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STATE EX REL. WALTER R. JOHNSON, ATTORNEY GENERAL, ET AL., APPELLANTS, V. REX HASH ET AL., APPELLEES.

13 N. W. 2d 716

FILED MARCH 24, 1944. No. 31655.

1. **Nuisance.** A place where gambling is publicly and continuously permitted is a public nuisance which may properly be abated by injunction.
2. ———. The operation of a place which permits minors to gather for the purpose of gambling and drinking intoxicating liquors is a public nuisance in that it violates the health, morals and general welfare of the people of the state.
3. **Intoxicating Liquors.** A place situated in territory where intoxicating liquors may not be sold by the drink, where patrons gather for the purpose of group drinking in which the owner of the place aids and abets by furnishing "set-ups" for profit, is a place where persons are permitted to resort for the purpose of drinking alcoholic liquors contrary to the provisions of section 53-376, Comp. St. Supp. 1941, a part of the Liquor Control Act.
4. ———. A place, located in territory where alcoholic liquors may not be lawfully sold by the drink, operated principally for the purpose of inviting and encouraging large numbers of persons to congregate in such place and drink intoxicating liquors, when the principal business of such place is furnishing the ingredients for mixed drinks to customers who furnish their own liquor, when large numbers of people do congregate and sit at tables and in booths for the purpose of mixing and consuming intoxicating drinks, such place is a public nuisance which the courts will abate by injunction.
5. **Nuisance.** Evidence examined and *held* that the premises in question, because of the manner of their operation, were destructive of the peace, morals, health and general welfare of the people of the state and constituted a public nuisance.

APPEAL from the district court for Madison county: LYLE E. JACKSON and FAY H. POLLOCK, JUDGES. *Reversed, with directions.*

Andrew D. Mapes, Walter R. Johnson, Attorney General, and *Rush C. Clarke,* for appellants.

Frederick M. Deutsch, contra.

Heard before SIMMONS, C. J., PAINE, CARTER, CHAPPELL and WENKE, JJ., and POLK and NUSS, District Judges.

CARTER, J.

This is an appeal from a decree entered by the district court for Madison county in a suit commenced by the state to obtain an injunction to abate a common or public nuisance by reason of the manner of operation of a roadhouse. The trial court granted a part of the relief asked for and denied the balance. The state appeals.

The evidence shows that the defendants operated a tavern or roadhouse just east of the corporate limits of the city of Norfolk. It contained a dance floor, tables, booths and a bar. Dinners and lunches were served, especially in the early evening. The principal sales consisted of "set-ups" used to mix intoxicating liquors for consumption on the premises. Dance music was provided by a juke-box operated by the insertion of coins provided by the customers. The place operates from 8 p. m. to 3 a. m. each day of the week.

The state called 14 officers, including the state sheriff, state patrolmen and inspectors for the Nebraska Liquor Control Commission, who testified to the conditions observed by them prior and up to the date the place was raided on January 23, 1943. Space does not permit a discussion of the testimony of each of these officers. We will content ourselves with a recitation of the facts which we deem established by their testimony. The record discloses that inspections and investigations of the premises were made on numerous occasions by the officers between March 22, 1941, and January 23, 1943.

The testimony of the officers is to the effect that on each inspection the place was patronized by people numbering from 50 to 250. On each occasion Coca-Cola and Seven-Up were served with "set-ups" to mix with whisky and other intoxicating liquors. Whisky bottles were on practically every table and the contents were used in mixing drinks for immediate consumption. Numerous quart, pint and half-pint whisky bottles were observed under the tables and in the booths. The defendants permitted the drinking of these mixed drinks and encouraged it by selling the "set-ups" and

"mix" to those who desired to buy. Intoxicated persons were observed in the tavern by each inspector who investigated the place. Minors of both sexes ranging from 16 to 21 years of age were constantly in the place and participated in the drinking festivities without restraint on the part of the defendants. Minors were observed in an intoxicated condition on almost every inspection. Rough talk, profanity and vulgar language were common, and shouting and unseemly noises appeared to be the rule and not the exception. Slot machines were being operated openly and patrons were usually lined up awaiting their turns to play. Employees stood about to provide the nickels, dimes and quarters needed to play these machines. Other forms of gambling machines were present and given a big play each night the officers observed the place. Quarreling and fighting were continual problems, although the defendant Rex Hash was efficient in quelling such disturbances. The evidence also shows that many automobiles were usually parked near the tavern and that many intoxicated persons drove their cars out on the highway after leaving the place. Several arrests of persons leaving the premises are shown to have been made for speeding, passing up stop signs and driving while intoxicated, which evidences the danger not only to the patrons of the place but to the traveling public generally. Fights were observed on the premises outside the tavern and many persons in various states of intoxication were observed there. We think this evidence is ample to sustain the charge of the state that the place was a resort for people, including minors, to become intoxicated, to become noisy, profane and vulgar and to permit persons of vulgar, dissolute, obscene and roistering habits to congregate and engage in such activities with the approval and encouragement of the defendants.

It is not disputed that slot machines and other gambling devices were maintained by the defendants and that they received a heavy play by patrons, including minors, who frequented the place. The law is that places where gambling is publicly and continuously permitted are public nui-

sances which an equity court should abate by its injunctive processes. *State v. Ak-Sar-Ben Exposition Co.*, 121 Neb. 248, 236 N. W. 736; *State v. The Araho*, 137 Neb. 389, 289 N. W. 545; *Hill v. Pierson*, 45 Neb. 503, 63 N. W. 835.

The evidence does not show that any intoxicating liquors were ever sold by the defendants on the premises in question. It does appear that patrons brought intoxicating liquors with them or had deliveries made after their arrival. The defendants were fully aware of this situation and furthered it by providing the additional essentials to the preparation of mixed drinks. It is urged by defendants that this does not constitute a violation of law and consequently affords no basis for the charge that it constitutes a nuisance.

The evidence is conclusive that defendants openly and continuously permitted minors of both sexes to patronize the place. Defendants, for their own financial gain, furthered the drinking activities of such minors. Defendants well knew, as shown by the record, that the sale of intoxicating liquors to minors was unlawful and that the furtherance of the drinking of intoxicating liquors by minors is contrary to the public welfare. While it may be true that no crime was committed prior to January 23, 1943, in permitting minors to drink intoxicating liquors on the premises, we are of the opinion that a place established for the purpose of attracting persons, including numerous minors of both sexes, desiring to engage in drinking, carousing and roistering, is contrary to the public welfare and deserving of great weight in determining whether a nuisance exists.

It is argued by the defendants that the sale of intoxicating liquors or the operation of a place or house for their sale was not a nuisance at common law. We think this is true if the places or houses were conducted in an orderly manner. It is then argued that as the sale, dispensing and drinking of intoxicating liquors were not nuisances at common law, they cannot now be such unless the acts complained of violate the provisions of some criminal statute. This contention calls for a discussion and interpretation of

the Nebraska Liquor Control Act (Comp. St. Supp. 1941, ch. 53).

In 1935 the legislature of this state passed the Nebraska Liquor Control Act, the purpose of which is to govern and control the manufacture, sale, giving away, barter, carriage, possession and use of alcoholic liquors in this state. Under the provisions of the act liquor may be sold by the package in cities and villages, unless prohibited by a vote of the people within such cities and villages. Liquor may be sold by the drink in a city or village where the people thereof affirmatively authorize it. Liquor cannot be lawfully sold by the drink outside the corporate limits of cities and villages under any circumstances. In other words, in so far as selling and dispensing liquor by the drink is concerned, the country outside the boundaries of incorporated cities and villages is dry territory. This does not mean that persons may not congregate in such territory for the purpose of imbibing intoxicating liquors. It merely means that business places engaged in selling and dispensing liquors by the drink are not permitted in such areas under the terms of the act. It is quite evident that the legislature had reasons for absolutely prohibiting sales by the drink in rural areas while permitting it in urban areas which affirmatively approved it. Obviously, the legislature thought that there was a relation between group drinking in public places and the health, morals and welfare of the people. It is likewise evident that the legislature was willing to approve sales by the drink in urban areas and to wholly disapprove it in the rural districts. While it is not our province to speculate on the legislative reasons for the classifications made, it is apparent that it felt that the evils of public group drinking could only be controlled when under the surveilance of municipal and other law enforcement officers. Whether the reason be good or not, the restrictions were proper ones for the legislature to make. The act clearly indicates a legislative policy that places which permit sales by the drink and its consequent group drinking in the territory outside the corporate limits of cities and villages are

contrary to the public health, morals and welfare of the people of this state. Such a policy is peculiarly the province of the legislature to declare and for which the courts may not substitute their judgment.

The question then arises whether the purposes of the act may be defeated by having a place of business in a rural district provide the necessary equipment and ingredients for mixed drinks other than the liquor and invite the public to bring its own liquor rather than to purchase it on the premises. It seems to us that all the evils of sales by the drink in rural territory are present and that such a situation is directly violative of the purposes of the act, and the place so operating is a public nuisance.

In connection with the foregoing, it is noteworthy that the legislature provided: "This Act shall be liberally construed, to the end that the health, safety and welfare of the people of the state of Nebraska shall be protected and temperance in the consumption of alcoholic liquors shall be fostered and promoted by sound and careful control and regulation of the manufacture, sale and distribution of alcoholic liquors." Comp. St. Supp. 1941, sec. 53-397. See *State v. Novak,* 7 Wash. 2d 544, 110 Pac. 2d 636.

It is clear that defendants were operating a place of business for profit, which brought upon the community all the evils of public group drinking in rural areas, contrary to the provisions of the Nebraska Liquor Control Act. Defendants cannot escape responsibility for their contribution to the evils decried by the legislature by merely showing that liquor was not sold by them. By the simple expedient of having their patrons bring their own liquor, the defendants furnishing every other facility for the promulgation of the evils proscribed by the legislature, the defendants must be deemed to have created and maintained a public nuisance in direct contravention to the declared purposes of the act.

We think the maintaining of a place where liquor is habitually brought by others to be there consumed, with the encouragement of the owner who profits from the sale of

"set-ups," with all the evil results of public group drinking present, constitutes a public nuisance when such place is operated in territory in which sales by the drink are prohibited and is governed by the rules announced in cases similar in principle which arose during the prohibition era. In *Notary v. United States*, 16 Fed. 2d 434, it was held that a building where intoxicating liquor is habitually brought by others to be there possessed and consumed for beverage purposes was a place where liquor was kept or possessed contrary to law, although no liquor was manufactured, sold, possessed or kept for sale on the premises. The place involved was a roadhouse with a parking place, a pavillion, a kitchen and a dance floor with booths constructed on the sides. A soft drink bar was maintained. Customers brought their own liquor, publicly displayed the bottles on the tables and waiters provided glasses, ice, ginger ale and other soft drinks used in connection with the consumption of the liquor. The court in that case said:

"Now, it will be further noticed that the prohibition of section 21 is specifically directed against the maintaining of the room, house, building, boat, vehicle, structure or place, but its effect is not limited to cases where the one maintaining the place personally does the manufacturing, selling, keeping or bartering. The question then arises, if one maintains a building or place where intoxicating liquor is habitually brought by others to be there possessed and consumed for beverage purposes, and maintains such place and there permits such possession of intoxicating liquor for profit, does he thereby constitute his place a nuisance under the provisions of section 21?

"We have no hesitation in answering this question in the affirmative. We think that, where one maintains a place such as the one here in question, he is engaged in commerce; and if he purposely, and catering to the patronage of the illicit liquor drinking public, permits his patrons to bring intoxicating liquor upon the premises, and there possess it and consume it, and all this to increase the profits of his business, that he is maintaining a place where intoxi-

cating liquor is kept in violation of law. We think the liquor is kept on the place for a commercial purpose when it is permitted to be kept there for a commercial purpose, even though the keeper of the place may not own the liquor. In the given case the keeper's motive and purpose was a commercial one. He kept the place and permitted the unlawful possession of intoxicating liquor therein for profit."

We think the acts of defendants in permitting the equivalent of sales by the drink in territory where sales by the drink are prohibited are, under the holding in the *Notary* case, unlawful and constitute a public nuisance.

We also think the evidence amply sustains a finding that defendants were maintaining a place where persons are permitted to resort for the purpose of drinking alcoholic liquors contrary to the provisions (Comp. St. Supp. 1941, sec. 53-376) of the Liquor Control Act.

Defendants contend that their main business was that of a restaurateur specializing in steaks and fried chicken. It is evident to us, however, that such a business, located outside of the city limits of a city the size of Norfolk, operating only from 8 p. m. to 3 a. m. would have little likelihood of success without other sources of income. Defendants were unable to make any estimate as to the income derived from the sale of food, "set-ups," the juke-box and the gambling machines. We can safely assume, we think, that the sale of food alone would not have made the place a success. It is evident from the record that the main business was the sale of "set-ups" to facilitate spiking with intoxicating liquors and the play obtained on the slot machines and other gambling machines maintained in the place. Drunkenness, quarreling, fighting and gambling, accompanied by profane, obscene and vulgar language, the usual incidents to the maintenance of a "spike joint," were present. Into this place, reeking with the evils which our legislature sought to prevent, came minors of both sexes, ranging from 16 to 21 years of age, to engage in the activities of the place with the apparent approval of these defendants. It is urged that it is not unlawful for people to drink together in rural dis-

tricts and that it is not unlawful to provide "set-ups." Whatever the rule may be in respect to these contentions, in so far as individuals are concerned, it is unlawful to operate a business in territory where liquor cannot be sold by the drink, which has for its primary purpose the selling of "set-ups" and "mix," in order that public group drinking may be afforded to patrons irrespective of the liquor control law and the policy thereof as expressed by the legislature.

Defendants contend that the power of the court is limited to enjoining those things only which the court finds to be unlawful. This might be true if the primary purposes of the establishment are legitimate and the infractions of the law were incidental thereto. But where, as here, the main business of the defendants contravenes the law of the state and the legitimate business of the place is either a sham or a minor part of the whole, the only adequate remedy consists of an abatement of the nuisance by closing the place by injunctive process in the manner prescribed by the legislature.

We conclude therefore that the trial court was in error in failing to enjoin the operation of the roadhouse described in the petition, pursuant to the prayer thereof. The cause is therefore reversed with directions to the trial court to abate the nuisance, pursuant to the provisions of section 53-377, Comp. St. Supp. 1941.

REVERSED, WITH DIRECTIONS.

IN RE APPLICATION OF WILLIAM NIKLAUS FOR WRIT OF HABEAS CORPUS.
WILLIAM NIKLAUS, APPELLANT, V. MYLES HOLLOWAY, SHERIFF, APPELLEE.

13 N. W. 2d 655

FILED MARCH 24, 1944. No. 31698.

1. **Habeas Corpus.** Habeas corpus is not a substitute for appeal and error or writ of review.

2. ———. Habeas corpus is a proper proceeding in which to determine whether or not a charge of contempt under which a person is detained is void.
3. **Contempt.** By statute courts of record have power to punish as for criminal contempt persons guilty of wilful disobedience of or resistance wilfully offered to any lawful process or order of the court, or any wilful attempt to obstruct the proceedings, or hinder the due administration of justice in any suit or proceeding pending before the court.
4. ———. "Contempts committed in the presence of the court may be punished summarily; in other cases the party upon being brought before the court, shall be notified of the accusation against him, and have a reasonable time to make his defense." Comp. St. 1929, sec. 20-2122.
5. ———. Where a party to an action fails to obey an order of the court, made for the benefit of an opposing party, such act is, ordinarily, a civil contempt, and the rules applicable to a criminal contempt are not applicable.
6. ———. Where a civil contempt is charged, it need not be by information in the name of the state, but may be by affidavit by the party to the action who is injuriously affected.
7. ———. The affidavit charging a civil contempt may be by an officer of the court charged with the protection of the *res* of the litigation for the benefit of the parties.
8. ———. It is a matter of no importance who institutes the proceedings for contempt, since the alleged contemner is not prejudiced in his defense by the particular mode in which the facts are brought to the attention of the court.
9. **Judgment.** The minutes of a judge may in no proper sense be regarded as the judgment or decree of the court, but are merely a memorandum of the decision made upon his docket for the guidance of the clerk in entering the judgment or decree upon the journal.
10. ———. The failure of a judge to sign the judgment does not have the effect of rendering the judgment invalid.
11. **Habeas Corpus.** In the return to a writ of habeas corpus facts must appear which warrant restraint of the relator.
12. ———. A return to a writ of habeas corpus showing that the arrest was by virtue of a mittimus issued on proper authority is *prima facie* sufficient as a showing of cause for detention.

