Under the evidence as to the amount of the obligation and the value of the real estate securing it there could be but a remote possibility that plaintiff would ever be called upon to make any payment thereon. Even if she were so called upon no reason suggests itself as to why she could not be made whole in an action at law.

We conclude that this second contention must also be resolved in favor of the defendants.

There are other assignments of error but they are included in or are subordinate to the two considered, hence no discussion of them is required.

For the reasons herein stated we have concluded that the former opinion is erroneous and that it should be and is vacated and set aside, also that the decree of the district court should be reversed and the action dismissed.

REVERSED AND DISMISSED.

PAINE, J., dissenting. For the reasons stated in the first opinion adopted in this case and found, *ante*, p. 552, 10 N. W. (2d) 495, I respectfully dissent from this second opinion now adopted.

CORA GORSUCH, APPELLANT, V. JESS GORSUCH, APPELLEE: GLEN SUDDARTH ET AL., APPELLANTS.
10 N. W. (2d) 466

FILED JULY 9, 1943. No. 31610.

Divorce. In a controversy for the custody of a child, the order of the court should be made with a single reference to the best interests of such child.

APPEAL from the district court for Scotts Bluff county: HENRY J. BEAL, JUDGE. *Reversed, with directions.*

Morrow & Miller, for appellant.

Bertrand V. Tibbels, contra.

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

PAINE, J.

Action by a father for the modification of a decree of divorce, in so far as it had awarded the custody of his son to the mother. From a decree changing custody to the father, as prayed, the mother appeals. Interveners, with whom the boy is living, join in such appeal.

The transcript discloses that on November 18, 1936, Cora Gorsuch filed petition for divorce against her husband, Jess Gorsuch, alleging that the parties were married at Hyannis on January 16, 1934, and that ever since said marriage plaintiff has conducted herself as a faithful, chaste and obedient wife; that plaintiff is now a resident of Scotts Bluff county. Two children were born to the union, only one of which, Norman Paul, aged four months at the time of filing the petition, is living. On September 18, 1936, the older child of the parties died, and defendant left plaintiff

and no longer supported her, and it is alleged in the petition that he has cruelly treated her, and plaintiff prayed for a divorce, custody of the child, and support.

On December 23, 1936, after a hearing upon the petition and the evidence, the court found the allegations of the petition to be true, and granted plaintiff a divorce, awarding the care and custody of the child, Norman Paul Gorsuch, to the plaintiff, and requiring defendant to pay the sum of $10 a month for the maintenance of the child.

On February 8, 1941, defendant filed a petition for modification of decree, stating that he had fully complied with said decree, and that the circumstances of the parents of said child have changed since the date of the decree in the following respects: That plaintiff has failed to maintain a proper and suitable home for the child, and has abandoned his care and control to strangers; that plaintiff has become an unsuitable and improper person to have the care, custody and control of said child.

Defendant further alleges that on May 11, 1939, he was married to a respectable woman, with whom he is living under happy conditions on a ranch, where he maintains a comfortable, clean and respectable home, conveniently located with reference to schools; that he is gainfully employed, and receiving a sufficient wage to provide for his child's care and maintenance, and would be able to do more for the child if given its custody. Defendant insists that he is a fit and proper person to care for his child, and that it would be for the best interest of the child that his custody be awarded to him, and he asks that the decree be modified to give him the care, custody, control and education of the minor child.

On March 26, 1941, a supplemental petition for modification was filed, impleading Glen Suddarth and Kathryn Suddarth as defendants, and alleging that plaintiff has abandoned the custody of the minor child, Norman Paul Gorsuch, to them, and that they have refused to deliver possession of said child to defendant, and are making an attempt to adopt the child, and defendant prays that he be awarded the cus-

tody and possession of the child, and that the impleaded defendants be ordered to return said child to defendant. On said March 26, 1941, Glen Suddarth and Kathryn Suddarth waived the issuance and service of summons and entered their voluntary appearances.

On August 20, 1942, hearing was held upon the application of the plaintiff for attorney's fees and suit money in re modification of decree. The court gave plaintiff an award of $35 to apply on counsel fees in resisting the petition for modification, and found that defendant was in default of the payment of $200 child support pursuant to the decree, and ordered defendant to pay said amounts into court on or before August 31, 1942, or his petition for modification would be dismissed with prejudice for want of prosecution.

On August 27, 1942, defendant paid into court $235, as ordered. On September 10, 1942, plaintiff filed answer, admitting the rendition of the decree of divorce to her, with the custody of the minor child, but denying every other allegation contained in said petition, and praying that said petition for modification be dismissed.

On the same day Glen Suddarth and Kathryn Suddarth filed answer and cross-petition, denying that plaintiff had abandoned the custody of the child to them, admitting that they have refused to deliver possession of the child to the defendant, Jess Gorsuch, and allege that for more than two years subsequent to the entry of the decree of divorce the defendant refused to comply with the order of the court requiring him to pay $10 a month for the support of the minor child until he was arrested and execution issued. Defendants further allege that the defendant entered into a bigamous marriage with his present wife 33 days after the entry of the decree of divorce against her, and deny that the defendant or his wife are fit or suitable persons to be confided with the care, custody and control of said child.

The answering defendants further allege that they have been married more than 11 years, and live at Rising City, Nebraska; that they have known Cora Gorsuch during her entire lifetime, and for several months prior to September

6, 1937, they cared for the child while the mother was employed at housework; that on September 6, 1937, Cora Gorsuch decided to attend a beauty culture school in Omaha, and the answering defendants offered to take the child into their home, and have since cared for him as their own child; that in November, 1938, the mother of said child took him to Scottsbluff, but she was unable to earn enough money to support it, and wrote these defendants to come out to Scottsbluff and get the child and take it back to their home in Rising City, which they did, and have cared for the child in their own home ever since November, 1938, the same as if he were their own child.

Defendants further allege that Glen Suddarth is engaged in a profitable business, owns his own modern home, and that he and his wife bear an excellent reputation for good moral character in their community, and are regular church attendants; that during all these years they have carefully preserved the health of the child, clothed him properly, and expended considerable sums of money in so doing; that a very strong attachment has grown up between them.

These defendants allege that prior to the divorce the father of the child denied that he was its father, stated he would have nothing to do with it, and for more than three and a half years made no reasonable effort to see the child or inquire after its well-being.

The defendants further allege that the best interests of said minor child require that he remain in their custody, and that they are willing to continue to rear and educate said child as if he were their own; that they desire to proceed with the adoption proceedings, so that Norman Paul Gorsuch may be legally adopted by them as their child. Wherefore, defendants pray that the petition of Jess Gorsuch for modification of the decree be dismissed, and that he be denied his prayer for modification of the decree.

After an extended trial, the district court modified the original decree of divorce, and entered an order that the custody of the boy be granted to the father, with the right to take him to his home in Grant county, from which order the plaintiff and interveners appeal.

The eleven errors relied upon for reversal may be combined generally into the assignment that the court erred in finding that defendant is a fit person to have the custody of the child, or maintains a proper home. Specifically it is charged that the father has forfeited his right to such custody by his conduct, and that the court erred in finding it was for the best interests of the child to commit his care to his father, appellants citing *Schroeder v. State,* 41 Neb. 745, 60 N. W. 89, in which this court said: "The right to the custody of an infant child which the law confers upon its father is not for the benefit of the father, but for benefit of the child."

Appellants also cite the very recent divorce action where the question involved was as to whether the father or the mother should have the custody of two sons, aged 14 and 11 years respectively. We indicated, in effect, that the welfare of the parties' minor children is a question of primary importance as respects custody, and the entire surroundings of the proposed home as to comforts, discipline, religion, and educational advantages should be examined in determining custody. *Osborn v. Osborn, ante,* p. 1, 8 N. W. (2d) 444.

Many witnesses testified at the trial, and in reading this testimony we find many very serious charges and countercharges against both the plaintiff and the defendant, as well as against his present wife, but we refrain from discussing these matters in this opinion.

A close examination of this home and its surroundings is very important. The defendant from his present marriage has no children. He works on the Laughlin ranch of 20,000 acres, approximately nine miles south of Hyannis, Grant county. The proprietor said his duties as a ranch hand consist of feeding cattle in the wintertime, that he calves out the cows in the spring, fixes fences and puts up hay in the summer time to feed to the cattle. His pay is $90 a month, with the milk from two cows, and a garden spot. He has a separate brick-veneer house in which to live.

Since his joining the church in 1939, the father no longer

uses intoxicating liquors, and is regular in church attendance at the Assembly of God denomination, some distance from the ranch. There is a one-room school four miles away. At Hyannis, the county seat, there is an excellent twelve-grade high school.

The defendant's wife, to whom he was married May 11, 1939, has had little nephews and nieces visit at her home, and cared for all their needs. She testified that she would love to take this little boy, Norman Paul, into their home, and promised to make a good mother to him. She said she would give him the affection a mother should give, and would exercise such discipline as might be necessary, and would give her full time to her home duties and to this boy, as she has no outside work to take her away from her home.

There is abundant evidence in regard to Glen Suddarth and wife, who have taken care of this fine boy from the time he was eight months old. Mr. Suddarth has conducted a plumbing business in Rising City for some 15 years, and is 42 years old, and earns around $200 a month, and they have no children of their own, and both sincerely desire to adopt Norman Paul, and would do all in their power to make a good home for him in the future, as they have in the past.

The fact that so many of the prominent people of their community praise their character and standing so highly indicates that the mother of this boy was very fortunate in the selection of a fine home for him. The evidence discloses that they have been paid $10 a month for his keep all of the time they have had him in their care.

"In such a controversy for the custody of the child the order of the court should be made with a single reference to the best interests of such child." *Sturtevant v. State,* 15 Neb. 459, 19 N. W. 617, 48 Am. Rep. 349. See, also, *West v. Ofe,* 110 Neb. 443, 194 N. W. 464; *Steward v. Elliott,* 113 Neb. 421, 203 N. W. 580; *Towle v. Towle,* 141 Neb. 21, 2 N. W. (2d) 536; *Crandall v. Luhnow,* 137 Neb. 13, 288 N. W. 29; *Kaufmann v. Kaufmann,* 140 Neb. 299, 299 N. W. 617.

From a reading of the testimony in the case at bar, we are convinced that the trial court could not have continued to allow the custody of Norman Paul to remain with his mother. It was then a question whether the court, being compelled to make a change, would award the custody of this boy to the Suddarths, who have for years acted as his foster parents at the request of the mother, and who had by the time of the trial become greatly attached to the boy and were willing to adopt him legally, or, on the other hand, should the court award the custody to the father of the boy?

The trial court awarded the custody of the boy to his father, but we believe that a child of such tender years, who has been carefully nurtured and watched over as this child has been by the Suddarths, should not have that custody disturbed, especially in view of the fact that they live in a town with educational and religious advantages immediately at hand, and the child has known no other home or parents.

Therefore, the judgment of the trial court is reversed, and it is directed that the custody of this child remain with the Suddarths until further order.

REVERSED.

YEAGER, J., dissents.

The following opinion on motion for rehearing was filed October 25, 1943. *Rehearing denied.*

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

PAINE, J.

The court, upon its own motion, having carefully reconsidered the motion and brief for rehearing of the defendant, and in order to clarify its original opinion entered in this case on July 9, 1943, and reported, *ante,* p. 572, 10 N. W. (2d) 466, hereby enters this supplemental opinion.

The proper rule in a divorce case, where the custody of minor children is involved, is that the custody of the child

is to be determined by the best interests of the child, with due regard for the superior rights of fit, proper, and suitable parents. Where both parents are affirmatively found to be unfit, the custody of the child will be determined solely by the welfare and best interests of the child. See *Kaufmann v. Kaufmann,* 140 Neb. 299, 299 N. W. 617; *Hobza v. Hobza,* 128 Neb. 598, 259 N. W. 516; 27 C. J. S. 1168, sec. 308; 17 Am. Jur. 517, sec. 683. But this court has never deprived a parent of the custody of a child merely because, on financial or other grounds, a stranger might better provide. See *Voboril v. Voboril,* 115 Neb. 615, 214 N. W. 254.

This court affirmatively finds, from the evidence contained in the bill of exceptions, that neither the father nor the mother is a fit, proper, and suitable person to have the custody of Norman Paul Gorsuch, the child involved. With this clarification, the court adheres to its former opinion, wherein it was found that the best interests of the child required that it be kept in the custody of the impleaded defendants Suddarth until further order of the court.

GRACE BOOMER ET AL., APPELLEES, V. O. M. OLSEN, SECRETARY OF LABOR OF THE STATE OF NEBRASKA, APPELLANT.
10 N. W. (2d) 507

FILED JULY 9, 1943. No. 31568.

1. **Judgment.** Whether a former judgment is a bar to an action ordinarily depends on whether the same evidence will sustain both the present and the former action, and when it appears that different proof is required, a judgment in one of them is no bar to the other.
2. ———. Where the parties stipulated a single issue in the former action, a plea of *res adjudicata* is of no avail in a subsequent action between the same parties where it appears that the issues are outside the scope of the stipulation.
3. **Constitutional Law.** The operation of an employment agency is a beneficial and lawful business which cannot be taken away or destroyed under the guise of regulation.
4. ———. Whether such a business is charged with sufficient pub-

lic interest as to warrant its regulation is a legislative question with which the courts will not ordinarily interfere.

5. ———. In regulating such a business the legislature may not impose conditions which are unreasonable, arbitrary, discriminatory or confiscatory.

6. ———. Where it appears from the evidence that the enforcement of a regulation, after considering the nature of the business regulated, would prohibit the continuance of the business and result in a confiscation of property rights, the regulation is void for unreasonableness.

7. ———. A regulation of a private employment agency, which tends to stifle private enterprise and to create a monopoly in government operated employment agencies, is void as against public policy.

8. ———. The legislature's right to regulate a lawful and useful business does not include the power to fix prices and fees in ordinary occupations, professions and business pursuits.

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

Walter R. Johnson, Attorney General, John H. Comstock and *Carl H. Peterson,* for appellant.

Perry, VanPelt & Marti, contra.

Heard before SIMMONS, C. J., PAINE, CARTER, YEAGER and WENKE, JJ., and TEWELL and LIGHTNER, District Judges.

CARTER, J.

Plaintiffs commenced this suit to enjoin the defendant Olsen, secretary of labor of the state of Nebraska, from enforcing the provisions of section 48-508, Comp. St. 1929, in so far as it attempts to fix the maximum fee to be charged by private employment agencies. The trial court held that the prescribed maximum fee was arbitrary, unreasonable and confiscatory, and therefore unconstitutional. A permanent injunction restraining defendant from enforcing the provisions of the statute relating to the fixing of a maximum charge for the services rendered by plaintiffs was entered and defendant appeals.

The statute in question provides, among other things, that the fee to be charged by an employment agency shall

be the amount agreed upon in writing by the parties, such amount in no event to exceed ten per cent. of all moneys paid to or earned by the applicant for the first month's service growing out of the employment furnished by the employment agency, such fee to include the registration fee of $2 authorized by the statute. It is the contention of the plaintiffs that the statute in so far as it attempts to fix maximum fees to be charged by the plaintiffs is unreasonable, arbitrary, discriminatory, unjust, oppressive and confiscatory, is not regulatory, but is prohibitory in nature and effect, and that said provision is in violation of the Fourteenth Amendment to the Constitution of the United States and of sections 1, 16, 21 and 25, art. I of the Constitution of Nebraska.

The plaintiffs are engaged in operating private employment agencies. They have secured licenses, furnished surety bonds and kept their business records as required by the statute under consideration. The evidence shows that the principal business of these plaintiffs relates to the securing of positions for trained, clerical, sales, executive, technical and professional workers. The evidence also shows that the business is highly specialized and competitive in nature, the success of the business being largely dependent upon the number of voluntary applications obtained and the ability of the agency to render the service which will result in obtaining satisfactory employment for the applicants. The record further discloses that the success of the business is largely dependent upon the education, intelligence, experience and ability of the persons in charge of the business and that it approaches the status of professional service, if it is not in fact such. The evidence is voluminous in support of the claim of these plaintiffs that their work is professional in character in the sense that the knowledge, training, experience and reliability of the management of the agencies are ordinarily of prime consideration to the employer seeking trained employees and the applicant applying for a position requiring special schooling or experience. A recitation of the evidence as to the nature of the business

would unduly extend this opinion, and we consequently content ourselves with the statement of the conclusion reached with respect thereto.

Defendant argues that the issue presented is *res adjudicata* and not therefore a matter for consideration in the case before us. The record shows that the constitutionality of section 48-508 was previously questioned in the case of *State v. Kinney,* 138 Neb. 574, 293 N. W. 393, wherein this court held the act to be violative of the Fourteenth Amendment to the Constitution of the United States on the authority of *Ribnik v. McBride,* 277 U. S. 350, 48 S. Ct. 545, in which the court said: "The business of an employment agent is not one 'affected with a public interest'" so as to enable the state to fix charges to be made for the service rendered. An appeal to the supreme court of the United States resulted in a reversal of this court and a holding that "the drift away from *Ribnik v. McBride, supra,* has been so great that it can no longer be deemed a controlling authority." *Olsen v. Nebraska,* 313 U. S. 236, 61 S. Ct. 862. The effect of this decision is that the Fourteenth Amendment to the Constitution of the United States is no longer a bar to state legislation regulating the business of operating employment agencies, including the fixing of a maximum fee to be charged by such agencies. Defendant contends that the issue now before the court is *res adjudicata* under the theory that a plea of *res adjudicata* applies, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of the litigation, and which the parties in the exercise of reasonable diligence might have brought forward at that time. *Blochowitz v. Blochowitz,* 130 Neb. 789, 266 N. W. 644; *State v. Newman Grove State Bank,* 128 Neb. 422, 259 N. W. 170. It is well-settled law that one may not be permitted to split a cause of action; that if he might have had complete relief in an action which was prosecuted to final judgment he may not again vex his former adversary with another suit based upon the same wrong. *First Nat.*

Bank of Plattsmouth v. Gibson, 74 Neb. 232, 104 N. W. 174. It is just as well settled that one may not present issues for determination and avoid the effect of an estoppel by withholding proof thereof. *Slater v. Skirving,* 51 Neb. 108, 70 N. W. 493. But the foregoing authorities do not control the present case. The issue in *State v. Kinney, supra,* was limited solely to the question whether the statute was constitutional in so far as the same fixes or limits the fees or compensation of private employment agencies. It was the power of the legislature to regulate employment agencies and fix maximum fees that was challenged, not the reasonableness of the regulations made. This is shown by a stipulation of the parties made at the trial of the case and by a reading of the opinion of this court and that rendered by the United States supreme court wherein it is specifically recognized that the reasonableness of the charge fixed by the legislature in the statute was not raised nor involved in that action. The very nature of the case as limited by the stipulation of the parties prevented the consideration of the issue which is now claimed to have been previously adjudicated. The defendant, by joining in the stipulation to limit the issue to the question of the power of the legislature to regulate employment agencies, is in no position to recede from the effect of his stipulation and to assert an estoppel which the stipulation was intended to prevent. A person is not always required to join in one suit several distinct and separate causes of action which he may have had against the same defendant, nor does it mean that the previous adjudication is conclusive of matters not in issue where such matters became irrelevant and immaterial by the stipulation of the parties themselves. The applicable rule is stated in *Gayer v. Parker & Son,* 24 Neb. 643, 39 N. W. 845, wherein this court said: "A former verdict and judgment are conclusive only as to the facts directly in issue, and do not extend to facts which may be in controversy, but which rest on evidence and are merely collateral. It must appear that the matter set up as a bar was in issue in the former case. The test as to whether the former judg-

ment is a bar generally is, whether or not the same evidence will sustain both the present and the former action." The issue raised in the case at bar is different and the same evidence could not possibly sustain both the present and the former action. Clearly, the plaintiffs are not estopped to assert the issue raised in the present case nor is the defense of *res adjudicata* available to the defendant under the circumstances shown by the record.

The trial court held the provisions of the statute fixing a maximum fee of ten per cent. of the first month's salary to be unreasonable and confiscatory and therefore violative of the constitutional provisions cited. The correctness of this holding is questioned by this appeal.

The operation of an employment agency is a beneficial and lawful business. Whether such business is charged with such a public interest as to warrant its regulation is a legislative question with which the courts ordinarily will not interfere. It is for the legislature to determine whether the possibilities of fraud upon the public and the elimination of harmful trade practices and dishonest dealings with the public are such as to warrant regulation by the state. The legislature having determined this question in the affirmative by the enactment of section 48-508, the courts are bound by such legislative expression. *Nelsen v. Tilley,* 137 Neb. 327, 289 N. W. 388.

The legislature may not, however, under the guise of regulation, impose conditions which are unreasonable, arbitrary, discriminatory or confiscatory. Such regulations must be reasonable, considering the nature of the business, and not such as would prevent the carrying on of the business. *Petersen Baking Co. v. City of Fremont,* 119 Neb. 212, 228 N. W. 256; *Nelsen v. Tilley, supra.* The pertinent question therefore is whether the regulatory provision fixing the fees for the services rendered by the employment agencies is prohibitory or confiscatory.

Six operators of private employment agencies testified and produced their business records indicating that a compliance with the maximum statutory fee would prohibit the

continuance of their business and result in the confiscation of their property rights in the business. Several educators testified to the service rendered by private employment agencies and to the fact that they rendered a needed professional service in the educational field. There is evidence in the record that the Nebraska State Teachers Association discontinued its teachers' employment agency when a fee of two per cent. of the first year's salary failed to pay the expenses of operation. A similar experience was had by the Kansas State Teachers Association. Among the witnesses called by the defendant was the director of the bureau of educational service of the university of Nebraska, a man long experienced in the placing of school superintendents and teachers in positions in the educational field. His testimony is to the effect that if his bureau should be compelled to operate on the fees prescribed by section 48-508, it would result in a substantial loss and a discontinuance of the business. Many other witnesses were called, none of whom testified that a business such as that operated by these plaintiffs could be operated on the maximum fees permitted by the statute. The evidence amply sustains the trial court's finding that the maximum fee fixed by the statute is unreasonable and confiscatory, and consequently void.

The action of the legislature in prescribing a maximum fee for private employment agencies will have the effect of confiscating the business of these plaintiffs. It will have the further effect of placing the business of private employment agencies, such as were operated by these plaintiffs, under the control of the government operated agencies which the evidence shows are now operating in this state. It has the further effect of substituting human judgment for the market place, and the judgment of individuals has never proved to be an adequate substitute for supply and demand. The right to deal with one's property by barter and trade is thereby seriously infringed. The fixing of fees for personal services can only have the effect of limiting the quality of the service below that which the public may desire to purchase. The right to fix the value of person-

al services, even if specialized or professional, is thereby placed under the paternalistic control of a temporary majority. This contravenes the public policy of the state. It is not consistent with our system of private enterprise. The business of these plaintiffs is a lawful and beneficial occupation in which any person may engage by complying with the valid regulations in the act. But the legislature under the guise of regulation cannot properly engage in arbitrary price fixing. A person may still contract for the sale of his services. He may do business with whomsoever he desires and he may likewise refuse business relations with any person if he sees fit. The stifling of a legitimate occupational pursuit by legislative price fixing has been condemned as unconstitutional by this court as being beyond the realm of a regulatory statute. *Nelsen v. Tilley, supra.* We find no reason for receding from this position.

There is no evidence in the record of any fraud being perpetrated on the public, or any complaints that the fees charged by the private employment agencies are exorbitant or unconscionable. But even if the evidence showed that plaintiffs had engaged in unfair business practices and in the making of unconscionable profits, proper regulatory statutes afford a complete remedy without a resort to price fixing. "It has never been supposed, since the adoption of the Constitution, that the business of the butcher, or the baker, the tailor, the wood chopper, the mining operator or the miner was clothed with such a public interest that the price of his product or his wages could be fixed by state regulation. * * * One does not devote one's property or business to the public use or clothe it with a public interest merely because one makes commodities for, and sells to, the public in the common callings of which those above mentioned are instances." *Wolff Co. v. Industrial Court,* 262 U. S. 522, 43 S. Ct. 630. While it is true that the supreme court of the United States has receded from this position in the later cases in interpreting the provisions of the federal Constitution, this court has consistently adhered to the doctrine, except in a business in which the owner by devoting

it to a public use, in effect, grants the public an interest in the use and subjects himself to public regulation to the extent of that interest. Included in the exception are railroads, bus lines, street car lines, and similar businesses in which the extent of the public interest is such as to require protection from duplication and competition, and a fixing of rates and charges as a matter growing out of and reciprocal thereto. But the right to fix prices does not extend to ordinary business pursuits, occupations and professions. We think, therefore, that the legislature may properly prescribe standards, reasonable in their nature, by which a private employment agency may operate, and secure their enforcement by recourse to the courts and by granting licenses upon receipt of a reasonable license fee to those who comply with all the valid regulations of the act.

We hold therefore that the provision fixing the maximum fee to be charged by a private employment agency, to an amount equivalent to ten per cent. of the first month's salary, is unreasonable, prohibitory and confiscatory, and consequently in violation of the cited provisions of our state Constitution. We also hold that a private employment agency is not a business in which the public has such an interest that price fixing may properly be included as a method of regulation under the provisions of our Constitution.

The trial court therefore properly restrained the enforcement of the provisions of the act so far as the same purports to fix the maximum fee to be charged by private employment agencies at not to exceed ten per cent. of all moneys paid to or earned by the applicant for the first month's services growing out of said employment. The judgment of the district court is affirmed.

AFFIRMED.

RALSTON PURINA COMPANY, APPELLANT, V. ORVAL IIAMS, APPELLEE.

10 N. W. (2d) 452

FILED JULY 9, 1943. No. 31317.

1. **Fraud.** Fraud is never presumed but must be proved by a preponderance of the evidence by the person alleging it.
2. **Sales.** In order for an express warranty to exist, there must be something positive and unequivocal concerning the thing sold, which the vendee relies upon, and which is understood by the parties, as an absolute assertion concerning the thing sold, and not the mere expression of an opinion; representations which merely express the vendor's opinion, belief, judgment, or estimate do not constitute a warranty. Dealer's talk is permissible; and puffing, or praise of the goods by the seller, is no warranty, such representations falling within the maxim *simplex commendatio non obligat.*
3. **Appeal and Error.** In a controverted issue of fact upon a settlement made, the cause is remanded to determine the credits, if any, to which the defendant is entitled.

APPEAL from the district court for Boone county: FREDERICK L. SPEAR, JUDGE. *Reversed.*

Earl Hasselbalch and *Cottrell Fox,* for appellant.

William Keeshan and *Raymond P. Medlin, contra.*

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

MESSMORE, J.

This is an action on a contract, to recover balance due thereon in the amount of $1,253.65. The cause was tried to a jury, resulting in a verdict for the plaintiff in the sum of $359.89. From judgment entered on the verdict and the overruling of the motion for a new trial, plaintiff appeals.

Plaintiff's amended petition alleged, in substance, that on or about July 29, 1936, defendant made, executed and delivered to plaintiff his written contract for the purchase of merchandise, which he received. The amended answer and counterclaim acknowledged the purchase from plaintiff of 42 tons of "Hog Fatena Meal," to be sold to defendant by open finance; affirmatively alleged that the contract was ob-

tained by fraud and misrepresentation in that the agents of the plaintiff represented to defendant falsely and fraudulently that hog Fatena was a tested food, guaranteed and warranted by the plaintiff to feed out on the basis of 300 pounds of meal to 100 pounds of pork, and that no other feed would be required; that plaintiff's agents demonstrated through advertising and radio announcement, wherein the warranty was made by plaintiff directly to defendant, who relied upon the false representations and believed them to be true; that, so relying and believing, defendant was thereby induced to execute and deliver the contract; that plaintiff knew the representations to be false and made the same with reckless disregard of whether or not they were true, when it should have been known by plaintiff that the representations were false and made with the purpose and intent that defendant should act and rely thereon; acknowledged receipt on August 26, 1936, of 150 sacks of hog Fatena to be fed to 140 hogs owned by defendant, which were weighed previous to the feeding of the hog Fatena and averaged 50 pounds per head; that the first shipment did not last to exceed 20 days, and defendant thereafter received other feed from the plaintiff; that the product did not show the gain on the hogs, as represented, and in the month of October, 1936, plaintiff's agent called on defendant for the purpose of making a satisfactory adjustment, and plaintiff failed to deliver the meal, pursuant to the adjustment, and the amount so delivered was insufficient for the purpose, making it necessary for the defendant to feed, in addition, 200 bushels of barley, valued at $160; two hundred dollars' worth of buttermilk, and 100 bushels of seed corn at $3 a bushel, and, in addition, skim milk of the value of $10, totaling $720 in expenditures directly caused by the fraudulent act of the plaintiff, and which sum included loss by death of six hogs of the value of $50; prayed that the proper deductions be allowed and, in addition, damages in the amount of $41.07. The plaintiff's reply was, in effect, a general denial, and a specific denial of any warranty, express or implied; alleged that in December, 1936, plaintiff

delivered to defendant, without charge, approximately 11 tons of its product in complete settlement and in accord and satisfaction of any claim the defendant had; prayed for dismissal of defendant's counterclaim and that plaintiff recover in accordance with its amended petition.

The contract provided for the purchase of 42 tons of hog Fatena meal in the amount of $2,234.40, to feed 140 hogs, to be marketed through the O. K. Commission Company, Omaha, Nebraska, on or about April 1, 1937. In addition there was signed a statement by the defendant, listing 140 hogs of the value of $700, average weight 40 pounds, condition good, to be marketed April 1, 1937.

Defendant's counterclaim is based on fraud. Fraud is never presumed but must be proved by a preponderance of the evidence by the person alleging it. *Ralston Purina Co. v. Cox*, 141 Neb. 432, 3 N. W. (2d) 748; *Foley v. Holtry*, 43 Neb. 133, 61 N. W. 120; *Saffer v. Saffer*, 133 Neb. 528, 274 N. W. 479. This rule of law is well settled in this state, and other citation of authority on this point is unnecessary.

The first assignment of error is the insufficiency of the evidence to prove defendant's counterclaim, in accordance with the above stated rule. A review of the evidence discloses the following:

The defendant testified that some time in July, 1936, he first heard of the Ralston Purina feed over the radio from various broadcasting stations, one of which he designated. He did not remember any part of the broadcast, but recalled a statement made therein, that the feed was supposed to produce 100 pounds of pork by the use of 300 pounds of feed. Some time later he talked to a local dealer, who informed him that the feed was supposed to be guaranteed "and it just took three hundred pounds of that to make one hundred pounds of pork." The defendant purchased the product on that basis. He fed his hogs in a self-feeder and after it was gone new feed was given to the hogs, which they would not eat. It developed that this feed was defective in that it did not contain the proper amount of molasses. During this time buttermilk was also fed. The de-

fendant lost six head of hogs. He complained, and subsequently a representative of plaintiff called on him, taking samples of the meal, sending them in for examination, and agreeing to adjust the matter by furnishing an additional amount. According to the figures, 180 sacks would be the necessary amount. The defendant had some of the product on hand, and 220 sacks more, each weighing 100 pounds, were delivered to defendant free of charge.

With reference to the adjustment there is a dispute. Eleven tons of additional feed were furnished by the plaintiff. The defendant claimed that he was entitled to 19 additional tons. The local merchant testified that the settlement required 13 or 14 tons. The defendant marketed some hogs at different times, and from the sale thereof paid the plaintiff on the contract the sum of $980.75. The hogs so marketed had been fed on plaintiff's product exclusively for three and a half months, with the exception of buttermilk and skim milk. Eighty head sold on the market brought $1,339.59. The defendant on cross-examination testified that he had agreed with the representative of the plaintiff and was satisfied with the figures as to the amount of feed to be furnished. No complaint was made by the defendant until after all of the hogs were sold.

The local merchant testified that he sold a great quantity of plaintiff's product, receiving a commission therefor, and was in business for himself, not employed by the plaintiff; that he sold the feed on the basis that 300 pounds of it would produce 100 pounds of pork; that he had been so informed by a representative of the plaintiff and by letter that the product offered great possibilities when sold on such a basis, and he stated that such representation was a guaranty as to what it would do. He had also heard broadcasts to such effect in an advertising campaign put on by plaintiff, and that plaintiff's feed would effect a saving over the feeding of corn.

The local representative of plaintiff testified that the representation made as to the quality of the product would be taken from the records on the plaintiff's experimental farm

where hogs had been fed, and showing approximately the amount it took under certain favorable feeding conditions to accomplish certain results; that no positive guaranty as to what the product would do was made. The witness testified to the conversations had with the defendant about the feed, the taking of the samples, that the meal was defective, lacked molasses, and that he made an adjustment to the complete satisfaction of the defendant by furnishing him the additional amount, finally, of 220 sacks, and that no complaint was made by defendant until some considerable time after the hogs were sold; that the feeding and results thereof depended upon the condition of the hogs from date of birth, the manner in which the feeding was done, whether in self-feeders or by hand, to obtain uniform gains, or whether some of the product was wasted, and conditions generally. The foregoing constitutes the material evidence from which the defendant contends he has proved fraud and misrepresentation.

Defendant accepted the feed, fed it, marketed 80 head of hogs,—the first shipment averaging 227 pounds each, the last 195 pounds each,—for which he received the amounts as set forth in this opinion. For the remaining 60 head of hogs he was furnished 11 tons of meal; he had some of the feed on hand; he was satisfied with the settlement, except that he claimed to be entitled to eight tons more than furnished. The number of tons to which he was entitled was disputed; he made no complaint until after he had marketed all of his hogs. The evidence clearly demonstrates that no fraud was practiced by the plaintiff in procuring the contract.

It is clear, under the facts and circumstances in the instant case, that there was no statement or alleged representation made upon which the defendant had a right to act. At most, the statement attributed to the plaintiff was merely dealer's talk, puffing and praising its goods, which is permissible. The following authority applies:

"In order for an express warranty to exist, there must be something positive and unequivocal concerning the thing

sold, which the vendee relies upon, and which is understood by the parties, as an absolute assertion concerning the thing sold, and not the mere expression of an opinion; representations which merely express the vendor's opinion, belief, judgment, or estimate do not constitute a warranty. Dealer's talk is permissible; and puffing, or praise of the goods by the seller, is no warranty, such representations falling within the maxim *simplex commendatio non obligat.*" 55 C. J. 688.

The record discloses that the plaintiff made a motion for a directed verdict for the amount prayed in its amended petition, and when this motion was overruled plaintiff moved for judgment in the amount prayed in the petition, less eight tons of feed. This motion was overruled. The evidence respecting the settlement for additional feed which the plaintiff and defendant elected to make is controverted as to the amount of additional feed that the plaintiff should furnish the defendant.

On this issue the cause is remanded for further proceedings to determine the credits to which the defendant is entitled, if any.

REVERSED.

PAINE, J., dissenting.

I regret that I find myself in absolute disagreement with the majority of the court on both the evidence and the law set out in the opinion finally adopted in this case.

In August, 1936, when this case originated, the farmers in Boone county had suffered repeated droughts, and were desperate to salvage something; at least, that was the condition of the renter who is defendant in this case.

The plaintiff corporation was a very extensive manufacturer of stock foods, and the defendant heard their repeated pleas and promises over his radio.

May we examine the evidence on this point. The defendant testified that he first heard plaintiff's announcement of this hog feed over KMMJ radio station of Grand Island, and other radio stations; that it was also published in his county paper, and that the statement over the radio which

he heard, and as published in their advertising, was that if he would feed 300 pounds of this feed to his hogs they would gain 100 pounds of pork. After hearing this radio broadcast he called upon Joe Niemeyer, who handled the plaintiff's feed, and Mr. Niemeyer told him the chief selling point was that three sacks of feed of 100 pounds each would produce 100 pounds of pork, and said that he got that statement from a letter from Roscoe Shay, the representative of the defendant company, who got him to handle this feed, who told him that they guaranteed that 300 pounds of feed would make 100 pounds of pork, and that was the chief sales talk, and was the same thing that he had heard over the radio.

On these definite representations he purchased 42 tons of this feed at $53.20 a ton, or a total of $2,234.40. Defendant agreed that his 140 hogs were free and clear of all liens, and agreed to market them through the O. K. Commission Company of Omaha, and directed them to deduct $17 a head for each hog sold through the company until the $2,234.40 was paid in full.

The plaintiff, with its usual caution, secured a financial statement, showing that the defendant was a renter, who was on a farm of 380 acres; that he owned 140 hogs, worth $700, 14 horses, 75 cattle, 10 milk cows, and set out that the cattle were mortgaged for $2,000; that the hogs had been vaccinated against cholera. It states that he has no corn on hand, and in answer to the question, "If present supply of corn is insufficient to feed out the stock what provision will be made to secure more?" the answer written in was, "Hog Fatena," showing in this written financial statement that the defendant was relying entirely upon the promises made by plaintiff that with the hog Fatena no other feed was required.

The defendant testified that he first received 150 sacks out of a car of this feed from Joe Niemeyer, and that that first feed was good feed, and that he fed it in a self-feeder, but when he got the second lot of it the hogs would not eat it, but would just follow him around and squeal, and that

the buttermilk he was giving them was all that was keeping them alive; that they then cleaned out one end of the self-feeder and dumped in a sack of the first feed and the hogs just could not get to it quick enough, but they would not eat the second lot of feed in the other end of the feeder at all.

Defendant complained to plaintiff's agent, Joe Niemeyer, who came out and looked at it, and while they were trying for several days to get plaintiff's traveling agent to come out and see what was the matter with the second lot of feed six of the hogs died. Defendant then called Dr. Score, a veterinarian, out to see if the hogs had worms or something else was the matter with them. Dr. Score examined them, and said, "It is nothing, only your feed. If you don't get some feed other than what you have got, your pigs will all die." Then Leonard Martin, an agent of the company, came out with Joe Niemeyer, local agent, and took out a sample of the second lot of feed and sent it in for examination, and the agent admitted the feed was not the kind of feed it was supposed to be, and he agreed to furnish 380 bags in the place of this poor feed, but defendant never received but 220 bags in the place of the poor lot of feed, because agent Niemeyer had to stand the freight out from Omaha, which plaintiff company would not pay, so Niemeyer refused to ship out the balance of 160 sacks of 100 pounds each, and all the time defendant was compelled to use other feeds which he had to buy. The plaintiff company had also offered $2 a ton reduction in price if the feed was all taken within a 60-day period, which allowance they failed to credit in their petition.

Joe Niemeyer testified that he took Mr. Martin, representing the plaintiff company, out to get samples of the feed which the hogs would not eat, and he testified that Mr. Martin admitted that just one of the sacks was good feed and the others showed that they were defective, and so Martin agreed to send 380 sacks free, but plaintiff never did furnish the 380 sacks, as it had agreed to do.

Leonard Martin, a witness for the plaintiff, testified that

on the samples which he sent in he got a report from their laboratory that the feed lacked a little molasses, which made the feed less palatable. This was the only attempted explanation of the reason that the hogs absolutely refused to eat any of the defective feed, but would just squeal, and that six died.

This brings our inquiry to the real question upon which the decision in this case must turn. It is the alleged error in refusing to give the following instruction tendered by plaintiff: "You are instructed that, as a matter of law, statements of plaintiff's salesmen as to the number of pounds of Fatena that were required to produce one pound of pork shall not be construed as a warranty or guaranty of the plaintiff that the feed would produce pork on the basis stated by such salesmen, and that such salesmen's statements are what is known as selling talk or 'puff,' and that the defendant is not entitled to recover damages on his cross-petition by reason of these salesmen's statements as to what the feed would do."

As to the law on this point, the plaintiff cites us to many cases to the effect that the rule that parol evidence is admissible to prove that contemporaneously with, or preliminary to, the execution of a written contract the parties entered into a distinct oral agreement on some collateral matter or as a condition on which the performance of the written contract is to depend, does not apply where the written contract is complete in itself and unambiguous, and where it expresses a contractual consideration.

I cannot see the application of these cases, when the offer made by plaintiff repeatedly in its radio advertising and in newspaper advertising was the definite promise in each case that, if a hog owner would feed three pounds of its feed as directed, it would produce a pound of pork, so the contract on which defendant agreed to pay out some $2,234.40 was the oral contract, and the little slip he signed, but which was not signed by any one for the plaintiff, telling how many tons it would take to carry through his feeding operations on their offer, and the property statement he

signed, were but supplementary items to the main contract, which was oral, and was a definite and repeated offer that three pounds of their feed would produce one pound of pork. Plaintiff relies on the case that "A mere expression of opinion or belief, a bare affirmation, not intended or understood as a representation of the quality or character of goods, does not amount to a warranty." *Patrick v. Leach,* 8 Neb. 530, 1 N. W. 853.

The plaintiff also relies upon our recent decision in which this same company won a case in the same county on the same hog feed. It is *Ralston Purina Co. v. Cox,* 141 Neb. 432, 3 N. W. (2d) 748. However, that case held that the evidence had failed to show that defendant had relied upon any representations made by plaintiff, or that the contract was induced thereby. There is another piece of evidence in the *Cox* case on which the decision might well have rested. Mr. Cox wrote the plaintiff company, in response to their dun for the balance due: "Well I received your letter as you can see and as to giving you more security nothing doing. I told Martin (a representative of the plaintiff) that if you fellows let me alone till I got the money I would pay."

The evidence in the *Cox* case falls far short of the definite, positive assertions made by plaintiff in the case at bar, for here the evidence is convincing as to the specific representation made, and under the law I firmly believe that the defendant was justified in relying on the positive statements of fact made over the radio, and in newspapers, and by plaintiff's representatives, especially where an investigation would be required to discover the truth. See *Perry v. Rogers,* 62 Neb. 898, 87 N. W. 1063.

In the instant case, the defendant, relying on the representations made by plaintiff, was damaged thereby, and the money paid by him was retained by plaintiff, who is responsible for the representations, made in its advertisements by radio, by newspaper, and by word of mouth, that three pounds of this hog Fatena feed would produce one pound of pork. That definite, positive statement so made by

the plaintiff was believed and relied on by the defendant, and plaintiff seeks to avoid by the claim that it was just a clever piece of "puffing," which no farmer should have believed was honestly made. See *Tylee v. Illinois C. R. Co.*, 97 Neb. 646, 150 N. W. 1015; *Western Union Life Ins. Co. v. Mayhew*, 135 Neb. 6, 280 N. W. 250.

"While the soundness or policy of the rule permitting warranties to be based on affirmations by the seller as to the quality or condition of the chattel sold has been vigorously protested, it is generally recognized, especially in the more modern cases, that such affirmations may constitute a warranty, if so intended by the parties and relied on by the buyer as such." 24 R. C. L. 168, sec. 442.

A representation that seed rice was free from red rice and of good, sound, plump grains would be claimed, on the theory of plaintiff in the instant case, to be mere "puffing" talk, for which there was no liability, but the North Carolina court held that this constituted a warranty that the seed would grow, and held seller liable for the breach of warranty. *Reiger v. Worth*, 130 N. Car. 268, 41 S. E. 377, 89 Am. St. Rep. 865.

It has been held that seller's newspaper advertisement was in the nature of an implied warranty to subsequent purchasers who relied thereon. *Kitchin v. Oregon Nursery Co.*, 65 Or. 20, 28, 130 Pac. 408, 132 Pac. 956.

It is said that representations of the seller may become a part of the contract and constitute an express warranty, for the breach of which the seller will be liable in damages, and this is supported by numerous cases. 28 A. L. R. 992, Ann.

In my opinion, the trend of recent decisions is to hold stock feed companies to their advertising promises.

Representations in a pamphlet published by a company which manufactured and sold stock powder, presenting the merits of the same and the benefits of its use in the treatment of diseases of hogs, which pamphlet it was intended should be placed in the hands of prospective purchasers, were held in *Economy Hog & Cattle Powder Co. v. Comp-*

ton, 132 N. E. (Ind. App.) 642, to be more than mere expressions of opinion or dealer's talk, but representations of fact, which, if false and relied upon by a purchaser to his injury, would amount to a fraud rendering the seller liable to the injured party.

The defendant's claim in the instant case is supported by the evidence that the radio advertisements sponsored by the plaintiff stated that 300 pounds of hog Fatena would produce 100 pounds of gain, and this evidence is uncontradicted by any evidence of the plaintiff, and also plaintiff does not attempt to deny that it authorized its agents to make similar statements, and in fact encouraged them to make the same statement as was broadcast over the radio, and this statement, relied upon by defendant, proved to be false in his case.

In my opinion, the trial court was right in refusing to give the instruction, submitted by the plaintiff, that such positive representations are mere puffing talk.

I think the disputed questions of fact were properly submitted to the jury, and that the judgment entered on the verdict returned should be affirmed, and that this court should set out the law of Nebraska to be as follows:

(1) When a stock food company advertises by radio, and in newspaper publications, and by its agents orally, that if an owner will feed his hogs three pounds of its feed, as directed, it will produce one pound of pork, this constitutes a definite offer of a positive statement of fact, which if accepted makes a binding contract.

(2) The defendant, having relied upon this specific promise, and having ordered 42 tons of such feed, at a cost of $2,234.40, and having been damaged by his reliance upon the representations which were false, is entitled to recover such damages as he can prove.

(3) Neither the little sales slip ordering the feed, nor the financial rating slip furnished by the farmer, constituted the contract between the parties.

(4) Affirmations made by the seller as to the quality and effect of using its hog feed may constitute a warranty, if

so intended by the parties, and relied upon by the buyer as such.

(5) Representations over the radio, and in newspapers, and repeated by authorized agents, as to just what definite results will follow the feeding of a hog feed, are more than mere expressions of opinion, or dealer's talk, but are representations of fact, which, if false and relied upon by a purchaser to his injury, will amount to a fraud, rendering the seller liable to the injured party.

JAMES HARRISON DONALD, APPELLANT, V. EDWIN B. HELLER, APPELLEE.

10 N. W. (2d) 447

FILED JULY 9, 1943. No. 31616.

1. **Trial.** It is not prejudicial error for the court to refuse a request for separate findings of fact and conclusions of law which are improper in form and not within the contemplation of section 20-1127, Comp. St. 1929.
2. **Negligence.** The doctrine of the last clear chance does not apply where the negligence of the injured party is contemporaneous and active up to the very moment of an accident, and thus contributed to cause the accident.
3. **Trial.** Where the evidence establishes that the plaintiff was guilty of more than slight negligence, it becomes a question of law for the court to determine, and it is the court's duty to render judgment for the defendant.
4. **Appeal and Error.** Where a jury is waived by the parties to an action at law in the district court, the findings of the trial judge on issues of fact are equivalent to the verdict of a jury and will not be reversed on appeal if supported by sufficient evidence.

APPEAL from the district court for Lancaster county: JOHN L. POLK, JUDGE. *Affirmed.*

Stewart, Stewart & Whitworth, for appellant.

Chambers, Holland & Locke, contra.

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

MESSMORE, J.

Plaintiff brought this action to recover damages for personal injuries sustained by him when a motorcycle on which he was riding collided with an automobile driven by the defendant. Jury was waived, the case was tried to the court, and the trial court entered judgment dismissing the plaintiff's petition. Motion for a new trial was overruled. Plaintiff appeals.

Plaintiff's petition alleged the factual situation with reference to the accident, the injuries received, damages sustained, and several separate charges of negligence against the defendant, invoked the doctrine of the last clear chance, and prayed for damages. Defendant's answer admitted the collision, denied negligence on his part, alleged contributory negligence on the part of plaintiff which constituted the proximate cause of the accident and resulting damages, set forth separate charges of negligence on the part of the plaintiff, and prayed for dismissal of the plaintiff's petition. The reply was a general denial.

Exhibits 10 and 11 appearing in the record are maps drawn to scale, showing the respective distances and the state highway signs with reference to speed, slowing down, curves, etc. U. S. highway No. 6 is an arterial highway. The plaintiff proceeded to the west on the route that bypasses the city of Lincoln, over a viaduct. From the top of this viaduct there is a grade of 15 feet, and to the west thereof for 300 feet it is level to the center line where Seventieth street intersects highway No. 6. The highway is a paved slab 20 feet in width. Seventieth street is paved and 28 feet in width. In the vicinity of Seventieth street the right of way for road construction is 120 feet; that is, 60 feet on each side of the highway, which is separate and distinct from the paved portions of the highway. The intersection is within the corporate limits of the city of Lincoln. The collision occurred in the intersection of U. S. highway No. 6 and Seventieth street. The Pontiac car driven by the defendant is 16 feet, 9 inches long; the Harley Davidson two-cylinder motorcycle driven by the plaintiff is 3 feet, one inch wide, and 7 feet, 8 inches long.

The plaintiff, a young man 22 years of age, was proceeding on his 1938 model motorcycle, which was in good condition and with good brakes, en route from Ames, Iowa, to Oregon, where he had employment. The accident occurred at 8 o'clock in the evening of June 18, 1940. Plaintiff testified in substance as follows: Prior to and from the time he entered highway No. 6 to the place of the accident he obeyed all highway traffic signs. He slowed down at the junction which divided the city route of highway No. 6 and the route which by-passes the city of Lincoln, and as he proceeded over the overpass he increased his speed to 45 or 50 miles per hour. As he left the overpass he speeded up a little and again decreased his speed when he was 300 to 400 feet distant from the Seventieth street intersection, by retarding the throttle and shutting off the gas. He observed no other speed signs. As he came off the overpass he saw an automobile (defendant's car) to the north of the highway on Seventieth street. This car was about 25 or 30 feet from the north edge of the straight paved portion of the highway and was proceeding south at a rate of speed not to exceed five miles per hour. The plaintiff was traveling 45 miles per hour at the time he retarded the throttle, turned off the gas and sounded his horn, about 300 feet east of the intersection of the highway and Seventieth street. The defendant's car continued to the north edge of the highway, and just before reaching the edge it slowed down nearly to a stop. Plaintiff had again sounded his horn when he was 200 feet east of the intersection, at which time defendant's car was within six or eight feet of the north edge of the highway. Plaintiff's speed was then a little more than 40 miles per hour. Defendant's car continued to the highway at a speed of about two or three miles an hour. Reaching the north edge of the highway it picked up a little speed, and as he approached the center he seemed to slow down again. When the front end of defendant's car was near the center of the intersection and appeared to have slowed down, the plaintiff was from 125 to 150 feet east of the intersection.

As the defendant approached the center of the highway, the plaintiff crossed it to the left or south side, and, as he turned, he began to apply his brakes. The north side of the highway at the intersection was then blocked by the defendant's car; the south side was clear. The plaintiff, in order to turn from the north to the south side, would require a distance of 25 or 30 feet. After reaching the south side of the highway, the plaintiff put on his brakes with more force; his speed was 40 miles per hour, and after plaintiff was on the south side of the highway the defendant's car seemed to pick up speed, and that is when the plaintiff applied his brakes with still more force. After he had proceeded a short distance, the wheel on his motorcycle, reacting to the brakes, began to skid on the pavement, and the brakes locked the wheels, after which the motorcycle skidded for a ways, and the rear end and rear wheel began to turn to the north and to skid in that direction. Just before the collision, the rear wheel had gone on around until the motorcycle was just across from and perpendicular to the line of highway No. 6. It then proceeded on down and skidded on its side the last few feet before the collision, and, as he was coming down to this point, plaintiff turned off to the left or south. The defendant's car picked up some speed, and, as the plaintiff testified, it "seemed to jump right over there in front of me." It was then apparent to the plaintiff that the south side of the intersection was blocked. The motorcycle skidded for 50 feet, and, tilted on its side, went a distance of 15 to 18 feet. The point of impact was three or four feet west of the center line of Seventieth street, and six or eight feet south of the south line of highway No. 6. At the time of the collision, the speed of the motorcycle was 20 to 25 miles per hour; the speed of the defendant's car was placed by the plaintiff at from 10 to 15 miles per hour. Plaintiff testified the motorcycle could be stopped on the level in about the distance of a half-block when going about 40 miles an hour, and "probably half again as far" descending the overpass.

The substance of plaintiff's testimony on cross-examina-

tion is that the defendant's car had entered the intersection and was approaching the center line of highway No. 6 when the motorcycle was from 100 to 125 feet east of the intersection. The plaintiff had not applied his brakes at that time. The defendant's car did not stop from the time plaintiff first saw it. Plaintiff was probably 90 to 100 feet from the intersection when he applied his brakes and was on the south side of highway No. 6. The defendant's car was approaching and was at or near the center of the intersection at that time. The front end of the car may have been on the center line, or a foot or two south thereof, when the plaintiff was 90 feet east of the intersection. The plaintiff's brakes were applied with enough force to burn rubber for a distance of 50 feet, and during the last 90 feet he was doing everything he could to stop his motorcycle, but was unable to stop in that distance. The motorcycle finally pulled over on its side and started to slide on the paving for about six yards from the point of impact, in addition to the 50 feet that it skidded. At the time of the impact the left front wheel of defendant's car was six or seven feet south of the south edge or paved portion of highway No. 6 and three or four feet west of the center line of Seventieth street. The accident happened in the southwest corner of the intersection, and when the plaintiff hit the defendant's car he bounded a foot or two back to the east. After the impact the defendant's car traveled two or three feet before it stopped. Plaintiff testified that, going at 40 miles an hour, a motorcycle would travel 65 feet per second.

Defendant's testimony discloses the following: He was driving a 1940 Pontiac automobile. He stopped at the stop sign which is west of Seventieth street, looked in both directions and saw no motor vehicle. He first observed the plaintiff's motorcycle when the front end of his car was about four feet north of the center line of highway No. 6. The motorcycle was approximately 175 feet east, on the north side of the highway. The defendant endeavored to speed up his car to clear the highway and get out of the path of the motorcycle. He shifted into second gear and

stepped on the gas, and as soon as he was across, had cleared the highway, and observed that he was clear past the intersection, his speed diminished, and when the motorcycle struck his car it stopped immediately. About the center of the right side of the motorcycle came in contact with the left front wheel of the defendant's car. The motorcycle was then headed southwest. The rear of the defendant's car was south of the center line of the highway when the collision occurred. The point of impact, as given by defendant, was two feet to the south edge of the pavement of the highway. For the last 15 feet traveled, the plaintiff had no control over his motorcycle. He was trying to stop the motorcycle and was coming at such speed that he lost control of it; its speed was not decreasing.

The defendant testified further: "He (plaintiff) had an idea I was stopping and I thought I was clearing this road for him, giving him his right side on this road, * * * and I tried to get out of his way to clear the car and the road and he thought he would give things the gun and come in front of me and when he saw I was going on, then he come in, then he swung in, then he tried to throw it, and going so fast he couldn't do anything." From the time defendant first saw the motorcycle he watched it. When it turned over to the south side of the highway, it was 60 to 70 feet east of the intersection; that is when the defendant thought the motorcycle was going to pass in front of him. The front of defendant's car was four or five feet over the center of the highway at that time. When the plaintiff was about 70 feet east of him and starting onto the south side of the highway, it appeared to defendant that there would be a collision. After the accident, the motorcycle turned over on its side. It was headed southwest and was two feet east of the left front wheel of defendant's car.

A police officer of the traffic division talked with the defendant within a half-hour after the accident. Defendant told the officer he was going from five to ten miles per hour at the time of the collision, and prior thereto about five miles. He said he stopped at the stop sign and then start-

ed up again slowly across the intersection. The witness testified he talked with the plaintiff, who stated "he saw a car pull slowly from the stop sign and he thought all the time he was going to stop as it continued slowly." The officer noted skid marks for a distance of 48 feet. He testified the plaintiff "laid the motorcycle down on its side and went six more yards that way * * * and then into the automobile;" that "the motorcycle stood up as long as it would." He further testified that a motor vehicle going at 40 miles per hour would travel 60 feet per second, and that motorcycles did not stop quite as quickly as an automobile; that shutting off the throttle tended to slow down the motorcycle in much the same manner as an automobile. The foregoing constitutes the material evidence with reference to the collision and accident.

The plaintiff contends that the court erred in failing to make separate findings of fact and conclusions of law, as requested by the plaintiff. Section 20-1127, Comp. St. 1929, provides:

"Upon the trial of questions of fact by the court, it shall not be necessary for the court to state its finding (s), except, generally, for the plaintiff or defendant, unless one of the parties request it, with a view of excepting to the decision of the court upon the questions of law involved in the trial; in which case the court shall state in writing the conclusions of fact found separately from the conclusions of law."

An examination of the plaintiff's request in such respect discloses that plaintiff requested the court to find that all of the allegations and charges of negligence alleged in his petition are true, and, with respect to the conclusions of law, that each of the defendant's acts, constituting 14 separate charges of negligence, constituted negligence on the part of the defendant and was the proximate cause of the accident; that defendant had the last clear chance of avoiding the accident, and his failure to avoid the collision was negligence and the proximate cause of the accident; that the plaintiff was not negligent, and that his damages are in the total amount sued for, viz. $25,000.

It will be noted that the requested findings of fact and conclusions of law are all-inclusive, and the request is for a finding in plaintiff's favor on each and every allegation pleaded. In this connection, the purpose of findings of fact and conclusions of law is for the protection of both the court and the parties, to dispose of the issues raised by the pleadings and supported by the evidence, and to make the case easily reviewable by exhibiting the exact ground upon which the judgment rests. See *Carl v. Wents*, 116 Neb. 880, 219 N. W. 390. When the request is specific, definite and points out the essential and material findings of fact and conclusions of law applicable thereto, then assistance is given to the court, and they are helpful. However, where the request is merely a cover-all, such as in the instant case, they are not helpful, are of no value and are not such as contemplated by section 20-1127, Comp. St. 1929. Such request was improper, and it was not prejudicial error for the court to refuse it.

The plaintiff next contends that the court erred in holding that the last clear chance doctrine was not applicable to the defendant.

The person who has the last clear chance of avoiding an accident is considered, in law, solely responsible for the accident, notwithstanding the negligence of the person injured. See *Omaha Street R. Co. v. Martin*, 48 Neb. 65, 66 N. W. 1007; *Zelenka v. Union Stock Yards Co.*, 82 Neb. 511, 118 N. W. 103; *Wilfong v. Omaha & C. B. Street Ry. Co.*, 129 Neb. 600, 262 N. W. 537; *Carnes v. DeKlotz*, 137 Neb. 787, 291 N. W. 490; 45 C. J. 989.

Plaintiff invokes the doctrine of the last clear chance in his petition as follows:

"Defendant, knowing plaintiff was in a position of peril from which he could not extricate himself, failed to use due care to avoid a collision with plaintiff.

"Defendant, knowing plaintiff was in a position of peril from which he could not extricate himself, failed to stop his automobile or decrease its speed in order to avoid a collision with plaintiff."

This is based upon plaintiff's theory that when defendant's car was about half-way to the center of the highway he observed the plaintiff's motorcycle coming from a distance of 175 feet; that if defendant had stopped his car at that time plaintiff would have had half of the north side of highway No. 6 and all of the south side of the highway on which to pass; that the paved portion of the highway is 20 feet and the motorcycle required a little over three feet to pass; that, instead of availing himself of the last clear chance of avoiding the accident, defendant speeded up his car in order to pass in front of plaintiff; further, that when the front end of defendant's car was at the center or middle of the highway he slowed down. The plaintiff was then a distance of 60 or 70 feet and had turned to the south of the highway. If the defendant had stopped then, the plaintiff would have had the south part of the highway or most of it, but, instead, the defendant kept on going across the intersection. If the defendant had stopped at any time up to the moment his car reached the south edge of the highway, the collision would have been avoided, and he could have stopped his car instantly.

Section 39-1036, Comp. St. Supp. 1941, provides in part: "All motor vehicles entering or crossing such state highways on which stop signs are erected shall come to a full stop as near the right of way line as possible, before driving onto such state highway, and, regardless of direction, shall give the right of way to vehicles upon said highway." The foregoing provision of the statute is the one applicable in entering an intersection from a street or side road onto an arterial highway.

Considering the evidence: The plaintiff first saw the defendant's car when he was at a distance of at least, or more than, a block away, 300 to 400 feet. From his testimony, it is observed that he constantly watched the movement of the defendant's car. He noticed the relative position of the car at all times as it proceeded into and across the intersection. He had not slackened his speed to such an extent that he, himself, could have avoided the accident. In fact, the evi-

dence warrants the conclusion that the plaintiff lost control of his motorcycle. The defendant was endeavoring to do what an ordinarily prudent person would do under like or similar circumstances; that is, to proceed to cross the highway and at least try to clear the highway so that the plaintiff could pass on his own right side. The plaintiff admitted that when he applied his brakes he was unable to stop within a distance from the time he so applied his brakes to the point of collision. It is reasonable to assume that, knowing the position he was in and knowing his inability to stop his motorcycle, plaintiff should have applied his brakes at a greater distance east of the intersection. Even when the defendant was in the center of the highway, plaintiff was still 125 feet east of the intersection. He was aware that the defendant's car had entered the intersection. He was then traveling from 40 to 50 miles an hour. He had not then applied his brakes. He had made no attempt to decrease his speed, except to retard the throttle and shut off the gas. He testified he was unable to stop his motorcycle in the 90 feet in which he tried to stop. He was doing everything he could at the time. It is significant that the motorcycle skidded 48 to 50 feet and then on its side some 18 feet into the defendant's car. These physical facts indicate a high degree of speed and lack of control of the motorcycle. The plaintiff was not in peril except that brought about by his own negligence. He could have slowed down at a time when it would have been perfectly safe for him to do so and thus have avoided the accident.

"The doctrine of the last clear chance does not apply where the negligence of the injured party is contemporaneous and active up to the very moment of an accident, and thus contributed to cause the accident." *Hughes v. Omaha & C. B. Street Ry. Co., ante,* p. 47, 8 N. W. (2d) 509. See, also, *Long v. Guilliatt,* 137 Neb. 199, 288 N. W. 689.

The correctness of the foregoing proposition admits of no doubt. When the plaintiff was more than a block to the east of the intersection, the defendant was within 25 feet of the north edge of the intersection, and, when the plaintiff

was 175 feet east of the intersection, the defendant's car was either at the center line of highway No. 6, or a foot or two south of it. It would be unreasonable, under the circumstances that existed, to require defendant to keep any more of a lookout than he did. It is reasonable to assume that a driver will cross an arterial highway when an approaching motor vehicle is more than a block away.

We further conclude that the record in this case establishes that plaintiff was guilty of more than slight negligence. That being true, the question becomes one of law for the court, and it would be the duty of the court to direct a verdict for the defendant. See *Eaton v. Merritt*, 135 Neb. 363, 281 N. W. 620; *Whittaker v. Hanifin*, 138 Neb. 18, 291 N. W. 723.

Where a jury is waived and a trial had to the court, and the court finds that the evidence establishes that the plaintiff was guilty of more than slight negligence, it becomes a question of law for the court, and it is the court's duty to determine the matter as a proposition of law. In *Neill v. Dakota County*, 140 Neb. 26, 299 N. W. 294, this court held: "Where a jury is waived by the parties to an action at law in the district court, the findings of the trial judge on issues of fact are equivalent to the verdict of a jury and will not be reversed on appeal, if supported by sufficient evidence."

For the reasons given in the opinion, the judgment of the trial court dismissing plaintiff's petition is affirmed.

AFFIRMED.

GEORGE E. STUCKEY, APPELLANT, V. ROY F. STUCKEY, APPELLEE.

10 N. W. (2d) 458

FILED JULY 9, 1943. No. 31613.

1. **Venue.** In adjudging the merits of a special appearance for lack of jurisdiction of the person solely on account of improper venue, the court must consider the allegations of the petition as true,

and determine such merits from the averments of such petition, the character of the judgment that might properly be rendered on default of appearance, and the place, time and manner of the service of process.

2. ———. The venue of an action to establish that title to land held by the plaintiff is held by him in trust, and that the terms of such trust require the sale of such lands before an accounting may be had between the beneficiaries of such trust with reference to such land, and to decree a sale of such land at judicial sale, is the county in which such land or some part thereof lies, even though an accounting between such beneficiaries after such sale and a judgment against the person of defendant may be sought as a result of such accounting.

APPEAL from the district court for Custer county: ELDRIDGE G. REED, JUDGE. *Reversed, with directions.*

Cook & Cook and *Johnson & Johnson,* for appellant.

Lyman M. Stuckey and *Schaper & Runyan, contra.*

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

TEWELL, District Judge.

This action was begun in the district court for Custer county. George E. Stuckey was the only plaintiff and Roy F. Stuckey was the only person named as defendant. Summons, regular in form and directed to the sheriff of Dawson county, was issued by the clerk of such court. This summons was regularly served upon the defendant in Dawson county, and return thereof made by the sheriff of Dawson county, all within the time specified therein. The defendant filed a special appearance by which he objected to the jurisdiction of the court in Custer county over his person. The trial court sustained such special appearance and dismissed the plaintiff's petition. The plaintiff has brought the cause to this court by appeal.

The question of whether or not such special appearance was properly sustained, under such conditions, is the sole question presented upon appeal for determination. The facts hereinafter stated are alleged by the petition to be true.

In the year 1926 the plaintiff and defendant were both stockholders in the Oconto State Bank. The defendant was then a large stockholder in, and the president of, the Lexington State Bank. At such time one Paul Cavenee was indebted to said Oconto State Bank in the sum of $12,711. The state of Nebraska, through its banking department, required said Oconto State Bank to liquidate such loan. The debtor Cavenee was then the owner of 558 acres of land which is described in the petition and located in Custer county, and then offered to convey such land to said Oconto State Bank in full payment of such indebtedness. The officers of said Oconto State Bank concluded that such an amount of real estate should not be taken into the assets of such bank, but no other form of payment could be made by said debtor. In October, 1926, the plaintiff and defendant entered into an oral agreement to the effect that the plaintiff should pay said indebtedness of said Cavenee from his own individual funds, and that said lands should be conveyed to said Lexington State Bank in trust for the purpose of repayment to the plaintiff of the amount paid by him in payment of said Cavenee debt, with interest thereon at seven per cent. per annum. By such agreement said Oconto State Bank was to collect the rents from such real estate, pay the taxes thereon, and pay the interest upon the amount due the plaintiff, until a sale of such real estate could be made. By such agreement the plaintiff and defendant agreed that if such land did not sell for a sufficient amount to repay the plaintiff both the principal and interest due him, that then defendant should pay the plaintiff one-half of the resulting deficiency, and that if such sale should bring more than the amount required to so repay the plaintiff, then the surplus should be divided equally between the plaintiff and the defendant. In accordance with such agreement the plaintiff paid said Cavenee indebtedness to said Oconto State Bank in the sum of $12,711 from his individual funds, and Cavenee in October, 1926, conveyed said real estate to said Lexington State Bank by deed. The method of handling such lands provided by such agree-

ment was used until in March, 1930, when the plaintiff and defendant purchased all of the capital stock of said Oconto State Bank other than that then owned by plaintiff or defendant. Thereupon the plaintiff and defendant liquidated said Oconto State Bank by transfer of a large part of its assets to the Farmers State Bank of Oconto which paid all debts of said Oconto State Bank. The plaintiff and the defendant retained certain former assets of the Oconto State Bank as their own, and such bank then ceased to exist as an operating bank. Such assets so retained are not described in the petition. The plaintiff and the defendant then entered into another oral agreement to the effect that the plaintiff should collect the rents from such lands, and therefrom pay the taxes and costs of looking after such lands, and apply any surplus upon the amount due the plaintiff. By such second agreement the Lexington State Bank was to continue to hold the title to said real estate in trust until a sale thereof could be made, the plaintiff and defendant to share equally any amount realized from said land over and above the amount due the plaintiff, and the defendant to pay the plaintiff one-half of any amount by which the sum so realized failed to pay the amount due the plaintiff. Under such agreement the plaintiff took charge of said lands, collected the rents therefrom, and paid the taxes thereon. About July 9, 1934, the Lexington State Bank conveyed said lands to the plaintiff. The plaintiff then mortgaged said lands to the Federal Land Bank of Omaha, Nebraska, to secure the payment of a loan of $7,500 in amount, and applied such loan upon the amount due him under the above-mentioned agreements. From the time of such conveyance by deed to the plaintiff in 1934 to the date of the commencement of this action the plaintiff has collected the rents from such real estate and paid the taxes thereon. In his petition the plaintiff discloses the amounts received by him from rents between the date he took charge of the lands in March, 1930, and the date he received deed thereto from the Lexington State Bank in July, 1934, and also discloses the rents received by him between the date of

the receipt of such deed and the date of filing this action. The amounts paid out by the plaintiff for taxes and costs of handling such lands are pleaded in the petition. In short, the plaintiff's version of a proper accounting of his receipts and disbursements with reference only to such land as between himself and the defendant is set forth in the petition. The petition alleges a claim of ownership of an interest in such lands by the defendant, his refusal on demand to make an adjustment of the interest and liabilities of the parties with reference thereto, and the inability of the plaintiff to sell such land on account of the defendant's interest therein. The prayer of the petition is to the effect that the court shall adjudge the existence of the oral agreements pleaded in the petition, the plaintiff's performance thereof, and the amount remaining due to the plaintiff upon the said sum of $12,711 with interest thereon and for taxes paid by him that have not been repaid to him. The petition further prays that said lands be ordered sold at public vendue; that, upon confirmation of sale, the proceeds of such sale be paid to the plaintiff to the extent of the amount due to him, and that, in the event such proceeds are insufficient to pay such amount, the plaintiff be given judgment against the defendant for one-half of such insufficiency. Such other, further and different relief as may be just and equitable is also prayed.

In adjudging the merits of a special appearance for lack of jurisdiction of the person solely on account of improper venue, the court must consider the allegations of the petition as true, and determine such merits from the averments of such petition, the character of the judgment that might properly be rendered on default of appearance, and the place, time and manner of the service of process. 67 C. J. 24; *Terry v. Rivergarden Farms Co.*, 29 Cal. App. 59, 154 Pac. 476; *Work v. Associated Almond Growers*, 76 Cal. App. 708, 245 Pac. 790. In this case it is conceded that the summons was regular in form, and was served and returned in the manner and within the time prescribed by law. The question presented relates only to whether or not

the district court for Custer county is the proper venue of the action. The allegations of the petition must be considered as true, and the answer to this question must be found in such allegations and applicable statutory provisions.

Section 20-401, Comp. St. 1929, so far as applicable to this action, provides as follows: " * * * and all actions for the following causes must be brought in the county in which the subject of the action is situated, except as provided in the next following section: First. For the recovery of real property or of an estate or interest therein; Second. For the partition of real property; Third. For the sale of real property under a mortgage, lien or other incumbrance or charge." The "next following section," referred to in the above-quoted portion of section 20-401, refers only to cases affecting lands in two or more counties. A study of the allegations of the petition herein at once discloses that the plaintiff holds title to the lands involved in trust. No power to sell the land without the consent of the defendant is shown to exist. The defendant claims an interest in the land. If plaintiff did sell the lands without the defendant's consent, he might be liable to the defendant for its reasonable value rather than its sale price in an action for accounting, in case the defendant established that the sale price was less than the reasonable value. The beneficiaries of the trust held by the plaintiff are the plaintiff and the defendant. Under the terms of the agreements pleaded the lands must be sold and the sale price thereof determined, before the rights and liabilities of the parties can be determined. The action primarily is one to establish the fact that land is held in trust, and to have the same sold at judicial sale in order that the court may make an accounting between the parties under the rule, often announced, to the effect that when a court of equity has acquired jurisdiction of a cause for one purpose it may and should retain it generally for complete relief. The action is not primarily an action for an accounting with the sale of the land merely incidental thereto, as contended by the defendant. The district court for Dawson county could not, under our statutes, direct the

sheriff of Custer county to sell the land and make return of such sale to that court. The allegations of the petition require the judgment of the court to operate directly upon the *res*, before an accounting may be had. The primary object sought is the establishment of the trust and the judicial sale of the land under such trust. The venue of an action to establish that title to land held by the plaintiff is held by him in trust, and that the terms of such trust require the sale of such lands before an accounting may be had between the beneficiaries of such trust with reference to such land, and to decree a sale of such land at judicial sale, is the county in which such land or some part thereof lies, even though an accounting between such beneficiaries after such sale and a judgment against the person of defendant may be sought as a result of such accounting. 67 C. J. 52; *Miles v. Martin*, 103 Neb. 261, 171 N. W. 907; Comp. St. 1929, sec. 20-401; *Prudential Ins. Co. v. Bliss*, 123 Neb. 578, 243 N. W. 842.

The defendant appellee contends that this action is transitory in nature. He cites the case of *Scow v. Bankers Fire Ins. Co.*, 109 Neb. 241, 190 N. W. 858, in support of his contention. In that case the judgment sought was rescission of a contract for fraud, and cancelation of notes and mortgages upon real estate located in a foreign county and given to secure payment of the purchase price of stock in a corporation. As pointed out in that case the relief prayed would operate entirely against the person of the defendant. Appropriate space does not permit a discussion of the various cases cited by the defendant to support his contention. The defendant cites the following authorities: *Barnes v. Barnhart*, 102 App. Div. 424, 92 N. Y. Supp. 459; *Turlock Theatre Co. v. Laws*, 12 Cal. (2d) 573, 86 Pac. (2d) 345; *State v. District Court*, 120 Minn. 99, 139 N. W. 135; *Smith v. Barr*, 76 Minn. 513, 79 N. W. 507; *State v. District Court*, 85 Minn. 283, 88 N. W. 755; *State v. District Court*, 94 Minn. 370, 102 N. W. 869. In none of these cases is the primary object sought the judicial sale of real estate with an accounting merely incidental thereto. In fact in

each of them the primary object is relief against the person, with real estate merely incidentally affected.

Under the rules above set forth and for reasons above given the judgment of the trial court is reversed with instructions to reinstate the plaintiff's action, overrule the defendant's special appearance, and to require the defendant to plead within a time to be fixed by the trial court. The costs in this court are taxed to the defendant.

REVERSED, WITH DIRECTIONS.

MASSACHUSETTS BONDING & INSURANCE COMPANY, APPELLEE, V. MASTER LABORATORIES, INC., APPELLANT.

10 N. W. (2d) 501

FILED JULY 13, 1943. No. 31591.

1. **Corporations.** The general rule is that a corporation will be looked upon as a legal entity until sufficient reason to the contrary appears; that is, when the notion of legal entity is used to justify wrong and protect fraud.
2. ———. Where various corporations, substantially owned by one individual, are but instrumentalities through which such individual transacts his business, and, where such corporations are used as a cloak or shield to perpetrate a fraud, a court of law will examine the whole transaction, looking through corporate forms to the substance of things to protect the rights of innocent parties and to circumvent fraud.
3. ———. Where an individual owns all of the stock of several corporations, or substantially so, and such corporations are, in truth and in fact, but the juristic double of the owner, and, where fraud or injustice will likely operate to the injury of third persons, this situation suffices to dissipate the separate identity of the corporations, and the law will have no compunction in holding the corporation liable for the acts of its owner, or *vice versa*. And this rule is the same although the stock of such corporations is owned by two or more, who act in conjunction with the corporate organization.
4. ———. The defense of *ultra vires* cannot be set up against a liability founded on fraud, and, regardless of rights between the parties in *pari delicto*, no immunity is acquired by the defense to the prejudice of innocent third persons.

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

Reed, Ramacciotti & Hruska, for appellant.

Kennedy, Holland, Delacy & Svoboda and *Edwin Cassem, contra.*

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

MESSMORE, J.

This law action was commenced in the municipal court on a special indemnity agreement, appealed to the district court by defendant where the action was, by agreement, tried on the same pleadings to the court. The court found generally in favor of the plaintiff and entered judgment for it in the sum of $1,000, from which the defendant appeals.

Plaintiff's petition alleged that on or about September 20, 1934, plaintiff issued a "Release of Garnishment" bond to Crazy Crystals Company of Minnesota in the amount of $1,500, to secure liability of $750; that said bond was filed in the circuit court of Ramsey county, Minnesota, in a case entitled "Minnesota Broadcasting Corporation v. Crazy Crystals Company of Minnesota;" that to secure the plaintiff the defendant entered into a special indemnity agreement as follows: "Whereas, the said Massachusetts Bonding and Insurance Company has become or is about to become surety, at the request of the undersigned on the bond above described, the undersigned, in consideration thereof, hereby agree to indemnify and keep the Massachusetts Bonding and Insurance Company indemnified and hold and save it harmless from and against any and all demands, liabilities, charges and expenses of whatsoever kind or nature, which it may at any time sustain or incur by reason of or in consequence of having executed the above described bond, and ———— do further guarantee that the charges for executing and continuing upon the bond will be paid as agreed until the Company has been released from liability thereunder;" that it was attached to and made a part of the

Crazy Crystals Company's application for the bond; alleged further that the plaintiff was forced to pay Minnesota Broadcasting Corporation on August 27, 1936, the sum of $889 under said bond and the additional amount of $62.55 as expense, making a total loss of $951.55 under the bond for which amount, with costs, plaintiff prayed judgment.

The defendant's answer contained a general denial; alleged that neither the defendant nor any one purporting to obligate it signed any special indemnity agreement on the date of or before the bond was executed or became binding upon the plaintiff; alleged that any agreement purported to have been executed by defendant was without valid or sufficient legal consideration; also, that John E. von Dorn was never, in fact, authorized to bind defendant by the execution of any such agreement, and the alleged execution thereof was *ultra vires* and without authority or direction on behalf of the defendant and outside the power or right of von Dorn to bind it and unenforceable as to this defendant; further alleged that if any one, purporting to bind defendant in connection with the issuance of the bond prior thereto, plaintiff, through its agent, Harry A. Koch Company, assured and agreed with defendant that any such agreement would not be relied on or enforced by plaintiff, and that if such agreement should be executed by defendant the same would merely be an accommodation to the agent of plaintiff (Koch), to be retained in the files of such agent only until the prior indemnity agreement, executed by other parties, should be located or a new one obtained from said third party; that the indemnity agreement was, after the time of its execution, materially altered, and that S. Z. Alpirn never witnessed any signature of von Dorn in connection with any alleged agreement executed by him in connection with the bond; prayed for a dismissal of the plaintiff's petition.

Plaintiff's reply reaffirmed the allegations of the petition; alleged that at the time of the execution of the bond the Crazy Crystals Company of Minnesota and Master Laboratories, Inc., were corporations, both wholly owned and controlled by William C. Kalash, either directly or through

the medium of holding companies, wholly owned and controlled by Kalash; that in obtaining the bond Kalash, through his corporations, represented and promised that said indemnity would be provided; that after the bond had been executed Kalash stalled and evaded his obligation for a long period of time and ultimately caused his wholly owned and controlled corporation, the defendant, to execute the indemnity agreement; that the defendant and Crazy Crystals Company of Minnesota were but the alter ego of William C. Kalash and used by him to perpetrate a fraud upon the plaintiff and to hinder, delay and defraud creditors; that defendant, acting as the alter ego of Kalash and Crazy Crystals Company of Minnesota, paid the premium on the bond after the execution of said indemnity agreement, ratified and made payment of $100 upon the liability incurred by defendant under the indemnity agreement, and defendant, acting as the alter ego of William C. Kalash and his various corporate disguises, promised to make further payments under the indemnity agreement. The reply further alleged that the whole course of dealing by the Crazy Crystals Company of Minnesota, the defendant and Kalash was, in fact, one in which Kalash sought to use the corporate forms as a means of hindering, delaying and defrauding the plaintiff. Further answering, plaintiff denied each and every allegation in the answer not admitted or affirmed by the petition or reply.

The record discloses that on September 20, 1934, Master Laboratories, Inc., by telephone to the Harry A. Koch Company, a general insurance and bonding company, requested it to procure a release of garnishment bond for the Crazy Crystals Company of Minnesota, involved in litigation with the Minnesota Broadcasting Corporation. The Koch company telephoned insurance and bond agents in Minneapolis to write the bond, and on the same day dispatched a telegram to Twin City Insurance Agency of Minneapolis as follows: "Please get in touch with Attorney George Jansen, First National Bank Building St. Paul executing fifteen hundred dollar release garnishment bond Crazy Crys-

tals Company of Minnesota. Have requested Home Office wire you today sure authorizing this bond." On the same day a telegram was sent by the Koch company to the plaintiff, requesting it to authorize Minneapolis agents to execute release of garnishment bond for Crazy Crystals Company of Minnesota, "to be indemnified by its owner personally Mr. W. C. Kalash who is worth upwards of two hundred thousand dollars with no debts or obligations," and stating that Kalash was "perfectly safe and large clients of this office. * * * Minneapolis office must have this authorization today." On September 21, 1934, plaintiff telegraphed the Koch company that it must have the customary collateral before authorizing the bond, and a letter written by plaintiff to Koch company, dated September 22, 1934, contained the same requirement. At the time of issuing the bond the Koch company did not procure an application or collateral security, due to the fact that it was its customary practice, in furnishing bonds needed in an emergency, for some of its clientele, to forego a written application at the time. Up to October 9, 1934, no application had been received, and Harry A. Koch, president of the Koch company, delivered an application in person to the defendant which was lost; subsequently, other sets of applications were taken to the defendant's office, not signed or returned.

W. C. Kalash promoted and set up the following corporations: Master Laboratories, Inc., Master Drugs, Inc., Crazy Crystals Company of Minneapolis, Michigan, Nebraska, Inc., and the Crazy Crystals Company of Canada, Ltd., and W. C. Kalash, Inc., the latter organized subsequent to the others as a holding company for the capital stock of the other corporations. Kalash owned the stock in W. C. Kalash, Inc. The corporations were operated by Kalash from one office at Twenty-seventh and N streets, in Omaha, and all correspondence and business transactions involving the corporations were from this location. Koch had transacted business with Kalash and the different corporations at the same location, having known Kalash since 1920. In 1929 von Dorn, an attorney, came into the Kalash organi-

zations and became "right-hand man" of Kalash, and Koch had transacted business with him for the various organizations, which included insurance on public liability, compensation and fire.

On October 9, 1934, the Koch company wrote Kalash concerning the application, requesting him to sign and return it, and stating that the bond was recommended on Kalash's personal responsibility; that if the bond was to "stick" there should be a financial statement, and, even with it, there should be collateral which Koch hoped to have waived if Kalash's statement would justify such course. Previously, the Koch company had obtained a general indemnity agreement with the different corporations, signed by Kalash, and business was transacted by the parties, relying on this agreement. Whether or not such general indemnity agreement covered the Crazy Crystals Company of Minneapolis was not definite. In any event, such indemnity agreement did not appear in this lawsuit. The final analysis of Koch was that it had been attached to some bond and sent to the principal office of plaintiff. It was not found. The application for the bond was not obtained, nor the premium collected, nor the bond reported to the plaintiff by the Koch company.

In 1936 the plaintiff informed the Koch company that it had been called upon to pay the liability created under the bond and desired an explanation, requesting Koch to have his clients pay the judgment. There are several exhibits in the record, which we shall not enumerate, wherein Koch urged plaintiff to institute suit against Kalash to recover the amount plaintiff had paid on the judgment and expenses. Finally, the Koch company obtained an application, signed by von Dorn as vice-president of the Crazy Crystals Company of Minnesota, and the special indemnity agreement, sued on and set forth in the pleadings, by Master Laboratories, Inc., by John E. von Dorn, Secretary. The witness to the instruments was S. Z. Alpirn, private secretary of Mr. Koch and head of the bond department.

While the special indemnity agreement was procured in

the early fall of 1936, together with the application, the instrument was dated back to the date of issuance of the bond, when it was returned to the Koch company office, and S. Z. Alpirn signed as a witness to the signature of von Dorn, he not being present. Correspondence then took place between Koch and the plaintiff with reference to procuring the application and special indemnity agreement. As to obtaining the special indemnity agreement, the testimony of Koch and von Dorn is at variance. The latter, at the time of signing the instrument, informed Koch that he did not know whether his execution of the instrument would be "any good," as the Crazy Crystals Company of Minnesota had either gone into bankruptcy or been dissolved. Koch testified that he relied upon the signature of von Dorn and that it was "good enough" for him. A letter from Master Laboratories, Inc., signed by John E. von Dorn, Secretary, dated September 24, 1936, to the Harry A. Koch Company reads as follows:

"As the bonding company has paid this bond in this matter and we have a liability to pay the correct amount which has not as yet been determined in full, and as it is quite a load to pay at this time we are enclosing our check in the amount of $100 and will attempt to make these payments each week until the matter is straightened out.

"We would like to have a complete itemized statement of the amount that the bonding company claims is due so that this may be settled between us.

"You may expect our check weekly as per this letter."

No further payment was made.

In the corporations previously mentioned Kalash held the principal offices, generally president, and issued a qualifying share of stock to von Dorn, with one exception, when the amount of $100 was paid by von Dorn, or credited to him, for one share of stock in Master Laboratories, Inc. Stock in such corporations was held by Kalash, Mrs. Kalash or W. C. Kalash, Inc. It is apparent from the record that in all of such corporations, with reference to the ownership of stock, management and business transactions, Kalash was the

prime and moving factor and that von Dorn acted only upon Kalash's suggestions and advice. In 1932 von Dorn became vice-president of Master Laboratories and later secretary. When the latter company was known as Master Drugs, he was secretary. Kalash was president of Master Laboratories, Inc., in 1929 and became the sole owner in 1931, continuing as president. He was president of Master Drugs, von Dorn secretary, holding a qualifying share, actually owned by Kalash, Mrs. Kalash, or W. C. Kalash, Inc. von Dorn was vice-president of the Crazy Crystals Company of Minnesota; Kalash president. von Dorn owned no stock in that company, merely a qualifying share. He was likewise vice-president and an officer in other Crazy Crystals organizations as before designated. At the time of the trial von Dorn was president and treasurer of Master Laboratories, Inc. Kalash had obtained a contract with a company in Texas, for distribution rights of its product (Crazy Crystals) in various states, which he assigned to the different corporations selling the product, owned and controlled by him. von Dorn devoted a substantial part of his time to the management and promotion of the Crazy Crystals Company of Minnesota and other such companies, being employed by Kalash.

Subsequent to 1934, and, as near as can be ascertained from the record, in April, 1935, Kalash transferred his stock ownership in Master Laboratories to W. C. Kalash, Inc., and Master Drugs, Inc., was formed in 1935 or 1936. When the application for the bond was being sought, Koch was not able to find Kalash at his place of business, as he was generally out of the city. On one occasion he did find him, and Kalash would do nothing about the matter because von Dorn was absent from the city. In August, 1936, von Dorn informed Kalash that Koch had been down to the office and had stated that the bonding company had been compelled to pay the judgment obtained against the Crazy Crystals Company of Minnesota; that Koch was "in bad shape," needed the application for his files, and that he had told Koch that his (von Dorn's) signature on the indemnity

agreement "wasn't any good" at the time he signed it. Kalash asked him if it was true, and von Dorn said "yes," to which Kalash replied, "that was fine, or words to that effect."

Referring to the letter, heretofore set out, under date of September 24, 1936, when the 60-dollar premium on the bond was paid and the 100-dollar payment made, Kalash told von Dorn to send such amount and charge the same to him. von Dorn testified there was no business connection between Master Laboratories, Inc., and the Crazy Crystals companies in September, 1934, and that the last time W. C. Kalash personally, W. C. Kalash, Inc., or Mrs. Kalash had any interest in Master Laboratories was June 4, 1937. Shortly thereafter Kalash became a permanent resident of California.

Other exhibits appear in the record,—a letter written by Koch to plaintiff, dated February 3, 1938, wherein he stated he was pleased "to enclose the original application which we thought had been forwarded to you but which now develops was all the while contained in our file;" a letter, dated July 29, 1937, from Koch to Kalash, informing him that he, Kalash, had signed a general indemnity agreement; other correspondence between the Koch company and plaintiff with reference to the liability of Kalash on the indemnity and the liability of this defendant, expressing the thoughts of Koch and the plaintiff on such matter, and an endeavor of Koch to induce Kalash to reimburse the plaintiff. These exhibits we will not detail. The foregoing constitutes the substance of the material evidence in the case.

The defendant contends that the court erred in not sustaining the defense of lack of valid or sufficient consideration as to it. In this connection, defendant states the bond was issued without an application, on sole reliance of the personal indemnity agreement executed by Kalash. Plaintiff had no knowledge of the existence of the bond; that its agent wrongfully procured the bond, contrary to the plaintiff's instructions; consequently, the plaintiff did not reply on anything when the bond was issued, and its agent, the

Koch company, relied on the personal indemnity agreement of Kalash; that the indemnity agreement sued on was never signed by the defendant until the plaintiff was irrevocably liable on the release of garnishment bond; therefore, no loss was suffered by plaintiff through the defendant's acts; that defendant was not interested in the bond; no benefit accrued to it and it had no business interest in the Crazy Crystals Company of Minnesota, or in its product, for which the bond was issued.

While many cases are cited by the defendant, the law announced therein is covered in 31 C. J. 424, on "Indemnity," wherein it was said: "The general rule that a past consideration, if it imposed no legal obligation at the time it was furnished, will support no promise whatever, has been held applicable to contracts of indemnity. In accordance with such rule the incurring of liability or the performance of an act is not valid and sufficient consideration for a subsequent contract of indemnity against the consequences of such liability or act, and such a contract is invalid for want of consideration, unless it is made in pursuance of an arrangement or agreement between the indemnitor and indemnitee entered into before or at the time such liability was incurred or such act was performed, or the consideration is of a continuing nature, or the subsequent promise of indemnity is coupled with a precedent instance or request, or unless a new consideration is given for the indemnity." And defendant also contends that all plaintiff did in the instant case, when it paid off on the bond, was to perform an existing legal obligation, citing: "Mere performance of an existing legal obligation is no consideration." 31 C. J. 422.

Without repeating or summarizing the evidence, we conclude that the following authorities are applicable:

Anderson, Limitations of the Corporate Entity, states (p. 252, sec. 247): "It is now so well established that it has become almost aphoristic that, upon a proper showing that a corporation is but an instrumentality through which its owner or substantial owners for convenience transacts or transact his or their business, by the great weight of au-

thority, both equity and law will look through the form to its substance and will hold such corporation bound as the owner of the corporation might be bound or conversely hold the owner bound by acts which bind his corporation. And so, where an individual owns all of the stock of a corporation or substantially so, and that the corporation is in truth and in fact, but the juristic double of its owner and where fraud or injustice will likely operate to the injury of third persons, this situation suffices to dissipate the separate fictional identity of the corporation and the law will have no compunction in holding the corporation liable for the acts of its owners or *vice versa*. And this rule is the same though the stock of the corporation is owned by two or more who act in conjunction with the corporate organization."