APPEAL from the district court for Lancaster county: JOHN L. POLK, RALPH P. WILSON and JEFFERSON H. BROADY, JUDGES. *Affirmed.*

Herbert W. Baird, for appellant.

Max G. Towle, Farley Young, Walter R. Johnson, Attorney General, H. Emerson Kokjer and *Rush C. Clarke, contra.*

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

YEAGER, J.

This is an appeal by William Niklaus, relator, who will be hereinafter referred to as appellant, from an order of the district court for Lancaster county, Nebraska, denying a writ of habeas corpus for the release of appellant from the custody of Myles Holloway, sheriff of said county, respondent, who will be hereinafter referred to as appellee.

To the extent necessary to state them here and to the extent that they are made clear by the record the facts surrounding the matter in controversy are substantially as follows: On June 9, 1942, in an action in the district court entitled the Lincoln Joint Stock Land Bank v. Lafayette P. Barnes et al., wherein appellant, according to recitals of pleadings and orders appearing in the bill of exceptions herein, was a party defendant, an order was entered directing, among other things, John Doe, found to be Carl E. Lipe, tenant of certain real estate described in the order, to attorn to the receiver in the action all rents under the tenancy. The same order directed the defendants in the action to deliver up and surrender possession of the real estate to the receiver. It appears from recitals in exhibits that the receiver was one William Crane Condit.

Thereafter on July 23, 1942, in the said action of the Lincoln Joint Stock Land Bank v. Lafayette P. Barnes et al., William Crane Condit, describing himself as receiver, filed an application positively verified in which he declared that the said Carl E. Lipe had failed to attorn to the receiver the rents for the real estate and the defendant, William Niklaus, had failed and refused to deliver possession, but on the contrary had taken and removed 330 bales of hay, at least

2 loads of wheat, and that he had forcibly and violently taken possession of the rent share of crops on the real estate and converted the same to his own use.

As a part of the application there was motion for an order against Carl E. Lipe and appellant to show cause why they should not be proceeded against and punished for contempt. There was a prayer that the said Lipe and appellant should on hearing be punished for contempt.

Pursuant to the application an order to show cause was issued out of the district court citing the said parties to appear and show cause why they should not be adjudged guilty of contempt of court.

To the order to show cause appellant filed a pleading denominated "Response to Order to Show Cause." The part of the response pertinent here is a denial that he was guilty of contempt of court and prayer that the complaint of William Crane Condit be dismissed.

A hearing was had on the application and response thereto and on July 27, 1942, appellant was found guilty of contempt of court and sentenced to serve a term of 30 days in the jail of Lancaster county, Nebraska. On the same day motion for new trial was filed and overruled. This judgment and the order overruling the motion for new trial were entered in the Journal as follows:

"Now on this day hearing is had on order citing William Niklaus and Carl E. Lipe to show cause why they should not be punished for contempt. Motions overruled. Evidence taken. Evidence completed and each party rests. Arguments made and matter submitted. Court finds that the action of Wm. Niklaus and Carl E. Lipe in refusing to deliver rental of wheat crop to receiver was contumacious and contemptuous, and William Niklaus sentenced to thirty days in Lancaster County Jail and to pay costs of this proceeding and to stand committed until the costs are paid.

"It is therefore considered, ordered and adjudged by the Court that the said defendant William Niklaus is guilty as he stands charged of contempt herein, and that he be confined in the County Jail of Lancaster County, Nebraska, for

a period of thirty (30) days, from this date, and pay costs of this proceeding, taxed at $——, for which execution is hereby awarded, and said defendant to stand committed until costs are paid.

"Sentence as to Carl E. Lipe is suspended and he may purge himself of contempt by delivering wheat rental now in elevator to the Receiver and account to the Receiver for crop rentals for balance of crop year.

"To all of which defendants except.

"This cause now comes on to be heard on motion of defendant William Niklaus to vacate the judgment guilty of contempt of court and grant said defendant a new trial, and is submitted to the Court, on due consideration whereof, the Court doth overrule said motion.

"Sentence suspended on defendant showing that he intends to prosecute error. Recognizance fixed at $200.00." This entry was not made in the Journal until about a week later. It was not signed by the judge who presided over the hearing.

On the day of the hearing the judge presiding made a minute of the hearing on the minute book or docket used for that purpose during proceedings in court. This minute is not set forth here for reasons which will appear later in this opinion.

From exhibit No. 1 in the bill of exceptions which is an order of the district court entered February 25, 1943, it appears that from the judgment finding appellant guilty of contempt of court he prosecuted error proceedings to this court which were dismissed and that on such dismissal mandate was issued to the district court. This appears by recital in the exhibit which is an order of judgment on the mandate and for confinement of appellant under the judgment and sentence of July 27, 1942, and not otherwise. Nowhere in this record except by this recital is this court advised either that there was an error proceeding, or that there was a dismissal thereof, or that mandate was issued out of this court.

Presumably mittimus was issued in accordance with the

order of February 25, 1943, although it appears nowhere in the record. Also presumably appellant was taken into custody, whereupon he filed his petition for writ of habeas corpus.

Hearing was had upon the petition and writ denied. From the order denying the writ of habeas corpus he has appealed to this court.

Numerous errors are assigned but only four are discussed in the brief of appellant. First he asserts that he has never been charged with the commission of any offense in Lancaster county, Nebraska.

There has been no attempt by any one connected with this record to say that appellant has been charged with the commission of any crime defined by the laws of the state. The charge is that he contemptuously and contumaciously refused to comply with the orders of the court in an action to which he was a party.

The order which it is claimed he violated is in the record, as is also the charged violation and the finding and judgment in relation thereto. The evidence to support it of course is not and could not be properly here since it is not permissible to substitute the writ of habeas corpus for appeal and error or make of it a writ of review. *In re Application of Maher, North v. Dorrance, ante,* p. 484, 13 N. W. 2d 653. See, also, *Hulbert v. Fenton,* 115 Neb. 818, 215 N. W. 104.

The only proper question for determination under this assignment is that of whether or not there is a charge of contempt of court invulnerable to an attack on the ground that it is void. *Michaelson v. Beemer,* 72 Neb. 761, 101 N. W. 1007; *Hulbert v. Fenton, supra; In re Carbino,* 117 Neb. 107, 219 N. W. 846; *Davis v. O'Grady,* 137 Neb. 708, 291 N. W. 82.

We are convinced that the charge here is not thus vulnerable. If the charge is thus vulnerable it must be found to be so on the ground either that there can be no legal recognition of the right of William Crane Condit to make presentation of the contempt or that in fact and in law the presentment contains no charge of contempt of court.

Taking these two questions in their reverse order we point out here the following from section 20-2121, Comp. St. 1929: "Every court of record shall have power to punish by fine and imprisonment, or by either, as for criminal contempt, persons guilty of any of the following acts: * * * Third. Wilful disobedience of or resistance wilfully offered to any lawful process or order of said court; Fourth. Any wilful attempt to obstruct the proceedings, or hinder the due administration of justice in any suit, proceedings, or process pending before the courts; * * * ."

The record here contains the order of the district court requiring appellant, defendant there, to deliver up possession of the real estate therein involved to the receiver. The application of the receiver shows that in violation of the order appellant interfered with the receiver's possession and removed crops from the real estate. The district court found that the interference was wilful, contemptuous and contumacious. It cannot then well be said that the action of the district court was void unless it be found that the manner of presentation of the violation of the order was insufficient to confer jurisdiction upon the court to act in the premises. Appellant so contends but the contention is without merit. The principal objection in this connection is that the receiver was not a proper party to inform against the appellant.

Section 20-2122, Comp. St. 1929, provides as follows: "Contempts committed in the presence of the court may be punished summarily; in other cases the party upon being brought before the court, shall be notified of the accusation against him, and have a reasonable time to make his defense."

It will be noted here that the only statutory requirement as to information where the contempt has been committed out of the presence of the court is that the accused shall be notified of the charge against him when brought before the court.

On the subject of the manner of instituting such contempt proceedings as this one, in *Maryott v. State,* 124 Neb.

274, 246 N. W. 343, it was said: "Where a party to an action fails to obey an order of the court, made for the benefit of the opposing party, the rule is well recognized that such act is, ordinarily, a mere civil contempt, and the rules applicable to a criminal contempt are not applicable. Where a civil contempt is charged, it may be by an affidavit by the party to the action who is injuriously affected. Procedure may be in the original action and need not be by information in the name of the state."

The only distinction between the situation there and here is that there the informant was a party to the action whereas here he was an officer of the court charged with the protection of the *res* of the litigation for the benefit of the parties. The same principle should be controlling in both cases. Moreover we do not think that in that case there was a purpose to limit the statutory method of presenting contempts but only to approve the method there employed.

The following from 13 C. J. 60, with regard to presentation of civil contempts, appears to meet the requirements of statute: "It has also been held that it is a matter of no importance who institutes the proceedings for contempt, since the alleged contemner is not prejudiced in his defense by the particular mode in which the facts are brought to the attention of the court."

This disposition of the first proposition argued disposes, adversely to appellant, of the second which is that "The relator has never been found guilty of the commission of any offense known to the law."

The third proposition is that the journal entry sentencing the appellant which has been quoted herein is not in fact the judgment of the court. Inferentially it is contended that the judge's minute which has been referred to but not quoted contains the judgment of the court if there is one. This contention may not be sustained.

The minute is not set forth for the reason that this court has consistently held that the judge's minutes may in no proper sense be regarded as the judgment or decree rendered by the court in the case, but are merely a memoran-

dum of the decision made by the trial judge upon his docket for the guidance of the clerk in entering the decree upon the journal. *Ward v. Urmson,* 40 Neb. 695, 59 N. W. 97; *Brown v. Ritner,* 41 Neb. 52, 59 N. W. 360; *Garneau v. Omaha Printing Co.,* 42 Neb. 847, 61 N. W. 100; *Ball v. Nelson,* 45 Neb. 205, 63 N. W. 361; *Ford v. State,* 46 Neb. 390, 64 N. W. 1082; *Maher v. State, ante,* p. 463, 13 N. W. 2d 641.

The journal entry was not signed by the judge and the validity of the judgment is attacked on this ground. The failure of a judge to sign the judgment does not have the effect of rendering the judgment invalid. *Fouts v. Mann,* 15 Neb. 172, 18 N. W. 64; *Colony v. Billingsley,* 2 Neb. (Unof.) 670, 89 N. W. 744; *Gallentine v. Cummings,* 4 Neb. (Unof.) 690, 96 N. W. 178.

The last proposition discussed in the brief is a claim that the return of the respondent shows no justification for the detention of appellant.

Section 29-2817, Comp. St. 1929, applicable here requires that the respondent in habeas corpus shall make a return and sets forth what shall be contained therein. It is the following: "If he has the party in his custody or power, or under restraint, he shall set forth at large the authority and the true and whole cause of such imprisonment and restraint, with a copy of the writ, warrant, or other process, if any, upon which the party is detained." This court in interpretation of this statutory provision has held that in the return to a writ of habeas corpus facts must appear which warrant restraint of the relator. *Rose v. Vosburg,* 107 Neb. 847, 187 N. W. 46. In *Chandler v. Sipes,* 103 Neb. 111, 170 N. W. 604, it was held that a warrant of arrest and detention in the hands of the officer executing it is *prima facie* evidence of the cause of detention.

In the action here there was a return showing a mittimus in the hands of the appellee, as respondent, issued by the clerk of the district court on a mandate of this court and the effect of which was to declare in full force and effect, and not appealed from, a judgment and sentence of the dis-

trict court. The mittimus as set forth in the return to the writ of habeas corpus, within the meaning of the statute and the decisions, contained *prima facie* evidence of the cause of detention of appellant, and the claim that the return was not sufficient cannot be sustained.

For the reasons herein set forth the judgment of the district court is affirmed.

AFFIRMED.

COUNTY OF SCOTTS BLUFF, APPELLEE, V. OWEN A. FRANK ET AL., APPELLANTS.

13 N. W. 2d 900

FILED MARCH 31, 1944. No. 31682.

1. **Judicial Sales.** The only matters inquired into and adjudicated in the proceedings for confirmation of a judicial sale are those steps which the law requires shall be had and done for the satisfaction of the decree.
2. **Appeal and Error.** Alleged errors of law in a decree and in the proceedings leading thereto are not reviewable upon objections to confirmation of a sale had thereunder.

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

Morrow & Miller, for appellants.

Jack L. Raymond and *Frank Glebe, contra.*

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

SIMMONS, C. J.

This is an appeal from an order confirming a judicial sale of real estate. The trial court confirmed the sale. Defendants appeal. We affirm the judgment of the trial court.

Plaintiff brought this action for the foreclosure of a tax sale certificate. Defendants contended that the tax sale certificate was void and prayed for a declaration to that effect and that their title be quieted as against the claims of

the plaintiff. The trial court found for the plaintiff and entered a decree determining the amount due the plaintiff, declared the same to be a first lien on "All that part of the Northwest Quarter of Section 24, Township 22 North, Range 55 West of the Sixth Principal Meridian lying South of the Winter Creek Canal" (excepting certain parts described by metes and bounds, which had been segregated and redeemed from the tax sale certificate and which are not involved here). The trial court further decreed that in default of the payment of the amount so found due, together with costs and attorney's fees, for a period of 30 days, the premises be sold as upon execution, directed the order of the application of the proceeds of the sale, and that defendants be foreclosed of all right, title, interest and equity of redemption in and to said premises.

Thereafter, the defendants appealed to this court from that decree. The decree of the trial court was affirmed. See *Scotts Bluff County v. Frank,* 142 Neb. 698, 7 N. W. 2d 625, for a more complete statement of the facts, issues and findings. The mandate of this court was issued on the 13th day of March, 1943.

Thereafter, on March 17, 1943, the clerk of the district court issued an order of sale directing the sheriff to advertise and sell, as upon execution, the premises involved, describing them exactly as in the decree. Notice of sale was given in which the property was described exactly as in the decree. Thereafter, the sale was held, the property sold, and a return made.

The defendant, Owen A. Frank, filed objections to the confirmation of the sale. A hearing was had upon the objections to confirmation. The defendant produced evidence that the notice of sale was read at the sale, and the land was sold as one tract. The defendant offered in evidence a notice that he had served upon the sheriff, reciting that the assessment records and tax lists carried the land involved in two separate parcels under the names of two owners, at different valuations and with different amounts of taxes set opposite each tract; objecting to the land being sold in one

tract; and demanding that it be sold in separate parcels in accordance with the assessment records and tax lists. Defendant offered in evidence the bill of exceptions of the trial on the issues presented prior to the decree and then offered separately the assessment records and tax lists as they appear in the bill of exceptions. The trial court refused to admit the offers in evidence. The trial court overruled the objections, confirmed the sale, ordered the deed to be made and a writ of assistance to issue placing the purchaser in possession.

The defendants appeal, and assign here as error a series of objections which they reduce to the "principal issue," which they state is "the validity of the sale of the two tracts *en masse*." They argue that section 77-2045, Comp. St. 1929, provides in part that "No lot or parcel of land shall be sold for taxes due upon any other lot or parcel of land," and rely upon *Taylor v. Evans*, 106 Neb. 233, 183 N. W. 89, and *City of Scottsbluff v. Acton*, 135 Neb. 636, 283 N. W. 374.

This contention was advanced to this court when we determined, adverse to the defendants, the fact questions presented and the applicable law, and affirmed the decree of the trial court.

In *Taylor v. Evans, supra*, there were separate tracts of land, separately sold for delinquent taxes, separate tax sale certificates issued, separate liens asked for and determined in the foreclosure action, and a decree rendered ordering each tract to be sold separately for the amount of the lien adjudged thereon. In the order of sale the two liens and two tracts were not kept separate and distinct, but were combined, and the sheriff directed to sell both tracts for the aggregate sum of both liens. Both tracts were appraised and sold together, the sale confirmed and the deed issued. Plaintiff brought an action to cancel the deed, to set aside the proceedings and to be let in to redeem. This court there held that the mode of sale was one which the court was without jurisdiction to order or later confirm, and that the sale was void and subject to collateral attack. It will be

noted that the error occurred in the proceedings subsequent to the decree, and consisted in a sale in violation of the terms of the decree. In the instant case, the defendants Frank seek to go behind the decree which this court affirmed, relitigate the issues there decided against them, and secure a sale, not in accord with, but in violation of, the terms of the decree. In the *Taylor* case it was further said that the provision of the statute relied upon here "prohibits the district court, in a suit in which the holder of separate tax liens upon distinct tracts owned by the same person seeks foreclosure, from ordering the sale of one tract for the lien upon another." Quite obviously the statute does not prohibit the district court from ordering the sale of a tract of land where it has been determined that there was but one tax lien upon the one tract ordered sold. So far as it is applicable here, the *Taylor* case is authority for the proposition that the land must be sold in accordance with, and not in violation of, the terms of the decree, for this court in that case said: "The violation by the sheriff of the terms of the decree would undoubtedly have entitled the appellee, as owner of the land, to an order setting aside the sale, if he had filed timely objection before confirmation."

In *City of Scottsbluff v. Acton, supra,* special assessments had been levied against a part of a tract of land. A tax sale certificate for the general taxes and the special assessments was issued covering the entire tract. This court held that the tax sale certificate was void, and that the trial court was without jurisdiction to enter a decree of foreclosure thereon. In the instant case, the tax sale certificate was held valid by the trial court, and its decision affirmed, after a full review, by this court, and that determination has become final.

Defendants further contend that "As long as the decisions in the *Taylor* and *Acton* cases stand as the law in this state and as long as section 77-2045 remains in the statutes, the sale in this case cannot be confirmed without denying" them the "equal protection of the law as guaranteed by Section 1 of the Fourteenth Amendment to the Con-

stitution of the United States." The above analysis of the decisions construing the statute demonstrates that there is no merit in their contention in that regard.

It has long been the rule that the only matters inquired into and adjudicated in the proceedings for confirmation of a judicial sale are those steps which the law requires shall be had and done for the satisfaction of the decree. Comp. St. 1929, sec. 20-1531; *Schribar v. Platt,* 19 Neb. 625, 28 N. W. 289; *Best v. Zutavern,* 53 Neb. 619, 74 N. W. 81; *Wollmer v. Wood,* 119 Neb. 248, 228 N. W. 541; *Douglas County v. Barker Co.,* 125 Neb. 253, 249 N. W. 607; *Holferty v. Wortman,* 135 Neb. 732, 283 N. W. 855; *Wallace v. Peterson,* 136 Neb. 39, 284 N. W. 866.

There is a further rule that is here applicable. Alleged errors of law in a decree and in the proceedings leading thereto are not reviewable upon objections to confirmation of a sale had thereunder. *Cochran v. Cochran,* 1 Neb. (Unof.) 508, 95 N. W. 778; *Beatrice Paper Co. v. Beloit Iron Works,* 46 Neb. 900, 65 N. W. 1059; *Hoover v. Hale,* 56 Neb. 67, 76 N. W. 457; *Cox v. Parrotte,* 59 Neb. 701, 82 N. W. 7; *Douglas County v. Barker Co., supra*; *Farmers Security Bank v. Wood,* 132 Neb. 175, 271 N. W. 349.

Defendants' attack here is not upon the proceedings had subsequent to the decree, but upon the decree itself, and upon the questions of fact and law that were determined in the decree. They are not reviewable upon objections to the confirmation of the sale.

This determination makes it unnecessary to review the assignments of error that go to the rejection of the offer of the many exhibits.

The judgment of the trial court is affirmed.

AFFIRMED.

HATTIE TATE, ADMINISTRATRIX, APPELLEE, V. WILLARD BARRY ET AL., APPELLANTS.

13 N. W. 2d 879

FILED MARCH 31, 1944. No. 31674.

1. **Trial.** It is proper for the trial court to give an instruction to the jury which sets out in simple language a concise summary of the pleadings, in so far as the evidence tends to support the same, thereby placing the issues of the case fairly before the jury.
2. **Appeal and Error.** In summarizing the allegations of the petition, it is not prejudicial error to set out in an instruction the amount for which the plaintiff prays damages.
3. **Death.** A presumption of pecuniary loss exists in favor of one legally entitled to service or support from one killed by the wrongful or negligent act of another.
4. ———. An action for wrongful death by the personal representative is brought for the exclusive benefit of the widow or widower and next of kin, and any judgment secured is reported to the county court, and the distribution is ordinarily made to such persons and in the same proportions as personal property of an intestate is distributed.
5. ———. When objection is made in the county court that any person has not suffered any pecuniary loss, or less than others bearing the same relationship to deceased, then the county court will make proper distribution, after full hearing thereon, all as provided in section 30-810, Comp. St. Supp. 1941.
6. ———. Standard tables of life expectancy are not conclusive, even when received in evidence, but may be considered by the jury with all the other evidence bearing upon the question of the probable continuance of the life of the deceased.
7. ———. The law does not provide any positive, definite mathematical formula or legal rule by which a jury shall fix the pecuniary loss suffered in the death of the head of a family.
8. **New Trial.** To justify the granting of a new trial on the ground that the verdict is excessive, that fact must be plain or evident. It is not sufficient merely to raise a doubt as to whether the damages are too large; it must be affirmatively and satisfactorily shown that they are so.

APPEAL from the district court for Lancaster county: FREDERICK E. SHEPHERD, JUDGE. *Affirmed.*

L. R. Doyle, for appellants.

Chambers, Holland & Locke, contra.

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

PAINE, J.

This is an appeal by the defendants from a judgment for damages for wrongful death of a pedestrian struck by an automobile.

Hattie Tate alleged in her petition that she was the administratrix of the estate of Guy W. Tate, her husband, who was struck and killed by a truck belonging to Willard Barry and driven by his employee, John F. Hraban, in the course of his employment for said Willard Barry. Said accident occurred on June 17, 1942, on U. S. highway No. 77, six miles south of Lincoln, on a bridge crossing Salt creek at this point.

It was alleged that immediately prior to the accident plaintiff's decedent was walking north on the left-hand side of the highway, in plain sight of Hraban.

Plaintiff further alleges that the proximate cause of the accident and resulting death was the negligence and carelessness of said John F. Hraban, in that (1) he failed and neglected to keep a proper lookout ahead on said highway, and particularly for plaintiff's decedent; (2) he failed and neglected to have said truck under proper control; (3) he failed and neglected to observe the plaintiff's decedent on said highway, and failed to avoid striking him; (4) he negligently attempted to pass another vehicle on said bridge without determining that said movement could be made in safety; and (5) he attempted to pass another vehicle while the latter was crossing a bridge on U. S. highway No. 77.

It is claimed that prior to his death plaintiff's decedent was a healthy, able-bodied man, 57 years old, upon whom his wife, Hattie Tate, was solely dependent for support, and that through farming and stock raising he earned at least $1,200 a year, all of which was expended toward the care, maintenance and support of said Hattie Tate.

The answer filed by defendants admitted the death of

Guy W. Tate on June 17, 1942, and that on said date John F. Hraban was driving a truck belonging to defendant Willard Barry, which truck was involved in the accident, and denied each and every other allegation contained in the petition.

The answer alleges that John F. Hraban was driving said truck in a careful and prudent manner and at a reasonable rate of speed, and that Guy W. Tate suddenly and without warning stepped onto the pavement and into the left side of the truck.

The answer further alleges that Guy W. Tate was killed by his own acts of negligence and contributory negligence in the following particulars, to wit: (a) Stepping from the side of the road directly into the side of said truck; (b) failure to keep a proper lookout for traffic, particularly for the truck driven by defendant John F. Hraban; and (c) stepping out onto the pavement directly into the side of said truck when deceased knew, or in the exercise of reasonable care should have known, of the approach of said truck. It is claimed that all of the above described acts of negligence or contributory negligence on the part of decedent were the proximate cause of his injuries and death and the damages alleged to have been sustained by plaintiff, and defendants pray that plaintiff's petition may be dismissed.

The reply was a general denial of all new matter set out in defendants' answer.

The cause was tried to a jury, and a verdict was rendered in favor of plaintiff for the sum of $15,000, whereupon the court entered judgment thereon.

The court, in ruling on the motion for new trial, ordered that the motion of defendants for a new trial should be sustained unless plaintiff filed a remittitur of $3,000 within ten days, in which case motion should be overruled. Four days thereafter plaintiff filed remittitur of $3,000 to be deducted from the judgment rendered.

The defendants set out ten errors for reversal, which may be briefly summarized as excessive damages not sustained by the evidence; that instruction No. 1 was erro-

neous in telling the jury to consider decedent's daughter Lois as a beneficiary, and in informing the jury that decedent earned $1,200 a year from farming and stock raising, when there was no evidence to show the amount of the earnings of deceased, and in setting out in said instruction No. 1 that plaintiff was asking a judgment for $20,500, and in setting out almost verbatim the allegations of the petition.

The next assignment of error is that the court erred in giving instruction No. 4, which implied that the daughter of the decedent suffered a "great" loss on account of the death of her father, when there was no testimony in the record to show that the daughter suffered any loss whatsoever.

The final assignment is in regard to instruction No. 6, which, it is claimed, told the jury that, if they found for the plaintiff, it was their duty to give the full amount of damages the widow and next of kin would suffer by such death; whereas plaintiff did not plead that next of kin was dependent, and the jury were cut off entirely in this instruction from any reduction under the comparative negligence doctrine.

We will now consider each of these assignments of error. It is charged that instruction No. 1 was prejudicial in that it set out "almost verbatim the allegations of the petition," and set out the total damages for which the plaintiff brought suit. An examination of instruction No. 1 shows that it gave a fair synopsis of the material allegations of the pleadings in a little over three pages of typewriting, which condensed the pleadings about one-half and still retained the substance of them.

This court has said that, if the court gives the jury in simple language a concise summary of the pleadings, in so far as the evidence tends to support such facts, thus setting out the issues fairly before the jury, it is a proper instruction. See *Evans v. First Nat. Bank*, 138 Neb. 727, 297 N. W. 154; *Merritt v. Ash Grove Lime & Portland Cement Co.*, 136 Neb. 52, 285 N. W. 97.

In regard to stating the amount for which the plaintiff brings suit, it appears that trial judges follow two plans. It is quite customary for some of them to state the amount for which suit is brought in summarizing the allegations of the petition, while other trial judges simply state at the conclusion of their instruction, setting out the substance of the petition, that the plaintiff brings suit for a substantial amount. The latter is probably the preferred plan, but the former certainly does not constitute prejudicial error.

The defendants charge that the fourth instruction was erroneous in saying that the case depends upon negligence, and "unless negligence on the part of the defendant Hraban which was the proximate cause of the accident has actually been proved by the evidence, you cannot properly find for the plaintiff, no matter how great the injury to the plaintiff's decedent intestate *or how great the loss to the plaintiff and her daughter,* and your verdict should be for the defendants." (Italics ours.)

This all-inclusive mention of the only two members of the family left surviving is not a positive or direct charge to find anything on account of the daughter, who was the next of kin. The evidence disclosed that the daughter has been a schoolteacher in the Seward high school for many years, then married, and her husband has been in the army since May, 1942, and when he left she moved out to the farm to stay with her parents.

It is contended by the defendants that, if the impression made upon the jury by these instructions was that they could also provide for the daughter's needs, it would be prejudicially erroneous.

A petition filed by the personal representative of a deceased person under the provisions of Lord Campbell's Act, as adopted by our legislature, is based on the theory that ordinarily the next of kin do have a pecuniary interest in the life of a person killed, and the value of that interest is the amount of the pecuniary injury for which the statute provides compensation. It treats human life in a pecuniary aspect. It might include a loss arising from a deprivation

of benefits which from all the circumstances of the particular case it could be expected with reasonable certainty that such heirs would have received from the deceased had his life not been taken.

"A presumption of pecuniary loss exists in favor of one legally entitled to service or support from one killed by the wrongful or negligent act of another." *Killion v. Dinklage*, 121 Neb. 322, 236 N. W. 757. See, also, *Warren v. Englehart*, 13 Neb. 283, 13 N. W. 401.

In our opinion, there was no error in referring to the daughter in the fourth instruction, she being the next of kin.

We will now examine instruction No. 6, to which exceptions are also taken. It reads as follows: "If you find for the plaintiff under the evidence and under these instructions, your verdict should be for such an amount as will equal the present worth of the monetary loss which the widow of the deceased and next of kin will suffer by reason of the death of the plaintiff's decedent, taking into account the probable life expectancy of the deceased and the contributions he would have with reasonable certainty made to his widow had he lived his normal expectancy. You will in no event give the plaintiff anything by way of punishment and no exemplary or punitive damages as the same are not permitted by the law of this state."

This instruction, apparently limiting the recovery to the payments he would have made to the widow alone, is more favorable to the defendants than to the plaintiff, but the plaintiff has not cross-appealed.

This section 30-810, Comp. St. Supp. 1941, of our statutes contains apparently inconsistent provisions. By the amendment of 1937, six lines were added at the end, reading as follows: "and the amount so received in settlement or recovered by judgment shall be reported to and paid into said court for distribution subject to the order of such court to the persons entitled thereto: Provided, said amount shall not be subject to any claim against the estate of said decedent."

Even after this amendment of 1937, Judge Rose in writing the opinion in *Boell v. Overbaugh,* 141 Neb. 264, 3 N. W. 2d 439, explained that the proceeds in that suit under Lord Campbell's Act would pass one-third to plaintiff and two-thirds to his four children. For while this statute clearly limits the damages to the pecuniary loss of certain designated persons, yet it also provides for distribution in the same proportions as personal property. Undoubtedly in this case there was no reason why any one or more beneficiaries should be treated as having any special reason for being favored in the final distribution because of probable contributions which they might have received from the deceased.

But in the case of *In re Estate of Lucht,* 139 Neb. 139, 296 N. W. 749, we have a rather unusual case, in which a 14-year-old boy was killed and the mother brought action as administratrix for his wrongful death, and recovered $3,261.78. The trial court ruled that the father was entitled to no part of this money. The mother had secured a divorce from the father when the son was a year old, and his custody was awarded to the mother, but no alimony; aside from $50 given the mother shortly after the decree was granted in 1920, the father has never contributed anything to the support of the son, and now he has several children by his second marriage. In deciding this case, we rejected the claim of the father on the ground that he had not suffered a pecuniary loss, and said:

"In the phrase 'shall be paid to and distributed among such persons,' the words 'such persons' can logically only mean those persons in whose behalf the action is brought, namely, that portion of the potential beneficiaries of the act as are damaged. We hold that the amount recovered by the personal representative of a deceased, under the provisions of section 30-810, Comp. St. 1929, as amended by chapter 92, Laws 1919, shall be paid to and distributed among such of the widow, widower and next of kin of such deceased as suffer a pecuniary loss by the death of such deceased. The amendment of 1937, heretofore mentioned, seems to be in harmony with this holding."

These last two cases are not in conflict. In the action for the wrongful death brought by the personal representative in the district court, he is required to bring such action "for the exclusive benefit of the widow or widower and next of kin," and if he secures a judgment it is reported to the county court and the distribution thereof is to be made in that court to "such persons in the same proportions as the personal property of an intestate" is distributed.

However, under the amendment of 1937, as construed by this court in *In re Estate of Lucht, supra,* when objections are made to such distribution by any one in whose behalf the action was brought and a showing made in support thereof it is then the duty of the county court to determine who, of the widow or widower and next of kin, have suffered a pecuniary loss and the extent thereof, and distribute the funds recovered to such persons as are entitled thereto. The legislature having placed in the county court the duty to determine who, of the widow or widower and next of kin, have suffered the pecuniary loss and the amount thereof, this question is not for the trial court. Therefore, in an action by the legal representative of a deceased brought in behalf of the widow or widower and next of kin, the trial court should submit to the jury the question of the amount of the pecuniary loss, if any, which the evidence, with reasonable certainty, shows they have suffered.

It is also charged that the verdict of the jury was excessive and that by the Carlisle tables of expectancy the deceased had 16.89 years to live, and that the largest possible recovery would have been the sum of $9,755.80. However, the expectancy tables are not conclusive, and while these tables were offered in evidence, the law is that "Generally, mortality tables are regarded merely as convenient aids in estimating the probable expectancy of life of an individual, and are not to be taken as conclusive." 116 A. L. R. 416, Annotation. See, also, *Litwiller v. Graff*, 124 Neb. 460, 246 N. W. 922; *Moses v. Mathews*, 95 Neb. 672, 146 N. W. 920.

The widow in the instant case testified that the deceased

was a strong, active, healthy farmer, doing all kinds of general farm work, and that he gave her the sum of at least $80 a month.

The law does not provide a positive, definite mathematical formula or legal rule by which the jury shall fix the pecuniary loss suffered in the death of the head of a family. Substantial damages will be presumed from the death of a husband who was supporting his wife. See L. R. A. 1916E, 143-146; *Hindmarsh v. Sulpho Saline Bath Co.*, 108 Neb. 168, 187 N. W. 806.

To justify the granting of a new trial on the ground that the verdict is excessive, that fact must be plain or evident. It is not sufficient merely to raise a doubt as to whether the damages are too large; it must be affirmatively and satisfactorily shown that they are so. In the case at bar, the amount of the judgment was supported by the evidence as not excessive.