Defendant contends, however, that, in the event this rule is applied, the liability would be the personal liability of Kalash for which he had given his personal indemnity, and still not the liability of the defendant upon the indemnity agreement sued on. With this technical objection we are not in accord. The transaction is still the transaction of all the parties. Kalash acquiesced in the act of his principal agent, adviser and confidant, who executed the indemnity agreement sued on. Kalash's instructions were to pay the premium, pay the obligation and direct the manner in which it should be paid.

In *United States v. Milwaukee Refrigerator Transit Co.*, 142 Fed. 247, it was said (p. 255): "If any general rule can be laid down, in the present state of authority, it is that a corporation will be looked upon as a legal entity as a general rule, and until sufficient reason to the contrary appears; but, when the notion of legal entity is used to defeat public convenience, justify wrong, protect fraud, or defend crime, the law will regard the corporation as an association of persons." See, also, *Wenban Estate, Inc., v. Hewlett*, 193 Cal. 675, 227 Pac. 723; *Ehlers v. Bankers Fire Ins. Co.*, 108 Neb. 756, 189 N. W. 159.

The supreme court of the United States has laid down the rule which has the sanction of the authorities generally,

that, where the difference between corporations is reduced to mere matter of bookkeeping, such corporations cease to have separate legal entities and will, in the interest of justice, be treated as one. Anderson, Limitations of the Corporate Entity, p. 310, sec. 316.

We hold that the defense of lack of consideration is without merit. In view of our holding the defense of *ultra vires* falls, and the following statement of law is pertinent to such defense when applied to the instant case:

"The plea should not, as a general rule, prevail whether interposed for or against the corporation, where it will not advance justice but on the contrary will accomplish a legal wrong. So, the defense cannot be set up against a liability founded on fraud, and regardless of rights as between the parties in *pari delicto,* no immunity is acquired by the defense to the prejudice of innocent third persons." 19 C. J. S. 425, sec. 970.

We are in accord with the finding that the special indemnity agreement was not executed as an accommodation to the Harry A. Koch Company. The act of the Koch company in failing to forward the premium or report the bond to plaintiff, or to act in accordance with plaintiff's instructions, is a matter solely related to the Koch company and the plaintiff. The plaintiff was an innocent party, acted in good faith and paid its obligation when it learned of its liability, and, under the facts and circumstances and the law applicable thereto, should not be penalized.

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

AFFIRMED.

YEAGER, J., not participating.

THEODORE BAUM, APPELLEE, V. HAROLD G. MCBRIDE, APPELLANT.

10 N. W. (2d) 477

FILED JULY 13, 1943. No. 31609.

1. Partnership. Partnership is a contract of two or more competent persons to place their money, effects, labor, skill, or some or all of them, in lawful commerce or business, and to divide the profit or bear the loss in certain proportions.
2. ———. The existence of a partnership is a question of fact under the evidence.
3. ———. More convincing evidence is required to prove existence of partnership where alleged partners are the only litigants than where the controversy is between a third party and the partners.
4. ———. The existence of a partnership depends upon the agreement of the parties, and their intention is to be ascertained from all the evidence and circumstances.

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

Mothersead & Wright, for appellant.

F. J. Reed, contra.

Heard before SIMMONS, C. J., PAINE, YEAGER, CHAPPELL and WENKE, JJ., and TEWELL and LIGHTNER, District Judges.

WENKE, J.

This action was commenced in the district court for Scotts Bluff county by Theodore Baum, plaintiff and appellee herein, against Harold G. McBride, defendant and appellant herein, to establish a partnership between the appellee and appellant entered into for the purpose of dealing in potatoes, for dissolution thereof, and for a determination of the rights of the partners therein. Upon the issues raised by the pleadings the court limited the trial to the matter of whether or not there was a partnership. From a judgment that the appellee and appellant doing business under the name of McBride Potato Company constituted a partnership, ordering a dissolution and liquidation thereof

and appointing a referee to take charge thereof for that purpose, and retaining further jurisdiction to determine the rights of the parties to the proceeds, McBride, appellant, has appealed.

The question presented by this appeal is whether or not a partnership existed. As stated in *Carlson v. Peterson,* 130 Neb. 806, 266 N. W. 608: "The existence of a partnership is a question of fact under the evidence," and further: "More convincing evidence is required to prove existence of partnership where alleged partners are the only litigants than where the controversy is between a third party and the partners." The burden of establishing the partnership is on the appellee.

A partnership has been defined in *Waggoner v. First Nat. Bank of Creighton,* 43 Neb. 84, 61 N. W. 112: "Copartnership is a contract of two or more competent persons to place their money, effects, labor, skill, or some or all of them, in lawful commerce or business, and to divide the profit or bear the loss in certain proportions."

Appellee testified that sometime in the first week of July, 1939, the appellant suggested that they put everything they had together and deal in potatoes and operate as fifty-fifty partners, to which the appellee consented; whereas, the appellant contends that, after he had talked with the appellee in the spring and then in the forepart of July, 1939, when he suggested he would make him a better deal, in the latter part of September of the same year he told the appellee that if he would stay with him five years, use his car, would not draw over $150 a month and would get his father to help in case they needed some credit he would give the appellee half of the profits, to which the appellee consented. In order to determine which of these parties is correct as to the agreement they made it will be necessary to consider all of the facts and circumstances disclosed by the evidence, for as stated in *Carlson v. Peterson, supra:* "The existence of a partnership depends upon the agreement of the parties, and their intention is to be ascertained from all the evidence and circumstances of a case."

In order to clarify the facts of this case it will be necessary to briefly explain the prior relationship of the parties. Appellant, under the name of McBride Potato Company, had been engaged in the potato business, which is commonly referred to as "potato deal," in the season 1938-1939 and prior thereto. In October of 1938 he employed appellee, a young man 24 years of age who lived on his father's farm in the vicinity of Mitchell, Nebraska, and who had been previously engaged as an inspector of potatoes for the federal government, for the purpose of buying potatoes. For about a month he bought potatoes on a commission basis and thereafter was paid $150 a month during the balance of that season. Sometime in the forepart of 1939, appellee and appellant entered into a fifty-fifty partnership for the purpose of spraying potatoes and to that end, under the name of McBride and Baum, purchased a sprayer and chemicals through the assistance of appellee's father who loaned them $1,000 in June, 1939.

The evidence discloses that in the summer of 1939 a potato washer and also potatoes were purchased out of the funds of McBride and Baum for the McBride Potato Company and subsequently all of the assets and liabilities of the partnership of McBride and Baum were, sometime in September of 1939, included with the assets of the McBride Potato Company as shown by the financial statement dated September 11, 1939, prepared by the appellant for the purpose of securing credit at the bank. It was agreed that in view of the established business of the appellant under the name of McBride Potato Company they would continue to use it in their business. Commencing with September, 1939, appellee started writing checks on the account of McBride Potato Company both for the purpose of buying potatoes and for his own expenses. About the latter part of October or the forepart of November, 1939, a carload of potato bags was received and appellee's father was then solicited to assist in financing the purchase thereof and he testifies that then and on other occasions thereafter when his credit was necessary to finance the business appellant

told him that Ted and he were fifty-fifty partners in the business each having a half and half interest therein. In the fall of 1939 they planned a warehouse at Mitchell, the construction of which was begun in October, 1939, and finished shortly before Christmas at a cost of something like $7,000. The contract, which was verbal, was given to John Mathson who testified that he discussed the matter with the appellant and appellee and that appellant told him they had a lease and they were going to put up the warehouse in partnership. In the spring of 1940 appellant and appellee attempted to negotiate a $5,000 loan from appellee's aunt, Katie Toensmier, who lived at York, Nebraska, and for this purpose appellee and appellant each took out a $5,000 life insurance policy made payable, as shown by the policy on appellee, to "Katie Toensmier, Creditor, or as her interest may appear, balance to Harold G. McBride, Partner;" the policy on appellant being the same except balance payable to Theodore Baum, partner. They also prepared a mortgage on certain items of the property of the McBride Potato Company made out as a partnership and signed by both appellee and appellant. During March of 1941 a partnership income tax return for the McBride Potato Company was made out and signed by the appellant. This return was dated March 15, 1941, and disclosed it as a partnership consisting of Hal McBride and Theodore Baum. Mr. W. O. French, whom the records show to be a public accountant, helped in preparing this return and he testified he received this information as to the partners from appellant and that he helped prepare a similar return for the year 1941, returned March 16, 1942, which likewise shows Hal McBride and Theodore Baum to be partners and is signed by appellant. The record further shows that in March, 1941, application was made for an R. F. C. loan and from the testimony of Mr. Wright, a banker, who helped prepare the application, the loan was to be made to Hal McBride and Theodore Baum. On July 26, 1940, a lease was entered into with the Union Pacific Railroad Company for a potato sorting platform at Gering, Nebraska, which lease

was signed by both appellee and appellant, witnessed by Mr. Clark, General Agent of the Union Pacific Railroad Company, and signed by appellee and appellant in each other's presence, which lease shows the McBride Potato Company as a partnership consisting of Hal McBride and Theodore Baum. The evidence shows that appellant was generally to do the selling and office work, his wife to do the book work therein, and the appellee was generally to do the buying and outside work and that each of them performed their duties. Appellee assisted with the plans and construction of the warehouse at Mitchell in the fall of 1939, likewise at Gering in 1940, and moved to Gering in October, 1940, to take charge of the warehouse. That up until he moved to Gering appellee continued to write checks against the funds of the McBride Potato Company but thereafter he drew drafts; that he lived in Gering until the season 1941-1942 when he moved back to Mitchell but continued to have charge of the Gering warehouse; that he signed most of the obligations of the company at the bank and to his father and signed the mortgages securing the same; and that he generally took part in the conduct and operation of the business.

To continue with a further detailed statement of the facts, as shown by the voluminous testimony and exhibits, would only necessitate unnecessarily extending this opinion. While the appellant testifies that he did not enter into an agreement with the appellee to conduct the potato business of the company on a partnership basis but rather on the basis of sharing the profit and denies that it was conducted as a partnership and testified as to the contents of letters exchanged between the parties in December of 1939, which contents appellee denies, to show that the parties did not consider themselves as partners in the business and adduced evidence of transactions of the company in which it was not designated as a partnership, however, from the record as a whole it shows by clear, satisfactory and convincing evidence that the parties entered into an agreement to put everything they had together and deal in potatoes and

to conduct the business of the company on a fifty-fifty partnership basis and that subsequent thereto the parties did put everything they had together and did conduct the business of the company on that basis and therefore the judgment of the lower court was right in holding it was a partnership.

Under the facts as herein determined those cases cited by appellant where a sharing of profits as compensation for the use of money or property or service does not constitute a partnership are not applicable.

The judgment of the lower court is affirmed.

AFFIRMED.

TRUCK OWNERS FREIGHT COMPANY, APPELLANT, V. EARNEST POLAND ET AL., APPELLEES.

10 N. W. (2d) 473

FILED JULY 13, 1943. No. 31626.

1. Carriers. A consignee who receives a C. O. D. shipment is bound either to pay therefor or return the goods.
2. ———. Where a carrier delivers goods to the consignee without collecting the C. O. D. charges and is compelled to pay the consignor the amount it should have collected, the carrier has a right of action against the consignee for the money so paid.

APPEAL from the district court for Custer county: ELDRIDGE G. REED, JUDGE. *Reversed.*

E. F. Myers, for appellant.

Evans & Lee, contra.

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

WENKE, J.

This action was commenced in the justice court by the Truck Owners Freight Company, a corporation, as plaintiff, against Earnest Poland and Earl Poland, as defendants, seeking to obtain a judgment for $157.52 with interest and

costs. On appeal to the district court for Custer county, that court sustained the defendants' demurrer to plaintiff's second amended petition and the action was dismissed. From this ruling the plaintiff has appealed to this court.

During the pendency of the action Earl Poland, one of the defendants, died and the action was revived in the name of Ruey Poland as administratrix of his estate.

The question presented by this appeal is the sufficiency of plaintiff's second amended petition to state a cause of action against the defendants. A general demurrer admits the truth of well-pleaded facts in the petition but does not admit conclusions. The plaintiff's second amended petition alleges that the defendants, Earnest Poland and Earl Poland, were partners and owned and operated the Red Star Transfer of Sargent, Nebraska, and on October 21, 1939, they ordered from Mr. J. P. Johnson of Clear Lake, Iowa, doing business under the name of the Transport Tire Company, six tires which he in turn ordered from the Monarch Rubber Company of Hartville, Ohio, custom manufacturers of tires, to be sent C. O. D. The Monarch Rubber Company delivered these tires to the plaintiff, a common carrier, with directions to collect on delivery the sum of $157.52 and to route the shipment from Chicago to Omaha through Watson Bros. Through error the plaintiff turned the shipment over to Watson Bros. at Chicago without directions to collect the $157.52 and the tires were turned over to defendants at Omaha, Nebraska, without collection; thereafter, plaintiff asked the defendants to either pay for the tires or return them, which they failed to do. On March 11, 1941, the plaintiff paid the Monarch Rubber Company the sum of $157.52 and took an assignment of the claim. The defendants were obligated to either return the goods or pay for them, section 186, 13 C. J. S. 384: "A consignee who receives a C. O. D. shipment is bound either to pay therefor or return the goods;" and section 186, 13 C. J. S. 386: "Where a carrier delivers goods to the consignee without collecting the C. O. D. charges, and is compelled to pay the consignor the amount it should have collected, the carrier

has a right of action against the consignee for the money so paid." It appearing from the plaintiff's second amended petition that the tires were received by the defendants, that they were not returned or paid for and that the plaintiff had paid the consignor, the petition states a good cause of action.

While the plaintiff's second amended petition contains allegations that anticipate defenses which the defendants may set up and the parties ask that we determine what defenses are available to the defendants, however, these matters are not properly before this court and therefore cannot be passed on.

REVERSED.

OSCAR ROHLFF ET AL., APPELLANTS, V. GERMAN OLD PEOPLE'S HOME ET AL., APPELLEES.
10 N. W. (2d) 686

FILED JULY 23, 1943. No. 31601.

1. **Trusts.** Where a charitable gift is contingent as to amount, the trust is not perverted by a compromise agreement by which the donee receives a definite amount of property impressed with the same charitable purpose in lieu of the contingent interest.
2. ———. A bequest in the form of a trust to a charitable corporation organized for the same charitable purpose as that shown in the grant is not technically a trust but is a gift to the corporation to accomplish the purposes of the corporation. Such a gift is equivalent to a bequest upon a charitable trust.
3. ———. A bequest will revert to the donor's heirs, even in the absence of an express provision therefor, if it appears from a construction of the whole instrument that the donor had no general charitable purpose in mind and contemplated only the carrying out of a particular purpose which is impossible of fulfilment.
4. ———. A charitable gift to "the Omaha Plattdeutsche Vereen to be used for the purposes of the Altenheim or Old People's Home which it proposes to establish, provided if before my demise there will be organized a separate corporation for the purpose of conducting said Old People's Home, the bequest and legacy so intended for purposes of an Old People's Home shall

pass directly to such corporation and not to the Omaha Plattdeutsche Vereen in trust" is a gift for a particular purpose and does not indicate a general charitable intent.

5. ———. It is encumbent upon a charitable corporation to carry out its purposes and those of the donor of a charitable gift to it within a reasonable time where no general charitable intent is found in the bequest, otherwise the gift will revert to the donor, if living, or to his heirs, if he be deceased.

6. ———. The doctrine of judicial *cy pres* is a principle of construction based on a judicial finding of the donor's intention as applied to new conditions.

7. ———. Ordinarily, the judicial *cy pres* doctrine can be applied only in a case where there is a general charitable purpose, since a court of equity will not be permitted by construction to defeat the particular purpose of the donor's narrow charitable trust intent.

8. **Limitation of Actions.** Where it does not appear on the face of a petition that the action is barred by the statute of limitations, a demurrer on that ground should be overruled.

9. **Parties.** In a suit by the heirs of a donor to recover the amount of a charitable gift on the theory that the purpose of the gift had failed, no general charitable intent being evidenced by the grant, the attorney general is a proper but not a necessary party to the litigation.

10. ———. The heirs of the donor of a gift for a particular charitable purpose may properly bring an action to recover the amount of the gift when facts are pleaded which would require a reverter to such heirs.

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

Clinton Brome, for appellants.

Peter & Dalton, contra.

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

CARTER, J.

Plaintiffs, as heirs of Henry Rohlff, deceased, commenced this action against the German Old People's Home, a charitable corporation, and its officers and trustees, to obtain a decree holding that a charitable trust created by the will of Henry Rohlff had failed through the failure of defendants

to carry out the purpose of the trust and for a distribution of the fund to the heirs of the said Henry Rohlff. The trial court sustained a demurrer to the petition and dismissed the action. Plaintiffs appeal.

The petition alleges that Henry Rohlff, the father of the plaintiffs, was during his lifetime a member of the Omaha Plattdeutsche Verein, an organization of persons of German descent organized for the promotion of the welfare of such persons. The members undertook to raise the funds necessary to construct and maintain a home for aged persons of German extraction, and, with the intention of assisting in the project, Henry Rohlff executed his last will and testament containing the following residuary clause: "All the rest, residue and remainder of my property, real, personal or mixed, of which I shall die seized or posesssed I give, devise and bequeath as follows, to wit: One-fifth to my daughter, Lillie Lierk, one-fifth to my son Oscar B. Rohlff, one-fifth to my daughter Clara Roos, one-fifth to my son, Erwin E. Rohlff, and one-fifth to the Omaha Plattdeutsche Vereen to be used for the purposes of the Altenheim or Old People's Home which it proposes to establish, provided if before my demise there will be organized a separate corporation for the purpose of conducting said Old People's Home, the bequest and legacy so intended for purposes of an Old People's Home shall pass directly to such corporation and not to the Omaha Plattdeutsche Vereen in trust."

Subsequent to the making of the will and on February 23, 1923, the German Old People's Home was incorporated and funds were solicited for the purpose of building an old people's home for aged persons of German descent.

Henry Rohlff died on November 19, 1925, and his will was duly filed for probate. The executors of the estate thereupon applied for an order declaring the bequest to the German Old People's Home to have lapsed by the failure of the trustees of the home to carry out the purposes of the corporation. The petition alleges that assurances were given that the home would be constructed and maintained, and in

order to close the estate an agreement was entered into on May 26, 1926, between the trustees of the corporation and the heirs of Henry Rohlff whereby certain property and cash in the amount of $10,000 were transferred to the trustees of the corporation to effect the intention of the testator and to release the executors and heirs of the Henry Rohlff estate from further liability by virtue of the provision of the will.

It is further alleged that the agreement was entered into by the executors and heirs of Henry Rohlff upon the representations of the trustees of the German Old People's Home that additional funds would be raised and the home constructed and maintained, and that since that date no funds have been raised, no home built and efforts abandoned for so doing. The petition alleges that the purpose of the trust has failed and that the funds have been dissipated and wrongfully diverted from the purposes for which the trust was created. It is further alleged that said trustees propose to divert the remainder of said funds to other and different purposes from that contemplated by the articles of incorporation of the home, the proviso of the will of Henry Rohlff, deceased, and the agreement entered into by the heirs and executors of the estate and the trustees of the corporation. The petition prays for injunctive relief, an accounting, a finding that the charitable trust has failed, the dissolution of the corporation, and for a distribution of said trust fund to the heirs of Henry Rohlff, deceased.

A consideration of the nature of the bequest made by the testator in his will is essential to a proper determination of the case. It will be noted that at the time the will was drawn the Omaha Plattdeutsche Verein was proposing to establish an old people's home for the benefit of the old people among its membership. One-fifth of testator's residuary estate was given to the Omaha Plattdeutsche Verein in trust for the purpose of aiding in the building and maintaining of the home. This provision was subject to a proviso to the effect that if a separate corporation would be organized for the purpose of conducting the home before tes-

tator's demise, then the bequest should pass directly to such corporation and not to the Omaha Plattdeutsche Verein in trust. The petition shows that such a corporation known as the German Old People's Home was organized before testator's death for the purpose of conducting such a home. Consequently the German Old People's Home, and not the Omaha Plattdeutsche Verein, became the designated object of testator's bounty.

The petition discloses that the German Old People's Home was a charitable corporation organized for the purpose of constructing and conducting a home for old people of German extraction. Testator's purpose in making the gift was clearly limited to the building and maintaining of a home for old people of German descent, which the Omaha Plattdeutsche Verein had planned to establish in Omaha.

There is a suggestion in the record that the rights of the parties were changed by the contract made subsequent to the death of Henry Rohlff. We do not think so. An agreement as to the amount of the present liability in lieu of the contingent interest of the German Old People's Home in the residuary estate of the deceased donor in no way affects the legal rights of the parties. "The trust itself is not and cannot be affected by any compromise as neither the court nor the litigants have power and authority to change its nature and purpose. Neither can the use be diverted by the beneficiaries for the time being through an agreement or arbitration. They cannot alien it, for the property is not theirs to sell. They cannot donate it, for the title is not in them. They cannot misapply it, for the use for which it was created cannot be changed. But, while this is true, the right to compromise a controversy in a proper case is undeniable. Where, therefore, a charitable gift is contingent on certain events, the trust is not perverted by a compromise agreement through which the trustees receive a certain definite amount of property impressed with the same trust in lieu of the contingent interest." Zollman, Charities, 431. See, also, *Johnston v. Osment,* 108 Tenn. 32, 65 S. W. 23.

It is urged by defendants that the will provides for an

absolute gift to the German Old People's Home. The plaintiffs contend that a charitable trust was created. The general rule is that a bequest in the form of a trust to a charitable corporation organized for the same charitable purpose as that shown in the purported trust is not technically a trust. It is a gift to the charitable corporation to accomplish the purposes of the corporation, but is equivalent to a bequest upon a charitable trust. The question then arises whether it is subject to conditions subsequent, as in the case of a charitable trust created for a specific as distinguished from a general charitable purpose.

The petition alleges that the German Old People's Home was a charitable corporation which was organized prior to the death of testator on November 19, 1925. Since that date the corporation has failed to establish a home for old people of German extraction, and the petition alleges that all hopes of doing so have been abandoned. It appears, therefore, that approximately 17 years have elapsed and the purpose of the gift and the object of the corporation have not been even partially consummated. Plaintiffs allege that this amounts to a failure of the purpose of the charitable use and that the bequest reverts to the donor or his heirs. We think the rule is that a bequest will revert to the donor's heirs at law, even in the absence of an express provision therefor, if it appears that the donor had no general charitable purpose in mind and contemplated only the carrying out of a particular purpose which is impossible of fulfilment. See cases cited in 38 A. L. R. 44.

It will be observed that the petition alleges that the gift failed at the outset. The possibility of a reverter in a case where the particular purpose failed some time after the creation of the charitable trust or gift involves intricate questions of law and fact with which we are not here concerned. In any event, the decisions appear to sustain reverters more readily where the charitable trust or gift failed initially as in the case at bar.

An authoritative text-writer states the rule as follows: "If a settlor gives property in trust to aid the orphans in a

particular school, and the court finds that he did not have in mind a general eleemosynary purpose, but rather had in view merely the assistance of orphan children in this particular institution, the abandonment or dissolution of the school may well cause a court to decree a return of the property to the donor or his successors on a resulting trust theory. Here there is implicit in his narrow charitable trust intent a desire that, if the execution of such limited purpose ever becomes impossible, the property shall not be retained by the trustees for their own benefit or for some allied purpose, but shall be returned to the donor or his successors." Bogert, Trusts and Trustees, 1279, sec. 418. It is evident to us upon an examination of plaintiffs' petition that the testator made the gift by his will for the purpose of assisting aged people of German extraction in the city of Omaha by aiding in building and maintaining a home for that purpose. The gift was for charity, with a narrow trust intent. The provision in the will indicates no general charitable intent. Under such circumstances the failure of the trust results in the fund reverting to the donor or his heirs. It may be urged, however, that technically no trust exists where the purported trustee is a charitable corporation organized for the same purpose for which the purported trust was created, and that the fund is in fact a gift to the corporation. Conceding this to be true, it must be borne in mind that such a gift to a charitable corporation is equivalent to a bequest upon a charitable trust, and will ordinarily be governed by the same rules. This court has held that when a gift is made by will to a municipal corporation to be used for a specific charitable purpose, the accomplishment of that purpose is a condition subsequent upon the failure of which the gift reverts. *Marble v. City of Tecumseh,* 103 Neb. 625, 173 N. W. 581; *Allebach v. City of Friend,* 118 Neb. 781, 226 N. W. 440. The same rule applies when the gift is to a charitable corporation and the trust relation is absent for the reason that the purpose of the charitable corporation coincides with the charitable purpose of the gift. As a result it is encumbent upon a chari-

table corporation to carry out its purposes and that of the donor within a reasonable time where no general charitable intent is found in the bequest, otherwise the gift will revert to the donor, if living, or to his heirs, if he be deceased. The petition alleges that the corporation has failed for a period of approximately 17 years to carry out the purposes of the bequest and that all attempts to so do have been abandoned. The applicable rule is: "Where no particular time is mentioned for the performance of a condition attached to a charitable grant, devise, or bequest, the law requires that it should be done in a reasonable time, to be determined from all the surrounding circumstances, and unreasonable delay may be considered as a refusal of the gift." 14 C. J. S. 497, sec. 44. See, also, *Allebach v. City of Friend, supra; American Church Missionary Society v. Griswold College,* 27 Misc. 42, 58 N. Y. Supp. 3. We think the rule is, also, that where a bequest is intended to establish and maintain a charitable institution and is insufficient of itself to accomplish that purpose, and is not supplemented from other sources, it will revert to the donor or his heirs where no general charitable intent can be shown. Restatement, Trusts, sec. 399g. The bequest having been made to accomplish a specific charitable purpose, we think the allegations in this respect are sufficient to state a cause of action. See *Hopkins v. Grimshaw,* 165 U. S. 342, 17 S. Ct. 401; *Bancroft v. Maine State Sanatorium Ass'n,* 119 Me. 56, 109 Atl. 585; *Bowden v. Brown,* 200 Mass. 269, 86 N. E. 351.

It is suggested in the briefs that the *cy pres* doctrine should be resorted to in order to avoid a failure of the charity. While it is true that the *cy pres* doctrine in so far as it comprehends the exercise of the prerogative power of the sovereign has not been adopted in this state, its application to charitable trusts and uses as a branch of the general equitable powers of a court of equity, independent of the prerogative of the sovereign power, has been adopted and applied. *Hobbs v. Board of Education,* 126 Neb. 416, 253 N. W. 627. The power of the court is ordinarily based on the existence of a charitable trust or an absolute gift to a

charitable organization. Bogert, Trusts and Trustees, 1291, sec. 432. The *cy pres* doctrine may be defined as meaning " * * * that when a definite function or duty is to be performed, and it cannot be done in exact conformity with the scheme of the person or persons who have provided for it, it must be performed with as close approximation to that scheme as reasonably practicable; * * * ." 14 C. J. S. 512, sec. 52. The doctrine of judicial *cy pres* is in reality a principle of construction based on a judicial finding of the donor's intention as applied to new conditions. But ordinarily the doctrine can only be properly applied in a case where there is a general charitable purpose, since a court of equity will not be permitted by construction to defeat the particular purpose of the donor's narrow charitable trust intent. *Gilman v. Burnett,* 116 Me. 382, 102 Atl. 108. The *cy pres* doctrine therefore has no application in the case at bar.

It is urged that the general demurrer to the petition was properly sustained for the reason that the petition shows the cause was barred by the statute of limitations. The donee of a charitable gift has a reasonable time in which to give effect to the donor's charitable purpose. What constitutes a reasonable time must be determined from all the circumstances affecting and surrounding the gift. *Allebach v. City of Friend, supra.* The statute of limitations does not commence to run until such reasonable time has elapsed. It does not affirmatively appear on the face of the petition whether such reasonable time has elapsed, it being a question to be determined from all the facts and circumstances with reference thereto. We are unable to say, therefore, from a reading of the petition that the statute of limitations bars the action. The demurrer on this ground should have been overruled.

It is urged that the attorney general is a necessary party to the action and that the demurrer on the ground that there was a defect in parties plaintiff was properly sustained. The case before us was filed to obtain a judicial determination that the charitable bequest had failed. We

think the rule was well stated in the English case of *Ware v. Cumberlege,* 20 Beav. 503, wherein the court said: "It is difficult to lay down any general rule, which shall be adapted to every case; there must be a great deal of discretion in these matters. The general principle which regulates them I take to be something of this description:—the attorney general represents all absent charities, and it is sufficient to have him here to represent all absent charities. But absent charities may obviously be of two different characters: they may either be under gifts to specified individual charities, or to charity generally. In case the gift is for charity generally, no one can represent it but the attorney general, and he must be here to represent such general charities. When there are specified individual charities, then the attorney general's presence is not universally necessary; but it is required by the court upon various occasions, as, for instance, where any rules are required for the regulation of the internal conduct of the charity itself, such as the establishment of a scheme and the like; there the attorney general is necessary for the purpose of aiding and assisting the court in directing and sanctioning the general system and principle that ought to govern charities of those descriptions. But there are other cases where there is no question as to the conduct or management of the charities, but only whether the charity is entitled to a particular legacy or not. In those cases, the attorney general is rather in the nature of a trustee for those charities, and the court prefers having before it the charities beneficially interested, for the purpose of putting their interests before the court in the light which they consider most favourable to them. In those cases I think it preferable that the charity itself should appear, rather than that the attorney general should represent it." See, also, Tyssen's Charitable Bequests (2d ed.) 218.

A text-writer in discussing this subject says: "In questions concerning a voluntary and private charitable society, the attorney general is not a necessary party, Anon., 3 Atk. 277. And where a legacy is given to the treasurer,

or other officer of some established charitable institution, to become part of its general funds, the attorney general need not be made a party, *Wellbeloved v. Jones*, 1 Sim. & S. 40. It is otherwise where a legacy to an established charity is upon trusts not corresponding with those upon which its general funds are held, *Corporation of the Sons of the Clergy v. Mose*, 9 Sim. 610; or the charity has no permannent trust, *Wellbeloved v. Jones*, 1 Sim. & S. 40; In b. McAuliffe, (1895) P. 290." Tyssen's Charitable Bequests (2d ed.) 219.

"There can, therefore, be no question but that the attorney general is in any case a proper party in a litigation involving a charitable trust, whether he appears as plaintiff or as defendant. * * * But though he is a proper party in any case, he is not for that reason in all cases a necessary party. 'The public interests must be directly and essentially, rather than remotely and accidentally, involved as to some distinct issue in order to prevent the cause from proceeding to a decision without the presence of the attorney general as a party.'" Zollmann, Charities, 427, 428. It would seem therefore that the attorney general is a necessary party to any action involving a gift or trust with a general charitable purpose, and conversely, if the gift or trust involved only a special charitable purpose, the donee is usually considered the necessary party and the attorney general is not. We conclude that in a suit by heirs of the donor of a gift for a particular charitable purpose, where no general charitable intent is shown, to recover the bequest because of the failure of the purpose, the attorney general is not a necessary party.

It is urged that the heirs of Henry Rohlff have no interest in the bequest and are not therefore proper parties plaintiff. The petition alleges the complete failure of a grant for a particular purpose. If such allegations be established by the evidence, a reverter to the heirs of the donor can be enforced, even in the absence of an express provision to that effect. The applicable rule is: "On the other hand, the fund will revert to the donor's estate or to his

heirs at law even in the absence of an express provision therefor, if it is clear that he had no general charitable purpose in mind but instead contemplated the carrying out of one or more particular purposes which are impossible of fulfillment, as where the beneficiaries have failed to accept it, or where the particular institution he intended to aid no longer exists. Accordingly, in gifts or bequests for specific rather than general charitable purposes, or in charitable bequests to corporations, there may be a possibility of reverter to the heirs of the donor." 14 C. J. S. 535, sec. 67. See, also, 2 Perry, Trusts and Trustees (7th ed.) sec. 726. It necessarily follows that if conditions exist which, if established, would require a reverter to the heirs of the donor, such heirs are proper persons to bring the action to have that question judicially determined. Under such circumstances, the heirs become the beneficiaries of a resulting trust and are entitled to enforce any rights they may have by a proper application to the courts.

We are of the opinion, therefore, that the petition states a cause of action and that the trial court erred in sustaining defendants' demurrer. The judgment is reversed and the cause remanded for further proceedings in accordance with this opinion.

REVERSED.

BERTHA E. GILLAN, APPELLEE, V. EQUITABLE LIFE ASSURANCE SOCIETY, APPELLANT.
10 N. W. (2d) 693

FILED JULY 23, 1943. No. 31397.

1. Insurance. In the absence of statute the chief distinction between a warranty and a representation in insurance law is that the former is the assertion by the assured of some fact, on the literal truth of which the validity of the policy depends, without regard to the materiality of such fact; while a representation is also the assertion by the assured of a fact, but the validity of the policy does not depend upon the literal truth of such assertion.

2. ———. By statute it is provided that all statements made by an insured shall, in the absence of fraud, be deemed representations and not warranties.
3. ———. In the absence of statute a warranty by an insured which is false and fraudulent renders the policy of insurance void at the option of the insurer when the falsity of the warranty comes to its attention.
4. ———. By statute no oral or written representation or warranty made in the negotiation for a contract or policy of insurance by the insured, or in his behalf, shall be deemed material or defeat or avoid the policy or prevent its attaching unless such misrepresentation or warranty deceived the company to its injury.
5. ———. Where a question in an application for insurance calls for an answer peculiarly within the knowledge of the applicant, an untrue answer relating to a matter material to the risk and relied upon by the insurer, if timely advantage is taken thereof by the insurer, will avoid the policy.
6. ———. In an action at law on an insurance policy an assured may not, by parol evidence, impeach his written statements in the application in those cases where the application has become a part of the contract, by stipulation and in accordance with statute, and a copy thereof attached to the policy at the time of delivery.
7. **Evidence.** The rule of law that parol evidence is admissible in an action at law on the policy of insurance to prove that answers in the application were not those of the insured, and that the insured made true answers which were incorrectly recorded without the knowledge of the insured is overruled.
8. **Trial.** Where a certain theory on any issue is relied upon by the parties at the trial as the proper one, it will be adhered to on appeal whether it is correct or not.

APPEAL from the district court for Fillmore county: STANLEY BARTOS, JUDGE. Opinion on motion for rehearing of case reported in 142 Neb. 497. *Former opinion vacated in part. Rehearing denied.*

Brown, Crossman, West, Barton & Fitch and *Sloans, Keenan & Corbitt,* for appellant.

Waring & Waring and *Perry, VanPelt & Marti, contra.*

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

YEAGER, J.

This action is now before this court on rehearing. An opinion previously adopted is reported in 142 Neb. 497, 6 N. W. (2d) 782. In the light of the view now taken a further statement appears to be required.

The action is at law and was commenced in the county court of Fillmore county, Nebraska. It was by Bertha E. Gillan, plaintiff, against the Equitable Life Assurance Society, defendant, and was to recover disability benefits of $50 a month for the months of March, April and May, 1941, on an insurance policy. The policy was a 20-payment life contract with a disability benefit provision for which an additional premium was paid. In the county court judgment was for the plaintiff from which the defendant appealed to the district court. There was a trial to a jury in the district court which resulted in a verdict and judgment for the plaintiff. From this judgment the defendant has brought the case to this court on appeal.

In her petition the plaintiff pleaded substantially that in January, 1929, the defendant issued to her a convertible term life insurance policy for $5,000, convertible within five years, in the consideration of quarterly premiums in the amount of $21.85 and that the policy contained a provision for the payment of $50 a month in case of total and permanent disability with a provision that premiums should be waived in case of such disability. The policy lapsed for nonpayment of premium in 1929 but was reinstated in the same year. In 1934 the policy was converted to a 20-payment life policy and the converted life policy contained the same provision for disability benefits as the original contract. She alleged that she became totally and permanently disabled in 1930 and that the defendant paid the monthly benefits from the date of disability to March, 1941, when it ceased to pay. She prayed for a judgment for $150 which was for monthly benefits for three months after the defendant ceased to make payments.

In an answer to the petition, it was alleged substantially that the plaintiff procured the policy by fraud; that the ap-

plication therefor which required that plaintiff submit to a medical examination and make response to questions to be propounded and which she was required to sign, contained false statements of fact material to the risk; that she was required to appear before a medical examiner of the defendant and state the name of every physician or practitioner whom she had consulted or who had treated her during the past five years and to answer the question: "Have you ever had or been treated for any disease or disturbance of the stomach, liver, intestines, kidney, bladder, or genito-urinary organs?" That the inquiries were made by the medical examiner and to the first inquiry she answered that she had consulted none. To the second she answered in the negative and the answers so made were entered on the application by the examiner and signed by plaintiff, which answers plaintiff agreed in the following words should become a part of the contract: "the foregoing answers shall also become part of any policy contract that may be issued on the strength thereof." That the answers were false in that prior to 1918 plaintiff had a disturbance or disease of the right kidney, which was anchored by a surgical operation, also that she had submitted to an operation for the removal of the right fallopian tube and an ovary, and further in May, 1928, she had submitted to an operation for the removal of her uterus.

It is further alleged that included in the quarterly premium of $21.85 was a premium of $2.90 for the disability feature of the policy.

It is further alleged that relying on the false representations of the plaintiff the defendant approved her application for disability benefits and paid her $50 a month from May 9, 1930, to March 9, 1941, or a total of $6,550, when it ceased to make payments for the reason that at that time it discovered the falsity of the statements made by plaintiff in her application.

By way of cross-petition the defendant sought to recover a judgment for $6,550, that being the amount claimed to have been paid because of the false and fraudulent representations of the plaintiff.

For reply the plaintiff denied that she made any false statements and alleged that she answered truthfully all questions propounded to her but that without her knowledge the untruthful answers were written in by the examiner and that she appended her signature without reading the answers and knew not their content.

Preliminary to a discussion of the issues thus presented by the pleadings it seems proper to state that this action in no wise affects the life insurance policy. By the specific terms of the policy it became incontestable as to life insurance after one year from the date of issue. Incontestability by likewise specific provision did not extend to the disability provision. If there was fraud it affects only the disability provision.

As pointed out in the former opinion the principal issue of fact arose on the traversed plea of the defendant that the insurer was induced by false material statements of plaintiff to enter into the contract and that otherwise the risk for disability benefits would not have been assumed. The opinion passes directly from this observation to the burden of proof and states as a rule of law the following: "On this issue the burden was on defendant to prove that the statements were untrue, that they were made knowingly with the fraudulent intent to mislead and deceive insurer, that they were material to the risks and that the insurer relied on them." As authority for the rule *Pollard v. Royal Highlanders,* 128 Neb. 790, 260 N. W. 399, is cited. This was premature if not definitely erroneous. If this rule is applicable it must be so because the statements were representations as distinguished from warranties. The statement in *Pollard v. Royal Highlanders, supra,* is the following: "The law is also well settled in this state that, in order to defeat a recovery because of representations made to the insurer alleged to be false, the insurer must prove that the representations are untrue, and were made by the assured knowingly with the fraudulent intent to mislead and deceive, that they were material to the risk, and were relied on by the defendant."

There can be no question that the court, in announcing this definitive principle, intended that it should apply to representations alone since in the paragraph immediately preceding, the distinction between representations and warranties is clearly drawn. It was there stated: "The chief distinction between a warranty and a representation in insurance law is that the former is the assertion by the assured of some fact, on the literal truth of which the validity of the policy depends, without regard to the materiality of such fact; while a representation is also the assertion by the assured of a fact, but the validity of the policy does not depend upon the literal truth of said assertion."

This rule then may not be applied unless and until it is ascertained that the answers claimed to have been made by plaintiff were representations and not warranties.

Whether they were representations or warranties, if made by plaintiff, must depend upon an analysis of the contract, and application thereto of the part of section 44-602, Comp. St. 1929, which distinguishes representations and warranties in insurance contracts where the application becomes a part of the contract, rather than the decisions of the court and texts wherein these terms are defined. There being no ambiguity, the legislative definition must be accepted. The provision referred to is the following: "No policy of life or endowment insurance, except policies of industrial insurance or where the premiums are payable monthly or oftener, shall be issued or delivered in this state unless it contains in substance the following provisions: * * * 3. A provision that the policy shall constitute the entire contract between the parties; but if the company desires to make the application a part of the contract, it may do so; Provided, a copy of such application shall be endorsed upon or attached to the policy when issued, and in such case, the policy shall contain a provision that the policy and the application therefor shall constitute the entire contract between the parties; and 4. A provision that all statements made by the insured shall, in the absence of fraud, be deemed representations and not warranties, and

that no such statement shall avoid the policy unless it is contained in a written application, and a copy of such application shall be endorsed upon or attached to the policy when issued."

That the answers here were false there can be no question. Were they also fraudulent, or in the words of the statute was there an "absence of fraud" in their making? If there was an absence of fraud then they were representations.

Fraud has been defined as follows:

"Fraud consists of some deceitful practice or wilful device, resorted to with intent to deprive another of his right, or in some manner to do him an injury. As distinguished from negligence, it is always positive, intentional." Black's Law Dictionary (3d ed.) 813.

"Fraud, in the sense of a court of equity, properly includes all acts, omissions, and concealments which involve a breach of legal or equitable duty, trust, or confidence justly reposed, and are injurious to another, or by which an undue and unconscientious advantage is taken of another." Black's Law Dictionary (3d ed.) 813.

"Deception practiced in order to induce another to part with property or surrender some legal right; a false representation made with an intention to deceive; may be committed by stating what is known to be false or by professing knowledge of the truth of a statement which is false, but in either case, the essential ingredient is a falsehood uttered with intent to deceive." Black's Law Dictionary (3d ed.) 44.

Within the meaning of these definitions the conclusion is inescapable that the answers given by plaintiff were fraudulent. It is well known that the issuance of policies with or without disability benefits is dependent upon the health of the applicant, and a wilful and intentional failure of an applicant to disclose in response to direct and clear inquiry that which the company had the right to know for the purpose of determining the true state of health of the applicant, and whether or not it would accept the risk, cannot be considered other than fraudulent.

This case is clearly distinguishable from *Modern Woodmen of America v. Wilson*, 76 Neb. 344, 107 N. W. 568. In that case this court permitted the verdict in favor of plaintiff, who had made untrue statements regarding matters bearing on his health in his application for insurance, to stand on the ground of high probability that the insured did not understand the questions propounded. The case of *Yonda v. Royal Neighbors of America*, 96 Neb. 730, 148 N. W. 926, is also distinguishable. There it was concluded that the insured when she made the statement as to her health, in the light of the evidence, only expressed an opinion and did not make a warranty, and with regard to attendance of a physician, because of the insignificance of treatment, could well have failed to respond correctly because of lapse of memory. The doctor had not been called for her but prescribed while in attendance upon another member of the family.

We do not think the case of *Pollard v. Royal Highlanders, supra*, supports the position of plaintiff here. There the insured made application for reinstatement of a policy of life insurance. She certified to her good health in the following words: "I have sustained no personal injury, nor been afflicted with any disease or sickness from which I am not now fully recovered." The court properly held that under the evidence there was a jury question as to the truthfulness of the certificate and the intention in making it. No such question was presented here. The untruthfulness of the answers attributed to plaintiff in this case appears without question.

Within the meaning of the statute (Comp. St. 1929, sec. 44-602) we are required to hold that the answers given by plaintiff were warranties and not representations. In the absence of statute, under the decisions of this court, we would still be required to hold that they were warranties. See *Aetna Ins. Co. v. Simmons*, 49 Neb. 811, 69 N. W. 125; *Aetna Life Ins Co. v. Rehlaender*, 68 Neb. 284, 94 N. W. 129; *Royal Neighbors of America v. Wallace*, 73 Neb. 409, 102 N. W. 1020; *Modern Woodmen of America v. Wilson*,

supra; Yonda v. Royal Neighbors of America, supra; Beeler v. Supreme Tribe of Ben Hur, 106 Neb. 853, 184 N. W. 917; *Morrissey v. Travelers Protective Ass'n,* 122 Neb. 329, 240 N. W. 307; *Pollard v. Royal Highlanders, supra.*

The next matter for determination is that of whether or not the warranty avoids the right of plaintiff to recover the benefits provided in the policy.

In the absence of statute the rule has generally been declared to be that a warranty by an insured which is false and fraudulent renders the policy of insurance void at the option of the insurer when the falsity of the warranty comes to its attention. *Spaulding v. Mutual Life Ins. Co.,* 96 Vt. 67, 117 Atl. 376; *Minsker v. John Hancock Mutual Life Ins. Co.,* 254 N. Y. 333, 173 N. E. 4; *Axelroad v. Metropolitan Life Ins. Co.,* 267 N. Y. 437, 196 N. E. 388; *Greber v. Equitable Life Assurance Society,* 43 Ariz. 1, 28 Pac. (2d) 817; *Metropolitan Life Ins. Co. v. Alterovitz,* 214 Ind. 186, 14 N. E. (2d) 570; *Mutual Life Ins. Co. v. Hilton-Green,* 241 U. S. 613, 36 S. Ct. 676.

In this state by statute (Comp. St. 1929, sec. 44-322) no misrepresentation or warranty made in the negotiation for a policy or contract of insurance by an insured may operate to avoid the policy unless such misrepresentation deceived the company to its injury. The section is the following:

"No oral or written misrepresentation or warranty made in the negotiation for a contract or policy of insurance by the insured, or in his behalf, shall be deemed material or defeat or avoid the policy or prevent its attaching unless such misrepresentation or warranty deceived the company to its injury. The breach of a warranty or condition in any contract or policy of insurance shall not avoid the policy nor avail the insurer to avoid liability unless such breach shall exist at the time of the loss and contribute to the loss, anything in the policy or contract of insurance to the contrary notwithstanding."

It will be noted that the section contains two sentences. The first deals with the effect of making misrepresenta-

tions and warranties and the second, breach after issuance of policy. This is important only for the purpose of pointing out that the argument of plaintiff that the defendant has no ground for complaint since plaintiff did not become disabled in consequence of any ailment suffered before issuance of the policy, and in further consequence the defendant suffered no loss therefrom, is beside any point in this case. The loss contemplated by the second sentence pertains to loss occasioned by breach. We are here concerned only with deception causing injury as the result of misrepresentation or warranty in the procurement of issuance of the policy as is apparent from the plain wording of the statute. See *Muhlbach v. Illinois Bankers Life Ass'n,* 108 Neb. 146, 187 N. W. 787.

Was the defendant injured within the meaning of the law by the answers in the application? That the condition and state of health of plaintiff at the time of her application was important to the risk of life insurance and disability benefits cannot well be denied. Her response to specific inquiries in relation to her health or to matters from which the state of her health might be ascertained were no less material. Her position required of her honesty and good faith, at least in those matters which were peculiarly within her own knowledge and beyond the knowledge of the defendant, in answering the questions propounded.

In *Muhlbach v. Illinois Bankers Life Ass'n, supra,* it is stated: "Where the question in the application calls for an answer peculiarly within the knowledge of the applicant, an untrue answer relating to a matter material to the risk and relied upon by the insurer will avoid the policy. In *Seal v. Farmers & Merchants Ins. Co.,* 59 Neb. 253, the application was for fire insurance, in which the insured falsely stated there were no liens upon the premises, and it was held the false statement avoided the policy. In *Swanback v. Sovereign Camp, W. O. W.,* 103 Neb. 34, the insured falsely stated that he had never been rejected by any other insurance company in applying for life insurance, and it was held that the false statement avoided the policy.

It will be observed that the questions asked in these cases called for information peculiarly within the personal knowledge of the applicant." In the same opinion, referring to section 44-322, then section 3187, Rev. St. 1913, the court said: "It seems plain that the question now before us arises under the first clause of the section above quoted. The statute was never intended to deprive an insurance company of the defense of fraud in the negotiations for the contract of insurance. On the contrary, by its very terms it is said that the misrepresentations shall not avoid the policy unless the misrepresentations deceived the company to its injury. If, through the untrue statement of the insured, the defendant was induced to issue the policy, and thus become obligated under its contract, when it would not have done so had a truthful answer been made, it would seem clear that the defendant was deceived to its injury, and the statute above quoted would not apply." See, also, *Goodell v. Union Automobile Ins. Co.*, 111 Neb. 228, 196 N. W. 112; *Morrissey v. Travelers Protective Ass'n, supra; Scott v. New England Mutual Life Ins. Co.*, 126 Neb. 514, 253 N. W. 685.

In the light of the authorities and under the facts of this case the conclusion is inescapable that the defendant was injured by reason of the false answers contained in the application of plaintiff for insurance.

There remains a further important question for consideration and determination. Plaintiff by reply has alleged that she gave truthful answers to the questions but that the medical examiner recorded the false ones which appear in the application, without her knowledge and that she signed her name without reading and that she was without knowledge of the falsity of the answers. She so testified. The medical examiner testified that he recorded the answers as given by her.

The defendant contends substantially, assuming that the answers were not those given by plaintiff, that in an action at law on the policy she may not be permitted by parol evidence to vary, contradict or impeach the terms of her writ-

ten contract. As has been pointed out, agreeable to the statute and stipulation in the policy, the application became a part of the contract, and of course a copy of the application was attached to the policy delivered to plaintiff.

In *Greber v. Equitable Life Assurance Society, supra,* the court, in denying the right of the insured to assert lack of knowledge of the contents of an answer in an application which became a part of the contract, said: "In addition, an exact copy of the answers he had made in his application * * * was * * * attached to the policy before it was delivered, and a reading of it when he received it would have disclosed to him that he had answered the physician incorrectly relative to a previous rejection and have led, if it had been done inadvertently, to a correction of it." In the same opinion the court quoted with approval the following from *Minsker v. John Hancock Mutual Life Ins. Co., supra*: "When an insured receives a policy, it is his duty to read it or have it read, and if an application incorporated therein does not contain correct answers to the questions asked by the medical examiner it is his duty to have it corrected."

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, a case originating in Nebraska, declared that the rule with regard to impeachment of the contents of ordinary contracts was equally applicable to insurance contracts. In relation to this subject in its application to ordinary as well as insurance contracts the court in the opinion quoted with approval from Starkie (9th Am. ed.) 587: "It is likewise a general and most inflexible rule, that wherever written instruments are appointed, either by the requirement of law, or by the compact of the parties, to be the repositories and memorials of truth, any other evidence is excluded from being used, either as a substitute for such instruments or to contradict or alter them. This is a matter both of principle and policy; of principle, because such instruments are in their nature and origin entitled to a much higher degree of credit than parol evi-

dence; of policy, because it would be attended with great mischief if those instruments upon which men's rights depended were liable to be impeached by loose collateral evidence."

In *Metropolitan Life Ins. Co. v. Alterovitz, supra,* a case in point of fact very similar to the one at bar, the court, after reviewing many decisions, quoted and adopted the following rule from *Sun Fire Office v. Wich,* 6 Colo. App. 103, 39 Pac. 587: "There is no reason, in contracts of insurance, that a party should be, by law, relieved from the duty of exercising the same ordinary care and prudence that is required in every other business transaction. It is the duty of every man to read what he signs. His failure to do so will or should not relieve him, or allow him to avoid the contract." In adopting the rule the court said: "This seems to us to be a sound statement of law and especially in view of the fact that in the instant case the appellee under his own signature stated that the answers to the questions in the application were correctly written as given by the applicant and were full, true and complete. It is at once apparent that in an ordinary contract the appellee would be bound by such a statement and we see no sound reason why the same rule should not apply in the instant case although it is a contract of insurance."

The United States supreme court in *Lumber Underwriters v. Rife,* 237 U. S. 605, 35 S. Ct. 717, said in regard to contracts of insurance: "Of course if the insured can prove that he made a different contract from that expressed in the writing he may have it reformed in equity. What he cannot do is to take a policy without reading it and then when he comes to sue at law upon the instrument ask to have it enforced otherwise than according to its terms. The court is not at liberty to introduce a short cut to reformation by letting a jury strike out a clause."

Other cases generally supporting the rule contended for by the defendant are, *Axelroad v. Metropolitan Life Ins. Co.,* 267 N. Y. 437, 196 N. E. 388; *Layton v. New York Life Ins. Co.,* 55 Cal. App. 202, 202 Pac. 958; *Modern Woodmen of America v. Angle,* 127 Mo. App. 94, 104 S. W. 297.

After a careful consideration of the authorities we conclude that there is no sufficient reason in contracts of insurance why a party should be relieved from the duty of exercising the ordinary care and prudence that would be exacted in relation to other contracts.

The proper rule of law is that in an action at law on an insurance policy an assured may not, by parol evidence, impeach the written statements of the assured in the application in those cases where the application has become a part of the contract by stipulation and in accordance with statute and a copy thereof attached to the policy at the time of delivery.

We are not unmindful of the fact that in the early case of *German Ins. Co. v. Frederick,* 57 Neb. 538, 77 N. W. 1106, this court adopted the rule that parol evidence was admissible to prove that answers were not those of the insured, and that the insured made true answers which were incorrectly recorded without the knowledge of the insured. This rule has been followed as late as 1939 in the case of *Farmers & Bankers Life Ins. Co. v. Mathers,* 135 Neb. 757, 284 N. W. 286, but having in mind the safeguards with regard to misrepresentations and warranties contained in section 44-322, Comp. St. 1929, and a due appreciation of the integrity of written contracts in general and the integrity which should obtain in insurance contracts, the rule contained in those decisions is overruled.

An examination of the record reveals, however, that the evidence of plaintiff to the effect that she gave the correct answers to defendant's medical examiner and that he inserted incorrect answers in the application was not objected to. Neither was objection made to the statement of plaintiff that she signed the application without knowledge of the incorrect answers contained therein. The defendant, not having objected at the trial, is in no position to object to the receiving of such evidence at this stage of the proceedings. It is evident that the case was tried in the district court on the theory that plaintiff could properly tender parol evidence to vary the terms of the application

signed by her. The trial court adopted this theory of the parties in his instructions to the jury. In doing this, no error was committed. We have many times held that, where a certain theory on any issue is relied upon by the parties at the trial as the proper one, it will be adhered to on appeal whether it is correct or not. *Behle v. Loup River Public Power District,* 138 Neb. 566, 293 N. W. 413; *United States Tire Dealers Mutual Corporation v. Laune,* 139 Neb. 26, 296 N. W. 333; *Bohmont v. Moore,* 141 Neb. 91, 2 N. W. (2d) 599. The judgment of the district court must under these circumstances be affirmed.

The former opinion in this case is vacated and set aside in so far as it conflicts with this opinion. The motion for a rehearing is denied for the reasons herein stated.

REHEARING DENIED.

STATE OF NEBRASKA, APPELLEE, V. PLATTE VALLEY PUBLIC POWER AND IRRIGATION DISTRICT, APPELLANT.

10 N. W. (2d) 631

FILED JULY 23, 1943. No. 31614.

1. **Public Lands.** The legislature is without power to make a grant in fee of, or an easement over, public school lands without compensation for the damage for such taking or use.
2. ———. The state as trustee of public school lands is without power through legislative means or otherwise to bestow a special benefit upon any person or corporation, public or private, at the expense of the *cestui que trust,* the public school system of the state.
3. **States.** The general rule that the doctrine of laches cannot be applied against public rights is applicable in this state in cases where the action deals with a public right, such as the public school lands and funds, which the state as trustee is bound by contract with the United States government and the Constitution of the state to protect and hold inviolate.
4. **Action.** Laches is not based on mere passage of time as is the statute of limitations; it is founded upon inequity resulting from changed conditions of the property or the parties.

5. **Damages.** Where interest is claimed as damages, and not by reason of any contract therefor, it may not be allowed if the delay in the payment of the principal debt is the result of the neglect of the creditor to demand and enforce payment, if to require payment would result in inequity and injustice.

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

Beeler, Crosby & Baskins, for appellant.

Walter R. Johnson, Attorney General, and *Robert A. Nelson, contra.*

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

YEAGER, J.

This is an action instituted in the district court for Lincoln county, Nebraska, by the state of Nebraska, plaintiff and appellee, against the Platte Valley Public Power and Irrigation District, a public corporation, defendant and appellant. The action grew out of the taking by condemnation of section 16, township 13 north, range 33, west of the 6th P. M. in Lincoln county, Nebraska, without compensating the state of Nebraska as trustee of the public school lands and funds for the interest it had in said land at the time of the condemnation.

Prior to December 1, 1908, the section of land was a part of the public school lands first of the organized territory of Nebraska and thereafter of the state of Nebraska. The history of its dedication to this purpose is fully set forth in *State v. Central Nebraska Public Power and Irrigation District, ante,* p. 153, 8 N. W. (2d) 841, and therefore it becomes unnecessary to repeat it here. On December 1, 1908, the legally empowered agency of the trustee of the public school lands sold this section of land under contract to one P. E. Gunderson for $8,320. Of the purchase price $832 was paid. By the terms of the contract the balance became due 20 years after the date of the contract. The contract bore interest at the rate of 5 per cent. per annum. On Sep-

tember 11, 1928, the contract was extended for a period of 10 years from December 1, 1928. The interest was duly paid on the contract up to and including the year 1934.

The appellant here is a public power and irrigation district organized agreeable to the provisions of Senate File No. 310 of the 1933 session of the Nebraska legislature, as amended. It now appears as section 70-707, Comp. St. Supp. 1941. Among the powers granted to such corporations is that of eminent domain. It purports also to grant the use and occupation of state and other public lands without compensation.

Under the grant of power of eminent domain the appellant, on September 7, 1934, instituted condemnation proceeding and the land in question was condemned and taken. In the condemnation proceeding the value of the land was fixed at $27,200. The value of the interest of Gunderson was fixed at $19,712, or the difference between the entire valuation and the amount still unpaid on his contract of purchase which was $7,488. Gunderson was paid but the balance due on the contract to the state (trustee) has never been paid.

The action here was for $7,488 and interest at 7 per cent. per annum from September 24, 1934.

A jury was waived and the case tried to the court with the result that judgment was rendered in favor of plaintiff and against defendant for $7,488 and interest thereon in the amount of $3,687.84, or a total of $11,175.84. Interest was computed at the rate of 6 per cent. per annum from September 24, 1934. From this judgment the defendant has appealed.

The theory on which the appellant failed and refused to pay the balance due on the contract was that it had the right to take and use state or other public lands in the construction and operation of its works without compensation. On this theory the appellant contends that judgment was erroneously rendered against it.

In *State v. Central Nebraska Public Power and Irrigation District, supra,* we held that the legislature is without

power to make a grant in fee of, or an easement over, public school lands without compensation for the damage for such taking or use.

Also we held that the state as trustee is without power through legislative means or otherwise to bestow a special benefit upon any person or corporation, public or private, at the expense of the *cestui que trust,* the public school system of the state.

On reexamination of the question we find no reason for departure from our former holding. The appellant may not be permitted to claim this special benefit at the expense of the public school system of the state of Nebraska.

Further assignment of error is that appellee was guilty of laches by failure to take timely action to institute and to prosecute the demand for principal and interest.

The action was instituted September 3, 1937, and the issues finally joined by reply on April 1, 1939. Trial was started on October 6, 1942, and judgment was rendered December 12, 1942.

In the condemnation action Charles W. Bryan, then governor of the state of Nebraska, Paul F. Good, attorney general, and Harry P. Conklin, commissioner of public lands and buildings, were served with notice, but appellee failed to appear therein and no appeal was taken.

The matter of service of notice on the duly constituted officials of the state has no significance beyond showing knowledge, actual or constructive, of the condemnation proceeding and the results thereof, since this proceeding is not grounded on irregularity of that proceeding, but on failure of appellant here to perform in accordance with the finding made in the condemnation proceeding.

The general rule is that the doctrine of laches cannot be applied against public rights. In other words laches is not available against the government or state, in a suit by it to enforce a public right, or to protect a public interest. The laches of the officers or agents of the state will not be imputed to the state. *People v. Commercial Union Fire Ins. Co.,* 322 Ill. 326, 153 N. E. 488; *United States v. Commis-*

sioner of Banks, 254 Mass. 173, 149 N. E. 883; *Lancaster v. Gray County,* 127 S. W. (2d) (Tex. Civ. App.) 385; *City of Paducah v. Gillispie,* 273 Ky. 101, 115 S. W. (2d) 574.

Certain of the jurisdictions, notably Arizona, Mississippi and Pennsylvania, hold to the contrary. *Blackburn v. United States,* 5 Ariz. 162, 48 Pac. 904; *Commonwealth v. Union Traction Co.,* 327 Pa. St. 497, 194 Atl. 661; *City of Jackson v. Alabama & V. R. Co.,* 172 Miss. 528, 160 So. 602.

This jurisdiction appears never to have announced its position in this regard. It appears, however, in light of reason, that the general rule should be adhered to in those cases where the action deals with a public right, such as the public school lands and funds, which the state as trustee is bound by contract with the United States government and the Constitution of the state to protect and hold inviolate. *State v. Central Nebraska Public Power and Irrigation District, supra.*

The decision here on this point, however, would still be in favor of appellee if it were grounded on the rule announced by the decisions of this jurisdiction with regard to laches in application to private parties.

The rule as most recently announced by this court is as follows: "Laches is not based on the mere passage of time as is a statute of limitations; it is founded upon inequity resulting from changed conditions of the property or the parties." *Neisius v. Henry,* 142 Neb. 29, 5 N. W. (2d) 291. See, also, *Schurman v. Pegau,* 136 Neb. 628, 286 N. W. 921.

There is nothing here to indicate a changed condition by which inequity would be imposed upon or exacted of the appellant by requiring it to pay that which it has illegally withheld since 1934. It has had the use and occupancy of the land as well as the use of the money properly belonging to the public school fund of the state.

Appellant further contends that even if it be required to pay the principal of the claim, that by reason of the delay of appellee in seeking to recover, it should be relieved from the payment of interest. The rule for which appellant contends in this regard is stated in 33 C. J. 190, and is as fol-

lows: "Where interest is claimed as damages, and not by reason of any contract therefor, it will not be allowed if the delay in the payment of the principal debt is the result of the neglect of the creditor to demand and enforce such payment."

Analysis of the decisions supporting the rule discloses that this is not a positive but only a permissive rule to be exercised in the sound discretion of the court in the light of the facts and circumstances disclosed. If under the particular circumstances it would be inequitable because of lapse of time and a failure of diligence to pursue the claim, then interest ought not to be allowed. *Sanborn v. United States*, 135 U. S. 271, 10 S. Ct. 812; *Redfield v. Bartels*, 139 U. S. 694, 11 S. Ct. 683.

Under the facts disclosed by this record we are unable to say that the trial court abused its discretion in the matter of allowing interest.

This permissive rule has its exception. The exception applies where the action is on contract which fixes the rate of interest. In such situation laches will not defeat a recovery of interest. *Redfield v. Ystalyfera Iron Co.*, 110 U. S. 174, 3 S. Ct. 570.

The action here is in damages but the measure is an amount, with interest, found to be due by a court of condemnation on a contract in form and substance required by statute, which amount the appellant has failed to pay. Essentially appellee seeks but to be made whole on its contract of sale of this real estate. We conclude therefore that since the action is for the purpose of making the public school funds whole because of a failure of the contract brought about by an illegal act of the appellant the action is contractual within the meaning of the exception.

The final contention of appellant to which we give attention is that the computation of interest by the trial court was incorrect. The court computed interest at the rate of 6 per cent. per annum from September, 1934, to December, 1942. If interest is to be computed in accordance with statute with regard to contracts of public school lands and

delinquent interest on the purchase price of such lands then the computation is incorrect, but favorable rather than unfavorable to the appellant.

Section 72-206, Comp. St. 1929, provides that unpaid balances on contracts for the sale of educational lands made after April 5, 1907, shall draw interest at 5 per cent. per annum payable annually on January 1 of each year; also that the interest thereon shall draw interest at 7 per cent. per annum. On this basis interest at 5 per cent. from September 24, 1934, to December 12, 1942, would be $3,076.32, which is interest for 8 years, 2 months and 18 days; interest on interest from January 1, 1935, to December 12, 1942, at 7 per cent. would be about $932.78; these two amounts added to $7,488, the balance due under the contract, would amount to $11,497.10.

It can hardly be said that the appellee was not entitled to the benefit of its contract which was drawn in conformity with statute enacted for protection of the public school fund and the guidance of the trustee and its administrative officers.

The error with respect to the judgment is favorable to the appellant, hence, since no cross-appeal was taken, it may not now be disturbed.

The judgment of the district court is affirmed.

AFFIRMED.

CHARLES H. WHOMBLE V. STATE OF NEBRASKA.

10 N. W. (2d) 627

FILED JULY 23, 1943. No. 31567.

1. **Criminal Law.** The rule is that to sustain a conviction for a crime the *corpus delicti* must be proved beyond a reasonable doubt.
2. ———. The *corpus delicti* is the body or substance of the crime, the fact that a crime has been committed, without regard to the identity of the person committing it.
3. ———. Extrajudicial admissions against interest by one charged

with a crime must be received and considered with caution and are not sufficient of themselves to support a conviction.

4. **Rape.** In a prosecution for statutory rape, the evidence must show beyond a reasonable doubt that defendant committed the act charged and that he did so under such circumstances that every element of the offense existed. Where the evidence fails to meet this test it is insufficient to support a conviction.
5. **Criminal Law.** This court recognizes the rule that the jury are the judges of questions of fact but does not hesitate to set aside a verdict when the evidence is clearly insufficient under applicable law to sustain it.

ERROR to the district court for Chase county: CHARLES E. ELDRED, JUDGE. *Reversed and dismissed.*

G. B. Hastings, for plaintiff in error.

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

Heard before SIMMONS, C. J., PAINE, YEAGER, CHAPPELL and WENKE, JJ., and TEWELL and LIGHTNER, District Judges.

CHAPPELL, J.

Plaintiff in error, Charles H. Whomble, hereinafter called defendant, was charged by information filed in the district court for Chase county, Nebraska, with statutory rape under section 28-408, Comp. St. 1929. The crime was alleged to have been committed on or about June 10, 1939, upon a girl then 13 years of age. The information was not filed until June 27, 1941, more than two years after the alleged offense.

Defendant was tried to a jury in November, 1941, and a disagreement resulted. Upon a second trial in October, 1942, the jury found him guilty as charged. His motion for a new trial was overruled, whereupon the trial court sentenced defendant to serve a term of eight years in the Nebraska state penitentiary. Defendant prosecutes error to this court, contending, among other assignments, that the verdict is contrary to law, and not sustained by the evi-

dence. Since these errors are fatal to the verdict and sentence we shall not discuss the others.

An examination of the record discloses that the girl involved would have been 17 years of age within a few days of the time of the trial. She did not testify. No complaint was ever made by her of any misconduct by defendant.

Her brother, 14 years old at the time of the trial, testified that on or about June 26, 1939, between 10:30 and 11:00 a. m. he came through an unlocked door into defendant's hatchery, where the sister of witness was employed, and saw her and defendant on a bed facing each other. He was not sure what they were doing. He did not disclose any other relative act or circumstance. He testified that Leonard Bonner, a friend, who worked there, walked through the place at the same time, just ahead of him, but he said nothing to Leonard Bonner at the time or later about seeing defendant and the sister of witness. This witness never said anything about it to his sisters, mother, or any other person. He frankly admitted on cross-examination that after the preliminary hearing he told his mother and another sister that this testimony was false; that he had never seen defendant and his sister together as he had previously testified. Leonard Bonner testified that he was not employed at the hatchery or present at the time, as related by the brother, because he was driving a tractor on a farm out in the country.

The chief of police testified that he had seen defendant with the girl on the street, at a show, and at the swimming pool; also that in the fall of 1939 he had talked with defendant, who said that he thought they should help them instead of hindering them, as defendant loved the girl very much and wanted to be married. The deputy sheriff testified that in October, 1939, defendant asked him if he did not think it would be better for defendant and the girl to be married than go on in the way they were.

The evidence discloses that defendant continued with his business affairs in Imperial, Nebraska, until August, 1940, when he left the city. Thereafter the authorities had in

their possession letters alleged to have been written by defendant indicating his whereabouts. His father and mother lived at Wray, Colorado. In June, 1941, defendant was arrested at Fort Morgan, Colorado, not far from Imperial, Nebraska. He thereupon immediately waived extradition and willingly returned for trial. These circumstances give slight credence to the contentions of the state concerning flight of defendant after the alleged commission of the crime. See *Mathews v. State,* 19 Neb. 330, 27 N. W. 234.

The evidence heretofore recited is in substance all the evidence appearing in the record upon which defendant was convicted of this serious offense, except certain unsigned and undated letters identified by handwriting experts as having been written by defendant. We will not detail the manner of the procurement of these letters or recite their irrational and inexplicable contents in this opinion. Suffice it to say, that they contain ardent professions of love, respect, and regard for the girl's welfare, and a desire to make her his wife, in addition to admissions of misconduct with the girl without revealing either times or places, when or where committed. Defendant took the witness-stand and under oath made categorical denial of the charges against him. He was not cross-examined in any manner by the prosecution.

This court, and many others, have approved the words of Sir Matthew Hale, appearing in *Mathews v. State, supra*: "It is true that rape is a most detestable crime and therefore ought severely and impartially to be punished * * * but it must be remembered that it is an accusation easily to be made and hard to be proved, and harder to be defended by the party accused, though never so innocent," and that we should "be more cautious upon trials of offenses of this nature." See 52 C. J. 1087. In *Prichard v. State,* 135 Neb. 522, 282 N. W. 529, the court clothed this old truth with new words when it said, "Public sentiment seems inclined to believe a man guilty of any illicit sexual offense with which he may be charged, and it seems to matter little what his previous reputation has been. This natural

tendency may be due to the fact that, where a female child is involved and a man is charged with unlawful interference with her, by necessity, it casts odium upon the child, as well as charging the defendant with a felony."

In a prosecution for statutory rape the law is that to sustain a conviction the evidence must show beyond a reasonable doubt that defendant committed the act charged, and that he did so under such circumstances that every element of the offense existed. Where the evidence fails to meet this test it is insufficient to support a conviction. See 52 C. J. 1087; 23 C. J. S. 187, sec. 918.

"The *corpus delicti* is the body or substance of the crime, the fact that a crime has been committed without regard to the identity of the person committing it." *Andersen v. State,* 141 Neb. 306, 3 N. W. (2d) 447. See, also, 23 C. J. S. 181, sec. 916. As applied to the case at bar, it means the actual commission by some one of the particular crime charged, statutory rape, upon the girl involved. We have held that the *corpus delicti* cannot be proved by the unsupported extrajudicial confession of defendant, but that confessions or admissions may be considered in connection with other competent evidence, if any appears, to establish the *corpus delicti.* See *Limmerick v. State,* 120 Neb. 558, 234 N. W. 98. The rule is that to sustain a conviction for a crime, the *corpus delicti* must be proved beyond a reasonable doubt. See *Dreessen v. State,* 38 Neb. 375, 56 N. W. 1024; *McCue v. State,* 112 Neb. 9, 198 N. W. 163; *Andersen v. State, supra;* 52 C. J. 1089; 23 C. J. S. 186, sec. 917.

Except for the letters alleged to have been written by defendant, there is no competent evidence, either direct or circumstantial, that any crime was ever committed by any one upon the girl involved. See *Fitzgerald v. State,* 78 Neb. 1, 110 N. W. 676. If the letters are extrajudicial confessions, as asserted by brief and in argument, they alone are insufficient to establish guilt.

"The uniform doctrine of the American courts is that a conviction for felony will not be sustained when the only evidence of guilt is the extrajudicial confession of the de-

fendant that a crime has been committed. His confession may be sufficient to prove his own connection with the alleged criminal act, but there must in all cases be proof *aliunde* of the essential facts constituting the crime." *Sullivan v. State,* 58 Neb. 796, 79 N. W. 721. See, also, *Andersen v. State, supra; Blacker v. State,* 74 Neb. 671, 105 N. W. 302; 23 C. J. S. 182, sec. 916. The general rule in our own state, supported by an almost unbroken stream of decisions from other jurisdictions, is that a naked extrajudicial confession of guilt by one accused of crime, uncorroborated by any other competent evidence, is not sufficient to warrant or sustain a conviction. A long and exhaustive note citing many cases including Nebraska, portraying the varied applications of this rule and giving cogent and compelling reasons therefor, will be found in 127 A. L. R. 1120-1142, inclusive. For its particular application in sex cases, see 40 A. L. R. 458-473, inclusive. Many courts in pointing out the danger of accepting and acting upon the confession of the accused without other evidence that the crime in question has been committed, frequently refer to the numerous known cases in which false confessions of guilt have been given. The danger of the use of extrajudicial confessions, unsupported, is that they may be the sequel of a diseased, disordered, or confused mind, based upon dangers, imaginary or real, or upon psychopathic aberration.

Counsel in brief and argument assume that defendant's alleged letters are extrajudicial confessions, but they are at most merely admissions by defendant of misconduct with the girl, written many months after the alleged offense. "The difference between a confession and an admission is that the former * * * is an acknowledgment of guilt while the latter is but an acknowledgment of some fact or circumstance in itself insufficient to constitute an acknowledgment of guilt, and tending only toward the proof of the ultimate fact of guilt." 22 C. J. S. 1422, sec. 816a. In the eyes of the law, extrajudicial admissions as evidence do not rise to the dignity and force of extrajudicial confessions. *A fortiori,* extrajudicial admissions against interest by one

charged with crime must be received and considered with caution and are not sufficient of themselves to support a conviction. See 22 C. J. S. 1248, sec. 730; *Limmerick v. State, supra.*

This court recognizes the rule that the jury are the judges of questions of fact, but does not hesitate to set aside a verdict when the evidence is clearly insufficient under applicable law to sustain it in a criminal case involving questions of life or liberty. See *Larson v. State,* 110 Neb. 620, 194 N. W. 684; *Prichard v. State, supra.*

An examination of the record and applicable law convinces this court that the evidence in the case at bar is wholly insufficient to support the judgment of conviction. The judgment of the district court is, therefore, reversed and the action dismissed.

REVERSED AND DISMISSED.

SECURITY MUTUAL LIFE INSURANCE COMPANY, APPELLANT, V. BUD GILLIAM, APPELLEE.

10 N. W. (2d) 670

FILED JULY 23, 1943. No. 31625.

1. **Statutes.** The statute (Comp. St. 1929, sec. 21-1302) is mandatory. The giving of the appeal bond is essential to confer jurisdiction of the cause upon the appellate tribunal.
2. **Appeal.** Since the furnishing of an appeal undertaking is a condition precedent to the jurisdiction of the appellate court, the objection may be raised at any time in any appropriate manner.
3. ———. A case removed to the district court from a judgment of a justice of the peace is rightly dismissed if the appellant, by reason of his own laches, failed to file an appeal bond within the time limited by statute for that purpose.

APPEAL from the district court for Custer county: ELDRIDGE G. REED, JUDGE. *Affirmed.*

Edwin F. Myers, for appellant.

Ross G. Moore, contra.

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

CHAPPELL, J.

A bill of particulars was filed by plaintiff in a justice of the peace court for Custer county, Nebraska, seeking recovery from defendant upon a promissory note allegedly given for necessaries, the premium on a life insurance policy, of which his mother was beneficiary. Defendant answered that he was a minor, 20 years of age, and that the note was not given for necessaries. Plaintiff filed a motion for judgment on the pleadings, relying upon section 44-804, Comp. St. Supp. 1939. After hearing upon the bill of particulars, answer, motion, and evidence, the justice court found for defendant and dismissed the case. Plaintiff filed a transcript from the justice court on appeal to the district court in due time, but upon examination of the transcript filed in this court we discover that plaintiff failed to file an appeal undertaking as required by section 21-1302, Comp. St. 1929. Thereafter plaintiff filed a petition on appeal in the district court and defendant answered. Plaintiff then filed a motion for judgment on the pleadings, and defendant filed a motion to dismiss for the reason that the district court was without jurisdiction of the subject-matter. The trial court on appeal heard these motions, and on November 17, 1942, dismissed the action.

Plaintiff appeals therefrom to this court, contending that the trial court erred in holding that it had no jurisdiction of the subject-matter.

Section 21-1302, Comp. St. 1929, provides: "The party appealing shall, within ten days from the rendition of judgment, enter into an undertaking to the adverse party, with at least one good and sufficient surety to be approved by such justice, in a sum not less than fifty dollars in any case, nor less than double the amount of the judgment and costs, conditioned: First. That the appellant will prosecute his appeal to effect and without unnecessary delay; Second. That if judgment be adjudged against him on the appeal,

he will satisfy such judgment and costs. Such undertaking need not be signed by the appellant."

This court said in *People's Building, Loan & Savings Ass'n v. Cook,* 63 Neb. 437, 88 N. W. 763: "A case removed to the district court from a judgment of a justice of the peace, is rightly dismissed if the appellant, by reason of his own laches, failed to file an appeal bond within the time limited by statute for that purpose." Likewise, in *School District No. 6, Cass County, v. Traver,* 43 Neb. 524, 61 N. W. 720: "The statute is mandatory. The giving of the appeal bond is essential to confer jurisdiction of the cause upon the appellate tribunal." See, also, *Hier v. Anheuser-Busch Brewing Ass'n,* 52 Neb. 144, 71 N. W. 1005; *Taylor Dairy Products Co. v. Owen,* 139 Neb. 603, 298 N. W. 332; *Greb v. Hansen,* 123 Neb. 426, 243 N. W. 278. Since the furnishing of an appeal undertaking is a condition precedent to the jurisdiction of the appellate court, the objection may be raised at any time in any appropriate manner. See 4 C. J. S. 968-969, sec. 502.

In *Steven v. Nebraska & Iowa Ins. Co.,* 29 Neb. 187, 45 N. W. 284, relied upon by appellant, an appeal bond was filed as required by law; therefore, it is not a controlling precedent in the case at bar.

There are other assignments of error which we do not find it necessary to discuss in this opinion.

The trial court properly dismissed the action, and the judgment is affirmed.

AFFIRMED.

HENRY JURGENSMEIER, APPELLANT, V. HARVEY KUENNING, APPELLEE.

10 N. W. (2d) 635

FILED JULY 23, 1943. No. 31645.

1. **Courts.** The county court has general, exclusive, and original jurisdiction in all probate matters.
2. **Executors and Administrators.** When the county court orders the distribution of an estate and fixes the interests of those entitled

thereto, whether it be claimants or distributees, and such decree is final, it has the force and effect of a judgment and any such claimant or distributee may have execution issued thereon and levy may be made on the property of the executor or administrator to satisfy the amount owing as it may appear in the decree.

3. ———. When the county court, in the administration of an estate, enters an order determining the amount an executor is owing to said estate and directing him to pay it into his account for the benefit thereof, without determining who are the legatees, devisees, and heirs at law of said estate or the amount of their several interests therein and without ordering a distribution thereof, such order is not a judgment in favor of the legatees, devisees, and heirs at law of said deceased which they can have enforced by execution.

APPEAL from the district court for Nemaha county: VIRGIL FALLOON, JUDGE. *Reversed.*

William G. Rutledge, John C. Mullen and *Gerald M. Mullen,* for appellant.

Lee Kelligar, contra.

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

WENKE, J.

This action was commenced in the district court for Nemaha county by Henry Jurgensmeier, as plaintiff and who is appellant here, against Harvey Kuenning, sheriff of Nemaha county, as defendant and who is appellee here, to permanently enjoin and restrain said sheriff from enforcing an execution issued by the county court of Nemaha county. From a judgment dissolving a temporary restraining order and denying the permanent enjoining of said execution and dismissing the plaintiff's action, the plaintiff has appealed.

The litigation, out of which this action arises, was before this court in the case of *In re Estate of Jurgensmeier,* 142 Neb. 188, 5 N. W. (2d) 233, wherein the objections of John Jurgensmeier, Jr., and Anna Schlosser, a son and daughter of the deceased, and devisees under his will, together with Dwight Griffiths, guardian *ad litem* of Joseph Jurgensmei-

er, an incompetent son of the deceased, to the final report of the appellant, as executor of said estate, were sustained and the action reversed with directions, "to require the executor to account for the real estate described as the southeast quarter of section 28, township 5, range 14, on the basis of its reasonable value of $16,000, taxing the costs of this appeal in this court to the executor." Pursuant to mandate issued, the county court of Nemaha county on December 3, 1942, entered an order as follows: "It is therefore ordered, considered and adjudged that Henry Jurgensmeier, executor, fully comply with the Mandate of the Supreme Court of the State of Nebraska; that there is due the Estate of John Jurgensmeier, deceased, from Henry Jurgensmeier, Executor, the sum of $6,320 which is the difference between the sum of $60.50 per acre previously accounted for and $100 per acre for the real estate described as the Southeast Quarter of Section 28, Township 5, Range 14 in Nemaha county, Nebraska, as so found to be the reasonable value thereof by the Supreme Court of the State of Nebraska; that Henry Jurgensmeier, executor, be and he is hereby ordered and directed to pay into the Estate of John Jurgensmeier, deceased, said sum of $6,320 as so found due on or before the 17th day of December, 1942, and that on or before said December 17, 1942, said Executor is hereby ordered and directed to file in this court his supplemental report showing that he has deposited said sum of $6,320 in his account as Executor of said Estate together with all money belonging to said estate heretofore reported and accounted for. It is further ordered, considered and adjudged that the matter of assessment of costs in this court, attorney fees, the hearing on the objections of Anna Schlosser, John Jurgensmeier and Dwight Griffiths, Guardian *ad litem,* to the supplemental report of said Executor, together with further hearing on the petition for final settlement, final account and supplemental account heretofore filed, be and the same are hereby continued until final settlement on said estate. It is further ordered, considered and adjudged that the costs in the sum of $92.50

in the Supreme Court of the State of Nebraska be and same are hereby taxed to Henry Jurgensmeier, personally." Thereafter the appellant, as executor of said estate, failed to comply with said order and on the 17th day of February, 1943, the county court of Nemaha county issued an execution in favor of John Jurgensmeier, Anna Schlosser and all the legatees, devisees, and heirs at law of John Jurgensmeier, deceased, and against the appellant which the appellee, as sheriff of Nemaha county, proceeded to execute by levying upon the personal property of the appellant.

The question here is, did the county court of Nemaha county have authority to issue the execution in favor of John Jurgensmeier, Anna Schlosser and all the legatees, devisees, and heirs at law of John Jurgensmeier, deceased, by virtue of its order of December 3, 1942?

Under our Constitution and statutes the county court has general, exclusive, and original jurisdiction in all probate matters. *Lydick v. Chaney,* 64 Neb. 288, 89 N. W. 801. Under the provisions of section 30-621, Comp. St. 1929, which is in part as follows: "Whenever a decree shall have been made for the distribution of the assets among the creditors, the executor or administrator of the estate, after the time of payment shall arrive, shall be personally liable to the creditors for their debts, or the dividend thereon, as for his own debts, or he shall be liable on his bond, * * * " and section 30-1303, Comp. St. 1929, which is as follows: "In such decree the court shall name the persons, and the proportions or parts to which each shall be entitled, and such persons shall have the right to demand and recover their respective shares from the executor or administrator, or any person having the same," we have held: " * * * that in case of distribution of estates under decree of distribution, whether it be claimants or distributees, such decree is final, has the force and effect of a judgment, and that any such claimant or distributee may have execution issue thereon and levy may be made on the property of the executor or administrator. *Lydick v. Chaney,* 64 Neb. 288, 89 N. W. 801." *Brownfield v. Edwards,* 132 Neb. 325, 271 N. W. 797.

However, the order entered by the county court of Nemaha county on December 3, 1942, in compliance with the mandate of this court does not bring the terms thereof within the provisions of either of these statutes, nor are we able to find a similar or comparable statute that authorizes a proceeding directly against the executor of an estate by execution where, as here, it is determined that the executor is owing to said estate and directing him to pay into said estate the amount thereof, nor does the order, which neither determines who the legatees, devisees, and heirs at law of John Jurgensmeier, deceased, are or the amount of their interests in the money which appellant is directed to pay into said estate, constitute a judgment in their favor within the provisions of section 27-533, Comp. St. 1929, which is as follows: "The county judge shall issue execution on judgments rendered by said court, and the proceedings upon any such execution shall, in all cases, be as is provided by law governing executions issued upon the judgments of a justice of the peace." Without statutory authority authorizing a proceeding by the legatees, devisees, or heirs at law directly against an executor of an estate personally for money owing the estate and ordered by him to be paid to the estate, an execution running to the legatees, devisees, and heirs at law of the state is unauthorized and therefore the execution should have been permanently enjoined.

We in no way pass upon the validity of the order entered by the county court or the enforcement thereof, except as herein determined, and in no way enjoin the county court from enforcing its order under the ample and sufficient methods therefor as provided by statute. Our holding only determines that the order entered by the court was not such a judgment as authorized the county court to issue an execution for its enforcement in favor of the legatees, devisees, and heirs at law of said estate and the enforcement of the execution issued should have been permanently enjoined.

REVERSED.

DORIS FAY CARLSON ET AL., APPELLEES, V. RUSSELL W. BARTELS, ADMINISTRATOR, APPELLANT: G. OLDENBURG, INTERVENER, APPELLANT.

10 N. W. (2d) 671

FILED JULY 30, 1943. No. 31517.

1. **Courts.** Jurisdiction of the subject-matter is the power to hear and determine cases of the general class to which the proceedings belong.
2. **Children Born Out of Wedlock.** A father is under no legal liability to support his children born out of wedlock, except in those cases where such liability is imposed by statute.
3. ———. In the absence of a statute, a cause of action for the support of a child born out of wedlock does not survive against the personal representative of the alleged father.
4. ———. In the absence of statutory authority an equity court does not have the power to charge the estate of a deceased alleged father of children born out of wedlock with the support, maintenance and education of such children for the period subsequent to the father's death.
5. **Action.** Under the declaratory judgment act an equity court has the power to determine the parentage of a child.
6. ———. The granting of declaratory relief is a matter within the discretion of the court, to be exercised or not according to the circumstances of the case under consideration.

APPEAL from the district court for Wayne county: ADOLPH E. WENKE, JUDGE. *Reversed and dismissed.*

Harry N. Larson and *A. C. R. Swenson,* for appellants.

Fred S. Berry, contra.

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

SIMMONS, C. J.

This is an action in equity, brought in the district court for Wayne county, wherein Helen Kahler as next friend of her two minor children sought for them a judgment that they are the children of Nels Carlson, deceased, that his estate is liable for the care, support and maintenance of said children; that the amount be determined and charged against his estate as a lien; that a trustee be appointed to

hold, manage and disburse funds allowed, and for equitable relief. The Consul of Sweden intervened in opposition to plaintiffs' petition to assert the rights of brothers and sisters of the deceased (nationals of Sweden). The defendant administrator and Consul demurred on the ground that a cause of action was not stated, and the Consul on the added ground that the district court was without jurisdiction of the subject-matter of the action. The demurrers were overruled. The administrator and Consul answered separately, denying that the deceased was the father of the children, and the Consul alleging in his answer the same grounds as stated in his demurrer. Trial was had, a finding for the plaintiffs made and decree entered holding that the plaintiffs are the children of the deceased, that his estate was liable for their support, maintenance and education, and the sum of $3,250 was fixed as the amount to be paid into court, to be held subject to the court's order for that purpose. After motions for new trial were overruled, defendants appeal. We reverse the judgment of the trial court.

Three questions are presented: The jurisdiction of the district court over the subject-matter of the action; the holding that paternity was proved; and the right to recover against the estate of the deceased father.

The following facts are admitted by the pleadings: Plaintiff Doris Fay Carlson was born October 4, 1933, and Alma May Carlson was born December 18, 1938, both at a hospital in the city of Wayne, in Wayne county, and both the children of Helen Kahler; Helen Kahler was at all times involved herein the wife of one Ed Kahler; Nels Carlson was an unmarried man, a farmer, residing near Wayne, who died intestate October 9, 1940; his estate is being probated in Wayne county, and defendant is the administrator.

Established by the evidence of friends, neighbors, relatives, peace officers and others are the following facts. Helen Kahler and Ed Kahler had two children, not involved in this action. Mr. and Mrs. Kahler separated in 1931 following court action to compel him to support his wife and

children, and thereafter Ed Kahler disappeared and has not since been seen by any one in or about his old haunts where his wife continued to live during all the time involved in this action. In May, 1932, Mrs. Kahler, with the two Kahler children, went to the near-by home of the deceased as his housekeeper, and remained there until Carlson's death. On each occasion, when the two children (plaintiffs) were born, Carlson took Mrs. Kahler to the hospital, paid the medical and hospital expenses, told the doctor he was the father in each instance, had the older child baptized by his minister, told friends and relatives that the plaintiffs were his children, and cared for them in his home as his own. Two policies of insurance were taken out in which Carlson and Mrs. Kahler were designated "husband" and "wife." Carlson and Mrs. Kahler went with the children to visit friends, to town for marketing and generally lived at home and in the community as though they were husband and wife, although there were those who knew they were not. Plaintiffs have no estate, income or means of support.

It was established on cross-examination of the administrator that contingent claims on behalf of Alma May Carlson and Doris Fay Carlson were filed in the estate matter in county court.

Defendant offered the testimony of Carlson's sister and her husband to the effect that in 1940 the deceased denied the paternity of the children.

We come first to the question of the jurisdiction of the court over the subject-matter of the action. The question was first raised by demurrer and again by answer. Intervener Consul argues that, under the provisions of section 16, art. V of the Constitution of the state of Nebraska, and section 27-503, Comp. St. 1929, this action is one where the original jurisdiction is in the county court.