In our opinion, the judgment entered in the lower court was sustained by the evidence, and is hereby affirmed.

AFFIRMED.

PHEBE NILES FORSHAY, EXECUTRIX, APPELLANT, V. WILLIAM H. JOHNSTON, APPELLEE.

13 N. W. 2d 873

FILED MARCH 31, 1944. No. 31697.

1. **Evidence.** The rule is that, in the absence of pleading and proof to the contrary, Nebraska courts presume that the law of the foreign jurisdiction which should be applied is the same as the Nebraska law, as to Constitution, statutes, and case law.
2. **Marriage.** A common-law marriage, alleged to have taken place in 1922, may be proved by showing the mutual consent of the parties thereto. It is the holding forth to the world by the manner of daily life, by conduct, demeanor and habits, that the man and woman who live together have agreed to take each other in marriage, permanently and exclusive of all others, and to stand in the mutual relation of husband and wife.

3. **Witnesses.** The agreement between parties which establishes a common-law marriage is not a communication between husband and wife concerning which they are prohibited from testifying by section 20-1201, Comp. St. 1929. When the conversation occurred which created a common-law marriage, the parties were not husband and wife. The status of marriage followed and was the result of that conversation. Furthermore, it was a public matter, and because of its very nature and its public interest required its revelation. This was no more a communication between husband and wife than the promise and agreement to take as husband or wife of the ceremonial marriage.
4. **Marriage.** The general rule is that the validity of a marriage is determined by the law of the place where it was contracted; if valid there it will be held valid everywhere, and conversely if invalid by the *lex loci contractus*, it will be invalid wherever the question may arise.
5. **Homestead.** Where a husband and wife reside upon a homestead and the wife dies, the homestead character of the land continues and the surviving husband, although he may have no children or dependents residing with him, may still retain the homestead as such.
6. ———. On the death of the homestead owner the right to the use and enjoyment of the premises passes to the surviving spouse, which interest is transferable, and may be mortgaged or conveyed. It is not lost by an abandonment of the premises or by a change in the character of the use of the premises or by the remarriage of the spouse. In short, this interest is a life estate in the land.

APPEAL from the district court for Dawes county: EARL L. MEYER, JUDGE. *Affirmed.*

Edwin D. Crites, for appellant.

Greydon L. Nichols, contra.

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

PAINE, J.

This is an action in ejectment, brought by the executrix against William H. Johnston, defendant and appellee. The court sustained his claim to a statutory homestead right to the land in question, and found he was not guilty of withholding the premises from the plaintiff. The question in-

volved is whether the decedent and defendant Johnston were husband and wife by virtue of a common-law marriage.

Petition was filed July 20, 1940, by Phebe Niles Forshay, as executrix of the last will and testament of Reana D. Parrotte, deceased, alleging that she has a legal estate in, and is entitled to the possession of, lot 5, block 23, in the original town of Chadron; that on May 26, 1940, Reana D. Parrotte died testate, seized and possessed of said real estate; that on July 3, 1940, the will was admitted to probate in the county court for Dawes county, and on said day petitioner was duly appointed executrix, and as such duly qualified executrix is entitled to the possession of said real estate.

Plaintiff further alleges that deceased bequeathed numerous pecuniary legacies under her last will and testament, and it is necessary that plaintiff as executrix sell the real estate for the purpose of paying the funeral expenses, the expenses of the last illness of deceased, her just debts and the expenses of administration, and the said legacies, all of which are unpaid, and for the payment of which petitioner is without means except it be the proceeds of the sale of said real estate and of another tract of real estate of small value, insufficient in amount for the payment of said items, and plaintiff alleges that she is prevented from selling said premises by the defendant, who wrongfully refuses to surrender possession; that said real estate was not otherwise disposed of under the will of deceased, and that the value of the rents and profits of said property is $15 a month, amounting to the sum of $105.

Plaintiff further states that she is one of the residuary devisees and legatees under the will of the deceased. Judgment is demanded against defendant for (1) the restitution of said lands and premises; (2) for the sum of $500 damages for the withholding thereof; (3) for the sum of $105, the value of the rents and profits thereof up to the date of the filing of suit, and in addition thereto the rents and profits at the rate of $15 a month until possession is obtained.

On January 24, 1941, William H. Johnston filed answer, denying each and every allegation of the petition not specifically admitted, and for further answer alleges that Reana D. Parrotte died May 26, 1940, and that defendant was, at the time of her death and for many years prior thereto, the husband of Reana D. Parrotte, and that he expects to exercise his right under section 30-107, Comp. St. 1929, to take the property that he is entitled to under the law out of the estate of his said wife, under his election to take under the statutes.

Defendant further alleges that the property described in the petition was the family homestead of deceased and of this defendant, husband and wife, at the time of the death of deceased, and defendant has a life estate in said homestead, and has occupied it as such since the death of deceased; Reana D. Parrotte, whose true name was Reana D. Parrotte Johnston; that defendant is entitled to the possession of said property under the laws of Nebraska, from which defendant cannot be expelled by ejection or any other action, and defendant prays that the action be dismissed.

Plaintiff filed reply, denying each and every allegation of new matter contained in defendant's answer. The cause was tried to the court on October 7, 1942, a jury being waived, and the court found defendant not guilty of withholding the premises described from the plaintiff, and it was adjudged that defendant go hence without day.

The errors relied upon by the plaintiff for a reversal will be briefly stated. It is charged that there was no competent evidence to show any valid marriage agreement, common-law or otherwise, between these parties, and no proof of general reputation of marriage; that the defendant failed to meet the burden of proving the existence of a valid marriage relation; that the trial court erred in permitting defendant Johnston to testify over plaintiff's objection concerning conversations, communications and transactions between himself and Mrs. Parrotte, and as to what she said to others in his presence, under section 20-1201, Comp. St. 1929, and also objected to on the ground that Johnston was

an incompetent witness under section 20-1204, Comp. St. 1929.

It is also assigned as error that the court permitted witness Ford to testify, over objection, that after Mrs. Parrotte moved to Nebraska in July, 1923, she introduced herself to him as Mrs. Johnston, such testimony being incompetent, irrelevant and immaterial.

The last assignment of error is that the court erred in admitting, over objection, an envelope and letter, exhibits Nos. 3 and 4. The envelope was postmarked in California at Los Angeles, April 3, 1935, and the envelope was addressed "Mrs. Wm. Johnston, 426 Morehead St., Chadron, Nebr." by the plaintiff in this case, who was living in Los Angeles.

The plaintiff, to support the allegations of her petition, introduced the original files from the county court for Dawes county, and also the will of Mrs. Reana D. Parrotte, and the certificate of probate, with leave to substitute copies. It was then stipulated generally that on the date of her death decedent was the owner of lot 5, block 23, in an addition to the original town of Chadron, which had been conveyed to her under the name of Reana D. Parrotte; that she died May 26, 1940, and that her last will was admitted to probate July 3, 1940; that plaintiff was appointed executrix; that the estate is still in process of administration; that property involved is a lot, with a small frame dwelling thereon, of which the defendant has refused to give up possession to executrix, which she has demanded, and that certain claims have been allowed against said estate, to wit, Mayo Clinic, $320, funeral expenses, $455, and for opening grave, $15, and that a certain real estate broker, if called as a witness, would testify that the fair rental value of said property was $15 a month. Thereupon, the plaintiff rests her case.

Mr. Nichols, counsel for defendant, thereupon stipulated with counsel for plaintiff that defendant's exhibit No. 1 is the original election to take under the law, signed by defendant and filed in the county court on January 24, 1941,

less than one year after issuance of letters testamentary; to which stipulation Mr. Crites reserved the objection that defendant was not the husband of deceased, and that no sufficient foundation was laid for its introduction, but the identity and genuineness of the paper was admitted, and same was received by the court.

Thereupon, the defendant called as his first witness E. L. Ford, a plumber, of Chadron, who testified that they came to his place in July, 1923, and she said her name was Johnston, and introduced William Johnston as her husband, and said she owned the place by her sister's, Mrs. Anderson's, place, and Mrs. Johnston furnished some of the material and witness did the work, and the bill showed that they paid witness $10 for the work in May, 1924.

Dr. Milton B. McDowell testified that he was acquainted with the defendant and his wife, Mrs. Johnston. He did not know her name was Mrs. Reana D. Parrotte, but knew her as Mrs. Johnston, having first met her about 1925. "She came up to my office and told me she was Mrs. William Johnston, she said, 'you know my husband, he works down there at the shops.'" After that he went to their home many times to see her when she was ill, sometimes at 11 or 12 o'clock, or 2 or 3 o'clock in the morning, when she would have a bad spell. Mr. Johnston made all the payments to him. When she was in her last illness, Mr. Johnston was there nearly every time witness went there. "He always helped me change the dressings, assisted me any way he could." Dr. McDowell testified that he had seen them out riding in an automobile frequently.

The deposition of Ruth J. Smith was taken at Minneapolis on September 30, 1942. She testified that she was a sister of defendant, and that her brother William first introduced the deceased to her in December, 1922, as his wife. She met her on other occasions. After Billy and Reana went to Chadron, Billy wrote letters to them and always signed them "Billy and Reana," and invited them to visit him, and in the summer of 1928 witness and her mother visited him at Chadron and stayed for about ten days. She

testified that Reana and her brother William occupied the same bed. "Q. How do you know that? * * * A. Because there was just one other bed besides the one my mother and I occupied."

Mae Hutchins, age 59, testified by deposition that she lives in Minneapolis, and is a sister of defendant. Her brother came over to her home in February of 1923. "William came over to my house in the evening with Reana, and he said, 'Mae, this is Reana, my wife.' He had told me before that he was married." He used to come over occasionally and visit, and he introduced Reana to witness' husband as his wife, and witness and her husband visited them. Asked whether witness could tell whether or not Mr. and Mrs. Johnston cohabited together as married persons, witness answered: "Yes, they did. * * * At my home and also at my sister's. * * * About the 7th of March, 1929, after my husband's funeral, and at my sister's in July, 1934; * * * she always called my mother 'mother.' "

Hazel Becker testified by deposition that she resides in Minneapolis, is 52 years old, and is a sister of defendant, who is younger than she is. She testified that the general understanding between her brothers and sisters that they were married was first created around Christmas, 1922, when "our family met her as his wife and Billy's friends talked to us about Billy being married and about his marrying a woman who appeared much older than himself."

The deposition of Ethel Stuart, a sister of defendant, shows that she also resides in Minneapolis, and met Reana D. Johnston once at her mother's house. "She was in the bedroom at my mother's house and my brother's wife took me into the bedroom and introduced Reana as Billy's wife." He was sitting there at the time. To all other questions asked this witness, the objections of Mr. Crites were sustained.

Nellie Johnston testified by deposition that she resided in Minneapolis, was 77 years old, and was the mother of defendant. She said she got him exempted from service in the last war, as he was her sole support; he stayed with her un-

til 1921. She said that her son brought Reana to her home around Christmas, 1922, "and she brought presents for the children and me, and I thought she was nice." She said they stayed that night and for several days thereafter at her home and occupied the same room. They talked about their future plans of going to Nebraska, and she said she had a house down there. "She said when we get down there, won't you come down and visit us; and later she sent me the fare for me and my daughter, Ruth, and we both went down. * * * I never knew her name was Parrotte. She was introduced to me as my son Billy's wife, Reana." She testified that when Reana was introduced by Billy she said, "How do you do, mother." She stated that Billy got passes for them and they traveled together, and went out to California, and came up to visit her, and they both told her that Billy got the pass.

At the end of the depositions Mr. Crites stated: "Let the record show that the plaintiff withdraws the cross-examination of all witnesses whose testimony was taken by deposition."

Defendant Johnston testified that he lives at 426 Morehead street, and has lived in Chadron since July 6, 1923; that he first met Reana D. Parrotte in January, 1922; that she was proprietor of the Lanning Hotel at 128 Frost street south, Minneapolis, and that he was a book and magazine salesman for Collier's, and that they entered into a perfect companionship. He testified that she was in trouble, it was a large hotel and she had lost her lease, and he "started living with her and to help her out." He rented a place over at 117 Main street southeast. He testified that they lived together as any other man and wife, that they cohabited together, slept in the same bed, ate together, she got his meals, and he took care of the hotel, and that her brother was staying there at the hotel at that time; that this companionship continued very faithfully until her death in Nebraska; that they lived together continuously in Minnesota for about 17 months; that they moved to Chadron and lived at her sister's, Mrs. Ora Anderson's, next door to the property in

question; that they had an auto tent in the back yard and lived in that; that in October, 1923, they went back to Minneapolis, sold the hotel at 207½ Market avenue, gave Mr. Gray notice to vacate the premises at 426 Morehead street, Chadron, and came back and lived all those years at that house in Chadron until she died, and that is where the defendant is living today.

Defendant also testified that in February, 1924, his brother-in-law, Gus Anderson, introduced him to the railroad authorities, and he got a job and has been working for the railroad (Northwestern) continuously ever since; that he always gave his wife his pay check, and she paid the grocery bills and taxes (the word "wife" was stricken out upon motion of Mr. Crites); that they had charge accounts at the store of defendant's attorney's father, and at several other stores in Chadron; that they had charge accounts at Montgomery-Ward in Denver and Montgomery-Ward in Alliance. He testified that they took many trips, and week ends they would go up to the Black Hills. He had also secured transportation for her from Chadron to Los Angeles, from Chadron to Denver, and to Lincoln, to Minneapolis, and to Rochester five times while she was sick, and he went with her on all of these trips and paid all the expenses.

It was stipulated that Reana D. Parrotte maintained an account in the First National Bank of Chadron, and also in the Farmers & Merchants Savings Bank of Minneapolis, and those accounts remained in that name until her death, and that at the time of her death she owned a Nash automobile, registered in her name as Reana D. Parrotte.

It was further stipulated that the real estate involved in this ejectment suit was acquired by Reana D. Parrotte long before the cohabitation that has been testified to between the deceased and the defendant.

After this brief review of the testimony as found in the bill of exceptions, we will take up the first question presented to this court for determination, and that is whether, under the facts and the law, the defendant is the surviving husband of the decedent.

In January, 1922, they entered into a companionship in Minneapolis, in which they openly lived together as man and wife, later the decedent's brother living in the same hotel. This relationship thus begun continued for 18 years and five months, until her death.

In this case the bill of exceptions does not disclose that either party offered in evidence the law of Minnesota in reference to marriages, or parol evidence, or decisions as to common-law marriages in Minnesota, as provided for in sections 20-1269, 20-1291, or 20-1293, Comp. St. 1929, which also provide that the unwritten, or common, law accepted in such state may be proved by parol evidence or reports of adjudicated cases.

The rule is that, if no evidence of foreign law is given, Nebraska courts presume that the law of the foreign jurisdiction which should be applied is the same as the Nebraska law, as to Constitution, statutes, and case law. See *Steinke v. Dobson*, 90 Neb. 616, 134 N. W. 169; *Triplett v. Lundeen*, 132 Neb. 434, 272 N. W. 307; *Johnson v. Hesser*, 61 Neb. 631, 85 N. W. 894; 20 Neb. Law Review, 39; 73 A. L. R. 897, Ann.

In January, 1922, when these parties orally agreed to start living together as husband and wife, the decisions of our state in force at that time said that the only essential of a valid marriage was the free consent of competent parties to live together in the marriage relation (*Eaton v. Eaton*, 66 Neb. 676, 92 N. W. 995), and it had been held that the fact of such a marriage could be proved by the testimony of one of the parties. See *Bailey v. State*, 36 Neb. 808, 55 N. W. 241.

All of these requirements for such a marriage were well set out by Judge Marshall in 1891 in his instructions to a jury, and will be found in the case of *Olson v. Peterson*, 33 Neb. 358, 50 N. W. 155.

To apply the law as set out in these and many other authorities to the facts proved in the case at bar, we find that they were competent parties to enter into the marriage relationship; that the consent of each was freely given to

then and there carry out such agreement, as shown by their acts and all the circumstances at the time, and that it was not a temporary, lustful relationship, but truly matrimonial in its nature, and was faithfully continued for over 18 years, without any evidence of a break of any kind; that the parties immediately began living together, and assumed all the mutual duties of husband and wife, and somewhat later introduced each other to relatives and friends, and to the stores in which they established credit; that the defendant took her to visit his mother as his wife, and that the wife thereafter called her "mother;" that all of the obligations usually performed by a husband were performed by the defendant, such as taking her riding in an automobile, taking her on trips to many parts of the United States, upon passes secured for her as his wife (he being a railroad man), watching over her health, taking her to Rochester to the Mayo Clinic five different times, and caring for her patiently in her last sickness.