"Jurisdiction of the subject-matter, in a court of record, is to be tested by the authorized extent of the powers of the court in respect of the cause of action before it." *Brandeen v. Lau,* 113 Neb. 34, 201 N. W. 665. "Jurisdiction of the subject-matter is the power to hear and determine cas-

es of the general class to which the proceedings in question belong." 21 C. J. S. 36, sec. 23, 15 C. J. 734. See 14 Am. Jur. 368, sec. 168. See, also, 21 C J. 34; 30 C. J. S. 327, sec. 9; 1 Pomeroy, Equity Jurisprudence (4th ed.) 153. "The test for determining jurisdiction is ordinarily the nature of the case, as made by the complaint, and the relief sought." 15 C. J. 734.

We come then to the question as to whether or not the ultimate relief sought, *i. e.*, a judgment for support, is within the power of any equity court to grant. In *Craig v. Shea,* 102 Neb. 575, 168 N. W. 135, such an action was held to be properly maintainable in equity against a living alleged father. May an action in equity be maintained against the representative of the estate of a deceased alleged father by children born out of wedlock to obtain money for their support, maintenance and education for the period subsequent to the father's death?

At common law the father is under no legal liability to support his children born out of wedlock. 7 C. J. 955; 10 C. J. S. 84, sec. 18(c); 7 Am. Jur. 673, sec. 69. This is conceded by the plaintiffs to be the common-law rule. Plaintiffs argue that we should refuse to follow the common-law rule and hold that present day conditions and needs require that the father of a child born out of wedlock is under a nonstatutory obligation to support the child. Plaintiffs cite *Doughty v. Engler,* 112 Kan. 583, 211 Pac. 619, 30 A. L. R. 1065. The Kansas court has, however, held that their decision is a minority view. See *Myers v. Anderson,* 145 Kan. 775, 67 Pac. (2d) 542. That case goes no further than to hold that the living father is so liable.

Plaintiffs next argue that there is a statutory liability for support, basing their contention on our decision in *Craig v. Shea, supra.* In that case the child of a married woman sought in equity a decree determining her father, and for support from her alleged father. We there held that under the provisions of the pauper's statute, now as amended, section 68-101, Comp. St. Supp. 1941, and the child abandonment act now section 28-458, Comp. St. 1929, the plaintiff

was entitled to support from the actual father. We held that "the legislature intended to *remove* the restrictions imposed by the common law, to *impose a duty not theretofore existing*" and that "the burden of support of an illegitimate child of a married woman should, as in the case of an illegitimate child of an unmarried woman, be cast upon the man responsible for its existence." The decision recognized that the common-law nonliability rule was in force in Nebraska, save as modified by statute, and held that it had been changed by legislative action only, however, to the extent to cast the burden of support of a child born out of wedlock to a married woman upon the father "as in the case" of such a child born to an unmarried woman. The decision does not go beyond that point and does not hold that the estate of the father, when deceased, is liable for that support in an action brought after the alleged father's death. The burden at that time upon the person adjudged to be the father of the child of an unmarried woman was to "stand charged with the maintenance thereof in such a sum or sums as the court may order and direct, * * * and * * * to give security to perform * * * " and if he failed to give such security "he shall be committed to the jail * * * to remain till he shall comply with the order." Rev. St. 1913, sec. 362. Such statutes are generally regarded as the exclusive basis of liability. 7 Am. Jur. 673, sec. 69; 10 C. J. S. 84, sec. 18(c).

In the absence of a statutory provision a bastardy proceeding does not survive against the personal representative of an alleged father. 7 Am. Jur. 691, sec. 100; 7 C. J. 972; 10 C. J. S. 150, sec. 47. Under the holding in *Craig v. Shea, supra,* the child of a married woman born out of wedlock was held to be entitled to the same right of support as a child born to an unmarried woman. To hold that plaintiffs had a cause of action against the estate of a deceased father would be to accord to them a greater right of support than that granted to the child of an unmarried woman. There is no statutory basis for such a holding.

But plaintiffs argue that they have a continuing right to

support, that they could have proceeded against their father in his lifetime to compel that support, that it was not done because he willingly furnished it and that we should grant the support order against the estate. This we may not do. There is no authority in law for so doing. To grant these plaintiffs that relief would be to accord to children born out of wedlock greater rights than accorded by law to children born in wedlock. Children born in wedlock also have a continuing right to support during the father's lifetime, but they have no rights after his death save those that are granted by will or by statute to be accorded to them in the administration of the estate of the deceased father.

Throughout plaintiffs' brief runs the argument that we should, by judicial opinion, set aside the established rules of the common law as no longer in accord with the public policy of the state, and declare rules that would permit these plaintiffs to have support and maintenance from the estate of their father in this proceeding. This question, as other questions, must be determined as a matter of law, not sentiment.

The questions of the descent and distribution of estates and the care and maintenance of children of a deceased parent are matters determined by statutory provisions. The legislature has determined those matters and their acts constitute the determined public policy of this state. The legislature has determined when a child born out of wedlock may inherit property and who shall be his heirs. Comp. St. 1929, secs. 30-109, 30-110. Provision is made for punishment of the parent who abandons such a child. Comp. St. 1929, sec. 28-458. The legislature in 1941 enacted a comprehensive act to provide among other things "for the support of children born out of wedlock." Laws 1941, ch. 81, Comp. St. Supp. 1941, secs. 43-701 to 43-717. The legislature did not in the act provide for "support" under the circumstances here shown. This act goes only to the extent of providing: "Any judicially approved settlement or order of support made by a court having jurisdiction in the

premises shall be binding on the legal representatives of the father or mother in the event of his or her death, to the same extent as other contractual obligations and judicial judgments or decrees." Comp. St. Supp. 1941, sec. 43-710. The act clearly presupposes action brought against and orders operating on the alleged father during his lifetime, and fastens an obligation upon his estate only in those cases that have proceeded to a "judicially approved settlement or order of support made by a court having jurisdiction in the premises." No such settlement or order was had here during Carlson's lifetime. This act is the last expression of legislative policy in the matter. We are not authorized to extend the provisions of the statute in the manner here requested.

It necessarily follows that an equity court does not have the power to grant the ultimate relief here sought.

Here plaintiffs seek a decree determining that they are the children of Nels Carlson, deceased, "in order that liability for her (their) care, support, maintenance and education and the amount necessary and required for such purpose may be adjudged and decreed herein against the estate" of Carlson.

Has the district court, and this court on appeal, the jurisdiction to determine that foundation question?

By the provision of section 20-21,140, Comp. St. 1929, commonly known as the declaratory judgments act, the district court and this court have power "to declare rights, status, and other legal relations whether or not further relief is or could be claimed." Under such acts it has been determined that the courts have jurisdiction to determine the parentage of a child. *Morecroft v. Taylor*, 225 App. Div. 562, 234 N. Y. Supp. 2; *Miller v. Currie*, 208 Wis. 199, 242 N. W. 570. The objection of the Consul to the jurisdiction of the court over the subject-matter was accordingly properly overruled, and the demurrers were properly overruled.

The declaratory judgment act clearly gives the courts a discretion as to whether or not the jurisdiction to declare a

"status" shall be exercised. The courts are not in accord on criteria by which it may be determined whether or not the discretion shall be exercised. See Borchard, Declaratory Judgments, Part II, ch. V, Discretion, p. 293. It has been generally held that the granting of declaratory relief is a matter within the judicial discretion of the court, to be exercised or not according to the circumstances of the case under consideration. Annotation, 87 A. L. R. 1212.

This record discloses that the estate of Carlson is being administered in the county court of Wayne county, a court that has "original jurisdiction in all matters of probate, settlement of estates of deceased persons," etc. Const. art. V, sec. 16; and that there are pending in that administration proceeding contingent claims (their nature not disclosed) filed on behalf of these two plaintiffs. It may well be that the county court, in the proper exercise of its "original jurisdiction" may be called upon to determine the question of whether or not plaintiffs are the children of the deceased Carlson. That court, in such an event, should not be confronted with a decision of this court, determining that question. We accordingly decline to determine that question in this proceeding.

The judgment of the trial court must accordingly be reversed and the action dismissed for the reasons here stated.

REVERSED AND DISMISSED.

PAINE, J., dissenting.

The opinion adopted in this case seems to imply that under the law these two little girls born out of wedlock can only be supported as paupers by county authorities. I believe that the equity powers of the district court are broad enough to give them an allowance from the estate of their father, who was proud of them, had gladly taken care of them, as a father should, while he lived, and had died expecting they would share in his estate, as he had told several of his friends.

I desire to set out additional details and facts from the bill of exceptions, which shows that on September 3, 1929, Helen Kahler signed a complaint in the county court for

Dixon county against her husband, Ed Kahler, for nonsupport. On November 14, 1930, he entered a plea of guilty, and judgment was entered against him for $220 in favor of Dixon county. Thereafter she again lived with her husband for some months, and on August 13, 1931, a son, Edwin Albert, was born to this union. Her husband deserted her, and has not been seen since. Then the mother and her two children lived with her sister, Martha Klaner, on a farm.

In May, 1932, Nels Carlson came there and employed her as his housekeeper on his farm for $3 a week and also board of her two children. She testified that she did the housework, tended chickens, and helped Nels with the chores, but he never asked her to do field work. He took Helen Kahler and her children on trips to Norfolk and Sioux City and to the neighbors, and they did their shopping in Wayne.

Helen Kahler testified that when she went there she slept in the bed downstairs and he slept upstairs, but in December, 1932, he moved downstairs, and they slept in the same bed as husband and wife continuously until his death October 9, 1940, and that Doris Fay Carlson was born to them October 4, 1933, and Alma May Carlson was born December 18, 1938.

Nels Carlson took Helen to the hospital at Wayne when each of his girls was born. He told the doctor they were his daughters, and he said their names were Carlson, not Kahler. His name was written in, as the father of each, in the birth certificates, copies of which were filed in the vital statistics records. Dr. Lutgen, owner of the hospital, said he told Nels Carlson that he ought to get married, and Carlson said he was ready.

Nels Carlson told Dave Holstrum, a hired man on the farm, "You have known me quite a while, I am going to protect them two kids of mine." He told Albert Beck, the brother of Mrs. Kahler, he would marry her if she got a divorce, and that the two children were his and he would take care of them, and he "didn't have anything to worry about." The children called him "Daddy."

Nels took out two policies of health and accident insurance on August 27, 1940. He made his own policy payable to "Helen Anna Carlson, Wife," and gave his age as 52. In the policy he purchased for Helen Anna Carlson, age 34, he made it payable to himself, "Nels Carlson, Husband." The policies are attached as exhibits Nos. 5 and 6.

Nels Carlson took Helen and their oldest daughter to the home of the pastor of the church of which he was a member and introduced Helen as his wife.

Exhibit 3-a is the "Certificate of Baptism," reading: "This certifies that Doris Fay child of Nels Carlson and his wife Helen born at Wayne, Nebr. Oct. 4, 1933 was baptized in Wakefield, Nebr. on the 23rd day of Nov. in the year of our Lord 1934 * * * . Witnesses: Mrs. Augusta Ohlquist Arthur L. Peterson Pastor"

Burr R. Davis, county attorney, and sheriff Pile had a conversation with Nels at the hospital when the second child was born. Nels told them that the two younger children of Helen Kahler were his children, and her two older children were not. The sheriff testified that later they both went out to Mr. Carlson's farm, and Mrs. Kahler went out in the field with them to where Mr. Carlson was plowing. Nels said that as soon as he got a little money he would see that she got a divorce and he would marry her. The deceased stated to several persons that these two children of his would inherit his property.

In the decree entered by the trial court it was found that it was impossible for said Ed Kahler to have had access to the said Helen Kahler, and impossible for him to have been the father of said Doris Fay Carlson or said Alma May Carlson, plaintiffs herein, and that he is not the father of said children or either of them. The court found further that said Nels Carlson, now deceased, was the father of said children and each of them; that said children and each of them are without property or funds, and are public charges, and are now being supported and maintained at public expense; that said Helen Kahler, mother of said children, is without property or funds, or means of support,

and is a public charge; that said Nels Carlson, deceased, left surviving him no issue or persons dependent upon him for support except his said children above named; that his estate is solvent, and comprised of sufficient property for the proper support, maintenance and education of his said children, and that his said estate, and the property thereof, is legally liable and responsible for the same. The court found that the sum of $3,250 is a just, reasonable and proper amount for the support, maintenance and education of said children, the plaintiffs herein, and directed that a copy of the decree be filed in the county court where administration proceedings are pending in the estate of Nels Carlson.

The action was brought against the administrator of his estate, and G. Oldenburg, Consul of Sweden, intervened, representing the three sisters and one brother of Nels Carlson residing in Sweden.

The only piece of evidence offered by those contesting the allowance of support to these two little girls was the evidence of Anna Nelson, a sister of Nels, and her husband, who testified that Nels was at their house one evening and said: "If Mrs. Kahler wants to raise kids she has to pay her own bills and hospital bills 'it aint my kids'."

This exact recitation by both of them was the substance of their entire evidence. The strength of this evidence is weakened by the fact that it is contrary to all the other witnesses, and weakened further by the fact that Nels had already at that time willingly paid the doctor bills for the birth of these children, and perhaps the fact that the administrator has an old $2,000 note to collect for money Nels had loaned to them might well be considered in weighing their evidence. No other evidence was offered by the defendants.

In regard to the many statements made by Nels Carlson to the doctor at the time of each confinement, to the minister of his church at the time of baptism, to the hired man who worked for him, and to neighbors that the plaintiffs were his own children, and he was their father and would support them, I quote a statement by Cardozo, C. J., in de-

ciding a bastardy case in New York: "Admissions by the spouses out of court are on the same plane in this regard as testimony in court. * * * There may be 'acts and conduct' * * * 'tending, as part of a series of *res gestæ*, to throw light upon and to lead to a just conclusion upon a question on which they would not directly be permitted to give evidence'." *In re Findlay*, 253 N. Y. 1, 170 N. E. 471.

Judge Cardozo also in this case discussed at length all the old rules of paternity now set aside, beginning with the rule that, if the husband was within the four seas, the child was legitimate, which was exploded in *Pendrell v. Pendrell*, 2 Strange, 925, decided in 1732. Nor do we adhere, he said, to Lord Campbell's dictum that a mulatto child born of a white mother must be ascribed to the white father. He also cited the case of *Nolting v. Holt*, 113 Kan. 495, 215 Pac. 281, 31 A. L. R. 1117, in which two mulatto sons were allowed to recover the real estate from the estate of their father, a Negro.

The old common law treated the child of parents not married to each other as *nullius filius*, the son of no one, of no father and no mother, that is, it just ignored its existence. But the whole of the common law is not, and never has been, in force in Nebraska. *Delaney v. Errickson*, 10 Neb. 492, 6 N. W. 600; *Bishop v. Liston*, 112 Neb. 559, 199 N. W. 825. The common law exists only where applicable, and not inconsistent with the laws of the state. *In re Estate of Grainger*, 121 Neb. 338, 237 N. W. 153.

Two cases from English courts are in point. In a bastardy case in 1887 in the Queen's Bench division, opinion by Jessel, M. R., it was held: "The court in deciding who is to have the custody of an illegitimate infant considers what is for the benefit of the infant." *Reg. v. Nash*, 31 Weekly Rep. 420.

In *Ex Parte Haycock*, 5 Russ. *154, 38 Eng. Rep. 985, decided by the Lord Chancellor (Lyndhurst) on June 24, 1828, a proper allowance was made out of a lunatic's estate for four illegitimate children of the lunatic. In this opinion reference is made to a decision of Lord Eldon and two

other decisions, in which yearly sums had been appropriated for the benefit of illegitimate children.

Equity has always had the power to make the remedy meet the need. It will not be limited by technicalities by which wrong or injustice shall be meted out to helpless little ones. This court said: "General equity jurisdiction is vested in the district courts of this state by the terms of our Constitution, and such jurisdiction is beyond the power of the legislature to limit or control." *Burnham v. Bennison,* 121 Neb. 291, 236 N. W. 745.

"The district courts of this state, being courts of general equity jurisdiction, are not limited in the exercise of such jurisdiction by statute." *Cochran v. Cochran,* 42 Neb. 612, 60 N. W. 942.

We are cited to section 30-801, Comp. St. 1929, as prohibiting this form of action against the administrator. This is not an action in the first place for the recovery of money, but each of these daughters as plaintiff first prays that she may be found, adjudged and decreed to be the daughter of Nels Carlson.

If they cannot each establish this question of paternity, their rights to support out of their father's property would fail, and such rights are established in an equity suit by the decree of the district court.

The new laws adopted in 1941 specifically provide for such proceedings in the district court. Comp. St. Supp. 1941, secs. 43-706, 43-711. See *Parker v. Luehrmann,* 126 Neb. 1, 252 N. W. 402, in which claims on bank stock liability are first allowed in the district court.

It is true that generally under the old common law children could be abandoned to starve, and opinions in twelve of our states, cited in 30 A. L. R. 1071, hold that a father is not bound to support his illegitimate child. However, in that old textbook, Puffendorf, Nature, bk. 4, ch. 11, sec. 4, from which Blackstone frequently quotes, we find these statements: "But we are rather inclined to think that parents lie under a perfect obligation to maintain their children, so long as they are unable to maintain themselves;

and this duty seems to be laid upon them, not only by nature itself, but by their own proper act, in bringing them into the world. For they would be in the highest manner injurious to their issue, should they have given the children life, for no other reason, but that they might afterwards see them perish. By the act of generation therefore they seem to have voluntarily bound themselves, to endeavor as far as in them lies, that the life which they have bestowed shall be supported and preserved. And thus the children will have a perfect right of receiving maintenance from their parents."

And again in section 6 it reads: "Farther, maintenance is due not to legitimate children alone; but to natural, and even to incestuous issue. For what reason is there that the poor innocent infant should be suffered to famish for another's sin?"

These quotations are taken from the case of *Doughty v. Engler,* 112 Kan. 583, 211 Pac. 619, 30 A. L. R. 1065, in which the Kansas court took the more enlightened view, and held: "The father of an illegitimate child too young to care for itself is under a nonstatutory obligation to support it, which may be enforced in an action brought by it through its next friend."

Our Nebraska court, in the interest of good morals, has also held that the common-law rule has been abrogated, and that the illegitimate child of a married woman, living separate and apart from her husband, is entitled to support from the actual father by a suit in equity for support and maintenance. *Craig v. Shea,* 102 Neb. 575, 168 N. W. 135.

If a district court can force the father of a child born out of wedlock to support, maintain, and educate such child against his will or wish, it would be a tragedy if the powers of an equity court are not broad enough to charge the education and support against the estate of the father who, in the case at bar, gladly supported his two children, born out of wedlock, as long as he lived.

The opinion adopted holds that an equity court does not have the power, in the absence of statutory authority, to

charge the estate of a deceased father with the support of his children born out of wedlock. With that holding I respectfully disagree, and in my opinion the trial court was right.

YEAGER, J., concurring.

I respectfully submit that the inadvertences of the dissent in this case should not go unchallenged.

In the first sentence of the dissent the writer says: "The opinion adopted in this case seems to imply that under the law these two little girls born out of wedlock can only be supported as paupers by county authorities." This is far from a correct reflection of the holding of the opinion. The opinion holds only that a court of equity has no power to charge the estate with their support.

Whether or not the evidence is sufficient to satisfy the requirements of statute (Comp. St. 1929, sec. 30-109) with regard to acknowledgment of parentage by the deceased so as to permit these children to take as heirs is not a question for determination by a court of equity. That is a matter for determination under the probate power of the county court. Possibility of participation in the estate, and incidentally in that manner obtaining support, is not foreclosed by the majority opinion.

It may be pertinent to remark that if these children are entitled to take as heirs the evidence would indicate the entire estate would descend to them since there is no widow and no other children.

The statement in the dissent that "Equity has always had the power to make the remedy meet the need" is both fallacious and injudicious. It does not reflect accurately or fairly the design or functioning of equity jurisprudence.

The equity courts, the dissent to the contrary notwithstanding, have never assumed to override or put at naught the law or to invade the jurisdiction properly conferred by Constitution and statute upon courts of probate.

The dissent would have this court hold that the district court in equity has power to charge the estate of the decedent with the support of these children nothwithstanding

the statutes make full provision for descent and distribution and presentation and proofs of claim, and notwithstanding heirship and claims against estates are matters over which the county court, and not a court of equity, has jurisdiction.

Even if we were to assume that the evidence was sufficient to entitle these children to support under section 30-1301, Comp. St. 1929, or section 30-109, Comp. St. 1929, the determination of that matter and the amount of money or property to be impounded or awarded would still be a matter within the jurisdiction of the county court sitting in probate.

The cases cited in the dissent do not justify the implications drawn from them. The case of *Pendrell v. Pendrell,* 2 Strange, 925, deals only with the rules of paternity, an incidental question not determined in the present case. The case of *Nolting v. Holt,* 113 Kan. 495, 215 Pac. 281, is authority for recovery by two illegitimate children from a deceased father's estate. The only questions determined were: Are the plaintiffs the children of James Holt, and, had he generally and notoriously recognized them as his children? An affirmative finding on these issues, under the Kansas statute, was sufficient to make the illegitimate children the heirs of the father. We have no such statute. In *Ex parte Haycock,* 5 Russ. 154, 38 Eng. Reprint, 985, the allowances were adjudged against the estate of a lunatic father. But it is specifically stated therein that such an allowance could not defeat a bequest in the will. The dissent cites sections 43-706 and 43-711, Comp. St. Supp. 1941, in support of the position therein assumed. These sections deal only with the establishment of paternity and allowances of support against a living father. If they meant as much as implied in the dissent, they would be evidence only that they were enacted to provide a remedy which had not before existed, and it is conceded by all parties that the case at bar is governed by the law existing prior to the passage of this legislation. The quotations from *Doughty v. Engler,* 112 Kan. 583, 211 Pac. 619, and Puffendorf, Nature, bk. 4, ch. 11,

sec. 4, constitute an enlightening discourse upon the obligations of a father to support his children, legitimate or illegitimate, during his lifetime, but they have absolutely no application in determining the rights of illegitimate children as heirs of the father or their right to support from the estate of the deceased father.

The dissent overlooks the fact that the descent and distribution of estates is purely statutory and asserts that "it would be a tragedy if the powers of an equity court are not broad enough to charge the education and support against the estate of the father who, in the case at bar, gladly supported his two children, born out of wedlock, as long as he lived." While the temptation to engage in judicial legislation is ofttimes great, it is the solemn pledge of this court to limit itself to the judicial function and to reserve to the legislature those things which are contained within the legislative power. To do otherwise amounts to nothing more than judicial usurpation of authority. I submit that it would be a gross violation of this fundamental rule to judicially enact into law that which the legislature has declined to do.

As one of the majority I do not yield to the writer of the dissent in my solicitude for the welfare of these or any other children born out of wedlock, but my solicitude will not permit me to override plain provisions of law and fundamental principles and conceptions of equity in their interest. My solicitude will not permit me to concur in a precedent, the application of which, when there are both legitimate and illegitimate children, would favor the illegitimate over the legitimate.

I concur in the majority opinion.

RUDOLPH ULRICH, APPELLEE, V. HOWARD M. BATCHELDER, APPELLANT.

10 N. W. (2d) 637

FILED JULY 30, 1943. No. 31589.

1. **Trial.** In a determination of whether or not there is sufficient evidence of negligence on the part of defendant to warrant a submission of that issue to the jury it is necessary that all facts and circumstances and legitimate inferences to be drawn therefrom must be viewed in the light most favorable to the plaintiff.
2. **Negligence.** The burden of proving negligence is on the party alleging it.
3. ———. Circumstantial evidence, to be sufficient to require submission of an issue of negligence based thereon to a jury, must be of such character as to justify a reasonable inference, and no other reasonable inference, that the party charged was guilty of negligence.

APPEAL from the district court for Douglas county: JAMES M. FITZGERALD, JUDGE. *Affirmed in part and in part reversed and dismissed.*

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

Gross & Crawford and *Harry L. Welch, contra.*

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

YEAGER, J.

This is an action for damages instituted in the district court for Douglas county, Nebraska, by Rudolph Ulrich, plaintiff and appellee, against Howard M. Batchelder, defendant and appellant. The cause was tried to a jury which resulted in a verdict and judgment in favor of plaintiff and against the defendant for $2,850. From this judgment and the order of the court overruling motion for a new trial the defendant has appealed.

The action grew out of a collision between automobiles owned and operated by plaintiff and defendant. On September 14, 1941, the plaintiff was driving his Chevrolet Town Sedan, 1940 model, weight not given, southward on a

public highway extending from Omaha, Nebraska, to and through Nebraska City, Nebraska, known as U. S. highway number 75-73. The highway runs generally north and south and is paved to a width of about 18 feet. It is divided for north and south-bound traffic by a line extending down the center. At the same time the defendant was driving his Pontiac Coupé, 1932 model, weighing about 3450 pounds, northward on this highway. At a point about eight and one-half miles north of Nebraska City on a level and straight portion of the highway the left fronts of the two automobiles came into collision as a result of which plaintiff was injured and his automobile damaged. The defendant was also injured and his automobile damaged. At the time of the accident the speed of plaintiff's automobile was estimated at 25 miles per hour and defendant's at 20.

The plaintiff by petition claimed that the collision was caused by the negligence of the defendant. The defendant by answer and cross-petition claimed that it was caused by the negligence of plaintiff.

Many grounds of negligence were alleged in the petition and in the cross-petition but only one was submitted to the jury. Each charged as negligence that the other was, at the time of the collision, driving to the left of the center line of the highway. Based upon an instruction containing this charge and countercharge and the usual and customary instructions with regard to comparative negligence, the jury returned a verdict in favor of plaintiff and against the defendant.

It is the contention of defendant, first that plaintiff failed to adduce any evidence to sustain the charge of negligence against defendant, and, second, that the failure of the jury to find that plaintiff was guilty of negligence was erroneous. These two propositions will be considered in the order stated.

For the purpose of determining whether or not there was sufficient evidence of negligence on the part of defendant to warrant a submission of that issue to the jury it is necessary that all facts and circumstances and legitimate infer-

ences to be drawn therefrom must be viewed in the light most favorable to the plaintiff. *Schroeder v. Bartlett,* 129 Neb. 645, 262 N. W. 447; *Meyer v. Platt,* 137 Neb. 714, 291 N. W. 86.

The substantial facts as related by witnesses for plaintiff are about as follows: It was raining when plaintiff passed Fort Crook, a few miles south of Omaha. Just below Fort Crook he picked up two soldiers. The three rode together in the front seat of the car. Sometime before and at the time of the accident there was a heavy downpour of rain described as a cloudburst. Vision ahead was obscured. Plaintiff's lights were on and the windshield wipers were working. Plaintiff's passengers did not see the approach of defendant's automobile. This was accounted for by the probability that one was asleep and the other probably dozing. Whether the plaintiff saw it or not cannot be stated. He was knocked unconscious by the collision and remembers nothing from the time he left Fort Crook until he regained consciousness at Nebraska City about midnight. The first knowledge that one of the passengers had of the accident was a fall through the right door of the automobile onto the shoulder on the west side of the pavement. Just at what instant with reference to the accident that the attention of the other was called to it is not very clear. It was thought very shortly thereafter. These two witnesses agree that immediately after the accident the right wheels of plaintiff's automobile were on the west shoulder and the left wheels on the pavement. The automobile was headed southward. The automobile was approximately half on and half off the pavement. One of these two witnesses said that the defendant's automobile was headed northwest and was about six feet east of plaintiff's automobile with its front end west of the center line and the rear end to the east of the line, and that the front end of defendant's automobile was a little to the south of the front end of plaintiff's automobile. The other said that after the accident defendant's automobile was facing west and that its front end was within three to five feet of plaintiff's automobile,

and was within two to four feet from the west edge of the highway. The distances testified to by these two witnesses were approximations.

The other testimony on behalf of plaintiff was given by witnesses who appeared on the scene after the accident. In important detail it deals with the position of the two automobiles after they appeared on the scene.

Very soon after the accident, the exact length of time being uncertain, an automobile owned by one John P. Moore came from the north to the scene of the accident. Moore got out and from his observation at the time the plaintiff's automobile appeared to be in the position described by the two soldiers. Defendant's automobile appeared to be about half on the east and half on the west of the center line of the highway and headed toward the northwest. The front end of defendant's automobile was about five feet south of the front end of plaintiff's automobile and about seven feet east of the west edge of the pavement.

Thomas Moore, driver of the John P. Moore automobile, fixed the positions of the two automobiles about the same as did John P. Moore. In addition he testified that there was not sufficient space for him to pass without leaving the pavement.

Leon B. Kramer, a passenger in the John P. Moore automobile, fixed the position of plaintiff's automobile about the same as did John P. and Thomas Moore. He did not attempt in his direct testimony to fix the position of defendant's automobile. On cross-examination he admitted that he had given a statement in which he stated that defendant's automobile was east of the center line of the highway and that the statement represented his recollection with reference to that matter.

This we think is a fair résumé of the evidence offered by the plaintiff as to the manner in which the accident came about and as to the circumstances surrounding it in proof of negligence on the part of defendant.

The defendant challenged its sufficiency at the conclusion of plaintiff's case by motion for directed verdict. This motion was overruled.

Following the ruling on the motion for directed verdict defendant adduced his evidence. The important parts of his testimony are: That he says he was driving at all times on his right side of the center of the highway and that he saw plaintiff's automobile about 75 feet away and it came down its wrong side of the highway and the left front ends of the two automobiles came into collision. He said that after the collision his car was on his right side of the highway facing northwest and that plaintiff's automobile was right in front with the left front wheels of the two automobiles lapped over. The automobiles were not in contact but were a foot or two apart. It was his thought that immediately after the accident plaintiff's automobile was about half on the east side of the center line of the highway.

At the conclusion of all of the evidence defendant renewed his motion for a directed verdict. It was again overruled.

The burden of proving negligence on the part of the defendant was upon the plaintiff. *Winterson v. Pantel Realty Co.*, 135 Neb. 472, 282 N. W. 393; *Olson v. Omaha & C. B. St. Ry. Co.*, 137 Neb. 216, 289 N. W. 356; *Bowers v. Kugler*, 140 Neb. 684, 1 N. W. (2d) 299.

Was there evidence of negligence or evidence from which a reasonable inference of negligence could be drawn that defendant was driving his automobile on the wrong side of the highway at the time and place in question? Admittedly there is no direct evidence of such fact. What then are the circumstances which must be examined? Taking the circumstances in the light most favorable to the plaintiff the defendant's automobile was standing, after the accident, diagonally across the highway headed northwest half east and half west of the center line with both rear wheels east of the line. The left front end was crushed. The plaintiff's automobile was to the northwest headed directly south paralleling the highway with one-half on and one-half off the pavement. The left front end was crushed. The two automobiles were not in contact. While there is no direct evidence that this was the position of plaintiff's

automobile immediatly after the accident such an inference may be drawn. There are no other informative circumstances.

Before it can be said that there is evidence that defendant was guilty of negligence, that is that he was driving on the wrong side of the highway, we must find that from these circumstances a reasonable inference flows that such was the case, and that inference is the only one that may be fairly and reasonably drawn therefrom. *Anderson v. Interstate Transit Lines*, 129 Neb. 612, 262 N. W. 445. No such single reasonable inference may be drawn. Illustrative of the fact that this is not the only inference that might reasonably be drawn from these circumstances, it could be inferred from the fact of the position of the rear wheels of defendant's automobile which were well to the east of the center line of the highway, that it was struck while the front end was on that side and dragged across and that the force of the impact, the angle of contact, the condition of the surface of the highway at the time, the speed of the automobiles, the difference in weight and the counteraction of the momentum of the two automobiles, had the effect of propelling plaintiff's automobile to its position at the edge of the highway. This is but speculation but not more so than the theory of plaintiff.

Plaintiff's cause of action in the light of the evidence is clearly controlled by *Anderson v. Interstate Transit Lines, supra,* wherein in the opinion it is stated: "We are inclined to accept the views of the courts heretofore quoted as to the fact that mere position of the 'bus' and 'truck' after the accident, with the accompanying marks, as shown by the evidence, afford no just basis for a reasonable conclusion. In other words, these facts are insufficient to meet the burden of proof." In this case there is not even evidence of marks, broken glass or other débris indicating a probable point of collision.

We are required to hold that the record is devoid of evidence of negligence on the part of defendant and that the trial court erred in submitting that question to the jury.

As has been pointed out defendant contends that the verdict against him on his cross-petition was erroneous.

It is true that the evidence of defendant on his charge that the plaintiff was guilty of negligence which was the proximate cause of the accident was sufficient on which to submit that issue to the jury. It was submitted on instructions of which no complaint is made. The verdict was in favor of plaintiff. It cannot be set aside by this court without an invasion of the province of the jury. We cannot say on the evidence adduced that reasonable minds could not differ on the question of whether or not plaintiff was guilty of negligence. The controlling rule in such circumstances is the following: "Where different minds may reasonably draw diverse conclusions from the same facts as to whether or not they establish negligence or contributory negligence, those issues must be submitted to the jury." *Casey v. Ford Motor Co.*, 108 Neb. 352, 187 N. W. 922; *Moncrief v. Interstate Transit Lines*, 129 Neb. 168, 261 N. W. 163; *Crandall v. Ladd*, 142 Neb. 736, 7 N. W. (2d) 642.

The judgment of the district court as to plaintiff's cause of action is reversed and the petition dismissed. The verdict and judgment on defendant's cross-petition are affirmed.

AFFIRMED IN PART AND REVERSED IN PART.

WILLIAM WEITZ, APPELLANT, V. UNITED STATES TRUST COMPANY ET AL., APPELLEES: G. HOWARD JOHNSON, INTERVENER, APPELLANT.

10 N. W. (2d) 623

FILED JULY 30, 1943. No. 31587.

1. **Negligence.** In the absence of a statutory provision to the contrary, contributory negligence that is more than slight on the part of the plaintiff may defeat recovery in an action by a third person against the absent owner of premises occupied by a tenant to recover damages arising from a dangerous condition on such premises, even though the existence of such condition is in

violation of a statute, or ordinance, and even though such violation may be held to be negligence *per se*.

2. ———. Evidence examined and contributory negligence of plaintiff held, as a matter of law, to prevent his recovery of damages for personal injuries incurred in falling down the elevator shaft of a warehouse, in an action against the owner of such building, where the evidence shows such premises to have been occupied by a tenant of such owner, and such shaft to lack a safety device required by ordinance.

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

E. L. Murphy, E. M. Kennedy, E. F. Fogarty and *Rosewater, Mecham, Shackelford & Stoehr,* for appellants.

Gaines & Shoemaker and *Morsman & Maxwell, contra.*

Heard before SIMMONS, C. J., PAINE, YEAGER and CHAPPELL, JJ., and TEWELL and LIGHTNER, District Judges.

TEWELL, District Judge.

This action was brought in the district court for Douglas county to recover damages arising from personal injuries incurred from falling down an elevator shaft. The defendants United States Trust Co., a corporation, and United States National Bank, a corporation, are alleged to be the owners of the building in which such shaft was located. At the close of the plaintiff's evidence, the trial court, upon motion of the two defendant corporations, discharged the jury and entered judgment for the defendants. The plaintiff appeals.

The elevator shaft involved is a portion of a building hereinafter described. The pleadings and the evidence do not disclose the exact nature of the title or interest owned in such building by either of the two defendant corporations. The pleadings indicate that one of these two corporations succeeded the other as trustee, and, at the time of the accident involved, held the legal title in trust. For the purposes of this opinion we do no violence to any right of the plaintiff by treating the two defendant corporations as being owners of the absolute fee title of the premises in-

volved. In any event it is conceded that neither of these two corporations was in the actual occupancy of such building, but that instead such building was being occupied and operated by a tenant, who is not a party to this action. We hereinafter refer to these two defendant corporations as the defendant owners. The defendant G. Howard Johnson, hereinafter referred to as the defendant Johnson, under the trade-name of Omaha Merchants Transfer Company, was the employer of the plaintiff at the time of the accident involved. No recovery is sought by the plaintiff in this action as against the defendant Johnson. The plaintiff has been awarded compensation under the workmen's compensation act as against the defendant Johnson in an action brought in the district court for Douglas county, and later appealed to this court. The opinion of this court in that case, entitled *Weitz v. Johnson,* was released on June 4, 1943, *ante,* p. 452, 9 N. W. (2d) 788. The defendant Johnson is made a party defendant for the purpose of giving him such right of subrogation to plaintiff's rights as he might have under the workmen's compensation act. The facts surrounding the accident involved are set forth in the opinion to which reference is above made, and therefore will be only briefly mentioned herein. From the nature of this case as above stated, it will be seen that we are confronted with a question that relates only to the liability of the absent owner of premises for personal injuries to a third person injured upon such premises, while operated by a tenant of such owner.

The building in which the plaintiff was injured is a six-story brick building facing west and located at 109 South Tenth street in Omaha, Nebraska. This street extends from north to south. The spur of a railroad track extends from east to west and parallel to and only a few feet south of the south wall of this building. The elevator shaft involved is adjacent to and north of the south wall of the building, and is located from 20 to 25 feet east of the west end of such building. The east and west wall of such shaft is of solid brick. At the north and also at the south side of

such shaft on the ground floor there is located a wooden panel gate, each of which is so constructed as to slide up and down. Immediately south of the wooden panel gate on the south side of such shaft, and in the south wall of such building, are steel doors that close the opening to the outdoors and to such railroad spur. The wooden panel gate on the north side of such shaft, when down, divides such shaft from the interior ground floor of such building. This ground floor is on a level with the floor of any railroad box car that might be located outside such building and immediately south of such shaft. The building contains a basement below such ground floor, and into this basement such shaft extends. There were outlets for electric lights above and below the elevator, so constructed as to move up or down with the elevator. An outlet for an electric light also existed in the ceiling of the ground floor at a point a few feet north of the center of the shaft. A switch to turn on this ceiling light was located on the north edge of the east brick wall of the shaft. There was a window in the south wall of the shaft, the bottom of which was several feet above the ground floor. The entrance to the building is from the west end, and from off the Tenth street dock. The top of this dock is about three feet above the street level, and level with the ground floor of the building. In the west wall of the building there are two sets of doors, each consisting of a large double door and a single door. Windows existed in the upper half of each of these doors, and a glass transom, semi-circular in design, was located over each door. At the time of the accident involved, all windows above mentioned were smoky and dirty, and no electric light in any of the outlets above mentioned was lighted. There was no automatic interlocking, or hold-down device, upon the shaft or elevator, and due to the lack of such device, the north panel gate in the shaft could be raised by hand, even though the elevator might not be at the ground floor.

On the morning of April 24, 1941, the plaintiff, and three or four other employees of defendant Johnson, were sum-

moned to the building by their employer for the purpose of unloading the contents of a box car into the building for storage. The building had been taken over by the war department of the United States from the tenant of the defendant owners, and was being used as a warehouse. The defendant Johnson, under a contract with said war department, furnished the labor to unload, from freight cars, materials sent to such building for storage. Upon arrival at the building, between 8 and 9 o'clock a. m., the plaintiff entered therein from the west end, and went directly to the elevator shaft. He raised the panel gate on the north side of the shaft by hand to above his head. The day was cloudy. No lights were lighted in the building. The plaintiff testified that his purpose was to walk across the elevator platform and open the steel doors in the south wall of the shaft. He could not see the bottom of the shaft, and it appeared to him that the platform of the elevator, which was dark in color, was level with the floor upon which he stood. He was feeling with his foot, to make sure of the presence of such platform, when his attention was attracted by some one calling. He testified that he then turned his head slightly, lost his balance and fell to the bottom of the shaft. The panel gate fell back into closed position. The platform of the elevator was in fact, at the moment of such fall, one or more floors above the ground floor. As a result of this fall the plaintiff was very seriously and permanently injured. He asks recovery in the sum of $100,000. It is well to add to this statement of facts, that plaintiff had worked in this building for about three weeks next before his injury, knew the location of light switches, and knew that the panel gate on the north side of the shaft and at the ground floor level could be raised by hand, even though the elevator was any place other than at such floor level.

One of the grounds of liability on the part of the defendant owners that is urged by plaintiff is the failure of such owners to equip the elevator shaft or elevator, with an interlocking device or hold-down latch, and thus to prevent the panel gate on the ground floor and in the north wall of

the shaft from being raised, except when the elevator platform was at such floor level. In his petition the plaintiff plead the provisions of section 344 of ordinance No. 11,416 of city of Omaha, which, he contends, required the installation of such a device in the shaft involved. This section appears to have been enacted in July, 1922. The evidence does not disclose when the elevator shaft was constructed. The plaintiff's petition alleges that the property was conveyed by deed in 1921, with no allegation relative to whether or not the shaft was then in existence. The answer of the defendant owners alleges that the elevator shaft was erected in the year 1920 substantially as it existed at the time of the accident involved. The provisions of the ordinance relating to such an interlocking device or hold-down latch, even if assumed to apply to a shaft such as the one involved, are not made retroactive by the terms thereof. It has been held by this court that a statute or ordinance requiring a safety measure will not be construed to act retroactively, unless made to do so by its terms. *Kerwin v. Thompson, Belden & Co.*, 110 Neb. 251, 192 N. W. 692. The plaintiff also predicates error upon the refusal of the trial court to admit into evidence the safety code adopted in 1937 by the department of labor, which he contends required such interlocking device or hold-down latch. It is the theory of the plaintiff that the alleged failure of the defendant owners to comply with the mandatory provisions of a statute, or ordinance, relative to a safety measure is negligence *per se*, and places the plaintiff within rules stated in the case of *Tralle v. Hartman Furniture & Carpet Co.*, 116 Neb. 418, 217 N. W. 952. We need not further discuss or decide the applicability of the ordinance or safety codes above mentioned, in view of the holdings hereinafter expressed upon another phase of this action. Even though both such ordinance and codes were applicable to the facts involved, and a violation thereof negligence *per se*, the holdings hereinafter made would remain unchanged. The exclusion of the safety codes from the evidence, if error at all, would be error without prejudice. In the absence of a

statutory provision to the contrary, contributory negligence that is more than slight on the part of the plaintiff may defeat recovery in an action by a third person against the absent owner of premises occupied by a tenant to recover damages alleged to have arisen on account of a dangerous condition on such premises, even though the existence of such condition is in violation of a statute, or ordinance, and even though such violation may be held to be negligence *per se*. *Vanderveer v. Moran,* 79 Neb. 431, 112 N. W. 581; 45 C. J. 980. It cannot be logically urged that the provisions of any statutory provision prevent applicability of the rules relating to contributory negligence to the facts of this case.

As has been stated, the plaintiff was well aware of the existence of the elevator shaft. He knew that the north panel gate on the ground floor could be raised upward, whether or not the elevator platform was at such ground floor level. He knew of the existence of the light switch on the north edge of the east wall of the shaft. He knew of the cloudy weather, the dirty windows, and of the semi-darkness in the room from whence he entered the shaft. The building involved was not designed for use by the public. It was a warehouse intended for use of the occupant and employees only. Even if it is assumed that the ordinance and safety codes above mentioned were applicable to the building and elevator shaft involved, and even if it is assumed that a violation thereof was negligence *per se* on the part of the defendant owners, can it reasonably be said by any one that the plaintiff was not guilty of any negligence contributing to the proximate cause of his injury, or that his negligence was not more than slight, or that the negligence of the defendant owners was gross in comparison to that of the plaintiff? We think not. If not, then the contributory negligence of the plaintiff bars his recovery as a matter of law. We are well aware of the rule requiring the evidence to be given that construction that is most favorable to the plaintiff, in adjudging the question of whether or not his contributory negligence bars his recov-

ery as a matter of law, and also well aware of our duty not to allow a verdict in his favor, if, as a matter of law, his contributory negligence bars his recovery. Cases in which contributory negligence was held to bar recovery as a matter of law in actions similar, in some respects, to this action are the following: *Wentink v. Traphagen*, 138 Neb. 41, 291 N. W. 884; *Gardner v. Metropolitan Utilities District*, 134 Neb. 163, 278 N. W. 137; *Kelley v. Luke*, 140 Neb. 283, 299 N. W. 593; *Kerwin v. Thompson, Belden & Co., supra; Sodomka v. Cudahy Packing Co.*, 101 Neb. 446, 163 N. W. 809. In some of the cases last above cited the plaintiff therein, prior to the time of his fall, was unaware of the existence of the pit into which he fell. It is true that in the case of *Tralle v. Hartman Furniture & Carpet Co., supra*, the owner of a building occupied by a tenant, under a condition such as we have assumed for the ordinance and safety code involved in this case, was held liable for damages arising from a condition created by violation of an ordinance. However, in that case, in the first place, the injured person did not know that the hammer was where it might fall, and, in the second place, the hammer was not caused to fall through any act of the injured party. Contributory negligence was not present. Here, the plaintiff is the author of his own injury.

It will be noted that, for the purpose of this opinion, we have assumed that both the ordinance and safety codes above mentioned are applicable to the facts of this case. We do not so decide. We have also assumed that a violation of either such ordinance, or codes, would be negligence *per se*. We do not so decide. No assumption more favorable to the plaintiff, with relation to such ordinance or codes, could be made. We have not seen fit to discuss the question of whether or not the lack of the hold-down latch above mentioned, with plaintiff's knowledge thereof, and with his knowledge of all conditions surrounding him, was any portion of the proximate cause of the injuries involved, or was, instead, a known and non-acting condition. We have not seen fit to discuss the difference between the du-

ties of a tenant occupying premises under lease, and those of the landlord owner who is out of possession. If the plaintiff may not recover under the assumptions of negligence on the part of the defendant owners herein made in his favor, there is not any necessity of discussing other questions that might otherwise be involved.

For reasons above given the judgment of the trial court is affirmed.

AFFIRMED.

BESSIE STEPHENS, APPELLEE, V. CLAYTON H. STEPHENS, APPELLANT.

10 N. W. (2d) 620

FILED JULY 30, 1943. No. 31611.

1. **Divorce.** One who reasonably understands the nature and purpose of an action for a divorce from the bonds of matrimony, the effect of his acts with reference thereto, and who has the will to decide for himself whether or not such action should be brought, has sufficient mental capacity to maintain such action in his own name.
2. ———. Misconduct on the part of the plaintiff in an action for divorce, not amounting to a statutory ground for divorce, affords no justification for punishment inflicted upon such plaintiff by the defendant in retaliation out of all proportion to such misconduct.
3. ———. Violence by choking, slapping and kicking the person of a wife by her husband, when not reasonably necessary to prevent an immediate impending harm, is not prevented from being extreme cruelty, merely because the sane perpetrator was highly nervous from lack of sleep and worry.

APPEAL from the district court for Sherman county: ELDRIDGE G. REED, JUDGE. *Affirmed.*

Lamont L. Stephens, for appellant.

R. H. Mathew, contra.

Heard before SIMMONS, C. J., PAINE, YEAGER, CHAPPELL and WENKE, JJ., and TEWELL and LIGHTNER, District Judges.

TEWELL, District Judge.

This action was brought in the district court for Sherman county by Bessie Stephens, plaintiff, to secure a divorce from her husband, the defendant Clayton H. Stephens, Jr. From a decree granting the plaintiff a divorce, awarding the custody of children to the plaintiff, and also awarding the plaintiff alimony and future monthly payments for support of such children, the defendant has brought the case to this court by appeal proceedings.

The ground for divorce alleged in the plaintiff's petition is that of extreme cruelty. The defendant by his answer denies that any acts of cruelty to the plaintiff were committed by him while he was mentally competent, and alleges that any acts of violence on his part toward the plaintiff occurred subsequent to the month of June, 1941, and after he had become mentally deranged. The defendant also alleges that the plaintiff is mentally deranged and not competent to maintain this action. By his answer the defendant prays that the action be dismissed. In the defendant's brief filed in this court, no complaint is made, if a divorce is to be granted, as to the amount of alimony, or child support awarded to the plaintiff. Either by allegations and admissions in the pleadings, or by the evidence, the facts hereinafter related may properly be found to be true.

The parties were married to each other at Ord, Nebraska, on May 20, 1929, and at all times since such marriage have resided in Sherman county. Three children, all still living, were born to this union, Betty on October 23, 1930, Lyle on September 3, 1932, and Marjorie on November 10, 1940. The defendant is a farmer by occupation, and the parties have lived upon a farm during all of the time they have lived together. The contentions of the plaintiff and of the defendant, perhaps, may be best made clear by mention first of some events that are shown to have occurred during the years 1941 and 1942. One morning, in the month of June, 1941, before the defendant had arisen for the day, the plaintiff came into the defendant's bedroom, seated herself upon the bed, and told the defendant that she

did not love him any more; that she had written a few letters to another man; that she was in love with such other man, and desired to go and live with him. The facts are that the plaintiff had written three different letters to this party, all within a few months of the date of voluntarily telling her husband thereof. In these letters she asked him to come to see her. The facts also are that the plaintiff had never met the man, had never talked to him in her life, and he did not know who she was. He did not answer any of the letters. Later in 1941 the plaintiff attempted to talk to him by telephone from Omaha. When she told him who she was, he hung up the receiver. He did not at any time ever seek to get in touch with the plaintiff in any manner. It is the contention of the defendant that the things told him in the above-mentioned conversation caused him great mental worry, and that he lost sleep, became highly nervous, and mentally deranged. The evidence also shows that the plaintiff's mother has been insane and in the asylum at Ingleside for the past 22 years, except at intervals. The nature of such mother's insanity caused her to think she was in love with, and actually married to, a man other than her husband, although such other would have nothing to do with her. It is upon the above related facts that the defendant bases his contention to the effect that the plaintiff is incompetent to maintain this action.

The plaintiff testified to several acts of violence, such as slapping, choking and kicking, committed upon her by the defendant. The defendant admits some of such acts. All of such acts as are admitted by the defendant occurred after he was told of the letters to the other man. It would unduly lengthen this opinion to relate the many incidents shown by the evidence. To relate a few of the more important will suffice. Several times the defendant told the plaintiff that if she ever left him "it would just be too bad for her." In August, 1941, the defendant took the plaintiff and their three children to Ravenna, Nebraska, on a Saturday afternoon. When the defendant was about ready to go home, he could not find the plaintiff, or any of the children.

He went home without them, and found a note on the table from his wife telling him that she could not carry on, and was leaving him. He later ascertained that she had employed a trucker to take herself and children home from Ravenna, and to load nine head of defendant's cattle and haul them to Broken Bow, Nebraska, where she sold them. That night the defendant drove to where the plaintiff's sister lived in Omaha. Not finding the plaintiff there, he drove back home very early the next day, and found the plaintiff at Ansley, Nebraska, where she had rented a room in a hotel. He persuaded her to go home with him, and got from her $474 in money, that being what was left from the sale price of the cattle. On at least two different occasions subsequent to June, 1941, the defendant, in the plaintiff's presence, attempted, ostensibly at least, to commit suicide by taking poison. The poison was knocked from his hand in time to prevent its consumption by him. The plaintiff is shown to have gone to Omaha on two different occasions after June, 1941, each time with the defendant's consent. There she tried to find work for hire, and did work for a time as a housemaid. While she was there she wrote the defendant for money. He sent no money, but, instead, went to Omaha, and took the children home with him. Finally the plaintiff, at defendant's solicitation, agreed to go back to Sherman county, if the plaintiff would rent a house where herself and children could live away from the defendant. This the defendant did, and gave the plaintiff the sum of $20 per month to support herself and the children. While thus living, the plaintiff, on May 1, 1942, brought this action for a divorce. In September, 1941, the defendant went to consult Dr. Kelly, a psychiatrist, in Omaha, as he felt he was going insane. He was treated by Dr. Kelly with electric shocks for a period of about twelve days. At the end of such time the plaintiff took him home for the week-end. The plaintiff wanted the defendant to go back for further treatment, but he refused to do so. The defendant was again treated by Dr. Kelly for mental ailment from March 22 to April 15, 1942, after his father had filed a

complaint of insanity before the Commissioners of Insanity of Sherman county. This occurred just after one of the defendant's attempts to take poison.

The defendant's contention, to the effect that the plaintiff is so mentally deranged as to be unable to maintain this action, cannot be sustained. He cites no authority to sustain such contention, and we think none such could be found that would be applicable to the facts of this case. Other than proof of her mother's insanity, and of plaintiff's attempted communications with the man referred to, the record is bare of any proof of the plaintiff being other than sane. There could reasonably exist any one or more of several motives for the letters, any one of which would be that of a sane person. If a plaintiff in an action for divorce reasonably understands the nature and purpose of such action, the effect of his acts with reference thereto, and has the will to decide for himself whether or not such action should be brought, he has sufficient mental capacity to maintain such action in his own name. *Simmons v. Kelsey*, 76 Neb. 124, 107 N. W. 122. The evidence does not show the plaintiff to be insane. We need not decide the question of whether or not insanity on her part could be raised by the defendant's answer, or made a matter of defense by him.

The defendant seeks to invoke as a defense the doctrine of recrimination, and contends that the plaintiff has been guilty of such acts as to give rise in him to grounds for divorce against her, and that therefore the plaintiff's action should be dismissed. Upon this phase of the case the defendant cites the opinion in the case of *Studley v. Studley*, 129 Neb. 784, 263 N. W. 139, and other cases cited therein. The evidence in this case fails to show any applicability of such doctrine to the facts of this case. From the general tenor of the evidence and from incidents shown therein, one is justified in concluding that the plaintiff is a meek sort of person. Aside from her acts of attempting to communicate with the other man, not an incident that reflects upon her character or virtue, or that shows any cruelty to

the defendant, is shown by the evidence. The defendant's father and mother think well of, and have highly praised, the plaintiff as a housewife and mother. The plaintiff says she wrote the letters to the other party and then voluntarily told him of them, because he had many times told her that, if he desired, he could "take out" a certain schoolteacher. She seems merely to have tried to arouse his jealousy, and thereby to cause him to be more considerate of her. Misconduct on the part of the plaintiff in an action for divorce, not amounting to a statutory ground for divorce, affords no justification for punishment inflicted upon the plaintiff in retaliation out of all proportion to such misconduct. *Walton v. Walton,* 57 Neb. 102, 77 N. W. 392.

The defendant further contends that acts of violence committed by a person of unsound mind does not constitute extreme cruelty as a ground for a divorce, and cites the case of *Kirkpatrick v. Kirkpatrick,* 81 Neb. 627, 116 N. W. 499. We deny the applicability of any such rule to the facts of this case. We are not called upon to discuss the question as to what, if any, condition of insanity on the part of the defendant would prevent actual acts of violence by him against the plaintiff from constituting extreme cruelty. There is ample evidence of extreme cruelty on the part of the defendant toward the plaintiff having existed long before the letters were written to the innocent man she involved in her domestic troubles. It is not even contended that the defendant did not have the mental capacity to form an intent, if such be required to constitute extreme cruelty, to injure the plaintiff at the times he either slapped, choked or kicked the plaintiff or pulled her hair, after he knew of the letters to the other man. The plaintiff testified that as early as 1930, within a year after the marriage, the defendant forbade some of her relatives to come upon his farm, and chased them away with a shotgun; told her that her youngest brother was no good, and told the plaintiff many times that she was just like her "damned old mother." In 1934 the plaintiff says the defendant did not speak a pleasant word to her for about two weeks. From the testimony

of the plaintiff, the defendant is shown many times to have told her that "If you think so damn much of your relatives, go live with them." We do not have the advantage of having seen and heard the witnesses, as did the trial court, but we glean from the record that the defendant lived upon the farm with his wife from 1929 to 1941, was inconsiderate of her, and regarded her much the same as one of his chattels, always insisting upon having his own way about his daily life. Then, when told of the letters which plaintiff had written, the seedbed of domestic trouble, which his own conduct had generated, burst into an uncontrolled rage. He then began to fear that he might, without compensation, lose one of his chattels, and resorted to such devices as threatening suicide, slapping, choking and kicking the plaintiff at various times. Such conduct, when not reasonably necessary to prevent an immediately impending harm, is not prevented from being extreme cruelty, merely because the sane perpetrator was highly nervous from lack of sleep and worry. *Walton v. Walton, supra.*

For the reasons above stated, the decree of the trial court is affirmed.

AFFIRMED.

ETHEL L. STINTON JONES, EXECUTRIX, APPELLANT, V. CLYDE K. EWART ET AL., APPELLEES.

10 N. W. (2d) 708

FILED JULY 30, 1943. No. 31541.

Gifts. Where parents, coowners of a farm, deed it to their son-in-law and daughter for a stated consideration of $18,000, $8,000 of which was a gift to the grantees, and in the same instrument require the grantees to pay as consideration for said deed $550 per year to the grantors during their lifetime and one year after the death of the survivor of the parents to pay the $10,000 balance of the stated consideration to the three other children of the grantors with interest at 5½ per cent. from the date of the death of such survivor, which deed gives both the grantors and the donees the right to foreclose on breach of the provisions of the

deed, the provision for payment of said $10,000 is a completed gift *inter vivos*, as of the date of the deed, to said donees and a subsequent attempt to modify the same to the disadvantage of the donees by an amendment to the deed executed by both grantors and grantees is invalid.

APPEAL from the district court for Fillmore county: STANLEY BARTOS, JUDGE. *Affirmed.*

John C. Gewacke, R. B. Waring and *Guy A. Hamilton,* for appellant.

Sloans, Keenan & Corbitt and *Walter C. Weiss, contra.*

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

LIGHTNER, District Judge.

This controversy arises by reason of a provision in a deed by Charles and Emma L. Stinton to their son-in-law and daughter, Clyde K. Ewart and Vallia F. Ewart, which among other considerations requires the grantees to pay $10,000 to three other children of the Stintons a year after the death of the survivor of the Stintons. An attempt was made later by the Stintons and Ewarts to cancel this $10,000 provision by an amendment to the deed. The claim of certain of the defendants is that the $10,000 provision amounted to a completed gift *inter vivos* which could not be canceled while plaintiff and other of the defendants claim that it was not a completed gift. The district court found that the $10,000 provision amounted to a completed gift *inter vivos* and plaintiff and part of the defendants appeal.

It is necessary in order to give an understanding of the matter that a much more detailed statement be made of the facts. They are not in serious dispute and are as follows: On and prior to April 19, 1922, Charles Stinton and Emma L. Stinton, as husband and wife, were the owners as tenants in common of a 160-acre farm in Fillmore county, Nebraska. The Stintons were parents of the following children, to wit: Vern L. Stinton, son; Ethel L. Stinton, now

known as Ethel L. Stinton Jones, daughter; Elva A. Archer, daughter; and Vallia F. Ewart, daughter. They had no other children, except those above named, then or at any time, and all of said children were on April 19, 1922, living away from the home of their parents. On said date of April 19, 1922, the said Charles and Emma L. Stinton signed, acknowledged, executed and delivered a deed of said farm to Clyde K. Ewart and their daughter, Vallia F. Ewart, husband and wife. The expressed consideration for the execution and delivery of said deed was the sum of $18,000 and other considerations, $8,000 of which was a gift to the grantees.

The grantees were to pay as part of the consideration for the deed the sum of $550 on March 1, 1923, and a like sum on March 1 annually thereafter to the grantors of said deed, and in case of the death of one of the grantors to the survivor; and said grantees were to pay the taxes on said real estate for the year 1922 and all subsequent years.

Said deed further provided that the grantees of said deed were to pay $10,000 " * * * one year from the date of the death of the surviving grantor herein, with interest at the rate of five and one-half per cent. (5½%) from date of said death until date of payment. Said payment to be made unto Vern L. Stinton, of Ubero, Montana, Ethel L. Stinton, of Ryegate, Montana, and Elva A. Archer, of Ryegate, Montana, share and share alike; provided that should any of the three last mentioned persons depart this life, leaving no heirs of his or her body surviving, that his or her share of Ten Thousand and no/100 ($10,000) Dollars shall lapse and shall be divided share and share alike among the survivor, or survivors and grantee Vallia F. Ewart or their respective heirs, administrators, or assigns."

That on said date of April 19, 1922, the same date the deed was executed and delivered, the said Charles Stinton, executed a last will and testament whereby he bequeathed and devised all of his other property; that he made three codicils to said last will and testament on the following subsequent dates, to wit: April 10, 1925, December 1, 1934, and January 5, 1935.

That on June 15, 1936, the grantors and grantees to the deed executed on April 19, 1922, made an instrument designated "Amendment to Deed" whereby it was provided that the grantees shall have the right on the maturity of said $10,000 obligation to pay the same to the legally appointed representative, executor or administrator of the estate of Charles Stinton, the same to be distributed according to the terms of the last will and testament and several codicils executed by the said Charles Stinton.

At the time of the execution of the deed heretofore mentioned Vern L. Stinton was indebted to his father, Charles Stinton, in the sum of $3,500.

Charles Stinton died May 17, 1940, and thereafter his last will and testament and several codicils thereto were duly admitted to probate in the county court of Fillmore county, Nebraska, and Ethel L. Stinton Jones was duly appointed executrix thereof and is now the duly appointed, qualified and acting executrix of said estate.

Emma L. Stinton, the widow of Charles Stinton, died October 8, 1940.

Clyde K. Ewart and Vallia F. Ewart made the annual payments of $550 on March 1, 1923, and thereafter, and paid the 1922 and subsequent real estate taxes, as was provided in said deed.

Defendants, Clyde K. Ewart and Vallia F. Ewart, have not paid said sum of $10,000 as provided in said deed.

Vern L. Stinton, son of the said Charles Stinton and Emma L. Stinton, died July 4, 1928, leaving him surviving, his widow, the defendant, Daisy Stinton Beeker; his daughter, the defendant, Laveeta Moore, thirty-five years of age; and an infant son, Allen Stinton, who died April 5, 1929, at the age of ten years.

Elva A. Archer, daughter of the said Charles Stinton and Emma L. Stinton, died August 5, 1934, leaving her surviving three sons, the defendants, Harold Dean Archer, Paul Augustus Archer, of legal age, and Gerald Eugene Archer, who is a minor.

Another fact considered of importance by some of the

parties is the codicil of Mr. Stinton's will executed on December 1, 1934. The original will was made on the same day as the deed, April 19, 1922, and after giving his wife a life interest in his property, in case she survived him, bequeathed and devised the remainder to his three children other than Vallia who had been provided for by the deed, viz., Vern, Elva and Ethel, share and share alike. By December 1, 1934, the date of the codicil, two of his children, Vern and Elva, had died, Vern leaving one child and Elva three. Vern when he died had owed his father $5,000 and one of the purposes of the codicil and the amendment to the deed was to offset this indebtedness against his share of the Stinton estate. The codicil of December 1, 1934, left the provisions for his wife and daughter Ethel intact and then bequeathed and devised the remaining two-thirds of his estate equally to the four grandchildren above referred to, but provided that from the one-fourth given to Laveeta Moore, the daughter of Vern, any of Vern's $5,000 indebtedness and interest which had not been paid should be deducted, but that no claim should be made against her for any deficiency.

The deed of April 19, 1922, further provided that the grantees shall keep the buildings, appurtenances and improvements in as good repair as they now are during the period above set forth, and "As a part of the consideration of this conveyance, it is stipulated and agreed that if the grantees shall fail or neglect to promptly pay the annual payments hereinbefore stated or fail to pay the taxes at or before the maturity, or should cause or permit the buildings, appurtenances, and improvements to become out of repair, or to be neglected or damaged so as to materially decrease the value of the security herein, then and in that event, the grantors or those who may be entitled to rights hereunder shall have the right to foreclose the agreement embodied herein, and sell the premises described in the form and manner provided by law for the foreclosure of mortgages, and out of the proceeds be paid a sum sufficient to satisfy the obligations herein set forth, whether the same

shall have all been matured or in part may be reasonably anticipated."

The original deed was executed by Mr. and Mrs. Stinton only, the "Amendment to Deed" by Mr. and Mrs. Stinton and the grantees Mr. and Mrs. Ewart.

This case as will be noticed from the statement of facts presents the question of the validity of the amendment to the deed in so far as it affects the rights of the named beneficiaries to the $10,000, which in turn depends upon whether or not the provisions for their benefit in the deed giving them this $10,000 was a valid and completed gift *inter vivos* as of the date of the deed. The district court held that it was a valid gift and that the subsequent attempt to modify it by the amendment and codicil referred to were ineffectual and the correctness of this holding is the question now presented to this court.

Many cases involving gifts *inter vivos* have been before the courts and the general principles are, we think, quite well established. The difficulty is in applying them to various sets of facts. Appellants call attention in their brief to the four elements that must concur to make a valid gift *inter vivos,* to wit: 1. Intention to give; 2. Delivery; 3. End of dominion of donor, and 4. Creation of dominion of donee. *Madison Trust Co. v. Skogstrom,* 222 Wis. 585, 269 N. W. 249.

One of the difficult questions in this case has to do with the question of delivery. Manual delivery of certain species of property cannot be made and the trend of modern decisions is to permit a symbolic or constructive delivery where the circumstances of the case require it. 28 C. J. 636. In *Dinslage v. Stratman,* 105 Neb. 274, 180 N. W. 81, a son owed his mother $1,400 on open account. His mother in her lifetime directed him to pay $1,000 of this to her granddaughter, the daughter of another son. The payment was not made in the lifetime of the mother. The court held this to be a valid delivery. "Hence, she (the mother, Mrs. Stratman) did everything in June, 1915, that was in her power to divest herself of the title to the chose in action,

and invest Tracey (the granddaughter) with it. We think that there was a sufficient delivery. To hold otherwise would be to say that there can be no delivery of a chose in action unless it is accompanied by delivery of written evidence of it, * * * ." The second and third points of the syllabus in *Dinslage v. Stratman, supra,* are as follows: "The mere fact that actual enjoyment of the gift by the donee is, by the declaration of the gift, postponed until the death of the donor, does not render the gift either conditional, or testamentary, or in any way invalid."

"In such a case, the stipulation that actual enjoyment of the gift is to be deferred until the donor's death only marks the time when enjoyment begins, and is not a condition, since the donor's death is inevitable."

In *In re Estate of Dayton,* 121 Neb. 402, 237 N. W. 303, Dr. Dayton of Lincoln, had purchased 10 bonds in the sum of $1,000 each, registered them in the name of a nurse for a long time in his employ. He kept the bonds in his own safety deposit box for his convenience in collecting the interest thereon so long as he lived; he had stated to witnesses that the bonds were a gift to the nurse. Held that a complete delivery of the bonds to the nurse had been effected.

In *Novak v. Reeson,* 110 Neb. 229, 193 N. W. 348, it is held: "Where a father, in making a loan of $4,000 to one of his sons, required said son to execute four notes in the sum of $1,000 each, payable to each of his four daughters, which said notes the father delivered to another son, with directions to hold said notes, collect the interest thereon and pay same to father during his lifetime, and at his death to deliver the notes to each of the daughters named therein, *held* a complete and irrevocable gift of the notes to the daughters."

In *Snyder v. Snyder,* 131 Mich. 658, 92 N. W. 353, it is held as indicated by the second paragraph of the syllabus: "Where one assigns a mortgage to another on an understanding that moneys collected on the mortgage during the assignor's life shall be paid to her, and that any balance

remaining due at the time of her death shall belong to the assignee, there is no gift *inter vivos.*" Discussing the matter in the opinion it is said: "To constitute a valid gift *inter vivos,* it must take effect at once, and pass entirely beyond the control of the donor. The retaining of any control in the hands of the donor over the subject of the gift renders it invalid. * * * Under defendant Thomas' own statement in his answer, his mother retained the entire control over this gift, and had the right to retain as her own all sums that Benjamin paid to her or to Thomas during her lifetime. She could collect and use the entire amount. It follows that this assignment must be held void."

In *Hild v. Hild,* 135 Neb. 896, 284 N. W. 730, the following rules applicable to gifts *inter vivos* are set forth in the opinion:

"A clear and unmistakable intention on the part of the donor to make a gift of his property is an essential element of the gift * * * ."

" * * * the person asserting it (a gift) must prove all essential elements by clear, direct, positive, express and unambiguous evidence."

In *Madison Trust Co. v. Skogstrom, supra,* the general rules relating to gifts *inter vivos* are stated, but in that case the court found as a matter of fact that there was no delivery of the certificate which had been assigned to the claimant, " * * * but, on the contrary, delivery was rather pointedly refused." The alleged gift was in that case a trust certificate owned by one Crowley which respondent Skogstrom claimed he had given to her. Further discussing the question of delivery in the opinion it is said: "After the noting of the assignment by the Central Wisconsin Trust Company, Mr. Schenck left the certificate on the corner of his desk. * * * Mr. Ferris testified that when the certificate with the assignment on it was returned to Mr. Schenck's desk, the suggestion was made that he turn it over to the respondent, to which Crowley replied, 'Oh no. Oh no, I will keep that myself, I will take care of that.' Before executing the assignment, he had told respondent that

he did not want to 'sign it over to her' and that 'he wanted it fixed in case something happened to him.' "

In *Ladman v. Farmers & Merchants Bank of Milligan*, 130 Neb. 460, 265 N. W. 252, the general rules in regard to gifts are well stated, but since there seems to be little or no dispute about the general rules we will not restate them. The facts in that case clearly distinguish it from the instant case. The instrument under consideration in that case did not state the amount of the deposit which was the subject of the alleged gift, nor designate any particular amount which should go to any particular child, but left for future determination by some one, not designated, the amount that should be set up and belong to each child; the instrument also provided that the children should not be entitled to the money until after the mother's death, and that the mother might use the funds deposited.

In *Andersen v. Luikart*, 127 Neb. 256, 255 N. W. 18, the general rules are again stated and there is a good review of the Nebraska cases in the opinion by Judge Good. The facts in that case are set forth in the following quotation from the opinion:

"In the instant case there is no gift, nor language showing a present intention to make a gift, by the plaintiff to his daughter. He did not communicate to her the fact that he had executed a release. He did not deliver the note or mortgage to her, but kept them in his possession and gave no direction to any one to deliver the note and mortgage to her. The release was executed evidently with the thought in his mind that he might not live to return from his trip to Denmark, and, in that event, the release should operate. We think the evidence falls far short of being convincing that there was any intention on the part of plaintiff to make a gift to his daughter. Moreover, long after this release was executed the daughter and her husband executed an extension agreement of the mortgage and note, recognizing their full liability for $5,000 and interest thereon."

In *Tucker v. Tucker*, 138 Ia. 344, 116 N. W. 119, it was held:

"Where a father executed a completed gift of certain certificates of deposit and stock to his sons, retaining only the right to collect interest and dividends thereon during his life, a change in the form of the certificates of deposit, made by the father without consultation of the donees only to enable the father to draw the interest, and without any purpose on his part to revoke the gift or assert title to the fund, was ineffective to invalidate the gift."

There is an excellent statement in the opinion of the principles governing cases of this kind, part of which we quote as follows:

"If the gift is absolute, the mere postponement of the enjoyment until the death of the donor is not material and will not defeat it. * * * In *McNally v. McAndrew,* 98 Wis. 62 (73 N. W. 315), a father indorsed an assignment on certain notes and the mortgages securing them, and gave them to his son with the understanding the donor was to have the interest on them so long as he lived; and subsequently the notes were returned to him to enable him to collect the interest and were found among his papers at his death. The court sustained the gift, and held the circumstances not to show a revocation. * * * The test seems to be whether any interest in the property itself has been retained, as distinguished from the mere use or enjoyment."

Other cases were cited by both parties and have been examined, but a discussion of more of them would unduly extend this opinion. Besides the general rules are well established, each case depends on its own facts to which must be applied the established principles. To this task we will now devote attention. Taking up the deed of April 19, 1922, upon which the claims of appellees are founded we note first that there is an absolute and unconditional transfer of the farm in question. *Emkee v. Ashton,* 139 Minn. 443, 166 N. W. 1079, is cited by appellants. There the parents conveyed the land to one son who was to pay them $200 and deliver them a dressed hog each year during the remainder of their lives and to pay certain sums ranging from $5 to $300 to other children of the grantors, all of ma-

ture years and residing in homes of their own, within six months after the death of the grantors. The deed is not set out in the opinion, but the opinion says with reference to it that "The conveyance of the property by the Krugers to the son Albert did not unconditionally vest title in the grantee. On the contrary the passing of full title was reserved and made dependent upon a performance of the conditions imposed by the support agreement, a failure of which would constitute a breach of the contract entitling the grantors to either an annulment of the conveyance, or to such other relief as might be appropriate to the facts presented." The land was reconveyed by the grantees to the grantor and the court held that the liens were extinguished. Here on the contrary the deed did vest unconditional title in the grantees and in case of their failure to pay the $550 reserved to grantors their only remedy was by foreclosure.

The direction to the grantees to pay the $10,000 to the three children of grantors is in positive and unequivocal terms. While the payment was to be postponed until one year after the death of the surviving grantor it comes under the rule laid down in *Dinslage v. Stratman, supra,* and other cases, which hold that the stipulation that actual enjoyment of the gift is to be deferred until the donor's death only marks the time when enjoyment begins, and is not a condition, since the donor's death is inevitable. While the direction to pay is not coupled with words actually giving the $10,000 to the three children of grantors we think that there can be no doubt from reading the entire deed that the grantors meant the direction to pay to include a giving of the $10,000 to the three children referred to.

That the donors intended to give the donees dominion over the gift is further indicated by the fact that they were given the right to foreclose against the grantees for breach of any of the conditions of the deed. In the last paragraph before the date it is provided that should the grantees fail or neglect to pay the annual payments or comply with other provisions of the deed therein referred to not only the

grantors, but " * * * those who may be entitled to rights hereunder shall have the right to foreclose the agreement embodied herein, and sell the premises described in the form and manner provided by law for the foreclosure of mortgages, and out of the proceeds be paid a sum sufficient to satisfy the obligations herein set forth, whether the same shall have all been matured or in part may be reasonably anticipated."

There are other considerations that lead to the conclusion that a present and irrevocable gift was intended. In making the deed all parties undoubtedly considered that it amounted to a gift of $8,000 to the grantees and a gift of the $10,000 lien to the other three children of the grantors. It is not substantially different than if the grantees had given a mortgage of $10,000 to the donees with interest at 5½ per cent. payable annually to the grantors. Now if the grantees had given a $10,000 mortgage to the donees with provision for payment to the grantors of the interest during their lifetime and the principal one year after their death it could hardly be successfully urged that such was not a gift to the donees. Yet the conditions of the deed are very similar to those of a mortgage providing as it does for the payment of the $550 (equivalent to interest) annually, the payment of taxes, the keeping up of the improvements, and finally the provision in relation to foreclosure.

It seems to us therefore that all the elements of a gift *inter vivos* are satisfied, to wit: (1) Intention to give, which is indicated by the unequivocal direction to pay; (2) Delivery in about the only way that delivery could be made by putting the deed of record, notifying the donees (the evidence in regard to notice is rather vague, but sufficient to establish we think that these members of the family although living at a distance got notice that this provision had been made for them, and did not refuse it). Delivery was not dissimilar to that established in *Dinslage v. Stratman, supra, In re Estate of Dayton, supra,* and *Novak v. Reeson, supra,* and other cases. (3) End of dominion of donor. The only right reserved by the donors was to fore-

close against the land if the provisions in the deed in their favor were not met. They reserved no interest in the land except this right to foreclose and no interest whatever in the $10,000. The fact that the $10,000 might have been wiped out in whole or in part by a foreclosure proceeding does not show retention of any control over the $10,000, but only that they had a superior lien. If they had owned a $10,000 second mortgage on any other land and given it to these three children it would not affect the validity of the gift even though they themselves had owned a first mortgage on the same land and the second mortgage had been wiped out by a foreclosure of the first mortgage. (4) Creation of dominion of donee. Dominion in cases of this kind must it seems to us from the very nature of the right be largely symbolical or token. The donors having transferred the right to the donees by unequivocal intention and delivery *in præsenti* of this $10,000 lien which however would not be due until after the death of the donors the dominion is perhaps only a right to protect the gift which the deed gives them in the form of a right to foreclose, they also had the right which the law would give them to bring suitable action if an effort were made to cancel or destroy it, and such rights as the law gives remaindermen to protect property in which they are interested. The donors having entirely given up dominion over this $10,000 lien and gift, the donees obtained by the same instrument dominion over it.

All of the elements to make a valid gift *inter vivos* having concurred we find that the gift was valid and could not be canceled by the subsequent amendment to deed executed by grantors and grantees.

One other question remains. It is contended that the share of Vern L. Stinton who was killed on July 4, 1928, intestate, should be paid to his administrator. No administrator was ever appointed and it is not claimed that it is needed to pay his debts which by now have undoubtedly been outlawed or barred by the statute of non-claims. The meaning of the deed as implied from the language used and

the provisions made seems to be that the Stintons wanted the share of each donee to go to the heirs of his body in case of the death of the original donee. The district court found that the daughter of Vern L. Stinton and his only surviving child was entitled to the share of her father as substituted donee. No creditor and no representative of the estate of Vern L. Stinton is here complaining. His widow is a party to this action and is not complaining. We think that the finding of the district court is correct.

There is a very interesting and instructive discussion in the briefs as to whether the provision in the deed for the donees is in the nature of a contract for their benefit as third persons. Inasmuch as we have held that there was a valid gift *inter vivos* and this opinion is already quite long we will not discuss that question.

The judgment of the district court is therefore in all things affirmed.

AFFIRMED.

JOHN CAHILL, APPELLANT, V. ROBERT S. MOCKETT, EXECUTOR, ET AL., APPELLEES.

10 N. W. (2d) 679

FILED AUGUST 6, 1943. No. 31531.

Specific Performance. Evidence contained in the record examined, and *held* insufficient to establish the contract alleged in the plaintiff's petition, and insufficient to entitle plaintiff to a specific performance thereof.

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

O. B. Clark, for appellant.

Mockett & Finkelstein, Thomas M. Davies and *Herman Ginsburg, contra.*

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

MESSMORE, J.

This is an action for specific performance of a contract. The court found and decreed: (1) That the plaintiff did not prove by clear, competent and satisfactory evidence the contract alleged; (2) that, had the plaintiff proved that a contract was entered into, then and in that event the plaintiff has breached it and has wholly failed to perform it. From these findings and decree, plaintiff appeals.

The pleadings establish that Robert S. Mockett is the executor of the estate of Margaret Sheehy, deceased, who died on April 17, 1940, a resident of Lancaster county, Nebraska; that on May 24, 1940, her last will and testament was admitted to probate in the county court. No appeal was taken.

In his second amended petition plaintiff alleged a written contract, evidenced by letters written by Margaret Sheehy. The substance of the contract pleaded is as follows:

On or about October 1, 1902, Margaret Sheehy and James Sheehy, her husband, were engaged in the monument business in Lincoln, Nebraska. Margaret Sheehy, in writing, represented to Thomas and Johanna Cahill, plaintiff's parents, for his benefit, that she was unable to bear a child, and, if plaintiff's parents would permit him to come to her home and he would come, she would receive him into her own family as her son and sole heir, teach him the monument business, continue to treat him as a son and sole heir and bestow upon him absolutely all her life savings, property and estate, acquired and accumulated during her lifetime, to be his upon her death. Plaintiff's parents, for his benefit, accepted the terms of the agreement and permitted him to leave his home in Ireland to come to the home of his aunt, Margaret Sheehy, in Lincoln, Nebraska. Plaintiff came to the home of his aunt in Lincoln, was received by her as her son and sole heir, became one of her family, and for many years worked in the monument business to her profit, without compensation other than his board, room and clothing. From the time he entered the home of his aunt up to the time of her death, he treated and cared for her,

and attended to her wants and needs as though she were his mother, looked after her welfare and happiness, performed each and all of the terms of the agreement by him to be performed. From and after he came to Lincoln his aunt frequently and repeatedly stated orally to the plaintiff and divers other persons, in the presence of the plaintiff, that she had made the contract and plaintiff had performed and carried out all the terms of the agreement.

The answer of defendants Martin and of the executor specifically denied the making of any such agreement; that if it was made plaintiff failed to perform the terms thereof, and any service he may have rendered his aunt had been fully paid. The reply was a general denial.

The record discloses without dispute that Margaret O'Connor was born in Listowel, County Kerry, Ireland, October 14, 1863, came to America in 1880, married James F. Sheehy in 1884. He was engaged in the monument business at Twentieth and O streets in Lincoln, Nebraska; he died March 24, 1910. The plaintiff came to Lincoln to his aunt's home in April, 1903, and lived with her until 1906, then boarded and roomed away from her home, receiving $7 a week to be expended for his living. On April 5, 1910, plaintiff married, after which he received $15 a week as wages. In June, 1910, he and his wife went to Ireland on money that the wife had saved. He stayed about three months, and his wife remained until June, 1911. Upon plaintiff's return he stayed with his aunt until March, 1911, when he was employed by the Burlington railroad, continuing in this employment until 1913, when he and his wife moved to California, where he worked for a warehouse company. In 1917, he moved to Cleveland, Ohio, where he worked as a pile driver, receiving the average wage of $400 a month. He returned to Lincoln in 1929, was employed by the Burlington railroad from September of that year until March, 1930. He was then employed by the Lincoln fire department where he worked for four years. Thereafter, he became a salesman for a monument company in Sioux City, Iowa, and later worked in the same capacity for an Omaha firm.

January 3, 1917, the aunt purchased and furnished a residence at 945 South Fourteenth street, Lincoln. From and after that date until her death, she owned and occupied the same as her home, using a part of the premises for roomers. In 1934 the aunt made a will, which contained certain charitable bequests to her church. She devised her home to the plaintiff and made certain bequests to her living sisters and the children of her deceased sisters. Later in 1934 she destroyed this will by tearing it up in the presence of her attorney in his office, and on October 12, 1934, she executed a new will, making certain specific bequests, providing for her sisters and the children of any deceased sister and leaving out the plaintiff. July 1, 1936, she added a codicil to her will in which she devised a life estate in her home property to a niece, Mamie Drysdale Martin, one of the defendants, and the remainder title she devised to the niece's children. In June, 1934, she purchased at auction a house at 2147 C street, Lincoln, and on January 7, 1935, executed and delivered a deed to this house to the plaintiff. On March 11, 1940, the aunt executed and delivered a deed to the home property to Mamie Martin, and on March 18, 1940, assigned to Mamie Martin and her husband what is referred to in the evidence as the Novicoff mortgage.

The plaintiff contends that the court erred in holding that the evidence was insufficient to prove the contract. The plaintiff testified he was born in Listowel, County Kerry, Ireland, October 4, 1884; that he was 19 years old when he came to this country and went to work for his aunt, received pocket money in the sum of $5 a month and wore the cast-off clothing of his uncle; that he worked long hours and became proficient as a marble cutter. The going wage of an apprentice did not exceed $1 a day, and the average wage of marble cutters was $4 a day. Before his marriage, his sister Minnie approached the aunt to prevail on her to pay him wages. The aunt refused, saying that he could not be paid wages at that time; that he had been given a promise he would receive all her property at her death. Upon his return to Lincoln in 1929 he moved, at the aunt's re-

quest, into a home near her and subsequently moved into the property on C street. With reference to the C street property, it was purchased at auction for an amount approximating $1,125. Plaintiff testified that upon examination of the premises at the time it was purchased he found it was not livable; that he and his wife, by their work and in making repairs, expended an amount equivalent to $500. He mortgaged the property for $1,500 and sold it a week prior to trial for $2,400. The aunt paid for repairs, as shown by checks in evidence. In conversations with various witnesses the aunt said she had purchased this property and repaired it so that the plaintiff could rent rooms for an income and live in part of the house as a home; that it was a gift to him.

Various witnesses, who lived in close proximity to the aunt at the time the plaintiff came into her home and went to work at the monument works, testified that the aunt had told them on different occasions that she had sent for the plaintiff to come from Ireland to her, live with her as a son, learn the monument business, and that he would be treated as a son; that she was unable to bear a child, and that she had sent passage money and traveling expenses and he was to be her sole heir and entitled to all the property that she had accumulated during her lifetime; that all of such property was to be his upon her death. These conversations are similar in the language used, and a separate recitation of each would unnecessarily lengthen this opinion. They cover a period of approximately 40 years, and most of the witnesses were old acquaintances of the aunt who knew the plaintiff. These witnesses likewise testified that the plaintiff worked hard at the monument works, became proficient as a marble cutter, was attentive to the aunt and looked after her welfare and happiness. There is further testimony of witnesses to the effect that they saw plaintiff doing various kinds of work in and about the aunt's home after he returned from Cleveland,—such as repairing, painting, looking after the rooms and generally keeping up the premises, both inside and out; that he was attentive to his aunt;

she had repeatedly said he was to have that home as his and had made it so all he would have to do would be to walk in and take possession at her death.

Persons, who roomed at the aunt's home after the plaintiff's return in 1929 until her death, testified that they did not see the plaintiff in or about the premises, doing any work, and that he was seen there only on one or two occasions during the last week of his aunt's illness and at the time of the funeral; that other persons were employed to care for and nurse the aunt during her last illness. One of plaintiff's daughters testified, in substance, to a letter, sent to her father in Cleveland by the aunt, in which she informed the plaintiff that she needed him; that she had a large house and roomers, and that he should come back and care for her; that he had a great interest in coming back because all of her property would be his at her death. One of plaintiff's daughters who helped and assisted the aunt was sent to business school by her; another daughter was sent by her for a short time to the university.

The plaintiff testified as to the substance of the letters written by the aunt to his parents and their reply, the original letters or copies thereof not being in evidence. His version follows:

"Dear Brother and Sister: I and my husband James is in the monument business in Lincoln, Nebraska. We are in need of some help, and your oldest son John ought to be the right age to learn the trade. If you leave him come out to us, I and my husband have agreed and will promise that we will take him into our home as our own son, and any property or money we should accumulate in years to come will be his at our death." Other parts of the letter, testified to by plaintiff, need not be quoted. The reply to the letter was to the effect that they (plaintiff's parents) "were willing to let John come out to her under those conditions." The contents of the second letter, as the plaintiff testified he remembered it, stated that "she was glad that I was going to come out to her, and to rest assured that I would get the proper care; that she would take me into her home as her

own son and future heir, and to have me come right away. Enclosed in that letter, also, was a passage ticket, paying my way from Listowel to Lincoln, Nebraska, and * * * check for $20 for expense money."

Mamie Martin, the recipient of the home property and the assignee of the Novicoff mortgage, testified to her acquaintance with the aunt, and that during her last illness the aunt, in writing, sent for her to come and care for her, which she did; that her husband was out of employment, came later and assisted in keeping up the aunt's home. She testified to the care she had given her aunt and to the conversations with the aunt, wherein she was promised the home place and the other property which she received. The transaction with respect to the property so received by the niece was testified to, as being the aunt's wish and desire, by her attorney, his secretary and others. Mamie Martin likewise testified that she had had no difficulty with the plaintiff, had visited with him, and she denied certain conversations testified to by him, wherein the plaintiff told her that the aunt was giving him all of her property,—this in reference to the home property,—and the witness admitted she had known that before and had been told so by the aunt. The aunt's attorney and his secretary testified, in substance, that the aunt destroyed the will in 1934 because she had had difficulty with the plaintiff and said she was "through with him," and had given him enough when she gave him the house on C street, repaired it, and, in addition, had given him $550 to trade in his old car and purchase a new one, and he always wanted more. On this point the plaintiff and members of his family testified, in substance, that he was satisfied with his old car, but that it had been inconvenient for the aunt when he took her different places, and that she required him to get another car, paying the difference. The aunt told many witnesses that she kept her room locked and had denied the plaintiff admittance to her home. This situation seems to have been brought about by the plaintiff when he mortgaged the home on C street. He and his family explained the mortgaging of the home in that

when the aunt came for dinner on one occasion plaintiff explained to her the reasons for mortgaging the home, she agreed that it was right, and said that "a promise is a promise," and he still was to get all of her property at her death.

The executive of a trust company in Lincoln, who had transacted business with the aunt for more than 20 years, testified that she was a woman of good business judgment and he had had pleasant business relations with her, and that she had never at any time told him of any agreement with the plaintiff whereby she was leaving him all of her property. Witness was acquainted with the C street property and her purchase of it, and stated the aunt told him it was a gift from her to the plaintiff. The aunt's attorney testified that she had not told him, and he had never heard, of any arrangement whereby the aunt had agreed to give the plaintiff all of her property at her death, and that he had transacted business with her at various times from about 1920. He testified to the making of the wills, the codicil and the assignment, and that at the time they were executed the aunt was of sound mind, knew the objects of her bounty and directed the manner in which her property should be disposed of, and he complied with her desires; that the plaintiff had called on him, inquired what provision the aunt had made for him in her will, but the attorney refused to disclose it, and after the will was opened the plaintiff called again, was informed that he knew the contents of the instrument admitted to probate, and that the plaintiff seemed interested in obtaining orders for some headstones mentioned in the will, his explanation being that he wanted to make the headstones without charge, as he had great respect for his aunt.

An attorney, who represented the aunt at an earlier period, testified he had never heard of any such arrangement with reference to the aunt's property, or the contract. Her attending physicians, one of whom had known and attended her at different times for more than 30 years, testified to conversations had with the aunt about her property;

that she was a good business woman and alert, and the substance of this testimony is that she was going to give plaintiff some property. There is testimony by several witnesses that the aunt in various conversations told them how faithful Mamie Martin had been; that she had never asked for anything and that she was to receive the home property. The record is voluminous, and we have not attempted to set out all of the evidence, but have given a general summary thereof which we deem pertinent to the issues joined.

The plaintiff cites cases which hold that "Equity will grant specific performance of a parol contract to leave property to another, where the terms of the contract are established by evidence that is clear, convincing and satisfactory, and where it has been wholly performed by one party and its nonfulfilment would amount to a fraud on that party." *Craig v. Seebecker,* 135 Neb. 221, 280 N. W. 913.

In the case of *Overlander v. Ware,* 102 Neb. 216, 166 N. W. 611, this court held that "not only must the terms of the contract be established by evidence that is clear, satisfactory and unequivocal, but the work constituting the performance required under the statute of frauds must be such as is referable solely to the contract sought to be enforced, and not such as might reasonably be referable to some other and different contract or relation. Nothing will be considered as part performance which does not put the party into a situation which is a fraud upon him unless the agreement be fully performed. Equity interferes only to prevent fraud or unconscionable advantage."