These and other facts, proved by direct or circumstantial evidence, lead this court to the conclusion that the defendant was the common-law husband of deceased.

Plaintiff assigns as prejudicial error that the trial court permitted defendant to testify concerning communications, conversations and transactions with the deceased, as incompetent under section 20-1201, Comp. St. 1929, forbidding a husband and wife to testify concerning communications made one to the other. But this court has held: "The agreement between parties which establishes a common-law marriage is not a communication between husband and wife concerning which they are prohibited from testifying. It is not within the purview of section 20-1201, Comp. St. 1929. When the conversation occurred which created a common-law marriage, the parties were not husband and wife. The status of marriage followed and was the result of that conversation. Furthermore, it was a public matter, and because of its very nature and its public interest required its revelation. This was no more a communication between husband and wife than the promise and agreement

to take as husband or wife of the ceremonial marriage." *In re Estate of Tilton,* 129 Neb. 872, 263 N. W. 217.

Then we come to the objections founded on section 20-1202, Comp. St. 1929, that no person having a direct legal interest shall be permitted to testify when the adverse party is the representative of a deceased person. However, we are not compelled to pass upon this question, because we find there is sufficient evidence in the record, outside of the defendant's evidence, to sustain the judgment of the trial court.

The right of election of a surviving husband or wife to take under the will of the deceased or to take by inheritance is purely statutory. See Comp. St. 1929, secs. 30-107, 30-108.

"' * * * where a husband and wife reside upon a homestead and the wife dies, the homestead character of the land continues and the surviving husband, although he may have no children or dependents residing with him, may still retain the homestead as such.' *Dougherty v. White,* 112 Neb. 675, 200 N. W. 884." *Abboud v. Boock,* 137 Neb. 652, 290 N. W. 713.

"In discussing this question, Dean Foster, in 3 Neb. Law Bulletin, 386, said: 'On the death of the homestead owner the right to the use and enjoyment of the premises passes to the surviving spouse. In many states, this is the extent of the right of such survivor under the homestead acts. The Nebraska statute and the Nebraska decisions go much further. The interest of the surviving spouse is transferable. It may be mortgaged or conveyed. It is not lost by an abandonment of the premises or by a change in the character of the use of the premises or by the remarriage of the spouse. In short, this interest is a life estate in the land.' " *Gordon v. Gordon,* 140 Neb. 400, 299 N. W. 515.

While the parties in the instant case arrived at Chadron, Nebraska, to make their home on July 6, 1923, and while the new law (Laws 1923, ch. 40) to abolish common-law marriages contracted after that date did not take effect until August 2, 1923, we have decided that, in view of our

holding, it is unnecessary to discuss the effect of their residence in Nebraska and whether or not it also constituted a valid common-law marriage.

"The general rule is that the validity of a marriage is determined by the law of the place where it was contracted; if valid there it will be held valid everywhere, and conversely if invalid by the *lex loci contractus*, it will be held invalid wherever the question may arise." 38 C. J. 1276.

We have examined all the alleged errors set out in the brief of plaintiff, and have reached the conclusion that the judgment of the trial court was right, and it is hereby affirmed.

AFFIRMED.

VERNE C. BARNEY, APPELLEE, V. CITY OF LINCOLN, APPELLANT.

13 N. W. 2d 870

FILED MARCH 31, 1944. No. 31708.

1. **Limitation of Actions.** An action brought to enforce the provisions of a pension law is an action upon a liability created by statute and, in the absence of a limitation period in the act itself, is barred in four years as provided by section 20-206, Comp. St. 1929.
2. ———. An action to determine the liability of a city for the payment of pension benefits necessarily precedes and is distinct from an action to recover delinquent installments after the pension has been granted.
3. ———. A cause of action accrues when a suit may be maintained thereon and the statute of limitations begins to run at that time.
4. ———. The cause of action to establish plaintiff's right to a pension accrued at the time he became totally and permanently disabled, and plaintiff having failed to bring his action within four years thereafter, the statute of limitations is a bar.
5. ———. Where the right to a pension has been established, the statute operates against delinquent payments from the date each payment accrues.

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

Max Kier and *A. A. Whitworth,* for appellant.

Maxwell V. Beghtol and *J. Lee Rankin, contra.*

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

CARTER, J.

Plaintiff commenced this action to recover pension benefits from the city of Lincoln by virtue of the provisions of sections 2439 and 2441, Comp. St. 1922. From a verdict for $4,093.87, and a judgment entered thereon, the defendant appeals.

The record shows that plaintiff entered the employ of the city of Lincoln as a paid fireman on December 10, 1923, and remained continuously in that employment until November 18, 1928, at which time he alleges that he became totally and permanently disabled as the result of an injury received in line of duty. For the purposes of this opinion it will be assumed that the plaintiff was so disabled on and after November 18, 1928.

The record further discloses that on July 27, 1942, plaintiff filed his application for a pension with the defendant, which application was disallowed on November 30, 1942. On December 12, 1942, this action was filed. The defendant, among other defenses not material to this decision, pleaded the statute of limitations. Since a proper application of the statute of limitations controls the result, we will confine our discussion to that question.

The liability, if any, of the defendant arises by virtue of the provisions of sections 2439 and 2441, Comp. St. 1922. Consequently, it is a liability created by statute governed by the following provisions of our general statute on the subject of limitations of actions:

"Civil actions, other than for the recovery of real property, can only be brought within the following periods, after the cause of action shall have accrued." Comp. St. 1929, sec. 20-204.

"Within four years, an action upon a contract, not in writing, expressed or implied; an action upon a liability created by statute, other than a forfeiture or penalty." Comp. St. 1929, sec. 20-206.

Defendant urges that plaintiff's right of action accrued on November 18, 1928, and that unless action be commenced within four years thereafter it is barred. We think the defendant's position is correct.

An authoritative text states the rule as follows: "As in other cases generally, the cause of action upon a claim for a pension accrues when a suit may be maintained thereon, and the statute of limitations begins to run at that time. It may be observed, in this connection, that an action to determine the existence of the right to a pension necessarily precedes and is distinct, as regards the commencement of the period of limitation, from an action to recover instalments which have fallen due after the pension has been granted. The view taken in some cases is that liability for the payment of a pension is to be regarded as an obligation created by statute within the operation of a general statute of limitations." 40 Am. Jur. 991.

The foregoing rule was correctly applied in *Dillon v. Board of Pension Commissioners*, 18 Cal. 2d 427, 116 Pac. 2d 37, wherein the court in a similar case said:

"The right to receive periodic payments under a pension is a continuing one (see *Dryden v. Board of Pension Commrs.*, 6 Cal. (2d) 575 [59 Pac. (2d) 104].), and any time limitation upon the right to sue for each instalment necessarily commences to run from the time when that instalment actually falls due. Before plaintiff can claim these periodic payments, however, she must establish her right to a pension. If the Board of Pension Commissioners refuses to acknowledge this right upon application, she can properly bring an action of *mandamus* in the superior court to review the soundness of the board's decision, and to establish as a matter of law that she is entitled to the status of a pensioner. * * * An action to determine the existence of the right thus necessarily precedes and is distinct from an ac-

tion to recover instalments which have fallen due after the pension has been granted.

"A cause of action accrues when a suit may be maintained thereon, and the statute of limitations therefore begins to run at that time. * * * The cause of action to establish the right to a pension accrued to plaintiff at the time of her husband's death. At any time following the death she could demand a pension from the board and upon refusal could maintain a suit to enforce such action. The city charter requires an application to the board before court proceedings can be instituted, but it is established in California that a claimant cannot delay the running of the statute of limitations by postponing the time of demand upon the proper officials; the statute therefore begins to run at the time when the plaintiff first had the power to make such demand."

For a review of the cases on this subject see 136 A. L. R. 809. See, also, *Lund v. Minneapolis Fire Department Relief Assn.*, 137 Minn. 395, 163 N. W. 742, and *Nicols v. Board of Police Pension Fund Commissioners*, 1 Cal. App. 494, 82 Pac. 557.

It appearing from the record that plaintiff became totally and permanently disabled on November 18, 1928, his cause of action against the defendant accrued at that time. No action having been commenced within four years thereafter, the statute of limitations bars a recovery.

The plaintiff cites *Dryden v. Board of Pension Commissioners*, 6 Cal. 2d 575, 59 Pac. 2d 104, and *Gaffney v. Young*, 200 Ia. 1030, 205 N. W. 865, and other cases of similar import, to sustain his position that the right to a pension is a continuing right and that the statute of limitations operates only on payments more than four years past due at the time of the commencement of the suit. We do not think the reasoning which supports these opinions is sound as we will endeavor to point out.

In the first place, it is evident that if the *Dryden* case holds as the plaintiff contends, and we think it does, it has been receded from by the California court in subsequent

cases. The *Dryden* case appears to have been followed in *Talbot v. City of Pasadena,* 28 Cal. App. 2d 271, 82 Pac. 2d 483. In *Dillon v. Board of Pension Commissioners, supra,* the latest California case on the subject, the *Talbot* case was expressly disapproved. The dissent filed in the *Dillon* case evidences the fact that the same contentions were advanced by the plaintiff in that case as here, the *Dryden* and *Talbot* cases being cited in support thereof, and the court rejected them in favor of the rule which we have heretofore cited from the *Dillon* case. We conclude therefore that the latest expression of the California supreme court does not sustain the position of the plaintiff where the facts are such as we have before us in the present case.

A pension law which provides for the payment of benefits based upon the monthly earnings of an employee, to be paid monthly upon the death, disability or retirement of the employee, does not create a continuing liability. The liability for the payment of the pension accrues when the events stated in the law occur which entitle the employee to a pension. In the present case, the liability accrued when plaintiff became totally and permanently disabled on November 18, 1928, and the statute of limitations began to run at that time. The fact that such liability is to be discharged under the provisions of the statute by monthly payments for the remainder of the life of the employee entitled thereto does not make the liability a continuing one in the sense that a new liability is created from day to day or month to month. An example of a continuing liability is where a person contracts to support another during his lifetime. In such case, every day that support is not afforded constitutes a breach, —the liability continues to exist up to the very day of the decease of the person to be supported. No analogous situation exists where the liability accrued by the happening of a certain event and the discharge of the liability thus accruing is by statute made payable by monthly installments during the remainder of the lifetime of the beneficiary.

Where the right to a pension has been established by agreement or by suit, then, of course, the statute of limita-

tions becomes operative upon each monthly payment or installment as it accrues. *State ex rel. Delaney v. Holmes*, 5 Ohio App. 1; *Dillon v. Board of Pension Commissioners, supra.*

We conclude therefore that, if a city within the scope of the pension statute here involved refuses or neglects to place an employee on the pension rolls after the event is alleged to have happened which brings him within the act, the statute of limitations commences to run against the employee and will constitute a complete bar at the end of four years. In the present case, plaintiff's cause of action accrued on November 18, 1928, the date he became totally and permanently disabled. No action having been commenced within four years from that date, no enforceable claim exists when the statute of limitations is pleaded as a defense.

REVERSED AND DISMISSED.

STATE EX REL. NEBRASKA STATE BAR ASSOCIATION, RELATOR, V. HUBERT J. PRICE, RESPONDENT.

13 N. W. 2d 714

FILED MARCH 31, 1944. No. 31514.

1. **Attorney and Client.** While disbarment proceedings are not criminal in their nature, in view of the consequences to the person charged, the presumption of innocence applies and guilt of the charges made must be established by a clear preponderance of the evidence.
2. ———. In a disbarment proceeding only those matters which are specifically charged in the complaint can be considered.

Original proceeding by the state, on the relation of the Nebraska State Bar Association, against Hubert J. Price. *Judgment for respondent.*

Walter R. Johnson, Attorney General, H. Emerson Kokjer and *John H. Comstock,* for relator.

Harry F. Russell and *Edward E. Carr,* for respondent.

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

WENKE, J.

The Committee of Inquiry for the Thirteenth Judicial District of Nebraska, pursuant to the provisions of article XI of the Rules Creating, Controlling and Regulating Nebraska State Bar Association, filed their complaint in this court against Hubert J. Price of Cozad, Nebraska, for his discipline or disbarment as a duly admitted and practicing lawyer of the Nebraska bar.

The complaint was filed in the name of the State of Nebraska ex rel. Nebraska State Bar Association, as plaintiff, who will be referred to herein as the state, and against Hubert J. Price, as defendant, who will be referred to herein as the defendant.

The complaint contains two counts. The first count grew out of an automobile accident near Cozad, Nebraska, on December 21, 1940, and charges the defendant with: (a) Attempting to persuade James Scott to commit perjury by falsely testifying that Earl Turpin was employed by Scott at the time of the accident, when he, the defendant, knew that Turpin was not so employed; (b) Soliciting James Scott to employ the defendant in his capacity as an attorney to represent Scott in connection with said automobile accident; (c) Attempting to bribe R. E. Bannister, a practicing attorney at Cozad, Nebraska, by offering him $500 if he, Bannister, would procure and induce James Scott and Wreford W. Beckley to testify falsely that Earl Turpin was in Scott's employ and working for him on December 21, 1940, at the time of the accident, when he, defendant, knew such facts to be false; and (d) Attempting to bribe and persuade Wreford W. Beckley to commit perjury by testifying falsely that he, Beckley, had employed the said Earl Turpin for and on behalf of James Scott on December 21, 1940, he, the defendant, knowing such fact to be false. The second count grew out of a car accident near Cozad, Nebraska, on July 25, 1941, and charges the defendant with: (a) Soliciting Evert Kincheloe to employ the defendant in his capacity

as an attorney to represent Kincheloe in connection with claims for damages sustained in said automobile collision; and (b) Soliciting Dr. John W. Neslund to employ the defendant in his capacity as an attorney to represent him as to his account for services rendered to Evert Kincheloe resulting from and sustained by reason of said accident.

To this complaint the defendant filed his answer. Upon motion of the state, B. F. Butler, a member of the Nebraska bar residing at Cambridge, Nebraska, was appointed referee. After hearing was had the referee filed his report in this court on September 14, 1943. To this report the defendant filed his exceptions.

The defendant's exceptions raise two questions: First, the sufficiency of the evidence to sustain the charges specified in counts one and two of the complaint; and, Second, that no such unprofessional conduct can be considered in this cause which is not specifically contained in or raised by the complaint itself.

While a disbarment proceeding is essentially a civil proceeding and the recognized rules governing that practice are controlling, *State ex rel. Nebraska State Bar Assn. v. Bachelor,* 139 Neb. 253, 297 N. W. 138, however, the nature of the proof required is stated in *In re Newby,* 82 Neb. 235, 117 N. W. 691, and approved in *State ex rel. Nebraska State Bar Assn. v. Bachelor, supra*: " 'While the proceedings in this matter are not criminal in their nature, in view of the momentous consequences to the person charged, involving his means of obtaining a livelihood from his profession and his reputation as an honest and honorable man, the presumption of innocence applied, and his culpability must be established by at least a clear preponderance of the evidence. The court should be satisfied to a reasonable certainty that the charges are true.' "

While the referee's report is not entirely clear, it would seem that he finds the defendant not guilty of the matters specifically charged in counts one and two of the complaint and with this we agree. From an examination of the record, we cannot say that we are satisfied that the defendant

is entirely innocent of the charges made against him, nor can we say that we are satisfied to a reasonable certainty of his guilt. Under these conditions it is our duty to give the defendant the benefit of the doubt and to hold that the charges have not been sustained by the evidence.

The defendant further contends that no unprofessional conduct can be considered which is not specifically contained in or raised by the complaint itself. It appears, from the reading of the referee's report, that because of the way in which the defendant generally conducted his law practice, and more particularly with reference to certain letters, including one of February 11, 1941, to the National Mutual Casualty Company of Tulsa, Oklahoma, which was written after he was discharged by Earl Turpin, that some disciplinary action should be taken, if possible, under the charges made in the complaint. This letter has particular reference to the violation of the rule as announced in *Federal Trust Co. v. Damron,* 124 Neb. 655, 247 N. W. 589, that, "An attorney, after receiving the confidence of a client, may not enter the service of others whose interests are adverse to such client, in the same subject-matter to which the confidence relates, or in matters so closely allied thereto as to be, in effect, a part thereof. 1 Thornton, Attorneys at Law, 307" and to the solicitation of legal business, which this court has condemned in *State ex rel. Hunter v. Crocker,* 132 Neb. 214, 271 N. W. 444, and *State ex rel. Sorensen v. Goldman,* 127 Neb. 340, 255 N. W. 32.