Some of the conversations testified to with reference to the contract were had approximately 40 years ago and apparently were loose and casual. The supreme court of Iowa, in such a situation, has announced the conclusion that no species of testimony is more dangerous or received with greater caution. *Cooper v. Skeel,* 14 Ia. 578, 581. As applicable to the subject of proof of admissions of declarants, Corpus Juris Secundum, after a discussion of the obvious weakness of this class of testimony, states: "Exposed to

all the infirmities mentioned in the preceding section and to the further objection that it is impossible, in most cases, to convict the witness of perjury if his testimony is wilfully false, testimony as to the oral statements of deceased persons is therefore regarded as the weakest kind of evidence and subjected to the closest scrutiny." 31 C. J. S. 1018, sec. 266. In principle, our own authorities are in substantial accord with the above rule. See *Overlander v. Ware, supra; Williams v. Miles,* 68 Neb. 463, 94 N. W. 705; *Clark v. Turner,* 50 Neb. 290, 69 N. W. 843; *Johnson v. Kern,* 117 Neb. 536, 225 N. W. 38; *Goodwin v. Freadrich,* 135 Neb. 203, 280 N. W. 917.

In addition, the record discloses a letter written by the plaintiff to the aunt as follows:

"You can feel safe and rest assured that I will not bother you in your home again. However if at any time you should happen to need a friend or I can be of any service to you, you can feel free to call me at any time day or night. Yes I did put a mortgage on this place that you was kind enough to give me, and the proceeds from that was used for what I consider to be a very good purpose. Part of it was used to put a new roof on the house also a new furnace and a lot of other improvements on the inside. There was also a part of it used to educate my family. I send Elizabeth to the University for one year, then to business college until she graduated. She has now one of the best jobs in Omaha with the United States internal revenue dept. (temporary but we expect her to work in as a regular) Margaret is with the Home Owners Loan Corp. Catherine is on her last year at the university and will be out this fall. So I consider that money was well spent as we have a family that we feel is a credit to us. And I and their Mother's sole ambition is to be a credit to them also. I also helped my sister Katie who owing to an accident has been laid up for the past 4 years but is now well on her way towards recovery thank God. And I could not in her trouble forget my good sister Minnie (as she did not forget me years ago) when she buried her only son 25 years old

last summer. I am not trying to make any of these things any concern of yours. I just want to show that it is very little we waste or squander mortgage or no mortgage.

"I am making monthly payments on what I borrowed and if I succeed in getting the Contract I am after at present time, what I do owe will be paid off inside of three years. So don't be bashful in letting us know if there is anything I can do for you I will be very glad to do it and won't expect anything as anything I may do is paid for long ago."

It is apparent from the record that plaintiff lived with his aunt when he first came from Ireland, from 1903 to 1906. Thereafter, in 1907, he boarded out and still worked for his aunt. He married a week after his uncle's death in 1910 and went to Ireland for approximately three months. He returned and worked for the aunt for a short time until March, 1911. He then ceased to follow his trade and worked at various places and occupations, as hereinbefore set out, until 1929. He was away from the home of his aunt from and after 1911, and she disposed of the business in 1912. He lived in California and Ohio most of the time, returning to Lincoln in 1929. There is no evidence of correspondence with her during a period of a good many years, or any evidence to show in what manner he was looking after her welfare and interests, or in just what respects he considered her as a mother and she, in turn, considered him as a son. There is a conflict in the evidence as to just what he did in assisting his aunt after his return in 1929, or if he did anything to assist her. There is a conflict in the evidence as to just what provision she was to make for him, if any, and her business confidant and attorneys were not familiar with, nor had they heard of, such an agreement as contended for by the plaintiff. Her attending physician gained the impression that she was going to give plaintiff some property. In this connection, she purchased and put some repairs on the C street home, deeded it to plaintiff and his wife as a gift; she furnished $550 towards the purchase of a new automobile and provided some mon-

ey for educational purposes for two of plaintiff's daughters. She had difficulty with him and made statements that he wanted more of her property and wanted to take over the home place, and that she was unable to satisfy him, and she denied him admittance to her home. Most of the difficulty arose over his mortgaging of the C street property. He contended, as did the members of his family, that this matter was straightened out to her satisfaction, and that she said she had made the promise to give him all her property and was going to stay by it. This was an explanation of the letter heretofore set out. In reading this letter we can arrive at no other conclusion than that the plaintiff considered he had been paid for everything he had done and expected nothing more. This he stated specifically and indicated that he would be glad to render any service in the future for which the aunt would call upon him.

There is a conflict in the testimony as to his age at the time the contract was alleged to have been consummated. He testified he was 19 years old when he came to the United States. He signed a declaration of intention shortly thereafter that he was born October 4, 1881. If this be true, he would have been 21 years of age before leaving Ireland and competent to negotiate a contract with the aunt in his own behalf and avoid the necessity of his parents making it for him and for his benefit.

From an analysis of the record, it seems extremely improbable that a woman, of the aunt's business ability and shrewdness, would have entered into such a contract at the time alleged. It would be a most imprudent contract for such a woman to make under the circumstances; that is, to pledge her whole present and future estate in such a way. It would be reasonable and logical for her to promise to do well by the nephew, take him, help him and remember him, if he, in turn, had reciprocated and been faithful, but further than this no prudent woman would go under the circumstances. She did take him, help him and remember him. He suffered no detriment by coming to this country and apparently has been able, by his own ingenuity and

ability, to provide for his family and procure an education for his daughters, who obtained creditable employment.

"Appeals in equity are for trial *de novo* in this court, and it is the duty of this court to reach an independent conclusion with reference to the findings of the district court. But, when the evidence on material issues so conflicts that it cannot be reconciled, the court considers the fact that the trial court observed the witnesses and their testimony, and must have accepted one version of the facts rather than the opposite." *First Trust Co. v. Airedale Ranch & Cattle* Co., 136 Neb. 521, 286 N. W. 766.

We conclude that the evidence to establish the contract is not clear, satisfactory, convincing and unequivocal, as contemplated by the authorities *(Overlander v. Ware, supra; Craig v. Seebecker, supra; Goodwin v. Freadrich, supra)*, and that specific performance of the contract, which is sought to be proved by parol in the instant case, should be denied.

In a suit for specific performance, equity withholds or grants relief according to the circumstances of each particular case. *Kofka v. Rosicky*, 41 Neb. 328, 59 N. W. 788.

We are in further agreement with the court in that there has been a substantial failure of performance by the plaintiff in fulfilling the terms of the contract, if made. The rule is: In case an oral agreement to make a will is proved, specific performance of the oral contract will be enforced only where one party has wholly and the other party partly performed it, and its nonfulfilment on the one hand would amount to a fraud on the party who has fully performed. The agreement pleaded by the plaintiff in the instant case is tantamount to an oral contract to execute a will in his behalf, leaving him all of the property, real, personal and mixed, which the aunt would have at her death. See *Kofka v. Rosicky, supra; Gilgren v. Price*, 140 Neb. 124, 299 N. W. 325.

The plaintiff contends that the testimony offered by the defendants is a declaration against interest and, as such, is ordinarily conclusive as against the party making it.

Evidence of self-serving declarations of a party, inconsistent with the declarations against interest, is incompetent and inadmissible and cannot be received to annul or explain away such declarations against interest; citing *Harrison v. Harrison,* 80 Neb. 103, 113 N. W. 1042; *Davis v. Murphy,* 105 Neb. 839, 182 N. W. 365.

There is no reason to dispute the correctness of the rule announced. However, the evidence by the defendants in the instant case, as to statements made by the aunt, was offered and received on the theory that such evidence was to prove that if such contract had existed the plaintiff wholly failed to perform it. It went solely to failure of performance of the contract by the plaintiff, and the evidence was admissible for such purpose.

Plaintiff further contends that the court erred in sustaining objections to certain interrogatories in the deposition of his sister, a resident of California. We have carefully examined the evidence of this witness and, considering it in its most favorable light, we can arrive at no other conclusion than that which is heretofore announced. In this connection, no citation of authority is necessary to disclose the incompetency of the affidavit furnished by plaintiff's mother, when her deposition could have been taken, and preparation was made to do so.

We are further convinced from an examination of the record that it is barren of any evidence showing that the aunt was mentally incompetent, through old age, illness, or otherwise, to transact her business, and a discussion of this assignment of error is not necessary.

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

AFFIRMED.

SIDNEY JAMES CULLINGHAM ET AL., APPELLEES, V. CITY OF OMAHA ET AL., APPELLANTS.

10 N. W. (2d) 615

FILED AUGUST 6, 1943. No. 31579.

1. **Municipal Corporations.** Where a city attempts to levy a special assessment without compliance with all conditions essential to a valid exercise of the taxing power, the taxes so levied are void.
2. ———. Where special assessments against property to pay the costs of paving are void, knowledge of the proceedings and of the construction of the improvement will not estop the owner from avoiding liability therefor, and they cannot be enforced solely on the ground of the benefits of the improvements to the owners of abutting lots or lands.
3. ———. The power of a municipality to contract for public improvements and to levy special assessments to defray the expense is statutory and such powers must be strictly construed.
4. ———. A property owner affected is not estopped to assert irregularity of a special assessment where the irregularity is of such character as to defeat the jurisdiction of the city to act in the premises.

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

Harold C. Linahan, W. W. Wenstrand, G. H. Seig and *Edward Sklenicka,* for appellants.

Louis J. TePoel and *Barton H. Kuhns, contra.*

James C. Kinsler and *Wear, Boland & Nye, amici curiæ.*

Heard before SIMMONS, C. J., PAINE, YEAGER and CHAPPELL, JJ., and TEWELL and LIGHTNER, District Judges.

YEAGER, J.

This is an action by Sidney J. Cullingham and Barton H. Kuhns, executors and trustees of the estate of Alice C. Howell, deceased, and others, plaintiffs and appellees, against the city of Omaha, Nebraska, and Otto J. Bauman, City Treasurer of the city of Omaha, defendants and appellants, to have title quieted in the respective plaintiffs to real es-

tate owned by them in the city of Omaha, Douglas county, Nebraska.

It is the claim of plaintiffs that the defendant, city of Omaha, by ordinance, levied a special assessment for repaving a part of Twenty-fourth street and for readjusting and replacing defective curbing thereon against the real estate of the plaintiffs which special assessment was illegal and invalid, that the special assessment constitutes a cloud upon the title of the real estate, and that they have a right to have title quieted against the assessment and the cloud removed.

A trial was had to the court and a decree was rendered quieting title as prayed by plaintiffs. From this decree defendants have appealed.

The factual situation out of which the action arose was about as follows: The city of Omaha on July 12, 1938, passed and adopted an ordinance creating a street improvement district in the city within one and one-half miles from the block on which the city hall is located. The location of the district was on Twenty-fourth street. Provision was made in the ordinance for repaving, readjusting and replacing old and defective curbing. The boundaries of the district were defined as the outer boundary of the lots described in the ordinance. The properties of plaintiffs were within the district described. Estimates of the cost of the improvement were made and thereafter the city asked for bids. The request for bids was alternative in that bids were asked on the basis of construction with Work Projects Administration (W.P.A.) participation and without such participation. The alternative bid of the contracting company to which the contract was let was for paving with Asphaltic Concrete B, $2.43 per square yard with W.P.A. participation, or $2.63 per square yard without W.P.A. participation. The contract as let was for $2.43 per yard with W.P.A. participation.

During the progress of work under the contract, W.P.A. failed to furnish certain classes of workmen. Upon receiving this information the city engineer directed the contrac-

tor to secure workmen of this class. The contractor did so and therefor made and submitted to the city a payroll. It would appear from the bill of exceptions that the city paid on account of the service of these special classes of workmen the sum of $487.67. The total of the vouchers is $544.97, but included are items for material in the amount of $33.29 and an item denoted profit of $24.01.

On January 6, 1942, the city council of the city of Omaha passed and adopted a special levy ordinance purporting to levy a special assessment, the purpose of which was to defray the expense of the improvement in question here. The ordinance is not a part of the record, but by the pleadings it becomes clear that the special assessment was against all of the property included in the district and that the expense to be defrayed by the special assessment was money paid out under the contract above referred to as well as the cost of service of the special classes of workmen not furnished by W.P.A. but who were employed outside of the contract.

It is the contention of the appellee that the city was without power to levy a special assessent for the work paid for outside the contract for the improvement and that by reason of its inclusion in the special assessment such assessment in its entirety is illegal and void. This is the sole question presented for review.

In the petition it was also pleaded that the special assessment was void because of the fact that the special improvement district was formed without petition of the property owners in the district. On this proposition the trial court held against the plaintiffs and no cross-appeal was taken therefrom, hence that question is not presented on this appeal.

The appellee contends that the special assessment is illegal and void for the reason that the city failed to comply with the statutory requirements necessary to confer upon it jurisdiction to levy a special assessment to defray the cost of the street improvement in question. In particular it is contended that as a condition precedent to jurisdiction to levy such special assessment the improvement must have

been done and performed under contract with the lowest responsible bidder in compliance with section 14-331 Comp. St. 1929, the pertinent part of which is as follows: "The improvements herein referred to shall be done under contract with the lowest responsible bidder and with the material designated in the manner hereinbefore provided. All bids shall be received and opened at the same time and at a regular meeting of the city council. The city council may reject any and all bids."

In interpretation and application of this and similar statutes this court has consistently held that if a city attempts to levy a special assessment without a compliance with all conditions essential to a valid exercise of the taxing power, the taxes so levied are void. In *Harmon v. City of Omaha,* 53 Neb. 164, 73 N. W. 671, the rule is well stated and the earlier cases collected. The rule has been adhered to in the following later cases: *Rooney v. City of South Sioux City,* 111 Neb. 1, 195 N. W. 474; *Carr v. Fenstermacher,* 119 Neb. 172, 228 N. W. 114; *Interstate Power Co. v. City of Ainsworth,* 125 Neb. 419, 250 N. W. 649; *City of McCook v. Red Willow County,* 133 Neb. 380, 275 N. W. 396.

A further rule of law in this connection is that: "Where special assessments against property to pay costs of paving are void, knowledge of the proceedings and of the construction of the improvement will not estop the owner from avoiding liability therefor, and they cannot be enforced solely on the ground of the benefits of the improvements to the owners of abutting lots or lands." *City of McCook v. Red Willow County, supra.* This is a departure from some apparent aspects of the earlier rule as stated in *Morris v. Merrell,* 44 Neb. 423, 62 N. W. 865; *Harmon v. City of Omaha, supra,* and other cases, as follows: "A party who is not guilty of laches may invoke the aid of a court of equity to restrain the collection of a void tax or assessment." It will be noted that by the earlier rule laches might be a defense to an action in equity to restrain the collection of a void tax or assessment whereas by the later rule it may not.

We think the later statement of the rule is the correct one. Delay of effort to protect against a void tax or assessment cannot have the effect of making vital and valid that which had no vitality or validity from the beginning.

Within the meaning of the law then was the special assessment void?

For the purposes of this case we may assume, but we do not so decide, that the contract let for this improvement was proper and regular and that if the improvement had been made in conformity with the contract the special assessment to defray the expense would have been proper and valid. The improvement, however, was not made in strict conformity with the contract. Special classes of workmen were employed for which the city paid. This was added to the contract and the special assessment was made for the purpose of satisfying the obligation of the contract and, in addition thereto, the amount paid out for the special classes of workmen. In other words, the special assessment specifically covered items of payment made outside of and in addition to the amount required to be paid under the contract.

If the assessment is void, on the record presented, it is because of the inclusion of the amount paid outside the contract.

As pointed out, the statute (Comp. St. 1929, sec. 14-331) requires that improvements such as this shall be done under contract with the lowest responsible bidder. In the main, with this provision there was compliance, but to the extent pointed out there was a departure and to that extent a part of the work was performed outside and without any formal contract.

There can hardly be any question that the portion of the special assessment levied for the purpose of paying for the work done outside the contract is void. This was not done in compliance with statute. Clearly the statute contemplated that contracts for public improvements should be entire in character, that is that full responsibility for the performance of the contract for the contract price should

rest upon the contractor. It does not contemplate a discretion to modify or depart therefrom by the municipality and consequent payment on the basis of modification or departure in violation of the terms of the contract and statute.

The power of a municipality to contract for public improvements and to levy special assessments to defray the expense is statutory and such powers must be strictly construed.

In *Hutchinson v. City of Omaha,* 52 Neb. 345, 72 N. W. 218, the court 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."

In *Futscher v. City of Rulo,* 107 Neb. 521, 186 N. W. 536, it was stated: "The power delegated to a city to construct local improvements and levy special assessments for the payment thereof is to be strictly construed against the city, and every reasonable doubt as to the extent or limitation of such power is resolved against the city." The same holding was made in slightly different wording in *Baker v. Dahlman,* 119 Neb. 425, 229 N. W. 280. Of like effect are *Garver v. City of Humboldt,* 120 Neb. 132, 231 N. W. 699, and *Musser v. Village of Rushville,* 122 Neb. 128, 239 N. W. 642.

A compelling reason for this rule is well stated in *Wright v. Hoctor,* 95 Neb. 342, 145 N. W. 704, by quotation from *Malette v. City of Spokane,* 68 Wash. 578, 123 Pac. 1005, as follows: "Under such a system there would be no limit to the 'discretion' of the city officers, who to serve personal or political ends might burden the taxpayer beyond the point of endurance."

If we are to hold here that the city, in its discretion, had the power to go beyond the terms of this contract and authorize extras to the extent of a few hundred dollars, and levy a special assessment for payment thereof, could we say that it did not have the same power to the extent of many thousands of dollars?

The same principle applies to the situation here as would apply to the stated hypothesis.

The appellants assert that since appellees knew of the work being done on the paving project and took no steps to prevent it and failed to appear before the board of equalization and protest the assessment, they are estopped to enjoin collection of the assessments.

This contention cannot be sustained. The rule thus contended for is only applicable where there is a mere irregularity in the proceedings not affecting the jurisdiction of the city to act in the premises leading up to the letting of the contract or in its performance. Where the irregularity is of such character as to defeat the jurisdiction of the city to act in the premises estoppel can have no application. *Kister v. City of Hastings*, 108 Neb. 476, 187 N. W. 909; *Wookey v. City of Alma*, 118 Neb. 158, 223 N. W. 953; *Bamrick v. Village of Minatare*, 118 Neb. 644, 225 N. W. 755.

It is suggested by appellant that even if it be found that the special assessment as to the amount representing the pay to the special classes of workmen is void the assessment to the extent of the contract should not be held void since, on the theory on which the case was decided, a special assessment to defray the expense of the improvement under the contract was not found to be improper.

Because of the condition of the record we are without opportunity to pass upon this question. One cogent reason for the lack of opportunity to pass upon this question is that it cannot be ascertained from the record what portion of the special assessment is attributable to the contract obligation and what portion to the amount paid for work outside the contract. The record contains neither the special assessment ordinance nor the record of the action of the board of equalization and it does not otherwise show the entire amount to be raised by special assessment. It discloses only the description of the properties of plaintiffs and the amounts assessed thereto without showing whether or not these are all of the properties in the district. Addition of these amounts would indicate either that there were other properties or that the special assessment was for much less than the cost of the improvement.

In either event this condition of the record prevents a severance of the definitely illegal and void portion of the assessment and an apportionment of the reduction to the various properties in the district. This leaves no alternative but a holding that the matter should be remanded to the district court for the making of a proper and complete record in order to have the question of the legality of that portion of the special assessment levied for the payment of the contract obligation litigated and determined.

It is contended by appellant that since the amount paid on account of the contract and for the special classes of workmen was less than would have been required under a contract based upon the proposal for the improvement without W.P.A. participation, the assessment should not be declared invalid. We fail to see any legal merit in this contention. We must consider here the rights and liabilities of the parties in the light of the law and the contract entered into and not in the light of the prospects growing out of an empty proposal. Authorities do not support this contention of the appellants.

It is further suggested that the city has the power to itself make improvements such as this, and that as an incident of that right it had the power to do in part that which it could do in entirety. Whether or not the city has such power we do not determine, but the fact is that here the city sought to perform in part that which it had contracted with another to perform. The Nebraska case (*Best v. City of Omaha,* 138 Neb. 325, 293 N. W. 116) cited by appellant as authority for the city to itself construct public improvements is not in point on the proposition. The holding there is that a part of the work submitted in the proposal for bids may be withdrawn after bids have been opened and before the contract is let.

We therefore hold that the portion of the special assessment representing the payment for extra work and service over and above the contract price is void and to that extent the decree of the district court is affirmed. For the purpose of determining the legality of the remainder of the

special assessment the cause is reversed and remanded.

AFFIRMED IN PART AND REVERSED IN PART.

The following opinion on motion for rehearing was filed December 10, 1943: *Former opinion modified and motion for rehearing denied.*

YEAGER, J.

On examination of the motion for rehearing it appears that we made some inadvertent statements in our opinion appearing, *ante*, p. 744, 10 N. W. (2d) 615, which ought to be corrected. The corrections do not change the result but they do have the effect of clarifying the statement leading to the result.

The first correction is with regard to the seventh paragraph of the opinion. The following is substituted for this paragraph: "The appellees contend among other contentions that the city was without power to levy a special assessment for the work paid for outside the contract for the improvement and that by reason of its inclusion in the special assessment such assessment in its entirety is illegal and void."

The second correction is with regard to paragraph 14. This paragraph is amended to read as follows: "For the purposes of this case we assume but we do not decide that legal preliminaries and formalities leading up to the letting of the contract were proper and regular since the appellees made no effort in this court to show that the contrary was true and appear to have abandoned their theory in that connection in the district court. The attack was upon the contract, it being contended that the contract failed to embrace all of the elements for the completion of a contract for public improvements, in that labor was provided outside the contract, and in addition special classes of workmen were employed for which the city paid. This was added to the contract price and the special assessment was made for the purpose of satisfying the obligation of the contract and, in addition thereto, the amount paid for the special classes of workmen. In other words, the special

assessment specifically covered items of payment made outside of and in addition to the amount required to be paid under the contract."

The third and last amendment is with regard to paragraph 31. It is amended to read as follows: "We therefore hold that the portion of the special assessment representing payment for work and service outside the contract is void and to that extent the decree of the district court is affirmed. Otherwise the cause is reversed and remanded for further proceedings in accord with this opinion, that is, for the purpose of apportioning and allocating to the properties involved in this action, on a proper and sufficient record their portion of the special assessment held herein to be valid."

In all other respects the opinion is adhered to and the motion for rehearing is denied.

STATE, EX REL. WALTER R. JOHNSON, ATTORNEY GENERAL, RELATOR, V. CONSUMERS PUBLIC POWER DISTRICT, RESPONDENT: CITY OF SIDNEY ET AL., INTERVENERS.

10 N. W. (2d) 784

FILED AUGUST 6, 1943. No. 31433.

1. **Pleading.** Demurrer admits only facts that are well pleaded, and not conclusions of either law or fact.
2. **Constitutional Law.** The general principles as to waiver and estoppel in their application to cases involving constitutional law are subject to the important limitation that an estoppel does not necessarily extend to all the details of the statute.
3. ———. The mere fact that a corporation is organized under a statute does not estop it to deny the constitutionality of a provision of the statute which constitutes a distinct, separable legislative enactment, the elimination of which would leave in full force and effect the provisions under which the corporation was organized.
4. **Statutes.** The last sentence of section 70-713, Comp. St. Supp. 1939, being a separable part thereof, is local, special, and class legislation, which freezes the class both in its terms and in its effect, and is unconstitutional.

5. **Corporations.** In the absence of estoppel only the provisions of the franchise or charter which are legally enforceable will control the parties.
6. **Municipal Corporations.** Section 1, article XI of our Constitution must be construed with reference to the evils it was intended to correct or prevent. It was intended to prohibit any subdivision of the state from entering into private business by being associated as a stockholder, or by being a partner, or a part owner, in a private business venture or enterprise.
7. **Quo Warranto.** If a public corporation usurps or exercises powers not conferred upon it by law, *quo warranto* is the appropriate remedy to oust it from the exercise thereof without affecting in any other manner the corporate franchise, but it is only authorized and available as a remedy where the franchise is exercised in the absence of the vital element of power.
8. ———. When a corporation lawfully possesses a certain power, the irregular or improper exercise thereof is not ground for proceedings in the nature of *quo warranto.*
9. ———. *Quo warranto* will not lie to prevent a public corporation from exercising a power conferred upon it by law even though the power is exercised in an irregular or improper manner, nor to test the validity of a contract which is a mere incident to the execution of a power conferred.
10. ———. The violation of a contract must be redressed, as all ordinary wrongs are redressed, by the usual remedies. The remedy by *quo warranto* cannot be used for the enforcement or forfeiture of a municipal contract.
11. ———. *Quo warranto* is employed only to test the actual right to an office or franchise, and it can afford no relief for official misconduct or be used to test the legality of the official action of public or corporate officers.

Original proceeding in *quo warranto* by the state, on the relation of the attorney general, against Consumers Public Power District. *Demurrer sustained; amended information and petition in interventions dismissed.*

Walter R. Johnson, Attorney General, and *Edwin Vail,* for relator.

George A. Lee, for respondent.

P. J. Heaton, L. J. TePoel, Bern R. Coulter, Robert J. Bulger, Edwin D. Crites, Morrow & Miller, for *interveners.*

Flansburg & Flansburg, amicus curiæ.

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

CHAPPELL, J.

This is an original proceeding in the nature of *quo warranto* instituted by the attorney general by direction of the governor. The action is to determine by what warrant of law respondent, a public corporation, organized August 5, 1939, under the provisions of art. 7, ch. 70, Comp. St. Supp. 1939, exercises possession, ownership and control of the interconnected, integrated electric system known as western division of the Western Public Service Company, including certain ice and steam heating plants, and to require respondent to cease and desist therefrom and be ousted and excluded from the exercise of any relative pretended rights, franchises or privileges. Petitions in intervention adopting substantially the same formulae of allegations and prayers for relief as those set forth in the amended information were filed by the cities of Bridgeport, Chadron, Sidney, and Scottsbluff by permission of this court.

Respondent filed demurrers to relator's amended information and to the petitions in intervention. We held in a former opinion in this case (142 Neb. 114, 5 N. W. (2d) 202), that *quo warranto* is a civil action both in substance and in form, as defined by our civil code, and that demurrer is a proper pleading. We have long recognized an applicable rule that demurrer admits only facts that are well pleaded and not conclusions of either law or fact. See *American Water-Works Co. v. State,* 46 Neb. 194, 64 N. W. 711; *Griffin v. Gass,* 133 Neb. 56, 274 N. W. 193.

Preliminary to discussion of the questions involved we call attention to certain facts appearing in the amended information and petitions in intervention. In December, 1941, respondent contracted to purchase, and since a short time thereafter has owned and operated, all of the electric properties of the Western Public Service Company. These properties include electric facilities in the intervener cities

and many other cities and towns, which comprise what was formerly known as the western division of the Western Public Service Company. There are other divisions of the Western Public Service Company comprising other such facilities, the lawful purchase, ownership, possession and control of which relator and interveners concede and do not contest or challenge in this action. It is sought only to oust and evict respondent from franchises asserted in that part or portion of the property known as the western division. The federal power plants at Guernsey and Lingle, Wyoming, are the only plant or plants owned by the United States of America referred to in the pleadings as being involved in section 70-713, Comp. St. Supp. 1939.

Since there are only questions of law presented, we will not recite at length the allegations of the amended information or petitions in intervention. Suffice it to say that discerning examination discloses three reasons or grounds for the prayers thereof, to wit: 1. That purchase by respondent of the western division including intervener cities and other towns therein was prohibited by the last sentence of section 70-713, Comp. St. Supp. 1939, and that purchase of all the common stock of Western Public Service Company by respondent was *ultra vires*, illegal, without statutory authority, and in violation of section 1, art. XI of our state Constitution. 2. That the purchase by respondent of certain ice manufacturing equipment and steam heating plants in Nebraska and a small portion of interconnected and integrated electrical transmission lines in South Dakota, as a part of the properties of the Western Public Service Company, were *ultra vires*, illegal, and without statutory authority. 3. That respondent violated certain agreements between Western Public Service Company and certain named cities, whereby the cities had an option, upon 90 days' notice of a proposed sale, to purchase and take over from Western Public Service Company certain electric facilities within their own borders; and that section 70-713, Comp. St. Supp. 1939, required respondent to assume all municipal contractual obligations and pay certain mu-

nicipal bonds of Sidney, Grant and Republican City, guaranteed contractually by Western Public Service Company, but that respondent in violation thereof terminated such guaranties without notice to or the consent of such cities, and in so far as is known, or it is able to be ascertained, has made no provision to fulfill such obligations.

Demurrers of respondent, in so far as they are important here, contend that the amended information and petitions in intervention do not plead facts sufficient to constitute a cause of action in *quo warranto;* that *quo warranto* will not lie because there are adequate remedies at law and in equity, and that so much of section 70-713, Comp. St. Supp. 1939, as is referred to and relied upon by relator and interveners, to wit, the last sentence thereof, is unconstitutional for the reason that it is special, local, and class legislation, which freezes the class.

Original jurisdiction in *quo warranto* is vested in this court by section 2, art. V of our Constitution. Sections 20-21,112 to 20-21,139, inclusive, Comp. St. 1929, constitute the only statutory provisions applicable to the subject. Section 20-21,112 reads in part: "An information may be filed against any person * * * if, being incorporated, they * * * *exercise powers not conferred by law.*" (Italics supplied.) The purpose of the present action, therefore, is to test the existence of powers conferred upon a public corporation. The only question before the court in such a case is whether the corporation has in fact the power which it assumes.

"When a corporation is organized under a general enabling act, its charter consists of the provisions of the existing state constitution, the particular statute under which it is formed and all other general laws which are made applicable to corporations formed thereunder, and of the articles of association or incorporation filed thereunder, or the charter or certificate of incorporation granted by the court or officer in compliance with its terms; and its powers, rights, duties, and liabilities are determined accordingly." 14 C. J. 117, sec. 108. If a public corporation usurps or ex-

ercises powers not conferred upon it by law, *quo warranto* is the appropriate remedy to oust it from the exercise thereof, without affecting in any other manner the corporate franchise, but it is only authorized and available as a remedy where the franchise is exercised in the absence of the vital element of power. See *State v. City of Lyons*, 31 Ia. 432; 5 Fletcher, Cyc. Corp. (Perm. ed.) 806, sec. 2332; 2 Bailey, Habeas Corpus, 1325, sec. 347.

That part of section 70-713, Comp. St. Supp. 1939, involved, reads: "Provided, that no such district shall have the power to construct, lease, purchase or otherwise acquire any electric light or power plant or system or any part thereof, within the boundaries of any city or village in said state, for the purpose of supplying said city or village, or the inhabitants thereof, with electrical energy, if said city or village *has been supplied for one year immediately prior to the passage and approval of this Act*, with electrical energy which was produced in a plant or plants owned by the United States of America, *except* that this provision shall not apply to any city or village supplied with fifteen per cent. or less of said electrical energy produced in said plant or plants and *used* by said city or village *during said year*." (Italics supplied.) If this prohibition in the statute is unconstitutional, then the remaining parts of section 70-713 and other sections *in pari materia* confer powers of purchase upon respondent.

Relator and interveners make able argument orally and in the briefs that respondent is estopped to question the constitutionality of the section involved or any part thereof, having voluntarily accepted all the provisions of the statute existent at the time of its organization, as its charter. In this connection, relator first contends that the creative public power district act and the petition thereunder for the creation of respondent district provided that the district, if the creation thereof is permitted by the department of roads and irrigation, will be subject to the act and *amendments thereto*, and that where a corporation has accepted benefits under a statute it will be estopped from

questioning the constitutionality of other provisions of the same act imposing burdens upon the corporation. It is obvious at once that respondent, being a public corporation created by the legislature, is subject to all the restrictions, limitations and burdens now or hereafter constitutionally imposed upon it, and addition of the words "as amended" in the statute and in the petition for creation of the district add no force to this fact.

With relation to estoppel, relator and interveners rely upon a rule stated in 14a C. J. 269, sec. 2117, that, "Where a corporation accepts a charter, it takes it *cum onere* and must enjoy it subject to the conditions named therein, or not enjoy it at all." However, we find in the same citation a further admonition, "The general rule, however, is that a prohibition proviso, exception, or reservation in a charter should be so construed as not to defeat the grant, if such a construction is possible."

The question of whether respondent has accepted benefits under the other provisions of the statute which estop it from questioning the constitutionality of the last sentence thereof, depends primarily upon its construction and the applicable law of estoppel. Estoppel is most frequently applied in cases involving constitutional law when persons in some manner partake of advantages under statutes. There is authority to the effect that one who voluntarily proceeds under a statute and claims benefits thereby conferred, will not be heard to question constitutionality in order to avoid resulting burdens. 11 Am. Jur. 767, sec. 123. But this general doctrine is not applied solely on technicalities. It must rest upon substantial grounds of prejudice or change of position. *Ashwander v. Tennessee Valley Authority*, 297 U. S. 288. Where no available right is parted with and no injury suffered there can be no estoppel, and, *a fortiori*, an act clearly beneficial to the party who sets up the estoppel cannot be relied on. 21 C. J. 1137; *Haschenberger v. Dennis*, 118 Neb. 411, 225 N. W. 25. Estoppel is without application where no injury resulted to any one except the party against whom the estoppel is claimed. 21 C. J. 1208. "Es-

toppel must be reciprocal and mutual and is founded on the idea that the acts of the party estopped must result in injury to the other party and, generally, that it would be a fraud if the right asserted be maintained." *Furstenberg v. Omaha & C. B. Street Ry. Co.*, 132 Neb. 562, 272 N. W. 756.

The general principles as to waiver and estoppel in their application to cases involving constitutional law, are subject to the important limitation that an estoppel does not necessarily extend to all the details of the statute. 11 Am. Jur. 770, sec. 124. "The fact that one would be estopped to challenge the constitutionality of a particular provision of a statute is no bar to such a challenge as to an independent and separable provision of the same act, * * * ." 16 C. J. S. 186, sec. 89. See, also, 16 C. J. S. 193, sec. 90; 12 C. J. 772; *South Carolina & W. Ry. v. Ellen*, 95 S. Car. 68, 78 S. E. 963. The mere fact that a corporation is organized under a statute does not estop it to deny the constitutionality of a provision of the statute which constitutes a distinct, separable, legislative enactment, the elimination of which would leave in full force and effect the provisions under which the corporation was organized. 16 C. J. S. 189, sec. 90; 12 C. J. 771; *Morse v. Metropolitan S. S. Co.*, 88 N. J. Eq. 325, 102 Atl. 524; *Petition of Philadelphia, M. & S. Street Ry. Co.*, 203 Pa. St. 354, 53 Atl. 191.

Mojave River Irrigation District v. Superior Court, 202 Cal. 717, 262 Pac. 724, is in many respects similar to the case at bar. In that case the court said, in part: "We do not think that the principle of estoppel can be so far applied as to prevent a party who may be entitled to the benefits to be obtained by application to an administrative board or officer from asserting in a court of justice that other and severable portions of the law under which he makes such application and receives such benefit, and which impair his full enjoyment thereof, are void because violative of the Constitution; * * * ." See, also, *Van Camp Sea Food Co. v. Newbert*, 76 Cal. App. 445, 244 Pac. 946; *People v. Coler*, 166 N. Y. 1, 59 N. E. 716.

This court said in *State v. Stuht*, 52 Neb. 209, 71 N. W.

941: "If a portion of a legislative act is unconstitutional and it can be separated from other portions of the act and the latter enforced independent of the former, and it further appears that the unconstitutional part did not constitute such an inducement to the passage of the other parts of the law that they would not have been passed without it, the former may be rejected and the latter upheld.

"The same rule obtains in relation to parts of the sections of a statute, and that which is unconstitutional may, under the operation of the foregoing rule, be rejected from a section or sections of a law and what remains be sustained, unless they are inseparably connected in substance." See, also, *Nelsen v. Tilley*, 137 Neb. 327, 289 N. W. 388.

Section 70-715, Comp. St. Supp. 1939, provides: "If any clause, sentence, paragraph or part of this act (Comp. St. Supp. 1939, 70-701 to 70-715) shall for any reason be adjudged to be invalid, by any court of competent jurisdiction, such judgment shall not affect, impair or invalidate the remainder of this Act, but shall be confined in its operation to the clause, sentence, paragraph, or part thereof directly involved in the controversy in which such judgment shall have been rendered." This section is a declaration of assurance to courts that such separate provisions were not the inducement for passage of the other provisions of the act and creates a presumption of separability which is overcome only when no inseparability is evident or where there is a clear probability that with the provisions eliminated the legislature would not have adopted the remaining provisions. For a discussion of these questions and the elements which must be considered in the decision thereof, see *State v. Hall*, 129 Neb. 669, 262 N. W. 835; 1 Cooley, Constitutional Limitations (8th ed.) 359.

We have given careful consideration to a study of the act itself and examined the Nebraska Legislative Journal of 1939, p. 986, which discloses that the prohibition involved was considered separately by the legislature. By amendment it was lifted in its entirety from the body of the act, placed separably at the end thereof, and so adopted with-

out a negative vote. We conclude that it is separable from the other provisions of the section; and that its constitutionality can be decided without passing upon the constitutionality of the whole act or the other separate provisions thereof.

Under these circumstances respondent has not in its organization or thereafter sought to beneficially invoke any part of the provision involved or otherwise received any benefit therefrom. Its elimination will leave in full force and effect the provisions under which respondent was organized. We find no allegations in the amended information or interveners' petitions showing any disadvantage or damage to the state or any of its subdivisions, or cities or federal plants involved, resulting from invocation of this provision by the respondent which would justify the application of any theory of waiver or estoppel. Respondent is within the class affected by the legislation, may question its validity, and is entitled to the constitutional shield of courts.

In argument upon the question of constitutionality of the provision involved, relator and interveners contend that it is poorly worded and ambiguous. They reason that it is not unconstitutional, as claimed by respondent, because it applies not only to individual plants which may be located in whole or in part within the boundaries of any city or village, but also to *any system any part whereof* may be located within any city or village. If this be true, the prohibition applies to all the western division of Western Public Service Company and all the cities and villages therein, as they are all integrated and interconnected. If relator's and interveners' contentions are correct, the exception means nothing. Certainly in attempting to fix the public power status of a large part of the state comprising very many cities and towns, for all the future, dependent only upon the past, our legislature never intended to arrive at such an illogical and meaningless result.

We conclude that the act is clear and unambiguous. In simple language of our own it provides, in substance, that

if any city or village has been supplied with its electrical energy by a plant or plants owned by the United States of America *for one year immediately prior to the passage and approval of the act,* then the purchase by respondent of said city or village plant or system or any part thereof within its boundaries is prohibited, but it is not prohibited if any such city or village was thus supplied with only 15% or less of the electrical energy used by it *during said year.*

This is the only construction that can give any force and effect to both the prohibition and the exception. Bearing this in mind, we find, upon examination of the allegations of the amended information and petitions in intervention, that Scottsbluff, Nebraska, is the only city in the western division which during the year immediately prior to the passage of the act, purchased more than 15% of the electricity used by it from the plant or plants owned by the United States of America. Scottsbluff is the only city, and there are many others, in the whole western division which is within the prohibition. All others come within the exception. Its status, as well as all the other cities therein and in the state of Nebraska, is thus frozen for all time, past, present, and future.

In view of this construction, does the provision involved have constitutional validity? Upon this question we have made diligent search and have found comparable and compelling precedent.

In re Elm Street in City of New York, 246 N. Y. 72, 158 N. E. 24, involved an act of the New York legislature which provided that where an award for damages in condemnation proceedings *had been within one year last past* adjudged barred by any statute of limitations, such award might be enforced notwithstanding the bar. The New York Court of Appeals unanimously held this statute to be unconstitutional. It bears striking similarity to the statute involved in the case at bar. We quote appropriate parts of the able opinion: "The act is general 'in its terms' to the extent that it applies to any city where the prescribed conditions are fulfilled. It is general to that extent 'in its ef-

fect.' Even so, the question remains whether the conditions are so circumscribed and narrow that the class subjected to the statute is one in name and nothing else. * * * It is not enough that such a judgment has been rendered; it must have been rendered *'within one year last past.'* A claim upon an award might have been barred by the delay of a single day beyond the statutory term. There would be no revival of its life unless the bar had been adjudged within the year. It might have been barred under a judgment rendered a day earlier than the year or a day later. There would be no revival then. Out of all time, past and future, a single year is selected. * * * Anything not condemned within that lucky year * * * is to be governed by existing law. We close our eyes to realities if we do not see in this act the marks of legislation that is special and local in terms and in effect. * * * An act is not general when the class established by its provisions is at once so narrow and so arbitrary that duplication of its content is to be ranked as an unexpected freak of chance, a turn of the wheel of fortune defying probabilities." (Italics supplied.) In *State v. Kelso,* 92 Neb. 628, 139 N. W. 226, our own court said: "The rule appears to be settled by an almost unbroken line of decisions that a classification which limits the application of the law to present condition, and leaves no room or opportunity for an increase in the numbers of the class by future growth or development, is special, and a violation of the clause of the constitution above quoted (now art. III, sec. 18, Neb. Const.)" See, also, *State v. Scott,* 70 Neb. 685, 100 N. W. 812; *State v. Hall, supra; Axberg v. City of Lincoln,* 141 Neb. 55, 2 N. W. (2d) 613; *State v. Turner,* 141 Neb. 556, 4 N. W. (2d) 302; *Steinacher v. Swanson,* 131 Neb. 439, 268 N. W. 317; *State v. Gering Irrigation District,* 114 Neb. 329, 207 N. W. 525. This court can only decide that the last sentence in section 70-713, Comp. St. Supp. 1939, is local, special, and class legislation, which freezes the class both in its terms and in its effect, and is unconstitutional. In the absence of estoppel, only the provisions of the franchise or charter which are legally enforceable will

control the parties. *Morse v. Metropolitan S. S. Co., supra.*

The amended information and petitions in intervention allege, in substance, that respondent unlawfully purchased all the common stock of Western Public Service Company, and upon receipt thereof elected its own officers, and after the transfer of all the assets by deed and other conveyances to respondent, immediately dissolved the Western Public Service Company corporation and surrendered its corporate charter. Contention is made that respondent not only lacked the power, but was prohibited by section 1, art. XI of our Constitution from purchasing the stock of a private corporation. These allegations do not state a cause of action in *quo warranto.*

Section 70-706, Comp. St. Supp. 1939, gives a public power district "all the usual powers of a corporation for public purposes;" it "may purchase, hold, sell and lease personal property and real estate reasonably necessary for the conduct of its business;" it is authorized to "enter into any kind of contract or arrangement with any person, firm, corporation;" and "for any of the purposes above mentioned or for or incident to the exercise of any one or more of the foregoing powers." Section 70-712, Comp. St. Supp. 1939, provides, in part, that whenever any public power district "shall * * * acquire by purchase, lease, or otherwise, any electric distribution system * * * (or) shall purchase or acquire the plant or property of an existing privately owned public utility * * * ." Section 70-713, Comp. St. Supp. 1939, reads in part: "In the event that any such district shall lease, purchase or acquire *in any manner* the generating plant, distribution system *or other property* of an existing utility * * * ". (Italics supplied.) We observe at once the powers of purchase thereby conferred. They are not confined to any specific statutory method or manner of their exercise. "*Quo warranto* under our statute * * * is intended to prevent the exercise of powers that are not conferred by law, and is not ordinarily available to regulate the manner of exercising those powers." *State v. Drainage District,* 100 Neb. 625, 160 N. W. 997. See, also,

State v. Scott, supra; State v. Lancaster County Rural Public Power District, 130 Neb. 677, 266 N. W. 591. When a corporation lawfully possesses a certain power, the irregular or improper exercise thereof is not ground for proceedings in the nature of *quo warranto.* 51 C. J. 321, sec. 17. See, also, 6 McQuillin, Municipal Corporations (2d ed.) sec. 2696. The general rule is that *quo warranto* will not lie for a mere irregular exercise of a conferred power although such irregularity may be sufficient when tested by other remedies to vitiate or render void the act done. If the power attaches the manner of its exercise cannot be challenged by information in *quo warranto.* Nor is it within the legitimate scope of the relief afforded by such proceedings to declare null and void what may have been done but only to affirm or adjudge as unauthorized the franchise or power which may have been, with or without color of right, unlawfully exercised. *State v. City of Lyons, supra.*

Section 1, art. XI of our Constitution provides: "No city, county, town, precinct, municipality, or other subdivision of the state, shall ever become a subscriber to the capital stock, or owner of such stock, or any portion or interest therein of any railroad, or private corporation, or association." Section 70-702, Comp. St. Supp. 1939, reads in part: "A district * * * when so created shall be a public corporation and political subdivision of this state * * * ." Relator and interveners contend, but without citing applicable authority, that since respondent is a political subdivision of the state, purchase of the common stock of Western Public Service Company was void *ab initio.* Even if respondent is a political subdivision of the state, which we do not decide in this opinion, section 1, art. XI of our Constitution has no application under the circumstances. This provision of our Constitution must be construed with reference to the evils it was intended to correct or prevent. It was intended to prohibit any subdivision of the state from entering into private business by being associated as a stockholder, or by being a partner, or a part owner, in a private business venture or enterprise.

In *Long v. Mayo,* 271 Ky. 192, 111 S. W. (2d) 633, it was sought to enjoin the commissioner of highways and other public officials of Kentucky from issuing $885,000 par value of bridge revenue bonds and purchasing the capital stock of a private bridge company with the proceeds. In its opinion the court said, in part: "The purpose of section 177 of the Constitution in prohibiting the commonwealth from owning stock in, or from making donations to, a corporation was to prohibit the commonwealth from entering into private business by becoming associated as a stockholder, or by being a partner, or a part owner in a private business venture. It was never intended by that section of the Constitution that the commonwealth could not acquire property for a public use." Likewise, in *People v. Kelly,* 76 N. Y. 475, the court said in part: "It was not the purpose or effect of the act, to make the city of New York a stockholder in the bridge company, or to cause it to loan any money, or credit to such company. It was the purpose of the act to extinguish the company, and vest all its property in the two cities for a public purpose. * * * All the money they paid for stock or upon the debts of the company, was simply in furtherance of the purpose to vest the property of the bridge in the two cities, and it was not paid to aid the company, or to make the cities stockholders therein. The effect was to be the dissolution of the company, and the transfer of its property." See, also, 1 McQuillin, Municipal Corporations (2d ed.) sec. 206; *Wheeler v. Philadelphia,* 77 Pa. St. 338.

Section 1, article XI of our Constitution was never intended to prohibit a purchase by a subdivision of the state of all the capital stock of a corporation solely for the purpose of lawfully acquiring the physical property of such corporation for a public use, constitutionally defined and lawfully authorized by the legislature.

The amended information alleges in substance that Western Public Service Company owned and operated in five different cities in Nebraska plants for the manufacture, distribution and sale of ice, and that they also owned and op-

erated in three different communities in Nebraska steam heating systems with pipes and conveyors and necessary equipment for the providing, furnishing and selling of steam for heating purposes to the inhabitants of such communities, together with other equipment not used or useful to the operation of a business of manufacturing and selling electricity, all of which were not properties which respondent had authority to purchase when it acquired all the common stock of Western Public Service Company, and that the *purchase, attempted purchase,* or *acquisition* thereof by respondent was *ultra vires* and beyond its statutory powers. These allegations do not state a cause of action in *quo warranto.*

We have heretofore called attention to the powers of purchase conferred upon respondent by sections 70-706, 70-712, 70-713, Comp. St. Supp. 1939. These ice and steam facilities are integral parts of and inseparable from the physical plants and properties purchased by respondent from Western Public Service Company. Only the question of respondent's power to purchase and acquire them is involved. Whether respondent has the power to sell excess steam for heating purposes and the power to engage in the separate business of selling ice, are not issues presented for decision by this court. Under these circumstances we must apply the rule that, *quo warranto* will not lie to prevent a public corporation from exercising a power conferred upon it by law even though the power is exercised in an irregular and improper manner, nor to test the validity of a contract which is a mere incident to the execution of a power conferred. See 6 McQuillin, Municipal Corporations (2d ed.) sec. 2696, and other authorities heretofore cited.

The amended information further alleges, in substance, that Western Public Service Company owned and operated transmission lines and other electrical equipment located outside of Nebraska but interconnected with its properties in Nebraska, for the furnishing and selling of electrical energy in communities outside of Nebraska and in South Dakota, all of which were not properties which respondent

had authority to purchase when it acquired all the common stock of Western Public Service Company, and that such *purchase,* or *attempted purchase,* or *acquisition* was *ultra vires* and beyond statutory powers. There are no allegations of fact setting forth the objects and purposes of the alleged acquisition or the potential use of the properties thereafter. The use and purposes for which the property can be devoted determine the power or lack of power to purchase or acquire such property. We are unable to determine from these allegations whether respondent purchased the interconnected transmission lines in South Dakota for the purpose of engaging in the distribution and sale of electric power in South Dakota, or for the purpose of acquiring property necessary for its maintenance and business and to enable it to carry on its main purpose in Nebraska. Unusually broad powers of purchase have been conferred upon respondent by the sections heretofore referred to. Respondent is a public corporation created by legislative act to provide public power to the people of the state in a proprietary capacity, and as such is subject to all restrictions, limitations, and burdens now or hereafter constitutionally imposed by law. From sections 70-601 to and including 70-717, Comp. St. Supp. 1939, we find the words "in this state" used many times in connection with powers conferred. The rule is that, "The extent of the authority conferred by a franchise is measured by the language used, * * * ." 29 C. J. S. 522, sec. 15. " * * * a corporation cannot act or contract outside the state of its creation unless the power so to do is conferred by its charter; but this is not to be taken to mean that such power must be conferred expressly, for the power is implied, unless expressly or impliedly excluded by the charter or by general law. Under charter or statutory provisions, however, a corporation may be expressly or impliedly prohibited from doing business, making contracts, or doing other acts beyond the limits of the state, or its right to act beyond the limits of the state may be regulated * * * ." 18 C. J. S. 588, sec. 178 (2). "It seems clear that an express proviso

that a corporation shall not do certain acts is no stronger than the failure to give authority, express or implied, to do them, for powers not granted either expressly or impliedly, are impliedly prohibited." 14a C. J. 251, sec. 2079. We are convinced that the legislature never intended that respondent could lawfully engage in the business of the sale and distribution of electric power in other states. Any other construction would of necessity be judicial legislation. We conclude that the purchase of this property for any such purposes would be the exercise of powers not conferred by law.

Other rules of law applicable to the circumstances are: "Companies chartered for the purpose of supplying the public with electricity * * * have such lawful rights and powers as are clearly and expressly granted, together with such implied * * * powers as are reasonably * * * necessary to enable them to exercise those expressly conferred, and to enable them to accomplish the objects of their creation. All rights and powers not thus granted are withheld." 29 C. J. S. 521, sec. 15. See, also, 14a C. J. 252, sec. 2084, and 269, sec. 2119. "Where a corporation is manifestly intended for local objects only and its capacities are limited to a particular place, it will be presumed that the powers conferred on it were intended to be exercised only within the limits of such place, and it cannot exercise them in other jurisdictions; but even a purely local corporation, required by its charter to carry on its main purpose in a particular place, may carry on in other states the incidental powers which are necessary for its maintenance and business," or necessary to enable it to carry on its main purpose. 18 C. J. S. 588, sec. 178 (2). We conclude that if the transmission lines in South Dakota were purchased as property necessary for the latter purposes it would be the exercise of a power conferred by law.

These distinctions are aptly illustrated in *State v. Mitchell Irrigation District,* 129 Neb. 586, 262 N. W. 543. In that case defendant irrigation district's necessary headgates, diversion works, and appropriation, were in the state

of Wyoming, by permission of that state, but this court held that the irrigation district, having been organized under the laws of Nebraska, and irrigating lands wholly within this state, was by residence subject to the jurisdiction of the state of Nebraska.

In *Langdon v. City of Walla Walla,* 112 Wash. 446, 193 Pac. 1, the defendant Washington city in its proprietary capacity purchased lands in the state of Oregon for the necessity of its water supply. The court held that the city in its proprietary capacity had acquired the necessary power from the state of Washington to acquire and own such property in the state of Oregon (distinguishing *Becker v. City of La Crosse,* 99 Wis. 414, 75 N. W. 84, wherein such power did not exist), and that whether or not the city might be able to exercise such power in the state of Oregon was a question to be decided under the laws and the Constitution of that state. See, also, 44 C. J. 187, sec. 2329.

In view of these authorities and others heretofore cited, we conclude that the allegations of the amended information alleging that respondent did not have the power to purchase the interconnected transmission lines in South Dakota, are insufficient and do not state a cause of action in *quo warranto.*

Relator and interveners allege, in substance, that section 70-713, Comp. St. Supp. 1939, requires respondent, upon purchase of the electric facilities serving a city or village, to assume all contractual obligations of any franchise or contract assigned to such district; that Western Public Service Company guaranteed contractually the payment of certain municipal bonds of Sidney, Grant, and Republican City, but respondent terminated such guaranties without notice to or consent of such cities and in so far as is known, or it is able to be ascertained, has made no provision to fulfill such obligations.

These allegations do not state a cause of action in *quo warranto.* "In *quo warranto,* as in other civil proceedings, the cause of action should exist and be complete when the proceedings are commenced." 44 Am. Jur. 130, sec. 61.

See, also, *People v. City of Whittier*, 133 Cal. App. 316, 24 Pac. (2d) 219. *Quo warranto* will not lie to ascertain whether a corporation intends in good faith to carry out the express purpose of its organization. 5 Fletcher, Cyc. Corp. (Perm. ed.) 806, sec. 2332. *Quo warranto* will not lie to test the validity of a contract which is a mere incident to the execution of a power conferred on a public corporation. 6 McQuillin, Municipal Corporations (2d ed.) sec. 2696. See, also, *People v. City of Springfield*, 61 Ill. App. 86. " * * * the remedy by *quo warranto* cannot be used for the enforcement or forfeiture of a municipal contract, * * * ." 5 Fletcher, Cyc. Corp. (Perm. ed.) 810, sec. 2332. The violation of a contract must be redressed, as all ordinary wrongs are redressed, by the usual remedies. 2 Bailey, Habeas Corpus, 1336, sec. 350.

In *State v. Scott*, 70 Neb. 681, 97 N. W. 1021, our own court said: "The original writ of *quo warranto*, which has been largely superseded by informations in the nature of *quo warranto*, was a high prerogative writ and, like all other extraordinary processes, it generally would only lie when no other adequate remedy would afford the required relief. The rule appears to even go further with reference to *quo warranto* than with reference to extraordinary proceedings by injunction or mandamus. In the latter, it being the rule that they may be invoked where there is no adequate remedy at law, but in *quo warranto* it is held that it will not lie where there is even an adequate remedy by bill in equity." See, also, 51 C. J. 321, 323; 44 Am. Jur. 96, sec. 14.

The foregoing authorities likewise apply to relator's and interveners' allegations that respondent violated certain agreements between Western Public Service Company and certain named cities whereby the cities had an option upon 90 days' notice of a proposed sale, to purchase and take over from the Western Public Service Company certain electrical facilities within their own borders. In addition, however, we call attention to the fact that section 70-712, Comp. St. Supp. 1939, specifically gives the cities aggrieved a con-

tinuing option to purchase such electric distribution system situated within or partly within such cities or villages from respondent, who is thereby required to sell. If relator and interveners have a cause of action against respondent relating to contractual responsibility there are other adequate remedies. Relator and interveners have not cited any authority holding otherwise. They have not attempted in any manner to answer respondent's contentions that *quo warranto* cannot be maintained if there are other adequate remedies at law or in equity.

There are other allegations in the petition in intervention of the city of Scottsbluff alleging misconduct of officers and employees of respondent in an election held as provided by law to determine whether the city of Scottsbluff should appropriate and acquire its then serving electric system from respondent, which proposal was defeated by the voters of that city. These allegations do not state a cause of action because *quo warranto* is employed only to test the actual right to an office or franchise, and it can afford no relief for official misconduct or be used to test the legality of the official action of public or corporate officers. See High, Extraordinary Remedies (3d ed.) 573, sec. 618; *State v. Conklin,* 127 Neb. 417, 255 N. W. 925; *State v. Drainage District, supra; State v. Scott, supra.*

Accordingly, we decide that respondent's demurrers, and each and all of them, should be sustained for the reasons given herein, and that the amended information and petitions in intervention are each and all hereby dismissed, without prejudice to any other remedy either at law or in equity.

DISMISSED.

CATHERINE MAJERUS ET AL., APPELLANTS, V. THERESA SANTO ET AL., APPELLEES.

10 N. W. (2d) 608

FILED AUGUST 6, 1943. No. 31619.

1. **Deeds.** Estates upon condition subsequent, which, after having been fully vested may be defeated by a breach of the condition, are never favored in law and no deed will be construed to create an estate upon condition unless the language to that effect is so clear that no room is left for any other construction.
2. **Specific Performance.** Courts of equity, under the proper circumstances, will grant specific performance of contracts to leave property to others.
3. **Deeds.** Where the owners of an interest in real property convey the same but by agreement contained in the instrument of conveyance retain an interest in the premises such interest will support the imposition of a restriction on alienation where it is reasonably necessary to protect the interest retained.
4. **Partition.** When, in a partition suit, the question of title is drawn in issue it does not make a dismissal of the partition suit necessary but the court, being one of general jurisdiction and administering both legal and equitable remedies, is invested with authority in that proceeding to first try the issues as to the title, and, after they are determined, to proceed in the partition action to partition of the property among the parties found to be the owners thereof.
5. ———. A cause of action for partition of one tract of land is improperly joined in a single bill with a cause of action for a partition of another tract where some of the persons interested in one are not interested in the other and do not derive their interests from a cotenancy of both tracts.
6. ———. Partition of two or more parcels of real estate may be made in one proceeding if the title to all the parcels sought to be partitioned is derived from a cotenancy as a common source of title, though some of the cotenants, parties to the proceeding for partition, may be interested in only one or some of the parcels and not in all.
7. ———. In a proceeding for partition, whether at law or in equity, all of the cotenants are indispensable parties and such of them as do not join as plaintiffs must be made defendants and the same is true of the successors in title of any of the cotenants.
8. ———. Under section 20-2172, Comp. St. 1929, any creditor having a specific or a general lien upon all or any portion of the

property being partitioned may or may not be made a party at the option of the plaintiff.

9. ———. An heir or devisee of an estate cannot maintain an action for distribution or partition until the debts, allowances, and expenses against said estate have been paid or provided for, unless he give a bond with approved sureties to pay the same, except, where the allegations of the petition allege the solvency of the estate as well as the sufficiency of the personal assets to pay the debts against it and this is conclusively established by the evidence.

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

Joseph L. Gagnon and *J. H. Falloon,* for appellants.

Paul P. Chaney, Cain & Cain, Archibald J. Weaver, Wiltse & Wiltse, Paul F. Good, Wallace Hawkins and *Earl A. Brown, contra.*

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

WENKE, J.

This action was commenced in the district court for Richardson county by Catherine Majerus, Anna Caverzagie, Mary Wissman, Louise Sprung, Theresa Larson, Sophia Reschke, and Lawrence Santo, as plaintiffs and who are appellants here, against Theresa Santo, Charles Santo, Fred Santo, Richardson County Bank of Falls City, Nebraska, a corporation, Magnolia Petroleum Co., a corporation, William Herbster, and Paul P. Chaney, Administrator, with the will annexed, of the estate of Charles J. Santo, deceased, as defendants and who are appellees here, for the purpose of canceling and setting aside a deed to certain lands described in their third amended petition or in the alternative for the specific enforcement thereof and for a determination of the rights of the plaintiffs in and to said lands and for partition thereof. From an order of the district court sustaining the demurrers of each and all of the several defendants and dismissing the action, the plaintiffs have appealed.

The demurrers of the several defendants raise the following questions: "First, that there is a misjoinder of parties plaintiff; second, that there is a misjoinder of parties defendant; third, that there is a misjoinder of the causes of action; fourth, that the facts alleged are insufficient to state a cause of action. In considering the court's ruling on these demurrers, we must, of course, apply the rule as announced in *Van Horn v. Lincoln Sales Outlet Co.*, 127 Neb. 301, 255 N. W. 36: "A demurrer is an admission of the truth of all facts properly averred in the pleading demurred to; it admits, however, only such facts as are well pleaded and all intendments and inferences that may fairly and reasonably be drawn therefrom."

The third amended petition, to which the several demurrers of the defendants were directed and which demurrers the court sustained, alleged that Josephine Santo, who prior to her marriage to Charles J. Santo was Josephine Litty and a daughter of Magnus Litty and Annie Litty, inherited from her parents 160 acres of land in Butler county, Nebraska, and also her distributive share of their personal property; that after her marriage to Charles J. Santo a part of these funds were used on April 21, 1883, to purchase the southeast quarter of section 4, except 20 acres off the west side thereof, in township 2, range 17, in Richardson county, Nebraska, and on February 8, 1889, a part of these funds were used to purchase the southeast quarter of the southwest quarter and the southwest quarter of the southeast quarter, and a tract of land described by metes and bounds as commencing at the northeast corner of section 5, and running south 60 rods, west 80 rods, north 20 rods, east 40 rods, north 40 rods, east 40 rods to place of beginning, all in section 5, township 2, range 17, in Richardson county and both tracts contained approximately a total of 240 acres and were taken in the name of Charles J. Santo and Josephine Santo as tenants in common; that Josephine Santo died intestate May 19, 1895, and at the time of her death she owned an undivided one-half interest in the aforesaid real estate and also possessed personal prop-

erty consisting of money, cattle, horses, and other livestock and left surviving her besides her husband, Charles J. Santo, all of the plaintiffs, who are her children, and a daughter Josephine Santo who died subsequent to her mother and at the time of her death was a minor and not married; that the father, Charles J. Santo, took possession of said real estate and personal property without administering the estate and collected rents and profits from the real estate and used the personal property as his own; that subsequently, on February 3, 1906, from the rents and profits of the lands in which the mother had an undivided one-half interest at the time of her death, Charles J. Santo purchased the northeast quarter of the northeast quarter of section 9 and the north half of the northwest quarter of section 10, township 2, range 17, in Richardson county, being 120 acres, and on October 4, 1911, from the rents and profits of this same land he purchased the south half of the northwest quarter of section 10, township 2, range 17, in Richardson county, being 80 acres, and from the same source did on May 23, 1914, purchase the south half of the northeast quarter and the southeast quarter of the northwest quarter and the northeast quarter of the southeast quarter of section 9, township 2, range 17, in Richardson county, being 160 acres.

That Charles J. Santo remarried and the defendant Theresa Santo is his widow and the defendants Charles Santo and Fred Santo are children born of the second marriage. On July 26, 1919, all of the plaintiffs, except Lawrence Santo, entered into an agreement of settlement with Charles J. Santo, their father, as to the personal property of their mother and for the use and rentals of the real estate of which she died seised of an undivided one-half interest and also for a deed conveying their interest in and to the premises of which their mother died seised and in consideration therefor, and prior to its execution, their father, Charles J. Santo, agreed he would not sell or convey the lands therein described and would hold it free of encumbrances, that he would not make a will and at the time of his death all of his children, by both his first and second marriage, should

share in his estate, and that he would not convey any of the lands or encumber them, of which he was then owner, and which lands are described in the petition, which said deed contained the following: "And the further consideration that said Charles J. Santo agrees to die intestate, and not alienate the property hereinafter described and that his children, above named, born as the fruit of his marriage with the said Josephine Santo, nee Litty, deceased, shall inherit and share in his estate the same as the children of said Charles J. Santo born of his second marriage, * * * " and at the time of said agreement Charles J. Santo was the owner and in possession of the 360 acres of land purchased from the rents and profits of the 240 acres as previously stated. Since the agreement, the plaintiffs have made no demands upon the said Charles J. Santo for any rents and profits of said premises and have fully complied with the agreement, but that the said Charles J. Santo violated and broke the conditions of the agreement by giving to the Richardson County Bank on March 17, 1936, a mortgage for $8,000 signed by himself and wife, Theresa Santo, on the southeast quarter of section 4, except 20 rods off the west side thereof, and the southeast quarter of the southwest quarter and the southwest quarter of the southeast quarter of section 5, all in township 2, range 17, in Richardson county, and by giving to C. J. Taylor on January 28, 1939, a gas and oil lease on the southeast quarter and the southwest quarter and the southwest quarter of the southeast quarter, section 5, township 2, range 17, in Richardson county, which has been assigned to the defendant Magnolia Petroleum Co., and on November 14, 1939, by giving an oil and gas lease to O. E. Bradley on the southeast quarter of section 4, township 2, range 17, except a strip 20 rods wide off the west side thereof, and which has been assigned to the defendant Magnolia Petroleum Co., and also by making a will on January 21, 1939, wherein he gave all of his property, real and personal, to his widow, Theresa Santo, and leaving nothing to the plaintiffs contrary to the provisions of the agreement. The defendant William Herbster claims to be the owner of the

piece of land, approximately 20 acres, described by metes and bounds in section 5, township 2, range 17, by reason of conveyances from Charles J. Santo. Charles J. Santo, Jr., and Fritz Santo, who are the same persons as Charles Santo and Fred Santo, defendants, have a deed to the south half of the northeast quarter, the southeast quarter of the northwest quarter, and the northeast quarter of the southeast quarter of section 9, township 2, range 17, from Charles J. Santo and Theresa Santo, as husband and wife, dated October 7, 1935. Charles J. Santo died testate on April 14, 1942, leaving a will which gave all interests in his property, real and personal, to his widow, Theresa Santo, and Paul P. Chaney has been appointed administrator with will annexed of said estate which is being administered in the county court of Richardson county and an order has been entered therein barring claims and claims in the amount of $797.75 have been allowed. The personal property is in the sum of $960.82 together with the rentals of the premises herein described for the share of deceased's interest therein for the year 1942. Besides the personal property of Charles J. Santo at the time of his death, he was seised of the original 240 acres, except the tract of 20 acres deeded to the defendant William Herbster, and of the 360 acres purchased, he was seised of all but the 160 acres deeded to his two sons of his second marriage, Charles J. Santo, Jr., and Fritz Santo. Whatever interest any of the defendants may have in and to the premises in so far as the plaintiffs' rights thereto are concerned are subsequent and inferior and prays that the deed of July 26, 1919, conveying their interest in the 240 acres as inherited from their mother be set aside and canceled and held for naught or in the alternative to enforce the agreement and to set aside the will and decree Charles J. Santo to have died intestate in so far as it affects the plaintiffs' rights in and to his estate by reason of the agreement and that the interests of the parties in and to said premises be determined and that the interests of the plaintiffs be declared clear of all liens and encumbrances and that the rights of all the

defendants be subsequent and inferior thereto and that a partition thereof be had and a referee appointed for that purpose and for the purpose of collecting the rents and profits therefrom.

The first question here for consideration is, did the appellants' petition state a cause of action? Under section 76-109, Comp. St. 1929, this court has held in *Hiles v. Benton,* 111 Neb. 557, 196 N. W. 903: "The rigid rule of the common law that, where an estate has been conveyed or devised directly to the grantee or devisee, all subsequent restrictions upon the nature or quality of the title, or upon the manner of the enjoyment of the estate, are void, has been relaxed by the provision of our statute that any instrument conveying or creating any interest in real estate shall be construed so as to effectuate the intention of the testator gathered from the language of the will, provided only that such construction is not violative of any rule of law. It occurs to me that the rule of law here spoken of does not include legal rules of construction in conflict with the very rule of construction sought to be established by the statute, for this would be a *felo de se,* * * * ." But the correct rule as to the construction of this statute is properly stated in *Stuehm v. Mikulski,* 139 Neb. 374, 297 N. W. 595: "Section 76-109, Comp. St. 1929, commonly known as 'the intent statute,' relates only to rules of construction, and does not enlarge or limit, or in any way modify, any rule of substantive law that existed at the time of its passage or that thereafter has been created." That the agreement, contained in the instrument of conveyance, does not create a condition subsequent is well settled by the authorities, for as stated in *Davis v. Skipper,* 125 Tex. 364, 83 S. W. (2d) 318: "There are many authorities to the effect that a recital in the deed of conveyance that it is made upon a money consideration, and a further consideration that the grantee shall do certain things, or that only a certain use shall be made of the property, does not impose a condition and does not create an estate upon a condition subsequent. 8 R. C. L. p. 1101; 18 C. J. pp. 353-354; *Board of*

Councilmen v. Capital Hotel Co., 188 Ky. 754, 224 S. W. 196; *Adams v. First Baptist Church*, 148 Mich. 140, 111 N. W. 757; *Fraley v. Wilkinson*, 79 Okla. 21, 191 Pac. 156." And in *Ruggles v. Clare*, 45 Kan. 662, 26 Pac. 25: "The authorities are uniform, that estates upon condition subsequent, which, after having been fully vested may be defeated by a breach of the condition, are never favored in law, and that no deed will be construed to create an estate upon condition, unless the language to that effect is so clear that no room is left for any other construction." Whether the agreement contained in the instrument is called a covenant or a contract seems immaterial for the appellants would be entitled, upon proper showing, to either rescission or specific performance. In a similar case, where the consideration in the agreement, to construct and erect upon the lot conveyed a business building of a certain type within a certain length of time, was breached by failure to perform, the court held that the grantor was entitled to either specific performance or rescission by cancellation of the deed. *Willard v. Ford*, 16 Neb. 543, 20 N. W. 859. And in *Bennett v. Moon*, 110 Neb. 692, 194 N. W. 802, we held that, courts of equity will, under a proper state of facts, specifically enforce contracts concerning real estate. That courts of equity will grant specific performance of contracts to leave property to others, under the proper circumstances, has long been the law in this state. *Lennox v. Anderson*, 140 Neb. 748, 1 N. W. (2d) 912; *Craig v. Seebecker*, 135 Neb. 221, 280 N. W. 913; *Best v. Gralapp*, 69 Neb. 811, 96 N. W. 641, and the authorities cited therein. We have held that in a grant or a devise of real estate to a designated person in fee simple with provisions therein that are inconsistent or repugnant thereto such as a restriction against the power to sell, mortgage or otherwise encumber, such provisions are void, *State Bank of Jansen v. Thiessen*, 137 Neb. 426, 289 N. W. 791; *Moffitt v. Williams*, 116 Neb. 785, 219 N. W. 138; *Grant v. Hover*, 103 Neb. 730, 174 N. W. 317. As stated in *Grant v. Hover, supra*: "When, however, there are different provisions in the same will as to

the disposition of specified property, they must be construed together to ascertain the intention of the testator." Although, in *Peters v. Northwestern Mutual Life Ins. Co.*, 119 Neb. 161, 227 N. W. 917, where the devise to the son was in fee, we held that a restriction against alienation until the devisee became 35 years of age was a reasonable restraint and valid. See, also, 4 Thompson on Real Property (Perm. ed.) sec. 2083. However, when the estate in fee does not pass, but a lesser estate is created, then provisions against alienation are valid. *Hiles v. Benton, supra; Nebraska National Bank of Minden v. Bayer*, 123 Neb. 391, 243 N. W. 115; *Drury v. Hickinbotham*, 129 Neb. 499, 262 N. W. 37, 4 Thompson on Real Property (Perm. ed.) sec. 2081. In construing the provisions of this deed, parts of which have heretofore been set forth, under this statute which applies to deeds, *Blochowitz v. Blochowitz*, 130 Neb. 789, 266 N. W. 644, wills, *Peters v. Northwestern Mutual Life Ins. Co., supra*, and all other instruments conveying real estate or any interest therein, we will not be bound by the view that certain technical words, which will import a fee, will be held controlling so as to peremptorily discard whatever words of qualification that may precede or follow, but will seek the true intent of the grantors in so far as it does not conflict with our construction of the intent statute. The granting clause and habendum of the deed, standing alone, would give to the grantee a fee simple title, however, the deed further provides: "That said Charles J. Santo agrees to die intestate, and not alienate the property hereinafter described and that his children, above named, born as the fruit of his marriage with the said Josephine Santo, nee Litty, deceased, shall inherit and share in his estate the same as the children of said Charles J. Santo born of his second marriage, * * * ." Considering all of the provisions of this deed it shows that in consideration of the premises conveyed the grantee, who is the father of the grantors, agreed to die intestate, and permit certain of his children to inherit his estate according to the provisions of the statute of descent and further that he would not alien-

ate the property therein described. This agreement on the part of the grantee to die intestate and leave his property to certain of his children is a valid and enforceable agreement and thereby created in the grantors an interest in the premises. As stated in 26 C. J. S. 478, sec. 145: "A valid and enforceable intent to reserve some right to the grantor touching alienation of the land must be given full effect, and, where the grantor retains an interest in the property granted, such interest generally will support the imposition of a restriction on alienation." *Sloman v. Cutler,* 258 Mich. 372, 242 N. W. 735; *Bank of Hartford v. Buffalow,* 217 Ala. 583, 117 So. 183; *Iowa Farm Credit Corporation v. Halligan,* 214 Ia. 903, 241 N. W. 475. Where the owners of an interest in real property convey the same but by agreement contained in the instrument of conveyance retain an interest in the premises, such interest will support the imposition of a restriction on alienation where it is reasonably necessary to protect the interest retained. The third amended petition of the appellants therefore states a good cause of action.

The second question raised by the appeal is the question of a misjoinder of causes of action. The prayer of the petition seeks cancelation of the deed or in the alternative to have a specific performance of the terms and provisions thereof. While we have said in *Central Nebraska Public Power and Irrigation District v. Walston,* 140 Neb. 190, 299 N. W. 609: "Notwithstanding the prayer for relief is a part of the petition, it is no portion of the statement of facts which are required to constitute a cause of action, and the entire omission of any demand for judgment would not subject the petition to a general demurrer." However, an examination of the allegations of fact contained within the third amended petition of the appellants discloses sufficient facts upon which to base either an action for rescission or for specific performance. One cannot both rescind a contract and ask for its enforcement at the same time for the two are opposite types of relief and inconsistent and repugnant. 1 Am. Jur. 469, sec. 83; 1 C. J. S. 1231, sec. 79. Al-

though there are exceptions to this rule as where the nature of the relief will be precisely the same in each case, *Williams v. Lowe,* 4 Neb. 382, or where the petition shows the pleader is in ignorance of the facts he may plead in the alternative, 21 C. J. 406, sec. 426, but neither of these situations are applicable here for the relief would not be the same and the facts are fully pleaded and known to the appellants. However, the primary purpose of the action was for the partition of real estate. While the question of title was drawn in issue, the action should not have been dismissed but the question of title and the interests of parties should have been first determined, for as stated in *Phillips v. Dorris,* 56 Neb. 293, 76 N. W. 555: "The parties made defendants to Miller's action in the district court denied his title to the real estate in controversy and set up title in themselves. This did not oust the district court of jurisdiction to hear and determine the partition suit nor make the dismissal of that suit necessary. The court was one of general jurisdiction, administering both legal and equitable remedies, and was invested with authority in that proceeding to try the issues as to the title, and, after they were determined, proceed to partition the estate among the parties found to be the owners thereof. *(Wilkin v. Wilkin,* 1 Johns. Ch. (N. Y.) 110; *Lynch v. Lynch,* 18 Neb. 586; *Seymour v. Ricketts,* 21 Neb. 240.)" And the determination of title is a final order and appealable. *Sewall v. Whiton,* 85 Neb. 478, 123 N. W. 1042; *Peterson v. Damoude,* 95 Neb. 469, 145 N. W. 847. The question of title being drawn in issue, the action for partition should not have been dismissed but should have remained pending while the question of title was determined and before the question of title is litigated upon proper application the appellants should be required to elect whether they will stand upon rescission or specific performance.

The next question for consideration is whether or not there is a misjoinder of causes of action because the action may or may not contain two tracts of land in which all of the appellants may or may not have an interest. The cor-

rect rules are announced in *Shoup v. Cummins,* 65 A. L. R. 887, 890 (334 Ill. 539, 166 N. E. 118): "A cause of action for partition of one tract of land is improperly joined in a single bill with a cause of action for a partition of another tract, where some of the persons interested in one are not interested in the other and do not derive their interests from a cotenancy of both tracts," except, "that partition of two or more parcels of real estate may be made in one proceeding if the title to all the parcels sought to be partitioned is derived from a cotenancy as a common source of title, though some of the cotenants, parties to the proceeding for partition, may be interested in only one or some of the parcels and not in all." And in 40 Am. Jur. 29, sec. 35: "There is no question as to the right of a tenant in common to the partition of different tracts of land in the same proceeding, where the tracts are held by him in common with the same persons." See, also, 47 C. J. 333, sec. 156. Under these holdings this question is premature for until the question of title has been determined the question of whether or not there is a misjoinder of causes of action in the partition action cannot be properly passed on.

What has been said in regard to the question of a misjoinder of several tracts of land is likewise true with reference to the misjoinder of parties plaintiff, for whether or not Lawrence Santo and the other appellants have any interest in and to any part or all of the tracts of land sought to be partitioned can only be determined after the question of title has been passed on. Generally, "All persons, however numerous, materially interested in the event of the suit or in the subject-matter, should be made parties either as plaintiffs or defendants, so that the decree may finally and completely determine the rights which all persons have in the subject-matter decided, that the parties may safely obey and act on the decree, and a multiplicity of suits may be avoided." 30 C. J. S. 564, sec. 133. And "In proceedings for partition, whether at law or in equity, all of the cotenants are indispensable parties, and such of them as do not join as plaintiffs must be made defendants. The rule ap-

plies with equal force where the object of the suit is to obtain other relief in addition to partition, as for instance, where the suit is for partition and an accounting, or where, in addition to partition, cancellation of a deed of the premises sought to be partitioned is asked." 47 C. J. 365, sec. 231. And what has been said of cotenants is likewise true of their successors in title.

What has been said of the misjoinder of parties plaintiff is applicable to the defendants with the further provision that section 20-2172, Comp. St. 1929, provides: "Creditors having a specific lien or general lien upon all or any portion of the property may or may not be made parties, at the option of the plaintiff," and section 20-21,110, Comp. St. 1929, provides: "Persons having contingent interests in such property may be made parties to the proceedings, and the proceeds of the property so situated (or the property itself, in case of partition) shall be subject to the order of the court until the right becomes fully vested." If, in either the partition action or in the litigation affecting the title, a plaintiff or a defendant is a necessary or proper party for any purpose, he is properly joined in the action.

The same may also be said in regard to the question as to the allegations of the assets of the estate of the deceased, Charles J. Santo, being sufficient to permit partition before the estate has been closed. The petition shows the amount of the claims, that time for filing has passed, and also the personal property of which the estate is possessed. As stated in *Alexander v. Alexander*, 26 Neb. 68, 41 N. W. 1065: "An heir or devisee of an estate cannot maintain an action for distribution or partition until the debts, allowances, and expenses against said estate, have been paid or provided for, unless he give a bond with approved sureties to pay the same." But as held in *Schick v. Whitcomb*, 68 Neb. 784, 94 N. W. 1023, where the allegations of the petition allege the solvency of the estate, as well as the sufficiency of the personal assets to pay the debts against it and this is conclusively established by the evidence, then partition may be had. There being no allegation that a bond has

been given, the question of the sufficiency of the assets of the estate is one of fact to be determined by the court upon the evidence submitted at the time of hearing on the partition.

It is therefore the opinion of the court that the action be reversed with directions to the lower court to first determine the title of the parties in and to the premises, during which time the partition action is to remain pending, and upon the determination thereof, when the same becomes final, that the partition action be heard.

REVERSED.

DOUGLAS CALLAHAN, ADMINISTRATOR, APPELLANT, V. GATHER F. PREWITT, APPELLEE.

10 N. W. (2d) 705

FILED AUGUST 6, 1943. No. 31638.

1. **Appeal and Error.** When a cause is remanded for a new trial, ordinarily it is for trial generally.
2. ———. In the absence of a record to the contrary, after a general remand for a new trial, it will be presumed that the trial court, in submitting the case to the jury, found an existing difference in the evidence, which required that all issues of fact be again submitted.
3. **Negligence.** Evidence examined and held that plaintiff was not entitled to an instruction that defendant was guilty of negligence as a matter of law.
4. ———. Evidence of contributory negligence of plaintiff's intestate examined and *held* sufficient to go to the jury.
5. **Trial.** A motion to disqualify a county attorney from participating in a civil case, when the duties of his office might conflict with the duty owed to his client in the civil suit, comes too late when first made within 48 hours of the commencement of a second trial.

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

Morrow & Miller, for appellant.

Frank Glebe and *Mothersead & Wright, contra.*

Heard before SIMMONS, C. J., PAINE, YEAGER, CHAPPELL and WENKE, JJ., and TEWELL and LIGHTNER, District Judges.

LIGHTNER, District Judge.

Suit for death of plaintiff's intestate, Otto H. Doerfler, in an automobile head-on collision on a bridge about one mile west of Morrill on the night of December 15, 1939, about 10 p. m. Doerfler was driving a Dodge passenger sedan and was alone, and defendant was driving a truck and semi-trailer loaded with eight tons of hay. His brother, Warren Prewitt, was with him in the truck. The passenger car was proceeding eastward and the truck westward.

The case was before the court once before, and is reported in 141 Neb. 243, 3 N. W. (2d) 435. The juries in both trials found for the defendant. One of the principal contentions of the plaintiff in the present appeal is that the findings and holdings of this court in the case above referred to, that is, 141 Neb. 243, 3 N. W. (2d) 435, constituted a holding that, as a matter of law, the defendant was guilty of negligence, and that the only question to submit to the jury on the second trial was the amount of damages. The former opinion does not indicate an intention that the case was remanded solely for the ascertainment of damages.

There would be no purpose in discussing the errors referred to in points 3 and 4 of the syllabus of the former opinion if the case was reversed only to ascertain the amount of the damages, since these errors do not relate to the question of damages, and the court clearly intimates that the case would be retried on all issues remaining in the case.

The general rule is that, when a case is remanded for a new trial it is for trial generally. 4 C. J. 1239. In the absence of a record to the contrary after a general remand for a new trial, it will be presumed that the trial court in submitting the case to the jury found an existing difference in the evidence which required that all issues of fact be again submitted. *Missouri P. R. Co. v. Fox,* 60 Neb. 531, 83 N. W. 744. We are unable to determine from the record before us whether the evidence in the present case is sub-

stantially the same as that produced at the former trial. Consequently, the foregoing rule controls, and the trial court cannot be said to have erred in submitting the whole case to the jury. Therefore, unless an examination of the record shows that plaintiff was entitled to recover as a matter of law it was proper to submit the case to the jury and its verdict should stand unless other errors occurred.

An examination of the record shows the following facts which in our opinion are sufficient to justify the jury in finding for the defendant: The accident happened about ten o'clock on a dark, windy, cold night. Mr. Prewitt had left Morrill about 10 o'clock and was driving westward, at a reasonable rate of speed, about thirty miles an hour, on his own side of the road and observing all the rules of the road. As he approached the bridge where the fatal accident occurred he saw the lights of a car coming toward him from the west. This was on highway No. 26 which runs almost exactly straight at this place. Both cars were approaching the bridge where the collision occurred. When the car coming toward defendant Prewitt was from 75 to 200 yards west of the bridge and Prewitt's car 60 to 70 feet east of the east side of the bridge the Doerfler car turned to the north side of the road. The bridge is 32 feet long. When the Doerfler car was perhaps 50 yards west of the bridge and Prewitt about 30 feet east of the bridge Prewitt became alarmed and said to his brother: "What in the world is that fool going to do?" and began to turn his car to the left. There is a side road leading north immediately west of the bridge and Prewitt seems to have surmised that the Doerfler car intended to turn north on this road. As Prewitt began to turn left he applied his brakes. Doerfler's car was about 50 feet west of the bridge and not over 50 to 100 feet from Prewitt's car when the Doerfler car "just careened across the road, it just flopped back" to its own side. There is evidence that the cars were approaching each other at more than 100 feet a second. Immediately after Doerfler's car turned back its lights loomed up in Prewitt's face, there was what Prewitt describes as

an explosion, a terrific noise and a terrific impact. At the time of the impact Prewitt was in the center of the bridge and there was no room to pass on either side of him.

What caused Doerfler to be on the north side of the road does not appear. It probably appeared to Prewitt at the time that he intended to drive north on the side road immediately west of the bridge. One witness who is somewhat discredited states that he was walking on the road just west of the bridge and that Doerfler went around another car just before the accident and was too slow in getting back to his side of the road. This witness claims to have been walking on the south side of the road and Doerfler may have taken to the north side to avoid striking him. There was no evidence that he was intoxicated. It was admitted that Doerfler had suffered a loss of vision in one eye prior to this accident. Whatever the cause there is ample evidence in the record to justify the jury in finding that Doerfler was on the wrong side of the road until immediately before the accident. One reputable witness who followed only a few hundred yards behind Prewitt testifies that Doerfler was on his left side of the road at the time of the accident, but we are inclined to believe from the other evidence in the case that he was mistaken. It is apparent from reading the bill of exceptions that the jury was justified in finding that Doerfler was guilty of contributory negligence and the trial court correctly instructed the jury "if you find from the evidence that the negligence of the plaintiff's intestate was in any degree more than slight, or that the negligence of the defendant was in any degree less than gross in comparison therewith, then, or in either of such cases, you should find that the plaintiff is not entitled to recover, * * * ." Can the court say on this record that the negligence of Doerfler was not more than slight? It was his initial negligence in being on the wrong side of a busy highway on a cold, dark, windy night that caused the situation out of which the accident arose. Prewitt was confronted with an emergency, a car coming toward him on the wrong side of the road. His spontaneous exclamation:

"What in the world is that fool going to do?" as the car was coming toward him and his statement right after the accident while he was in a dazed and shocked condition that he didn't know what the fellow meant by being on the wrong side of the road shows that he was suddenly and unexpectedly confronted with a dangerous and confusing situation. Can it be said as a matter of law that Doerfler who caused the dangerous situation was not guilty of more than slight negligence? In our judgment it cannot be so held. Doerfler in being on the wrong side of the road and in remaining there until he was close to the other car and under circumstances which would tend to confuse the driver of the other car was guilty of negligence that was much more than slight. So far we have not discussed the element of speed. The witness above referred to who was somewhat discredited placed the speed of the Doerfler car just before the accident and while he was still on the wrong side of the road at 60 miles per hour. Other witnesses say he was traveling fast, he went around several cars, one a 1937 Ford in which there were three young men and one of them said: "He can't do that to us," and tried to catch him and failed, but were gaining on him all the time and were only 300 to 400 yards behind him when the accident happened. There was therefore evidence from which the jury might have found that Doerfler was traveling at a dangerous and unlawful rate of speed on the wrong side of the road.

Appellant insists that it was error to submit the question of Prewitt's negligence to the jury, especially that it was error to submit to the jury the question of whether or not an emergency existed which might excuse Prewitt's action in turning to the left just before the accident, claiming that these questions were foreclosed by the syllabus and opinion on the first appeal. It cannot be held as a matter of law on the record now before us that Prewitt was guilty of negligence. The facts shown by the present record are that Mr. Prewitt was on his own side of the road and traveling at a lawful rate of speed when he saw the other car coming toward him at a rapid rate of speed and on the

wrong side of the road and maintaining its position there until it got very close to him. He was alarmed and frightened and did not know what to do. He probably concluded that the other car intended to turn north on the road just west of the bridge and if that had been its intention Mr. Prewitt's act in turning left was not such a wrong thing to do because it would give the oncoming car just a little more space so that by getting off the pavement a little and onto the shoulder it could have turned north. There is certainly a great deal of authority to the effect that being on the wrong side of the road or turning left is sometimes excusable. "Invasion of the left half of the highway by a motorist would not constitute negligence if the motorist so acted because he was confronted with an emergency." *Schworer v. Einberger*, 232 Wis. 210, 286 N. W. 14. "If a driver confronted by an emergency turns his car to the left in an attempt to avoid a collision, the question of negligence is for the determination of the jury." *Hardung v. Sheldon*, 133 Neb. 427, 275 N. W. 586. See, also, 42 C. J. 908, sec. 620. The contention of appellant seems to be that Mr. Prewitt caused the emergency by turning left, but the fact is that Mr. Doerfler had himself caused the emergency. The emergency caused Mr. Prewitt to turn left rather than Mr. Prewitt's turning left causing the emergency. The trial court did not err in submitting the question of defendant's negligence and as to whether or not an emergency existed which might excuse Prewitt's act in turning left, to the jury, especially in view of the fact that the trial court quoted the exact words of syllabus points 1 and 2 of 141 Neb. 243, 3 N. W. (2d) 435, in its instructions.

A motion was filed asking the court to prohibit Frank Glebe, the county attorney for Scotts Bluff county, from appearing as attorney for defendant. It appears that Mr. Glebe acted as one of the attorneys for defendant throughout the first trial without objection, although he was county attorney at that time. The motion objecting to his appearance in the case was filed on November 21, 1942, which was the Saturday before the trial was to begin on Novem-

ber 23, 1942, the Monday following. Mr. Glebe was the only counsel for defendant who had participated in the first trial. He was familiar with the issues and facts, and to disqualify him at so late a date, assuming for the purposes of this appeal that the motion was otherwise good, would undoubtedly have prejudiced the rights of the defendant. We think that a motion to disqualify a county attorney from participating in a civil case, where the duties of his office might conflict with the duty owed to his client in the civil suit, comes too late when first made within 48 hours of the commencement of the second trial. The trial court was justified in overruling the motion to avoid the prejudice which would result to the rights of defendant.

These are the principal errors relied upon by the plaintiff for a reversal. Many others are alleged, but none nor all of them are sufficient to require a reversal.

The judgment of the trial court is therefore affirmed.

AFFIRMED.

The following opinion on motion for rehearing was filed March 24, 1944. *Former judgment of affirmance vacated and set aside and cause reversed.*

1. **Appeal and Error.** It is a fundamental principle of jurisprudence that material facts or questions which were in issue in a former action, and were there admitted or judicially determined, are conclusively settled by a judgment rendered therein, and that such facts or questions become *res judicata* and may not again be litigated in a subsequent action.
2. ———. The rule that the findings of this court on a first appeal become the law of the case on a retrial of the same issues is not available where on a second trial the facts are materially and substantially different.
3. ———. Except as to questions of jurisdiction, questions not presented to nor passed on by the trial court will not be considered on appeal.
4. ———. Where on appeal findings of fact are made which become the law of the case and there is a remand for a new trial, on such retrial, such findings are binding on the parties, the trial court and this court, unless on the retrial the facts relating to the issues upon which the findings were made are materially and

substantially different from those adduced on the former trial, and the burden of showing a difference shall rest upon the party making the claim.

5. ———. The determination of the question of whether or not the evidence on a retrial is different from that adduced on an earlier trial is one for the court and not for the jury.

6. Negligence. While evidence of use of intoxicating liquor at or about the time of an accident may be insufficient to prove intoxication yet if the occurrence is so close in time to an accident as to be considered as an incident related thereto it may be admitted as a circumstance proper to be considered by a jury in determining the existence or nonexistence of negligence.

7. ———. The sudden emergency rule cannot be successfully invoked by one who has brought that emergency upon himself by his own acts, or who has not used due care to avoid it.

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

YEAGER, J.

This is an action by Douglas Callahan, administrator of the estate of Otto H. Doerfler, deceased, plaintiff and appellant, against Gather F. Prewitt, defendant and appellee. The action is for damages on account of the death of the decedent claimed by plaintiff to have been brought about by the negligence of the defendant.

The case was before this court previously and in 141 Neb. 243, 3 N. W. (2d) 435, it was reversed and remanded for a new trial.

On the present appearance of the case an earlier opinion was released, which opinion appears, *ante*, p. 787, 10 N. W. (2d) 705.

On examination of motion for rehearing and a further study of the entire matter we have concluded that the opinion on the second appearance of the case in this court fails in certain respects to announce sound principles of law and legal procedure.

To the extent necessary to state them for the purposes of this part of the opinion, the facts were the following: In the night of December 15, 1939, a dark, windy and cold night, the defendant started westward from Morrill, Ne-

braska, on highway No. 26 with a truck and semi-trailer loaded with eight tons of hay. He met and collided head-on with a passenger automobile driven by Doerfler on a bridge. The automobile driven by decedent was traveling in an easterly direction. The bridge was a two-way bridge wide enough for automobiles to pass going in opposite directions.

At the time of the collision defendant was driving in the center of the bridge and there was not sufficient space on either side for Doerfler to pass. There is evidence that Doerfler was driving at a high rate of speed before and at the time of the accident and that he was not driving on his right side of the road. As a result of the collision Doerfler was killed.

In his petition plaintiff claimed that the collision was caused by the negligence of the defendant. The answer charges that the collision was caused by the negligence of Doerfler.

From an examination of the evidence adduced at the first trial this court made a finding that the defendant was guilty of negligence in the manner of driving his truck at the time of the accident. The summary of the finding is in the first syllabus point, as follows: "When a driver of a truck, proceeding at 30 miles an hour, sees a rapidly oncoming car, driving on one side and then the other of the center line of the road, the driver of the truck is negligent if he steadily proceeds in the center of the road and a collision occurs because the oncoming car was not left sufficient room on either side to pass the truck."

The defendant contended that he was confronted with an emergency and was entitled to the benefit of the rule relating to emergencies, that is, if he was confronted by a sudden emergency not created by his own negligence he was not, in determining his course of action, held to the same degree of care as if he had had time for reflection, and he was not negligent provided he used such care in meeting the emergency as an ordinary, prudent person would use under such circumstances.

This court made a finding on this matter and under the evidence denied to him the benefit of this rule. This finding and denial is summarized in the second syllabus point as follows: "The negligence of a truck driver is not excused by the sudden emergency rule, when he deliberately drives in the middle of the road, across a bridge which is in safe condition for travel from one side to the other, and of ample width for two cars to pass, and thus leaves insufficient room for an approaching car to pass on its proper side."

These findings were definite and unequivocal and, within the limits of the evidence upon which they are based, became final, *res judicata* and binding upon the parties. By an abundance of authority they became the law of the case to that extent.

In *Anheuser-Busch Brewing Ass'n v. Hier*, 61 Neb. 582, 85 N. W. 832, this court said: "The decision of questions presented to this court in reviewing the proceedings of the district court becomes the law of the case, and, for the purposes of the litigation, settles conclusively the points adjudicated."

In *Kuhns v. Live Stock Nat. Bank*, 138 Neb. 797, 295 N. W. 818, this court said: "So, too, all matters decided expressly or by necessary implication by this court in its opinion in reversing the first judgment became the law of the case. This applies not merely to all questions actually and formally presented, but to all existing in the record and necessarily involved in the decision. Such points will not be reconsidered in this appeal."

In *Blum v. Truelsen*, 139 Neb. 282, 297 N. W. 136, this court quoted with approval the following from 30 Am. Jur. 920, sec. 178: "It is a fundamental principle of jurisprudence that material facts or questions which were in issue in a former action, and were there admitted or judicially determined, are conclusively settled by a judgment rendered therein, and that such facts or questions become *res judicata* and may not again be litigated in a subsequent action." This statement was again approved in *Bohmont v. Moore*, 141 Neb. 91, 2 N. W. (2d) 599.

In the face of these and numerous other decisions to like effect and on the record presented we held in our former opinion that because of the general remand of the opinion on the first appearance of the case here all issues of fact were properly submitted to the jury. This of course included the two findings hereinbefore set forth.

This holding was in strict conformity with the factual and trial procedural background of *Missouri P. R. Co. v. Fox,* 60 Neb. 531, 83 N. W. 744.

Before passing to an analysis and comparison of *Missouri P. R. Co. v. Fox, supra,* it may be well to point out clearly that the rule that the findings of this court on a first appeal become the law of the case on a retrial of the same issues is not available where on a second trial the facts are materially and substantially different. With the part of the opinion in *Missouri P. R. Co. v. Fox, supra,* sustaining this view we are in accord.

With this in mind we observe that in *Missouri P. R. Co. v. Fox, supra,* on its first appearance, this court made certain findings as was done in this case. There, as here, on a later appearance, it was contended that the former findings became the law of the case and that the pertinent issues were not the subject of inquiry on a retrial. This court held to the contrary, but not on the ground that the findings were not the law of the case. The rule itself was approved.

The basis for the holding that the "law of the case rule" did not apply was a presumption indulged by the court that the trial court had before it the evidence of the former trial and that the evidence on the later differed substantially from that on the earlier. In the opinion it is stated: "We are unable to say from the record now before us that the evidence now presented is not materially different from what it was on the first trial of the case." Further it is stated: "If the evidence is the same, or substantially so, and made to thus appear, doubtless the rule would apply. Whether or not it is the same, we are unable to say from the record before us, which is now to guide us in our exam-

ination. It is but a fair and legitimate presumption to say that the trial court, in passing upon the instructions requested, and having before him the evidence in both trials, found a material difference in the testimony in the last trial from that of the first, and, therefore, determined that the opinion regarding the matter, announced in the first appeal, did not apply to the testimony as then existing." Again it is stated: "From the different expressions of the court upon the question, we understand the rule to apply to a legal principle involved in the trial of a case, which, when once determined, becomes thereafter the law of the case, binding, not only on the trial court, but this court as well; and will not, ordinarily, be reexamined in a subsequent review of the proceedings of an inferior court had in the further trial of the action. A conclusion, however, arrived at from an examination of the testimony upon one trial of a case must necessarily be subject to modification or entire change, if, upon a subsequent trial, the testimony with respect to such question is materially different."

On the same basis all of the issues were submitted to the jury on the second trial of this case and this resubmission was upheld in our former opinion.

We are now of the opinion that the basis for the two opinions is violative of sound reason and well-recognized legal principle.

In the first place it assumes either that the trial court had before it the bill of exceptions of the first trial or that the case was presided over by the same judge and his recollection of the evidence was sufficient to enable him to say that the evidence on the second trial was materially different from that on the first.

In either event the effect of the presumption is to say that under such circumstances as these the trial court has the right to determine questions of fact on evidence which is not subject to review by this court, since the supreme court will not, for the purpose of determining whether the district court reached a correct conclusion, examine any evidence which was not presented to the district court. *Oma-*

ha Fire Ins. Co. v. Dierks & White, 43 Neb. 473, 61 N. W. 740. Likewise the indulgence of the presumption denies the right even to preserve an exception to the basis for the resubmission without which there can be no review, since this court is committed to the proposition that, except as to questions of jurisdiction, questions not presented to nor passed on by the trial court will not be considered on appeal. *Bankers Life Ins. Co. v. Robbins,* 59 Neb. 170, 80 N. W. 484; *Hyde v. Hyde,* 60 Neb. 502, 83 N. W. 673; *Harlan County v. Thompson,* 125 Neb. 65, 248 N. W. 801.

In the second place it appears unreasonable and illogical to adopt and sustain a view that a party in whose favor a finding of fact is made amounting to a declaration of the law of the case on the facts presented or as some of the authorities say, a finding which is *res judicata,* should be required to assume the burden of showing that the facts on a second trial of the case were not materially or substantially different from the facts on the former trial. This runs counter to the fundamental ideal of common law and equity jurisprudence, which ideal has in practice been jealously guarded by judicial decision. No reason is apparent why, in such instances as this, the party who in theory at least, if not in fact, makes the contention that facts found are not the true facts should be relieved from sustaining the burden of his contention.

It is therefore the holding of this court that where on appeal findings of fact are made which become the law of the case and there is a remand for a new trial, on such retrial, such findings are binding on the parties, the trial court and this court, unless on the retrial the facts relating to the issues upon which the findings were made are materially and substantially different from those adduced on the former trial, and that the burden of showing a difference shall rest upon the party making the claim.

In order to avoid confusion in the future we deem it advisable to say here that the burden is evidentiary and is for determination by the court and not the jury. As to methods, of course, the introduction of the bill of exceptions of

the first trial or pertinent parts thereof would be most satisfactory but there should be no such limit on method. The right to present this question should not be denied if for some reason the bill of exceptions is not available. To the extent that it is in conflict herewith the holding in *Missouri P. R. Co. v. Fox, supra,* is overruled.

In the light of the view now taken of this case it becomes necessary to discuss some of the other assignments of error set forth in the brief of appellant. Attention is directed first to claimed errors in the admission and rejection of evidence.

Assignments Nos. 4, 5, 6 and 7 relate to the use of intoxicating liquors by Doerfler at a tavern about 500 feet west of the Nebraska state line in Wyoming immediately before proceeding to the point where the fatality occurred. The distance from the scene of the accident was but a few miles and the interval between was evidently but a matter of minutes. In the light of the other evidence this could not be considered in proof of intoxication, but we have no doubt, because of the brief interval of time and the closeness of its relationship to the accident and the incidents leading to it, of its admissibility as a circumstance proper to be considered by the jury in determining whether or not Doerfler was guilty of negligence which was the proximate cause of the accident or which contributed to it.

In assignment No. 8 appellant complains of the fact that a witness was permitted to say that Doerfler possibly had been drinking. This was clearly error.

In assignment No. 9 is a contention that it was error to allow an inquiry of a tavern keeper as to the character of his liquor license. This was error but it could not have affected the result, therefore it must be treated as harmless.

The same may be said of assignment No. 11 wherein defendant was allowed to say substantially that he could not detect a change in the speed of the Doerfler automobile.

As to No. 12, there being no cross-petition, it was error to permit defendant to testify to extent of care given him by a physician.

Assignment No. 13 deals with questions propounded to the defendant by attorneys for the appellant to which objections were sustained. The questions dealt with the manner in which defendant operated his truck and his knowledge or recollection in that connection. The sustaining of these objections was clearly prejudicial error.

Assignments Nos. 15 and 16 relate to an effort on the part of defendant to get into evidence a partly filled whisky bottle claimed to have been found in Doerfler's automobile after the accident. We find no misconduct in this effort and for the reasons stated in our discussion of assignments Nos. 4, 5, 6 and 7 we think this evidence was admissible.

Assignment No. 19 asserts that it was error to admit evidence of drinking intoxicating liquor by Doerfler before the accident at times not even remotely connected therewith. The admission of such evidence was clearly erroneous.

Complaint is made that instruction No. 17 given by the court is not a proper statement of the duty and requirement of a motorist when he meets with a sudden emergency. This assignment does not require determination in the light of the holding that the question of negligence of the defendant became the law of the case or *res judicata* on the second trial because of the absence of a showing that the facts adduced were materially and substantially different from those adduced at the first, but since on another trial a different state of facts may be shown it appears proper to discuss it in order to avoid error in instruction on the emergency rule. The instruction is as follows:

"You are instructed that when one is confronted with a sudden peril requiring instinctive action, he is not, in determining his course of action held to the exercise of the same degree of care as when he has time for reflection, and in the event that a motorist suddenly meets with an emergency which would naturally overpower the judgment of a reasonably prudent and careful driver so that momentarily he is thereby rendered incapable of deliberate and intelli-

gent action, he is not negligent providing he used such care in meeting such an emergency as an ordinary prudent man would under such circumstances.

"However, the negligence of a truck driver is not excused by the sudden emergency rule, if he deliberately drives in the middle of the road, across a bridge which is in safe condition for travel from one side to the other, and of ample width for two cars to pass, and thus leaves insufficient room for an approaching car to pass in its proper side."

The particular complaint is that it leaves out the qualification that the rule is not applicable if the emergency is caused by the person claiming the benefit of the rule. The complaint is well founded. There is an attempt in the second paragraph to cure the defect of the first. The effect of the second paragraph of the instruction was to tell the jury that the defendant was entitled to the benefit of the emergency rule unless he *deliberately* did the things enumerated. This is an improper and unwarranted limitation of the rule. In *Hughes v. Omaha & C. B. Street Ry. Co., ante,* p. 47, 8 N. W. (2d) 509, is found the following: "This court, however, has recently said that the rule of sudden emergency cannot be successfully invoked by one who has brought that emergency upon himself by his own acts, or who has not used due care to avoid it." See, also, *McClelland v. Interstate Transit Lines,* 142 Neb. 439, 6 N. W. (2d) 384. Not alone deliberation but any act or failure to act amounting to a lack of due care under the circumstances defeats the right to claim the benefit of the emergency rule.

Instruction No. 18 is vulnerable to the same objection as No. 17 since it leaves out the element of the due care required of the driver of the motor vehicle.

Other objections are made to introduction and rejection of evidence and to instructions given and refused but we do not consider that they require discussion.

It is obvious that the case must be reversed and remanded for a new trial. On a new trial it is equally obvious that the only matters for submission to a jury, in addition to instruction that the defendant was guilty of negligence, are

the negligence of Doerfler, if any, and the degree thereof, the comparison of the negligence of defendant and Doerfler, if comparison is called for, and the amount of damages, if any, to be assessed against the defendant, unless plaintiff shows that the facts are materially and substantially different from those on which findings of fact amounting to a pronouncement of the law of the case were dependent on the first appearance of the case in this court.

The opinion appearing, *ante,* p. 787, 10 N. W. (2d) 705, is vacated and set aside and the case reversed and remanded for a new trial in accordance with the terms of this opinion.

REVERSED.

CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

SEPTEMBER TERM, 1943

STATE, EX REL. WALTER R. JOHNSON, ATTORNEY GENERAL, APPELLANT, V. CONSERVATIVE SAVINGS AND LOAN ASSOCIATION ET AL., APPELLEES.

STATE, EX REL. WALTER R. JOHNSON, ATTORNEY GENERAL, APPELLEE, V. CONSERVATIVE SAVINGS AND LOAN ASSOCIATION ET AL., APPELLANTS.

11 N. W. (2d) 89

FILED SEPTEMBER 24, 1943. Nos. 31562, 31563.

1. **Quo Warranto.** *Quo warranto* under our statute is intended to prevent the exercise of powers that are not conferred by law, and is not ordinarily available to regulate the manner of exercising those powers.
2. ———. Section 20-21,112, Comp. St. 1929, prescribes who the defendant may be in a *quo warranto* action, and the acts, the doing of which may be the basis for an information that may bring a person before the bar of a court to answer as to the alleged acts.
3. ———. Under section 20-21,117, Comp. St. 1929, the defendant is required to answer the charges made against him in the information.
4. ———. The issues in a *quo warranto* action are those made by the information and the answer.
5. ———. The statutes above cited contemplate that a *quo warranto* action shall be used to determine the issues made by the authorized charge of the information, and the answer thereto of a defendant, properly charged in the information.
6. ———. In the absence of a statutory provision extending its scope a *quo warranto* action may not be used merely to establish or determine private rights and obligations or to redress private grievances in which the public has no interest.

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

Walter R. Johnson, Attorney General, and *Edwin Vail,* for relator.

Wells, Martin & Lane, for appellee Hill.

Baird & Baird, for Conservative Savings and Loan Association.

Heard before SIMMONS, C. J., PAINE, YEAGER and CHAPPELL, JJ., and TEWELL and LIGHTNER, District Judges.

SIMMONS, C. J.

The attorney general filed an information in *quo warranto* against the defendant a building and loan association and one Hill, charging the association with exercising powers not conferred by law by holding title and possession of certain real property, and seeking a cease and desist order against the association and the cancelation and termination of a lease against the defendant Hill. After issues were joined and trial had, the court granted the cease and desist order and denied jurisdiction to determine the issue as to the lease. From this judgment the attorney general and the association filed separate appeals. We affirm the judgment of the trial court.

Section 8-310, Comp. St. Supp. 1941, upon which this action is based, provides in part as follows: "Such associations may purchase, hold, lease, and convey real estate for the following purposes and no others: 1. Such as it may need to occupy as a place of business. * * * 4. * * * No such association shall hold the title and possession of any real estate longer than five years, unless authorized in writing by the Department of Banking so to do; provided, this restriction shall not apply to real estate held for the purpose first above named."

The defendant Conservative Savings and Loan Association is a corporation organized and existing under the laws of Nebraska. At all times mentioned herein its home office and place of business has been at 1614 Harney street, Oma-

ha, Nebraska, in property owned and modeled for its use as such place of business.

In 1916 defendant association purchased the fee simple title to property at Eighteenth and Farnam streets in Omaha, which we shall refer to as lot 8. In 1919 it solicited and entered into a 99-year lease with one Elizabeth Dufrene Hill whereby it secured possession of lot 7, adjoining its lot 8. Its purpose in acquiring these two properties was to build a large office building thereon, to be used in part as its place of business. The construction of this building was never undertaken. Because of economic conditions the building project was abandoned in 1926. The association made some effort in 1926 and following years to dispose of these properties, without success. The banking department of the state on a number of occasions called its attention to the fact that it was holding this property in violation of the statute and requested compliance with the act. No effective action was taken.

In February, 1934, the superintendent of banking, by letter, called the attention of the defendant association to the report of the examiners for December, 1933, to the statute and expressed the view that the Hill lease "be canceled and the adjacent property disposed of." Following that an officer of the defendant association undertook to persuade Mrs. Hill to cancel, modify or accept settlement on the Hill lease so that defendant association might be relieved of its burdens. An agreement was not reached. No further action was taken to comply with the statute and the request of the banking department. It appears that the association was willing to dispose of the two properties if satisfactory disposition could be made. The association appears to have desired to make lot 8 help it dispose of its leasehold on lot 7. That lease, however, was so termed that the association has not found any qualified party willing to assume the obligations of the lease so as to relieve the association of the obligations under it.

Mrs. Hill died March 2, 1935. The defendant Hill succeeded to her ownership of lot 7. The defendant associa-

tion paid the stipulated rental to Mrs. Hill during her lifetime, and continued to do so after her death down to the beginning of this action in November, 1939, when it ceased payments.

In September, 1939, in the examiner's report attention was again called to this property, the statute and "its elimination" was directed. In November, 1939, the attorney general brought this action in *quo warranto* alleging the securing of the title to these two lots, their holding in violation of the statute and that the association was "exercising powers not conferred by law and which are *ultra vires* of the corporation." He also alleged that Mrs. Hill, the lessor of lot 7, had only a life estate in the property; that the remainder in fee was vested in the defendant Hill; that notwithstanding Mrs. Hill's death, the defendant Hill claimed to be successor in interest under the lease; alleged the exacting terms of the lease; that the association had sought its termination and to be released therefrom; and that he joined the defendant Hill "for the purpose of determining the invalidity of said lease * * * that the same may be declared canceled and terminated." The attorney general prayed that the association be required to "cease and desist from exercising powers not conferred upon it by law and from holding title or possession to said real estate or any part thereof;" that it be required to sell and dispose of lot 8, and that the Hill lease be "declared canceled and terminated."

The association by answer admitted that it was holding the property in violation of the statute, set out the facts of its holding and that it was proceeding in good faith to protect itself from loss and in an effort to get out of the "predicament" it was in as a result of the Hill lease. The association prayed that the Hill lease be decreed to be terminated and of "no further force and effect" and that it be given time to dispose of lot 8.

The defendant Hill, by appropriate pleadings along the way, presented the question of the jurisdiction of the court to try the validity of its lease in a *quo warranto* proceed-

ing, pleaded his title, alleged the validity of the lease and asserted affirmative defenses not necessary to be mentioned here.

There was accordingly no issue presented as to whether or not the defendant was holding the property in violation of the statute. That was admitted. The issue which the attorney general and the association sought to have determined by the trial court was the force and effect of the Hill lease, as between the defendant Hill and the association.

The trial court found that the association had lawfully acquired the two lots; that it had abandoned the purpose for which they were purchased; that it was holding the property in violation of the statute above quoted and ordered that it cease and desist "from holding said lots * * * within a reasonable time from the entry" of the judgment and retained jurisdiction to make further orders on application of the attorney general. The trial court further found that defendant Hill was the owner of lot 7 subject to the rights of the defendant; that it had no jurisdiction to determine the rights of the defendants as between themselves and refused to determine those issues, without prejudice to their being determined in a proper action.

Before considering the specific assignments of error it is advisable to define the limited questions presented by the appeal. It is not contended that the original acquiring and holding of the property was other than lawful. The finding of the trial court that the association "did lawfully acquire the said lots 7 and 8" is not here questioned. Neither is the trial court's finding and order questioned that the association is holding lot 8 (held in fee simple) in violation of the law and that it cease and desist from holding said lot. Neither is the trial court's finding and order questioned that the association is holding whatever title it has, if any, to lot 7 (the leasehold), in violation of the statute nor that it should cease and desist from holding that title and possession. The questions presented by the appeals are the manner in which it shall dispossess itself of that title, if any, and whether or not it has any title, right of possession or obligation under the lease.

The attorney general in his brief states that "the nature and character of the Hill lease * * * is wholly immaterial to this controversy," and that whether the association was occupying under the 99-year lease as tenant at will or from month to month is beyond the issues of this controversy; that the state is entitled to an order requiring the association to cease and desist from holding lot 7, and advances the contention that the only way that can be effected is by the cancelation and termination of the Hill lease; that the trial court's order to the association to "cease and desist from holding" lot 7 is ambiguous unless construed to require the "cancelling and terminating" of the Hill lease. We see no merit in this contention. It resolves itself down to the position that if one party to a contract finds the burdens difficult to perform that the remedy is to have a court cancel and terminate the contract. Obviously there are legal ways to cease "holding" the Hill lease other than by cancelation, although that method is open to the parties. The attorney general admits that the method to cease holding lot 8 is by sale. The same method is legally available as to the leasehold of lot 7. The fact that the lessor has been unwilling to agree to a cancelation or modification of the terms of the lease "so as to make it more marketable" (as stated by the association in its brief), does not justify a court ordering a cancelation of the lease. The fact that a purchaser of the leasehold who will save the association from loss cannot be found is not an excuse for failure to comply with the law. The fact, if it be true, is apparently the basis of the attorney general's position that cancelation is the only way out of the association's "predicament." Assuming that the lease could be sold at a profit, would the attorney general be here contending that the only method by which the association can comply with the order would be by cancelation of the lease? We take it not. The statute provides that the association shall not "hold the title and possession." The statute does not provide that the association may hold the property until it may dispose of it at a profit or without loss. There is no more basis for requir-

ing a cancelation of the lease as a method of complying with the statute and the court order than there would be to require the ceasing to hold the fee title to lot 8 by reconveyance to the original grantor. The attorney general does not suggest that there is any ambiguity in the court's order as to lot 8 (held in fee) nor does he suggest that that part of the court's order be "construed" so as to require a certain method by which the association shall cease holding that property. The question of how the association is to comply with the court's order is, at least in the first instance, an administrative decision for the association to determine. That it must comply with the statute and court order and dispose of the title and possession of this property is clear. We see no reason for modifying the trial court's order in the manner suggested by the attorney general, nor do we agree with the attorney general that the trial court's order means that the lease "be regarded as cancelled and terminated."

The attorney general is here in effect asking that the court determine the method, and the only method, by which the association is to exercise its power to cease holding the title and possession of the leasehold. This argument goes not to the exercise of the power to cease and desist holding, but is a request that the court determine the manner of exercising the power, and that the court, having determined the manner, itself execute the decision. This court has said: "*Quo warranto* under our statute is intended to prevent the exercise of powers that are not conferred by law, and is not ordinarily available to regulate the manner of exercising those powers." *State, ex rel. Gantz, v. Drainage District,* 100 Neb. 625, 160 N. W. 997; *State, ex rel. Wright, v. Lancaster County Rural Public Power District,* 130 Neb. 677, 266 N. W. 591.

The association in its appeal presents the general contention that any further holding or leasing of the Hill property must be terminated, and that the trial court erred in refusing to determine the issue as between it and the defendant Hill and that the judgment should require the ter-

mination of the lease, the surrender of possession, an accounting of rents received since the beginning of this action, and that the further payment of the association's funds on the lease be ordered stopped. Although asking for a reasonable time to dispose of the fee simple title to lot 8 it asks that the leasehold be terminated "at once." The association advances first the argument that the lease, if valid, is executory as to the part to be performed since the beginning of this action; that it has been unable to secure an agreement with the lessor terminating it or modifying it so as to make it "more marketable" and that it must have a termination of the holding by court order. The argument that the lease is executory is predicated on the proposition that although the lease was within the power of the association when made it has since become *ultra vires* as a result of the action of the association in abandoning the building project and is accordingly unenforceable.

The association next argues that the lease should be ordered terminated "at once" by the court in order that it may thereby protect itself from further loss, and, in this argument, gives no recognition of the duty of the court to protect whatever rights, if any, defendant Hill may have under the lease contract. The association argues finally, that although a determination of whether or not the lease expired with the death of Mrs. Hill in 1935 may not be an absolute essential to a determination of the case, yet it is proper for the court to determine that matter, but that in the event it is held the association is still a tenant under the lease the court should order the lease canceled and terminated, or if it is not such a tenant that the court should grant relief by ordering its occupancy terminated. It will thus be seen that the order sought by the association is not a determination of the question of whether or not it is exercising "powers not conferred by law" in the holding of lot 7, nor whether or not it should cease and desist to hold the title and possession of the property. Rather it seeks a determination by the court of the issue between itself and the defendant Hill as to the existence of the obligations of

the lease and the rights and liabilities, if any, which each have under it, and seeks ultimately to be relieved of its contract liability, if one exists under that instrument. This brings up directly the question of whether or not that issue may properly be determined and that relief granted in a *quo warranto* action.

The action of *quo warranto* is one provided by statute. Comp. St. 1929, secs. 20-21,112 to 20-21,139. Section 20-21,112 not only "prescribes who the defendants to the action may be" (*State, ex. rel. Johnson, v. Consumers Public Power District,* 142 Neb. 114, 5 N. W. (2d) 202), but it also prescribes the acts, the doing of which may be the basis for an information that may bring a person before the bar of a court to answer as to the alleged acts. Patently the defendant Hill has neither been charged with the doing of any of those acts, it is not shown that he has done any of the enumerated acts, nor that he has done any wrong that authorizes the bringing of a *quo warranto* action against him. The basis of the information here is that the defendant association, a corporation, has and is exercising "powers not conferred by law." That charge is not made as against the defendant Hill. Section 20-21,117 provides that the "defendant shall appear and answer such information in the usual way, and issue being joined it shall be tried in the ordinary manner." What does the defendant answer? It is the charge of the information. What issue is joined? It is that made by the information and the answer. Clearly the statute contemplates that a *quo warranto* proceeding shall be used to determine the issue made by the authorized charge of the information and the answer thereto of a defendant properly charged in that information. The controversy between the defendant Hill and the association is no part of that authorized issue. We reach the conclusion, from an analysis of the statute, that the trial court correctly refused to determine the issues between the defendant Hill and the association.

In this we are sustained by the authorities.

"In the absence of statutory provision extending its scope,

quo warranto can be resorted to only when the act or wrong complained of does injury to the public. Consequently, it cannot generally be invoked for the redress of mere private grievances or the vindication of private rights." 44 Am. Jur. 98, sec. 18.

Quo warranto "does not lie merely to establish, determine, and vindicate private rights and interests, or to redress private grievances in which the public has no interest, unless it is so provided by statute." 51 C. J. 315.

The association argues that sections 20-317 and 20-323, Comp. St. 1929, make the defendant Hill a proper party and authorize the court to enter judgment affecting his rights and in this instance the cancelation and termination of his lease. Those provisions are: "Any person may be made a defendant who has or claims an interest in the controversy adverse to the plaintiff, or who is a necessary party to a complete determination or settlement of the question involved therein." Comp. St. 1929, sec. 20-317. "The court may determine any controversy between parties before it, when it can be done without prejudice to the rights of others, or by saving their rights; but when a determination of the controversy cannot be had without the presence of other parties, the court must order them to be brought in." Comp. St. 1929, sec. 20-323. Assuming, but not deciding, that those statutes apply to *quo warranto* proceedings we are unable to see where they sustain the association's position. They must, at best, be construed in connection with the *quo warranto* statute. The "controversy" in the *quo warranto* proceeding had to do with the association exercising powers not conferred by law, to wit, the holding of title and possession to certain real estate. Hill has or claimed no interest in that controversy "adverse to the plaintiff" nor was his presence necessary to a "complete determination" of that question. As has been pointed out the only "controversy between parties" before the court in the *quo warranto* action was that which had to do with the charge that the association was exercising "powers not authorized by law." The dispute between Hill and the asso-

ciation was not a controversy properly before the court in this action, and hence was not for determination.

The judgment of the district court is affirmed.

AFFIRMED.

SMITH MOTORS, INCORPORATED, APPELLEE, V. NEW AMSTERDAM CASUALTY COMPANY, APPELLEE: CENTRAL SURETY AND INSURANCE CORPORATION, APPELLANT.

11 N. W. (2d) 73

FILED SEPTEMBER 24, 1943. No. 31629.

Insurance. 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.

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

Gaines & Shoemaker, for appellant.

George Boland, Fried & Mars and *Kennedy, Holland, DeLacy & Svoboda, contra.*

Heard before SIMMONS, C. J., PAINE, YEAGER and CHAPPELL, JJ., and TEWELL and LIGHTNER, District Judges.

SIMMONS, C. J.

The plaintiff here is a corporation engaged in the sale of new automobiles and the reconditioning and sale of used cars. The defendants are insurance companies doing business in the state of Nebraska.

This action was brought by the plaintiff, and heard by the court over the objections of the defendants, on the theory that it was one for a declaratory judgment to determine the liability of the defendant companies under policies of "garage liability" insurance issued to the plaintiff, and to recover for money spent and liabilities incurred in the defense of a suit by one Ethel Oberman against the plaintiff. The trial court dismissed the action against the defendant

New Amsterdam Casualty Company and found defendant Central Surety and Insurance Corporation liable and entered judgment against it. The Central Surety and Insurance Corporation appeals. It will be hereinafter referred to as the defendant. Plaintiff by its brief makes cross-appeal from the dismissal of the action against the New Amsterdam Casualty Company, but waived that cross-appeal at the bar of this court, and it will not be further considered. We reverse the judgment of the trial court and dismiss the action.

The Oberman suit against the plaintiff alleged in the original petition that on or about the 27th day of June, 1937, Ethel Oberman purchased from the plaintiff (defendant in that action), under written contract, a used automobile; that the plaintiff (defendant in that action) orally represented and warranted at the time of the purchase that the car was equipped with shatterproof glass; that the plaintiff (defendant in that action) knew that it was not so equipped; that Ethel Oberman relied upon the representations and warranties, purchased and used the car wholly ignorant and unaware of the fact that the windshield of the car was of ordinary glass. Ethel Oberman further alleged that on June 25, 1939, the car was involved in an accident and she was seriously injured by flying glass. She alleged further that the injury was the result of the windshield being of ordinary glass instead of shatterproof glass "as had been represented and warranted by defendant" and that "by reason of the aforesaid misrepresentation and breach of warranty" she sustained injuries and damage in the sum of $5,000. By assignment from her husband she sought recovery also of $527.25 for hospital and medical care, loss of services, etc.

The New Amsterdam Casualty Company had issued a "garage liability policy" which was in force on June 27, 1937, the date of the sale of the car.

The defendant had issued a "garage liability policy" effective from December 30, 1938, to December 30, 1939. The defendant was notified of the pendency of the suit, denied

liability and refused to defend. The plaintiff here defended the action. A demurrer to the original petition was sustained. An amended petition was filed by Ethel Oberman which retained the allegations of the original petition as to misrepresentations and warranties but added the further allegation that the plaintiff (defendant in that action) negligently sold and delivered the car to Ethel Oberman and negligently failed to give her notice of the ordinary glass in the windshield. The concluding allegation that Ethel Oberman was damaged by reason of the "misrepresentation and breach of warranty" was retained unchanged in the amended petition. A demurrer to this amended petition was filed and overruled.

An amended answer was filed in the Oberman action by the plaintiff which is hereinafter summarized. Notice of the amended pleadings was given to the defendant. After Ethel Oberman had testified briefly at the trial, plaintiff settled the Oberman suit by payment of $400 and $37 court costs. The record here does not contain a recital of the evidence in the original action, nor a copy of the judgment entered.

Defendant here pleads that the Oberman action was one based on a contract made before the issuance of its policy; that the liability of plaintiff to Ethel Oberman, if any, was not within the insuring clauses of defendant's contract and was specifically excluded therefrom and that the payment made to Mrs. Oberman was not for a liability imposed by law, but one made without respect to liability.

The insuring agreement of defendant's policy applicable here is: "To pay on behalf of the Insured all sums which the Insured shall become obligated to pay by reason of the liability imposed upon him by law for damages, including damages for care and loss of services, because of bodily injury, including death at any time resulting therefrom, sustained by any person or persons, caused by accident and arising out of such of the operations hereinafter defined as are indicated by specific premium charge or charges in item 3 of the declarations."

The policy contains the following "Definition of Operations": "The ownership, maintenance, occupation or use of the premises herein designated, including the public ways immediately adjoining, for the purpose of an automobile dealer or repair shop, and all operations either on the premises or elsewhere which are necessary and incidental thereto, including repairs of automobiles or their parts, and ordinary repairs of buildings on the premises and the mechanical equipment thereof; and the ownership, maintenance or use of any automobile for any purpose in connection with the above defined operations, and also for pleasure use."

The policy further provides: "This policy does not apply * * * to any liability assumed by the insured under any contract or agreement."

To the defendant's contention that it had no policy liability on June 27, 1937, the plaintiff counters with the policy provision that: "This policy applies only to accidents which occur during the policy period," and contend that the "accident" occurred during the policy period. The question so presented we do not determine.

Plaintiff contends that the Oberman action against it was one "based on negligence in tort." We do not so construe the petition or amended petition in that action. The question is not what could have been the basis of the original action, but what was the basis of that action. The question is not was the plaintiff liable to Ethel Oberman in tort, but was her action in fact one in tort or on contract. We are not concerned here with possible errors of law made in the first trial.

Clearly the original petition was one based on misrepresentation and breach of warranty. The demurrer to it was on that ground, according to the testimony of plaintiff's attorney who handled the defense of the Oberman action. On that same theory a demurrer was made to the amended petition. Plaintiff's amended answer in the Oberman case was a general denial and admissions of capacities of parties; that it sold the car under a written contract; that it

had made no representation and warranty that the car was equipped with shatterproof glass and that its entire contract was the one in writing which had been attached to Ethel Oberman's amended petition; and that plaintiff had an opportunity to examine the car, used the same and assumed the risk. It specifically pleaded that there was no contract obligation such as Ethel Oberman alleged. It cannot now be heard to argue that what was in fact a contract action and so considered when tried, should have been and is now one in tort.

The policy here specifically excluded "liability assumed by the insured under any contract or agreement." In a somewhat similar case, *Omar Baking Co. v. Employers Liability Assurance Corporation,* 130 Neb. 365, 264 N. W. 873, we followed the established rule that "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" and, as there, so we hold here that "the loss sustained by plaintiff in paying damages for breach of its warranty was not one covered by the policy."

The case of *O'Toole v. Empire Motors, Inc.,* 181 Wash. 130, 42 Pac. (2d) 10, relied upon by the plaintiff is not in point here. There, in the principal action against the insured, the insured was found liable for negligence. The court held against the insurance carrier on two grounds, (1) that the action was one in fact based on tort and not on contract, and (2) that the insurance carrier (who had notice of the pendency of the principal action) was bound by the judgment in the original action "establishing negligence." Here we are presented with no such a record.

Plaintiff argues that the defendant relied upon an excluding clause in its contract, that it had the burden of proof on that issue and failed to meet it. We see no merit in this contention. True, defendant here pleaded the clauses of its contract set out above. It is also true that the plaintiff, at the trial, offered the contract in evidence, and that the pleadings in the original action, and other evidence referred to herein, were produced in plaintiff's case in chief. It

would merely have encumbered the record for defendant to have offered the evidence a second time.

The judgment against the defendant is reversed and the cause dismissed.

REVERSED AND DISMISSED.

KARL E. HAHN, APPELLEE, V. MARY MARGUERITE VERRET, APPELLANT: OMAHA NATIONAL BANK, EXECUTOR, APPELLEE.

KARL E. HAHN, APPELLEE, V. MARY MARGUERITE VERRET, APPELLEE: OMAHA NATIONAL BANK, EXECUTOR, APPELLANT.

11 N. W. (2d) 551

FILED OCTOBER 22, 1943. Nos. 31569, 31570.

1. **Executors and Administrators.** The construction of a will, in the probate court, for the information and benefit of the executor only in order to advise him what course to pursue adjudicates nothing beyond his rights and liabilities in the execution of his office. Controversies between adverse claimants under a devise or bequest or between the executor and persons claiming adversely to the estate will not be affected thereby.
2. **Venue.** In actions to quiet title, the district court has jurisdiction to construe a will in determining the rights of the parties to the land under the will.
3. **Wills.** Actions to quiet title to real estate may be maintained after the time for filing claims has passed and when an order has been entered barring the further filing of claims if the petition alleges the solvency of the estate as well as the sufficiency of the personal assets to pay the debts, costs, and expenses of administration against it and this is conclusively established by the evidence.
4. ———. When a legatee or devisee enters into possession of the estate given him by the will, with the consent of the executor or otherwise, his possession may not be disturbed unless it appears that the property, real or personal, must be used for the payment of debts, costs, and expenses of administration. However, such legatee or devisee takes the property subject to the liabilities, if any, as are imposed by statute, section 30-233, Comp. St. 1929, whenever finally determined by the court under section 30-237, Comp. St. 1929.
5. **Executors and Administrators.** Rents, either share or cash, accruing after the death of the owner of the real estate, vest in the

devisee or heir by reason of the passing of the title. While the same may be defeated by the executor or administrator taking possession thereof under the statute, such possession is for the purpose of paying the debts, costs, and expenses of the estate and if not needed for that purpose because the personal property is sufficient, then the heir or devisee is entitled thereto.

6. **Wills.** Legacies, as a general rule, are payable primarily out of the personal estate of the testator and real estate will not be charged with their payment unless the intention to do so is expressly declared or clearly inferable from the dispositions of the will.

7. **Conversion.** The effect of a testamentary power of sale depends primarily upon the intention of the testator as evidenced by the wording thereof. Such power may work an immediate equitable conversion of the realty as between the executor and the heir or legatee. In order, however, to work such a conversion there must be a positive direction to sell or an absolute necessity to sell involved in the due execution of the will or such a blending of real and personal estate by the will as to show clearly that the testator intended to create a fund out of both real and personal estate and to bequeath such fund as personalty.

8. ———. *Held,* that under the provisions of the will of the testatrix and from a consideration of all the facts and circumstances surrounding the testatrix at the time of making the will the legacy to Mrs. Verret was not a charge on the real estate nor was there a conversion of the realty into personalty.

APPEAL from the district court for Adams county: FRANK J. MUNDAY, JUDGE. *Affirmed as modified.*

Ambrose C. Epperson, for Mary Marguerite Verret.

Waldron & Newkirk, for appellee Hahn.

Hotz & Hotz, for the Omaha National Bank.

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

WENKE, J.

This action was commenced in the district court for Adams county by Karl E. Hahn, as plaintiff, against Mary Marguerite Verret, George L. Verret, and the Omaha National Bank, as executor of the estate of Mary Hahn, deceased, as defendants, for the purpose of quieting title in

and to the lands described therein, which are located in Adams county, to construe the will of Mary Hahn, deceased, particularly with reference to the rights of Mary Marguerite Verret, named as legatee therein, and to enjoin the defendants from in any way interfering with the possession or collection of rents since December 22, 1940. The action was dismissed as to George L. Verret who is the husband of the defendant Mary Marguerite Verret. From a decree finding generally in favor of the plaintiff and that the defendant Mary Marguerite Verret had no rights in or to said premises under the will of Mary Hahn, deceased, quieting title in the plaintiff and permanently enjoining the defendants from molesting the plaintiff's possession and collection of rents therefrom which accrued after December 22, 1940, the defendants Mary Marguerite Verret and the Omaha National Bank, as executor of the estate of Mary Hahn, deceased, have taken separate appeals to this court.

By stipulation of the parties the separate appeals were consolidated and are considered and disposed of by this opinion. For the purpose of this record, Karl E. Hahn, the appellee, will be referred to as Hahn; Mary Marguerite Verret, appellant, will be referred to as Mrs. Verret; and the Omaha National Bank, as executor of the estate of Mary Hahn, deceased, appellant, will be referred to as the executor.

The record discloses that Mary Hahn and Leopold Hahn were the parents of Karl E. Hahn and Edith Hahn and lived in Omaha, Nebraska. That Leopold Hahn died in about 1915 and Mary Hahn died on December 22, 1940. Karl E. Hahn is now a resident of Chicago, Illinois, and has been for a number of years and at the time of the trial he was 58 years of age. He left home at the age of 18 years, but had always remained on friendly terms with his parents and had visited his mother about once a year up until the time of her death. After the death of his father he generally looked after the property of his mother, including the farm in Adams county, and collected the income and rents therefrom and remitted the same to her. The

daughter, Edith Hahn, married Jess Rhine and unto this marriage was born the granddaughter Mary Marguerite Rhine. About a year after her birth in 1908, the mother, Edith Rhine, died and the son-in-law and granddaughter continued to live in the home of Mary and Leopold Hahn where she remained until she married George L. Verret in 1932. In the meantime her father remarried in 1927 and moved out of the Hahn home. After the granddaughter's marriage she left Omaha for some time and did not again take up her residence with her grandmother Hahn until 1934 when Mary Hahn bought a residence on North Forty-fifth street and gave it to her granddaughter, Mrs. Verret, paying from her funds thereon the sum of $4,350. Mrs. Hahn and the Verrets lived in this home for about a year when they all moved to Nebraska City where they lived until Mrs. Hahn was confined to a sanitarium about the first of the year 1940 where she remained until the date of her death. The relationship between Mary Hahn and her granddaughter and husband was at all times friendly.

On May 13, 1933, Mary Hahn made a last will and testament which was allowed and admitted to probate in the county court of Douglas county on May 19, 1941, the principal part of which, for the purposes of this appeal, are paragraphs one, two, and four, which are as follows:

"I. I give, devise and bequeath unto my son, Karl E. Hahn, now of Chicago, Illinois, in fee all of my real estate wheresoever situate; it being my intention that he shall have the real estate as his own and to do with it as he pleases.

"II. I give, devise and bequeath unto my granddaughter, Mary Marguerite Verret, Five Thousand ($5,000.00) Dollars in cash or in securities of a value equal to Five Thousand ($5,000.00) Dollars; it being my desire in making this specific bequest to my said granddaughter that this money be used by my said granddaughter for the purchase of a home, but that this bequest of Five Thousand ($5,000.-00) Dollars I give to my said granddaughter absolutely and without any restrictions. * * *

"IV. I hereby direct, authorize and empower my executors, while in possession and control of this estate, to manage the said estate with full power and authority in the discretion of said executors and in the same manner and to the same extent as I could do if living, to retain any or all property, whether real, personal or mixed, which I may own at the time of my death, subject to the terms of this Will, or to sell at public or private sale, convey with or without covenants of warranty, to execute, acknowledge and deliver to any purchaser or purchasers thereof good and sufficient deeds or other instruments of transfer, to lease for any term, exchange all or any of said property, to borrow money, to make promissory notes, bonds or other obligations, and to renew or extend same or any part thereof as security therefor."

This will named Karl E. Hahn and the Omaha National Bank as coexecutors but Karl E. Hahn resigned and failed to qualify and the bank was appointed executor and qualified as such. The county court fixed a time for filing claims and notice thereof was published and on September 13, 1941, order was entered barring the further filing of claims. Thereafter the executor filed its final report and petition for the settlement of the estate on November 21, 1941, notice of which was published and hearing was set for December 22, 1941, but was postponed and no order has been entered approving said final account or ordering the final disposition of the estate. However, on May 27, 1942, pursuant to application of the executor for directions regarding its administration of the assets of the estate, the county court entered an order construing the will to provide that the $5,000 legacy of Mrs. Verret should be paid in any event and directing postponement of the final settlement of the estate and directing the executor to collect the rents from the land herein involved from and after the date of the death of Mary Hahn. From this order Hahn filed a petition in error in the district court for Douglas county on August 24, 1942, which, upon application of Hahn for continuance, was on October 3, 1942, dismissed by the district

court for Douglas county for the reason that the order appealed from was not a final order. From this dismissal none of the parties took an appeal. This action was commenced by Hahn May 23, 1942. At the time of making her will Mary Hahn owned the real property in Adams county, that being the only real estate she then owned, and had more than sufficient personal property to take care of the legacy which she provided in her last will and testament for Mrs. Verret. However, she used $4,350 of this in 1934 to purchase a home for Mrs. Verret.

During her lifetime Mary Hahn entered into a three-year lease on the Adams county property being from March 1, 1939, to March 1, 1942. This lease provided for cash rent payable annually as evidenced by notes executed by the lessee at the time of the lease. The lease provided rent for the last year, being from March 1, 1941, to March 1, 1942, in the sum of $1,100 as evidenced by two notes, each in the sum of $550 due March 1, 1941, and October 1, 1941, and which notes were possessed by Mary Hahn at the time of her death and subsequently collected by Hahn.

At the time of her death Mary Hahn was the owner of 16 shares of American Telephone and Telegraph stock of a market value of about $2,000 and had joint bank accounts with her granddaughter totaling over a thousand dollars. That at the time of making the will the land was worth about $6,000 to $7,500 and at the time of her death from $16,000 to $18,000.

The first question presented by this appeal is, did the district court for Adams county have jurisdiction to entertain this action while the estate of Mary Hahn was being administered by the county court of Douglas county? Under section 16, article V of the Constitution, the county court has exclusive jurisdiction of the probate of wills and the administration of estates. *Zimmer v. Gudmundsen,* 142 Neb. 260, 5 N. W. (2d) 707. Likewise, the district court for Adams county, being the county in which the real estate here involved is located, has jurisdiction of an action to quiet title thereto. Comp. St. 1929, sec. 20-401. On May

27, 1942, the county court of Douglas county entered an order in said estate, upon application of the executor for directions, instructing the executor to take possession of the real estate of the deceased, being the real estate herein involved, to collect the rents therefrom and apply them on the legacy of Mrs. Verret, she, under the provisions of the will as construed by the court, being entitled thereto. This order made no distribution of the estate nor did it pass upon the final report of the executor for settlement, but postponed the hearing thereon. Does this order in any way prevent the district court from proceeding in this action? In the case of *In re Estate of Stieber,* 139 Neb. 36, 296 N. W. 336, we held: "A county court in Nebraska in the exercise of its probate jurisdiction, as a distinct and independent branch of jurisdiction, has no power to construe wills. *Andersen v. Andersen,* 69 Neb. 565, 96 N. W. 276; *Lesiur v. Sipherd,* 84 Neb. 296, 121 N. W. 104; *Youngson v. Bond,* 69 Neb. 356, 95 N. W. 700. Under the record in this case, the construction of the will by the probate court was not incident to distribution of the estate, but solely for the benefit of the executor in advance of any distribution. Such a decree bound no one, but could only be for the guidance of the executor. No appeal from such decree would lie, and the district court acquired no jurisdiction on appeal." As stated in *Annable v. Ricedorff,* 140 Neb. 93, 299 N. W. 373: "This jurisdiction was long ago committed to the doctrine: 'The construction of the will in such a case (in probate court) is for the information and benefit of such executor or administrator only, in order to advise him what course to pursue. It adjudicates nothing beyond his rights and liabilities in the execution of his office; controversies between adverse claimants under the devise or between the executor or administrator and persons claiming adversely to the estate, will not be affected thereby.' *Youngson v. Bond,* 69 Neb. 356, 95 N. W. 700." As stated in *Youngson v. Bond, supra:* "A county court is not precluded from construing a will in a proper case and determining the effect and meaning of a devise of land, so far as is neces-

sary to give proper directions to an executor or administrator with the will annexed. The directions given by the court to the administrator cannot be used as the basis of a recovery by any one or to defeat a recovery by any one. The present title to the land is in no way brought in question. The construction of the will in such a case, is for the information and benefit of such executor or administrator only, in order to advise him what course to pursue. Controveries between adverse claimants under the devise or between the executor or administrator and persons claiming adversely to the estate will not be affected thereby, except as to claims for maladministration or improper execution of the trust. As pointed out in the former decision, the interest of the administrator with the will annexed extends only to possession of the land and disposition of the rents and profits in settlement of the estate. Such instructions as the court may give him, based upon construction of the will, in order that he may act intelligently with respect to lands devised, are not to be taken as adjudicating anything beyond his rights and liabilities in the execution of his office, and if there were any possibility that they might be given further effect, the constitutional provision in question would prevent it."

We are also committed to the view that in actions to quiet title, *St. James Orphan Asylum v. Shelby,* 75 Neb. 591, 106 N. W. 604; partition, *Mohr v. Harder,* 103 Neb. 545, 172 N. W. 753, and *Annable v. Ricedorff, supra;* and to enforce legacies, *Klug v. Seegabarth,* 98 Neb. 272, 152 N. W. 385, the district court has jurisdiction to construe a will in determining the rights of the parties to the land or legacy under the will.

At the time this action was brought the estate of Mary Hahn was being administered by the county court of Douglas county and an order barring claims had been entered. In his petition Hahn alleged and at the time of trial presented evidence and established, as the lower court found, that the personal property in the possession of the executor was ample to pay all debts, costs, and expenses of ad-

ministration. We have held that, although the statute provides that an heir or devisee of an estate cannot maintain an action for distribution or partition until the debts, allowances, and expenses against said estate have been paid or provided for unless he give bond with approved sureties to pay the same; nevertheless, when the allegations of the petition allege the solvency of the estate as well as the sufficiency of the personal assets to pay the debts, costs, and expenses of administration against it and this is conclusively established by the evidence, then partition may be had. *Majerus v. Santo, ante,* p. 774, 10 N. W. (2d) 608. Also, *Schick v. Whitcomb,* 68 Neb. 784, 94 N. W. 1023; Comp. St. 1929, sec. 30-405. This rule is likewise applicable in actions to quiet title.

The time for filing claims having expired, an order having been entered barring the further filing thereof and the personal assets of the estate being sufficient to pay the debts, costs, and expenses of administration, Hahn was entitled to bring this action to quiet title. Under the holdings of this court the order of the county court of Douglas county, made on application of the executor, directing the executor with reference to its actions in the administration of the assets of the deceased under the provisions of the will was entirely proper in safeguarding the executor in the administration of the estate but such order was not binding upon the devisee or legatee as between themselves nor between themselves and the executor. It was not a final order that was appealable and the entry thereof by the county court and the dismissal of the petition in error by the district court for Douglas county for the reason that it was not a final order that was appealable, and from which the parties took no appeal, in no way prevented Hahn from maintaining this action to quiet title.

The jurisdiction of the district court for Adams county is further challenged by the contention that under the provisions of sections 30-231, 30-232, 30-233, 30-234, 30-235, Comp. St. 1929, the county court of Douglas county has certain functions to perform in the administration of the es-

tate affecting this real estate. These statutes are not all applicable to the facts in this case and only those that are applicable will be discussed. Section 30-233, Comp. St. 1929, provides in part as follows: "The estate, real or personal, given by will to any devisees or legatees, shall be held liable to the payment of the debts, expenses of administration, and family expenses, in proportion to the amount of the several devises or legacies * * * ." And section 30-235, Comp. St. 1929, which reads as follows: "All the devisees and legatees who shall, with the consent of the executor, *or otherwise*, have possession of the estate given to them by will, before such liability shall be settled by the county court, shall hold the same, *subject to the several liabilities mentioned in the preceding section*, and shall be held to contribute, according to their respective liabilities, to the executor or to any devisee or legatee from whom the estate devised to him may have been taken, for the payment of debts or expenses, or to make up the share of a child born after the making of the will, or of a child or the issue of a child omitted in the will; and the persons who may, as heirs, have received the estate not disposed of by the will as provided in this article shall be liable to contribute in like manner as the devisees or legatees." (Italics ours.) The procedure for the determination of the liabilities is provided in section 30-237, Comp. St. 1929, which is as follows: "The county court may, by decree for that purpose, settle the amount of the several liabilities as provided in the preceding sections, and decree how much, and in what manner, each person shall contribute, and may issue execution as circumstances may require, and the claimant may also have a remedy in any proper action or complaint in law or equity." When, as provided in section 30-235, Comp. St. 1929, a legatee or devisee enters into possession with the consent of the executor, *or otherwise*, his possession may not be disturbed unless it appears that the property, real or personal, must be used for the payment of debts, costs, and expenses of administration. However, under the provisions of these statutes a devisee who has possession

of the real estate devised to him takes the same subject to the liabilities, if any, imposed by section 30-233, Comp. St. 1929, whenever they are finally determined by the court as provided in section 30-237, Comp. St. 1929.

The next question for consideration is whether or not the executor is entitled to the possession and rents from the lands involved in this action under the provisions of section 30-406, Comp. St. 1929, which reads as follows: "The executor or administrator shall have a right to the possession of all the real as well as the personal estate of the deceased, and may receive the rents, issues and profits of the real estate, until the estate shall have been settled, or until delivered over, by order of the county court, to the heirs or devisees, and shall keep in good tenantable repair all houses, buildings, and fences thereon which are under his control." It appears from the evidence that Hahn has had possession of the premises and collected the rents therefrom since the date of the death of the testatrix, December 22, 1940, including the cash rent for the year March 1, 1941, to March 1, 1942, in the sum of $1,100 evidenced by two notes due March 1, 1941, and October 1, 1941, as provided by the three-year lease of the premises entered into by the testatrix on July 11, 1938, and which notes were owned by the testatrix, as lessor, on the date of her death. That the title to real estate under a devise in a will is vested in the devisee at the instant of the testator's death is without question, *Stanton v. Stanton,* 134 Neb. 660, 279 N. W. 336, and conveys all of the interest of the deceased, section 30-202, Comp. St. 1929: "Every devise of land in any will hereafter made, shall be construed to convey all the estate of the devisor therein, which he could lawfully devise, unless it shall clearly appear by the will, that the devisor intended to convey a less estate." In *National Bank of Commerce v. Lefferdink,* 110 Neb. 275, 193 N. W. 916, we approved the following from *Eiseley v. Spooner,* 23 Neb. 470, 36 N. W. 659: "Rent reserved by lease of real estate, and not accrued at the time of a conveyance of the reversion, passes with such conveyance to the grantee. Every con-

veyance of real estate passes all the interest of the grantor therein, unless a contrary intent can be reasonably inferred from the terms used." The general rule is set forth in 32 Am. Jur. 364, sec. 448: "As a general rule, since rent to accrue is an incident of the reversion, upon the death of a lessor, who had reserved rent generally for the duration of the term, rents thereafter to accrue and to become payable either in money or in a share of the crops raised upon the premises do not devolve upon his executor or administrator for administration as a part of his personal estate, but descend at once, with the reversion, as real estate, to his heirs at law, or pass to the devisees who are entitled under his will to the reversion, unless otherwise disposed of by will." And as stated in *Schmid v. Baum's Home of Flowers*, 162 Tenn. 439, 37 S. W. (2d) 105: "Rent accruing to the lessor of real estate under the terms of his lease is said to be incident to the lessor's reversion. It is not a debt within the classification of choses in action, whether evidenced by promissory notes of the lessee or not. This right to future rents is not personal property, and upon the death of the lessor, or owner of the reversion, passes to the heir at law with the reversion. *Combs v. Combs*, 131 Tenn. 66, 173 S. W. 441." To like effect: *Watkins v. Duvall*, 69 Miss. 364, 13 So. 727; *Equitable Life Ins. Co. v. Bowman*, 225 Mo. App. 855, 32 S. W. (2d) 126. As stated in *Lewon v. Heath*, 53 Neb. 707, 74 N. W. 274: "If the title passes to and vests in the heirs, as it most certainly does, then the possessory right goes with it, except to the extent it is placed by law in the administrator, which is not exclusively or absolutely, but optionally with him, and for purposes indicated by statute and for none other; * * * ." And as stated in *Blochowitz v. Blochowitz*, 130 Neb. 789, 266 N. W. 644: "Thus, our probate enactments do not contemplate that under all circumstances or conditions executors and administators are vested with a continuing and exclusive right of possession and control of the real and personal estate of their decedents." And in *Tunnicliff v. Fox*, 68 Neb. 811, 824, 94 N. W. 1032: "Under our law, the real estate of a decedent be-

longs to the heirs at law, subject to the claims of creditors of the estate. There is no legal obligation upon the executor to take possession of the real estate until such action may be necessary to protect creditors; at all events not until claims are filed, or until directed so to do by the probate court." And also in *In re Estate of Pope*, 83 Neb. 723, 120 N. W. 191: "Where land is let and rent reserved in a share of the crops, the title to the land and to the landlord's share of the crops are not severed, but remain in the landlord and pass by his devise of the land."

Construing the foregoing authorities, the rents, either share or cash, accruing after the death of the owner, vest in the devisee or heir by reason of the passing of the title. While the same may be defeated by the executor or administrator taking possession thereof under the statute, such possession is for the purpose of paying the debts, costs, and expenses of the estate and if not needed for that purpose because the personal property is sufficient, then the heir or devisee is entitled thereto. Where the executor of the estate permits the devisee to remain in possession and collect the rents and the time for filing claims has passed and the personal property of the estate is sufficient to pay all debts, costs, and expenses, then the purpose for which the right of possession is given has passed and the right of the executor to possession for that purpose no longer exists and the devisee is entitled to have his title quieted as to the executor.

Did the provisions of the will make the payment of the legacy a charge on the real estate? A careful reading of the provisions of the will do not disclose any such charge to be made by the language thereof. The appellants cite the case of *Burton v. Defenbaugh*, 132 Neb. 851, 273 N. W. 489, in which the third paragraph of the syllabus reads: "A legacy will ordinarily be regarded as payable primarily from personal property; but where that is insufficient, and in the absence of language in the will indicating a deliberate intent to exclude the real estate from such liability, the legacy will be chargeable against the real estate." A careful reading of the will in that case discloses no ne-

cessity for the application of the above principle for a determination of the issues therein presented nor do we think it states the correct rule. We think the correct rule is stated in *In re Estate of Strolberg,* 106 Neb. 173, 183 N. W. 97: " * * * legacies, as a general rule, are payable primarily out of the personal estate of the testator, and that real estate will not be charged with their payment unless the intention to do so is expressly declared or clearly inferable from the dispositions of the will." The court goes on further to state: "That the chief criterion is the intention of the testator, which may appear either expressly or by implication from the language and dispositions of the will; that such intention cannot be inferred solely from or shown solely by evidence of circumstances altogether extraneous to the will, nor is such evidence admissible on the question of intent where there is no ambiguity in the will; but where legacies are not expressly charged upon the land and the intention of the testator is not clear, the court may and should, for the purpose of ascertaining the intention, read the will in the light of the circumstances existing when it was made." And as stated by the author in 69 C. J. 1170: "There has always existed a marked distinction between a charge on the realty for the payment of debts and one for the payment of legacies; as to the former, the courts may act on slight implication and on moral principle to uphold the charge, but as to legacies there must be a clear manifest intention that the devisee or heir should take subject to the legacies; * * * ." And in *Martens v. Sachs,* 138 Neb. 678, 294 N. W. 426, this court approved the following from 69 C. J. 1183: "In the absence of anything indicating a contrary intention, land specifically devised will be charged with the payment of legacies where the will expressly directs the devisee to pay the legacies; or where the land is specifically devised 'subject to,' 'charged with,' or 'on condition that' the devisee pay the legacies."

It is further contended that the provisions of paragraph IV of the will create a conversion of the realty into personalty. After giving to Karl E. Hahn all of her real estate in

the first paragraph and then giving Mary Marguerite Verret $5,000 in the second paragraph and providing for the residuary in the third paragraph, which is immaterial here as there will be no residuary, and making no provision in the will for the payment of debts, costs, or expenses of administration, the testatrix, in the fourth paragraph of her will, gives to her executors the power to manage the assets of her estate and authority to sell the same. The authority given to the executors to sell does not either require or direct them to do so nor does it provide any purpose for which it should be sold but expressly makes it "subject to the terms of this Will."

By the terms of paragraph I of the will she had already given the real estate to her son and by none of the provisions of the will was it subject to any conditions except as might be imposed upon it by law. As stated in 21 Am. Jur. 774, sec. 700: "The effect of a testamentary power of sale depends primarily upon the intention of the testator as evidenced by the wording thereof. Such power may work an immediate equitable conversion of the realty as between the executor and the heir or legatee. In order, however, to work such a conversion there must be a positive direction to sell or an absolute necessity to sell involved in the due execution of the will, or such a blending of real and personal estate by the will as to show clearly that the testator intended to create a fund out of both real and personal estate and to bequeath such fund as personalty." And in *Chick v. Ives*, 2 Neb. (Unof.) 879, 90 N. W. 751: "Where the provisions of a will are of such a character as to amount to a positive direction to convert the real estate into money or personalty, or where by a fair construction of the will such intention of the testator is clearly shown by implication, a court of equity will decree that an equitable conversion of the real estate of the testator into money, or personalty, took place at the time of his death. 2 Jarman, Wills, 183; *Wurts' Executors v. Page*, 4 C. E. Greene (N. J. Eq.) 365; *Stagg v. Jackson*, 1 N. Y. 206; *Martin v. Sherman*, 2 Sandf. Ch. (N. Y.) 342; *Van Vechten v. Van Veghten*, 8 Paige Ch.

(N. Y.) 104." And in *May v. American Red Cross,* 140 Neb. 43, 299 N. W. 272: "As determinative of a question similar to that here presented, this court has approved the following language: 'The rule is that where there is a positive direction in a will to convert the real property into personalty, or where there is a power of sale in a will and bequests of such a character as to plainly indicate a testamentary intent that such power shall be executed to provide the means of satisfying them, or where the provisions of a will cannot be carried out without converting the realty into personalty, and the conditions are such that the testator must have contemplated that such conversion would take place to that end, courts of equity deal with the estate as personal property from the time the will takes effect—from the death of the testator.' *Stalder v. Stalder,* 105 Neb. 367, 180 N. W. 566. See, also, *Harrington v. Pier,* 105 Wis. 485, 82 N. W. 345; *In re Estate of Willits,* 88 Neb. 805, 103 N. W. 757."

As has been stated, the will contained no positive direction to convert the real property into personalty nor does it contain a bequest of such a character as to plainly indicate a testamentary intent that the power of sale shall be executed to provide the means to satisfy it. Let us then examine the facts to see whether or not the conditions at the time of the drafting of the will were such that the testatrix must have contemplated that such conversion would take place to the end that the bequest to Mrs. Verret would be paid if the personal property were not sufficient. Under our statute and decisions of this court, it is the rule that in the construction of a will we must give effect to the true intent of the testator so far as it can be collected from the whole instrument, if such intent is consistent with rules of law, and as stated in *Fisher v. Fisher,* 80 Neb. 145, 113 N. W. 1004: "In arriving at an understanding of the intention of the testator and the meaning of the language used in his will, it is the duty of the court to take into consideration all the facts and circumstances surrounding the testator at the time of the making of the will." See, also, *In*

re Estate of Hunter, 132 Neb. 454, 272 N. W. 318; *Lehman v. Wagner,* 136 Neb. 131, 285 N. W. 124. At the time of making her will on May 13, 1933, Mary Hahn had two people who were the natural persons to whom she would give her worldly goods. These were her son, Karl E. Hahn, and her granddaughter, Mrs. Verret, and she was on friendly terms with both. At that time she owned 400 acres of farm land in Adams county and personal property well in excess of $5,000, she having sold her home prior thereto for some $4,000. In her will she gave her son all her real estate which consisted of this 400-acre farm. To her granddaughter she gave $5,000 and the residue was to be divided equally between them. She requested in the will that the money given to Mrs. Verret be used for a home but this in no way restricted the bequest, which was absolute, but was merely an express of desire. She then gave her executors authority to handle the assets of her estate and power to sell and convey, subject to the terms of her will. In 1934 she used $4,350 to buy her granddaughter a home. She also deposited her money in a joint account with her granddaughter as she lived with her and had complete confidence in her. It seems clear that when she made her will the testatrix had sufficient money to pay the bequest and have ample left for debts, costs, and expenses of administration and that by the powers she gave to the executors she did not intend to create a conversion of the land into personalty for the purpose of paying this bequest. It, likewise, seems clear that she had no intention of creating a lien on the lands by this bequest. Unfortunately for the granddaughter there is not sufficient personal property at this time to pay the bequest.

For the reasons herein given we find the decree of the lower court correct except that the title is quieted in Karl E. Hahn, subject to the liabilities, if any, in the estate of Mary Hahn, deceased, as the same may be finally determined.

AFFIRMED AS MODIFIED.

YEAGER, J., participating on briefs.

IN THE MATTER OF THE EQUALIZATION OF THE ASSESSED VALUATION OF LANDS AND TOWN LOTS IN SCOTTS BLUFF COUNTY, NEBRASKA, FOR THE YEAR 1943. SCOTTS BLUFF COUNTY V. STATE BOARD OF EQUALIZATION AND ASSESSMENT OF THE STATE OF NEBRASKA.

11 N. W. (2d) 453

FILED OCTOBER 22, 1943. No. 31715.

1. **Taxation.** The state board of equalization and assessment is, under the powers and duties conferred upon it by statute, in no sense a board of review with power to correct the errors of the county boards of equalization or assessors.
2. ———. County boards deal with assessments of individuals and between townships, precincts, or districts within the county, while the state board deals with equalization between counties or tax districts, that is, between the several counties in the state.
3. ———. This court cannot consider and correct any errors and irregularities of the assessors or county boards in their proceedings upon a petition in error from the action of the state board.
4. ———. The state board of equalization and assessment, when proceeding under section 77-1004, Comp. St. Supp. 1941, cannot deal with individual assessments nor take into consideration inequalities between individual taxpayers nor inequalities between townships, precincts or districts within the county, but it deals only with the values of taxable property of the county as a whole as to any class, classes or kinds of property either personal, real or mixed.
5. ———. *Held,* that the action of the state board did not deal with the property of Scotts Bluff county as a whole as to any class, classes or kinds of property, either real, personal or mixed.

Action by petition in error by Scotts Bluff county to review the action of the State Board of Equalization and Assessment in equalization of assessed valuation in Scotts Bluff county for 1943. *Action of state board reversed.*

Straight Townsend, W. H. Kirwin and *Herman Ginsburg,* for plaintiff in error.

Walter R. Johnson, Attorney General, and *Edwin Vail, contra.*

Heard before SIMMONS, C. J., PAINE, CARTER, CHAPPELL and WENKE, JJ., and POLK and NUSS, District Judges.

WENKE, J.

This action by petition in error is brought here by the county of Scotts Bluff, as plaintiff in error, from the action of the state board of equalization and assessment, defendant in error, making certain changes in the 1943 assessed valuation in Scotts Bluff county, asking that we hold void the action of the state board.

For the purpose of this opinion the plaintiff in error will be referred to as the county, the county board of equalization of Scotts Bluff county as the county board, and the defendant in error as the state board.

The record discloses that in 1942 the county board made certain changes in the valuation of a part of the real estate and the improvements thereon by increasing it from 12 to 75 per cent. In 1943 the county board reduced all the property 20 per cent. that had been raised 50 per cent. or more the previous year.

On July 26, 1943, pursuant to notice given the county, hearing was had and after making its findings, including the following: "The State Board of Equalization and Assessment is of the opinion that the County Board of Equalization of Scotts Bluff County was without legal power or authority under the law of the State of Nebraska to make such reduction in the assessed valuation in lands and town lots in the year 1943 and in the manner in which the same was made," the state board passed the following resolution which the county seeks to hold void:

"Now, therefore, be it resolved by the State Board of Equalization and Assessment that the assessed valuation of lands and town lots of Scotts Bluffs County, Nebraska, as shown by their Abstract of Assessment, returned to the State Tax Commissioner, be, and the same is hereby ordered, increased 25 per cent. for the purpose of restoring on the assessment rolls the former 1942 assessed valuation of such land and town lots as were reduced 20 per cent. by the action of the County Board of Equalization of Scotts Bluff County in the year 1943.

"Be it further resolved that the amount of this increase,

to wit, 25 per cent. shall be certified to the County Clerk of Scotts Bluff County with instructions to add an amount equal to the per cent. of such increase to the assessed valuation of each piece or parcel of real estate in said county affected by said flat reduction of 20 per cent.; and that the County Clerk of said county be instructed to extend the same upon the tax rolls of Scotts Bluff County."

A more detailed statement of the raises made by the county board in 1942 discloses that the city property in Gering, Morrill, Scottsbluff, and Mitchell was raised 75 per cent. on improvements and 50 per cent. on lots; that in other towns in the county the raise was 50 per cent. on improvements and nothing on the lots; that irrigated lands classified as one, two, three, and four were raised 75 per cent. and that improvements on leased land and school-land were raised in proportion but that in fact the improvements of sugar factories were increased 12 to 14 per cent.; that the raises did not affect all lands nor did it equally affect all improvements, so that the decrease of 20 per cent. made in 1943 was not applicable to either all of the lands, town lots, or improvements in Scotts Bluff county.

There are two questions presented in this action: First, did the state board have authority to question the validity of the action of the county board? Second, did the action taken by the state board, as shown by its resolution, come within the scope of its authority?

Can the state board review the validity of any act of the county board? The powers and duties of the county board are fixed by statute, chapter 77, art. 17, Comp. St. 1929, particularly section 77-1702 thereof. From any action taken by the county board the statute section 77-1705, Comp. St. 1929, provides for appeal to the district court. From an examination of the statutes fixing the powers and duties of the state board, chapter 77, art. 10, Comp. St. 1929, as amended by chapter 77, art. 10, Comp. St. Supp. 1941, and particularly section 77-1004, we find no authority given the state board for appellate procedure to review the actions of the county boards. These boards act solely by

virtue of these statutes which brought them into being and prescribed their powers and functions, and, of course, they can only exercise the powers conferred by express enactment or by necessary implication. The general rule, as stated in 61 C. J. 749, is as follows: "The state board of equalization is not a tribunal of appellate jurisdiction. It is revisory but not appellate, and, unless such power is specially conferred, it has no power to review the action of the other assessing bodies." And as stated in *Des Moines Gas Co. v. Saverude,* 190 Ia. 165, 180 N. W. 193: "Its function (state board) is the equalization of the value of property between the several counties, not to review the action of the assessor or of the local board of review, or of the district court on appeal." And as stated in *Dayton v. Board of Equalization,* 33 Or. 131, 50 Pac. 1009: "The state board is in no sense a board of review, with power to correct the errors of the county boards or the assessors. They deal with assessments of individuals, and an equalization of values between them; and the state board with equalization between districts, to wit, between the several counties in the state,—functions entirely dissimilar and distinct." The Nebraska state board of equalization and assessment is, under the powers and duties conferred upon it by statute, in no sense a board of review with power to correct the errors of the county boards or assessors. County boards deal with assessments of individuals and between townships, precincts, or districts within the county, while the state board deals with equalization between counties or tax districts, that is, between the several counties in the state—functions entirely distinct. This court cannot consider and correct any errors and irregularities of the assessors or county boards in their proceedings upon a petition in error from the actions of the state board.

Was the action of the state board within the powers conferred upon it by the statute? That part of section 77-1004, Comp. St. Supp. 1941, under the provisions of which the state board was proceeding, conferred powers and duties on the state board which are material to this proceed-

ing, as follows: "They shall proceed to examine the abstracts of real and personal property assessed for taxation in the several counties of the state, * * * and shall equalize such assessment so as to make the same conform to law, and for that purpose they shall have the power to increase or decrease the assessed valuation of real and/or personal property of any *county* or *tax district,* and such increase or decrease shall be made by a per centum, and the per cent. of increase or decrease when made shall be certified to the county clerk of the proper county, who shall thereupon add to or deduct from the assessment of each item of personal property and of each piece or parcel of property in the county affected an amount equal to the per cent. of increase or decrease fixed by the state board. The state board shall have the power, in equalizing assessments, to increase or decrease the assessed valuation of any *class, classes* or *kinds* of property, personal, real and/or mixed in any *county* or *tax district,* whenever in their judgment it shall be necessary to make such assessment conform to law; * * * ." (Italics ours.) As we have stated in *Hacker v. Howe,* 72 Neb. 385, 101 N. W. 255: " * * * the county assessor shall ascertain the value in the first instance, and that the valuation as thus determined is subject to correction and review as between individual taxpayers and taxing districts in the county by the county board of equalization and that the values of the property of the different counties in the aggregate as thus determined may be adjusted and equalized by the state board of equalization, to the end that all property of the different counties may contribute its just and equitable proportion of the public revenues." And further states (p. 400): "The state board does not deal with individual assessments but with the property of a county as a whole, and if it appears to them to be assessed at a valuation relatively lower or higher than the property in all other counties, the whole is affected by the order of equalization, and not the different items or classes." And as stated in 61 C. J. 751: "The function of a state board of equalization is to equalize the valuation among the several coun-

ties, or districts, if the statute so provides, of the state, so that the share of tax imposed upon each county or district shall be justly proportioned to the value of the taxable property therein; and, except as otherwise specially provided, equalization as between the counties is its sole function. It cannot increase or decrease the valuation of a part of one of the counties or districts, nor can it equalize the values of property among the holders thereof within a certain district of the county, * * * ." Under section 77-1004, Comp. St. Supp. 1941, and our construction thereof, the state board of equalization and assessment cannot deal with individual taxpayers, and cannot adjust inequalities between townships, precincts, or districts within the county, but deals only with the values of taxable property of the county as a whole as to any class, classes, or kinds of property, personal, real, or mixed.

The facts disclose that the property affected by the raises made by the county board in 1942 did not cover all of the property of any class or kind. Part of the irrigated land was raised, part of the town lots were raised and improvements were raised in varying amounts. The reduction made by the county board in 1943 did not apply to all of the lands, town lots, or improvements in the county. Since the action of the state board was to restore the reductions made by the county board, it, consequently, did not apply to all of the property of Scotts Bluff county as to any class, classes, or kinds of property either personal, real, or mixed and the action of the state board was not within the powers conferred upon it by statute and therefore void.

The action of the state board being outside of the powers conferred upon it by statute is void and therefore vacated and set aside. The action of the state board is reversed.

REVERSED.

JOHN J. O'SHEA, APPELLANT, V. EDWARD O'SHEA ET AL., APPELLEES.

11 N. W. (2d) 540

FILED OCTOBER 29, 1943. No. 31588.

1. **Trusts.** By the express provisions of section 36-104, Comp. St. 1929, trusts arising by implication or by operation of law are excepted from the operation of the statute of frauds.
2. ———. Both resulting and constructive trusts fall within the exception of section 36-104, *supra*.
3. ———. If a party obtains the legal title to property by virtue of a confidential relation, under such circumstances that he ought not, according to the rules of equity and good conscience as administered in chancery, hold and enjoy the benefits; out of such circumstances or relations, a court of equity will raise a trust by construction and fasten it upon the conscience of the offending party and convert him into a trustee of the legal title.
4. ———. The violation by the grantee of a promise to reconvey is constructively fraudulent and gives rise to a constructive trust, which may be established by parol, if he obtains an absolute deed without consideration, by means of a parol agreement to reconvey to the grantor to whom he stands in the confidential relation, even where there be no intention at the time not to perform the promise.
5. ———. A decree establishing a constructive trust should not be limited to a cancelation of the conveyance whereby the constructive trustee acquired title to the land; the trust should be ascertained and enforced.
6. ———. A constructive trust is a relationship with respect to property subjecting the person by whom the title to the property is held to an equitable duty to convey it to another on the ground that his acquisition or retention of the property is wrongful and that he would be unjustly enriched if he were permitted to retain the property.
7. ———. Where the owner of an interest in land transfers it *inter vivos* to another in trust for the transferor, but no memorandum properly evidencing the intention to create a trust is signed, and the transferee refuses to perform the trust, the transferee holds the interest upon a constructive trust for the transferor, if (a) the transfer was procured by fraud, duress, undue influence or mistake, or (b) the transferee at the time of the transfer was in a confidential relation to the transferor.
8. **Pleading.** Under our code the chancery practice has been so enlarged that an answer in the nature of a cross-petition may

properly seek affirmative relief beyond that which is merely defensive, and such relief sought need not necessarily be based on equitable grounds if germane to the original action.

9. ———. The matters set up in the cross-petition must be germane to the original suit.

10. ———. New and distinct matter, not maintainable under the provisions of the code as to counterclaims, and not involved in a proper determination of the subject-matter of the original suit, must be litigated in a separate action.

11. ———. When it is said that a court of equity will administer complete relief and adjudicate all controversies between the parties, the meaning is that a complete decree will be rendered with reference to the immediate subject-matter of the original suit. The subject-matter of that suit will not be dealt with piecemeal. It is not meant that all causes of action between the parties, or some of them, will be disposed of in the one cause where they are not involved in a complete disposition of the subject-matter of the bill.

APPEAL from the district court for Madison county: LYLE E. JACKSON, JUDGE. *Reversed.*

F. M. Deutsch, Marion B. Foster, Fay H. Pollock and *Cline, Williams & Wright,* for appellant.

Moyer & Moyer and *R. J. Shurtleff, contra.*

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

SIMMONS, C. J.

The plaintiff seeks here by petition in equity to quiet title in him to some 400 acres of land in Madison county, Nebraska. The defendant prayed that the title be quieted in him. The defendant by cross-petition sought a money judgment upon a promissory note. The trial court quieted title to the land in the defendant and awarded the defendant a judgment against the plaintiff on the note. Plaintiff appeals. We reverse the judgment of the district court and remand the cause with directions to quiet title to the land in the plaintiff, direct an accounting for rents and profits; set aside the money judgment; and direct that the motion to strike the cross-petition be sustained.

As a preliminary fact statement it may be said that the plaintiff John J. O'Shea and the defendant Edward O'Shea are brothers and Ella O'Shea mentioned herein was their sister. They are generally referred to in the record by their first names and for clarity that plan will be followed in this opinion. The transcript of the pleadings consists of 150 pages. The summary of the pleadings is here made in order that the general situation may be presented and is not a complete and full analysis of all allegations made.

Plaintiff, by petition (later amended) filed July 5, 1940, alleged that he was the owner of some 400 acres of land in Madison county, Nebraska, which he conveyed to his sister Ella O'Shea in 1904 under an oral understanding that she was to hold title to the same; that she was to have the use and benefit of it during her lifetime, subject to the understanding that if he, the plaintiff, or plaintiff's wife, became in need they were to have support from the land and that if he, the plaintiff, survived his sister Ella, Ella was to devise the land to the plaintiff, but that if Ella survived the plaintiff she was to become the owner of the land; that thereafter in 1913 Ella made a will devising said land to the plaintiff; that Ella died in 1938, that her will was admitted to probate, that the probate of her estate had been completed with all claims paid; that plaintiff was the owner of the land; that the defendant Edward O'Shea claimed ownership by virtue of a deed from Ella to him in 1935. Plaintiff prayed that the title to said premises be quieted in him and for an accounting for rents and profits. Defendant, Edward O'Shea, by answer and cross-petition, alleged that Ella became the owner of the land by virtue of the 1904 deed; alleged his ownership of the land by virtue of the 1935 deed; that when he received the conveyance he had no knowledge of the alleged verbal agreement between the plaintiff and Ella O'Shea; that Ella at all times exercised all rights as owner of the premises and that plaintiff is estopped to deny her title; that the alleged oral agreement was void by virtue of the statute of frauds; that subsequent to the probate of Ella's will he had, on demand of the plain-

tiff, conveyed other lands, claimed by him, to plaintiff, that said conveyances constituted a settlement and that plaintiff was estopped to claim the land in question.

Defendant further, by cross-petition, alleged the execution and delivery to him by plaintiff of a promissory note for $18,641.64 representing money loaned to plaintiff at different times by Edward and Ella; that he had on June 14, 1940, filed his petition to recover judgment at law on the note, without knowledge of plaintiff's claim as set out in his petition; that John had answered in that action alleging that the debt to Ella was to have been surrendered on her death. Defendant alleged that the title to said notes and to the real estate should be quieted in him. Defendant prayed that the court in equity take jurisdiction of all issues pleaded; that the title to the real estate and note be quieted in him; and for an accounting and judgment on the note.

The matter came on for hearing, on motion to strike the allegations of the cross-petition with reference to the note, before the late judge of the district court, Charles H. Stewart, and he ordered that part of the cross-petition stricken.

Plaintiff then by reply alleged that the defendant knew the terms and conditions under which the conveyance was made to and title held by Ella O'Shea; that defendant was not a *bona fide* purchaser for value without notice.

Defendant then filed a motion to consolidate his action on the note with plaintiff's action. This motion was denied.

The matter then went to trial before Judge Stewart in March, 1941, and was taken under advisement by him. Before a decision was announced Judge Stewart died. The matter was then presented to Judge Wenke, then a district judge of that district, on a renewed motion to consolidate, which Judge Wenke denied. After more preliminary motions the matter went to trial before Judge Wenke in June, 1942, resulting in his sustaining a motion for a mistrial and ordering a retrial. Thereafter the defendant filed his motion for leave to file an amended and supplemental answer and cross-petition and a motion to consolidate the two

actions. These motions then came on for hearing before Judge Jackson, a judge of that district, and were by him granted. The plaintiff then demanded a jury trial on the issues presented by the action upon the note and that demand was then and subsequently denied.

In the meantime a transcript of the evidence produced before Julge Stewart, consisting of over 1,000 pages, had been made and it was stipulated that that transcript should be considered at the new trial together with whatever additional evidence might be offered by the parties and received by the court.

Plaintiff moved to vacate the order of consolidation, to vacate the order permitting the filing of the amended answer and cross-petition, and to vacate the order denying a jury trial on the note. These motions were again denied. Plaintiff then replied to the amended answer and cross-petition, setting out an extended statement of alleged facts both with reference to the deed and the note. To the answer as to the notes defendant filed a reply.

The matter then went to trial and in addition to the transcript of the evidence of the former trial some 500 more pages of testimony were taken before Judge Jackson. This was devoted largely to evidence of experts, in part by deposition, as to whether or not the description of the land involved was written into the 1935 deed when prepared, or at a subsequent time, to a reoffer of evidence in various depositions, and to evidence offered by the defendant as to the note. Plaintiff refused to offer evidence as to the note and preserved his objections to the consolidation, to the cross-petition and his demand for a jury trial. After the trial was completed, and before decision had been made, defendant dismissed without prejudice his separate action on the note, and thereby removed the question of the correctness of the consolidation of the two cases. However his cross-petition on the note remained in the action before the trial court.

Finally in October, 1942, the trial court entered extended findings and quieted title to the land in the defendant and

entered judgment for the defendant against the plaintiff on the note with interest in the sum of $22,557.13.

After motion for new trial was overruled plaintiff appeals here presenting some 106 assignments of error largely directed to rulings on the admissibility of evidence. Plaintiff presents generally three questions: (1) Whether or not the title should have been quieted in the plaintiff? (2) Whether or not the cross-petition on the note should have been allowed in the equity suit? (3) Whether or not the plaintiff should have been denied a jury trial on the issues pleaded as to the note? These questions will be determined so far as necessary separately.

As to the first question plaintiff presents four propositions: (1) That Ella O'Shea held title to the land by a constructive trust for the plaintiff. (2) That the deed of 1935 was secured by fraud and undue influence. (3) That the 1935 deed was not legally delivered. (4) That the deed was a forgery, in that he claimed the description to the land in question was inserted in the deed, after the remaining description was written and after its execution by Ella O'Shea. An issue tendered by the pleadings, that Ella O'Shea was mentally incompetent to make the 1935 deed, was removed from the case by stipulation of counsel during trial.

The interveners in this action allege that by deed from John J. O'Shea dated in October, 1941, they hold title to 80 acres of this land and sums due from rents and profits and join with plaintiff in the prayer of his amended petition. They also filed a motion for a new trial and are appellants here.

Patrick O'Shea, his wife and six children, John, Ella, Edward, Thomas, Peter and Frank, came to Madison county in 1874. Ella, Edward and Frank never married. In 1886 Thomas entered the real estate business and later engaged in banking at Madison. Prior to 1886 John and Peter had Thomas entered the real estate business and later engaged to Nebraska, John going into the real estate business at Newman Grove and Peter into business at Humphrey. John prospered and in 1891 had holdings which he valued at

$20,000. Frank had been in Colorado with the others and remained there. In 1891 he had holdings valued at $1,000. At the suggestion of the father, John persuaded Frank to return to Nebraska. Frank and John in 1891 entered into the real estate business at Newman Grove as O'Shea Brothers, each contributing their then holdings and on a "fifty-fifty" basis, John and Frank lived together in a home at Newman Grove. About that time John contributed some $1,600 to the purchase of land for his father. About that time also the father and mother, together with Ella and Edward, moved the home to the city of Madison. The mother died in 1896. The father spent the following winter in Texas and upon his return to Madison in 1897 was, for some reason not disclosed by the record, denied admission to the home by Edward and went to live with John and Frank at Newman Grove, where he remained until his death in 1916. The record discloses a coldness between the father and Edward thereafter, continuing so long as the father lived, although it appears that Edward, at one time during the absence of John, looked after his father's land. The father, in his will made in 1912, made no distinction between his children and named John and Edward as executors. Edward and Ella continued to live in the same home in Madison until Ella's death.

The business of John and Frank prospered. Frank died May 13, 1904. At that time the partnership holdings were estimated to be worth $75,000.

It appears that John early established the practice of placing the title to land owned by him in, or having land which he purchased conveyed to, third parties for him. Some of this land was at different times in the names of parties not related to him, and at other times in the name of Ella. At the time of Frank's death Ella held title to a considerable acreage of land belonging to the partnership of Frank and John. At the time of her death she held title to land belonging to John, and which was conveyed to John by Edward (reference to which will be made later). Other partnership land was in Frank's name at the time of his

death. The partnership's bank account was in Frank's name. John's reason for starting this practice was that land held ostensibly by a third party could be more advantageously sold and occasional commissions collected from a buyer. Also John at one time had a judgment against him, although after the judgment was paid the practice continued. It does not appear that there was ever any memoranda, agreements or writing evidencing the ownership of these lands made by any of the parties.

After Frank's death intestate May 13, 1904, John and Edward held at least one, if not more conferences, to determine what should be done with Frank's estate. They were advised by competent counsel that Frank's estate passed by law to his father, Patrick. At that time included in the land held by Ella, belonging to the partnership, was 160 acres involved in this action which Frank had conveyed to her in 1895. All of the land so held, Ella conveyed by deed, June 1, 1904, to John for the recited consideration of "love and affection." In the land held by Frank, belonging to the partnership, was 240 acres involved in this action. All of the land so held by Frank was deeded by the father to John by deed dated June 8, 1904, for the recited consideration of "love and affection." By deed dated June 10, 1904, John and his wife conveyed the 400 acres of land involved in this action to Ella, by deed reciting a consideration of "love and affection." All of these deeds were prepared by Edward and all filed for record June 13, 1904. By these three conveyances the title to all of the partnership real estate was placed in John's name and the 400 acres here involved placed in Ella's name. Ella was at that time about 45 years of age. She then owned 80 acres of land that had been purchased for and conveyed to her. John and Frank paid one-half and Edward one-half the cost of that 80 acres. From that time on until her death Ella participated in the management of the land, sometimes Edward and sometimes John, leasing it for her, collecting the rents and accounting to her for them. No dispute ever arose between the three of them about it during Ella's lifetime. These facts are not

disputed. The dispute comes as to the conditions under which Ella held title to the 400 acres involved in this action.

John in 1903 married a widow, living in Humphrey, who had a considerable estate in her own right. John lived with his wife at Humphrey, and continued to maintain his business and the old home at Newman Grove for himself, his father and Frank. The record establishes that after Frank's death Mrs. John O'Shea went to a trusted friend of her husband and advised him that her husband, John, wanted to convey land to Ella. Mrs. O'Shea was concerned that she not involve her separate estate.

On June 10, 1904, John, Mrs. O'Shea and Ella were at the Humphrey home. John called the trusted friend, who was a notary public, to the home to witness and acknowledge the conveyance of the 400 acres to Ella. The notary testified, by deposition, that it was there agreed that the land was being conveyed to Ella, to hold with the understanding that if either John or his wife should become in need that they could have support from it (a contingency that never occurred); that Ella was to have support from it; that she was to will it to John if she (Ella) predeceased him, and that if he predeceased Ella it was to be Ella's without qualification. Reference will be made later to Edward's admission that that understanding existed. The notary further testified that at the time the deed was executed Ella agreed to these conditions. An attempt is made to discredit the notary's testimony by showing that in 1904 he too was holding title to land belonging to John and did not at first testify to that fact. However as we see it this evidence establishes the confidence that John placed in the notary in 1904.