Under article XI of the Rules Creating, Controlling and Regulating Nebraska State Bar Association, pursuant to which this proceeding is being prosecuted, section 7 provides in part as follows: " * * * said committee shall immediately reduce or cause the charges to be reduced to writing, *specifying with particularity the facts which constitute the basis thereof* * * * ." After the complaint is sent to the clerk of this court by the Committee of Inquiry, it may be amended by the Advisory Committee as provided in section 8: "If the Advisory Committee determines that probable cause for disciplinary action exists, it shall trans-

mit its report, the report of the Committee of Inquiry, the transcript, and the complaint submitted by the Committee of Inquiry, *together with such amendments thereto as to it may seem proper,* to the Clerk of the Supreme Court who shall forthwith enter the same upon the docket of the court as an original action." After the complaint is filed in this court, section 11 further provides: "The Attorney General or attorney so appointed may in his discretion prepare and file an amended or new complaint, and in case he has in his possession evidence which in his opinion warrants disciplinary action or any additional charge or charges, *he may incorporate such additional charge or charges in the complaint and prosecute same regardless of the fact that such new charge or charges have not been presented to the Committee of Inquiry or considered by the Advisory Committee.*" (Italics ours.)

Certainly the defendant in this case, whose means of livelihood are affected by its results, should have a right to know upon what particular facts the state was going to rely in claiming that he should be disciplined or disbarred. The provisions of the rules of the Nebraska State Bar Association, under which this proceeding was had, so provide. The defendant had a right to rely upon the fact that the only matters to be considered were those particularly charged in the complaint and to meet whatever evidence the state offered in support thereof. Since the conduct of the defendant, upon which the referee recommends that he be disciplined, is not particularly set forth in the complaint, it was not properly before the referee and is not properly before this court and the merit thereof will not be here discussed. In a disbarment proceeding only those matters which are specifically charged in the complaint can be considered. The complaint is therefore dismissed.

JUDGMENT FOR THE DEFENDANT.

IN RE APPLICATION FOR WRIT OF HABEAS CORPUS. RICHARD (DICK) RICE, PETITIONER, APPELLANT, V. NEIL OLSON, WARDEN, RESPONDENT, APPELLEE.

14 N. W. 2d 850

FILED APRIL 7, 1944. No. 31735.

1. **Criminal Law.** The constitutional right of accused to have the assistance of counsel may be waived, and a waiver will be implied where accused, being without counsel, fails to demand that counsel be assigned him.
2. ———. When a defendant enters a plea of guilty, he thereby waives all defenses, other than those that are jurisdictional.
3. ———. The acceptance of a plea of guilty authorizes the imposition of the legal sentence for the crime properly charged in the information.

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

Richard Rice, pro se.

Walter R. Johnson, Attorney General, and *Carl H. Peterson, contra.*

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

PAINE, J.

This matter comes before this court upon a petition filed by Richard (Dick) Rice in the district court for Lancaster county, praying that a writ of habeas corpus may issue. This application was denied by the district court.

On July 30, 1943, a petition was filed in the district court for Lancaster county, which sets out that the petitioner is a Winnebago Indian by birth, and a resident of Winnebago, Nebraska, and is a ward of the federal government; that on June 10, 1935, he was tried and convicted in the district court for Thurston county at Pender on an information of the county attorney charging him with the offense of breaking and entering a building located in Thurston county, and carrying away property of the value of $35, and was sentenced to a term of one year in the men's reformatory near

Lincoln, Nebraska, and served ten months, and was discharged on April 10, 1936.

This petition then charges that thereafter on May 22, 1940, an information was filed, charging petitioner and one Joe Bigbear with forcibly breaking and entering into a certain dining hall in the village of Winnebago on May 17, 1940, which dining hall is owned by the Winnebago Indian Mission of the Reform Church in America, with the intent to steal property of value contained in said building, and on October 14, 1940, defendant waived preliminary hearing in the county court and was arraigned upon information filed for burglary in the district court and pleaded guilty thereto; that thereupon section 28-538, Comp. St. 1929, was read to him, and he was then asked if, after knowing what penalty could be inflicted upon him under his plea of guilty, he still desired to plead guilty, to which question of the court he replied in the affirmative, and having stated that he had nothing to say before sentence was pronounced he was thereupon sentenced by the district court to hard labor in the penitentiary for a period of one to seven years.

It is charged that the trial court did not advise the petitioner of his constitutional rights to have counsel and witnesses, or to be charged and informed against by indictment of a grand jury, which is guaranteed under the Fourteenth, the Fifth, and the Sixth Amendments to the Constitution of the United States, nor of his right to a trial by jury, guaranteed by section 6, art. I of the Nebraska Constitution, and that said petitioner did not waive those constitutional rights either by action or words, and that such rights cannot be waived by agreement of the parties, and it is charged that he was convicted by a court of competent jurisdiction and deprived of his constitutional right of due process of law; that no jurisdiction rested in the trial court, or over the person of the accused, because the alleged crime was committed on an Indian reservation and without and beyond the jurisdiction of the trial court.

It is also charged that judgment of conviction is unconstitutional and void in that the trial court imposed an inde-

terminate sentence of from one to seven years instead of a flat or definite sentence, as by law required, in that petitioner had previously served a sentence in a penal institution at the men's reformatory. See Comp. St. 1929, sec. 29-2620.

It is further charged in said petition that the petitioner is an Indian of the Winnebago tribe, and the same is under the exclusive jurisdiction of the federal government, and without the jurisdiction of the trial court.

The petitioner further charges that, after being confined in the Nebraska state penitentiary for 18 months he employed counsel, who advised him that his proper remedy was to file a writ of error *coram nobis* with the trial court, and petitioner's sister paid said counsel $75 to prepare said petition, which petition was dismissed October 5, 1942.

It is further charged that under section 29-1803, Comp. St. 1929, it was mandatory upon the district court to assign counsel to guard and enforce rights guaranteed under the Fourteenth Amendment to the United States Constitution.

It is further charged that he was deprived of his right to be served with a copy of the information and given 24 hours thereafter within which he might examine the charge and prepare a defense.

Because of these allegations, the petitioner prays that a writ of habeas corpus may issue, directing Neil Olson, warden of the penitentiary, to bring the petitioner before the court to determine the facts and legality of the petitioner's imprisonment and dispose of the petitioner as law and justice may require, and release him from such false imprisonment, and that he may go hence without day.

The federal Constitution does provide, in article V of the Amendments, as charged in the petition, that no person shall be held to answer for a crime such as was charged in this case unless upon an indictment of a grand jury, but section 10, art. I of the Constitution of Nebraska provides that the legislature may provide for holding such persons upon the information of the public prosecutor, and section 26-901, Comp. St. 1929, provides that when a county attor-

ney has sufficient evidence he is authorized to file such proper complaint as was done in this case, in strict accordance with the Nebraska Constitution and laws.

It is also claimed in the petition that the petitioner is a Winnebago Indian and is under the exclusive jurisdiction of the federal government, and without the jurisdiction of the district court of Nebraska. However, chapter 15, title 18, U. S. C. A., sec. 548, of the federal Penal Code, provides generally that all Indians committing a crime, either within or without an Indian reservation within the boundaries of a state, shall be subject to the same laws, and tried in the same courts, and subject to the same penalties as all other persons.

It is contended that it was mandatory for the district court to assign counsel to assist the defendant. In *Alexander v. O'Grady*, 137 Neb. 645, 290 N. W. 718, and *Davis v. O'Grady*, 137 Neb. 708, 291 N. W. 82, this court has adopted the rule to be: "The constitutional right of accused to have the assistance of counsel may be waived, and a waiver will be implied where accused, being without counsel, fails to demand that counsel be assigned him." 16 C. J. 821.

"It is not necessary that there be a formal waiver; and a waiver will ordinarily be implied where accused appears without counsel and fails to request that counsel be assigned to him, particularly where accused voluntarily pleads guilty." 23 C. J. S. 314, sec. 979.

Judge Parker, of the Fourth Circuit Court of Appeals, said: "We do not think that the plea of guilty was vitiated or that the sentence imposed was avoided by reason of the fact that appellant was not represented by counsel in the District Court. Where an accused personally enters a plea of guilty to a crime whereof he stands charged, and does so understandingly, freely and voluntarily without asking the assistance of counsel, a waiver of the right to be represented by counsel may fairly be inferred. *Logan v. Johnston*, D. C., 28 F. Supp. 98; *Erwin v. Sanford*, D. C., 27 F. Supp. 892." *Cundiff v. Nicholson*, 107 Fed. 2d 162.

It is charged that petitioner was deprived of his right to be served with a copy of the accusation and given 24 hours within which to examine the charge and prepare his defense. It is contended that this is a substantial right which it is error to deny. The case of *Zink v. State,* 34 Neb. 37, 51 N. W. 294, is cited, but in that case Zink did not plead guilty, while in the instant case the defendant did enter such a plea.

"A defendant, by pleading guilty, waives all defenses other than that the indictment charges no offense." 14 Am. Jur. 952, sec. 272.

"A plea of guilty, accepted and entered by the court, is a conviction or the equivalent of a conviction of the highest order, the effect of which is to authorize the imposition of the sentence prescribed by law on a verdict of guilty of the crime sufficiently charged in the indictment or information." 14 Am. Jur. 952, sec. 272.

"A plea of guilty admits all facts sufficiently pleaded, confesses the indictment or information to be wholly true, with respect to each and every allegation, operates as a waiver of any defense, and of the constitutional right to a trial by jury, and with it, of course, the constitutional guarantees with respect to the conduct of criminal prosecutions." 2 Standard Ency. of Procedure, 895.

" 'A plea of guilty waives any defect not jurisdictional, and which may be taken advantage of by motion to quash or by plea in abatement.' 16 C. J. 403." *State ex rel. Gossett v. O'Grady,* 137 Neb. 824, 291 N. W. 497.

In the case at bar, as the record shows affirmatively that the defendant had pleaded guilty, this absolutely waived this and all other preliminary steps in connection therewith, so this allegation has no merit.

In this petition for habeas corpus, it is charged that the sentence is unconstitutional and void because it is an indeterminate sentence of one to seven years after he had served a previous sentence on a similar charge.

The present record does disclose his prior sentence of one year to the state reformatory for a felony, and it appears

that the legislature did not contemplate that a second indeterminate sentence should be given. The trial court, either through inadvertence or misapprehension, appears to have given a different sentence, that is, a lighter sentence than might have been given. This frequently occurs when an entire stranger is arrested in our state and claims it is his first felony and receives an indeterminate sentence as a first offender, but when it appears somewhat later that he was actually a second offender, that does not make the sentence given illegal or void. Doubtless the board of paroles and pardons can consider such facts in later consideration of the exact time of his discharge.

In *McElhaney v. Fenton,* 115 Neb. 299, 212 N. W. 612, the trial court gave a sentence of not less than three years nor more than twenty years, while the statute provided that the maximum sentence should not be more than ten years. It was held that, while the sentence was erroneous, it was not void, and it would stand for the term that the law authorized. It was held that on an application for a writ of habeas corpus, errors and irregularities, not jurisdictional, will not be considered.

In the case of *Hulbert v. Fenton,* 115 Neb. 818, 215 N. W. 104, it was said that habeas corpus is a collateral, and not a direct, proceeding as a means of an attack upon a judgment and sentence regular upon its face, and no extrinsic evidence is admissible in a habeas corpus proceeding to show its invalidity. See *In re Evans,* 173 Mich. 25, 138 N. W. 276.

The judgment of the trial court was right, and it is hereby affirmed.

AFFIRMED.

VERNON HUSTON, APPELLANT, v. CHARLES N. ROBINSON, APPELLEE.

13 N. W. 2d 885

FILED APRIL 7, 1944. No. 31699.

1. **Automobiles.** If one suffers injury and damage as the proximate result of the negligence of two others, and the damage would not have occurred but for the negligence of each of such persons, both are liable to the person so injured.
2. ———. The operator of an automobile must drive it at such a rate of speed that he can bring it to a stop within the range of his vision, and if he continues to proceed when he is unable to see because his vision is obscured, he is negligent.
3. ———. Where a motorist ran into a cloud of dust and collided with a parked car left standing on the paved portion of a highway, the question is for the jury as to whether the negligence of the motorist is the sole proximate cause of the collision.
4. ———. In an action for injuries sustained where the automobile in which plaintiff was riding as a guest ran into a cloud of dust and collided with a car standing upon the highway contrary to section 39-1154, Comp. St. Supp. 1941, it is for the jury to determine whether the parking of said car was negligence and a proximate cause of the collision.
5. ———. The requirement of section 39-1154, Comp. St. Supp. 1941, that vehicles shall not be parked or left standing on the paved, improved or main traveled portion of a highway, is positive, unless circumstances exist which make the moving of the vehicle impracticable.
6. ———. Where the evidence shows that a vehicle was left standing on the paved portion of a highway, a *prima facie* violation of section 39-1154, Comp. St. Supp. 1941, is established, and when a collision results, the violation of the statute is evidence of negligence on the part of the person responsible for the violation.

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

Pilcher & Haney, for appellant.

Kennedy, Holland, DeLacey & Svoboda, contra.

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

CARTER, J.

This is an action brought by the plaintiff for damages resulting from personal injuries sustained in a collision between an automobile in which he was riding and that of the defendant which was standing on a paved highway. The trial court directed a verdict for the defendant at the close of plaintiff's evidence and plaintiff appeals.

The evidence shows that on April 27, 1942, plaintiff appeared at Ft. Crook, Nebraska, for the purpose of taking a physical examination to determine his fitness for army service. At the time of the accident he was being returned to Omaha in an army reconnaissance car as a rejected draftee. The automobile being used was one usually described as a station wagon. It contained three seats, the first two having a capacity of two passengers and the third a capacity of three. The plaintiff was sitting on the right side of the second seat. The car was being driven by one Schumacker, a member of the armed forces.

The car left Ft. Crook at approximately 2:45 p. m. and traveled north on highway No. 73-75. The highway consisted of four lanes, two for northbound and two for southbound traffic. There was a 12-foot shoulder on each side of the paved portion of the highway, the surface of which was hard and level. The pavement was dry, with little skiffs of dust on it. The wind was blowing with such force that one's vision was impaired, especially in the cut on the hill about a mile and a half north of Ft. Crook. The car approached the crest of the hill at a rate of speed estimated at 30 miles an hour. As the dust became thicker the car was slowed down at the request of one of the passengers, so that it entered the dust area at 20 miles an hour. The evidence is that the dust was so bad that one could not see to exceed 15 feet. As the car went over the brow of the hill, a car standing on the pavement directly in the path of the car in which plaintiff was riding suddenly became visible. The driver turned the car to the left in an attempt to avoid a collision, but due to the short distance was unable to do so. The evidence is that the standing car was from 10 to 15

feet away when it was first observed. As a result of the collision the car in which plaintiff was riding was overturned and the plaintiff injured. He was taken from the car and laid on the pavement close to the overturned car. Shortly thereafter a car driven by one Siefkin crashed into the overturned car from the rear, causing such overturned car to be thrown on and against the plaintiff and causing additional injuries to his person. At the conclusion of this evidence the trial court directed a verdict for the defendant.

In considering the evidence before us it must be borne in mind that plaintiff was not driving the car in which he was riding. He was sitting in the seat behind the driver on the opposite side of the car. As the car approached the crest of the hill and the dust condition became more noticeable, the passenger sitting beside the plaintiff warned the driver of the danger and suggested that the car be slowed down. The evidence is that the driver thereupon reduced his speed from 30 to 25 miles an hour. As the dust became thicker the same passenger suggested that the speed be further reduced and the driver complied by reducing the speed to 20 miles an hour. The driver having been fully warned of the dust condition by one of the passengers, the others were clearly under no obligation to do more. It seems to us that plaintiff under the circumstances shown was not guilty of any negligence.

The question then arises whether the negligence of the driver of the car in which plaintiff was riding was the sole proximate cause of the collision as a matter of law. If it was, the plaintiff has no cause of action against the defendant. But if the record shows that the drivers of both cars were negligent and that the collision would not have occurred but for the negligence of each, either or both are liable for the damages caused. *Koehn v. City of Hastings*, 114 Neb. 106, 206 N. W. 19. In the final analysis the question to be determined is whether the driver of defendant's car was guilty of any negligence but for which no collision would have occurred.

The evidence shows that the reconnaissance car was trav-

eling at 20 miles an hour when the accident happened. At that time vision was limited to 15 feet because of the dust. Whether or not the car was being driven too fast to be stopped within the distance of the driver's vision is not shown, except that such driver did fail to stop in time to avoid the accident. We think that the driver of the reconnaissance car was negligent in failing to have his car under such control that he could stop it within the distance of his vision, and such negligence would undoubtedly be sufficient to bar a recovery in a suit by such driver as a matter of law. Even though such driver is negligent, we do not think the evidence shows as a matter of law that his negligence was the sole proximate cause of the accident. The record shows that when the reconnaissance car left Ft. Crook, the day was clear and visibility good, though the wind was blowing. As the car approached the crest of the hill where the accident occurred, the dust became thicker and visibility poorer. The conditions as to visibility were variable and constantly changing as the car proceeded over the hill.