When this action to quiet title was commenced, Edward's deposition was taken in the nature of discovery. He first explained the conveyance to Ella on the ground that it was a settlement of the interest that the "O'Sheas" had in Frank's estate. This did not prove tenable when it was revealed that an able lawyer had, prior to the deed, been consulted by Edward and John and had advised them that the

estate passed in its entirety to the father. It was further established that the other brothers were not consulted about the matter at the time, although living close by. It was then advanced that the conveyance to Ella was in accord with an agreement between John and his father, that Ella be cared for by this conveyance. Satisfactory evidence of that contention is not found in the record.

The next important evidence deals with the events in 1913 when Ella desired to and did make her will. Edward drew the will for her. He talked to his brother John about the will before it was drawn and in particular what disposition Ella should make of this 400 acres of land. Edward and John are in disagreement as to what was said, but in any event Ella on July 29, 1913, made her will, which exclusive of the opening and closing sentences contains the three following paragraphs:

"(1) I give and bequeath to my brother, John J. O'Shea, of Newman Grove, Nebraska, the following described real estate, situated in Madison county, Nebraska: (Here follows a description of the land involved in this action.) In case of the death of my said brother John J. O'Shea, during my lifetime, I direct that his share shall pass to my brother Edward O'Shea, mentioned in paragraph two of this my last will.

"(2) I give, devise and bequeath all the residue of my estate, real and personal, to my brother Edward O'Shea, charged with the payment of my debts. In case of the death of my said brother Edward O'Shea, during my lifetime, I direct that his share shall pass to my said brother John J. O'Shea, mentioned in paragraph one of this my last Will.

"(3) I hereby appoint my brothers John J. O'Shea and Edward O'Shea, or the survivor of them executors of this my last Will and testament, hereby revoking all former wills by me made."

It is to be noted that this will is in accord with the testimony of the notary, who acknowledged the 1904 deed, that Ella was to will this land to John. It contains a definite

expression of her desire that this land should pass to John free of her debts, for she charged the residuary devised to Edward "with the payment of my debts." This will was admitted to probate and is the unquestioned last will and testament of Ella O'Shea.

When his deposition was taken Edward was asked with reference to this will. The deposition was not offered in evidence, but the notary taking the deposition was called and the testimony offered as an admission against interest. In that deposition Edward admitted that when the terms of the will were being discussed, Ella told him it "was the understanding" that she was to will this land to John as against the possibility that she would predecease him. Later at the trial Edward undertook to explain this admission by saying that he understood the questions to refer to an agreement between himself and Ella that the will should be drawn so as to give John this 400 acres. The direct and cross-examination of Edward indicates a clear understanding of questions asked and answers given. The questions and answers directly involved are as follows:

"Q. Ella told you from time to time did she not, that John had made this deed to her to be a nest egg for her and to furnish support for him and his wife if something went against them, did she? A. At the time of the execution of this deed John O'Shea had married Mrs. Murphy and she was a well-to-do woman and he was a well-to-do man, and nothing was said about John O'Shea and his wife Mrs. Murphy O'Shea becoming unable to support themselves. No there was nothing of the kind. (It is noted that the denial here goes directly to the matter of support for John and wife.) Q. Was anything said about Ella making a will of this property to John back against the possibility she died first? A. I don't believe there was at that time. Q. In any event it was talked about at the time the will was made? A. It would look like it. Q. That was the fact, was it not? A. You have the same right to draw your opinion as I have. Q. Did not Ella tell you that was the understanding? A. I think she did. She signed that will

and I suppose that would be the understanding. Q. She told you that was the understanding, did she not? A. I don't recall that. Yes, I would say she did. Q. That was, she was to will that land back to John if she died first? A. At the time of the execution of the will? Q. Yes? A. I think that is true."

The language does not support the later explanation of it. The admission must stand as corroborative evidence of the notary of the 1904 "understanding" and as evidence of Edward's knowledge of it at least as early as 1913.

In the sequence of events the next evidence deals with the contention of the defendant that during the 1920's he and Ella had an "understanding" that if Ella died first Edward should have all of her property, and that if Edward died first Ella should have all of his property. To sustain this understanding Edward offered the testimony of three witnesses who related the statement made to them, by Ella, in the late 1920's, to the effect that "there was an understanding between her and Edward that when she went what she had was to be Edward's and when Edward went what he had was to be her's, if he went first." These were general statements. The witnesses state that Ella did not discuss her property nor refer to any particular property nor to the land involved in this action, nor did Ella say that this result was to be accomplished by deed or will although one witness testified that Ella in 1930 or 1931 said "a deed was considered very good because it settled everything and saved expense." They were discussing the settlement of an estate in which the witness, not Ella, was interested. One witness testified that in September, 1936, when starting on a trip Ella bade her goodbye and said "Well, you know, I might not be here when you get back. We're getting old. That's all right! I've everything fixed and everything is all right." Ella however made no reference then to the 1935 deed nor did she say what was "fixed" nor how it was "fixed." Her mental competency in September, 1936, is seriously questioned.

Another of the witnesses related that both Ella and Ed-

ward told him at different times that "they willed it to each other" or were "going to." This same witness relates a statement made to him by Ella in 1925 or 1926 "she did not say she was going to deed it or that she was going to will it, she said she was going to leave it." These likewise were general statements without discussion of holding or reference to any particular property.

On April 23, 1926, Edward knowing the provisions of Ella's will, for he drafted it, made his will in which, after the payment of his debts, he devised all of his property, including after-acquired property, to Ella. Ella's will (set out heretofore) had been made 13 years before. She did not, in 1926 nor thereafter, change it. We see no contradiction in the statements of these three witnesses with the contention of the plaintiff that he is the owner of this property, nor do they indicate that Ella considered this particular land to be hers. The question still remains as to whether or not this 400 acres of land was Ella's to give to Edward by deed, will or otherwise. The testimony of these three witnesses does not answer or touch that question. There is no question but that Ella was fully competent when these statements were made in 1928 or 1929 and 1930 or 1931. She at that time had willed this land to her brother John and permitted that will to stand until her death. We see nothing in this evidence other than support for the conclusion that both Edward and Ella understood that this 400 acres was John's after Ella's death, and had disposed of their property by will to each other accordingly.

In August, 1934, Ella suffered what may be termed a stroke. She apparently recovered from that and was able to perform her duties about the home and her church. It is not seriously disputed however that by the latter part of 1936 or 1937 she had become mentally incompetent and physically incapacitated and remained so until her death, as a result of arteriosclerosis. Edward at all times gave his sister Ella considerate and loving care.

On or before February 7, 1935, Edward prepared a deed from Ella to him whereby "in consideration of one dollar

and other valuable considerations" Ella conveyed to him (recited in the order named) city property in Madison, an undivided one-third interest in 320 acres of farm land, an 80-acre tract, and finally the land described in this action. On the morning of February 7, 1935, Edward and Ella drove to the office of a notary, who was then a tenant of Edward's in the city of Madison. The office was on the ground floor. The notary had not previously been consulted in the matter. Edward's brother Thomas and other relatives operated the bank close by where notaries were available. Ella entered the notary's office. Edward apparently remained outside. Ella asked "to have the deed notarized and she wanted to sign it." The notary was testifying on direct examination as a witness for the defendant. He was asked this question: "Q. Did she tell you at that time what that instrument was or what she was doing? A. Yes, in this way. She said I'm deeding *some, or a part of my property to Ed O'Shea.*" After the deed was acknowledged it was handed to Ella who instructed the notary to hand it to Edward. He is not shown to have been present before, but at that time was at the door and some four or five feet away from the notary and Ella. Edward took the deed, helped Ella to the car and they drove away. Nothing was said then or thereafter to any of the relatives or others about the deed. John, without protest from Edward, continued to act as Ella's agent in renting a part of the land. On June 3, 1935, Edward executed a lease to a part of this land signing "Ella O'Shea by Edw. O'Shea" although he now claims to have then owned the property in his own right. Checks for rent were sent to Ella by John and were apparently indorsed by Edward for her. The 1936 taxes were paid by Edward by check on Ella's account in the bank. There was no change in the management of the property during Ella's lifetime. The deed conveyed to Edward all of Ella's holdings about which there is no dispute. Later Edward rented a safety box and opened an account in a Norfolk bank, closing out both his own and Ella's account in Thomas' bank at Madison. The money in Ella's account,

over $2,000, was transferred to Edward's account. Before her death Edward had taken over the control if not the ownership of everything that was Ella's including personal property originally belonging to John's first wife and which had been given to Ella. Before Ella's death Edward became unfriendly to his brothers, Peter and John, so that John felt obliged to discontinue his regular and frequent visits to Ella. There were "words" between John and Edward. Ella died February 23, 1938. Edward did not personally notify the brothers of her death. They learned of her death and attended the funeral. After Ella's death John rented the land in dispute and collected and retained the 1938 rents, without Edward questioning his right to do so until the close of the trial before Judge Stewart. Edward made no move to offer his sister's will for probate. John tried to find out from Edward about the will, without success. Finally John filed a petition for the probate of Ella's estate as an intestate estate. Edward then on September 30, 1938, produced the will and offered a petition for its probate. On the same day he filed for record the deed of February 7, 1935. It appears that that was the first knowledge that any of the interested parties, other than Edward, had of the existence of the deed.

By quitclaim deed dated October 25, 1938, Edward conveyed to John some 240 acres of land (not involved in this action) and two city lots in Newman Grove. This conveyance was requested by John and executed and delivered by Edward, it apparently being property belonging to John, title to which had been held by Ella. No mention seems to have been made at that time of this 400 acres nor is any agreement shown that this constituted a settlement. On February 25, 1939, John wrote Edward a short letter, inclosing a quitclaim deed for the land involved in this action which he asked Edward to sign, describing the land as that "mentioned in Ella's will, which she intended for me to have." Edward did not comply with John's request. The defendant argues that this letter does not mention the claim now advanced by John. Neither does it refute that claim.

It was obviously a letter written in the hopes of securing a friendly settlement. It was not successful and this litigation followed.

There is also in the record a letter written by John to Edward in October, 1905, suggesting that he had a purchaser for "one 80 of Ella's land" (being a part of that involved in this action) at a price which he thought would be "a good sale" and that "she could get something over near Madison for that money." He also suggested a piece of land that could be purchased. He asked for Edward's thought on the matter. Nothing came from it. We see no controlling weight in the letter. The matter proposed was, in effect, the substitution of one piece of land for another. That did not call for a discussion of, or a declaration of, the conditions under which Ella held the title.

We hold that this record establishes by evidence that is clear, convincing and satisfactory that the plaintiff and his wife conveyed this land to Ella O'Shea to hold during her lifetime; that she was to receive the income therefrom for her care and support; that plaintiff and his wife were to have support therefrom if needed; that Ella was to will this land to the plaintiff so that the fee title would be restored to him if Ella O'Shea predeceased him; and that if plaintiff predeceased Ella then and only then was the property to belong to Ella O'Shea absolutely. We further hold that by the same force the evidence establishes that there existed between the plaintiff and Ella O'Shea a close personal, business and confidential relationship, beginning years before the deed of 1904 was executed and delivered and continuing until the death of Ella O'Shea. We further find that the defendant Edward O'Shea was at all times fully cognizant of that confidential relationship and, at least as early as 1913, likewise knew the conditions under which Ella held title to the land, and that he took the title to the land in 1935 subject to those conditions and is bound thereby.

Sections 36-103 and 36-104, Comp. St. 1929, commonly known as the statute of frauds provides:

"No estate or interest in land, other than leases for a

term of one year from the making thereof, nor any trust or power over or concerning lands, or in any manner relating, thereto, shall hereafter be created, granted, assigned, surrendered, or declared, unless by operation of law, or by deed of conveyance in writing, subscribed by the party creating, granting, assigning, surrendering or declaring the same."

"The preceding section shall not be construed to affect in any manner the power of a testator in the disposition of his real estate by a last will and testament, nor to prevent any trust from arising or being extinguished by implication or operation of law."

These sections in substantially the present form were before this court in *Pollard v. McKenney*, 69 Neb. 742, 101 N. W. 9. This court there said: "But, by the express provisions of the fourth section, trusts arising by implication, or by operation of law, are excepted from the operation of the statute. Both resulting and constructive trusts obviously fall within the exception." It was there also held: "Closely allied to resulting trusts, and frequently confused with them, are constructive trusts. This class of trusts arises from actual or constructive fraud or imposition, committed by one party on another. 1 Perry, Trusts (5th ed.), sec. 166. Thus if one person procures the legal title to property from another by fraud or misrepresentation, or by an abuse of some influential or confidential relation which he holds toward the owner of the legal title, obtains such title from him upon more advantageous terms than he could otherwise have obtained it, the law constructs a trust in favor of the party upon whom the fraud or imposition has been practiced. Again, if a party obtains the legal title to property by virtue of a confidential relation, under such circumstances that he ought not, according to the rules of equity and good conscience as administered in chancery, hold and enjoy the benefits; out of such circumstances or relations, a court of equity will raise a trust by construction and fasten it upon the conscience of the offending party and convert him into a trustee of the legal title." And also " * * * a promise made with the intention of not

performing it is fraudulent, but that the violation by the grantee of a promise to reconvey, is constructively fraudulent and gives rise to a constructive trust, which may be established by parol, if he obtains an absolute deed without consideration, by means of a parol agreement to reconvey to the grantor to whom he stands in the confidential relation, even where there be no intention at the time not to perform the promise." In the fourth paragraph of the syllabus it was said: "Where a person obtains the legal title to real estate belonging to another by means of fraud, actual or constructive, a court of equity will fasten a constructive trust upon the property, and convert the grantee or those claiming under him, by descent, into trustees of the legal title, and enforce the trust for the benefit of the grantor or those claiming under him." Upon rehearing it was held (p. 753): "A decree establishing a constructive trust should not be limited to a cancelation of the conveyance whereby the constructive trustee acquired title to the land; the trust should be ascertained and enforced." This case has been repeatedly followed as late as *Federal Trust Co. v. Ireland*, 124 Neb. 369, 246 N. W. 707.

A constructive trust has been defined as follows: "A constructive trust is a relationship with respect to property subjecting the person by whom the title to the property is held to an equitable duty to convey it to another on the ground that his acquisition or retention of the property is wrongful and that he would be unjustly enriched if he were permitted to retain the property." 1 Restatement, Trusts, 5, sec. 1e. It is stated in the same authority that "Where the owner of an interest in land transfers it *inter vivos* to another in trust for the transferor, but no memorandum properly evidencing the intention to create a trust is signed, and the transferee refuses to perform the trust, the transferee holds the interest upon a constructive trust for the transferor, if

"(a) the transfer was procured by fraud, duress, undue influence or mistake, or

"(b) the transferee at the time of the transfer was in a

confidential relation to the transferor." 1 Restatement, Trusts, 135, sec. 44.

This authority was accepted and followed by this court in *Wilcox v. Wilcox,* 138 Neb. 510, 293 N. W. 378; *Fisher v. Keeler,* 142 Neb. 728, 7 N. W. (2d) 659. See, also, 3 Pomeroy, Equity Jurisprudence (4th ed.) p. 2370; 1 Scott, Trusts, p. 253; 3 Bogert, Trust & Trustees, p. 1594.

Applying these principles to the facts as they clearly appear in this record it is held that the defendant Edward O'Shea holds title to the land involved in this action under a constructive trust for the plaintiff John J. O'Shea.

On this feature of the case 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 defendant any right, title or interest therein or right of possession thereto, and placing the plaintiff in possession of the premises. Plaintiff also prayed for an accounting for rents and profits received prior to the beginning of the action and those thereafter received during the pendency of the action. Evidence was taken on that matter, but in view of the decree, no finding made by the trial court. It is probable that additional rents and profits have accrued and been collected by the defendant since the trial of this action. The trial court is further directed to hear the issue presented by the plaintiff's petition and prayer for rents and profits, to determine the amount, if any, found to be due the plaintiff from the defendant Edward O'Shea and to render judgment accordingly.

We now come to the second general question presented by this appeal and that is whether the cross-petition on the note should have been allowed. The original action was clearly one in equity to quiet title to the land in the plaintiff and to secure an accounting for rents and profits. The defendant by cross-petition sought to recover upon a promissory note dated June 6, 1938, and payable six months thereafter. It was alleged that the indebtedness evidenced by the note was for moneys loaned to John J. O'Shea by Ed-

ward O'Shea and Ella O'Shea in her lifetime, and that the note set out in the cross-petition was given for one in the same amount dated December 6, 1937, and that the note of December 6, 1937, was in turn given to evidence the total sums due on a number of notes, some payable to Ella and some to Edward. It is the same note upon which suit was originally brought by defendant as an independent action before the plaintiff brought his action to quiet title. It is conceded that the suit on the note was an action at law and ordinarily triable to a jury.

This court has long followed the rule that under our code the chancery practice has been so enlarged that an answer in the nature of a cross-petition may properly seek affirmative relief beyond that which is merely defensive, and such relief sought need not necessarily be based on equitable grounds if germane to the original action. *Armstrong v. Mayer*, 69 Neb. 187, 95 N. W. 51; *Gibson v. Koutsky-Brennan-Vana Co., ante*, p. 326, 9 N. W. (2d) 298. This court has further said: "But the matters set up in the cross-petition must be germane to the original suit. The cross-petition is not maintainable for purposes of affirmative relief as a cross-suit beyond the requirements of a complete adjudication upon the subject-matter of the original suit." *Armstrong v. Mayer, supra.* And "In an equitable action, a cross-suit must be germane to the original bill, and the issues thus introduced are limited to such as are necessary for the court to consider in deciding the questions raised in the original suit in order to do complete justice to all parties with respect to the cause of action on which plaintiff demands relief." *Higgins v. Vandeveer*, 85 Neb. 89, 122 N. W. 843.

In *Armstrong v. Mayer, supra,* it is said: "Hence, we are of opinion that a cross-petition is maintainable under the code, as a cross-bill would be in the chancery practice, either to aid *in the defense of the original suit,* where affirmative equitable relief is required to make such defense effective, or to obtain a complete adjudication of the controversies between the original complaint and the cross-

complaint *over the subject-matter of the original suit.*" (Italics ours.) "It is also required under the chancery practice that the cross-suit be germane to the original suit. The new issues which a defendant may introduce by cross-bill are limited to such as it is necessary for the court to have before it in deciding the questions raised in the original suit in order to do complete justice to all parties with respect to the *cause of action* on which the plaintiff bases his claim for relief." " * * * the matters set up in the cross-petition must be germane to the original suit under the code, quite as much as under the chancery practice." " * * * a cross-petition is not maintainable for purposes of affirmative relief as a cross-suit beyond the requirements of a complete adjudication upon the subject-matter of the original suit. New and distinct matter, not maintainable under the provisions of the code as to counterclaims, and not involved in a proper determination of the subject-matter of the original suit, must be litigated in a separate action. When it is said that a court of equity will administer complete relief and adjudicate all controversies between the parties, the meaning is that a complete decree will be rendered with reference to the immediate subject-matter of the original suit. The subject-matter of that suit will not be dealt with piecemeal. It is not meant that all causes of action between the parties, or some of them, will be disposed of in the one cause where they are not involved in a complete disposition of the subject-matter of the bill."

We are unable to see any basis upon which it can be held that the cross-petition upon the promissory note is germane to the action to quiet title to land.

It necessarily follows that the trial court did not err in its original order sustaining the motion to strike the cross-petition wherein the defendant sought, in the equity action, to recover a judgment on the note, and that the trial court subsequently erred when it permitted, over objection, the filing of an amended cross-petition praying for recovery on the note. The objections of the plaintiff have been preserved. It is held that the defendant was not entitled to

maintain his cross-petition on the note and should have been remitted to a separate and independent action at law.

On this feature of the case the judgment of the district court awarding the defendant a money judgment is accordingly reversed and remanded with directions to sustain the motion to strike the cross-petition seeking recovery on the note.

REVERSED, WITH DIRECTIONS.

VERA A. DUNCAN, APPELLANT, V. GEORGE A. WEIDMAN ET AL., APPELLEES.

11 N. W. (2d) 537

FILED OCTOBER 29, 1943. No. 31688.

1. **Workmen's Compensation.** The burden of proof is upon the claimant in a compensation case to establish by a preponderance of the evidence that personal injury was sustained by the employee by an accident arising out of and in the course of his employment.
2. ———. The burden placed on plaintiff under the workmen's compensation law is not met by surmise or conjecture, nor can it be based upon mere guess, speculation, or possibility, but must be established by sufficient legal evidence leading to the direct conclusion, or a legal inference, that an accidental injury occurred which caused the disability.

APPEAL from the district court for Lancaster county: JOHN L. POLK, JUDGE. *Affirmed.*

Frederick J. Patz, for appellant.

Cline, Williams & Wright, contra.

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

PAINE, J.

This is an appeal in a workmen's compensation case from a trial *de novo* in the district court, in which an award of compensation had been set aside and the petition dismissed.

The deceased, Orville Duncan, was employed as a battery man by the defendant, and plaintiff claims that he came to

his death while on duty and in the course of his employment at the defendant's place of business. His widow, as plaintiff and appellant, brings her appeal to this court. Defendant denies that the deceased had had any accident or injury while on the job.

Plaintiff testified that they lived at 2028 Q street; that they had no children; that her husband was receiving $18 a week at the time of his death; that the deceased had been working as battery man for Super-Service, but went to work for the defendant company January 1, 1940; that he worked until the 6th, and that on Sunday, January 7, Dr. Reed was called to see the deceased, and told him that he had a bad heart condition; that he remained at home a week or two and then went back to work. She testified that during the time he was home the manager came out to see him, and she told him what the doctor had said about his weak heart, and the manager said that he would put him on easier work, but that they needed him back at work very badly.

Elmer Woodley testified that he was a fellow employee of deceased in the defendant company; that he and the deceased had both been working for the P. R. Robinson Super-Service Station, and that on January 1, 1940, they both began working for the defendant company when it bought out the Super-Service and moved the stock and equipment to a new location about a block away; that while the deceased was employed as a battery man he worked, as did the rest of them, in moving the stock over to the new place. He testified that it snowed that first week in January, and that the employees always kept the snow scooped off the sidewalk. He knew that the deceased worked from January 1 to January 6 and then did not return to work until the middle of one week, and that he died on Monday of the following week. He said the deceased was supposed to come to work at 7 o'clock, go to the post office, get the mail, clean up the place, sweep out the service room and service floor, and usually on Monday morning orders would come in by mail that had to be filled. The witness said he came

to work at 8 o'clock, and that this Monday morning they finished loading and checking out the truck for Mr. Burns, the salesman, so he could leave town. They put a load of tires on his truck, and three to five batteries. He said the batteries weigh about 35 pounds each; that the deceased put some of the batteries on the truck.

Witness Woodley had worked at the Super-Service Station with the deceased for about four years, and said it was quite generally known that the deceased had a heart ailment, and it was the practice of the other employees to help the deceased as much as he would let them in doing the heavier parts of his work, to relieve him of the strain because of his heart ailment. He had also gone on hunting trips with the deceased, where they had walked long disstances. He testified that the deceased collapsed between 8:30 and 9 o'clock on the morning of January 22, the witness catching him in his arms before he hit the floor; that the last thing he had done just before that was to drive the store service truck in from the street; that deceased did not say anything to any one at the time he collapsed, or after; that they immediately called the fire department and had the pulmotor squad and the doctor.

On cross-examination witness Woodley testified that the deceased went out in the street, got in the pick-up truck and drove it into the place of business, got out of the truck, walked about 30 feet, looked like he was reaching for something, and started to say something; that he broke out into a sweat, and he saw him going down and grabbed him.

Dr. E. Burkett Reed testified that he was first called to attend the deceased in August, 1937, for a pain in the chest, and treated him until September 27, 1937, and he was then able to carry on; that he next saw him at his home on January 7, 1940, suffering from a deep chest pain, the deep-pressure type of pain, and complained of having done some extra work at his place of business. Because of his past history of angina and two recoveries, he started giving him the same medicine as before, and told him to remain real quiet for the next several days. He testified on cross-exam-

ination that the cause of death was coronary thrombosis. He said that such an attack may occur when a man is sitting in a chair, or when he gets up and starts to stir around, but it may come at any time, no matter what a man is doing. He believed that extra exertion might hasten the process.

The death certificate, attached as defendant's exhibit No. 1, signed by Dr. E. Burkett Reed, shows that the deceased was over 51 years of age, that he died of coronary occlusion, that there were no contributing causes, and after the words "manner of injury" he had filled in the word "none." Q. 24. "Was disease or injury in any way related to occupation of deceased?" A. "No."

Art Dammann testified by deposition taken at Buckhorn Mineral Wells, Arizona. He sold out his business to the defendant company, which also bought the Super-Service Station at the same time. He testified that he had also managed the Super-Service Station, and that he never knew of the deceased sustaining any strain or injury while he worked there. He testified that deceased was not a robust man, nor in particularly poor health; that he had charge of the battery room. He never knew that deceased was suffering from any heart trouble prior to the time of his death. He said that immediately prior to his death that morning the deceased just helped get the trucks ready, and did not do anything out of the ordinary, and did not do any strenuous work to his knowledge. The first time he saw him on that morning was when he went out and drove in the service truck, and he was kind of staggering, and they brought him into the office and he keeled over, and broke out in a sweat. He said he called the fire department and Dr. Allan Campbell, who was his own personal physician, and the fire department arrived first, and worked on the man for a while with a pulmotor; that then Dr. Campbell examined him, and told the boys from the fire department that they might just as well quit working on him, for he was dead.

Witness Dammann said deceased was off work for a couple of weeks sick just before this, and he went out to his

home to see if there was anything he could do for him. He was in bed at the time, but said he never urged him to come back to work, and never said he would put him on lighter work, and that deceased just came back naturally. "I don't recall every bit of conversation I had down at his house. I might have said, 'When Orville comes back we will try to shield him,' which would be entirely human. You know what I mean? Anybody that is sick can come and take the work milder to be darn sure he was plenty okay."

There was evidence that plaintiff might have overstrained in shoveling snow off the sidewalk the last week he worked, from January 1st to the 6th. The evidence of Thomas A. Blair, senior meteorologist, U. S. Weather Bureau, was that there was only 5/10 of an inch of snowfall in Lincoln on January 3, and that there was also snow on January 6, which began falling at 12:45 p. m., but it only amounted to one inch of snow by 6:30 p. m. that night.

Dr. Arthur L. Smith was called as a medical expert. He had never seen nor examined the deceased. In the statement of facts given him, it was stated that deceased assisted in throwing from 12 to 14 tires on the truck, and lifted three to five batteries off the floor onto the truck. Dr. Smith's opinion was that "Contributing factor was doing work which he should not do and knew he should not, and his employer knew he shouldn't do, and I know a person with angina pectoris should not engage in activities which are beyond his work tolerance for a damaged heart of that type."

The plaintiff relies upon several errors for reversal: (1) That plaintiff was entitled to a full death benefit award under the Nebraska workmen's compensation law for accidental death; (2) that the court erred in refusing and failing to find that the plaintiff had conclusively established the fact of accidental death; (3) the court erred in refusing and failing to find that deceased received a strain and overexertion of his heart on January 6 by reason of shoveling heavy snow, which work was extra heavy work, beyond the duties of the deceased as battery man, and that this ag-

gravated a previous heart disease, resulting in a collapse of his heart and his death, which constituted accidental death under the law; (4) that the court refused to find that the manager made a new working agreement before he returned to work, under which he was to do lighter work.

This court has had many workmen's compensation cases in which it developed that the active cause was disease, and not accident or injury, and we will refer very briefly to a few of them.

In *Feeney v. City of Omaha,* 140 Neb. 497, 300 N. W. 571, an award to a fireman was set aside by the district court on the ground that plaintiff was suffering from a disease of the heart, myocarditis, which was of long standing, and became progressively worse.

In *Shamp v. Landy Clark Co.,* 134 Neb. 73, 277 N. W. 802, the deceased was found crumpled up and dying in a coal truck, from which he had unloaded part of the load. There was no evidence that he did not come to his death during the ordinary exertion required of him to perform his ordinary duties. The district court was affirmed in denying recovery.

In *Uribe v. Woods Bros. Construction Co.,* 124 Neb. 243, 246 N. W. 233, employee brought action for accidental injury arising out of heat stroke. *Held,* that no accident occurred, but his disability arose from chronic myocarditis due to infection, a rheumatic type of heart disease. It was held that Cecil Matthews, deputy compensation commissioner, was right in dismissing the claim, and the award of $3,300 made in the district court should be reversed and the cause dismissed.

In *Kaffenberger v. Iverson,* 142 Neb. 257, 5 N. W. (2d) 687, deceased washed mud out of a basement with a fire hose, and a month later died of pneumonia. No other employee engaged in this work suffered any serious results from the same work, and this court held: "The burden of proof is upon the claimant in a compensation case to establish by a preponderance of the evidence that personal injury was sustained by the employee by an accident arising out of and in the course of his employment."

In *Rose v. City of Fairmont,* 140 Neb. 550, 300 Neb. 574, the light commissioner of the city of Fairmont repeatedly and continuously cranked a Model T Ford on a very cold day, and suffered a heart attack. In reversing an award of the district court, this court said that the burden placed on plaintiff under the workmen's compensation law is not met by surmise or conjecture, nor can it be based upon mere guess, speculation, or possibility, but must be established by sufficient legal evidence leading to the direct conclusion, or a legal inference, that an accidental injury occurred which caused the disability.

In *Mullen v. City of Hastings,* 125 Neb. 172, 249 N. W. 560, a widow brought action for death of her husband, a fireman of the city of Hastings, who was working a suction pump during a fire at Ingleside in the nighttime. Deceased was found lying on the ground dead. This court said that a careful reading of the evidence, principally relating to the *post mortem* examination, failed to show that he did not die from natural causes, or that he died from any accident arising out of his employment. The judgment entered by the district court was reversed because an award must be based on sufficient evidence to show he suffered a disability because of an injury arising out of and in the course of his employment.

As stated in the above and many other cases, the law requires proof of an unexpected and unforeseen accident, arising in the course of employment, which results in a compensable disability.

The evidence in this case fails to measure up to the requirements of our workmen's compensation law for a recovery viewed from its most liberal angle. The plaintiff's deceased had suffered from a serious and unfortunate heart disease since 1937, and the evidence fails to establish any accident or injury from his employment which led to his death. The district court was right in vacating the award of the compensation court and dismissing appellant's petition.

AFFIRMED.

WILLIAM B. HUNT V. STATE OF NEBRASKA.

11 N. W. (2d) 533

FILED OCTOBER 29, 1943. No. 31617.

1. **Indictment and Information.** The general rule is that a defect in the manner of charging an offense is waived if, upon being arraigned, the defendant pleads to the general issue, provided the information contains no jurisdictional defect and is sufficient to charge an offense under the law.
2. ———. The governing principle is that an information is fatally defective only if its allegations can be true and still not charge a crime.
3. ———. An information questioned for the first time on appeal must be held sufficient unless so defective that by no construction can it be said to charge the offense for which accused was convicted.
4. ———. An information charging a violation of section 69-109, Comp. St. 1929, is not fatally defective because it fails to allege the name of the person or body corporate to whom the sale or transfer was made. In so far as *State v. Hughes*, 38 Neb. 366, 56 N. W. 982, conflicts herewith, it is overruled.

ERROR to the district court for Lincoln county: J. LEONARD TEWELL, JUDGE. *Affirmed.*

Daniel E. Owens and *V. H. Halligan,* for plaintiff in error.

Walter R. Johnson, Attorney General, and *Carl H. Peterson, contra.*

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

CHAPPELL, J.

Plaintiff in error, hereinafter called defendant, was found guilty by a jury in the district court for Lincoln county, Nebraska, of the unlawful sale, transfer, and disposal of mortgaged personal property, under section 69-109, Comp. St. 1929. The trial court overruled defendant's motion for new trial and sentenced him to one year in the penitentiary, whereupon he prosecuted error to this court, contending that the information does not state an offense punishable

by the laws of the state of Nebraska because it does not allege the name of the person or body corporate to whom the mortgaged property was sold. Defendant also contends that the penalty imposed was excessive.

The record discloses that upon arraignment defendant pleaded not guilty to the information, and no objections thereto were ever made by him either before, during the trial, or thereafter, in any manner or form. His contention that the information does not state an offense is raised for the first time in the brief and oral argument to this court. Ordinarily, objections not presented to the trial court are not available on review. *Lorimer v. State*, 127 Neb. 758, 257 N. W. 217; *Green v. State*, 116 Neb. 635, 218 N. W. 432. The general rule is that a defect in the manner of charging an offense is waived if, upon being arraigned, the defendant pleads to the general issue, provided the information contains no jurisdictional defect and is sufficient to charge an offense under the law. "Accordingly the sufficiency of the * * * information * * * cannot ordinarily be determined in the first instance by the appellate court, especially where the evidence is sufficient to sustain a conviction; but, where the * * * information is fatally insufficient in that it fails to charge a crime, the objection, in the absence of a statute to the contrary, may generally be raised for the first time on appeal * * * . An indictment (or information) questioned for the first time on appeal, however, must be held sufficient, unless so defective that by no construction can it be said to charge the offense for which accused was convicted." 24 C. J. S. 271, sec. 1671. See, also, 17 C. J. 54, 55; 16 C. J. 403; *State v. O'Grady*, 137 Neb. 824, 291 N. W. 497; *Wiese v. State*, 138 Neb. 685, 294 N. W. 482; Maxwell, Criminal Procedure (2d ed.) p. 555.

The statute, section 69-109, Comp. St. 1929, provides: "Any person who, after having conveyed any article of personal property to another by mortgage, shall, during the existence of the lien or title created by such mortgage, *sell, transfer, or in any manner dispose of the said personal property, or any part thereof so mortgaged, to any person*

or body corporate, without first procuring the consent, in writing, of the owner and holder of the debt secured by said mortgage, to any such sale, transfer, or disposal, shall be deemed guilty of a felony, and, upon conviction thereof, shall be fined in any sum not less than one hundred dollars, or imprisoned in the penitentiary for a term not less than one year nor more than ten years, or both." (Italics supplied.)

In *State v. Butcher,* 104 Neb. 380, 177 N. W. 184, we said: "The doing of the inhibited act constitutes the crime. The statute (now section 69-109, Comp. St. 1929), was enacted to prevent the fraudulent transfer of mortgaged chattel property.

"An examination of the history of this statute to its present form clearly indicates the purpose of the legislature to be the protection of the mortgagee in his security, and to permit him to have the full value of the chattel property applied to the mortgage debt. * * * Under this statute the state makes out a *prima facie* case when it has established beyond a reasonable doubt the execution and delivery of a valid chattel mortgage, and the sale of the chattel mortgaged property during its life without the written consent of the mortgagee." See, also, *State v. Hurds,* 19 Neb. 316, 27 N. W. 139; *Fiehn v. State,* 124 Neb. 16, 245 N. W. 6.

The information in question is not claimed to be defective in any manner except for failure to name the person or corporation to whom the mortgaged property was sold.

The governing principle is that an information is fatally defective only if its allegations can be true and still not charge a crime. See *State v. Isaacson,* 155 Minn. 377, 193 N. W. 694. It is sufficient if the offense is so stated in the information as to enable the court, looking alone to the information and the verdict, to impose the sentence prescribed by law. See *State v. Perry,* 87 S. Car. 535, 70 S. E. 304.

In *McKenzie v. State,* 113 Neb. 576, 204 N. W. 60, we said: "When an information alleges all the facts or elements necessary to constitute the offense described in the statute and intended to be punished, it is sufficient."

In *Trosper v. State,* 128 Neb. 165, 258 N. W. 62, a prosecution for blackmail, where one objection was that the information contained no allegation as to the ownership of the property demanded, this court reaffirmed the above rule, and said: "The information in this case sufficiently charges a crime, the elements of which are defined by the statute. The criticism of the information is highly technical. Nobody was misled by it or misunderstood the charge made against the defendant. The technical rules of the common law are relaxed in this state. *Nichols v. State,* 109 Neb. 335. To hold this information insufficient would be to recede from our advanced position in the *Nichols* case and restore in part at least the old, cumbersome and involved form of information which served no useful purpose in the administration of justice. We are not willing to do this."

Likewise, in *Buckley v. State,* 131 Neb. 752, 269 N. W. 892, "The information in this case sufficiently charges a crime, the material elements of which are defined by statute. The objection of the defendant to the indictment filed against him is very technical. Super-technical rules in the drawing of complaints, informations and indictments have been abandoned by this court in recent years where it appears that the defendant was not misled and understood the charge against him."

The legislature long ago took cognizance of, and approved, this field of judicial construction by providing in section 29-1501, Comp. St. 1929, "No indictment shall be deemed invalid * * * for any other defect or imperfection which does not tend to the prejudice of the substantial rights of the defendant upon the merits." Also, section 29-2308, Comp. St. 1929, " * * * No judgment shall be set aside, or new trial granted, or judgment rendered, in any criminal case on the grounds * * * or for error as to any matter of pleading or procedure, if the supreme court, after an examination of the entire cause, shall consider that no substantial miscarriage of justice has actually occurred."

Defendant relies exclusively upon *State v. Hughes,* 38 Neb. 366, 56 N. W. 982, an opinion written by this court on

November 21, 1893. The case is distinguishable at once from the case at bar because in the trial court defendant raised the objection that the indictment did not state facts sufficient to constitute a crime, which objection was sustained by the trial court, and, in turn, affirmed by this court. In that opinion the court pointed out and discussed other fatal defects which undoubtedly required a reversal, but, in addition, it was also said: "In an indictment for selling or transferring mortgaged personal property, it is necessary to allege the name of the person or corporation to whom such sale or transfer was made," citing as authority therefor *State v. Ruhnke,* 27 Minn. 309, 7 N. W. 264. A study of this authority discloses that the name of the purchaser appeared in the information, but it was charged, under a statute different from our own, that the sale was made with intent to defraud such named purchaser, one O'Neil, instead of the mortgagee, as required by the statute involved. Under these circumstances the Minnesota court said: "The intent to defraud the mortgagee being an indispensable ingredient of the offense, the indictment is fatally defective * * * . The intent charged is an attempt to defraud O'Neil (the purchaser) and no other person." We find the same case discussed in *State v. Blakeley,* 83 Minn. 432, 86 N. W. 419, wherein, referring specifically to *State v. Ruhnke, supra,* the court said: "In the latter case the court had under consideration G. S. 1878, c. 39, sec. 14 (See G. S. 1894, sec. 4142), and held that the fraud described in that section referred to the mortgagee. In such a case the person against whom the fraud was perpetrated must, of course, be described in the indictment." In this connection, it does not appear that *State v. Hughes, supra,* is in any manner supported by *State v. Ruhnke, supra.*

A search for authorities from other states discloses that in some jurisdictions it is necessary to state in the information the name of the purchaser of the mortgaged property, while in others no such averment is necessary. Some authorities hold that while the omission might not be a fatal defect, it is better to make the averment. See 11 C. J. 643;

14 C. J. S. 913, sec. 284 (b). The authorities are about evenly divided. The cases cited holding that it is necessary were all written between 1878 and 1893, the last of which is our own case, *State v. Hughes, supra.* Cases holding *contra* were written between 1897 and 1925. The authorities are reconcilable only by a differentiation between particular statutes and informations involved, or an evolution of the criminal law from ancient technicalities and clandestine sales to modern reality in the administration of justice by courts.

This is aptly illustrated in the case at bar by *State v. Perry, supra,* an opinion written in 1911, wherein the court said: "We do not regard it essential under the statute to name the party to whom the property was sold. This might be impossible in the case of clandestine sales, and yet the fact of sales be shown by admission of the defendant or by circumstances which fall short of the disclosure of the party to whom sold." See, also, *McClaskey v. State,* 168 Ark. 339, 270 S. W. 498, written in 1925. While this court has not yet specifically overruled *State v. Hughes, supra,* we said in *State v. Stapel,* 103 Neb. 135, 170 N. W. 665: "It is apparent that the legislature intended by this statute to protect the interests of the mortgagee by guarding against any disposal of the property without the latter's consent. In the accomplishment of this purpose it would be immaterial to whom the sale or transfer was made."

It is only logical to conclude that under our statute, the words, "sell, transfer, or in any manner dispose of the said personal property, or any part thereof so mortgaged, to any person or body corporate," of themselves import alienation or conveyance of title and ownership which could only and in any event be to some person or body corporate. Defendant could not have been misled or prejudiced in any manner by failure to name the person or corporation to whom the mortgaged property was sold or transferred. Further, in instructions No. 4 and 6 the trial court specifically and correctly told the jury, in reciting all the necessary elements of the crime, that the sale, transfer, or other

disposition, must have been to some person or corporation.

We are now of the opinion that an information charging a violation of section 69-109, Comp. St. 1929, is not fatally defective because it fails to allege the name of the person or body corporate to whom the sale or transfer was made. In so far as *State v. Hughes, supra,* conflicts herewith it is overruled.

In connection with defendant's contention that the penalty is excessive, the evidence becomes material. See Comp. St. 1929, sec. 29-2308. The record discloses that defendant, a farmer, upon failure to pay his rent as agreed, became involved in litigation with his landlord. Threatened with a loss of his crops for the year defendant gave a chattel mortgage on his almost matured corn crop to secure payment of a loan with which he profitably compromised and settled the litigation. Thereafter, during the life of the mortgage, he harvested the corn and sold it without the written consent of the mortgagee, loaner and owner of the debt, without paying any part thereof. Defendant took the witness-stand and admitted execution of the chattel mortgage, that it was entirely unpaid, and that without the written consent of the mortgagee, then the owner and holder of the debt, defendant sold a part of the mortgaged property to the Day Milling Company at North Platte, Nebraska, on December 8, 1939. He produced in court the original sale's memorandum and introduced it in evidence. Further, defendant admitted that on December 9, 1939, and again on December 22, 1939, he hauled a part of the mortgaged property to Kansas in his own truck and sold it without the written consent of the mortgagee. He produced in court the original sale's memoranda therefor and introduced them in evidence. Defendant admitted that he hauled other loads of corn and sold them, but claimed to have bought such corn on the open market with "kites", fictitious checks. Under these circumstances we do not consider the penalty excessive.

We have examined other related assignments of error and find them without merit. No error prejudicial to de-

fendant appearing in the record, the judgment of the trial court is affirmed.

AFFIRMED.

YEAGER, J., participating on briefs.

KANSAS CITY LIFE INSURANCE COMPANY, APPELLEE, V. EDWARD W. ZAKRZEWSKI, APPELLANT.
11 N. W. (2d) 496

FILED OCTOBER 29, 1943. No. 31664.

Mortgages. An order confirming a judicial sale under a decree foreclosing a mortgage on real estate will not be reversed on appeal for inadequacy of price, when there was no fraud or shocking discrepancy between the value and the sale price, and where there is no satisfactory evidence that a higher bid could be obtained in the event of another sale.

APPEAL from the district court for Sherman county: ELDRIDGE G. REED, JUDGE. *Affirmed, with leave to redeem.*

R. H. Mathew, for appellant.

E. W. Moehnert, contra.

Heard before SIMMONS, C. J., PAINE, CARTER, CHAPPELL and WENKE, JJ., and POLK and NUSS, District Judges.

CHAPPELL, J.

Defendant appeals from decree of confirmation of sale in a real estate mortgage foreclosure, urging inadequacy of price as ground for reversal.

Upon examination of the record this court concludes that it must decline to set aside the sale for the reason that defendant's appeal is controlled by the following rule:

"An order confirming a judicial sale under a decree foreclosing a mortgage on real estate will not be reversed on appeal for inadequacy of price, when there was no fraud or shocking discrepancy between the value and the sale price, and where there is no satisfactory evidence that a higher bid could be obtained in the event of another sale." *Equi-*

table Life Assurance Society v. Buck, 138 Neb. 203, 292 N. W. 605. See, also, *Prudential Ins. Co. v. Norall,* 140 Neb. 431, 300 N. W. 349; *Cole v. Madison,* 140 Neb. 812, 2 N. W. (2d) 115.

The judgment of the district court is affirmed, with leave to redeem within 30 days from the issuance of the mandate.

AFFIRMED.

MARIE JESS, APPELLEE, V. WILLIAM JESS, APPELLANT.
11 N. W. (2d) 763

FILED NOVEMBER 12, 1943. No. 31575.

Divorce. The record is here examined and the decree of the trial court is modified as to permanent alimony.

APPEAL from the district court for Hall county: WILLIAM F. SPIKES, JUDGE. *Affirmed in part and reversed in part.*

Harry Grimminger, for appellant.

B. J. Cunningham, contra.

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

SIMMONS, C. J.

Here the plaintiff filed a petition asking for a divorce from bed and board, for equitable relief, a division of property and alimony. Defendant filed a cross-petition asking for an absolute divorce. At the close of the trial, by leave of court, plaintiff amended the prayer of her petition asking for an absolute divorce. The trial court granted the divorce to the plaintiff, awarded her the equity in the home, the furniture, allowed $75 a month as alimony beginning September 15, 1942, to continue "until the further order of this court" and allowed plaintiff attorney's fees in the sum of $150. The defendant appeals assigning as errors the award of all the jointly accumulated property to the plaintiff, the award of alimony both as to amount and because it

was without limitation as to time, and contends that the attorney's fee allowed is excessive. Defendant concluding his argument submits that "plaintiff should have no monthly recovery and no permanent alimony, and that the attorney's fee should be reduced to $50."

It is not contended that the trial court erred in the granting of the divorce. A review of the evidence sustains the finding of the trial court in that regard. The evidence will not be stated here except in so far as it relates to the assignments of error.

The plaintiff and defendant have been married well over a third of a century. They raised and educated two children. They were respectively 60 and 61 years of age at the time of the trial. They were without funds when married. They worked together on a farm and accumulated property which sold for $3,100. This they invested in a home in Grand Island. It was later sold and a second and costlier home purchased, subject to a mortgage. The defendant for over a quarter of a century has been an employee of the Union Pacific Railroad as a brakeman and conductor, working steadily, at a good wage. The plaintiff always carried the pocketbook, the defendant had a not too liberal allowance for spending and away from home living costs. When the daughter attended the university for four years she and the plaintiff moved to Lincoln, taking some of the furniture and the automobile with them. The home was rented and the income applied to the payments on the mortgage. Apparently the parties have not lived together since. The plaintiff made certain, during the time that she and the daughter were in Lincoln, that she received two-thirds of the defendant's earnings, after deductions of fixed charges and payments due on the family car. At the time of the trial both parties were without savings save the equity in the home and the furniture. This the trial court awarded to the plaintiff.

The defendant had received by inheritance from his father a one-fourth interest in 120 acres of land. The trial court quieted title to this land in the defendant.

We think, under the facts of this case, that the trial court erred in allowing alimony to the plaintiff to continue until the further order of the court. It is true that the defendant is gainfully employed and may in a few years be able to retire upon a pension adequate for his care and probably more than he has had for his own use during the time the parties have lived together. However, the plaintiff has had the benefit of the lifetime earnings of this defendant, she has lived well to the extent of his earnings, she has, by the award of the court, been given the entire savings that have been accumulated by their joint efforts. She has not been entirely without fault in the long period of discord that has resulted in their separation. We think that an award of alimony in the sum of $1,500 payable to the plaintiff in monthly instalments as hereinafter set out is all that justice requires.

The decree of the trial court is accordingly reversed and remanded with directions to award the plaintiff the sum of $1,500 as permanent alimony, payable at the rate of $75 a month beginning September 15, 1942, and to continue thereafter at that rate for 15 months, that thereafter the defendant shall pay the plaintiff $25 a month for 12 months, after which time all payments of alimony shall cease. The defendant is to have credit on this award for all payments of alimony made as a result of the decree of the district court.

This case had about the usual number of preliminary proceedings; it was tried in part, due to continuances, on three separate days. Plaintiff's attorney made an effort to secure an adjustment of some of these matters before the action began. We do not consider the fee allowed by the district court to be excessive.

The decree of the district court is affirmed other than as stated herein.

REVERSED, WITH DIRECTIONS.

YEAGER, J., participating on briefs.

JAMES H. GIBSON, APPELLEE, V. ELSIE MARIE GIBSON, APPELLANT.

11 N. W. (2d) 760

FILED NOVEMBER 12, 1943. No. 31572.

Divorce. Record examined, and found to support plaintiff's allegations for an absolute divorce. Decree modified as to alimony, and affirmed as modified.

APPEAL from the district court for Holt county: D. R. MOUNTS, JUDGE. *Affirmed as modified; appellant allowed $100 attorney's fee for services in this court.*

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

J. J. Harrington, contra.

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

PAINE, J.

This was an action for divorce, in which a decree was granted to the plaintiff husband upon his petition. The wife was denied a decree for separate maintenance on her cross-petition, and appeals to this court.

On December 15, 1941, the plaintiff, James H. Gibson, filed petition for divorce, alleging that he had lived in Holt county all his life; that he is a member of the board of county supervisors; that the defendant is cross and unreasonable and cruel with his two daughters by his first marriage, and has slapped them and abused them. He further charges that the defendant is insanely jealous of him, which jealousy has no foundation; that he has lost all love and affection for her, and cannot live with her as his wife. He asks for an absolute divorce.

On January 19, 1942, the defendant filed answer and cross-petition, denying the allegations of the petition in the main, alleging that they were married November 11, 1939, that he erected a new home in Chambers at a cost of $3,500. Defendant alleges that she brought with her to Cham-

bers $1,285, which the plaintiff used; that his conduct with another woman was indiscreet; that he refused to take his wife with him on picnics of courthouse employees and other social occasions, and never took her to the courthouse but once; that he insisted that she get up at 4:30 in the morning and begin work; that he mistreated her at the time of the birth of their son; that one time he struck her and threw her to the floor; that he has a large income, and defendant prays that she be awarded separate support and maintenance for the support of herself and their child.

The evidence discloses these facts: Each of the parties was about 40 years old at the time of their marriage. The plaintiff had two daughters by his former marriage, who were about six and ten years of age, and his first wife died in 1936.

The defendant had been employed for 18 years by the Nebraska Culvert & Pipe Company, of Wahoo, Nebraska, earning $125 a month plus a bonus. The parties were married November 11, 1939, in Dodge county, but after a few days it was agreed between them that she should continue to work a few months there at Wahoo until a certain important job was completed by her company. The defendant had saved from her own earnings during these years about $2,000. She used some $700 of this to buy furniture, which was put in their new home at Chambers, and testifies that she took $1,285 in cash to Chambers, of which $1,165 was deposited in her husband's account on July 6, 1940, in the Chambers State Bank, and within a few months he had checked out all of this money and applied it on the bills for erecting the home and in his business of a road contractor, except possibly $200, which she had drawn out for expenses.

The issue of this marriage was a boy, born September 27, 1941, who was continuously sickly, which may have been partly due to a hernia in his side. Serious complaint is made by the defendant of the way her husband treated her during her pregnancy. He objected to her seeing a doctor but twice before the baby came. A short time before the birth of the baby her hands swelled up and were sore,

but the husband insisted upon her milking the cow and doing the work, and while the doctor prescribed two kinds of medicine which were necessary for her condition the plaintiff refused to buy them for her. She thereupon instructed her parents at Omaha to sell an old typewriter which she owned and send her the money, with which she was able to buy the necessary medicine. The baby was born at the home, with no nurse employed, and on the fifth day thereafter, upon the plaintiff's insistence, she resumed her work.

During the two years and one month of their marriage the plaintiff prospered financially, for when they were married he had but little property. He engaged in the business of road-making for the county, for various townships, and for cemetery associations, outside of his work as a county supervisor. The summary of the disputed evidence indicates that the home cost about $3,500, upon which there is an indebtedness of either $300 or $600; that also during their marriage he purchased a 1940 Buick automobile for $1,095, which is worth more than $500; that he purchased a second-hand caterpillar Diesel tractor for $2,500, against which there was a mortgage of $600, and bought a second-hand elevating grader for $600, also a blade grader for $400, a refrigerator for $100, a sewing machine for $65, as well as a washing machine, milk separator, and a radio, the values of which are not shown in the evidence. The evidence discloses that, when a heavy tractor like this is worked hard in sand in road work, it deteriorates very rapidly, perhaps 10 per cent. a month, but the evidence shows that there were $250 repairs on the tractor, and the evidence is that it is worth $2,000. There were also repairs made of $411.04 on the elevating grader, and of $224 on the blade grader, and the testimony of a machinery salesman is that, by these constant and expensive repairs, their high depreciation can be offset to a great extent.

The testimony of the principals in the case as to the value of plaintiff's holdings cannot be reconciled, the plaintiff contending that he is worth practically nothing, and the defendant contending that he had all of the property as set

out, with other household appliances not listed, which all reaches a value of a good many thousand dollars. The defendant, in moving to Omaha and leaving the plaintiff, took with her the furniture which she had bought and installed in the house, but there can be no doubt that she contributed $1,285, which was used up in paying bills on the property accumulated after they were married, and the evidence indicates that plaintiff was making around $226 a month. This is proved by the copy of his income tax report for 1941, showing that his salary and expenses as county supervisor was $1,076.60, and he shows in this income tax return that he received $5,095 that year for road work, and deducting his necessary expenses of $2,956.95 left a net profit on his road contract work of $2,138.05, and taking out his other legal deductions left a net income of $2,713.32 for that year.

The defendant devoted her entire time to chores, housework, and the upbringing of the two little girls by the first marriage. She honestly endeavored to train them to say their prayers and to conduct themselves with better manners than they did before she came into the home. There is no doubt but that, when they were wilful and disobedient, she punished them, but she claims there was justification for this action on her part.

Their baby boy was continually sick and cried night and day, doubtless because of the hernia with which he was afflicted from birth, and although so sickly the plaintiff refused to allow an operation or pay doctor bills, therefore the defendant was justified in taking this boy to Omaha on December 19, 1941, and having him operated upon by Dr. Shramek at St. Joseph's Hospital. Since the above date the father has never been to see his son. The hospital and incidental bills amounted to $117.30, which the mother has paid, and Dr. Shramek's bill was $130, which she has not yet been able to pay. She took the boy to the home of her parents. Her father is nearly 70 years old and unable to work, and her mother has been an invalid in a wheel chair for 18 years. Her sister is sickly, but works as she is able as a maid, and therefore her parents are unable to do any-

thing for defendant or her baby at all, so she will not be able to leave him and find a position for several years. Neither party objects to the allowance of $20 a month made for the child's support, which appears to be adequate at the present time, and is affirmed.

With this review of the evidence, we will now consider the assignments of error, which charge that the judgment, finding and decree are not sustained by sufficient evidence, and are contrary to the evidence and the law; that the court erred in granting plaintiff an absolute divorce, and particularly that the court erred in the inadequate and insufficient alimony allowed the defendant.

Our court has held: "This court will not require a party in a divorce action, who has prayed for a divorce from bed and board only, to accept an absolute divorce when she does not request such a decree, where the other party is not entitled to relief." *Yost v. Yost, ante,* p. 80, 8 N. W. (2d) 686.

In the case at bar, doubtless the prayer of either the petition for a divorce, or of the cross-petition for separate maintenance, would have been found to be supported by sufficient evidence, for the conditions existing between the parties were intolerable and unbearable. Frequently a limited divorce proves inadequate, and several decisions plainly illustrate the unfortunate difficulties following separate maintenance decrees: *Stocker v. Stocker,* 112 Neb. 201, 199 N. W. 23; *Mann v. Mann,* 124 Neb. 639, 247 N. W. 602; *McKnight v. McKnight,* 5 Neb. (Unof.) 260, 98 N. W. 62; *Sutherland v. Sutherland,* 132 Neb. 558, 272 N. W. 549. See, also, annotation, 138 A. L. R. 361.

A study of the evidence in the case at bar discloses such an unfortunate marital condition existing between the parties as absolutely prevents a reconcilement, and therefore the action of the trial court in granting the plaintiff an absolute divorce is supported by the evidence. It has been held by this court that the trial court is vested with a sound discretion in determining whether a limited divorce from bed and board or an absolute divorce shall be granted, and

we have said that in the majority of cases an absolute divorce is to be preferred. See *Wetenkamp v. Wetenkamp*, 140 Neb. 392, 299 N. W. 491.

We now come to defendant's assignment of error in the allowance of alimony. Our statute provides that, except in the one case where the divorce has been granted from the wife on the ground of adultery, if it is necessary for her support and the maintenance of herself and the issue of the marriage awarded to her, the court may decree the payment of such an amount of alimony out of the estate of the husband as it shall deem just and reasonable, having regard to the ability of the husband, the character and situation of the parties, and all other circumstances. Comp. St. 1929, sec. 42-318.

In the case at bar, the parties were mature at the time of their marriage, and the evidence shows that she contributed to the accumulation of their property by relieving him entirely of the management of his two little girls by his former marriage, and that she took care of the cow and chickens, and performed all of the household duties, giving her entire time thereto. In addition to that, there is no doubt but that her contribution of $1,285 in cash at the beginning of their marriage was a much greater amount than the husband had at that time.

In the case of *Phillips v. Phillips*, 135 Neb. 313, 281 N. W. 22, many similar cases of marriages of short duration are reviewed, and the amount of alimony given in each case is set out, and therefore such cases will not be discussed again in this opinion.

Considering the contribution of the wife in cash at the time of the marriage, and the fact that they accumulated all of the property set out herein by their joint efforts, and that he has an earning capacity of over $225 a month, and that she will be unable to seek employment for some years because of the necessity of giving practically her entire time to the nurture and care of the little son, who has always been sickly, it is our opinion that the defendant is entitled to alimony in the sum of $3,000, payable in monthly

instalments of $50 a month, with proper credits for all payments on alimony heretofore made. In this respect the decree of the trial court is modified, but in all other respects it is affirmed. The defendant wife is also granted an attorney's fee in this court in the sum of $100.

AFFIRMED AS MODIFIED.

YEAGER, J., participating on briefs.

A. R. FENSTER, APPELLEE, V. HAROLD ISLEY, APPELLANT.
11 N. W. (2d) 822

FILED NOVEMBER 12, 1943. No. 31648.

1. **Injunction.** An action to enjoin trespassing upon real estate can be brought only in the county where the lands are situated.
2. **Landlord and Tenant.** A tenancy from year to year can only be terminated by the agreement of the parties, express or implied, or by notice given six calendar months prior to the ending of the year at which the tenancy commenced.
3. **Injunction.** When the nature and frequency of the trespasses are such as to prevent, or threaten to prevent, the substantial enjoyment of the right of possession and property in land, an injunction will be granted.

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

E. O. Richards, for appellant.

P. J. Heaton and *R. L. Smith, contra.*

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

WENKE, J.

This action was commenced in the district court for Deuel county by A. R. Fenster, as plaintiff, against Harold Isley, as defendant, to permanently enjoin the defendant from entering on certain lands in Deuel county for any purpose whatsoever and for a determination that the defendant has no interest in certain wheat growing on said lands which

the defendant had seeded. From a finding for the plaintiff and permanently enjoining the defendant from molesting the plaintiff's possession of the premises but not determining the rights of the parties to the wheat, the defendant has appealed.

For the purpose of this opinion the plaintiff, A. R. Fenster, will be referred to as the appellee and the defendant, Harold Isley, as the appellant.

The record discloses that prior to March 1, 1942, J. E. Blevins was the owner of the southwest quarter of section one (1), township fourteen (14) north, range forty-six (46) west of the sixth P. M., in Deuel county, Nebraska, and for some 14 or 15 years prior thereto appellant together with his father had been farming this land under a year to year oral contract, except the last 4 or 5 years thereof when he farmed it by himself. On February 26, 1941, J. E. Blevins, who lived at Grand Island, wrote the appellant at Lodgepole, Nebraska, and which letter the appellant received, that he was going to rent the land to appellee commencing March 1, 1942, and for him not to do any summer fallowing but that appellee would do it. On May 1, 1941, Blevins entered into a one-year written lease with appellee for these lands being from March 1, 1942, to March 1, 1943. Blevins again sent appellant a letter on May 12, 1941, which he registered and which appellant received, and advised him not to sow wheat and that he was terminating the lease. However, appellant summer fallowed the ground and put in 60 acres of wheat. On March 1, 1942, appellee went into possession of the quarter-section and put in 65 acres of corn, 8-10 acres of rye, and the balance in barley. When, in June of 1942, appellant, who lives in Garden county, Nebraska, advised appellee that he was going to enter on the premises in order to harvest the 60 acres of wheat, the appellee started this action and while a temporary injunction was in force harvested about two-thirds of the wheat. On August 1, 1942, the temporary injunction was dissolved on appellant's motion and then appellant harvested the balance. Both appellee and appellant have delivered to Tuep-

ker, the then owner, his share of the crop harvested. Subsequently, when the matter was tried, the defendant was permanently enjoined but the rights of the parties to the wheat were not determined.

The first question presented by this appeal is, did the district court for Deuel county have jurisdiction of the action? The real estate involved was in Deuel county. The appellant was not a resident thereof but of Garden county and not in Deuel county on the day the action was commenced. Subsequently, he was served in Deuel county. Under section 20-401, Comp. St. 1929, entitled "Actions, When Brought Where Property is Situated," we have held in *State v. Central Nebraska Public Power and Irrigation District*, 140 Neb. 471, 300 N. W. 379: "It is clear from the above quoted provisions of the statutes, and others to which reference will be made, that the legislative intent is generally that the venue of actions involving the determination of the title to land, rights and interests therein and damages thereto, shall be in the county wherein the land lies, and that the location of the land is a superior consideration to the location of the parties in determining the proper venue for such actions." Under this statute we have also held that: "All actions to recover damages for any trespass upon or any injury to real estate shall be brought only in the county where such real estate or some part thereof is situated." *Dryden v. Peru Bottom Drainage District*, 99 Neb. 837, 158 N. W. 54. Since the determination of a proceeding to enjoin trespassing necessarily involves the determination of the title or the right to possession of the lands involved, therefore, under the provisions of our statute, jurisdiction lies in the county where such land is situated.

The second question presented by this appeal is, can the appellee maintain this action? The appellant cites the general principle that injunction will not lie to recover the possession of real property and cites many cases of this jurisdiction wherein we have held that injunction is not available to enforce legal rights where there is a plain, adequate

and speedy remedy at law and therefore not a substitute for forcible entry and detainer or ejectment. But those cases are not applicable here for the appellant was neither in possession nor did he have a right to possession. Appellee had a written lease from the owner from March 1, 1942, to March 1, 1943. More than six months prior to March 1, 1942, in February and May of 1941, the appellant, who was a tenant from year to year, was notified that his tenancy would be terminated on March 1, 1942. Pursuant thereto he relinquished his possession of the lands prior to March 1, 1942, and the appellee went into possession. As held in *Critchfield v. Remaley*, 21 Neb. 178, 31 N. W. 687: " * * * the tenancy (year to year) can only be terminated by the agreement of the parties, express or implied, or by notice given, six calendar months ending with the period of the year at which the tenancy commenced." Therefore, after March 1, 1942, the appellant had no further right to the possession of the premises by reason of his tenancy from year to year and appellee was in possession under his lease and entitled to enjoin any trespass thereon during the terms thereof if the facts entitled him thereto.

Was the appellee entitled to a judgment permanently enjoining the defendant from trespassing on the lands involved? In 28 Am. Jur. 318, sec. 127, we find the following: "As to the present-day view of the situation, it has been remarked that the tendency of recent decisions is to enlarge, rather than to narrow, the class of cases in which a court of equity will interfere to prevent a threatened trespass." As stated in *Hagadone v. Dawson County Irrigation Co.*, 136 Neb. 258, 285 N. W. 600: " 'Equity will afford relief by the process of injunction against repeated acts of trespass, especially where committed under a claim which indicates a continuous and constant repetition of it.' *Hackney v. McIninch*, 79 Neb. 128, 112 N. W. 296." And in *Hackney v. McIninch, supra*: "It is now well settled that injunction is a proper remedy, particularly when, as in this case, the injury is of a continuous nature and committed under a claim which indicates a continuance or frequent

and constant repetition of it." And as stated in *Ayres v. Barnett*, 93 Neb. 350, 140 N. W. 634: "Defendant contends that the decree must stand or fall absolutely upon the question of the insolvency of defendant Barnett, and argues that the evidence is clearly insufficient to sustain the charge of such insolvency. We do not think this question enters into the case. If the land belonged to plaintiff, and Barnett had trespassed upon the same, and was threatening to trespass further by cutting down the timber, plaintiff was entitled to restrain him from so doing, regardless of the question as to whether or not he was insolvent. If he were worth a million, plaintiff would not have to submit to such trespass and content himself with an action for damages." In a similar case, *Meyers v. Schmidt*, 103 Neb. 475, 172 N. W. 352, where the defendant claimed the right of farming the land on which the plaintiff held the lease, we affirmed the action of the lower court restraining the defendant, stating: "The rule seems to be that, where the nature and frequency of the trespasses are such as to prevent or threaten the substantial enjoyment of the rights of possession and property in land, an injunction will be granted. *Sillasen v. Winterer*, 76 Neb. 52; *Hackney v. McIninch*, 79 Neb. 128." And so in the instant case, where the appellant threatens to enter and trespass upon lands for the purpose of harvesting 60 acres of crops, the right to possession of which is in the appellee, he thereby threatens to substantially destroy the appellee's rights of possession and an injunction permanently enjoining him from so doing was properly granted.

The judgment of the lower court is affirmed.

AFFIRMED.

YEAGER, J., participating on briefs.

FRANK RIGGINS, APPELLEE, V. LINCOLN TENT & AWNING COMPANY: ROBERT B. ELROD ET AL., APPELLANTS.

11 N. W. (2d) 810

FILED NOVEMBER 19, 1943. No. 31672.

1. **Workmen's Compensation.** There is no hard and fast rule by which to decide whether one is an employee or an independent contractor; the correct relation must be determined from all the facts in each particular case.
2. ———. A workman who is paid wages by the piece or quantity comes within the workmen's compensation law the same as one who is paid by the day.
3. ———. The payment of a social security tax by a factory owner on the earnings of a workman is evidence tending to show that the workman was an employee.
4. ———. Under the facts established in this case, as shown in the opinion, the plaintiff is held to be an employee and not an independent contractor.
5. ———. An owner who inserts in a contract with his contractor a promise by the latter to procure compensation insurance for the workmen he employs does not escape liability for compensable injuries where the contractor fails to procure such insurance.

APPEAL from the district court for Lancaster county: FREDERICK E. SHEPHERD, JUDGE. *Affirmed; appellee allowed $100 attorney's fee for services in this court.*

John S. Bishop and *J. A. Brown*, for appellants.

Baylor, TouVelle & Healey, contra.

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

CARTER, J.

This is an action to recover benefits claimed to be due under the workmen's compensation law growing out of an accident to plaintiff during his employment by the defendant August Schreiber. The trial court entered judgment for plaintiff against the defendants Schreiber and Elrod. The defendants appealed.

The record shows that on May 17, 1941, the defendant Schreiber entered into a written contract with the Lincoln Tent & Awning Company to build automobile trailers. On or after December 14, 1941, the Lincoln Tent & Awning Company was dissolved and the defendant Elrod assumed all the obligations of the corporation. The contract between Schreiber and the Lincoln Tent & Awning Company provided that Schreiber was to carry compensation insurance on all employees, which he failed to do. The liability of Elrod is based on his assumption of the liabilities of the Lincoln Tent & Awning Company and the failure of that company to require Schreiber to obtain compensation insurance.

Plaintiff was engaged by Schreiber in June, 1941, to paint the trailers manufactured by Schreiber under his contract with the Lincoln Tent & Awning Company. The nature of the arrangement made between Schreiber and plaintiff is the principal question to be determined in this controversy. It is the theory of plaintiff that he was an employee of Schreiber, while the defendants claim that he was an independent contractor.

The evidence of Schreiber is that he told the plaintiff that "I would give him $2.50 a trailer to paint the trailers and we would furnish all the equipment and all the paint." It is established by the evidence that the arrangement made had no definite time within which it was to be performed and specified no particular number of trailers to be painted. At the direction of Schreiber plaintiff painted some trailers not manufactured by him and received $2 to $3 for each, depending upon their size and condition. On one or two occasions plaintiff was directed by Schreiber to do sanding and varnishing inside a trailer for which he was paid 40 cents an hour. There is evidence that plaintiff painted on jobs in which Schreiber had no knowledge or concern. The evidence further shows that Schreiber instructed plaintiff as to the color of the paint to be used and the number of coats to be applied. Defendant Schreiber informed plaintiff when trailers were available for painting and the time when each

was required to be completed. The work was all done in the factory operated by Schreiber. Plaintiff was paid in cash each Saturday night for the work that had been done during the week. Social security payments were deducted by Schreiber from the amounts owing plaintiff. Defendant Schreiber testified that he could terminate his relationship with plaintiff at any time by merely telling him to quit.

In *Reeder v. Kimball Laundry*, 129 Neb. 306, 261 N. W. 562, we discussed the meaning of the term independent contractor in the following language: "'The true test of a "contractor" would seem to be, that he renders the service in the course of an independent occupation, representing the will of his employer only as to the result of his work, and not as to the means by which it is accomplished. * * * In actual affairs an independent contractor generally pursues the business of contracting, enters into a contract with his employer to do a specified piece of work for a specific price, makes his own subcontracts, employs, controls, pays and discharges his own employees, furnishes his own material and directs and controls the execution of the work. When these conditions concur there is, of course, no difficulty in determining his character as such. It is only where one or more of them is lacking that a question arises. The one indispensable element to his character as an independent contractor is that he must have contracted to do a specified work and have the right to control the mode and manner of doing it.'" See, also, *Prescher v. Baker Ice Machine Co.*, 132 Neb. 648, 273 N. W. 48; *Peterson v. Christenson*, 141 Neb. 151, 3 N. W. (2d) 204.

It will be readily observed from an examination of these authorities that the question whether the plaintiff was an employee or independent contractor cannot be decided by the application of a general rule; it can be determined only from a consideration of the facts and circumstances of each case as they arise. In this respect the following facts tend to establish that plaintiff was an employee: The equipment and materials were furnished by the defendant Schreiber. *Prescher v. Baker Ice Machine Co., supra.* There was no

definite time fixed within which the work was to be performed and no particular number of trailers were specified to be painted. *Showers v. Lund,* 123 Neb. 56, 242 N. W. 258. The contract of employment was oral and subject to termination at the will of either without liability therefor. *Standish v. Larsen-Merryweather Co.,* 124 Neb. 197, 245 N. W. 606. The fact that plaintiff's services were not continuous and that it was contemplated that plaintiff might engage in other work is not necessarily inconsistent with plaintiff's status as an employee. *Cole v. Minnick,* 123 Neb. 871, 244 N. W. 785. Nor does the fact that an employee furnishes some or all of the tools required necessarily convert him from an employee into an independent contractor. *Claus v. DeVere,* 120 Neb. 812, 235 N. W. 450. The fact that Schreiber deducted social security tax from plaintiff's earnings is evidence of the fact that plaintiff was an employee. *Carter v. Hodges,* 175 Tenn. 96, 132 S. W. (2d) 211. The fact that the work was to be performed on the premises of the party engaging his services is some evidence of an employer-employee relationship. *Dobson's Case,* 124 Me. 305, 128 Atl. 401.

The defendants contend that the fact that plaintiff was paid $2.50 a trailer is strong evidence that plaintiff was an independent contractor. We are of the opinion that the payment of wages on a piece or quantity basis is not inconsistent with the status of an employee. A pieceworker, cutting trees at the rate of 10 to 20 cents a tree according to size and included in the biweekly payroll, was held an employee in *Ex parte W. T. Smith Lumber Co.,* 206 Ala. 485, 90 So. 807. So, also, was one who cut wood at a specified price per cord. *Estate of Cowell,* 167 Cal. 222, 139 Pac. 82. And in *Johnson v. Department of Industrial Relations,* 101 Cal. App. 1, 281 Pac. 440, it was held that a workman, paid wages by piece or quantity, comes within the provisions of the workmen's compensation law the same as if he had been paid by the day. See, also, *Cangreme v. Alberta Coal Mining Co.,* 7 Butterworths' W.C.C. 1020; *Gilyard v. O'Reilly,* 4 La. App. 498; *McKinstry v. Guy Coal Co.,* 116 Kan. 192,

225 Pac. 743; *New York Indemnity Co. v. Industrial Accident Commission,* 80 Cal. App. 713, 252 Pac. 775.

We conclude that plaintiff was subject to the control of Schreiber and could be discharged by him at any time without liability. These facts, together with the evidence hereinbefore shown, establish the plaintiff as an employee within the meaning of the workmen's compensation law.

The defendant Elrod, as the successor of the Lincoln Tent & Awning Company, is liable under the workmen's compensation law because of his failure to require Schreiber, an independent contractor, to carry compensation insurance. *Hiestand v. Ristau,* 135 Neb. 881, 284 N. W. 756.

It is contended by defendants that plaintiff was injured by falling from the top of a trailer as a result of playfully kicking at one Samuel Twing, a fellow employee, and that the accident did not therefore arise out of and in the course of the employment. We have examined the record and are convinced that the evidence is insufficient to sustain such defense.

Defendants contend that plaintiff's claim was settled by defendant Schreiber by paying $100 to the plaintiff. The alleged settlement was never approved by the workmen's compensation court and, consequently, it is ineffective to defeat plaintiff's claim. Comp. St. 1929, secs. 48-136, 48-141. See, also, *Zurich General Accident & Liability Ins. Co. v. Walker,* 128 Neb. 327, 258 N. W. 550; *Duncan v. A. Hospe Co.,* 133 Neb. 810, 277 N. W. 339.

Defendants urge that the award is not supported by the evidence. We think the evidence will support a finding that plaintiff was earning $12.50 a week. The evidence also shows that plaintiff suffered temporary total disability for a period of 26 weeks and a 40 per cent. partial permanent disability. The award of the district court was properly calculated on this basis under the provisions of section 48-121, Comp. St. 1929, less a payment of $100. Medical and hospital bills were also properly allowed.

We have found no prejudicial error in the award of the district court. An attorneys' fee of $100 is allowed plain-

tiff's attorneys for services performed in this court. The judgment of the district court is affirmed.

AFFIRMED.

YEAGER, J., participating on briefs.

ANNA PIERCE ET AL., APPELLEES, V. PLATTE VALLEY PUBLIC POWER AND IRRIGATION DISTRICT, APPELLANT.

11 N. W. (2d) 813

FILED NOVEMBER 19, 1943. No. 31620.

1. **Eminent Domain.** Where, on appeal in a condemnation proceeding, the only issue is the amount of damages, no pleadings are necessary.
2. ———. Where land, no part of which is taken, is temporarily damaged by a temporary public improvement, the measure of damages is not the market value but the value of the use for the period damaged.
3. ———. Where one's land is damaged temporarily for public use in the acquiring of an easement by a public corporation for the construction of a transmission line, it constitutes such a damage as requires compensation under section 21, art. I of the Constitution.
4. ———. Where land is taken, not to be held permanently, but only for temporary use, the measure of compensation is not the market value, but what the property is fairly worth for the time during which it is held, and the same rule applies where property, no part of which is taken, is temporarily injured.
5. ———. The best available test of the value of the use of land is the value of the crops which could and would have been grown thereon, particularly where it is removed from speculation and remoteness and made definite and certain by proof as to what portions of the land and similar adjoining land produced.
6. ———. Appraisers in condemnation proceedings may testify as any other witness when the proper foundation is laid, but in no event must evidence of the award of such appraisers be admissible as evidence to go to the jury.
7. ———. General fear, or fear which is not connected with or an incident of knowledge of present or potential danger, cannot be made the basis upon which to predicate the value of the use of land for the period damaged.
8. ———. The only fear which may be considered as an element

in fixing the value of use of land for the period damaged by the construction of a transmission line across that land is that of danger, the present or potential existence of which is grounded in authentic observation and experience, or in scientific investigation, and which fear circumscribes activity or limits freedom of use in the area of the present or potential danger, and which tends to lessen the market value of the use of the land for the period damaged.

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

August Wagner, William P. Kelley and *M. E. Crosby,* for appellant.

Shotwell & Vance, contra.

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

MESSMORE, J.

Platte Valley Public Power and Irrigation District filed an application in the county court against Anna Pierce et al., representing it to be a public corporation organized and existing under the laws of Nebraska, and clothed by law to exercise the right of eminent domain; that it was organized for the purpose of creating a public power district to engage in the electric light and power business, within the meaning of chapter 86, Session Laws of Nebraska for 1933 (Comp. St. Supp. 1933, secs. 70-701 to 70-715, inclusive); that the applicant requires a right of easement over the lands of the defendant, Anna Pierce, with the privilege to enter on, construct, reconstruct and maintain the structures and line, and trim and remove underbrush and trees to safe clearance and operate said electric transmission line upon, along and over the real estate; that the applicant "does not desire the fee title to said easement; the owners retain the use of said land under said line, around and between the structures;" the applicant remains "obligated and hereby agrees to pay all damages that occur during the construction and will pay all future crop damages in the mainte-

nance and reconstruction of said line. All such damages to be due and payable immediately after they occur. The right of ingress and egress acquired herein shall be exercised in the manner suggested by the occupant of said premises. If the applicant deems that manner improper, then it will confine its entire entry within 50 feet on each side of the center line of said easement. The rights herein acquired are limited for the duration of the war plus six months, but in no event longer than April 2, 1947, and to a distance of 50 feet on each side of said center line. The applicant agrees to remove said structures and restore the land as nearly as may be on or before April 4, 1947."

Appraisers were appointed, and an award was made in favor of Anna Pierce in the sum of $375, and to the tenants Flynn in the sum of $15, which was accepted, and the motion to affirm the Flynn award was sustained by the district court. No further pleadings were filed in the district court, and the matter was heard before a jury. Plaintiffs were awarded the sum of $333.33. Motion for a new trial was overruled, and Platte Valley Public Power and Irrigation District appeals to this court.

The plaintiffs (hereinafter referred to as appellees) own 80 acres of farm land, adaptable to the production of corn, east of Valley, Douglas county, Nebraska, lying north and south. The right of way and easement condemned is a strip 2,018 feet long by 100 feet wide, the point of entry being located in the south boundary line of this land, close to the southwest corner, then extending 2,080 feet diagonally northeast across the south forty to a point in the east boundary of the tract. The appellant has erected on this strip three wooden, two-pole, three-cable structures; the first parallel to the center line at a point approximately 593 feet northeast of the point of entry, the second 625 feet northeast of the first, and the third 575 feet northeast of the second one, as shown by the transcript and exhibits.

At the time of the condemnation proceedings, the premises were occupied by a tenant, rent being reserved by the appellees of one-half of the crops delivered to the elevator.

There is some question about the term of the lease, C. R. Pierce, the husband, testifying that it was a year-to-year lease. There was evidence disclosing the loss in production, due to the construction of the line and the reasons for the loss, which need not be set out.

The appellant contends that the application filed in the county court terminates at a specific date and specifies that all construction, replacement and crop damage will be due and payable immediately after they occur, confining its evidence solely to the production of the farm and not to the value of the farm before and after the construction of the transmission line. It contends that the court should have instructed that the amount of recovery is the difference between the rental value before and after the line was constructed for the period of the easement. Appellant states that the amount of land used is insignificant; that six poles cover less than six square feet. It is conceded that this court has adopted the rule that for permanent easements the measure of damages in transmission line cases is the difference in the value of the land before and after the construction of the line; contending that in this case, where there is a temporary use, the principle calls for an instruction fixing the damages at the difference in the rental value of the farm before and after the construction of the transmission line, and that nothing should be allowed for the loss of crops; that this case is submitted upon an application, which amounts to an agreement by the parties to defer such future damages, and, no objection being made to the application to defer such damages, they are automatically deferred, citing the rule: Parties will, as a rule, be restricted in the appellate court to the theory upon which the cause was prosecuted or defended in the court of original jurisdiction. The only issue in the district court was the amount of damages.

In the case of *United States Nat. Bank v. Loup River Public Power District,* 139 Neb. 645, 298 N. W. 529, this court said: "While it is true that the proceedings for condemnation in the beginning are not in the nature of an ac-

tion at law, yet it does not follow that, when an appeal is taken from such proceedings to the district court and the case is there docketed, such action constitutes the beginning of an action in the generally accepted sense. But for the appeal, the award of the appraisers would be final and there never would be any proceedings in the district court. Consequently, it is the appellant who is responsible for instituting the action in the district court, even though by statute the parties in a condemnation action are designated in the reverse order from what they appear to be in the proceedings in the county court." The court further said:

"The fact that a petition was filed in the district court by condemnee cannot change the rule, because the filing of that petition was not essential or necessary. This court has, in a number of cases, held that, where on appeal the only question is the amount of damages, no pleadings are necessary. *Fremont, E. & M. V. R. Co. v. Meeker,* 28 Neb. 94, 44 N. W. 79; *Trester v. Missouri P. R. Co.,* 33 Neb. 171, 49 N. W. 1110. Since no petition was necessary, plaintiff could not acquire any additional rights by the filing of same." The appellant's statement in its application does not change the rule. There was no agreement as to deferment of damages, as contended for by appellant.

This court in *Gledhill v. State,* 123 Neb. 726, 243 N. W. 909, held: "Where land, no part of which is taken, is temporarily damaged by a temporary public improvement, the measure of compensation is not the market value but the value of the use for the period damaged." In the opinion we said (p. 730) that "where one's land is damaged temporarily for public use by the construction of a public improvement by the state, it constitutes such a damage as requires compensation under section 21, art. I of the Constitution," which reads: "The property of no person shall be taken or damaged for public use without just compensation therefor." The opinion quotes from 20 C. J. 740, as follows: "Where land is taken, not to be held permanently, but only for temporary use, the measure of compensation is not the market value, but what the property is fairly worth for the time

during which it is held, and the same rule applies where property, no part of which is taken, is temporarily injured."

Courts have held that the value of the use of land is the rental value; on the other hand, it has been held that the rental value is not the proper damage. In the opinion in *Gledhill v. State, supra,* at page 738, we said: "The best available test of the value of the use of the land to the lessee is the value of the crops which could and would have been grown upon this land, particularly where it is removed from speculation and remoteness and made definite and certain by proof as to what portions of the land and similar adjoining land produced." The *Gledhill* case sets forth the rule on the measure of damages, to be followed in the instant case.

Section 21, art. I of the Constitution of Nebraska protects the appellees in that their property "shall not be taken or damaged for public use without just compensation therefor," and, in this connection, the owner of the property taken or damaged must be compensated in the original condemnation proceedings, and the owner of property taken or damaged is entitled to have all proper elements of damage considered by the commissioners, and, on appeal, by the jury. See *Snyder v. Platte Valley Public Power and Irrigation District,* 140 Neb. 897, 2 N. W. (2d) 327.

We are not in accord with the appellant's position that damages are deferred; nor, in view of the holding in *Gledhill v. State, supra,* are we in accord with the measure of damages as contended for by the appellant.

The appellant contends that the court erred in admitting the evidence of the appraisers to testify as to the damages after counsel for appellees had informed the jury that they were the appraisers.

This court in *Langdon v. Loup River Public Power District,* 142 Neb. 859, 8 N. W. (2d) 201, held that "in future condemnation litigation, evidence of the award of appraisers shall not be admissible as evidence to go to a jury."

Appraisers may testify in condemnation proceedings as any other witness when proper foundation has been laid,

with the restriction as set out in *Langdon v. Loup River Public Power District, supra.*

Appellant contends that the court erred in admitting the evidence of appellee C. R. Pierce, who testified as to the danger in working about the high voltage transmission line; that there was no proper foundation laid to qualify him as such witness. The witness was one of the plaintiffs, 82 years of age; had been on the farm both before and after the transmission line was constructed; had served in the capacity of foreman for the Western Union Telegraph Company, built lines, set poles and directed mechanics for that company for 30 years. He testified that his practical experience in constructing lines during such period of time was in several states where there was a break; that he had not only constructed but had repaired lines and helped to build an electric plant in Omaha in 1883. He further testified that from actual experience he had the opportunity to learn about construction lines and the mechanics of construction, installation and dangers incident to power lines. He had had occasion to make a study and observation of insulation, grounding and the purpose of grounding, had attended a school for that purpose, and was required to pass an examination before he could become a foreman; that, in addition to the study made in such work, he had occasion to observe the dangers incident to one being in and about the power lines, where wet surfaces were contacted.

Reviewing the foregoing evidence, it is obvious that the witness was unacquainted with safety devices or lightning arresters, or oil surface breakers on modern construction. His experience was foreign to the safety of transmission lines, such as in the instant case. He was permitted to testify that the lines are dangerous. He did not know the spark over distance from a 65,000 volt line. He was asked: "Now, Mr. Pierce, can you tell the Jury what would be the danger to a person working in and about that power line with metal during the time it is damp and wet?" to which there was a proper objection. "A. Now, you take a machine of any kind, you take a cornpicker, and you take any

apparatus like that, and you get against those poles when it is wet, maybe it is misting, or raining a little, and you are driving that, it will kill you just as sure as shooting; that is all there is to it." Motion was made to strike this testimony which was overruled. The testimony of this witness was prejudicial and should not have been admitted under the applicable rule hereinafter set out.

In *Wahlgren v. Loup River Public Power District,* 139 Neb. 489, 297 N. W. 833, this court held:

"General fear, or fear which is not connected with or an incident of knowledge of present or potential danger, cannot be made the basis upon which to predicate depreciation in the market value of land.

"The only fear which may be considered as an element in fixing value is that of danger, the present or potential existence of which is grounded in authentic observation and experience, or in scientific investigation, and which fear circumscribes activity or limits freedom of use in the area of the present or potential danger, and which tends to lessen the market value of the land." See, also, *Dunlap v. Loup River Public Power District,* 136 Neb. 11, 284 N. W. 742, and cases cited.

We have discussed the assignments of error deemed necessary to clarify the issues on a retrial.

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

REVERSED.

YEAGER, J., participating on briefs.

WILLIAM S. FRAZIER, ADMINISTRATOR, APPELLANT, V. ALFRED C. ANDERSON, DOING BUSINESS AS ANDERSON EQUIPMENT COMPANY, UNINCORPORATED, APPELLEE.

11 N. W. (2d) 764

FILED NOVEMBER 19, 1943. No. 31615.

1. Negligence. Want of ordinary care and not knowledge of danger is the test of contributory negligence.

2. **Evidence.** Where an inference is so usual, natural, or instinctive as to accord with general experience, its statement is received as substantially one of a fact.
3. **Trial.** It is not error to refuse a requested instruction if the legal principles therein announced are either incorrectly stated or inapplicable to the issues involved.
4. **Negligence.** 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.
5. ———. If contributory negligence is relied upon by defendant as an affirmative defense, the burden is upon him to prove it by a preponderance of the evidence pertinent to that issue contained in the whole record, except in so far as the same may appear in evidence adduced for the plaintiff.
6. ———. Where, upon an issue of fact raised by a plea of contributory negligence, the testimony is conflicting, or where the evidence as a whole is of such a character as that reasonable minds may fairly draw different conclusions therefrom, it is for the jury and not the court to determine the question of contributory negligence.

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

Hotz & Hotz and *Gordon Diesing*, for appellant.

Gross & Crawford, contra.

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

CHAPPELL, J.

Plaintiff's amended petition sought to recover damages for the death of his son, Emil O. Frazier, by electrocution alleged to have been caused by an improperly insulated and defective second-hand Skilsaw negligently sold by defendant's agent to plaintiff. Defendant answered denying generally, and alleging that death was caused by decedent's own negligence which was more than slight. The issues were submitted to a jury which resulted in a verdict for defendant. Motion for new trial was overruled, and plain-

tiff appeals, contending that the trial court erred in permitting defendant's electrical expert witness to testify that in his opinion the ground wire on the Skilsaw had been used as such; erred in refusing to give plaintiff's requested instructions No. 12 and No. 13; and erred in submitting to the jury the question of contributory negligence. No complaint is made by plaintiff concerning the form and content of any of the instructions given by the trial court.

Plaintiff cites no authority supporting his first contention. The record and the law affirm that the trial court did not err in permitting defendant's electrical expert witness to testify that in his opinion the ground wire on the Skilsaw had been used as such. The evidence is that on new Skilsaws the ground wire is completely insulated to the end of the wire. With this type of plug, in order to use it as a ground, the insulation must be removed from a part of the end of the wire. It may be used as a ground by putting a clamp on the end for attaching, or by wrapping, or otherwise securing the wire to a suitable ground, such as a gas, water, or steam pipe, or an iron stake driven in the ground. There is a dispute in the evidence whether the insulation was intact when the machine was purchased by plaintiff or removed for such purpose thereafter. In its present condition, however, the insulation has been removed therefrom for a distance of approximately five inches and the exposed wire is marked, bent, and twisted. The Skilsaw with ground wire attached was in court as an exhibit in evidence before such witness and the jury. In this connection, this witness did not testify hypothetically as an expert, but drew inferences from present, demonstrable facts. An applicable rule is: "Where an inference is so usual, natural, or instinctive as to accord with general experience, its statement is received as substantially one of a fact—part of the common stock of knowledge." 32 C. J. S. 102, sec. 460. See, also, 22 C. J. 530.

Further, plaintiff's evidence is that the ground wire was never used as such because of lack of knowledge of the danger involved. Admission of the evidence was not prejudi-

cial to plaintiff in any event since we have only recently reiterated the rule that, "Want of ordinary care, and not knowledge of danger, is the test of contributory negligence." *Grantham v. Watson Bros. Transportation Co.*, 142 Neb. 367, 9 N. W. (2d) 157.