The only evidence in the record concerning the car being driven by defendant's wife is that it was standing on the pavement directly in the path of the reconnaissance car. Why it had stopped or how long it had been standing there is not apparent from the record. In reference to parking on highways, our statute says in part: "No person shall park or leave standing any vehicle, whether attended or unattended, upon the paved or improved or main traveled portion of any highway, * * * when it is practicable to park or leave such vehicle standing off the paved or improved or main traveled portion of such highway; * * * nor unless a clear view of such vehicle may be obtained from a distance of two hundred feet in each direction upon such highway." Comp. St. Supp. 1941, sec. 39-1154. Where the evidence shows that a vehicle was left standing on the paved, improved or main traveled portion of a highway, a *prima facie* violation of the statute is established and it is encumbent upon the person charged to show the existence of facts which take him out of the scope of the act. In the instant

case, therefore, the evidence that the defendant's car was standing on the pavement is evidence of a violation of statute relative to the use of motor vehicles on a highway which, if found to be true, is evidence of negligence which the jury may consider in connection with all the other facts and circumstances in determining whether or not the driver of defendant's car was negligent. In this connection we do not hold that the temporary stopping of an automobile on the proper side of a highway for a necessary purpose is negligence in all cases, the right to stop when the occasion demands being an incident to the right of travel. But in the present case there is no evidence indicating that it was not practicable to have moved the car off the highway and consequently the evidence is sufficient to show that there was a noncompliance with the statute. This is evidence of negligence, which the jury may properly consider.

The quoted statute declares that it is unlawful to park or leave any vehicle standing upon the paved, improved or main traveled portion of any highway when it is practicable to park or leave it standing elsewhere. Assuming that the driver of defendant's car was faced with the same physical conditions as testified to by the driver of the reconnaissance car, and that visibility was good within a range of 15 feet, it would apparently have been practicable to have moved the car off the paved portion of the road. It might be argued that the stop had just been made and that time would not have permitted this movement before the collision. This is rebutted by the evidence of plaintiff, who stated that visibility was good before reaching the crest of the hill and that the car had not been previously seen by him. We think the evidence sufficient, under the state of the record, to take the question of the negligence of the driver of defendant's car to the jury. If, as contended by the plaintiff, the driver of defendant's car was negligent, under the circumstances shown, in parking or leaving the car standing on the paved portion of the highway, such negligence would be a direct contributing factor in the accident and afford the plaintiff a basis for recovery.

Where visibility is lacking, the likelihood of danger in attempting to proceed is thereby brought to the attention of the driver. With this knowledge in mind he is required to exercise the care of a reasonable and prudent person under similar circumstances. Whether the driver of the reconnaissance car operated it in such a manner that his negligence, under all the evidence and circumstances shown, was the sole proximate cause of the accident, is clearly for the jury to determine.

On the other hand, there is danger of being struck from the rear when one stops his car because of poor visibility on a highly traveled highway. The law imposes certain requirements upon a driver in thus blocking the highway. The purpose of the statute hereinbefore quoted is to keep the highway free from obstruction by standing vehicles. The requirement in that respect is positive unless circumstances exist which make moving of the vehicle off the paved, improved or main traveled portion of the highway impracticable. A practical necessity for leaving defendant's car upon the paved portion of the highway is not shown by the evidence in this case and, giving the evidence every intendment in plaintiff's favor as we are required to do when a verdict has been directed against him, we think it is sufficient to make the question of the negligence of the driver of defendant's car a jury question.

We conclude that the action of the trial judge in directing a verdict for the defendant was erroneous. The judgment is reversed and the cause remanded for a new trial.

REVERSED.

YEAGER, J., concurs in the result.

GUY COLE ET AL., APPELLEES, V. CHICAGO & NORTHWESTERN RAILWAY COMPANY, CHARLES M. THOMSON, TRUSTEE, APPELLANT.

13 N. W. 2d 884

FILED APRIL 7, 1944. No. 31724.

Railroads. *Held* on the record presented that showing was insufficient to justify restoration of station agent at Emmet, Nebraska.

APPEAL from the Nebraska State Railway Commission. *Reversed.*

Dressler & Neely, for appellant.

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

YEAGER, J.

This is an appeal from an order of the Nebraska state railway commission requiring the restoration of a station agent at Emmet, Nebraska, by the defendant. The order was entered in an action wherein Guy Cole and others were complainants and Charles M. Thomson, trustee of the property of the Chicago & Northwestern Railway Company, was defendant. The appeal is by the defendant.

The village of Emmet is in Holt county, Nebraska, and on the line of the defendant's railroad. The advertised population of the village is 89. It is also situated on an east and west arterial state highway. It is a little more than 8 miles west of O'Neill and nearly 10 miles east of Atkinson. There are regular station agents at these two latter named points.

On December 4, 1942, in *Thomson v. Nebraska State Railway Commission,* 142 Neb. 477, 6 N. W. 2d 607, which was an action involving the retention of an agent at the identical location involved here, we said:

"Historically and legally a common carrier, in addition to being a commercial and transportation enterprise for profit, is a public service facility with duties owing to the domain it traverses, and to the people resident and commercially engaged in the areas tributary to the carrier. The necessities, requirements and convenience of the tributary areas must be considered and, moreover, reasonably protected.

"This application considered in this light brings us to the very definite conclusion that necessity does not require the maintenance of an agent at Emmet. The evidence is conclusive on the proposition that all of the essential service now furnished by an agent may be supplied by a caretaker, however, with a degree of inconvenience.

"If abandonment is allowed, no physical facility will be abandoned or changed and no essential service discontinued. The important inconveniences will be that no paper work may be done at Emmet, no freight bills for either incoming or outgoing freight may be paid there, registration of complaints will have to be made elsewhere, incoming freight bills will have to be either prepaid or received at an adjacent station where there is an agent, and cars for loading will have to be ordered direct by the shipper or through the caretaker by telephone. There are perhaps other inconveniences, but these are the most important ones. Subject to these inconveniences business would continue as usual at this station.

"Taking into consideration the amount of service required of an agent, the saving to be effected by substitution of a caretaker, the limited amount of shipping, the fact that no essential shipping service is discontinued, and the prospective inconvenience to the few shippers concerned, we conclude that the railway commission acted arbitrarily and unreasonably in denying the application to discontinue the employment of an agent at Emmet and to substitute a caretaker."

The railway commission was directed to enter an order allowing a discontinuance of the agency and the substitution of a caretaker.

Discontinuance of agent and substitution of a caretaker under the authority of our former opinion did not take place until March 13, 1943.

Further in the opinion in *Thomson v. Nebraska State Railway Commission, supra,* it was stated: "It may well be said that the ruling on this question by the railway commission or this court does not amount to an adjudication for the future. It is only a judgment on the condition presented by the application. If future conditions shall require restoration of an agency that matter may be taken care of by proper order in due course at the proper time and as the occasion requires."

Complainants, pursuant to this statement, filed the appli-

cation before us alleging a change in conditions at Emmet. Following the filing of the application a hearing was had before the railway commission. Both parties adduced evidence at the conclusion of which the commission ordered the restoration of an agent. It is from this order that the appeal has been taken.

On their part complainants offered no detailed statistical information showing a comparison and a changed condition from that which existed over the period covered by the former case. In fact on their objection the defendant was barred from making a comparison in this respect. They failed to go beyond statement that there had been an increase in business. Their other complaint was the inconvenience to shippers. It was not pointed out that the inconvenience was greater or of a different character than that which was recognized and commented on in our former opinion.

The defendant on its part adduced statistical evidence detailing the business of the station covering the period from the date when discontinuance of agency was authorized and covering the period contemplated by the complaint. The evidence by comparison with the findings in our former opinion (*Thomson v. Nebraska State Railway Commission, supra*) shows some increase but not sufficient to justify a departure from the pronouncement of our former opinion wherein we held that the requirement that an agent be retained at Emmet under the facts was unreasonable and arbitrary, and no other condition has been shown by the record before us which would at this time justify an order restoring an agent at this station.

The order of the Nebraska state railway commission is reversed.

REVERSED.

MALCOLM B. WILCOX ET AL., APPELLANTS, V. JOHN HAVEKOST, STATE TREASURER, APPELLEE: NEBRASKA WILDLIFE FEDERATION, INTERVENER, APPELLEE.

13 N. W. 2d 889

FILED APRIL 7, 1944. No. 31739.

1. **Pleading.** A demurrer to an answer searches the entire record and is applicable to the first pleading found to be defective.
2. **Licenses.** The Constitution does not specifically forbid the imposition of a license fee to hunt and fish by the state at large, hence the legislature is constitutionally free to provide by what authority such licenses shall be imposed and to direct the legal use to which the fees shall be appropriated.

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

Dryden & Jensen and *Ralph W. Slocum,* for appellants.

Walter R. Johnson, Attorney General, Edwin Vail and *C. L. Clark, contra.*

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

YEAGER, J.

This is an action in equity originally instituted by Malcolm B. Wilcox and Ralph W. Slocum, plaintiffs in their own behalf and in behalf of taxpayers of the state of Nebraska, against John Havekost, state treasurer, defendant. Since the commencement of the action there have been two changes in the office of state treasurer and therefore, by substitution of defendants, the action now proceeds against Carl G. Swanson, the present state treasurer.

To the extent necessary to state the case here the plaintiffs filed a petition in the district court for Lancaster county, Nebraska, wherein it was set out that chapter 37 of the Compiled Statutes of Nebraska for 1929, as amended by the Session Laws of 1935 and 1937, provides for the obtaining of permits to hunt and fish in the state and for the exaction of fees for such permits which fees are payable to the state treasurer. They alleged that at the time of the commence-

ment of the action there was an accumulation of fees in the hands of the treasurer of approximately $200,000, which sum of money was held by the treasurer as trustee.

They further allege that section 37-212, Comp. St. 1929, as amended by section 1, ch. 82, Laws 1935, which section provides for the disposition of the fees, is unconstitutional and void for the reason that it makes provision for a disposition in violation of section 5, art. VII of the Constitution of the state of Nebraska.

The section of the statute referred to is the following: "The fund derived from the sale of permits as provided in this act or from State Park Concessions and permits and any unexpended balance now on hand from the sale of hunting, trapping and fishing permits and all moneys required by this act to be paid into the State Game Fund and all moneys from State Park Concessions and permits are hereby appropriated to the use of the Game, Forestation and Parks Commission and shall be used for the propagation, importation, protection, preservation and distribution of game and fish and necessary equipment therefor: Provided, that up to and including July first 1937 ten per cent of said fees received in any one year may be used 'and expended' for park purposes."

Section 5, art. VII of the Constitution is the following: "All fines, penalties, and license moneys, arising under the general laws of the state, shall belong and be paid over to the counties respectively, where the same may be levied or imposed, and all fines, penalties and license moneys arising under the rules, by-laws, or ordinances of cities, villages, towns, precincts, or other municipal subdivisions less than a county, shall belong and be paid over to the same respectively. All such fines, penalties, and license moneys shall be appropriated exclusively to the use and support of the common schools in the respective subdivisions where the same may accrue."

They allege that these fees are license fees within the meaning of the constitutional provision quoted and are distributable exclusively for the use and support of the com-

mon schools in the political subdivisions wherein they may accrue and may not be used for the purposes enumerated in said section 37-212 of the statutes. They contend, and that contention is the basis of the action, that the statutory diversion of these fees to purposes other than the support of the common schools, and particularly the common schools in the political subdivisions wherein they may accrue, is unconstitutional.

They pray for an accounting; that the state treasurer be required to pay the fees to the clerk of the district court for distribution for the support of the common schools; and that section 37-212, *supra,* be declared unconstitutional and void.

To the petition the defendant filed an answer, the allegations of which, in the light of subsequent proceedings, need not be set out here.

To the answer the plaintiffs interposed a general demurrer.

It may also be noted that in the case the Nebraska Wildlife Federation, with leave of court, filed a petition in intervention to which plaintiffs' general demurrer was also directed but in the view we take of the case, discussion of this petition is not required.

The court, under the rule that a demurrer to an answer searches the entire record and is applicable to the first pleading found to be defective, found that the petition failed to state a cause of action, overruled the demurrer to the answer, in effect sustained it as to the petition and dismissed the action. See *Hower v. Aultman,* 27 Neb. 251, 42 N. W. 1039; *Oakley v. Valley County,* 40 Neb. 900, 59 N. W. 368; *City of Hastings v. Foxworthy,* 45 Neb. 676, 63 N. W. 955; *Hawthorne v. State,* 45 Neb. 871, 64 N. W. 359; *State v. Stuht,* 52 Neb. 209, 71 N. W. 941; *State v. Moores,* 52 Neb. 770, 73 N. W. 299; *Bank of Miller v. Moore,* 81 Neb. 566, 116 N. W. 167.

The question of whether or not hunting and fishing license fees, under a substantially similar statute, were distributable to school districts of the political subdivisions of

the state where collected has been previously construed by this court. The statute construed was the following: "All moneys derived from licenses and permits issued pursuant to this chapter shall by the state treasurer be paid over for the use of the school fund of the state." Rev. St. 1913, sec. 2702.

In interpretation and construction of the statute the court in *State ex rel. Stevens v. Nickerson,* 97 Neb. 837, 151 N. W. 981, said:

"It is argued that the money derived from the sale of hunting licenses is license money arising under the general laws of the state, and that such money cannot constitutionally go anywhere except into the treasury of some county; that Furnas county has a better claim to the money than any other county. This would be so if the license was levied or imposed in Furnas county. The act providing for the issuance of such licenses distinctly says that the license shall be issued by the state game and fish commissioner. It is imposed by the state without reference to any county, and for the benefit of all the schools of the state. To sustain appellant's contention would require us to declare the provisions of the act relating to game and fish unconstitutional. * * *

"The constitution does not specifically forbid the imposition of a license by the state at large. The legislature was constitutionally free to provide by what authority the licenses in question should be imposed upon those desiring to hunt and fish. The constitutional provision applies only to license money imposed by a county or some minor municipal corporation, and when a county imposes a license by virtue of a general law authorizing it so to do, such license money belongs to the county school fund. It does not forbid the state itself to impose licenses and direct how such money shall be used for the benefit of the schools. The legislature can exercise such general powers as are not forbidden by the constitution. * * * It is apparent that the legislature meant to confer authority upon the state treasurer to collect the license moneys in question. The game

and fish commissioner and the various county clerks are agents of the state, and there is no conflict between the provisions of the act and those of the state constitution. The intent of the legislature does not seem obscure."

In *School District of Omaha v. Gass*, 131 Neb. 312, 267 N. W. 528, which is an action under the declaratory judgment law to determine the allocation of license fees collected under the liquor laws, the same principles are announced.

If these precedents contain sound statements of principle and of law, and we are convinced that they do, then it must follow that plaintiffs' theory that these fees belong to the subordinate political subdivisions of the state is without merit and their petition in that respect does not state a cause of action.

It will be noted that in both of the cases cited the statutes under consideration provided that the fees should go to the state school fund. The litigation was to determine whether or not the Constitution inhibited such allocation and in consequence of such inhibition required that they be distributed to the subdivisions of the state. Here the statute provides that the fees shall be used for purposes having no relation to schools.

We call attention to this but fail to find in it any material significance. Any restriction upon or inhibition against the legislative right to designate the purpose for which the fees may be used must be found in the Constitution, and we find no such restriction or inhibition. Attention is directed again to the quotation from *State ex rel. Stevens v. Nickerson, supra,* and particularly to the following: "The constitutional provision applies only to license money imposed by a county or some minor municipal corporation, * * *." And the following: "The legislature can exercise such general powers as are not forbidden by the constitution."

It must follow that since the legislature is not forbidden by the Constitution to provide for the imposition of fees by the state itself upon persons seeking to hunt and fish and since there is no requirement that such fees, if imposed, shall go to the state school fund or to the school funds of the

minor divisions of the state, that it is within the legislative power to appropriate such fees to some legal purpose other than maintenance of schools.

It is not contended by appellants that the purposes to which these fees have been appropriated by the legislature are illegal. In fact the effect of the argument is to say that the purposes are legal since it is insisted that funds for the purposes contemplated by the act should be supplied from general taxation rather than by appropriation of fees collected under the act.

We conclude therefore that the petition failed to state a cause of action and that the judgment of the district court should be and is affirmed.