The trial court properly refused plaintiff's requested instructions No. 12 and No. 13. These instructions, and all the authorities cited to support them, treat solely with the liability of the principal to third persons in contractual relationships. In the case at bar there is involved the liability of the principal to third persons, not his employees, in the relative field of tort liability. Under these circumstances the rule is that the law imputes to the principal or master responsibility for the negligent acts of his agent or servant done in obedience to the express orders or directions of the master or within the scope of the employee's authority or employment in his master's business, and if those acts cause injury to third persons the law holds the principal or master liable in damages therefor. See *Van Auker v. Steckley's Hybrid Seed Corn Co., ante*, p. 24, 8 N. W. (2d) 451; 1 Restatement, Agency, sec. 228; 35 Am. Jur. 959, sec. 532, and 961, sec. 533. It is not error to refuse a requested instruction if the legal principles therein announced are either incorrectly stated or inapplicable to the issues involved.

Concededly the important question involved in the case at bar is whether contributory negligence was a question of law for the court or an issue of fact for the jury's determination. Defendant pleaded contributory negligence, and plaintiff, by appropriate instruction, requested that the trial court withdraw the issue from the jury.

There are well-established applicable rules of law. We have heretofore stated: "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." *Eaton v. Merritt,* 135 Neb. 363, 281 N. W. 620. See, also, *Klement v. Lindell,* 139 Neb. 540, 298 N. W. 137; *Groat v. Clausen,* 139 Neb. 689, 298 N. W. 563. "If contributory negligence is relied upon by defendant as an affirmative defense, the burden is upon him to prove it by a preponderance of the evidence pertinent to that issue contained in the whole record, except in so far as the same may appear in evidence adduced for the plaintiff." *Roberts v. Carlson,* 142 Neb. 851, 8 N. W. (2d) 175. "Where, upon an issue of fact raised by a plea of contributory negligence, the testimony is conflicting, or where the evidence as a whole is of such a character as that reasonable minds may fairly draw different conclusions therefrom, it is for the jury and not the court to determine the question of contributory negligence." *Chicago, B. & Q. R. Co. v. Winfrey,* 67 Neb. 13, 93 N. W. 526. See, also, *Casey v. Ford Motor Co.,* 108 Neb. 352, 187 N. W. 922; *Day v. Metropolitan Utilites District,* 115 Neb. 711, 214 N. W. 647; *Zimmer v. Brandon,* 134 Neb. 311, 278 N. W. 502.

Having these rules of law in mind, we have examined all the evidence for a determination of the question presented, and conclude that if defendant could under the record be found guilty of negligence which was the proximate cause of the death, a question which under the circumstances we are not required to discuss in this opinion, there is ample evidence requiring the trial court to submit the question of plaintiff's contributory negligence to the jury.

In this connection, the evidence discloses that plaintiff, decedent's father, a building contractor in Omaha, Nebraska, for 22 years, purchased the Skilsaw, an electrical tool used by carpenters to ease and speed the sawing of heavier timbers. Decedent was a mature man, 29 years of age, and an experienced journeyman carpenter who had worked 10 years for his father. The Skilsaw had been used by decedent and others in building houses for a period of approximately four months before the death. The tool has a drop cord 8 or 10 feet long, to the end of which is attached a two-prong socket plug like that found on any ordinary elec-

trical appliance with the exception that there is on the side of the plug and protruding almost perpendicular therefrom a ground wire six and one-half inches long so placed by the manufacturer because it is a tool often used by carpenters for outdoor work and sometimes in damp, wet weather, which requires its attachment to a ground for safety. There is a dispute in the evidence whether a ground warning tag was attached to the drop cord at the time of its purchase. However, upon examination of the plug the ground wire is immediately observed and its protruding interference is so unmistakably evident as to arouse the curiosity concerning its utility. While all new Skilsaws are equipped with such a two-prong plug with a ground wire, as standard equipment, and it is as safe as any other if properly grounded, the city of Omaha will not give approval to its use because the user will not ordinarily take the necessary time or precaution to properly ground it for his protection. The city since 1940 has required carpenters, when they intend to use such a machine, to call up the city electrician's office, whereupon an electrical inspector, at a cost of only $1, is sent out to hook it up properly by setting up a grounded, wooden pole on the lot with facilities for a three-prong plug which when connected automatically grounds the machine through the same plug that supplies the current. Such a pole, was found on the premises but it was not set up for inspection or use, and no request was ever made that it be serviced or inspected.

At 12:30 p. m. on the day of the accident a hundred foot drop cord, belonging to plaintiff, was inserted through a basement window of a house adjoining on the north and plugged into an ordinary hanging socket in the basement. The Skilsaw was then plugged into the end of the drop cord. This connection so remained until after the accident. The ground wire was not grounded in any manner or at any time during its use that day. The day was damp. It rained a short time before the tragedy, and the ground was wet. The accident happened thereafter when decedent picked up or used the saw out of doors. The tool, even if defective

and shorted, could have been used inside where it was dry without a ground, with slight shock, if any, unless the user personally came in contact with a ground, but if it were used outside without a ground, and the earth was wet, as happened here, the user would himself be the ground and receive the shock which might, and in the instant case did, cost him his life. It is only reasonable to assume that if the machine had been properly grounded the accident would not have occurred. Under these circumstances contributory negligence was an issue which the trial court was required to, and did, properly submit to the jury for their decision.

It follows that the trial court did not err as urged by plaintiff, and the judgment, therefore, is affirmed.

AFFIRMED.

YEAGER, J., participating on briefs.

MARTIN O. FENDER, APPELLANT, V. ROBERT M. REED ET AL., APPELLEES.

12 N. W. (2d) 98

FILED NOVEMBER 26, 1943. No. 31550.

1. **Subrogation.** This is an action in equity to subject real estate to a judgment lien. The facts are reviewed and the judgment of the trial court affirmed.
2. ———. The doctrine of subrogation is not administered by courts of equity as a legal right, but the principle is applied to subserve the ends of justice and to do equity in the particular case under consideration. It does not rest on contract, and no general rule can be laid down which will afford a test in all cases for its application. Whether the doctrine is applicable to any particular case depends upon the peculiar facts and circumstances of such case.

APPEAL from the district court for Lancaster county: JOHN L. POLK, JUDGE. *Affirmed.*

Harry R. Ankeny, for appellant.

Beghtol, Foe & Rankin, contra.

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

SIMMONS, C. J.

The plaintiff, a judgment creditor of the defendant, Robert M. Reed, by petition in equity, seeks to subject two pieces of land to the satisfaction of his judgment. The trial court denied his petition as to one piece of land and granted it, in part, as to another. Plaintiff appeals. We affirm the judgment of the trial court.

From a review of the record, independent of the findings of the trial court, we find the following factual situation.

James is the oldest and Robert the youngest of a family of 8 children. The mother died when Robert was an infant. The father died in Robert's early minority. When Robert was about 10 years of age he came to live with James and with one exception to be mentioned later, lived with James until his, Robert's, marriage in 1935. In the partition proceedings of the father's estate, Robert was awarded a 160 acres of unimproved land in Lancaster county. There were estate debts which had to be paid. There was no personalty to distribute.

Although not Robert's legal guardian, James took care of his person and property, received the income from the property, allowed him spending money, paid his debts and cared for Robert to the apparent satisfaction of Robert and the other brothers and sisters. With one exception, to be now mentioned, this arrangement was followed until Robert's marriage in 1935. James kept a separate bank account of Robert's funds, but otherwise made no record of income or outgo.

Another brother Lawrence was married and lived in Box Butte county. In 1930, at Lawrence's solicitation and without advising with James, Robert went to Box Butte county and lived for about a year and a half with Lawrence. While there, Robert appears to have handled his own finances. While there his brother Lawrence's wife and Lawrence, on June 11, 1931, executed notes and a mortgage securing the same on land, the title of which was in the wife. Robert

signed the notes as an accommodation maker. On June 16, 1931, the plaintiff purchased the notes and mortgage. The makers defaulted on interest and principal due June 11, 1932. On November 19, 1932, plaintiff started foreclosure. Robert at that time had returned to James' home. Service of process was had on him there on November 25, 1932. James knew of this action and assisted in securing the services of an attorney for Robert, but it does not appear that James paid any further attention to that litigation. The foreclosure action went to decree on October 30, 1933. On July 8, 1939, a deficiency judgment was entered against Lawrence, his wife and Robert in the sum of $3,013.26. This judgment was transcribed and filed with the clerk of the district court of Lancaster county on July 26, 1939. Execution was issued October 7, 1941, and returned the same day wholly unsatisfied for want of lands, goods, etc., of the "defendant" upon which to levy. Robert knew of the motion for the deficiency judgment before it was entered in Box Butte county. James did not know of the deficiency judgment until October, 1941. It is this judgment which is the foundation of plaintiff's action.

In 1927, James determined that it was for the best interests of Robert that his 160 acres be improved. James placed a complete set of improvements thereon at a cost of about $5,500. James paid from his own funds some $2,750 of this amount, contributed his own services of the estimated value of $250 or $300 and paid the remainder from Robert's funds. No detailed record or accounting was made at the time of these expenditures, although at the trial receipts were produced, issued to James, for materials paid for in the sum of $1,700. It further appears, from general statements in evidence, that Robert, when living with Lawrence, mortgaged this land to secure a loan and turned the proceeds of the loan over to Lawrence. This was done without the knowledge of James. In February, 1932, the mortgage on Robert's 160 acres was in default and taxes were in arrears. James negotiated a sale of this 160 acres, through an agent, to one Arres for $19,500. Robert exe-

cuted the deed. The transaction was closed February 13, 1932. James testified, and the bank records support his testimony, that he received $8,551.17, as the net of the purchase price after the taxes and incumbrance had been paid. This was deposited in Robert's account. James later checked out of Robert's account $237.50 agent's commission and $700 to the tenant to get possession for the purchaser. These receipts are in the record. He also paid out $100 attorney fees. James, on February 20, 1932, withdrew from said account the sum of $3,000 and on February 25, 1932, withdrew the sum of $5,800 in currency. On March 15, 1932, James redeposited $1,000 of this amount in Robert's account. It is plaintiff's contention that this $1,000 was an additional part of the purchase price. This contention will be discussed later herein. From this money James paid accounts of Robert's which he fixes at a total of $265 and bought Robert two teams and an automobile and other property totaling $1,055. James also took the amount which he had paid on the cost of the improvements in 1927. He testified as to other items and that Robert was then owing him more than the $5,800. He further testified that the $3,000 withdrawn was "for what was coming" to him from the payment on the farm purchased from Lawrence.

On April 26, 1929, James purchased 80 acres from Lawrence and the deed ran to Robert and James, each for an undivided one-half interest. The purchase price was $10,000. The defendants borrowed $6,000 and secured the payment by two mortgages, one for $5,000 and one for $1,000. $4,000 was paid in cash. James paid them from his own funds $3,100 and from Robert's funds, $900. The $1,000 mortgage was released by instrument dated July 7, 1933. The $5,000 mortgage was released by instrument dated April 7, 1934, and on that same day a mortgage was given to one Wetenkamp for $2,000. James paid the amount to reduce the indebtedness. He also paid the taxes and the interest from his own funds. In 1941, Robert asked James to buy his interest. James did so paying $100 in cash and

giving his notes for $900. $300 was paid on the notes that summer and the balance of the notes were unpaid and in the hands of a third party at the time of the trial. By deed, dated and acknowledged March 20, 1941, Robert conveyed this undivided half interest to James Reed and wife for a consideration of $1,000. The deed was recorded October 10, 1941.

During the period of the joint ownership of this 80 acres, Robert and James each farmed 40 acres. James paid all of the taxes and all of the interest from his own funds. The plaintiff prayed that this deed of March, 1941, be set aside and Robert's interest in the land subjected to plaintiff's judgment. James conceded that the deed should be set aside, but contended that he should be protected in the taxes and interest paid subsequent to the 1932 settlement on Robert's share and in the purchase price paid to Robert. The trial court held that the interest and taxes paid retired liens, superior to plaintiff's judgment, that the deed should be set aside but gave James a lien on Robert's interest for the taxes and interest paid on Robert's share, and decreed that it was superior to plaintiff's lien. Plaintiff appeals from this part of the decree.

On December 8, 1932, James purchased 80 acres of land from one Bateman, paying therefor the sum of $5,100. There is no evidence that the $5,100 used to purchase this land was money which had been withdrawn from Robert's account ten months before, or that it had any connection with that fund. James testified that it was his practice to keep sums of currency on hand. James, at the time of the trial, did not remember whether he paid the purchase price in currency, check, or draft but testified positively that it was paid in full from his own funds. James rented this land for one or two years after it was purchased, received the rents and paid the 1933 taxes. This farm had on it some, not too good, improvements. When Robert married he moved upon this farm and has lived there since. The testimony is that Robert was to pay the taxes and cash rent. James testified that he "figured" about $250 cash rent but

"my agreement was he should pay me $150 a year." Robert was unable to make the farm produce enough to live upon and pay rent. He did not pay the rent. Robert paid the 1934 to 1937 taxes, inclusive, the 1935 receipt being issued "J. R. Reed by Robert Reed." The remaining taxes have not been paid. Robert sold what crops were available for sale and kept the proceeds. Robert did not like the location of the well and with James' approval put down a new well and windmill, paying for the same out of the proceeds of the crops. It is plaintiff's contention that this land was bought with Robert's money, held by James for Robert's benefit and the title taken in James' name for the purpose and with the intent of the defendants "to hinder and defraud plaintiff and to prevent the enforcement of his said judgment." Plaintiff prayed that the deed be canceled and the land subjected to his judgment.

As to this land purchased from Bateman December 8, 1932, the trial court found that it was purchased by James for his own benefit, paid for from his own funds, that it was James' property and that James was not holding it for Robert as trustee nor in any other manner. The trial court quieted title to this 80 acres in James, free of all claims of right or interest therein made by the plaintiff. This the plaintiff claims to be error, insisting that it was a transaction between close relatives, is to be carefully scrutinized and its good faith clearly established and that the burden is upon James to establish that good faith and that he has not done so. Plaintiff also advances the contention that James as the agent and as trustee of Robert's money and property has the burden of showing that he is entitled to the credit he claims. While questioning the applicability of the rules to this case, defendants state their willingness to have the facts tested by those rules. The question then becomes one of fact.

Plaintiff does not contend that Robert did not have the right to pay his debts to his brother James but rather contends that such debts did not exist and accordingly were not paid and that these transactions were conceived and

carried out with the intent to hinder and defraud the plaintiff and to prevent the enforcement of his judgment.

To find for the plaintiff it would be necessary to hold the testimony of James to be false as to the debts and the disposition of these funds in settlement of a long standing running account. It may be that the figures testified to, do not exactly balance. This is not an accounting action between Robert and James. Robert is not here contending that James made an improper disposition of his funds. So far as this record discloses Robert has at all times approved the handling of these funds and their allocation. He here testified repeatedly that James owed him nothing. To find for the plaintiff it would be necessary to hold Robert's testimony to be false also. True, the testimony of these two brothers is largely uncorroborated by documentary evidence. It is also uncontradicted by other evidence. Plaintiff contends that there are contradictions in the record. We will discuss those stressed in the argument.

James testified that the total net amount received from the sale of the 160 acres was $8,551.17 which is shown to have been deposited in Robert's account on February 13, 1932. Plaintiff contends that the amount actually received was $9,551.17. On cross-examination of James, plaintiff produced checks, 5 in number, given by Mr. Arres, totaling $19,500. One was payable to Robert for $8,551.17. Another dated February 3, 1932, was made payable to a real estate agent for $1,000. This is shown endorsed by the agent and paid February 5, 1932. James was asked if this did not represent "the first payment" to the agent "on this purchase price." James answered that he did not recall but "it could be." There is no evidence that that $1,000 ever was paid to James or Robert. The undated receipt of the agent is in the record showing receipt of $237.50 "balance in full for sale of NW-35-10-7." Robert's bank account ledger sheet shows a check for $237.50, paid February 15, 1932. On March 15, 1932, James deposited $1,000 in Robert's account. Plaintiff argues that this $1,000 was the "first payment" to the real estate agent. James testified that he put

that $1,000 back into the account out of the $8,551.17. On that same day (March 15, 1932) the bank account shows a withdrawal of $700, and in the record is the receipt of the tenant for $700 dated March 15, 1932, "In full settlement for vacating the premises." The balance of the $300 was left in the account of Robert and so far as this record shows was used for Robert's benefit. The record does not support plaintiff's contention that James received $9,551.17.

James also testified that he withdrew the $3,000 on February 20, 1932, "for what was coming to me from the payment there of Lawrence on that farm." It will be remembered that this farm was purchased in April, 1929. At that time it was mortgaged for $5,000 and $1,000 to secure money to apply on the purchase price. Plaintiff argues that James' statement cannot be true because he concludes the payments had not been made on the mortgages in February, 1932. To support this contention plaintiff cites the record that the $1,000 mortgage was released July 7, 1933, and that the $2,000 mortgage, to a new mortgagee was not given until April 7, 1934. This evidence does not show when the indebtednesses were paid which were secured by the mortgages given in 1929.

James testified that he paid the $1,000 mortgage before it was due. No date of payment is shown. He is shown further to have paid interest due on the $5,000 mortgage on December 9, 1932, and June 6, 1933, each receipt being for the sum of $125. The interest rate is not shown in the mortgage. However assuming as plaintiff contends, that the indebtedness secured by the $1,000 mortgage was not paid until July, 1933, and the indebtedness secured by the $5,000 mortgage not paid until April, 1934, plaintiff has not been harmed. The record shows that the indebtedness was reduced $4,000 and the testimony of James is that $2,000 of the money he took from Robert's account in February, 1932, went to that payment. Even if James had not then made the payment he was obligated to do so. The trial court held that plaintiff's judgment was a lien upon that land, and these payments went to reduce the mortgage liens which

were ahead of his judgment. That $2,000 of Roberts' has gone to the benefit of the plaintiff.

On May 9, 1932, Robert made his intangible tax return showing "bank deposits" $7,000 and again on May 15, 1933, he returned "bank deposits" $3,000. James in his intangible tax return made April 10, 1931, did not show these debts of Robert's to him. We do not consider these returns to be controlling on the issues presented by this appeal.

Plaintiff further contends that the testimony of James is discredited because James did not offer the records of his own bank account in evidence in corroboration of his own testimony and argues that the failure to do so raises an inference that those accounts would have established the fact that James' testimony is not true. The record shows that the cashier of the bank where James did business was subpoened and testified in rebuttal for plaintiff. He testified that he had in the courtroom all of the ledger sheets of accounts of Robert and James which the bank had. A recess was taken to permit plaintiff's attorney "to examine the records produced." The cashier was not thereafter examined as to those accounts nor were they offered in evidence. We see no merit in this contention.

It is to be remembered that these defendants were testifying as to events which had occurred 10 years before. The trial court saw them as they testified and heard their testimony. The trial court accepted it as true. We see no reason for doing otherwise.

Plaintiff, in argument, poses the question as to why James withdrew this money from the bank in February, 1932, put it in a safety box and paid some of the obligations in cash. Without any inference of fraud the answer may be found in the economic conditions that existed in Nebraska in February, 1932. Plaintiff argues that it was done as a part of a secret plan and scheme to dispose of this money so that no record could be found. Plaintiff's contention is that this record from the sale of the 160 acres down to date shows a fraudulent intent and purpose on the part of these two brothers to hinder and defraud plaintiff and to prevent the enforcement of his judgment.

To hold for the plaintiff it would be necessary for us to find that four months before there was a default in the Box Butte county indebtedness and over seven years before there was a deficiency judgment entered there, these defendants were clever, scheming and foresighted enough to anticipate that judgment, sell the 160 acres and convert the proceeds to cash and to hide the cash. Further it would be necessary to find that thereafter when foreclosure action was brought in Box Butte county and two weeks after service of summons upon Robert, these two brothers, to further accomplish their intent to hinder and defraud, brought the money out of hiding, purchased real estate with it, immediately placed the deed of record and covered up only to the extent of placing the title in James' name instead of Robert's, where it remains to this day. It would be further necessary to find in effect that while they were clever and foresighted enough to do those things, yet they, having such a fraudulent intent, were dumb enough to leave title to an undivided half interest in 80 acres of land remain of record in Robert's name in the community and county where he lived, throughout this whole period and for over two years after a deficiency judgment was rendered.

The facts of record do not warrant any such findings. Any such inferences are affirmatively overcome by the evidence of the defendants. If this is Robert's land it should be subjected to the payment of plaintiff's judgment. If it is James' land it should not be. We hold on the facts that the land is James' and as to the 80 acres of land, affirm the judgment of the trial court.

We now return to the matter of the lien awarded to James for taxes and interest paid upon the land held jointly, which the trial court decreed was a lien superior to the lien of plaintiff's judgment.

Plaintiff does not assail the finding as to amounts. He contends that there is no evidence other than James' testimony that he paid these amounts from his own funds and not Robert's funds. We have considered the same reasoning in the prior sections of this opinion. This argument

overlooks the fact that these payments of interest and taxes were made by James almost entirely after Robert had married and was transacting his own business and handling his own funds.

It is next argued that the payments were voluntarily made; that one cotenant may pay taxes upon his undivided interest and is under no obligation to pay the taxes of another cotenant; that there was no agreement for the repayment of these taxes and no debtor and creditor relationship established. This argument overlooks the essential relationship between these two brothers, the dependency of Robert upon his brother James, and the brother's burden that James had carried throughout the years. Under such circumstances we do not think that the hard and fast rules relied upon by plaintiff should be applied. Justice requires that courts recognize the circumstances under which these payments were made. This court has long followed the rule, "The doctrine of subrogation is not administered by courts of equity as a legal right, but the principle is applied to subserve the ends of justice and to do equity in the particular case under consideration. It does not rest on contract, and no general rule can be laid down which will afford a test in all cases for its application. Whether the doctrine is applicable to any particular case depends upon the peculiar facts and circumstances of such case." *Equitable Life Assurance Society v. Person,* 135 Neb. 800, 284 N. W. 260.

Plaintiff's argument as to the payment of the taxes and interest also overlooks another factual situation. The two defendants, as tenants in common, were the makers of a mortgage to secure the payment of $2,000. According to the mortgage terms the makers were liable for the payment of the interest and required to pay the taxes. By its terms, if they failed to do so the entire sum secured by the mortgage could have been due and collectible at the option of the mortgagee. James was required to pay the taxes on Robert's share and interest on the common obligation. He could not protect his own interest in the property except by making these payments.

In *Winn v. Winn*, 131 Neb. 650, 269 N. W. 376, this court determined a case where a tenant in common had paid taxes on the common property. We held that the tenant in common who paid the taxes was entitled to maintain suit for contribution against his cotenants for their proportionate share, and granted him an equitable lien against the interests of his cotenants.

There appears to be no merit in this contention of the plaintiff.

Plaintiff further calls our attention to the testimony of James that when he purchased Robert's interest in the 80 acres, in determining how much he would pay Robert, he, James, took into consideration the fact that he had been paying the interest and taxes. Plaintiff argues that when the conveyance was made by Robert to James the obligation for taxes and interest was settled and further that James' claim to a lien merged in the fee when it was acquired by James. Plaintiff appears to have overlooked the fact that the conveyance from Robert to James has been set aside by the trial court. The plaintiff is not entitled to rely upon a settlement and a merger, where the transaction at plaintiff's request has been set aside and held for naught.

The judgment of the district court is affirmed.

AFFIRMED.

YEAGER, J., participating on briefs.

LOVINA PIXA, APPELLANT, V. GRAINGER BROTHERS COMPANY ET AL., APPELLEES.

12 N. W. (2d) 74

FILED NOVEMBER 26, 1943. No. 31702.

1. **Workmen's Compensation.** In a workmen's compensation case, where the evidence fails to show a causal connection between an accident suffered by an employee and his instantaneous death from heart disease some time thereafter, there can be no award of compensation.
2. ———. The burden of establishing by a preponderance of the evidence that an accident contributed directly to the death of an

employee is not met by mere guess, surmise, conjecture, speculation, or possibility.

3. ———. The proof of an accident arising out of and in the course of employment must be made by sufficient legal evidence leading to the direct conclusion, or a legal inference therefrom, that an accidental injury occurred and caused the disability.

APPEAL from the district court for Lancaster county: JOHN L. POLK, JUDGE. *Affirmed.*

Good & Simons, for appellant.

Morse & Buschenfield and *Baylor, Tou Velle & Healey, contra.*

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

PAINE, J.

This is a workmen's compensation case, in which the action was dismissed April 20, 1942, at a hearing before one judge of the compensation court, and on rehearing before the full compensation court a dismissal of the claim was entered July 13, 1942, which action was affirmed by the district court May 6, 1943, from which order the plaintiff has appealed to this court.

The widow, as plaintiff, brings this action for the death of her husband, who had been employed for a number of years by Grainger Brothers Company, and at the time of his death was driving a delivery truck for said firm.

There is not much dispute about the following facts: The deceased was treated by Dr. John C. Thompson for heart disease on May 31, 1940, at which time his condition was so serious that he was taken to the hospital, and from May 31 to June 7 he was treated there. He was unable to breathe at night, unless propped up. He had insufficient power in his heart to provide adequate circulation. The doctor continued to see him, and gave him digitalis glucosides, which he was to continue taking, and diagnosed the heart condition as acute myocarditis, which is an inflammation of the heart muscle, which may have followed a recent

attack of influenza. An X-ray examination also showed an infection from diseased teeth, several of which were removed later that summer. The doctor advised rest in bed, and also that he should not do any hard work. He went back to work about July 1, telling the doctor that in order to eat he had to work. Dr. Thompson testified that he never complained of pain, which was rather unusual, and that in such a condition either the heart muscle gradually fails and cannot be brought back, or he might have had an acute dilation of the heart, which would result in sudden death.

Henry Goe, his foreman, testified that from the time he went back to work until his death he appeared to have slowed down, and while delivering groceries for his employer he dropped dead on January 30, 1941. No post-mortem was performed, and no physician was called, and the required death certificate was made out by the county attorney, which recites that death occurred at 5:20 p. m., January 30, 1941, from a "Sudden heart attack causing death before a physician could be called; no marks of violence, no sign of foul play."

The plaintiff filed a petition with the compensation court on July 23, 1941, against Grainger Brothers Company, a corporation, and Employers' Mutual Liability Insurance Company of Wisconsin, as defendants, alleging that the deceased came to his death as a direct result of injuries received in an accident.

The evidence relating to this accident may be summarized about as follows: On December 19 or 20, 1940, at about 10 o'clock in the morning, the deceased was carrying half a crate of head lettuce into the Y. M. C. A. cafeteria in Lincoln and slipped on ice in the alley east of the building, and fell with his shoulder against the building, and the crate of lettuce fell on him, injuring his back. However, he continued to work until about 3:45 in the afternoon.

Henry Goe, truck foreman of Grainger Brothers Company, testified that on the day of the accident deceased came back and reported that the lettuce had fallen on him and hit him in the chest or stomach, and that a report of the ac-

cident was made to the insurance carrier, setting out that deceased had slipped on the ice and fell, twisting his back, and that claim was made for compensation for sprained back.

Disability began on December 20, and compensation began on December 27 and stopped on January 2, for five-sevenths of a week, at $14 a week, and a claim of $10 compensation, $22.75 medical expense, making a total claim of $32.75, was paid. It is claimed by the plaintiff that deceased went back to work before he had entirely recovered from this injury.

Henry Goe testifies that he was short-handed; that two of his employees had gone to the Rose Bowl game in California, and he called deceased by telephone and asked if he could come back to work because he needed him, and that he acted stiff in the back for several days until he got loosened up, and in a week or two he got in stride again and did his usual work of truck driving and delivering groceries and food; that a short time before his death he saw him when he was loading up his last truckload, with cases of groceries which might weigh from 5 pounds to 60 pounds.

The plaintiff testified that the shortness of breath of her husband continued until the day of his death, and he had to be propped up with a pillow every night after the accident. Her contention is that his death was directly contributed to by the accident which he had on December 19, and in support thereof plaintiff produced the evidence of a duly qualified medical expert whose specialty was internal medicine and diagnosis, including diseases of the heart. He did not treat nor see the deceased, but the facts came to him from hypothetical questions which set forth the material parts of the testimony of the witnesses. He gave as his expert opinion that the cause of death in this case was an injury to the heart received at the time of the accident, for the fall on the ice caused a strain which could have injured his heart in one of three ways, by its touching the backbone, or the sternum, or the severe strain while he was falling; that the fact that he had to be propped up in bed, had

chest pains and shortness of breath immediately following the accident supported this contention. This expert witness gave it as his positive opinion that the accident aggravated his previously existing heart condition.

Deceased went to Dr. Thompson after this accident, who testified from his office notes, showing that deceased fell by the Y. M. C. A. building about 10:00 a. m., but continued to carry sacks of potatoes and other loads until about 3:45 p. m., when he was forced to stop by the pain in his back. Examination disclosed marked muscle spasm on the left side of the back, and tenderness over the third lumbar vertebra (in the small of the back). His spine was X-rayed and his back taped, and he was advised to go home and have absolute rest in bed for two or three days. He did not at that time treat him for any heart condition at all.

On December 21 he came to the office for a heat treatment of about 30 minutes over the lumbar region, and another such treatment was given on the 23d, while on the 24th the tape was removed and the patient was given a diathermy (penetrating type of electrical energy) treatment; which was repeated on the 26th, 27th and 30th days of December, at which time he was able to sleep without much distress, and the pain in his back had greatly subsided. On the 31st he came in for observation, at which time he showed no evidence of muscular spasm, the mobility was satisfactory, no tenderness on direct pressure on the back, and deceased wanted to return to work, and Dr. Thompson told him he thought it would be all right. He said the company was short of help, and had telephoned him, and "I told him if he could dodge heavy lifting for a few days that he would probably get along all right."

Dr. Thompson further testified that in taking these light treatments the deceased had to lie on his back for 20 to 30 minutes, and that he did not have any shortness of breath when he walked into the office or while taking the treatments.

Dr. Thompson testified that the accident of December 19 had nothing to do with his death on January 30. He testi-

fied that when he examined him after the accident he did not have any bruises on his chest, or make any complaint about his chest; that when deceased fell on his back he had the lettuce in his arms and it just fell with him. His answer to question 124 was: "Well, I can't say—of course, the whole matter is speculation, but I can't see, with the history we obtained and the findings, that there was any definite connection between his accident and his heart." He testified further: "Q. Well, would you say that it was possible that it had something to do with his passing away at this particular time? A. As I said before, all you can do is speculate about the cause of Frank's death. Perhaps there is a remote possibility that what you have to say should be considered. * * * Q. Would you say positively that he would have passed away on the 30th of January, doing work as he was doing, irrespective of whether he had the accident? A. That is exactly my idea. In other words, this thing was anticipated before this accident ever occurred; we were afraid such a thing might happen; and the story as we got it was that Frank was doing very hard work on that day."

For a reversal in this case, the plaintiff's attorney cites in the body of his brief several of our decisions in somewhat similar cases, upon which he relies. We will examine those cases. In *Skelly Oil Co. v. Gaugenbaugh*, 119 Neb. 698, 230 N. W. 688, an employee was lifting a stove and sustained an accidental injury, which appeared in the form of serious hemorrhage in his right groin and leg. He was in several hospitals, and suffered a long and dangerous illness immediately following this accident. In the text of the opinion it is said generally that, from a consideration of all the evidence, plaintiff suffered a strain, which was the immediate and proximate cause of his condition. The defense was that his condition was due to purpura, a serious disease of the blood and skin, and that the accidental strain caused this condition to light up and accelerate the results of the accident. It was held that "It is sufficient to show that the injury and preexisting disease combined to

produce disability, and not necessary to prove that the injury accelerated or aggravated the disease, in order to satisfy the requirement of the statute that the accident arose out of the employment."

The above syllabus was also used by this court in the case of *Palmer v. Sample,* 141 Neb. 36, 2 N. W. (2d) 583, in which an employee of a garage slipped on a cement stairway which had been scrubbed with caustic, and rolled down a flight of steps. He went home and was later daily treated at a doctor's office with heat lamp treatment for five weeks, and the injury lighted up a dormant case of osteoarthritis of the vertebral column, which resulted in continued disability. In this case compensation was awarded by the compensation court, and was also awarded by the district court, and the injury caused by the accident was proved to be the proximate cause of his disability.

Then appellant discusses at some length *Schirmer v. Cedar County Farmers Telephone Co.,* 139 Neb. 182, 296 N. W. 875, in which an accident produced a coronary thrombosis as a direct result, and compensation was allowed.

Appellant cites, but does not discuss, two other cases, one being *Chatt v. Massman Construction Co.,* 138 Neb. 288, 293 N. W. 105, in which an employee of a construction company was engaged in a revetment project along the Missouri river and slipped and fell into the river, injuring and bruising his right leg, and in wet, cold clothing he continued to work, exposed to chill, and as a direct result of the exposure, and pain from the accidental injury, he became disabled, and with a high temperature died ten days later. The defense was that he had been afflicted with arthritis, that his death was the result of acute rheumatic fever, and not the result of the accident. However, under the evidence this court affirmed the award.

Then in the case of *Gilcrest Lumber Co. v. Rengler,* 109 Neb. 246, 190 N. W. 578, an employee on July 3, 1920, accidentally suffered a slight bruise on the shin by a bundle of maple flooring falling against his leg, which was not sufficient of itself to cause disability, but three days later, ow-

ing to a diseased condition of his blood, the black and blue place broke open and formed an ulcer, which discharged and did not heal until November. Judge Redick discussed no Nebraska cases, but many from other states, and held that the plaintiff could recover, for the evidence showed that the accident was the proximate cause of the resulting disability.

From this analysis of the cases relied upon by the plaintiff for a reversal, we are unable to accept any of them as authority for a recovery in the case at bar, for each one of them can be very clearly distinguished from the facts in the case before us.

In our opinion, the reading of the evidence in the instant case leads to the conclusion that there was no connection between the accident the deceased had in slipping on the ice and twisting the small of his back on December 19 and his very unfortunate death occurring on January 30.

Any possible connection between the slight accident to his back, from which his attending physician says he had recovered, and his death would be a mere guess, surmise, conjecture, speculation, or possibility.

This is not sufficient, for under our law it is required that the plaintiff prove by a preponderance of the evidence, before compensation can be awarded, that personal injury to an employee must have been caused by an accident arising out of and in the course of his employment.

Such facts must be proved by the plaintiff by sufficient legal evidence leading to the direct conclusion, or a legal inference therefrom, that such an accidental injury occurred and caused the disability. See *Duncan v. Weidman, ante,* p. 864, 11 N. W. (2d) 537; *Rose v. City of Fairmont,* 140 Neb. 550, 300 N. W. 574; *Uribe v. Woods Bros. Construction Co.,* 124 Neb. 243, 246 N. W. 233; *Price v. Burlington Refrigerator Express Co.,* 131 Neb. 657, 269 N. W. 425; *Roccaforte v. State Furniture Co.,* 142 Neb. 768, 7 N. W. (2d) 656; *Gilkeson v. Northern Gas Engineering Co.,* 127 Neb. 124, 254 N. W. 714; *Mullen v. City of Hastings,* 125 Neb. 172, 249 N. W. 560; *Wayne County v. Lessman,* 136 Neb. 311, 285 N. W. 579.

In the opinion of this court, the same order entered by a judge of the compensation court, and by that court sitting *en banc*, and by the district court, dismissing the petition, was in each case correct, and the judgment of dismissal is hereby affirmed.

AFFIRMED.

SIMMONS, C. J., and CHAPPELL, J., concur in the result.

MINNIE L. MYERS, APPELLEE, V. ROSENBERG BROTHERS ET AL., APPELLANTS.

12 N. W. (2d) 77

FILED NOVEMBER 26, 1943. No. 31693.

1. **Husband and Wife.** A contract of a married woman can only be enforced against the separate estate which she possessed at the date of the contract.
2. ———. Record examined, and *held* that the evidence fails to show that the plaintiff, a married woman, carried on a separate trade or business on her sole and separate account.

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

Cook & Cook, for appellants.

Blackledge & Sidner, contra.

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

MESSMORE, J.

This is an action in equity to cancel, remove and extinguish a judgment in so far as the same is, or purports to be, a lien, encumbrance or cloud upon the plaintiff's title to real estate, described in the petition.

The plaintiff's petition discloses a default judgment against her husband and herself, entered in the county court of Dawson county on August 13, 1924, in an action brought by the defendants in the present action on September 20, 1923. The judgment was in the amount of $670 and was

for a tractor alleged to have been purchased by the plaintiff and her husband. Transcript of the judgment was filed in the district court and, by issuing execution at proper times, has been kept alive. The petition then alleged that the plaintiff did not purchase the tractor or enter into any agreement of any kind or obligate herself to do so; further, that Mollie B. Goff, plaintiff's mother, died testate November 12, 1932, owning certain real estate; that plaintiff was devised an undivided two-ninths interest, subject to the life estate of her father, who died testate December 14, 1941; that she then inherited an additional one-ninth interest in the real estate; that subsequently she, with others, entered into a contract to sell the real estate so inherited; that the purchaser claimed the judgment constituted an encumbrance on her interest in the real estate; hence this suit.

The defendants' answer alleged that the plaintiff and her husband each owned a separate 160 acres of land in fee; that on September 25, 1919, the plaintiff and her husband went to defendants' place of business to jointly purchase a farm tractor for the amount of $1,000; that $400 was paid on this amount and suit was brought for the balance; prayed a dismissal of the plaintiff's petition and that defendants be entitled to collect the judgment. The reply was a general denial and a specific denial with reference to the purchase of the tractor. The trial court found generally in favor of the plaintiff and against the defendants, granting the prayer of plaintiff's petition. From this judgment the defendants appeal.

Defendants' contention is that the plaintiff, a married woman, carried on the trade and business of farming on her sole and separate account, and, in so doing, had the right to enter into any contract to the same extent as a married man with relation to her real and personal property; further, that a married woman can sue and be sued in the same manner as if unmarried, and, if the husband and wife be sued together, the wife may defend in her own right and, in the event the husband fails to defend, she may defend for him also; citing the appropriate provisions of the

statute, which are conceded by the plaintiff to be the law.

An analysis of the record discloses that, while plaintiff and her husband each owned 160 acres of land, they farmed jointly. The plaintiff aided and assisted in the purchase of the real estate from money received from her parents and money she had earned previous to her marriage. Her husband had little money. The farming was over the entire half-section, with no definite line fences, and carried on in a general manner for the welfare and the benefit of the entire family who assisted and helped in the work. While some of the money from the sale of produce and stock was divided between the husband and wife, each taking a proportionate share and the farming implements being purchased by both, such implements were used jointly on the farm for the benefit of all.

The plaintiff testified that at the time of the alleged purchase she did not know of the purchase, had no part in it and signed no contract or other papers, indicating or implying such indebtedness. This testimony is borne out by the record. While the plaintiff rented her farm to her son in 1917, and he paid her one-half of the grain rent, using all of the farm implements, and also assisted his father in farming the 160 acres which the father owned, the evidence is insufficient to show that the plaintiff carried on the business of farming on her sole and separate account, but *contra,* the plaintiff, her husband and three children were living in their farm home, operating their farm in the same manner as many farm families in this section of the country, working together for the common good. Under the facts in this case, we conclude that the contention of the defendants, above stated, fails, for the want of sufficient evidence, to establish that the plaintiff, as a married woman, carried on a trade or business on her sole and separate account.

The defendants next contend that the judgment in the county court against plaintiff and her husband, being in default, may be the basis for a plea of *res judicata* or estoppel in a subsequent action involving the same matter and

is as conclusive on whatever is essential to support it as a judgment entered after answer and contest; citing *Jones v. Knosp,* 91 Neb. 224, 135 N. W. 1049. In that case there was some language used which gives credence to the position that, by failure to prove coverture in the original action, plaintiff is now estopped from setting up any defense to the judgment. However, in the case of *Giltner State Bank v. Talich,* 115 Neb. 236, 212 N. W. 536, this court, in speaking of *Jones v. Knosp, supra,* said: "Under the peculiar facts of that case, the conclusion reached was right; but the rule was perhaps too broadly stated, and so far as the doctrine announced therein runs counter to this opinion it is overruled."

In the instant case, it will be noted that the property involved in the action was not acquired by the plaintiff until 1932, and not finally until the death of her father in 1941. In other words, she did not have any interest in the real estate here involved at the time of the alleged purchase of the tractor. This brings us to the sole essential question for determination in this case, and that is: whether or not real estate subsequently inherited by the plaintiff from her parents is subject to the payment of a judgment entered by default against her husband and herself for a tractor sold to the husband during coverture. On this proposition the following authorities are applicable:

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. See *Giltner State Bank v. Talich, supra.* And on the proposition directly involved, the court in *Curley v. White,* 129 Neb. 829, 263 N. W. 134, said (p. 837): "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." Citing *Giltner State Bank v. Talich, supra;* also *Kocher v. Cornell,* 59 Neb. 315, 80 N. W. 911. In the latter case the court held:

"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." In the instant case, there is nothing in the record to disclose that this plaintiff bound her separate estate or any estate she might acquire in the future.

Other assignments of error are set out but need not be determined in view of our holding.

AFFIRMED.

VIVIAN G. LANDRUM, APPELLEE, V. RUTH RODDY, APPELLANT.
12 N. W. (2d) 82

FILED NOVEMBER 26, 1943. No. 31594.

1. **Negligence.** The question of the existence of gross negligence must be determined from the facts and circumstances in each case.
2. ———. Gross negligence, within the meaning of section 39-1129, Comp. St. Supp. 1941, means negligence in a very high degree, or the absence of even slight care in the performance of a duty.
3. **Trial.** An instruction, setting forth certain statutes regulating the use and operation of motor vehicles upon the highways, which contains that part of the statutes which provides that a violation thereof is a crime for which the violator should be punished is not error. In so far as *Missouri P. R. Co. v. Geist*, 49 Neb. 489, 68 N. W. 640, is in conflict herewith, the same is overruled.
4. **Negligence.** A violation of statutes regulating the use and operation of motor vehicles upon the highways is not negligence *per se*, but evidence of negligence which may be taken into consideration with all the other facts and circumstances in determining whether or not negligence is established thereby.
5. ———. When an action under the guest statute is based on gross negligence, the comparative negligence statute is applicable. *Sheehy v. Abboud*, 126 Neb. 554, 253 N. W. 683, is overruled in so far as the same is in conflict herewith.
6. ———. The maxim *"volenti non fit injuria"* means: If one, knowing and comprehending the danger, voluntarily exposes himself to it, though not negligent in so doing, he is deemed to have assumed the risk and is precluded from a recovery for an injury resulting therefrom. The maxim is predicated upon the theory of knowledge and appreciation of the danger and voluntary assent thereto.

7. ———. Within the limits of its terms the maxim of "*volenti non fit injuria*" is applicable to negligence actions in this jurisdiction.
8. ———. In actions based on negligence the defense of assumption of risk under the maxim "*volenti non fit injuria*" is not inconsistent with the defense of contributory negligence.
9. ———. Under the facts of this case the question of whether or not the conduct of the appellee is such as to defeat any right to recover, to which she may be entitled, is one of contributory negligence and should be submitted to the jury.

APPEAL from the district court for Adams county: FRANK J. MUNDAY, JUDGE. *Reversed.*

Stiner, Boslaugh & Stiner, for appellant.

Blackledge & Conway, contra.

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

WENKE, J.

This action was commenced in the district court for Adams county by Vivian G. Landrum, as plaintiff, to recover damages for personal injuries received in an accident occurring while riding as a guest in the car of Ruth Roddy, also known as Ruth Roddy Wood, defendant, who she alleged caused the accident by operating her car in a grossly negligent manner. Upon the issues joined the matter was submitted to the jury and verdict being rendered in favor of the plaintiff and judgment entered thereon, the defendant appeals.

For the purpose of this record the plaintiff, Vivian G. Landrum, will be referred to as the appellee and the defendant, Ruth Roddy Wood, will be referred to as the appellant.

While the issues presented by the pleadings contain the question of the defendant's liability under the guest statute for injuries caused by appellant driving her car while being under the influence of intoxicating liquor, however, there is no evidence to sustain this allegation and the trial court was correct in not submitting that question to the jury. This, of course, does not affect the evidence of her

drinking with reference to the question of whether or not she was guilty of gross negligence.

The pleadings admit that the accident complained of happened on the 26th day of September, 1941, at about 9:00 p. m. while appellee was riding as a guest of the appellant in her Pontiac car while they were traveling from Pueblo, Colorado, to Lincoln, Nebraska, to visit relatives and friends. It occurred at the southeast edge of the city of Hastings, Nebraska, at a place where U. S. Highway No. 6 forms a Y with Elm avenue and that as a result thereof the appellee was injured.

The evidence discloses that appellee is the wife of John P. Landrum, a traveling salesman. That about March 1, 1941, they moved to Colorado Springs, Colorado, but that previous thereto they had become acquainted with Ruth Roddy, who subsequently thereto on July 5, 1941, married Mr. Wood and who is the appellant Ruth Roddy Wood. After the Landrums moved to Colorado Springs, which is about 42 or 43 miles from Pueblo where the appellant lived, the acquaintanceship between the appellee and appellant grew very quickly. After May 1, 1941, they were constantly together over weekends either one going to Pueblo or the other to Colorado Springs, each having her own car. The appellant was secretary-treasurer of the Western Acceptance Corporation located in Pueblo. Some time in June the appellee moved most of her clothes from Colorado Springs to Pueblo into the apartment occupied by the appellant and from then on spent a great deal of her time in appellant's company. Commencing in July and extending through until the time of the accident, with the exception of when she had an operation in the middle of August, the appellee, who had been trained as a stenographer, had part time work with the same company for which the appellant was secretary-treasurer. On July 5, 1941, the appellant was married and took about a two week wedding trip to the state of Washington where she left her car with her husband and thereafter the appellee's car was the one used by these parties for driving until the day of the accident. In con-

nection with the appellant's work it was necessary as a matter of business that she contact the dealers of automobiles, who were their clients, and as such she visited various places in Colorado and New Mexico. She made such a trip in April, 1941, to Trinidad, Colorado, which was about 90 miles from Pueblo and on which trip the appellee went with her. The evidence shows that they drank together on this trip, although appellee denies there was any drinking in the car. The same thing is true with reference to a trip about the last week of July when they attended the Sky High Stampede at Monte Vista, Colorado, some 140 miles southwest of Pueblo. On the 4th or 5th of September appellee's son drove appellee and himself to Roswell, New Mexico, where the son was to attend a military school. Appellant took a train to Roswell, which is some 500 to 600 miles from Pueblo, to drive the car back as the appellee was not permitted to drive the car after the operation on her foot. They left Roswell on Friday afternoon and drove to Amarillo, Texas, where they stayed until Sunday afternoon when they drove home. On this trip drinking was indulged in. It appears from the evidence that on all of these trips and on all occasions, as the appellee states, the appellant was a good fast driver and she never complained about the speed at which the appellant drove, nor did she object to appellant driving her car. As to the trip made on September 26, 1941, during which trip the accident involved in this case happened, it is generally shown by the evidence, without dispute, that they left Pueblo about 12 noon mountain time and arrived in Hastings, Nebraska, where they stopped at the J. H. Wehn filling station about 7:45 mountain time or 8:45 central time. This distance is about 460 to 470 miles. They stopped at either two or three places on the route of travel to have the car serviced. This would give them an average driving speed of a little over 60 miles an hour without considering time out for stops. When they left Pueblo they put a bottle of Bourbon, a quart of buttermilk, and two sandwiches in the car, which sandwiches they ate shortly after they left Pueblo.

There is, however, this dispute in the evidence. Mrs. Landrum testifies that they opened the bottle of Bourbon shortly after they left Colorado Springs and each took a drink, that the appellant then took three or four drinks between there and Alma, Nebraska, where they arrived about 6:30 mountain time where they each took another drink. That after they had stopped in Hastings, where they stayed for about fifteen minutes and just before they left, the appellee suggested they stop and eat and stay there overnight, but the appellant suggested they eat in Lincoln. Shortly before leaving the station the appellant took a drink and then shortly thereafter while driving away from the station but before reaching the viaduct took the bottle and took another drink while the appellee held the steering wheel. Appellant stated, it being only about 100 miles to Lincoln they would be there in a few minutes. Appellee also testifies that while traveling during the day on two different occasions she complained about the speed at which they were traveling, not because she thought it was dangerous but because it made her nervous. After they left the filling station at Hastings she was sitting on her foot and fixing her cosmetics when she looked at the speedometer as they were going down the viaduct, the north end of which is some four or five blocks from the scene of the accident, and noticed they were going about 80 miles an hour and again protested to the appellant of the high speed, especially at night. She remembers very little about the accident other than when they reached the Y where Elm avenue extends north, the appellant failed to make the curve to the right on Highway No. 6 and continued straight ahead into the ditch on the right side of Elm avenue where the car upset.

The appellant testifies that after they left Pueblo they opened the bottle of Bourbon at Goodland, Kansas, where they each had a drink and then did not have another drink until they reached Alma, Nebraska, where each of them took another, which was the last drink they took before the accident, and that each of them had two drinks during the

entire trip. That after they had the car serviced in Hastings and as they proceeded on, the appellee made no suggestion as to eating and she did not take a drink of Bourbon but that she merely drank a bottle of coke while at the station. That as they were going down the viaduct the appellee was sitting with one leg under her and her hand resting on her knee facing her and fixing her finger nails from the light of the glove compartment. Noticing that she was going about 45 miles an hour, she mentioned to the appellee that the road was new to her and asked the appellee to help her watch the road to see which way to make the turn. That she then released her foot pressure on the accelerator. That as they approached the Y in the road Elm avenue, which extended north, seemed to be the better lighted and she continued on it and did not notice that it was a gravel road until she had gone onto it and then thought she would cut across the triangular space in the Y by turning to the right and was in the ditch before she realized it was too deep. She then attempted to turn back onto Elm avenue to the northeast and in doing so the car went over on its top. She then turned off the ignition and they got the bottle of liquor and put it in one of the bags in the car and honked the horn. Appellant denies that at any time during the trip the appellee had protested against the speed at which she was driving, which during the day on good stretches of the road had been between 80 and 90 miles an hour.

The weather was good and the car was practically new and in good working order. It ended upside down in the west part of the ditch east of Elm avenue facing northwest with its top buried about a foot in the dirt. Its gas tank, filled with gas, was in the ditch west of Elm avenue and about 40 feet from the car.

Are the facts sufficient to sustain a finding that the appellant was guilty of gross negligence? The record discloses, if believed by the jury, that the appellant had been driving her car at a high rate of speed during the entire trip and that shortly before the accident she was going approximately 80 miles an hour which speed she continued to

maintain until the accident happened. That she was traveling in the night time over a road with which she was not familiar. That she had been drinking intoxicating liquors during the entire trip. That she became confused when she arrived at the Y in the highway and took the wrong road. That she then attempted to cut across the island in the Y to get back to the highway and ran into a ditch and upset. We have held in many cases that the question of the existence of gross negligence must be determined from the facts and circumstances in each case. We therefore conclude that under the facts as disclosed by the record the question of whether the defendant was in this case guilty of gross negligence is for the jury.

The appellant contends that this action being based on gross negligence, the definition thereof contained in Instruction No. 5 not being in the language of the meaning thereof as stated in *Morris v. Erskine,* 124 Neb. 754, 248 N. W. 96, such was prejudicial error and grounds for reversal. The definition as contained in Instruction No. 5 is as follows: "'Gross negligence' is such an absence of care on the part of the person charged in failing to avoid causing or inflicting injury as may be described as reckless and such as indicates a reckless disregard for the consequences. It is a high degree of negligence." In *Morris v. Erskine, supra,* we said: "Gross negligence means great or excessive negligence; that is, negligence in a very high degree. It may be said that it indicates the absence of even slight care in the performance of a duty, * * * ," and this definition has been approved in many of our decisions since that opinion. However, there are other decisions of this court defining gross negligence which do not use the exact language of the definition in *Morris v. Erskine, supra,* but do have the same meaning. None of these definitions refer to the requirement of the act as being reckless, nor do we think any such requirement was intended by the statute. While this requirement may be said to be beneficial to the appellant, however, a careful examination of the entire definition does not bring it within the meaning of our definition

under the statute. While it is not required that an instruction defining gross negligence exactly follow that given in *Morris v. Erskine, supra,* its meaning must be the same. When a definition has been given by this court and continuously approved, no error can be had by using that definition and uniformity in the courts will be obtained thereby.

The appellant further contends that the court committed prejudicial error by including in Instruction No. 6 the fact that by violation of the laws of the road in Nebraska the defendant became criminally liable, citing as authority therefor the case of *Missouri P. R. Co. v. Geist,* 49 Neb. 489, 68 N. W. 640. That part of Instruction No. 6 containing reference thereto is as follows:

"It shall be unlawful for any person to operate any motor vehicle while under the influence of alcoholic liquor. *Any person who shall operate any motor vehicle while under the influence of liquor shall be deemed guilty of a crime, and upon conviction thereof shall be punished.*

"Any person who drives any vehicle in such a manner as to indicate either a willful or wanton disregard for the safety of persons or property is guilty of reckless driving, *and upon conviction thereof shall be punished.*" (Italics ours.)

However, in quoting these statutes, we do not think the trial court erred in including that part which provided that a violation thereof was a crime for which the violator should be punished. In so far as *Missouri P. R. Co. v. Geist, supra,* is in conflict herewith, the same is overruled.

While instruction No. 6 is poorly phrased, however, within the rule announced in *LaFleur v. Poesch,* 126 Neb. 263, 252 N. W. 902, it did properly submit to the jury the question of the effect of the violations, if any, of any statutes regulating the use and operation of motor vehicles upon the public highways. The rule as announced in *LaFleur v. Poesch, supra,* is as follows: " * * * a violation of statutes regulating the use and operation of motor vehicles upon the highways is not negligence *per se,* but evidence of negligence which may be taken into consideration with all

the other facts and circumstances in determining whether or not negligence is established thereby. *Stevens v. Luther*, 105 Neb. 184; *Dorrance v. Omaha & C. B. Street R. Co.*, 105 Neb. 196; *Thomas v. Rasmussen*, 106 Neb. 442; *Taylor v. Koukal*, 107 Neb. 409; *Burkamp v. Roberts Sanitary Dairy*, 117 Neb. 60."

Does the comparative negligence statute, section 20-1151, Comp. St. 1929, which is as follows: "In all actions brought to recover damages for injuries to a person or to his property *caused by the negligence* of another, the fact that the plaintiff may have been guilty of contributory negligence shall not bar a recovery when the contributory negligence of the plaintiff was slight and the negligence of the defendant was gross in comparison but the contributory negligence of the plaintiff shall be considered by the jury in the mitigation of damages in proportion to the amount of contributory negligence attributable to the plaintiff; and all questions of negligence and contributory negligence shall be for the jury," (Italics ours) apply in cases arising under the guest statute, section 39-1129, Comp. St. Supp. 1941, which is as follows: "The owner or operator of a motor vehicle shall not be liable for any damages to any passenger or person riding in said motor vehicle as a guest or by invitation and not for hire, unless such damage is caused by the driver of said motor vehicle being under the influence of intoxicating liquor or because of the *gross negligence* of the owner or operator in the operation of such motor vehicle. For the purpose of this section, the term 'guest' is hereby defined as being a person who accepts a ride in any motor vehicle without giving compensation therefor, but shall not be construed to apply to or include any such passenger in a motor vehicle being demonstrated to such passenger as a prospective purchaser." (Italics ours.) In *Sheehy v. Abboud*, 126 Neb. 554, 253 N. W. 683, we held that the statute was not ordinarily applicable in actions involving the guest statute. In the case of *Morris v. Erskine*, *supra*, we held: "We are of the opinion that in adopting the guest act the legislature used the term 'gross negli-

gence' as indicating a degree of negligence." And in *Rogers v. Brown,* 129 Neb. 9, 260 N. W. 794, we said: "The remedy of a motorist's guest for negligence resulting in personal injuries, as protected by the constitutional provision, that 'every person, for any injury done him in his lands, goods, person, or reputation, shall have a remedy by due course of law,' was not taken away by the guest law. * * * The legislature merely changed the degree of proof essential to a recovery for damages." The statute section 20-1151, Comp. St. 1929, above quoted, refers to all actions caused by the negligence of another. We believe the correct construction of the guest statute to be as stated in the concurring opinion of Judge Harvey in the case of *Koster v. Matson,* 139 Kan. 124, 30 Pac. (2d) 107: "It (the Nebraska guest statute) does not purport to take away from him the defense of contributory negligence which he had to all actions for negligence before the statute was enacted. The obvious purpose of the statute was to relieve him from certain liability, not to remove defenses then available to him. The result necessarily is that what we speak of as contributory negligence remained as a defense in an action for gross negligence under the statute." When an action under the guest statute is based on gross negligence, the comparative negligence statute is applicable. *Sheehy v. Abboud, supra,* is overruled in so far as the same is in conflict herewith.

The appellant pleaded that the appellee had assumed the risks of injury incident to the trip and the court failed to instruct with reference thereto. "A party to an action is entitled to have the jury instructed with reference to his theory of the case, when the pleadings present the theory as an issue and it is supported by competent evidence." *Boice v. Palmer,* 55 Neb. 389, 75 N. W. 849. This presents the following questions: First, is the principle of the assumption of risk available in a tort action based on negligence? Second, if available, is it consistent with the defense of contributory negligence? Third, if consistent with contributory negligence, do the facts here present a ques-

tion of contributory negligence, assumption of risk, or both?

In the case of *Wilkins v. Water & Light Co.*, 92 Neb. 513, 138 N. W. 754, we held: "The doctrine of assumption of risk arises from the relation of master and servant, and does not constitute a defense where that relation does not exist between the parties." And as stated in 38 Am. Jur. 845, sec. 171: " * * * there is authority for confining the doctrine of assumption of risk to cases arising out of the relation of master and servant, or at least to cases involving a contract relationship, * * * ." However, in the case of *Thompson v. Young Men's Christian Ass'n*, 122 Neb. 843, 241 N. W. 565, we held: " * * * risks which are obvious to a person are assumed by her, where, as in the present case, the relation is that of owner and invitee or patron," and this was approved in *Wendell v. Roberts*, 125 Neb. 619, 251 N. W. 264. We have also in *Kelly v. Gagnon*, 121 Neb. 113, 236 N. W. 160, approved the rule announced in *Olson v. Hermansen*, 61 A. L. R. 1243 (196 Wis. 614, 220 N. W. 203): "Guests who accept the hospitality of the driver of an automobile accept whatever risk attends the degree of proficiency of such driver and his usual and customary habits of driving with which they are familiar." This same principle was inferentially approved in *Swengil v. Martin*, 125 Neb. 745, 252 N. W. 207, and *McGrath v. Nugent*, 133 Neb. 237, 274 N. W. 549. From a survey of the many cases on the subject it now seems well established that one who voluntarily assumed the risk of injury from a known danger is barred from a recovery in a negligence case within the maxim of *"volenti non fit injuria."* As stated in 38 Am. Jur. 845, sec. 171: " * * * it is now fairly well settled that the defense of assumed risk may exist independently of the relation of master and servant. The maxim, *'volenti non fit injuria,'* applies in a proper case independently of any contract relation. It is said that one who knows, appreciates, and deliberately exposes himself to a danger 'assumes the risk' thereof. One cannot deliberately incur an obvious risk of personal injury, especially when preventive measures are at hand, and then hold the author of the danger

for the ensuing injury." The maxim *"volenti non fit injuria"* has been defined in *White v. McVicker,* 216 Ia. 90, 246 N. W. 385, as follows: " * * * the maxim meant the defense arising from a specific assent by the party injured to the particular act which, if done without assent, would be a legal wrong. * * * 'conduct as shows a willingness to take the chances of the defendant's action and run the risk; i. e., a general assent to a condition which may or may not give rise to the particular injury.'" Also, as stated in *Gover v. Central Vermont Ry. Co.,* 96 Vt. 208, 118 Atl. 874: "If one, knowing and comprehending the danger, voluntarily exposes himself to it, though not negligent in so doing, he is deemed to have assumed the risk and is precluded from a recovery for an injury resulting therefrom. The maxim is predicated upon the theory of knowledge and appreciation of the danger and voluntary assent thereto." See, also, discussion in 1 Shearman and Redfield, Law of Negligence (6th ed.) 290, sec. 114b. This principle as to the assumption of risk in negligence cases has been adopted in many jurisdictions. See *Gover v. Central Vermont Ry. Co., supra; Freedman v. Hurwitz,* 116 Conn. 283, 164 Atl. 647; *White v. McVicker, supra; Edwards v. Kirk,* 227 Ia. 684, 288 N. W. 875; *Columbia Amusement Co. v. Rye,* 288 Ky. 179, 155 S. W. (2d) 727; *Adams' Adm'r. v. Callis & Hughes,* 253 Ky. 382, 69 S. W. (2d) 711; *Bradburn v. Wabash R. Co.,* 134 Mich. 575, 96 N. W. 929; *Watterlund v. Billings,* 112 Vt. 256, 23 Atl. (2d) 540. This principle operates in a rather strictly limited field. A person, in entering upon an undertaking, may be fully aware of the danger and may use all the care that it is possible to use; in fact, the very danger involved may make him more careful than usual. Certainly in such a case it cannot be said that he is guilty of contributory negligence. However, there is a question involved of whether or not he has voluntarily assumed the risk of the danger. Since the application of the maxim is extending beyond contractual relations the doctrine of assumption of risk, its application must be strictly limited to the terms thereof. Within the limits of its terms the max-

im of *"volenti non fit injuria"* is applicable to negligence actions in this jurisdiction.

Is the defense of assumption of risk in negligence cases under the maxim *"volenti non fit injuria"* consistent with the defense of contributory negligence? A discussion of this distinction is found in 38 Am. Jur. 847, sec. 172: "The defense of assumption of risk is closely associated with the defense of contributory negligence. One who does not exercise ordinary care for his own safety is said, speaking broadly, to assume the risk, that is, take the chance, of being hurt. The defense of assumption of risk is not incompatible with contributory negligence; the two defenses may arise under the same state of facts. Some courts regard the defenses as interchangeable. However, there is a clear distinction between the defense of assumption of risk and the defense of contributory negligence, notwithstanding they may arise under the same set of facts and may sometimes overlap. There is a line of demarcation which, if carefully scrutinized and followed, will allow the court to differentiate between them. Assumption of risk rests in contract or in the principle expressed by the ancient maxim, *"volenti non fit injuria,"* whereas contributory negligence rests in tort. The former involves a choice made more or less deliberately and negatives liability without reference to the fact that the plaintiff may have acted with due care, whereas the defense of contributory negligence implies the failure of the plaintiff to exercise due care. As stated in some decisions, assumption of risk is a mental state of willingness, whereas contributory negligence is a matter of conduct." A further discussion of this will be found in 45 C. J. 1043, sec. 600. As stated in *White v. McVicker, supra:* "While the doctrine of contributory negligence and assumption of risk may arise under the same set of facts and sometimes thus overlap each other, yet we have consistently distinguished them and held that they are distinct and separate and must not be confounded with each other." As stated in *Watterlund v. Billings, supra:* "There is a distinction between the doctrine of contributory negli-

gence and the doctrine of assumed risk, since there may be the voluntary assumption of the risk of a known danger such as will bar one from recovery for injury to person or property, even though in the exercise of due care." To like effect are *Gover v. Central Vermont Ry. Co., supra; Galveston, H. & H. R. Co. v. Hodnett,* 106 Tex. 190, 163 S. W. 13; *Freedman v. Hurwitz, supra; Bradburn v. Wabash R. Co., supra; Fandek v. Barnett & Record Co.,* 161 Wis. 55, 150 N. W. 537; *Biersach v. Wechselberg,* 206 Wis. 113, 238 N. W. 905. Assumption of risk under the maxim *"volenti non fit injuria"* involves a choice made more or less deliberately and negatives liability without reference to the fact that the plaintiff may have acted with due care, whereas, the defense of contributory negligence implies the failure of the plaintiff to exercise due care. It may be said that contributory negligence involves the notion of some fault or breach of duty on the part of the one charged therewith, or a failure to use such care for his safety as an ordinary prudent person would have used under the same or similar circumstances. On the other hand, under the assumption of risk, even though the risk be obvious, the person may be free from any suggestion of fault or negligence on his part. While under a certain set of facts the two may be difficult to distinguish and sometimes seem to overlap, yet when carefully considered they can be distinguished and are distinct and separate and not inconsistent.

The two defenses being consistent, do the facts here present an issue of contributory negligence, assumption of risk, or do they overlap so that both issues should be present? Appellee voluntarily consented to ride in appellant's car from Pueblo to Lincoln knowing from her previous experiences that appellant was a fast driver and in the habit of drinking intoxicating liquors, in fact, appellee joined in the drinking thereof. Upon warning appellant that her fast driving between Pueblo and Hastings made her nervous, the appellee knew that the speed had not been diminished. She realized this at Hastings, where they stopped and other transportation was available, for they had just

traveled from Alma, Nebraska, a distance of about 90 miles after dark in about an hour and fifteen minutes. The evidence also discloses testimony that she warned appellant of the high speed shortly before the accident. As stated in the case of *Van Fleet v. Heyler*, 51 Cal. App. (2d) 719, 125 Pac. (2d) 586: "The true rule on this point is not that a guest must, where he knows the driver's conduct is improper, leave the car merely if he has reasonable opportunity to do so, but that he must leave it, a reasonable opportunity being afforded, if a person in the exercise of ordinary care would do so under the circumstances." And in *Curran v. Earle C. Anthony, Inc.*, 77 Cal. App. 462, 247 Pac. 236: "While one who knows or should know that the driver is carelessly operating the car must use ordinary care for his own safety, and it is incumbent upon him to take proper steps for his own protection, still whether failure to protest against the course being pursued by the driver, or to leave the vehicle, constituted a want of ordinary care which proximately contributed to his injuries was a question of fact to be submitted to the jury, unless from the evidence but one conclusion might reasonably be drawn." To like effect is *Dedman v. Dedman*, 155 Tenn. 241, 291 S. W. 449, and *Gudbrandsen v. Pelto*, 199 Minn. 220, 271 N. W. 465. While situations may arise where the conduct of the guest is such that none of his acts may fall within the category of negligence but where he had full knowledge and voluntarily accepted the risks of those things which caused the accident out of which he was injured and the question be one of assumption of risk, however, generally the question of whether or not the conduct of the guest while riding in the car of his host would preclude him from recovering damage if his host is guilty of gross negligence in causing the same is one of contributory negligence. Under the facts of this case the question of whether or not the conduct of the appellee with reference to her joining with the appellant in the drinking of intoxicating liquor while traveling in a car at a high rate of speed which she knew the appellant was in the habit of doing, the sufficiency of the warn-

ings which she said she gave, her failure to get out at Hastings when the opportunity presented itself and other transportation was available, and her general conduct in riding as a guest in the car while it was traveling in the night time and at a high rate of speed is such as to defeat any right to recover herein to which she may be entitled is a question of contributory negligence and under all of the facts, one that should be submitted to a jury.

For the reasons herein set forth, the judgment and verdict of the lower court are reversed and set aside and the action is remanded to the lower court for a new trial in accordance herewith.

REVERSED.

YEAGER, J., participating on briefs.

ANNA M. LONG, APPELLEE, V. RAILWAY MAIL ASSOCIATION, APPELLANT.

12 N. W. (2d) 113

FILED NOVEMBER 26, 1943. No. 31651.

1. **Appeal and Error.** In reviewing a motion for a directed verdict or dismissal made at the close of all the evidence, this court will assume the existence of every material fact which competent evidence tends to establish and give the plaintiff the benefit of the logical inferences therefrom.
2. **Insurance.** In an action on a policy of accident insurance which provides for payment upon death through external, violent and accidental means effected directly, independently and exclusively of all other causes and further provides there shall be no liability whatever unless death results wholly from the injury nor when any disease, defect or bodily infirmity is a contributing cause of death, the beneficiary cannot recover for accidental death where the effect of a disease existing in the insured at the time of the accident, added to the effect of the accident, caused the death, provided the accident alone would not have caused the death had the insured not been so diseased.
3. **Evidence.** A verdict may not rest on mere possibilities, conjecture, or speculation.

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

Rosewater, Mecham, Shackelford & Stoehr, for appellant.

Tunison & Joyner and *Edward F. Leary, contra.*

Heard before SIMMONS, C. J., PAINE, CARTER, CHAPPELL and WENKE, JJ., and POLK and NUSS, District Judges.

WENKE, J.

This action was commenced in the district court for Douglas county by Anna M. Long, as plaintiff, against the Railway Mail Association, a corporation, as defendant, seeking to recover, as beneficiary, on a certificate of accident insurance issued by the defendant upon the life of her husband, Chester R. Long, for his death caused wholly and alone from sudden, violent and accidental injuries. From a verdict for the plaintiff and judgment entered thereon, including an allowance of attorneys' fee, the defendant has appealed.

For the purpose of this opinion the plaintiff will be referred to as the appellee and the defendant as the appellant.

The appellant contends that the trial court erred in overruling its motion for a directed verdict or dismissal made at the close of all the evidence as the verdict is wholly unsupported by the evidence. Therefore, the first question presented by this appeal is whether or not there is any evidence in the record sufficient to submit to the jury the question of the appellant's liability under the provisions of the policy that it issued to the deceased. In construing the evidence the court will follow the rule announced in *McNaught v. New York Life Ins. Co., ante,* p. 220, 12 N. W. (2d) 108: "This court, in reviewing such decision, will assume the existence of every material fact which the evidence on behalf of the plaintiff tends to establish, including the answers to the hypothetical questions by the doctors, and, in addition, give the plaintiff the benefit of the logical inferences therefrom. See *Zielinski v. Dolan,* 127 Neb. 153, 254 N. W. 695; *In re Estate of Skade,* 135 Neb. 712, 283 N. W. 851."

The evidence discloses that on March 28, 1918, Chester R. Long, the deceased, then being a mail clerk, obtained from the appellant association an accident insurance policy, No. 25843, which he kept in full force and effect at all times and which remained in force at the time of his death and that he named the appellee as beneficiary therein. Sometime in 1932 the deceased retired from his active duties and thereafter occupied his time in taking care of his yard and home, traveling, and in his hobbies of hunting and fishing, of which he was very fond. That on or about the 20th day of July, 1939, the deceased, with his friend William J. Frenking, went fishing on the Platte river near the latter's shack. In the afternoon of said day while wading in the river he received severe cuts and lacerations below his knees from barbed wire which was submerged in the river. He remained at the shack, although not doing any more fishing, until the next forenoon when he returned to his home. The scratches on his legs had become red and inflamed and Dr. Niehaus was called and he prescribed a treatment of epsom salts solution which Mrs. Long applied for three or four days, after which vaseline was used. The inflammation to a large extent receded and the legs became white and scars formed on the injured parts. Dr. Niehaus again called at the house on August 1st and on August 10th deceased called at the doctor's office at which time he discharged him from further treatment. During the first part of this time the deceased was confined to his home but later on was up and about the yard and attended to the other matters such as buying groceries, etc. On August 10th after returning from Dr. Niehaus' office he went to the grocery store to buy groceries and then during the afternoon at about 4 o'clock, while visiting with a friend, the deceased had a stroke affecting the left side of his body. Dr. Bliss was called, but in his absence Dr. Anderson came to the home and shortly thereafter Dr. Bliss arrived. The deceased was taken to the hospital where he lingered until August 15th when he died. An autopsy was performed on the body by Dr. Baker, in the presence of Dr. Bliss and Dr. Niehaus,

whose report is in evidence. At the time of his death the deceased was about 71 years of age and prior to the scratching of his legs while wading in the Platte river had enjoyed an active outdoor life for a man of his advanced years.

The jury returned the following verdict: "We, the jury duly impaneled and sworn in the above entitled cause, do find that Chester R. Long came to his death on the 15th of August, 1939, solely and entirely by reason of an accident whereby he received lacerations to his legs while fishing, and without in any manner having his death caused by reason of any diseased condition existing prior to the time of said accident."

The certificate and the appellant's constitution, which is a part thereof, contain the following provisions which are applicable:

The insurance certificate provides: "If the member * * * receive bodily injuries * * * through external, violent, and accidental means * * * ." And further: "If death shall result from such injuries alone * * * the Association will pay $4,000.00 * * * to Anna Long, his wife." Section 8 (d) of Article XVI of the constitution provides: "Accidental death and accidental injuries are defined to be either sudden, violent death, or accidental injuries, from violent and accidental means alone, resulting directly, independently and exclusively of all other causes * * * . There shall be no liability whatever unless death or disability results wholly from the injury, nor when any disease, defect or bodily infirmity is a contributing cause of death or injury * * * ."

The rule is well settled that policies of this character are to be construed liberally and ambiguous provisions or those capable of two constructions should be construed favorably to the insured and against the insurer. However, plain, explicit language cannot be disregarded nor an interpretation given the policy at variance with a clearly disclosed intent of the parties. Taking the policy herein involved, it admits of but one construction. It provides that the company insures against injury or death through external, violent, and accidental means which results directly, independently and

exclusively of all other causes and there shall be no liability whatever unless death or disability results wholly from the injury nor when any disease, defect, or bodily infirmity is a contributing cause of death or injury.

In the case of *Russell v. Glens Falls Indemnity Co.*, 134 Neb. 631, 279 N. W. 287, involving an accident policy with provisions in effect the same as the policy herein involved, we laid down the rule applicable there as follows: "If the results of the accident, added to the diseased condition of an insured, produced the ultimate total result, under policy having the phrase 'wholly or in part, directly or indirectly,' there could be no recovery. But the disease must be of such a substantial character as to cause or in a substantial way to cooperate with the results of the injury to produce the total disability. Of course, in a case where the disease of which an insured was disabled resulted from the accidental injury, the situation would be different; as also it would be if the insured had a disease and the accidental injury caused the disablement independently of the disease." It should be carefully observed, as stated in the foregoing opinion, that where the policy does not include the provision "There shall be no liability whatever unless death or disability results wholly from the injury, nor when any disease, defect, or bodily infirmity is a contributing cause of death or injury," or a like phrase, that a different rule applies as therein set forth but which has no application here.

The undisputed evidence shows that the deceased had an advanced case of diabetes, an extreme case of arteriosclerosis or hardening of the arteries from the heart and to the brain, had apparently had a previous partial or complete occlusion of the coronary artery, had a severe fibrous or scar tissue condition of the heart and the septum of the heart was in a necrotic condition. The death certificate signed by Dr. Bliss gives as the cause of the death "Cerebral Thrombosis, right Lenticulo Striate artery, with left hemiplegia. General arterio sclerosis. Coronary artery thrombosis. Diabetes Mellitus. Receding cellulitus both legs. Secondary to barb wire injury (recent)." All of the

medical witnesses of both appellee and appellant agree that it correctly reflects the causes from which Mr. Long died. Under the rule announced in *Russell v. Glens Falls Indemnity Co., supra,* the appellee would be precluded from recovery unless he came within one of the exceptions thereto. It appears without question that the insured did not die from any accidental injury independent of these diseases.

The question is, is there any evidence upon which a jury might base its verdict that the diseased condition from which the insured died resulted from the accidental injury?

Dr. F. W. Niehaus testified in part as follows: "Q. Now, what was the nature of this infection that you observed there on his legs? A. We did not make any smears or cultures, but it looked something like erysipelas; not erysipelas, but what we call erysipeloid, an infection probably due to streptococcus. * * * It was a streptococcus infection. Q. These streptococci that you refer to in these wounds, do they in any way affect the lining of an artery? A. Well, they could, yes. Q. You don't know whether it (streptococcus) did or did not (get into the blood stream)? A. I don't know. Q. You found no evidence of streptococcus in the areas occlusioned, did you? A. No. Q. The local infection would not have caused the death had there not have been an arteriosclerosis in the already occluded arteries? A. No, it would not. Q. The occlusion of the arteries was probably hastened by the diabetic condition that the man had, that predisposed him to arteriosclerosis, didn't it? A. Yes. Q. Now, coming back to this necrotic condition which the autopsy discloses in the brain and in the heart, to my understanding you say that the condition could develop within a period of five days? A. Yes, it could. Q. Now, we can say now that this man had a very advanced condition of arteriosclerosis in the arteries around the heart, the aorta, the coronary arteries, and also that artery in the brain, a very advanced case? A. That is right. Q. And that was a very important factor in causing his death? A. That is right." (Our insert.)

Dr. R. W. Bliss testified in part as follows: "Q. Any

scratch or wound on the limbs or legs or on the hands is dangerous because of the possibility of gangrene setting in, in a diabetic? A. Correct. Q. Much more dangerous than it would be in a person who is not diabetic, is that right? A. Yes. We do not like to see any infection in a diabetic. Q. Now, is it your idea that infection may have accelerated the laying down of deposits in the artery? A. Yes. Q. Atheromatous deposits, including the aorta? A. It might have been a factor. Q. So that the death was due to a combination of things, the progressive atherosclerosis and the effect of the infection? A. Correct. Q. If the man had not had established—(interrupted). A. And his diabetes. Q. The three factors then combined to cause his death? A. Yes. Q. Then, as I understand you, Doctor, in your opinion, based on the facts you have testified to here, in your opinion the infection from the barbed wire injuries caused the onset or change of this cerebral thrombosis and coronary thrombosis, is that right? A. Not exactly. I would not go so far as to say it caused. I would say it easily may have been a very definite factor in this process, in this infection. It may very easily have been, in my opinion, a factor to which I have testified."

Dr. Charles Baker testified in part as follows: "Q. What in your opinion, was the cause of his death? A. This man died of myocardial infarction or thrombosis of the cerebral vessels. Q. Do you have an opinion, Doctor, as to the invading general cause from these two things from which you say he died? A. Yes, I have an opinion, sir. Q. What is that? A. I am of the opinion that the cellulitis which this man had might have precipitated it. Q. This necrosis, which you described in the brain, and also in the coronary vessels, you stated, I believe, could develop slowly or rapidly, is that correct? A. That is true. * * * A. You mean atherosclerosis? Q. Yes. A. Yes, it may develop rapidly. Q. Then finally, Doctor, you say that microbes or toxins could come from the legs up through the veins to the heart and then to the lungs and back into the arteries, is that correct? A. It is possible. Q. How far would you go on

that, Doctor? If you say that this man had no arteriosclerosis at all, in that short space of time could that infection in between July 20th and August 15th, as the history as we have it here shows, with no temperature rise, no abnormal pulse rate and only in bed five days, do you think, with the evidence that you have there, the evidence of that infection and the seriousness of it, could have caused all this arteriosclerosis that you found there? A. No, I do not think it would cause that arteriosclerosis that I found there. Q. Do you think it caused that scarring that you say had come from a previous occlusion or partial occlusion? A. No. Q. It is quite evident from the condition you found in these arteries, extreme degree of atherosclerosis, that in the light of that history the atherosclerosis must have been far advanced before the man had the accident? A. Yes, I am of the opinion that he had far advanced atherosclerosis. Q. Then if the infection which you say may have been a factor was in fact the factor, it was only one of several factors causing the man's death, is that right? A. Well, the man had several things that caused his death. The part that the infection played in this at the time he died, I think, was minor, but previous to that the infection may have played its role previous to his death."

From an examination of the foregoing parts of these doctors' testimony and from a consideration of the testimony of the record as a whole, it is undisputed that the insured came to his death by a combination of causes. He had an advanced case of diabetes which made him more susceptible to infection and which hastens arteriosclerosis or hardening of the arteries; he had a severe case of arteriosclerosis which normally develops over a long period of time; he had fibrous scar tissue in the heart; he had had a previous complete or partial occlusion of the coronary artery; he had a necrotic condition of the heart, all of which, according to the testimony, had its part in causing his death and under the rule herein would preclude the appellee from recovering. To say that a jury might, from the evidence here set forth and the record as a whole say all of these conditions

resulted from and occurred after the accident on July 20, 1939, and the infection that developed therefrom, is to permit the jury to come to a verdict based solely on possibilities, conjectures, or speculation which we have said many times is not sufficient to sustain a verdict. *Peabody v. Continental Life Ins. Co.*, 128 Neb. 23, 257 N. W. 482; *Securities Investment Corporation v. Krejci*, 132 Neb. 146, 271 N. W. 287. For the reasons herein stated the motion of the appellant, made at the close of all the testimony, for a directed verdict or dismissal should have been sustained.

In view of the foregoing it is not necessary to discuss other assignments of error.

REVERSED AND DISMISSED.

INDEX

Action.

1. Causes involving different defendants cannot be joined unless each cause affects them all and they have a joint or common liability or interest, and separate causes against separate defendants cannot lawfully be joined. *Sickler v. City of Broken Bow* 542
2. A joinder of causes of action is the uniting of two or more demands or rights of action in one action, and misjoinder is the joinder in one complaint of plural causes which cannot lawfully be joined. *Sickler v. City of Broken Bow* 542
3. Laches is not based on the mere passage of time as is the statute of limitations but it is founded upon inequity resulting from changed conditions of the property or the parties. *State v. Platte Valley Public Power and Irrigation District* 661
4. Under the declaratory judgment act, an equity court has the power to determine the parentage of a child. *Carlson v. Bartels* 680
5. The granting of declaratory relief is a matter within discretion of the court, to be exercised or not according to circumstances of case under consideration. *Carlson v. Bartels* 680

Adverse Possession.

1. A riparian owner is ordinarily entitled to access to the stream, but this is a right that may be lost by the adverse possession of another for the statutory period. *Conkey v. Knudsen* 5
2. The plea of title to land by adverse possession, to be effective, must be proved by actual, open, exclusive and continuous possession under claim of ownership for the statutory period of ten years. *Wells v. Tietge* 230
3. In action to quiet title to realty, evidence was not sufficiently clear and convincing to sustain defendants' claim of title by adverse possession. *Wells v. Tietge* 230
4. Before a party who is in possession under a contract of purchase of real estate may claim title by adverse possession against the holder of a fee simple title, he must prove that he surrendered possession or notified his vendor or the vendor's assignee, by some unequivocal act, that he no longer held possession under contract, and

that he thereafter held land adversely for ten years. *Hadley v. Platte Valley Cattle Co.* 482

Appeal and Error. SEE CRIMINAL LAW. TRIAL.

1. The repetition by trial court of a proposition of law in instructions each time in proper connection with facts or other principles involved, or where it does not appear that the effect was to perplex or mislead the jury, is not ground for reversal. *Van Auker v. Steckley's Hybrid Seed Corn Co.* 24
2. A verdict for damages may be set aside as excessive when it is so clearly exorbitant as to indicate that it was the result of passion, prejudice, mistake, or some other means not apparent in the record, or it is clear that the jury disregarded the evidence or rules of law. *Van Auker v. Steckley's Hybrid Seed Corn Co.* 24
3. The filing of an appeal shall vest in any appellee the right to a cross-appeal, which need only to be asserted by him in his briefs filed in the supreme court. *In re Estate of Dalbey* 32
4. A motion to dismiss after plaintiff has rested must be treated as an admission of the truth of all material and relevant evidence submitted on behalf of the party against whom the motion is directed, and said party is entitled to have every controverted fact resolved in his favor and to have the benefit of every inference that can reasonably be deduced from the facts in evidence. *Anderson v. Robbins Incubator Co.* 40
5. When an appeal is taken without a bill of exceptions, the supreme court will determine whether the pleadings sustain the decree entered and where the pleadings sustain the decree only questions of law will be considered. *Lincoln Joint Stock Land Bank v. Barnes* 58
6. An order is not final when the substantial rights of the parties involved in the action remain undetermined and when the cause is retained for further action. *Lincoln Joint Stock Land Bank v. Barnes* 58
7. An order entered when the substantial rights of the parties involved in the action remain undetermined, and when the cause is retained for further action, is interlocutory and is not appealable. *Lincoln Joint Stock Land Bank v. Barnes* 58
8. An order entered when no further action of the court is required to dispose of the cause pending is final and an appeal or proceedings in error will lie therefrom. *Lincoln Joint Stock Land Bank v. Barnes* 58

9. A trial court is vested with wide discretion in disposing of an application for a continuance filed on the eve of the trial, and a refusal to grant such continuance will not constitute reversible error unless there has been an abuse of discretion. *Aron v. Mid-Continent Co.* 87
10. An instruction, though erroneous, is not prejudicial unless it adversely affects appellant's rights. *Harstick v. Beckenhauer* 179
11. In reviewing action of trial court in directing verdict for defendant at close of plaintiff's evidence, the supreme court will assume the existence of all material facts favorable to plaintiff which competent evidence on behalf of plaintiff establishes or tends to prove, and will give the plaintiff the benefit of every reasonable inference therefrom. *McNaught v. New York Life Ins. Co.* 213
12. The supreme court is required, in determining an appeal in equity involving questions of fact, to reach an independent conclusion without regard to the trial court's findings, but in determining the weight of the evidence, where there is an irreconcilable conflict on a material issue, the supreme court will consider the fact that the trial court observed the witnesses and their manner of testifying. *Smith v. Black* 244
13. Findings based upon inspection of premises made by the trial court are entitled to great weight with a reviewing court. *Whipple v. Nelson* 286
14. A party does not waive his right to appeal from a judgment by accepting a benefit thereunder, if the benefit is one to which he is so absolutely entitled that a reversal of the judgment will not affect his right to it. *Hoesly v. Department of Roads and Irrigation* 387
15. Where an appellant has accepted the benefits of judgment appealed from, and there is no possibility that appeal may lead to a result whereby appellant may recover less than has been received under the judgment, the right to appeal is unimpaired. *Hoesly v. Department of Roads and Irrigation* 387
16. In preparing briefs, attorneys should follow the revised rules of the supreme court requiring counsel to set out in his brief an assignment of errors, separately numbered, upon which he relies for a reversal. *Hoesly v. Department of Roads and Irrigation* 387
17. Where purported bill of exceptions was quashed and time for preparing proper bill of exceptions expired, and only issue was sufficiency of evidence and pleadings are sufficient to sustain the judgment, appeal will be dismissed. *Adkisson v. Gamble* 417

18. In law action where jury is waived, the findings of fact of the trial judge will have the same force and effect as a verdict of a jury, and will not be set aside unless clearly wrong. *In re Estate of Hagan* 459
Donald v. Heller 600
19. Where there was no bill of exceptions, the only question which can be presented to the supreme court is the sufficiency of the pleadings to support the judgment. *Vaughan v. Omaha Wimsett System Co* 470
20. The rulings on motions to make more definite and certain are largely in the discretion of the trial court, and unless abuse thereof is shown so as to prejudice the rights of the parties, they will not be disturbed. *Vaughan v. Omaha Wimsett System Co* 470
21. All parties to cause tried in the district court who may be affected by the modification or reversal of a judgment in the supreme court must be made parties to the appeal. *Madison County v. Crippen* 474
22. The filing of notice of appeal and the depositing of the docket fee in the office of the clerk of the district court, within the time prescribed by statute, gives the supreme court jurisdiction of the cause and all persons made parties thereto in the district court. *Madison County v. Crippen* 474
23. A party is not barred from asserting for the first time on appeal that an inferior tribunal was without jurisdiction of the subject-matter of the action. *Plunkett v. Parsons* 535
24. The furnishing of an appeal undertaking is a condition precedent to jurisdiction of the appellate court, and the objection to jurisdiction for failure to file undertaking may be raised at any time in any appropriate manner. *Security Mutual Life Ins. Co. v. Gillian* 673
25. A case removed to the district court from a judgment of a justice of the peace is rightly dismissed if the appellant, by reason of his own laches, failed to file an appeal bond within the time limited by statute for that purpose. *Security Mutual Life Ins. Co. v. Gillian* 673
26. Ordinarily, when a cause is remanded for new trial, it is for trial generally. *Callahan v. Prewitt* 787
27. In absence of record to the contrary, presumption exists that the trial court, in submitting the case to the jury, found an existing difference in the evidence requiring that all issues of fact be again submitted. *Callahan v. Prewitt* 787
28. Material facts or questions, which were in issue in for-

mer action and were there admitted or judicially determined, are conclusively settled by a judgment rendered therein. *Callahan v. Prewitt* 793

29. The rule that findings of supreme court become law of case on retrial of same issues is not available where, on second trial, facts are substantially different. *Callahan v. Prewitt* 793
30. Except as to questions of jurisdiction, questions not presented to nor passed on by trial court will not be considered on appeal. *Callahan v. Prewitt* 793
31. Where on appeal findings of fact are made which become the law of the case and there is a remand for a new trial, on such retrial, such findings are binding on the parties, the trial court and the supreme court, unless on retrial the facts relating to the issues upon which the findings were made are materially and substantially different from those adduced on the former trial, and the burden of showing a difference shall rest upon the party making the claim. *Callahan v. Prewitt* 793
32. The determination of question of whether or not the evidence on a retrial is different from that adduced on an earlier trial is one for the court and not for the jury. *Callahan v. Prewitt* 793
33. In reviewing trial court's decision overruling defendant's motion for directed verdict or dismissal at close of all the evidence, the supreme court will assume the existence of every material fact which competent evidence tends to establish and give plaintiff the benefit of logical inferences therefrom. *Long v. Railway Mail Ass'n* 949

Assignments.

When an assignment is made for a valuable consideration and delivered to a third person who accepts it for the assignee and then informs the assignee thereof and of its contents, which are beneficial to the assignee, and the assignee makes no objection thereto, there is an effective delivery thereof. *In re Estate of Dalbey* 32

Attorney and Client.

1. Except as provided by statute an attorney has no lien for services performed by him. *Marshall v. Casteel* 68
2. The statute does not give a right to a lien to the plaintiff's attorney upon the real estate involved in a foreclosure action. *Marshall v. Casteel* 68

Automobiles.

1. The minimum age limit fixed by law for driving of automobiles on public highways, within the meaning of the

exclusionary clause of an insurance policy, is 14 years. *Hertzel v. Western Mutual Fire Ins. Co.* 19

2. Whether occupant of automobile is a guest within meaning of automobile guest statute must be ascertained from facts establishing the identity of the persons advantaged by the carriage, the relationship between the parties, and the purposes to which the transportation is incident. *Van Auker v. Steckley's Hybrid Seed Corn Co.* 24

3. If evidence is undisputed, or such that minds of men could not reasonably arrive at any other conclusion, question whether occupant of automobile is a guest within meaning of automobile guest statute is for decision by the court as a matter of law; otherwise, it is question for the jury to decide. *Van Auker v. Steckley's Hybrid Seed Corn Co.* 24

4. The phrase "without giving compensation therefor" as used in provision of automobile guest statute defining a guest indicates an intention not to limit compensation to persons specifically paying for transportation in cash or equivalent, or to require that it pass exclusively from the passenger to the driver. *Van Auker v. Steckley's Hybrid Seed Corn Co.* 24

5. A person riding in an automobile is a guest within meaning of automobile guest statute, if his carriage confers only a benefit on himself and no benefit on the owner or operator. *Van Auker v. Steckley's Hybrid Seed Corn Co.* 24

6 Generally, it is negligence as a matter of law for a motorist to drive an automobile so fast on highway at night that he cannot stop in time to avoid a collision with an object within the area lighted by his lamps. *Anderson v. Robbins Incubator Co.* 40

7. The presence of elements which materially impair or wholly destroy visibility, are not intervening causes but conditions that impose upon automobile drivers the duty to assure the safety of the public by the exercise of a degree of care commensurate with such surrounding circumstances. *Anderson v. Robbins Incubator Co.* 40

8. "Cars or trucks used as wreckers or for towing purposes" as set forth in section 39-11,112, Comp. St. Supp. 1941, *held* to include only that class of cars and trucks constructed and adapted for the use of assisting and helping distressed and disabled motor vehicles and used for that purpose. *Anderson v. Robbins Incubator Co.* 40

9. The violation of a statute regulating the use and operation of motor vehicles upon the highway is not negligence *per se* but evidence of negligence. *Anderson v. Robbins Incubator Co.* 40

10. Where, in driving an automobile, servant's deviation from the direct route to a destination is slight and not unusual, the court may, as a matter of law, determine that the servant was still executing his master's business, and where the deviation is very marked and unusual, the court may determine, as a matter of law, that the servant was not on the master's business, but cases falling between these extremes will be regarded as involving a question of fact for the jury. *Dafoe v. Grantski* 344
11. Where city ordinance prohibited operation of advertising vehicles on city streets, but excluded from prohibition vehicles being operated in usual business or regular work of owner, when not used primarily for advertising purposes, it was incumbent upon the state to establish by evidence that defendant was not within the exclusionary portion of the ordinance. *State v. Hind* 479

Banks and Banking.

1. An order of the court allowing or disallowing a claim and fixing its status in a bank receivership is a judgment and unless modified at the term at which it is rendered, or is appealed from, the order becomes with the adjournment of the term a final adjudication of the claim and its status. *State, ex rel. Spillman, v. Commercial State Bank of Omaha* 490
2. A stockholder is not entitled to set off any debt due him from bank against his statutory liability as a stockholder of an insolvent bank after decree of deficiency as the superadded liability of stockholders is a trust fund for benefit of creditors, to share *pro rata* without preference. *State, ex rel. Spillman, v. Commercial State Bank of Omaha* 490
3. In the collection and disposition of trust fund consisting of the statutory liability of stockholders of an insolvent bank, bank's receiver represents the creditors and not the bank, and the trust fund not being an asset of the bank, a debt due a stockholder from the bank and the stockholder's statutory liability do not arise in the same right, and set-off thereof would result in a preference of creditors. *State, ex rel. Spillman, v. Commercial State Bank of Omaha* 490

Bill of Exceptions.

Bulky exhibits, which have been described, identified and offered in evidence in a volume of the bill of exceptions that has been properly settled by the trial judge, are a

part of the bill of exceptions where it appears that they have been properly identified and designated by the official court reporter to be such. *Shiman Bros. & Co. v. Nebraska National Hotel Co.* 404

Bills and Notes.

An indorsement of a negotiable promissory note conveying or transferring title thereto makes the indorser liable with the maker. *Wistrom v. Forsling* 294

Bonds.

The liability of both principal and surety on an official bond is original and primary and creates a new obligation. *Neisius v. Henry* 273

Carriers.

1. In order to charge a common carrier with negligence for loss of property it is necessary to show that such property was unconditionally delivered to it for immediate transportation and that it was accepted for that purpose. *Shiman Bros. & Co. v. Nebraska National Hotel Co.* 404
2. A baggage check is *prima facie* evidence that the baggage it represents has been delivered to the issuing company by the person to whom the check was delivered, but where the evidence affirmatively shows that delivery of the baggage was not made to the company or its authorized agent, no liability attaches. *Shiman Bros. & Co. v. Nebraska National Hotel Co.* 404
3. A consignee who receives a C. O. D. shipment of goods is bound either to pay for or return them. *Truck Owners Freight Co. v. Poland* 634
4. Where a carrier delivers goods to the consignee without collecting the C. O. D. charges, and is compelled to pay the consignor the amount of such charges, carrier has right of action against consignee for money so paid. *Truck Owners Freight Co. v. Poland* 634

Champerty.

An agreement whereby a party agrees to finance the litigation of one party to a cause of action and to purchase the avails if the litigation is successful may not be set up as a defense to the cause of action. *Hadley v. Platte Valley Cattle Co.* 482

Chattel Mortgages. SEE INDICTMENT AND INFORMATION, 2.

1. An application for a deficiency judgment may be heard on a motion after the return of the order of sale. *Schreiner v. Witte* 109

2. The term "premises," as used in statute providing that when petition is filed for satisfaction of mortgage, court has power only to decree and compel delivery of possession of premises, does not refer to deficiencies in proceeds of foreclosure sales of mortgaged chattels. *Schreiner v. Witte* 109

Children Born Out of Wedlock.

1. At common law, a father is under no legal liability to support his children born out of wedlock. *Carlson v. Bartels* 680
2. In absence of statutory provision, a cause of action for support of a child born out of wedlock does not survive against the personal representative of the alleged father. *Carlson v. Bartels* 680
3. In absence of statutory authority, an equity court does not have power to charge the estate of a deceased alleged father of children born out of wedlock with the support, maintenance and education of such children for the period subsequent to the alleged father's death. *Carlson v. Bartels* 680

Constitutional Law.

1. Methods to be used in the assessment and equalization of values of real and personal property come within the exclusive province of the legislative department of government. *Speer v. Kratzenstein* 300
2. A police regulation, obviously intended as such, and not operating unreasonably or arbitrarily beyond the occasion of its enactment, is not invalid because it may affect incidentally the exercise of some constitutional right. *State v. Hind* 479
3. The operation of an employment agency is a beneficial and lawful business which cannot be taken away or destroyed under the guise of regulation. *Boomer v. Olsen* 579
4. Whether the operation of an employment agency is charged with sufficient public interest as to warrant its regulation is a legislative question with which the courts will not ordinarily interfere. *Boomer v. Olsen* 579
5. The operation of an employment agency is a beneficial and lawful business and the legislature may not under guise of regulation impose conditions which are unreasonable, arbitrary, discriminatory, or confiscatory. *Boomer v. Olsen* 579
6. The regulation of private employment agency, which tends to stifle private enterprise and create monopoly in

government operated employment agencies, is void as against public policy. *Boomer v. Olsen* 579
7. The legislature's right to regulate a lawful and useful business does not include the power to fix prices and fees in ordinary occupations, professions and business pursuits. *Boomer v. Olsen* 579
8. The mere fact that corporation is organized under statute does not estop it to deny constitutionality of provision of statute which constitutes a distinct, separable legislative enactment, the elimination of which would leave in full force and effect the provisions under which corporation was organized. *State, ex rel. Johnson, v. Consumers Public Power District* 753
9. The general principles of waiver and estoppel in cases involving constitutional law are subject to limitation that estoppel does not necessarily extend to all details of statute. *State, ex rel. Johnson, v. Consumers Public Power District* 753

Conspiracy.
1. In prosecution for conspiracy the state is required to prove an unlawful conspiracy to commit a felony or to defraud the state, and the doing by one or more of the conspirators of an overt act to effect the object of the conspiracy. *Platt v. State* 131
2. In prosecution for conspiracy to defraud state, overt acts established by evidence may be properly shown as evidence of a preexisting conspiracy. *Platt v. State* 131
3. Where two persons are charged with a conspiracy and one is convicted, the acquittal of the other upon a separate trial does not affect the previous conviction. *Platt v. State* 131
4. A finding that one of two persons charged with conspiracy is guilty concludes the guilt of the other for purposes of that trial, but a subsequent acquittal of the other merely indicates a failure of proof as to him. *Platt v. State* 131

Contracts.
1. Where two or more instruments are made at the same time with reference to the same transaction and to effectuate the same purpose, they will be construed together to the same extent as though made in one instrument. *Hanks v. Northwestern State Bank* 204
2. Parties to contract may agree that classification, quantity, or quality of work done or things furnished shall be left to the judgment of a third person whose decision

shall be final except when it is based upon fraud, gross mistake as would necessarily imply bad faith, or failure to exercise an honest judgment. *In re Appeal of Roadmix Construction Corporation* 425

3. Where a party makes an offer that is definite and complete and is unconditionally accepted by the party to whom it is made, such offer and acceptance constitute a contract binding upon the parties thereto. *Beard v. Morgan* 503

4. Voluntary extension of the time for performance of a contract, after a breach has been made, by a party not in default, does not void the contract. *Beard v. Morgan* 503

Conversion.

Power of sale contained in will will not work an equitable conversion unless there is a positive direction to sell, or intent of testator that sale be made is clearly shown by implications. *Hahn v. Verret* 820

Corporations.

1. In fixing the value of the assets of a corporation for the purpose of determining the worth of its capital stock it is the reasonable market value of such assets, and not a speculative actual value, that is material to the issue. *Aron v. Mid-Continent Co* 87

2. Where authorized agent of a corporation engaged in selling stock of the corporation induces a person to purchase such stock by fraudulent representations or concealments, the person defrauded will ordinarily be entitled to a rescission of the contract in the same manner and to the same extent as between two natural persons. *Vavricka v. Mid-Continent Co* 94

3. Generally an isolated or single sale of goods, transaction, or contract between a foreign corporation and a citizen of this state does not constitute "to engage in any kind of business" within the provisions of statute. *Pitzer v. Stifel, Nicolaus & Co.* 394

4. Whether activities of foreign corporation constitute "doing of business in state," as required by statute to subject corporation to state courts' jurisdiction by service of summons on auditor of public accounts, is matter for judicial determination primarily from particular facts and circumstances of each case. *Pitzer v. Stifel, Nicolaus & Co* 394

5. Generally, a corporation will be looked upon as a legal entity except when the legal entity is used to justify wrong and protect fraud. *Massachusetts Bonding & Ins. Co. v. Master Laboratories* 617

6. Where various corporations substantially owned by one individual are but instrumentalities through which such individual transacts his business and such corporations are used as a cloak to perpetrate a fraud, a court of law will examine the whole transaction, looking through corporate forms to the substance to protect innocent parties and to circumvent fraud. *Massachusetts Bonding & Ins. Co. v. Master Laboratories* 617
7. Where an individual owns all of the stock of several corporations and such corporations are but the juristic double of the owner, and fraud or injustice will likely operate to the injury of third persons, the separate identity of the corporations is dissipated and the corporations are held for the acts of the owner or *vice versa*, and the rule is the same although the stock of such corporations is owned by two or more who act in conjunction with the corporate organization. *Massachusetts Bonding & Ins. Co. v. Master Laboratories* 617
8. The defense of *ultra vires* cannot be set up against a corporate liability founded on fraud, and, regardless of rights between the parties in *pari delicto*, no immunity is acquired by the defense to the prejudice of innocent third persons. *Massachusetts Bonding & Ins. Co. v. Master Laboratories* 617
9. In absence of estoppel only the provisions of the franchise or charter which are legally enforceable will control the parties. *State, ex rel. Johnson, v. Consumers Public Power District* 753

Counties and County Officers.

1. The constitutional provision providing that "All claims against a county must be filed with the county clerk within ninety days" is mandatory both as to the filing and the time within which the filing must be made. *Verges v. Morrill County* 173
2. Statute authorizing appeal to district court by person whose claim against county is disallowed, and requiring county clerk to notify claimant in writing of disallowance of claim, relates to claims filed according to statute, and before appeal may be taken claim must be disallowed in whole or in part by county board. *Verges v. Morrill County* 173
3. A contract entered into by a county board in excess of its powers is void as an obligation against the county. *Speer v. Kratzenstein* 300
4. For money paid out on a contract entered into by a county board in excess of its powers, action may be main-

tained and recovery had in the name of a taxpayer for and on behalf of the county against the county commissioners participating and their sureties. *Speer v. Kratzenstein* 300

5. County commissioners are clothed with the powers expressly conferred upon them by statute and such powers as are requisite to enable them to discharge their official duties. *Speer v. Kratzenstein* 300
6. The county board is without express power to make, supervise or in anywise control the valuation of real estate or other property in the county for assessment purposes. *Speer v. Kratzenstein* 300
7. The county board of equalization and the county board or board of county commissioners are separate and distinct entities. *Speer v. Kratzenstein* 300
8. A county board is without authority in the absence of grant to perform the duties which are a part of the official duties of other officials or boards. *Speer v. Kratzenstein* 300
9. A county board is without power to enter into a contract for the appraisal of real estate for the use of the county board of equalization. *Speer v. Kratzenstein* 300
10. Unless restrained by the Constitution the legislature may exercise control over county agencies and require such public duties and functions to be performed by them as fall within the general scope and objects of the county as a body corporate or politic. *Speer v. Kratzenstein* 310
11. Both the county board and the board of equalization are county agencies required by statute to perform certain well-defined public duties and functions in perfecting the administration of representative local government. *Speer v. Kratzenstein* 310
12. A county board, subject to specific exceptions, is vested by statute with plenary jurisdiction of and authority to make all contracts for county on any subject within the scope of the powers of such county acting as a body corporate or politic. *Speer v. Kratzenstein* 310
13. The acts and contracts of a county board within the scope of its authority are the acts and contracts of, and binding upon, the county, and courts will not interfere therewith in the absence of illegality, mistake, fraud, or unreasonable discretion. *Speer v. Kratzenstein* 310

Courts.

1. The supreme court is primarily an appellate tribunal for the purpose of reviewing matters tried in the lower

courts and though it is given original jurisdiction in a few limited cases it will not ordinarily entertain original actions therein, when the county and district courts, or either, have concurrent jurisdiction, unless some good reason is shown why the application was not made to a county or district court. *Williams v. Olson* 115

2. If court in the trial of a case finds that a prior ruling is erroneous, the principle of *res adjudicata* does not apply and the ruling will be corrected at a subsequent term. *State, ex rel. Spillman, v. Commercial State Bank of Omaha* 490
3. Jurisdiction of the subject-matter of an action cannot be conferred on a tribunal not empowered to entertain jurisdiction by acquiescence or consent of the parties. *Plunkett v. Parsons* 535
4. Under the Constitution and statutes the county court has general, exclusive and original jurisdiction in all probate matters. *Jurgensmeier v. Kuenning* 675
5. Jurisdiction of the subject-matter is the power to hear and determine cases of the general class to which the proceedings belong. *Carlson v. Bartels* 680

Criminal Law.

1. Generally, error proceedings do not lie from a ruling on a plea in abatement in a criminal case unless such ruling terminates the action. *State v. Ludwig* 278
2. In order to have a final order after the sustaining of a plea in abatement, it is necessary that judgment be entered quashing the information or discharging the accused. *State v. Ludwig* 278
3. Where the grounds for sustaining a plea in abatement are such that the record can be corrected by amendment, or a new proceeding commenced by filing a new information, the court may order the accused held until such action can be taken. *State v. Ludwig* 278
4. Statements freely and voluntarily given, or made and signed, by accused, which are not induced by threats or promises, wherein he admits the commission of the crime for which he is being tried, are competent to be received in evidence. *Schlegel v. State* 497
5. In a criminal case error not prejudicially erroneous, whether in the giving of instructions or in the reception or rejection of evidence, is not sufficient to require reversal. *Schlegel v. State* 497
6. A reviewing court considers all the evidence and all the instructions given to the jury in determining whether a

particular instruction is prejudicially erroneous. *Schlegel v. State* 497
7. The jury are the judges of questions of fact, but the supreme court will set aside a verdict when the evidence is clearly insufficient under applicable law to sustain it. *Whomble v. State* 667
8. To sustain a conviction for a crime the *corpus delicti* must be proved beyond a reasonable doubt. *Whomble v. State* 667
9. *Corpus delicti* is the body or substance of the crime and in its primary sense is the fact that a crime has actually been committed. *Whomble v. State* 667
10. Extrajudicial admissions against interest by one charged with a crime must be received and considered with caution and are insufficient of themselves to support a conviction. *Whomble v. State* 667

Damages.
1. In personal injury action damages may be allowed for loss of future earnings. *Dafoe v. Grantski* 344
2. Award of $11,000 for personal injuries not excessive. *Dafoe v. Grantski* 344
3. Where interest is claimed as damages, and not by reason of a contract therefor, it may not be allowed if the delay in the payment of the principal debt is the result of the neglect of the creditor to demand and enforce payment, if to require payment would result in inequity and injustice. *State v. Platte Valley Public Power and Irrigation District* 661

Deeds.
1. Before a deed may be set aside on ground of mental capacity, it must be clearly established that the mind of grantor was so weak or unbalanced at the time of the execution of the deed that he or she did not understand the purport and effect of what was then being done. *Smith v. Black* 244
2. The elements necessary to be established in order that a deed may be set aside on the ground of undue influence are that the grantor was subject to such influence, that the opportunity to exercise it existed, that there was a disposition to exercise it, and that the result appears to be the effect of such influence. *Smith v. Black* 244
3. The delivery of a deed is in a large measure a question of intent to be determined by the facts of the particular case, and there must be an intent of the grantor that the

deed operate as a muniment of title to take effect presently. *Smith v. Black* 244

4. Where owners of an interest in real property conveyed the same but by agreement contained in the instrument of conveyance retained an interest in the premises, such interest will support the imposition of a restriction on alienation where it is reasonably necessary to protect the interest retained. *Majerus v. Santo* 774

5. Estates upon conditions subsequent, which, after having been fully vested, may be defeated by breach of the condition, are never favored in law, and a deed will not be construed to create an estate upon condition unless language to that effect is so clear that no room is left for any other construction. *Majerus v. Santo* 774

Divorce.

1. In divorce actions the welfare of the minor children is a question of primary importance as respects custody. *Osborn v. Osborn* 1
Gorsuch v. Gorsuch 572

2. It is always best to keep minor children within the custody of the court having jurisdiction of a divorce case, and whenever removal of such children is contemplated, application should be made to the court. *Osborn v. Osborn* 1

3. The supreme court will not require a wife who prayed for a divorce from bed and board only to accept an absolute divorce when she does not request such a decree. *Yost v. Yost* 80

4. A divorce from bed and board is in the nature of a conditional decree, leaving the status of the parties unchanged in many respects, but relieving both parties from all obligations and rights as to cohabitation, while the amount of support thereafter is fixed by the decree. *Yost v. Yost* 80

5. In wife's suit for separate maintenance, minor children's support, and alimony, order appointing receiver of husband's business and property must be in strict compliance with statute providing for order requiring husband to give security for payment of alimony and authorizing appointment of receiver of his property on his failure or neglect to give such security or pay alimony. *Bruening v. Bruening* 335

6. Party who reasonably understands the nature and purpose of action for divorce, the effect of his acts with reference thereto, and who has the will to decide whether or not action should be brought has sufficient mental capac-

ity to maintain such action in his own name. *Stephens v. Stephens* 711

7. Misconduct on part of plaintiff wife in action for divorce, not amounting to statutory ground for divorce, affords no justification for punishment inflicted on plaintiff by defendant husband in retaliation out of all proportion to such misconduct. *Stephens v. Stephens* 711
8. Husband's violence against wife by choking, slapping and kicking wife, when not reasonably necessary to prevent an immediate impending harm, was not prevented from being extreme cruelty, merely because the husband was highly nervous. *Stephens v. Stephens* 711
9. An award of alimony in the sum of $1,500 payable to the plaintiff in monthly instalments *held* sufficient. *Jess v. Jess* 879
10. Trial court is vested with a sound discretion in determining whether a limited divorce from bed and board or an absolute divorce shall be granted. *Gibson v. Gibson* 882

Eminent Domain.

1. General ill-defined fears of property owners that a dam impounding large quantities of water may break at some future time and damage their property cannot be shown as evidence of a reduced market value in a suit for damages. *Scully v. Central Nebraska Public Power and Irrigation District* 184
2. Damages suffered by the public generally on account of the construction of a lawful public improvement cannot be made the basis of an action in tort. *Scully v. Central Nebraska Public Power and Irrigation District* 184
3. Damages resulting from the relocation of a branch railroad cannot be recovered by property owners in proximity thereto, since their damages, though different in degree, are not different in kind from those suffered by the public generally. *Scully v. Central Nebraska Public Power and Irrigation District* 184
4. If injury suffered by a private property owner because of removal of railroad line or station is not a special damage, even though greater in degree than damage suffered by the general public, no cause of action arises, for such damage is *damnum absque injuria*. *Scully v. Central Nebraska Public Power and Irrigation District* 184
5. In absence of agreement to the contrary, payment for property taken under power of eminent domain must be made in money, as landowner cannot be compelled to accept other property in lieu thereof. *Hoesly v. Department of Roads and Irrigation* 387

6. In error proceeding to review appraisers' award in proceeding to condemn land for highway purposes, appraisers' findings reported to county judge were entitled to the same weight and conclusiveness as a verdict of a jury. *Hoesly v. Department of Roads and Irrigation*.... 387
7. Where, on appeal in a condemnation proceeding, the only issue is the amount of damages, no pleadings are necessary. *Pierce v. Platte Valley Public Power and Irrigation District*..... 898
8. Where land, no part of which is taken, is temporarily damaged by a temporary public improvement, the measure of damages is not the market value of the land, but the value of the use for the period damaged. *Pierce v. Platte Valley Public Power and Irrigation District*..... 898
9. Where land is damaged temporarily for public use in the acquiring of an easement by a public corporation for the construction of an electric transmission line, such damage is compensable under constitutional provision prohibiting damaging of property for public use without just compensation. *Pierce v. Platte Valley Public Power and Irrigation District*..... 898
10. Where land is taken for temporary use, the measure of compensation is not the market value, but what the property is fairly worth for the time during which it is held, and the same rule applies where property, no part of which is taken, is temporarily injured. *Pierce v. Platte Valley Public Power and Irrigation District*..... 898
11. In condemnation of a temporary right of way across farm for construction of electric transmission line, measure of damages was the value of crops which could and would have been grown on the farm. *Pierce v. Platte Valley Public Power and Irrigation District*..... 898
12. Appraisers in condemnation proceedings may testify as any other witness when the proper foundation is laid, but evidence of their award is not admissible. *Pierce v. Platte Valley Public Power and Irrigation District*..... 898
13. General fear, or fear which is not connected with or an incident of knowledge of present or potential danger, cannot be made the basis upon which to predicate the value of the use of land for the period damaged. *Pierce v. Platte Valley Public Power and Irrigation District*..... 898
14. The only fear which may be considered as an element in fixing the value of use of land for the period damaged by construction of an electric transmission line across that land is that of danger, the present or potential existence of which is grounded in authentic observation

and experience, or in scientific investigation, and which fear circumscribes activity or limits freedom of use in the area of present or potential danger, and tends to lessen the market value of the use of the land for the period damaged. *Pierce v. Platte Valley Public Power and Irrigation District* 898

Equity.

1. An equity court, obtaining jurisdiction of cause for any purpose, will retain it for all purposes and proceed to final determination of all matters in issue, thus avoiding unnecessary litigation. *Schreiner v. Witte* 109
2. A party seeking affirmative relief in equity court must do equity. *Hadley v. Platte Valley Cattle Co* 482

Estates.

The word "premises" is used both in law and in common speech to indicate lands and tenements, and is not used generally to include and designate personal property. *Schreiner v. Witte* 109

Estoppel.

Where plaintiffs entered into formal written contract that hog-feeding operations along small stream outside of city might continue if defendants' rendering plant operated in connection with feeding operations was entirely discontinued, and rendering plant was discontinued, and there was no evidence that a nuisance existed, plaintiffs were estopped to complain of hog lot. *Vana v. Grain Belt Supply Co* 118

Evidence.

1. Any statement, oral or written, the persuasiveness or probative value of which depends partly or wholly on something other than the credit to be given to the witness testifying or the instrument which contains it and renders necessary a resort to the veracity and competency of some other person, is hearsay and inadmissible. *Boehmer v. Heinen* 200
2. If a particular fact upon which a presumption is required to be based is not shown to exist, the presumption cannot be indulged. *McNaught v. New York Life Ins. Co.* 213
3. It is not a valid objection to the evidence of an expert that the answer covers the whole ground the jury are to decide, if the case is one to be wholly resolved by such evidence. *McNaught v. New York Life Ins. Co* 220

4. A duly qualified expert medical witness may, in answer to a proper hypothetical question, give his opinion as to the nature of the disease, or the general effect of an ailment or injury, and as to the means or cause of death. *McNaught v. New York Life Ins. Co.* 220
5. The admissibility of expert testimony is a question for the court, but its weight is a matter to be determined by the jury. *McNaught v. New York Life Ins. Co.* 220
6. In determining whether opinions of an expert witness are admissible, the court must exercise a large measure of discretion. *McNaught v. New York Life Ins. Co.* 220
7. Jurors are not bound by the testimony of experts, but their evidence is to be weighed as that of all other witnesses. *McNaught v. New York Life Ins. Co.* 220
8. The opinion evidence of experts is ordinarily sufficient to sustain a verdict, providing it has not been impeached and the facts upon which it is based are supported by competent evidence. *McNaught v. New York Life Ins. Co.* 220
9. An admission of an agent may be received in evidence against his principal where the agent, in making the admission sought to be used, made it in connection with the discharge of his duties and it consists of a statement of fact within his own knowledge and not a mere expression of opinion. *Shiman Bros. & Co. v. Nebraska National Hotel Co.* 404
10. The burden of proof in its proper sense rests, throughout the case, as to each issue, on the party originally having the burden as to such issue. *In re Estate of Hagan* 459
11. The question of where the burden of proof shall rest shall be determined from the pleadings. *In re Estate of Hagan* 459
12. The burden of evidence is determinable by the court from time to time throughout the trial and may shift from side to side during its progress. *In re Estate of Hagan* 459
13. When the verdict, as well as the judgment entered thereon, is not supported by the evidence, the same will be reversed and the action dismissed. *Swanson v. Mutual Benefit Health & Accident Ass'n* 515
14. The rule of law that parol evidence is admissible in an action at law on policy of insurance to prove that answers in the application were not those of the insured, and that the insured made true answers which were incorrectly recorded without the knowledge of the insured is overruled. *Gillan v. Equitable Life Assurance Society* 647

15. Where inference is so usual, natural, or instinctive as to accord with general experience, its statement is received as substantially one of fact. *Frazier v. Anderson* 905
16. A verdict, based solely on possibilities, conjecture, or speculation, cannot be sustained. *Long v. Railway Mail Ass'n* 949

Executors and Administrators.
1. A final decree directing the distribution of estate property to claimants or distributees has the force of a judgment and any claimant or distributee may have execution issued thereon and levy may be made on the property of the executor or administrator. *Jurgensmeier v. Kuenning* 675
2. An order of the county court determining amount an executor is owing to the estate and directing him to pay it into his account without determining who are the legatees, devisees and heirs or the amount of their several interests, and without ordering a distribution thereof, was not a judgment in favor of the legatees, devisees or heirs which could be enforced by execution. *Jurgensmeier v. Kuenning* 675
3. Rents accruing after the death of owner of real estate vest in devisee or heir by reason of the passing of title, but may be defeated by executor or administrator taking possession of real estate for purpose of paying debts, costs and expenses of estate, but if the rents are not needed for such purpose because personal property is sufficient, heir or devisee is entitled to such rents. *Hahn v. Verret* 820
4. The construction of a will in probate court for the information and benefit of the executor, only in order to advise the executor what course to pursue, adjudicates nothing beyond the executor's rights and liabilities in execution of his office, and controversies between adverse claimants under a devise or bequest, or between executor and persons claiming adversely to estate are not affected. *Hahn v. Verret* 820

Forcible Entry and Detainer.
1. A party seeking damages for the unlawful detention of property must establish his right to possession thereof during period for which he seeks to recover and that the party against whom he seeks to recover unlawfully withheld such possession. *Hanks v. Northwestern State Bank* 204
2. Statute relating to forcible entry and detainer provides remedy where the original entry was forcible or unlaw-

ful, and where the original entry was lawful but the detention became unlawful and, in the construction of law, forcible. *Gregory v. Pribbeno* 379

3. Where a statute makes provision for unlawful detainer the remedy is thereby extended to persons entitled to possession, and prior possession is not necessary to maintain the action. *Gregory v. Pribbeno* 379
4. The statute providing that every action must be prosecuted in the name of the real party in interest applies in forcible entry and unlawful detainer cases. *Gregory v. Pribbeno* 379
5. The mere filing of an answer claiming title to premises in unlawful detainer action will not deprive the court of jurisdiction, since the evidence determines whether a question of title or only the right of possession is involved. *Gregory v. Pribbeno* 379

Fraud.

1. Representations of positive facts pertaining to the quality of the thing sold and relied upon by the purchaser, which are calculated to mislead and deceive, do not constitute sales talk, puffing, or mere opinion, and, if proved false, they ordinarily constitute actionable fraud. *Aron v. Mid-Continent Co* 87
   Vavricka v. Mid-Continent Co 94
2. Fraud is never pursued but must be proved by a preponderance of evidence by person alleging it. *Ralston Purina Co. v. Iiams* 588

Fraudulent Conveyances.

In absence of a mutual fraudulent intent, the law does not interfere with the right of a person, solvent or insolvent, to make such disposition of his property, based upon a valid consideration, as his judgment dictates. *Smith v. Black* 244

Gifts.

Where coowners deeded farm to their son-in-law and daughter for $18,000, $8,000 of which was a gift to grantees, and deed required grantees to make annual payment to grantors and one year after death of survivor of grantors to pay $10,000 to three other children of grantors, and deed gave both grantors and other children right to foreclose on breach of obligation of deed, the provision for payment of $10,000 was a completed gift *inter vivos* as of date of deed which could not be cancelled by subsequent amendment to deed executed by grantors and grantees. *Jones v. Ewart* 717

Habeas Corpus.

Original jurisdiction to issue writs of habeas corpus is conferred upon the supreme court by the Constitution. *Williams v. Olson* 115

Highways.

1. Where highway contractor was prevented from performing contract within specified time by default of state's employees, delay was excused and contractor could not be liable under provision for liquidated damages or otherwise for noncompliance with terms of contract. *In re Appeal of Roadmix Construction Corporation* 425
2. The department of roads and irrigation is an administrative body having certain *quasi* judicial powers. *Plunkett v. Parsons* 535

Husband and Wife.

1. A contract of a married woman can only be enforced against the separate estate which she possessed at date of contract. *Myers v. Rosenberg Bros* 930
2. Evidence failed to establish that plaintiff, a married woman, carried on a separate trade or business on her sole and separate account. *Myers v. Rosenberg Bros* 930

Indictment and Information.

1. A plea in abatement reaches irregularities in the proceedings which do not appear on the face of the record and which can be established only by extrinsic evidence. *State v. Ludwig* 278
2. An information, charging unlawful sale, transfer, and disposal of mortgaged personal property, is not fatally defective because it fails to allege name of person or body corporate to whom sale or transfer was made. *Hunt v. State* 871
3. Generally, defect in manner of charging offense is waived by defendant's plea to general issue, if information contains no jurisdictional defect and is sufficient to charge an offense under law. *Hunt v. State* 871
4. An information is fatally defective only if its allegations can be true and still not charge a crime. *Hunt v. State* 871
5. An information, questioned for the first time on appeal, must be held sufficient, unless it is so defective that it cannot be said, by any construction, to charge offense of which accused was convicted. *Hunt v. State* 871

Innkeepers.

1. Where a hotel company claims the benefit of a statute altering its common-law liability as an insurer, the bur-

den is on it to show compliance with the provisions of statute on its part. *Shiman Bros. & Co. v. Nebraska National Hotel Co.* 404

2. The statute limiting the liability of an innkeeper applies only to his common-law liability as an insurer and has no application where the cause of action of the guest is based solely on the negligence of the innkeeper in caring for property entrusted to him. *Shiman Bros. & Co. v. Nebraska National Hotel Co.* 404
3. A statute limiting the common-law liability of an innkeeper as an insurer has no application where the loss occurs after a guest has begun his departure from the hotel and has delivered his baggage to a hotel porter for delivery to a transportation company. *Shiman Bros. & Co. v. Nebraska National Hotel Co.* 404

Injunction.

1. An action to enjoin trespassing upon real estate can be brought only in the county where the lands are situated. *Fenster v. Isley* 888
2. Equity will afford relief by injunction against repeated acts of trespass on land, especially when committed under claim indicating continuous or frequent and constant repetition thereof. *Fenster v. Isley* 888

Insurance.

1. Where an automobile collision insurance policy relieves the insurer of liability if the automobile was being operated "by any person under the age limit fixed by law," the insurer is not relieved where the automobile, at the time of the accident, was being driven by insured's 15-year-old daughter without a license, as required by statute. *Hertzel v. Western Mutual Fire Ins. Co.* 19
2. The purpose of the exclusionary clause of an insurance policy was to excuse liability only in case the operator was of an age below which no person is permitted to drive upon the public highways under the law of the state. *Hertzel v. Western Mutual Fire Ins. Co.* 19
3. A paid-up life insurance policy, payable to the estate of insured, is assignable and when assigned for a valuable consideration by a written assignment, which sufficiently identifies the policy, no actual delivery of the policy itself is necessary. *In re Estate of Dalbey* 32
4. Where insured voluntarily submitted to major surgical operation and as result of poor physical condition, and despite skilful performance of operation, died on operating table from surgical shock, death was not result of an

"accident" within meaning of accident policy providing indemnity for death from accident. *Rapp v. Metropolitan Accident and Health Ins. Co.* 144
5. Accident and health policy provided indemnity for death from accident and not for death from disease. *Rapp v. Metropolitan Accident and Health Ins. Co.* 144
6. In action on policy of insurance covering accidental death, where the evidence showed an injury to the body which appeared to have been caused by external force, there is a presumption that it was the result of an accident, and not self-inflicted. *McNaught v. New York Life Ins. Co.* 220
7. Under a statute providing that every action must be prosecuted in the name of the real party in interest, if the insurance paid by an insurer covers only a portion of the loss, the right of action against the wrong-doer who caused the loss remains in the insured for the entire loss and the action must be brought by him in his own name. *Shiman Bros. & Co. v. Nebraska National Hotel Co.* 404
8. An arrangement between an insurer and an insured, whereby the former loaned to the latter the amount of a loss under the terms of a policy of insurance, to be repaid only if the insured made a recovery from a third person, is a lawful agreement and the loan thus made is not such a payment of insurance as to make the insurer the real party in interest. *Shiman Bros. & Co. v. Nebraska National Hotel Co.* 404
9. By statute no oral or written representation or warranty made in the negotiation for a contract or policy of insurance by the insured, or in his behalf, shall be deemed material or defeat or avoid the policy or prevent its attaching unless such misrepresentation or warranty deceived the company to its injury. *Gillan v. Equitable Life Assurance Society* 647
10. An untrue answer relating to a matter peculiarly within the knowledge of the applicant and material to the risk and relied upon by the insurer, if timely advantage is taken thereof by the insurer, will avoid the policy. *Gillan v. Equitable Life Assurance Society* 647
11. In an action at law on an insurance policy an assured may not, by parol evidence, impeach statements in the application in those cases where the application has become a part of the contract by stipulation and in accordance with statute, and a copy thereof attached to the policy at the time of delivery. *Gillan v. Equitable Life Assurance Society* 647

12. In the absence of statute the chief distinction between a warranty and a representation in insurance law is that the former is the assertion by the assured of some fact, on the literal truth of which the validity of the policy depends, without regard to the materiality of such fact; while a representation is the assertion by the assured of a fact, on the literal truth of which the validity of the policy does not depend. *Gillan v. Equitable Life Assurance Society* 647
13. All statements made by an insured shall, in the absence of fraud, be deemed representations and not warranties. *Gillan v. Equitable Life Assurance Society* 647
14. In the absence of statute a warranty by an insured which is false and fraudulent renders the policy of insurance void at the option of the insurer when the falsity of the warranty comes to its attention. *Gillan v. Equitable Life Assurance Society* 647
15. 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. *Smith Motors v. New Amsterdam Casualty Co.* 815
16. In action on accidental death policy, evidence *held* insufficient to take to jury question of whether combination of diseases causing insured's death resulted from and occurred after accidental injury to insured, as required to entitle plaintiff to recover. *Long v. Railway Mail Ass'n* 949

Judgment.

1. Under the doctrine of *res adjudicata*, when a question of fact is once determined on the merits, that question is settled so far as litigants and those in privity are concerned, and cannot be relitigated between the same parties or their privies. *Hanks v. Northwestern State Bank* 204
2. A collusive joinder of defendants for the sole purpose of bringing suit against a nonresident of the county where the action is brought will not vest the court with authority to send its summons to another county, and a judgment rendered on default in such case is void. *Wistrom v. Forsling* 294
3. Where defendant, after adverse ruling on demurrer to petition in error, elected to stand thereon and plead no further, the case stood as upon default, and final judgment was properly entered thereon. *Hoesly v. Department of Roads and Irrigation* 387
4. The test whether former judgment is a bar to subsequent action is generally whether the same evidence will sustain both actions. *Boomer v. Olsen* 579

5. Where the parties stipulated a single issue in a former action, a plea of *res judicata* is of no avail in a subsequent action between the same parties where it appears that the issues are outside the scope of the stipulation. *Boomer v. Olsen* 579

Judicial Sales.

A purchaser at a judicial sale becomes a party to the proceedings and is entitled to enforce the rights secured by his purchase. *Madison County v. Crippen* 474

Jury.

1. The right to trial by jury on appeal from the county court in probate matters is expressly conferred by statute. *In re Estate of Hagan* 459
2. The right to a trial by jury in probate matters in the county court does not exist. *In re Estate of Hagan* 459
3. There is no constitutional right to trial by jury on appeals to the district court from the county court in probate matters. *In re Estate of Hagan* 459
4. There is no absolute right to trial by jury on appeals to district court in probate matters unless such right is expressly conferred by statute. *In re Estate of Hagan* 459

Landlord and Tenant.

A tenancy from year to year can only be terminated by the agreement of the parties, express or implied, or by notice given six calendar months prior to ending of the year at which the tenancy commenced. *Fenster v. Isley* 888

Limitation of Actions.

1. Ordinarily the statute of limitations begins to run when a cause of action accrues. *In re Estate of Dalbey* 32
2. Whenever a person is prevented from exercising his legal remedy by some paramount authority, the time during which he is thus prevented is not to be counted against him in determining whether the statute of limitations has barred his right. *Lincoln Joint Stock Land Bank v. Barnes* 58
3. An action upon the official bond of a public officer for a breach thereof may be commenced at any time within ten years after such breach. *Neisius v. Henry* 273
4. The chairman of the board of public works in a city of the first class is an officer and his bond is an official bond within statute requiring action on official bond of officer to be brought within 10 years. *Neisius v. Henry* 273
5. In proceedings to modify or vacate a judgment on ground of fraud, after two years from rendition of judgment,

petitions showing that the facts were discovered within the two-year limitation period, and failing to show good reason why the period should be extended by equity court, it is not error to dismiss. *State, ex rel. Spillman, v. Commercial State Bank of Omaha* 490

6. Where it does not appear on the face of a petition that action is barred by the statute of limitations, a demurrer on that ground should be overruled. *Rohlff v. German Old People's Home* 636

Master and Servant.

1. The law imputes to a principal or master responsibility for the negligent acts of an agent or servant done in obedience to the express orders or directions of the master or within the scope of the employee's authority or employment in his master's business, and if those acts cause injury to third persons, the principal or master is liable for damages. *Van Auker v. Steckley's Hybrid Seed Corn Co* 24
2. For all acts done by a servant in obedience to the express orders or directions of the master, or in the execution of the master's business, within the scope of his employment, and for acts in any sense warranted by the express or implied authority conferred upon him, considering the nature of the services required, the instructions given, and the circumstances under which the act is done, the master is responsible, but for acts which are not within these conditions the servant alone is responsible. *Dafoe v. Grantski* 344

Mechanics' Liens.

The statute providing that materialman shall forfeit an amount not exceeding one-half of the amount claimed by mechanic's lien for failure to release lien upon notice is remedial in nature, permits recovery of actual damages in a civil action but limits the amount thereof and is not unconstitutional. *Gibson v. Koutsky-Brennan-Vana Co.* 326

Mortgages.

1. Ordinarily, when one having a mortgage on real estate becomes the owner of the fee the former estate is merged in the latter, but the mortgagee may in such case keep his mortgage alive when it is essential to his security against an intervening title. *Lincoln Joint Stock Land Bank v. Barnes* 58
2. Where, at time mortgagee acquires equity of redemption in mortgaged realty, there is no expression of his inten-

tion as to whether his interest as mortgagee shall merge in the equity of redemption, it will be presumed, in absence of circumstances indicating a contrary purpose, that he intended to do that which would prove most advantageous to himself. *Lincoln Joint Stock Land Bank v. Barnes* 58

3. Mortgagee has no such interest in the mortgaged premises that he can question any title that is paramount and adverse to mortgagor's title, and persons holding titles paramount and adverse to mortgagor's title usually cannot be made parties to a mortgage foreclosure action. *Lincoln Joint Stock Land Bank v. Barnes* 58
4. Grantee of deed from mortgagor, executed prior to but recorded subsequent to mortgage, together with such grantee's successors in title, are proper parties to a foreclosure of the mortgage. *Lincoln Joint Stock Land Bank v. Barnes* 58
5. A mortgage foreclosure action is an equitable proceeding. *Lincoln Joint Stock Land Bank v. Barnes* 58
6. The purpose of a foreclosure action is to determine the existence of a mortgage lien, to ascertain the amount thereof and its priority, and to obtain a decree directing the sale of premises in satisfaction thereof in case no redemption is made. *Lincoln Joint Stock Land Bank v. Barnes* 58
7. In foreclosure action, where plaintiff's attorney filed an attorney's lien against the decree and the land involved, and land was sold to judgment creditor to satisfy the decree, the attorney secured a confirmation of the sale and delivered the deed to purchaser, title to land passed to purchaser free from lien. *Marshall v. Casteel* 71
8. The possession and production of a note for cancelation are not always necessary to obtain a decree in a foreclosure. *Boehmer v. Heinen* 200
9. Where all allegations of a petition have been put in issue by a general denial, proof of ownership of the note and debt it represents, and that it has not been sold, assigned, or otherwise disposed of, is necessary before a valid foreclosure decree can be entered. *Boehmer v. Heinen* 200
10. It is competent for parties to a real estate mortgage to make an arrangement as to the possession or right of possession of the premises other than that which the law would determine in the absence of an agreement, and this may be done by a separate instrument given at the same time with the mortgage. *Hanks v. Northwestern State Bank* 204

11. An order confirming judicial sale under decree foreclosing real estate mortgage will not be reversed for inadequacy of price, where there is no fraud or shocking discrepancy between value and sale price and there is no satisfactory evidence that a higher bid could be obtained. *Kansas City Life Ins. Co. v. Zakrzewski* 878

Municipal Corporations.

1. Where a city attempts to levy a special assessment without compliance with all conditions essential to a valid exercise of its taxing power, the taxes so levied are void. *Cullingham v. City of Omaha* 744
2. Where special assessments against property to pay cost of paving are void knowledge of the proceedings and of the construction of the improvement will not estop the owner from avoiding liability therefor, and they cannot be enforced solely on ground of benefits to the property. *Cullingham v. City of Omaha* 744
3. The power of a municipality to contract for public improvements and to levy special assessments to defray the expense thereof is statutory and such powers must be strictly construed. *Cullingham v. City of Omaha* 744
4. A property owner affected is not estopped to assert irregularity of a special assessment where the irregularity is of such character as to defeat the jurisdiction of the city to act in the premises. *Cullingham v. City of Omaha* 744

Negligence.

1. Where evidence is such that reasonable minds might draw different conclusions therefrom, the questions of negligence and contributory negligence are for the jury, and it is error to direct a verdict. *Anderson v. Robbins Incubator Co.* 40
2. In motorist's action for personal injuries and damage to automobile suffered when truck collided at night with automobile with trailer attached parked alongside highway with left wheels on paved portion thereof and facing same direction truck was traveling, whether either truck driver or motorist or both were negligent and the effect of such negligence under the comparative negligence statute were for the jury. *Anderson v. Robbins Incubator Co.* 40
3. The doctrine of last clear chance does not apply where the negligence of the injured party is contemporaneous and active up to the moment of an accident, and thus contributed to cause the accident. *Hughes v. Omaha & C. B. Street Ry. Co.* 47

4. A plaintiff may not, in reckless disregard of any possible negligence of a street car company, rely solely upon its statutory duty, proceed to a place of danger, and expect the street car company, whose car cannot turn out or stop instantly, to be an insurer of his safety, and if he does nothing for his own security he is negligent, and if physical facts leave no doubt that he proceeded recklessly, he is, as a matter of law, guilty of negligence more than slight, which under rule of comparative negligence bars recovery. *Hughes v. Omaha & C. B. Street Ry. Co.* 47
5. When one, being in a place of safety, sees and is aware of the approach of a moving vehicle in close proximity to him, suddenly moves from the place of safety into the path of such vehicle and is struck, his own conduct constitutes contributory negligence more than slight in degree, as a matter of law, and precludes recovery. *Hughes v. Omaha & C. B. Street Ry. Co.* 47
6. The sudden emergency rule cannot be successfully invoked by one who has brought the emergency upon himself by his own acts, or who has not used due care to avoid it. *Hughes v. Omaha & C. B. Street Ry. Co.* 47
7. The doctrine of last clear chance presupposes negligence on the part of the person injured or whose property is damaged. *Harstick v. Beckenhauer* 179
8. The doctrine of last clear chance has no application where the position of peril of the person or property injured is not due to negligence for which the party injured, in his person or property, is responsible. *Harstick v. Beckenhauer* 179
9. An owner is liable to an invitee for injuries occasioned by unsafe condition of his premises if such condition is known to him and not to the invitee, and the condition is negligently suffered to exist. *Malolepszy v. Central Market* 356
10. A visitor is entitled to expect that the owner will take reasonable care to discover the actual condition of the premises and either make them safe or warn him of dangerous conditions so that he will have an opportunity to decide intelligently whether to accept the invitation. *Malolepszy v. Central Market* 356
11. An owner is liable for injuries sustained by an invitee while the invitee is upon that part of the premises where the owner gives him reason to believe his presence is permitted or desired because of its connection with the business, and in determining this area the nature of the business to be transacted is of great importance. *Malolepszy v. Central Market* 356

12. A customer is a business visitor to area where business is transacted unless the possessor exercises reasonable care to apprise him that the area of the invitation is more narrowly restricted. *Malolepszy v. Central Market* 356
13. If an owner realizes that either one of two doors might be taken by his business visitor to be the door to the business area, the visitor is entitled to the protection of a business visitor even though he enters the wrong door. *Malolepszy v. Central Market* 356
14. The doctrine of last clear chance does not apply where the negligence of the injured party is contemporaneous and active up to the very moment of an accident, and thus contributed to cause the accident. *Donald v. Heller* 600
15. The burden of proving negligence is on the party alleging it. *Ulrich v. Batchelder* 697
16. Circumstantial evidence, to be sufficient to require submission of an issue of negligence based thereon to a jury, must be of such character as to justify a reasonable inference, and no other reasonable inference, that the party charged was negligent. *Ulrich v. Batchelder* 697
17. In determining whether plaintiff's contributory negligence bars his recovery as a matter of law, the evidence must be given that construction that is most favorable to plaintiff. *Weitz v. United States Trust Co.* 703
18. In absence of a contrary statute, contributory negligence that is more than slight defeats recovery in favor of a third person from absent owner for damages arising from a dangerous condition on premises occupied by a tenant, even though the existence of such condition violates a statute or ordinance and is negligence *per se*. *Weitz v. United States Trust Co.* 703
19. Evidence examined and held that plaintiff was not entitled to an instruction that defendant was guilty of negligence as a matter of law. *Callahan v. Prewitt* 787
20. Evidence of contributory negligence of plaintiff's intestate examined and held sufficient to go to the jury. *Callahan v. Prewitt* 787
21. In automobile accident case, evidence as to motorist's use of liquor a short time before accident was admissible on issue of contributory negligence. *Callahan v. Prewitt* 793
22. The sudden emergency rule cannot be successfully invoked by one who has brought that emergency upon himself by his own acts, or who has not used due care to avoid it. *Callahan v. Prewitt* 793
23. Want of ordinary care, and not knowledge of the danger, is the test of contributory negligence. *Frazier v. Anderson* 905

24. Contributory negligence is conduct for which plaintiff is responsible, amounting to a breach of duty which the law imposes on 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. *Frazier v. Anderson* 905
25. If contributory negligence is relied upon by defendant as an affirmative defense, the burden is upon him to prove such negligence by preponderance of the evidence, except as such negligence may appear in plaintiff's evidence. *Frazier v. Anderson* 905
26. The question of contributory negligence is for the jury, where testimony is conflicting or where evidence as a whole is such that reasonable minds may fairly draw different conclusions therefrom. *Frazier v. Anderson* 905
27. The question of existence of gross negligence, within automobile guest statute, must be determined from facts in each case. *Landrum v. Roddy* 934
28. Gross negligence, within automobile guest statute, means negligence in a very high degree, or the absence of even slight care in the performance of a duty. *Landrum v. Roddy* 934
29. A violation of statutes regulating the use and operation of motor vehicles on highways is not negligence *per se*, but evidence of negligence which may be taken into consideration with all other facts in determining whether negligence is established. *Landrum v. Roddy* 934
30. Where an action under the automobile guest statute is based on gross negligence, the comparative negligence statute is applicable. *Landrum v. Roddy* 934
31. The maxim "*volenti non fit injuria*" means: If one, knowing and comprehending the danger, voluntarily exposes himself to it, though not negligent in so doing, he is deemed to have assumed the risk and is precluded from a recovery for an injury resulting therefrom. *Landrum v. Roddy* 934
32. Within the limits of its terms, the maxim "*volenti non fit injuria*" is applicable to negligence actions in Nebraska. *Landrum v. Roddy* 934
33. In actions based on negligence, the defense of assumption of risk under the maxim "*volenti non fit injuria*" is not inconsistent with the defense of contributory negligence. *Landrum v. Roddy* 934
34. Question of whether or not the conduct of the plaintiff is such as to defeat any right to recover, is one of con-

tributory negligence and should be submitted to the jury. *Landrum v. Roddy* 934

Parties.

1. In a suit by the heirs of a donor to recover amount of a charitable gift because of failure of purpose and where no general charitable intent was shown, the attorney general is a proper but not a necessary party to the litigation. *Rohlff v. German Old People's Home* 636
2. The heirs of the donor of a gift for a particular charitable purpose may properly bring an action to recover the amount of the gift when facts are pleaded which would require a reverter to such heirs. *Rohlff v. German Old People's Home* 636

Partition.

1. A cause of action for partition of one tract of land is improperly joined in a single bill with a cause of action for partition of another tract, where some of the persons interested in one are not interested in the other and do not derive interests from a cotenancy of both tracts. *Majerus v. Santo* 774
2. Partition of two or more parcels of real estate may be made in one proceeding if title to all the parcels sought to be partitioned is derived from a cotenancy as a common source of title, though some of cotenants, parties to the proceeding for partition, may be interested in only one or some of the parcels and not in all. *Majerus v. Santo* 774
3. In proceeding for partition, whether at law or in equity, all of the cotenants are indispensable parties and such of them as do not join as plaintiffs must be made defendants and the same is true of the successors in title of any of the cotenants. *Majerus v. Santo* 774
4. Under statute, any creditor having a specific or a general lien upon all or any portion of property being partitioned may or may not be made a party at the option of the plaintiff. *Majerus v. Santo* 774
5. An heir or devisee of an estate cannot maintain an action for distribution or partition until the debts, allowances, and expenses against the estate have been paid or provided for, unless he gives a bond with approved sureties to pay the same, except where allegations of the petition allege solvency of the estate, as well as sufficiency of the personal assets to pay the debts against it, and such allegations are conclusively established by the evidence. *Majerus v. Santo* 774

6. Fact that question of title was drawn in issue in partition suit did not make dismissal of partition suit necessary, but district court was invested with authority in that proceeding to first try issues as to title, and, after they were determined, to proceed in partition action to partition of property among parties found to be owners thereof. *Majerus v. Santo* 774

Partnership.

1. A partnership is a contract of two or more competent persons to place their money, efforts, labor, skill, or some or all of them, in lawful commerce or business, and to divide the profit or bear the loss in certain proportions. Baum v. McBride 629
2. The existence of partnership is a question of fact under the evidence. *Baum v. McBride* 629
3. More convincing evidence is required to prove existence of partnership where alleged partners are the only litigants than in controversy between third party and partners. *Baum v. McBride* 629
4. The existence of a partnership depends upon the agreement of the parties, and their intention must be ascertained from all the evidence and circumstances. *Baum v. McBride* 629

Pleading.

1. So long as the court can see that the identity of the cause of action is preserved, the particular allegations of the petition may be changed and others added in order to cure imperfections and mistakes in the manner of stating plaintiff's case. *Lincoln Joint Stock Land Bank v. Barnes* 58
2. Under the Code an answer in the nature of a cross-petition may properly seek affirmative relief beyond that which is merely defensive, and such relief sought need not necessarily be based on equitable grounds if germane to the original action. *Gibson v. Koutsky-Brennan-Vana Co.* 326
3. A party may at any time invoke the language of his opponent's pleading on which a case is being tried on a particular issue, and in doing so he is neither required nor allowed to offer such pleading in evidence in the ordinary manner. *Gibson v. Koutsky-Brennan-Vana Co.* 326
4. Where a defendant desires an affirmative judgment against the plaintiff he should state in his answer the ultimate facts to support his contention, and if he fails to allege an essential fact but it is pleaded by his adver-

sary, an affirmative judgment in defendant's favor may be sustained by the pleadings. *Gibson v. Koutsky-Brennan-Vana Co.* 326

5. A motion for judgment on the pleadings is in the nature of a demurrer and admits truth of all well-pleaded facts in the pleadings of the opposing party. *Vaughan v. Omaha Wimsett System Co.* 470
6. The making of a motion for judgment on the pleadings does not waive the right to trial of an issue of fact, and upon the overruling thereof the party who made such motion should be given opportunity of electing to stand on his motion or to proceed further. *Vaughan v. Omaha Wimsett System Co.* 470
7. A demurrer *ore tenus* is permissible and if the pleading to which it is addressed is totally defective it is error to admit any evidence under such pleading. *State, ex rel. Spillman, v. Commercial State Bank of Omaha* 490
8. Where misjoinder of causes of action is apparent on the face of the petition, the infirmity may be challenged by demurrer. *Sickler v. City of Broken Bow* 542
9. Demurrer admits only facts that are well pleaded and not conclusions of either law or fact. *Sickler v. City of Broken Bow* 542
10. Where both general and specific allegations are made respecting the same matter the specific allegations control, and general allegations and conclusions lend no support to a petition which contains specific allegations inconsistent therewith. *Sickler v. City of Broken Bow* 542
11. A demurrer to pleading admits only facts well pleaded and not conclusions of law or fact. *State, ex rel. Johnson, v. Consumers Public Power District* 753
12. In equity action, an answer in the nature of cross-petition may properly seek affirmative relief beyond that which is merely defensive and such relief need not be based on equitable grounds if germane to original action, but matters set up in cross-petition must be germane to original suit and new and distinct matters, not maintainable under the Code as to counterclaims, and not involved in proper determination of subject-matter of original suit, must be litigated in a separate action. *O'Shea v. O'Shea* 843

Process. SEE JUDGMENT, 2.

Public Lands.

1. Under constitutional provision the board of educational lands and funds has control of management, preserva-

tion and disposition of public school lands, subject to direction by the legislature. *State, ex rel. Johnson, v. Central Nebraska Public Power and Irrigation District* 153
2. The state public school lands are a trust held by the state and under the Constitution are in the control of the board of educational lands and funds, which board is subject to control by the legislature within constitutional limitations. *State, ex rel. Johnson, v. Central Nebraska Public Power and Irrigation District* 153
3. The provision of the enabling act making the grant of public school lands, and of the Constitution of 1866 designating the lands, and the subsequent act admitting Nebraska into the Union under the Constitution constituted a contract between the state and the national government with regard to such grant. *State, ex rel. Johnson, v. Central Nebraska Public Power and Irrigation District* 153
4. By constitutional provision, the power to sell, lease and manage educational lands of the state was conferred upon a distinct board or commission, and the power thus conferred, the legislature is without power to take away. *State, ex rel. Johnson, v. Central Nebraska Public Power and Irrigation District* 153
5. The legislature may, by statute, provide upon what terms the public school lands shall be leased or sold, but it cannot empower any person or body to do so except the board of educational lands and funds. *State, ex rel. Johnson, v. Central Nebraska Public Power and Irrigation District* 153
6. Any act by which the legislature seeks to assume direct control over the public school lands and remove the control of the board of educational lands and funds is unconstitutional, null and void. *State, ex rel. Johnson, v. Central Nebraska Public Power and Irrigation District* .. 153
7. The legislature is without power to make a grant in fee of, or an easement over, public school lands without compensation for the damage for such taking or use. *State, ex rel. Johnson, v. Central Nebraska Public Power and Irrigation District* 153
State v. Platte Valley Public Power and Irrigation District 661
8. The state is without power through legislative means or otherwise to bestow a special benefit upon any person or corporation at the expense of the *cestui que trust*, the state public school system. *State, ex rel. Johnson, v. Central Nebraska Public Power and Irrigation District* .. 153
9. The statutes purporting to grant to public corporations

engaged in construction, operation and maintenance of works of internal improvement the right to obtain rights of way over public school lands without compensation are unconstitutional. *State, ex rel. Johnson, v. Central Nebraska Public Power and Irrigation District* 153

10. The state, as trustee of public school lands, is without power through legislative means or otherwise to bestow a special benefit upon any person or corporation, public or private, at the expense of the *cestui que trust*, the public school system of the state. *State v. Platte Valley Public Power and Irrigation District* 661

Public Service Commissions.

1. Where an order of the railway commission is administrative or legislative in character as distinguished from judicial, the only question for decision on appeal is whether its action was unreasonable or arbitrary, within its jurisdiction, or violative of legal and constitutional rights. *Thomson v. Nebraska State Railway Commission* 52
2. The object of railway commission control is to secure adequate, sustained service for the public at minimum cost and to protect and conserve investments already made for this purpose, and in doing this primary consideration must be given to the public rather than to individuals. *Thomson v. Nebraska State Railway Commission* 52

Quieting Title.

1. Where a trial court permits or orders all persons interested in an accretive area to be made parties to a suit in order to divide such accretive area among the riparian owners, a decree quieting title to all of said accretive area will ordinarily be entered. *Conkey v. Knudsen* 5
2. Petition in suit to quiet title which alleges generally title in the plaintiff and generally that defendant claimed or appeared to have some interest in, right or title to, or lien upon said real estate or a part thereof was sufficient. *Wells v. Tietge* 230

Quo Warranto.

1. *Quo warranto*, under statute, is intended to prevent exercise of powers not conferred by law and is not ordinarily available to regulate manner of exercising such powers. *State, ex rel. Johnson, v. Consumers Public Power District* 753
2. A corporation's irregular or improper exercise of power lawfully possessed by it is not ground for proceedings in nature of *quo warranto*. *State, ex rel. Johnson, v. Consumers Public Power District* 753

3. *Quo warranto* will not lie to prevent a public corporation from exercising power conferred on it by law, even though the power is exercised in an irregular or improper manner, nor to test the validity of a contract which is a mere incident to the execution of such power. *State, ex rel. Johnson, v. Consumers Public Power District* 753
4. The remedy by *quo warranto* cannot be used for enforcement or forfeiture of municipal contract. *State, ex rel. Johnson, v. Consumers Public Power District* 753
5. *Quo warranto* is employed only to test actual right to an office or franchise and it cannot afford relief for official misconduct or be used to test the legality of official action of public or corporate officers. *State, ex rel. Johnson, v. Consumers Public Power District* 753
6. *Quo warranto* is intended to prevent the exercise of powers that are not conferred by law, and is not ordinarily available to regulate the manner of exercising those powers. *State, ex rel. Johnson, v. Conservative Savings and Loan Ass'n* 805
7. Statute relating to the action of *quo warranto* prescribes who the defendant may be in such action, and the acts, the doing of which may be the basis for an information that may bring a person before the bar of a court to answer as to the alleged acts. *State, ex rel. Johnson, v. Conservative Savings and Loan Ass'n* 805
8. The statute requiring defendant to answer charges made against him in the information in *quo warranto* contemplates that *quo warranto* actions shall be used to determine the issues made by the authorized charge of the information and the answer thereto of a defendant properly charged in the information. *State, ex rel. Johnson, v. Conservative Savings and Loan Ass'n* 805
9. In the absence of a statutory provision extending its scope a *quo warranto* action may not be used merely to establish or determine private rights and obligations or to redress private grievances in which the public has no interest. *State, ex rel. Johnson, v. Conservative Savings and Loan Ass'n* 805

Railroads.

1. The service and facilities to be furnished by a railroad company at any station need only be just, reasonable and adequate to the requirements of the station, and should in a measure be commensurate with the patronage and receipts from that portion of the public to whom

such service is rendered. *Thomson v. Nebraska State Railway Commission* 52
2. Whether a railroad company may change a station from agency to caretaker service depends upon the facts and circumstances of the particular case. *Thomson v. Nebraska State Railway Commission* 52
3. A final order of the railway commission granting or denying a railroad company permission to substitute a caretaker for an agent is unreasonable and arbitrary unless its findings and conclusions conform to law and are supported by the evidence. *Thomson v. Nebraska State Railway Commission* 52

Rape.
1. In prosecution for statutory rape it is not essential to a conviction that prosecutrix should be corroborated by testimony of other witnesses as to the particular act constituting the offense, but it is sufficient if she is 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. *Schlegel v. State* 497
2. Previous chastity of female child under 15 years of age at time of commission of act is immaterial in prosecution for statutory rape. *Schlegel v. State* 497
3. In a prosecution for statutory rape, the evidence must show beyond a reasonable doubt that defendant committed the act charged and that he did so under such circumstances that every element of the offense existed. *Whomble v. State* 667

Sales.
1. Where the party rescinding a contract would be entitled to retain the money or property received, either by virtue of an original liability if the contract be rescinded, or under the contract itself if rescission be refused, no tender or offer of restoration is required. *Aron v. Mid-Continent Co* 87
Vavricka v. Mid-Continent Co 94
2. If restoration consists of money, the amount of which can be credited in partial cancelation of the injured party's claim, a failure to restore will not preclude a suit to recover the consideration paid. *Aron v. Mid-Continent Co.* 87
Vavricka v. Mid-Continent Co 94
3. Ordinarily a party rescinding a contract for fraud is required to restore whatever has been received under the contract in the way of money, property or other consid-

eration as a condition precedent to an action at law for the recovery of the purchase price. *Vavricka v. Mid-Continent Co.* 94

4. In order for an express warranty to exist, there must be something positive and unequivocal concerning the thing sold, which the vendee relies upon, and which is understood by the parties as an absolute assertion concerning the thing sold, and not the mere expression of opinion. *Ralston Purina Co. v. Iiams* 588

Specific Performance.

1. Whether a decree for specific performance of contract to sell real estate will be granted rests in the discretionary power of the trial court, but such discretion is not unlimited, and a decree is not to be given or withheld arbitrarily and capriciously. *Beard v. Morgan* 503
2. Where an oral contract has been performed by one party and he cannot be placed in *statu quo* by an award of damages which would furnish full compensation, equity will afford a remedy by specific performance. *Taylor v. Clark* 552
3. Equity will grant specific performance where the terms of a contract are established by evidence that is clear, convincing and satisfactory, and where it has been fully performed by one party and its nonfulfilment would amount to a fraud on that party. *Taylor v. Clark* 552
4. Specific performance of oral contract to convey realty may not be decreed because of part performance unless the acts of part performance in relation to subject-matter in and of themselves unequivocally indicate existence of contract alleged, and cannot be accounted for on any other reasonable hypothesis. *Taylor v. Clark* 563
5. Parol evidence was not sufficiently clear, satisfactory, convincing and unequivocal to establish testatrix' written agreement with her nephew's parents to receive the nephew into her family as her son and sole heir so as to entitle nephew to specific performance of the agreement. *Cahill v. Mockett* 730
6. Courts of equity, under proper circumstances, will grant specific performance of contracts to leave property to others. *Majerus v. Santo* 774

States.

1. A claim on contract originally authorized or subsequently ratified by the legislature must be presented to the auditor of public accounts with right of appeal from his decision to courts, and may not in first instance be pre-

sented to the courts. *In re Appeal of Roadmix Construction Corporation* ... 425
2. Generally, a contract between individuals and the state for the construction of highways or other authorized public improvements should be construed and liabilities determined by rules governing contracts between individuals. *In re Appeal of Roadmix Construction Corporation* 425
3. State employees, agents and officers may act for the state only as authorized by the Constitution or statutes. *In re Appeal of Roadmix Construction Corporation* ... 425
4. Generally, doctrine of laches cannot be applied against public rights. *State v. Platte Valley Public Power and Irrigation District* ... 661

Statute of Frauds.
1. An oral contract to convey realty is void and unenforceable within statute of frauds unless there has been part performance by promisee solely referable to contract sought to be enforced. *Taylor v. Clark* ... 563
2. Payment of consideration of an oral contract is not part performance taking it out of the statute of frauds. *Taylor v. Clark* ... 563
3. Joinder in execution of note and mortgage constituting consideration for oral contract to convey realty is not part performance which will take contract out of statute of frauds. *Taylor v. Clark* ... 563

Statutes.
The giving of an appeal bond is essential to confer jurisdiction of a cause upon the appellate tribunal. *Security Mutual Life Ins. Co. v. Gilliam* ... 673

Street Railroads.
The statute declaring certain circumstances under which a pedestrian has the right of way in crossing a street does not relieve the pedestrian of responsibility for the results of his own contributory negligence. *Hughes v. Omaha & C. B. Street Ry. Co.* ... 47

Subrogation.
1. The doctrine of equitable subrogation will be applied in all cases demanded by equity, good conscience and public policy, and no flexible rule for its application can be laid down. *Burks v. Packer* ... 373
2. Where insurance carrier settles a compensation action, conditioned that it be paid first out of the proceeds of an action, brought by the personal representative of the deceased employee against another person, the amount of

compensation paid by it, and the latter action is settled, such insurance carrier is entitled to equitable subrogation in the amount of compensation paid. *Burks v. Packer* 373

3. The doctrine of subrogation is not administered by equity court as legal right, but principle is applied to serve ends of justice and to do equity in particular case, and its application depends upon facts and circumstances of such case. *Fender v. Reed* 911

Taxation.

1. Where an owner of real estate being subjected to tax foreclosure proceedings makes an appearance by filing pleadings and offering evidence which were considered and adjudged on their merits by the trial court without objection, the absence of formal order making such owner a party to the suit will not nullify his right to appeal. *Madison County v. Crippen* 474
2. The right to redeem realty from sale on foreclosure of tax sale certificates is purely statutory, and legislature's intent, as expressed in statutes on subject, is controlling factor. *Madison County v. Crippen* 474
3. The amount, payable to redeem realty from unconfirmed sale on foreclosure of tax sale certificates to a stranger to foreclosure suit for less than amount of foreclosure decree, is amount of decree, interest and costs, plus interest on amount of purchase price at 12 per cent. per annum from date of sale until date of redemption. *Madison County v. Crippen* 474
4. Under the principle of *mobilia sequuntur personam* the situs of intangible personal property generally follows the residence or domicile of the owner and such property of nonresident owners is not subject to taxation unless statute expressly provides for inclusion of intangibles of nonresident owners. *Massey-Harris Co. v. Douglas County* 547
5. The state board of equalization and assessment has no authority under statute, as a board of review, to correct errors of county boards of equalization or assessors. *Scotts Bluff County v. State Board of Equalization and Assessment* 837
6. County boards of equalization deal with assessments of individuals and between townships, precincts or districts within the county, while the state board of equalization and assessment deals with equalization between counties or tax districts. *Scotts Bluff County v. State Board of Equalization and Assessment* 837

7. The supreme court cannot consider and correct any errors or irregularities of assessors or county boards of equalization in their proceedings on a petition in error from action of state board of equalization and assessment. *Scotts Bluff County v. State Board of Equalization and Assessment* 837
8. The state board of equalization and assessment, when proceeding under statute authorizing it to equalize assessments, cannot deal with individual assessments and cannot adjust inequalities between townships, precincts or districts within counties, but deals only with values of taxable property in the county as a whole as to any class, classes or kinds of property, personal, real or mixed. *Scotts Bluff County v. State Board of Equalization and Assessment* 837
9. Where action of state board of equalization and assessment in making changes in assessed valuation did not apply to all of property of county as to any class, classes, or kinds of property, the action of the board was unauthorized and void. *Scotts Bluff County v. State Board of Equalization and Assessment* 837

Trial. SEE APPEAL. CRIMINAL LAW. NEGLIGENCE, 17.
1. Where the trial court determined that the plaintiff failed to establish a *prima facie* case, it is not necessary for the court to allow the case to proceed further. *McNaught v. New York Life Ins. Co.* 213
2. Hearsay evidence tending to prove a material fact, admitted without objection, may sustain a finding of the existence of that fact, based solely thereon. *Dafoe v. Grantski* 344
3. Upon the overruling of a motion for judgment on the pleadings, the party so moving should be given the opportunity of electing whether he wishes to stand on his motion or to proceed further, and if he elects to proceed further then the case should be regularly assigned for trial upon its merits as to all issues raised by the pleadings. *Vaughan v. Omaha Wimsett System Co.* 470
4. It is not prejudicial error for the court to refuse a request for separate findings of fact and conclusions of law which are improper in form and not within the contemplation of statute. *Donald v. Heller* 600
5. Where evidence establishes that plaintiff was guilty of more than slight negligence, it becomes a question of law for the court and it is the court's duty to render judgment for the defendant. *Donald v. Heller* 600

6. Where a certain theory on any issue is relied upon by the parties at the trial as the proper one, it will be adhered to on appeal whether it is correct or not. *Gillan v. Equitable Life Assurance Society* 647
7. In determining whether there is sufficient evidence of defendant's negligence to warrant submission of that issue to the jury, all facts and circumstances and legitimate inferences to be drawn therefrom must be viewed in the light most favorable to plaintiff. *Ulrich v. Batchelder* 697
8. A motion to disqualify a county attorney from participating in a civil case, when the duties of his office might conflict with the duty owed to his client in the civil suit, comes too late when first made within 48 hours of the commencement of a second trial. *Callahan v. Prewitt* 787
9. An instruction, legal principles of which are incorrectly stated or are inapplicable to issues involved, is properly refused. *Frazier v. Anderson* 905
10. In personal injury action by automobile guest against host, giving an instruction setting forth certain statutes regulating use and operation of motor vehicles on highways, which instruction contained that part of statutes which provides that violation thereof is a crime for which the violator should be punished was not error. *Landrum v. Roddy* 934

Trusts.

1. A constructive trust is a relationship with respect to property subjecting the person by whom the title to the property is held to an equitable duty to convey it to another on the ground that his acquisition or retention of the property is wrongful and that he would be unjustly enriched if he were permitted to retain it. *Nelson v. Seevers* 522
2. Where owner of interest in land transfers it *inter vivos* to another in trust for transferor, but no memorandum properly evidencing intention to create trust is signed and transferee refuses to perform trust, transferee holds interest upon a constructive trust for transferor if transfer was procured by fraud, duress, undue influence, or mistake, or if transferee at time of transfer was in a confidential relation to transferor. *Nelson v. Seevers* 522
3. Where land is transferred temporarily to one in a confidential relationship to transferor, equity will declare a constructive trust for benefit of transferor and not permit transferee to be unjustly enriched. *Nelson v. Seevers* 522

4. Where a charitable gift is contingent as to amount, the trust is not perverted by a compromise agreement by which the donee receives a definite amount of property impressed with same charitable purpose in lieu of contingent interest. *Rohlff v. German Old People's Home*.... 636
5. Generally, a bequest in the form of a trust to a charitable corporation organized for same charitable purpose as that shown in the grant is not technically a trust, but is a gift to the corporation to accomplish the purposes of the corporation, and is equivalent to a bequest upon a charitable trust. *Rohlff v. German Old People's Home*.... 636
6. A bequest will revert to donor's heirs, even in the absence of express provisions therefor, if it appears that donor had no general charitable purpose in mind and contemplated only carrying out particular purpose impossible of fulfilment. *Rohlff v. German Old People's Home* 636
7. Bequest to organization to be used for purposes of old people's home for persons of German descent on condition that separate corporation be organized before testator's death to operate home and that bequest pass directly to corporation was bequest for particular charitable purpose and indicated no general charitable intent. *Rohlff v. German Old People's Home*.... 636
8. It is incumbent upon a charitable corporation to carry out its purposes and those of the donor of a charitable gift to it within a reasonable time, where no general charitable intent is found in the bequest, otherwise the gift will revert to the donor, if living, or to his heirs, if he be deceased. *Rohlff v. German Old People's Home*.... 636
9. Doctrine of judicial *cy pres* is a principle of construction based on a judicial finding of donor's intention as applied to new conditions. *Rohlff v. German Old People's Home* 636
10. Ordinarily, doctrine of judicial *cy pres* can be applied only where there is a general charitable purpose, since a court of equity will not be permitted by construction to defeat the particular purpose of donor's narrow charitable trust intent. *Rohlff v. German Old People's Home* 636
11. Trusts arising by implication or by operation of law are excepted from operation of statute of frauds. *O'Shea v. O'Shea* 843
12. If a party obtains legal title to property by virtue of a confidential relation, under such circumstances that he ought not, according to the rules of equity and good conscience as administered in chancery, hold and enjoy the

benefits, out of such circumstances a court of equity will raise a trust by construction and convert him into a trustee of the legal title. *O'Shea v. O'Shea* 843

13. The violation by the grantee of a promise to reconvey is constructively fraudulent and gives rise to a constructive trust, which may be established by parol. *O'Shea v. O'Shea* 843
14. A decree establishing a constructive trust should not be limited to a cancellation of the conveyance whereby the constructive trustee acquired title to the land, but the trust should be ascertained and enforced. *O'Shea v. O'Shea* 843
15. A constructive trust is a relationship with respect to property subjecting the person by whom the title to property is held to equitable duty to convey it to another on ground that his acquisition or retention of property is wrongful. *O'Shea v. O'Shea* 843
16. Where owner of interest in land transfers it to another in trust for transferor, but no memorandum evidencing intention to create trust is signed, and the transferee refuses to perform the trust, the transferee holds interest upon constructive trust for the transferor if the transfer was procured by fraud, duress, undue influence or mistake, or the transferee at time of transfer was in confidential relation to transferor. *O'Shea v. O'Shea* 843

Vendor and Purchaser.

1. A purchaser of real estate acquires only title which his grantor had at the time of sale, unless he purchased the property on the basis of an apparent ownership upon which he was justified in relying. *Hadley v. Platte Valley Cattle Co.* 482
2. A party who purchases real estate with knowledge that another has a contract of purchase for the same is not a *bona fide* purchaser, and if he acquires such knowledge at any time before payment of consideration he will not be protected as a purchaser in good faith. *Beard v. Morgan* 503
3. A purchaser of real estate under contract, with notice of prior contract, is liable to the same equity, stands in his place, and is bound to do that which the person he represents would be bound to do by the decree. *Beard v. Morgan* 503

Venue.

1. The statutory right to bring action in the county in which one of the defendants resides can only be secured

by naming and having served a resident party who shall be a real party defendant and shall have a real or *bona fide* interest in the controversy between the plaintiff and the nonresident defendant. *Wistrom v. Forsling* 294

2. On special appearance for lack of jurisdiction of the person on ground of improper venue, the court must consider the allegations of the petition as true and determine the merits of the appearance from the averments of such petition, the character of the judgment that might properly be rendered on default of appearance, and the place, time and manner of service of process. *Stuckey v. Stuckey* 610
3. The venue of an action to establish that the title to land is held by plaintiff in trust, requiring the sale of such land before an accounting may be had between the beneficiaries of the trust, and to decree judicial sale of such land, is the county in which such land or some part thereof lies, even though an accounting between the parties after such sale and a judgment against the person of defendant may be sought as a result of such accounting. *Stuckey v. Stuckey* 610
4. In actions to quiet title, the district court has jurisdiction to construe a will in determining the rights of the parties to the land under the will. *Hahn v. Verret* 820

Waters.

1. An accretion to land is the imperceptible increase thereto on the bank of a stream by alluvial formations or by dereliction. *Conkey v. Knudsen* 5
2. A batture is a filling in of the river from the bottom, and if it ultimately forms an island or becomes attached to the riparian lands, it is a form of accretion and the title thereto becomes the property of the owner of the riparian land. *Conkey v. Knudsen* 5
3. A general rule cannot be followed in dividing accretions between riparian landowners under all circumstances. *Conkey v. Knudsen* 5
4. Where the boundaries of an accretive area are much curved, either inwardly or outwardly, the boundary lines of the riparian owner's portion of the accretions must necessarily be either divergent or convergent, according as the river boundary is longer or shorter than the original river bank line, and in such cases the frontage of each riparian owner on a new river bank should be divided in proportion to his frontage on the original bank. *Conkey v. Knudsen* 5

5. The feeding of cattle, sheep and hogs along a small stream outside of any incorporated city, and where stock feeding is generally engaged in, may not be enjoined at the instance of a neighboring landowner in the absence of evidence showing that a nuisance was thereby created. *Vana v. Grain Belt Supply Co.* 118, 125
6. Where surface water resulting from rain and snow flows in a well-defined course, its flow cannot be arrested or interfered with by landowner to the injury of neighboring proprietors, and for such injury proper remedy is injunction action in which injured person may recover damages. *Seibold v. Whipple* 167
7. In an action by landowner for damages caused to land because of diversion of surface waters thereon, where said land has during the same time been subject to flood waters from other sources, it was incumbent upon landowner to allocate damages arising from such surface waters from damages by reason of flood waters and to show the extent of the damages arising therefrom before recovery could be had. *Seibold v. Whipple* 167
8. In action by landowner for damages to land because of diversion of surface waters thereon by defendant, wherein evidence showed that land had during the same time been subjected to flood waters from other sources, landowner's evidence was insufficient to allocate damages from diverted surface waters or to prove extent of damage therefrom. *Seibold v. Whipple* 167
9. Where the evidence disclosed that in 1923 original channel of a creek had been abandoned as a natural watercourse, and no apparent effort had been made by the parties since that time to keep original channel open for any purpose, a dismissal of plaintiff's petition to restore original channel was proper. *Whipple v. Nelson* 286
10. Where upper riparian landowner and predecessor in title of lower riparian landowner, by agreement, changed channel of stream under circumstances that showed an intent on their part as adjoining landowners that new channel should thereafter be course of the stream, and successor in title likewise accepted such condition, and the old channel gradually filled up with silt, and was, in places, filled in and leveled off by upper riparian owner, and both parties farmed over old creek bed for a number of years, upper riparian owner was estopped from restoring water to its former channel. *Whipple v. Nelson* 286
11. The *quasi* judicial powers of the department of roads

and irrigation have application only to the granting and cancellation of appropriation rights and priorities. *Plunkett v. Parsons* 535

12. The legislative grant of jurisdiction to the department of roads and irrigation does not extend to it power to adjudicate vested rights or to make an adjudication with regard to apportionment of irrigation water between users, which has passed through diversion outlets into common private ditches for dispersion over lands to be irrigated. *Plunkett v. Parsons* 535
13. The matter of apportionment of waters after they have passed into common private ditches for dispersion is a function which belongs to the courts. *Plunkett v. Parsons* 535
14. The right to use of water for irrigation acquired regularly under the irrigation statutes of the state is a vested right, and the department of roads and irrigation is without jurisdiction to make an adjudication in regard to such vested rights. *Plunkett v. Parsons* 535
15. The owner of land may protect it from surface water even to the damage of his neighbor and he is liable only in case of negligence. *Jorgenson v. Stephens* 528
16. The owner of land may, by proper use and improvement thereon, deflect surface water, and in the absence of negligence will not be liable for consequent damage to his neighbor. *Jorgenson v. Stephens* 528
17. In the interest of good husbandry and in the absence of negligence, a landowner may accelerate surface water in the natural course of drainage without liability to the lower proprietor. *Jorgenson v. Stephens* 528
18. Surface waters may be controlled by the owner of the land on which they fall or originate, or over which they flow, and he may appropriate to his own use all that falls or comes on his land, and refuse to receive any that falls or originates or flows on or over adjoining property. *Jorgenson v. Stephens* 528
19. Under an exception to common-law doctrine, the right to control surface waters must be so exercised as not to unnecessarily or negligently cause injury to rights and property of others. *Jorgenson v. Stephens* 528

Wills.

1. In will contest, burden of proving undue influence is on party asserting it. *In re Estate of Bowman* 440
   In re Estate of Hagan 459
2. In will contest, evidence of contestant's financial condition is admissible and may be considered with other evi-

dence on issue of undue influence, if such issue is properly raised by pleadings. *In re Estate of Bowman* 440
3. Undue influence, in order to invalidate a will, must be of such character as to destroy the testator's free agency and substitute another person's will for his own. *In re Estate of Bowman* 440
4. In proving undue influence invalidating will, contestant is not limited to bare facts adduced by him, but he is entitled to the benefit of all legitimate inferences derived from established facts. *In re Estate of Bowman* 440
5. In will contest on ground of undue influence, testator's declarations are admissible to show his state of mind and consequent susceptibility to undue influence. *In re Estate of Bowman* 440
6. The inequality of distribution, the unreasonableness of the will and its unnaturalness are considered in determining undue influence, where the will is grossly unreasonable and inconsistent with testator's duty to family. *In re Estate of Bowman* 440
7. While mere existence of confidential relations between testator and beneficiary under will raises no presumption that beneficiary exercised undue influence over testator, such relationship may be considered with all other facts and circumstances in evidence. *In re Estate of Bowman* 440
8. The essential elements of undue influence invalidating will are testator's susceptibility to such influence, another's opportunity to exert it, his disposition to do so for improper purpose, and result clearly showing effect of such influence. *In re Estate of Bowman* 440
In re Estate of Hagan 459
9. A will contest, where the evidence is conflicting, is triable to a jury, and upon appeal to the supreme court is not triable *de novo*. *In re Estate of Bowman* 440
10. Where a will is attacked on the ground of lack of capacity, the burden is on the proponent to show mental capacity. *In re Estate of Hagan* 459
11. Where a will has been attacked on ground of lack of mental capacity, before it may be upheld, it must be shown that the testator understood the nature of the act, knew the extent of his property, understood the proposed testamentary disposition, knew the natural objects of his bounty, and that the will represented his wishes. *In re Estate of Hagan* 459
12. In determining testamentary intent, court must consider all circumstances surrounding testator at time of making of will. *Hahn v. Verret* 820

13. Generally, legacies are payable primarily out of personal estate of testator, and real estate will not be charged with their payment unless intention to do so is expressly declared, or clearly inferable from dispositions of will. *Hahn v. Verret* 820
14. Where time for filing claims had passed and order had been entered barring further filing of claims and petition alleged solvency of estate and sufficiency of personal assets to pay debts, costs, and expenses of administration, which allegation was conclusively established by evidence, devisee's action to quiet title was proper. *Hahn v. Verret* 820
15. Where a legatee or devisee enters into possession of the estate given him by will, with consent of the executor or otherwise, his possession may not be disturbed unless it appears that property must be used for payment of debts, costs and expenses of administration, but such legatee or devisee takes the property subject to such liabilities, if any, as are imposed by statute whenever finally determined by the court. *Hahn v. Verret* 820

Witnesses.

A stenographer who recorded voluntary statements of accused in shorthand at time they were made, may, when sworn as a witness, read the shorthand notes as evidence, if such statements, when extended to script or print, would be admissible. *Schlegel v. State* 497

Workmen's Compensation.

1. The workmen's compensation law does not provide for compensation for loss of use of an eye, based on the amount of vision existing previous to the accident. *Bolen v. Buller* 237
2. The workmen's compensation act definitely fixes compensation for employee's loss of eye at two-thirds of his daily wages for 125 weeks, without exception. *Bolen v. Buller* 237
3. The legislative intent of the workmen's compensation act is to compensate and indemnify employee, losing eye capable of industrial use as result of injury in industry, to full extent of his industrial loss occasioned thereby. *Bolen v. Buller* 237
4. Where the evidence is conflicting and cannot be reconciled, this court, upon a trial *de novo*, in a workmen's compensation case, will consider the fact that the district court observed the demeanor of witnesses and gave credence to the testimony of some, rather than to the contradictory testimony of others. *Bolen v. Buller* 237

5. Where an employee dies suddenly and mysteriously while engaged in his work, the burden of proof that his death was an accident arising out of his employment rests upon the claimant for compensation. *Mook v. City of Lincoln* 254
6. Either party who refuses to accept the findings, order, award or judgment of a judge of the workmen's compensation court may within 14 days file application for, and obtain, a rehearing before the full court. *Mook v. City of Lincoln* 254
7. The right to a rehearing before the workmen's compensation court by either party is paramount to, and exclusive of, the right of appeal to the district court from such original decision. *Mook v. City of Lincoln* 254
8. A claimant for compensation under subdivision 3 of section 48-121, Comp. St. 1929, who through an injury has suffered a permanent partial loss of the use or function of both feet, is entitled to recover such proportion of the compensation allowed for total disability under subdivision 1 of said section as the extent of his loss would bear to the total loss of such members. *Bronson v. City of Fremont* 281
9. Where it is determined on appeal that the award of the district court was erroneous in that it failed to reduce the award of the compensation court, an allowance of attorney's fees by the district court is also erroneous. *Bronson v. City of Fremont* 281
10. The right to tax attorney's fees in compensation cases is statutory. *Rexroat v. State* 333
11. Where an employee appeals from a decision of the district court denying an award of compensation and the supreme court reverses the district court and holds that the employee is entitled to compensation, the supreme court is not authorized to allow the employee an attorney's fee for services therein. *Rexroat v. State* 333
12. The burden of proof is upon claimant in a compensation case to establish by a preponderance of the evidence that personal injury was sustained by claimant as result of an accident arising out of and in the course of his employment. *Zanski v. Yellow Cab & Baggage Co.* 340
Weitz v. Johnson 452
Duncan v. Weidman 864
Pixa v. Grainger Bros. Co. 922
13. A compensation award cannot be based on possibilities or probabilities, but must be based on sufficient evidence that the claimant incurred a disability arising out of and

in the course of his employment. *Zanski v. Yellow Cab & Baggage Co.* 340
Duncan v. Weidman 864

14. Where an employee files a claim under the workmen's compensation act and an order is entered thereon dismissing the claim, and employee does not file an application for a rehearing with the compensation court within 14 days after date of order, the order becomes conclusive and final, and application for a rehearing filed on the fifteenth day is properly dismissed. *Dolner v. Peter Kiewit & Sons Co.* 384
15. A bill of exceptions filed in the supreme court on appeal from the district court in a compensation case must be prepared, served, settled and filed in accordance with general statute on the subject. *Adkisson v. Gamble* 417
16. A compensation award will be calculated with reference to wage workman was receiving from person by whom he was immediately employed at time of the injury. *Johnsen v. Benson Food Center* 421
17. In determining amount of compensation award, injured workman's wages are required to be computed ordinarily according to terms of the contract of hiring in force at time of accident. *Johnsen v. Benson Food Center* 421
18. The work contemplated by compensation act to permit a recovery must arise out of and in the course of employer's business in performance of some duty which workman is employed to perform, or a duty incidental to that work. *Weitz v. Johnson* 452
19. The term, "arising out of and in the course of employment," in workmen's compensation law, covers all risks of accident from causative acts, done or occurring within the scope of the employment, which include all acts incident or necessary to the performance of work. *Weitz v. Johnson* 452
20. Generally, if employee suffered an accident and is injured while going to or from his work, from or to his home, accident does not arise "out of and in the course of his employment" within compensation act. *Lincoln Traction Co. v. Reason* 512
21. There is no hard and fast rule by which to determine whether one is an employee or an independent contractor, but the correct relation must be determined from all the facts in each particular case. *Riggins v. Lincoln Tent & Awning Co.* 893
22. A workman who is paid wages by the piece or quantity comes within the compensation law. *Riggins v. Lincoln Tent & Awning Co.* 893

23. The payment of social security tax by a factory owner on the earnings of a workman is evidence tending to show that the workman is an employee. *Riggins v. Lincoln Tent & Awning Co.* 893
24. Where claimant in painting automobile trailers was subject to his alleged employer's control and could be discharged at any time without liability, claimant was an employee and not an independent contractor within the compensation law. *Riggins v. Lincoln Tent & Awning Co.* 893
25. An owner who inserts in a contract with his contractor a promise by the latter to secure compensation insurance upon his workmen does not escape liability for compensable injuries of the contractor's employees where the contractor fails to procure such insurance. *Riggins v. Lincoln Tent & Awning Co.* 893
26. In a workmen's compensation case, where the evidence fails to show a causal connection between an accident suffered by an employee and his instantaneous death from heart disease some time thereafter, there can be no award of compensation. *Pixa v. Grainger Bros. Co.* 922
27. A compensation claimant must prove by sufficient legal evidence leading to direct conclusion, or a legal inference therefrom, that an accidental injury arising out of and in course of employment occurred and caused disability. *Pixa v. Grainger Bros. Co.* 922