AFFIRMED.

JOSEPH M. SEDLAK, APPELLEE, V. FERDINAND DUDA, APPELLANT.

13 N. W. 2d 892

FILED APRIL 7, 1944. No. 31704.

1. **Motions.** A motion may properly be overruled which cannot be allowed in substantially the same terms as requested.
2. **Pleading.** All facts which taken together are necessary to fix the responsibility for the injury complained of constitute but one cause of action although the prayer of the petition is for more than one kind of relief.
3. **Mortgages.** Where a foreclosure sale under a mortgage to the mortgagee, directly or indirectly, is voidable, the owner of the equity of redemption is not foreclosed and may maintain an action to redeem; and where the mortgagee goes into possession, he may require an accounting.
4. ———. Where an action is brought in equity to redeem, the offer in the petition to pay the amount due to the mortgagee is sufficient to support the action without a previous actual tender of the amount due.
5. ———. The right to redeem and the right to foreclose are reciprocal, and an action may be brought at any time before the statutory bar of ten years is complete.
6. ———. The right to redeem is a favorite of equity, and will not be allowed to be taken away, except upon a strict compliance

with the steps necessary to divest it, and by due process of law.

7. **Estoppel.** A party may not properly base a claim of estoppel in his favor on his own wrongful act or dereliction of duty, or fraud committed or participated in by him, or on acts or omissions induced by his own conduct, concealment, or representations.

8. **Attorney and Client.** A litigant in a suit in equity will not be permitted to secure the fruits of a decree in his favor, obtained for him by an attorney whom he knows also represents his adversary in the subject matter before the court, without in good faith making full disclosure of all the facts to such adversary.

9. **Mortgages.** For the purpose of redemption a purchaser in good faith at the judicial sale, believing he has a good title, will be entitled to credit for improvements made upon the property; but one who buys with notice of the facts is not a purchaser in good faith within the meaning of the rule, and is not entitled to such credit.

10. ———. Where a sale to the holder of the mortgage is voidable, he is accountable for rents and profits, together with interest thereon at the contract rate. And, where possession is not only wrongfully taken by the mortgagee but is accompanied by force and fraud, the mortgagee, on a suit to redeem, cannot be charged with less than the whole rental value during his possession.

11. ———. Interest, however, should not be charged upon rents and profits from the end of the year when they accrued, but rents and profits, less taxes paid, without interest on such taxes, should be first applied at the end of each year to extinguish the interest upon the principal for that year, and if a balance of rents and profits remains thereafter it should be applied *pro tanto* to payment of the principal of the mortgage until extinguished, after which rents and profits, less taxes paid, shall draw interest from the end of each year at the statutory rate until date of judgment.

APPEAL from the district court for Cass county: WILMER W. WILSON, JUDGE. *Affirmed in part and reversed in part, with directions.*

A. L. Tidd, for appellant.

Frank L. Frost and *Frederick L. Wolff, contra.*

Guy C. Chambers, amicus curiæ.

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

CHAPPELL, J.

Plaintiff filed this suit in equity to redeem from a mortgage foreclosure decree alleged to be void because the decree was rendered on defendant's cross-petition filed more than four months after answer day, without any issue of process or appearance of plaintiff, and the attorneys who took the decree for defendant against plaintiff and his wife, without their knowledge or consent, were admittedly their own attorneys, first employed by them to defend and protect their interests in the cause. Many pleadings were filed by defendant attacking plaintiff's petitions until the cause was finally at issue on plaintiff's third amended petition, defendant's answer, and plaintiff's reply. After hearing upon the merits the trial court at the March, 1943, term entered a decree finding and adjudging generally for plaintiff, except as to certain disputed items of accounting. Motions for new trial were filed by both parties, and thereafter the court on its own motion, during the same term, set aside its former decree and entered another more favorable to defendant. Motions for new trial were again filed and upon the overruling thereof defendant appealed and plaintiff cross-appealed to this court. Except as hereinafter modified in conformity with plaintiff's cross-appeal, we affirm the judgment of the trial court.

Defendant's chief contentions here are that the trial court erred in the following particulars: 1. Overruling paragraphs 1 and 2 of a motion filed by defendant December 19, 1942; 2. Permitting plaintiff to redeem without pleading and proving tender before suit; 3. Holding that the action was not barred by the statute of limitations; 4. Refusing to find that plaintiff was estopped to deny validity of the decree or to redeem; 5. Permitting plaintiff to recover rents and profits; 6. Awarding plaintiff the sum of $50 as costs and expenses for a handwriting expert necessary to prove the genuineness of certain documents, as provided by section 20-1266, Comp. St. 1929; and 7. In entering its last decree as the sequel of an alleged *nunc pro tunc* order.

By cross-appeal plaintiff contends that the trial court

erred: 1. In crediting defendant with improvements including costs of the original foreclosure action; 2. Refusing to charge defendant with interest on rents and profits; and 3. Refusing to credit plaintiff with certain payments of principal and interest.

The evidence and circumstances appearing in this record amply support the allegations of plaintiff's petition, which are in substance: That plaintiff is a man of limited education, unable to read English, and with no knowledge of law. That defendant Duda is his brother-in-law, and Dwyer & Dwyer were plaintiff's lawyers, upon whom he placed special reliance as to their superior knowledge, integrity, and duty to defend and protect him. That at all times since 1915 plaintiff and his wife were the owners of a valuable home in Plattsmouth, Nebraska, which since April 28, 1936, defendant has held in trust for plaintiff subject only to reimbursement to defendant of the balance unpaid upon a second mortgage for $812.50 at 5 per cent executed by plaintiff and wife on May 15, 1923, to secure a loan made by defendant. That plaintiff paid defendant on the principal thereof $50 on July 11, 1929, and $500 on May 12, 1930, which together with other admitted payments of principal and interest left a balance of $225.50 remaining unpaid on April 10, 1923, with interest at 5 per cent from that date, no part of which was due or delinquent until after April 10, 1934. That in 1920 plaintiff and wife executed a first mortgage on their home to the Plattsmouth Loan & Building Association, hereinafter called the Association, and on December 24, 1932, applied to it for an additional loan sufficient to pay defendant in full, which was granted upon condition that defendant release his second mortgage. That defendant was requested to execute such a release, whereupon he consulted Dwyer & Dwyer, plaintiff's attorneys, who requested plaintiff to come to their office where the attorneys, in defendant's presence, informed and instructed plaintiff that he should make no further payments to the association because he had already overpaid them, which they would prove by requiring the Association to bring their books into

court. That plaintiff complied with his attorneys' instructions, whereupon the Association filed foreclosure proceedings making plaintiff and wife and Duda et al. defendants. That upon receiving summons therein plaintiff immediately returned to his attorneys' offices where, in defendant's presence, the attorneys, with full knowledge that plaintiff's and his wife's interests were adverse to defendant, represented and promised that they would represent and defend both plaintiff and defendant Duda in the foreclosure suit, and protect and preserve the rights and interests of plaintiff and his wife in their home. Plaintiff alleges, however, that at all times theretofore and thereafter defendant and the attorneys, without plaintiff's knowledge or consent and without making full disclosure of facts to him, acted in concert and conspired together to wrongfully deprive plaintiff and his wife of their home for the benefit of defendant. That in pursuance thereof they first filed a general denial for plaintiff, his wife, and Duda, which was verified by defendant Duda. That later they filed an amended answer for plaintiff and wife denying generally the allegations of the Association's petition, alleging payment of the first mortgage in full, and praying that plaintiff Association's petition be denied. That more than four months after answer day, without any process ever issued and served on plaintiff and wife, who never made any appearance or had any knowledge thereof, the attorneys filed an answer and cross-petition for defendant Duda denying generally the allegations of the Association's petition, and alleging adversely to plaintiff and wife that there was then due and owing to defendant Duda on his second mortgage the sum of $812.50 with interest at 5 per cent from April 10, 1933, and praying foreclosure thereof, with notice and knowledge that such allegations were false. That the attorneys, who promised to represent and protect plaintiff and wife, did not file any answer for them to defendant's cross-petition, and, acting in concert with defendant, wrongfully deprived them of an opportunity to be heard or defend themselves against the cross-petition. That during the trial of this foreclosure action

the attorneys amended plaintiff's and wife's answer to the Association's petition and defendant's answer and cross-petition by interlineation, alleging the first mortgage to be void because acknowledged by a stockholder of the Association; and also in like manner they amended the prayer of defendant's cross-petition to ask that the Association's mortgage be adjudged void, be canceled of record, and title quieted against it; whereupon the Association asked to dismiss its foreclosure suit without prejudice, which was refused by the trial court. That defendant Duda and his attorneys then caused an absolutely void decree to be entered by the trial court on January 6, 1934, without plaintiff's knowledge or understanding, finding that Duda had a first lien on the property of plaintiff and wife for the sum of $845, and that such property should be sold as upon execution. That upon appeal to the supreme court by the Association (*Plattsmouth Loan & Bldg. Assn. v. Sedlak,* 128 Neb. 509, 259 N. W. 367), the trial court was reversed in its refusal to permit the Association to dismiss without prejudice, and on April 24, 1935, the trial court re-entered a void judgment on the mandate in favor of defendant Duda on his cross-petition. That thereafter defendant and the attorneys wrongfully and unlawfully sold the property of plaintiff and wife as on execution, whereat defendant Duda purchased the same for the bid of the judgment, later obtained confirmation of sale, on April 28, 1936, received a sheriff's deed therefor, and on May 12, 1936, wrongfully and unlawfully ousted plaintiff and wife from possession of their home. That since May 12, 1936, defendant Duda has wrongfully received and appropriated the rents and profits therefrom, the exact amount of which is unknown to plaintiff. That since that time defendant has denied that plaintiff has any right, title or interest in the property, has refused to negotiate with plaintiff or account for rents and profits, and has denied and prevented plaintiff's right of redemption. That plaintiff is ready, willing and able to pay, and offers to bring into court and pay any amount remaining due on defendant's second mortgage upon an accounting by the court.

Plaintiff alleges further that pursuant to, and as a part of, the conspiracy defendant, by his attorneys, but allegedly as attorneys for plaintiff, and without disclosing the facts to him, filed a separate action on April 27, 1935, after judgment on the mandate from this court, to quiet title to the premises in plaintiff and wife and declare the Association's mortgage void for want of lawful acknowledgment. That on April 1, 1938, almost two years after defendant had received a sheriff's deed and possession of the property, a decree was wrongfully obtained by defendant and the attorneys in the above action declaring the Association's mortgage void, canceling the same of record, and entering a personal judgment against plaintiff and wife for $1,680.28, all without notice to or knowledge of plaintiff until April 20, 1941. That as the result of such alleged conspiracy and wrongful conduct defendant has obtained plaintiff's valuable home for $225.50 and plaintiff has been left with a $1,680.28 judgment against him.

Plaintiff's second and third alleged causes of action by reference incorporated severally all the allegations of the first cause of action, amplified by alleged promises and representations by defendant and his attorneys that the defendant did not want the property, and that they would represent and protect plaintiff and deed the property back to him upon payment of the balance of the second mortgage, having at all times, however, the secret intention of never keeping the promises. Plaintiff prays for an accounting, the right to redeem, cancellation of the sheriff's deed, return of possession of the property to him, or in the alternative judgment for damages, and for such other and further relief as may be just and equitable.

Defendant's first contention that the trial court erred in overruling a part of his motion is without merit. It has long been the rule in this state that, " 'A motion may properly be overruled which cannot be allowed in substantially the same terms as requested.' " *Wiedeman v. Estate of Peterson,* 129 Neb. 74, 261 N. W. 150. The first paragraph of defendant's motion is that plaintiff be required to separately

state and number his causes of action praying for damages and redemption; and the second paragraph moves to eliminate from plaintiff's second cause of action all reference to the allegations contained in the first cause of action and to separately state and number his causes of action for cancellation of the sheriff's deed and redemption. It is elementary that equity having once obtained jurisdiction of a controversy for any purpose will retain it for all purposes, and render such decree as will protect the rights of the parties before it and do complete justice between them. While plaintiff's petition already contains three alleged causes of action as required by orders of the trial court, the applicable rule is that all facts which taken together are necessary to fix the responsibility for the injury complained of constitute but one cause of action although the prayer of the petition is for more than one kind of relief. See *Bailey v. Chilton,* 106 Neb. 795, 184 N. W. 939. A party has a right to plead his entire cause of action and when it consists of a series of acts and conduct which all taken together constitute one transaction, a portion of the same cannot be stricken out or eliminated by the court against objection.

Under our Code system, although proper and learned so to do, it is not necessary to state a cause of action in any particular form. The facts are to be stated in ordinary concise language without repetition, but all that the law requires is that there shall be a cause of action. A party has a right to plead the whole transaction by which he claims he was defrauded and the trial court has no right to strike out a part of his cause of action. See *Hovland v. Burrows,* 38 Neb. 119, 56 N. W. 800; *In re Estate of Wise, ante,* p. 273, 13 N. W. 2d 146.

In connection with defendant's second contention, we decide that plaintiff's petition stated a cause of action, and it was not necessary for plaintiff to plead and prove tender before suit. "The right of redemption after a sale on foreclosure as accorded by the statute in some states is distinct from the equity of redemption before the foreclosure sale. The former commences only when the latter ends. A valid

foreclosure destroys the latter and creates the former. One rests on the principles of equity, the other on the terms of the statute." 3 Wiltsie, Mortgage Foreclosure (5th ed.) 1660, sec. 1060. See, also, p. 1672, sec. 1070. "Where a person entitled to redeem under the statute is prevented from redeeming within the statutory period by the fraudulent representations or conduct of a person interested, a court of equity has power to set aside the deed upon the sale and to permit redemption after the expiration of the statutory period." 3 Wiltsie, Mortgage Foreclosure (5th ed.) 1822, sec. 1210. And, "Where a foreclosure sale under a mortgage * * * to the mortgagee * * * , directly or indirectly, is voidable, the owner of the equity of redemption is not foreclosed and may maintain an action to redeem; and where the mortgagee * * * goes into possession, he may require an accounting." 3 Wiltsie, Mortgage Foreclosure (5th ed.) 1697, sec. 1099.

Bearing these rules in mind, we find the law relating to tender in cases like the one at bar to be, that, "Where an action is brought in equity to redeem, the offer in the complaint (petition) to pay the amount found due to the creditor (mortgagee) is sufficient to support the action without a previous actual tender of the amount due." 3 Wiltsie, Mortgage Foreclosure (5th ed.) 1832, sec. 1215. And, "Where the person from whom redemption is sought has been in possession of the land and an accounting is necessary by virtue of his receipt of rents and profits, a tender by the plaintiff before bringing the action to redeem is unnecessary." 3 Wiltsie, Mortgage Foreclosure (5th ed.) 1834, sec. 1216. See, also, 2 Jones, Mortgages (8th ed.) 887, sec. 1400; 42 C. J. 404; *Clark v. Hannafeldt,* 79 Neb. 566, 113 N. W. 135.

The trial court did not err in holding that the plaintiff's cause of action was not barred by the statute of limitations. In *Dorsey v. Conrad,* 49 Neb. 443, 68 N. W. 645, directly in point here, this court said: "An action by an owner of the fee to redeem his land from a mortgage thereof which has been foreclosed, and to which foreclosure proceeding he was

not a party, or, if a party, not served with process, may be brought at any time within ten years after his cause of action accrued." It was also held in *Morrow v. Jones*, 41 Neb. 867, 60 N. W. 369: "The right to redeem and the right to foreclose are reciprocal, and an action to redeem may be brought at any time before the statutory bar of ten years is complete." See, also, *Dickson v. Stewart*, 71 Neb. 424, 98 N. W. 1085; *Clark v. Hannafeldt, supra.*

In conformity with the rule that, "An estoppel will not be predicated on a portion of the record and of the facts, but on the whole thereof" (31 C. J. S. 193, sec. 5), and bearing in mind that, "The right to redeem is a favorite of equity, and will not be allowed to be taken away, except upon a strict compliance with the steps necessary to divest it, and by due process of law" (3 Wiltsie, Mortgage Foreclosure (5th ed.) 1673, sec. 1071), we have searched the whole record and thus given consideration to defendant's contentions that plaintiff is estopped to deny the validity of the decree of foreclosure and to redeem. There are cases where persons seeking to redeem have been estopped by their own acts and conduct from exercising the right as against persons in good faith entitled to rely thereon, but these authorities have no similarity or application to the case at bar.

In *Rea v. Pierson*, 114 Neb. 173, 206 N. W. 760, this court gave approval to the language in 21 C. J. 1207, sec. 208, to wit: "In order to create an estoppel by the acceptance of benefits, it is essential that the party against whom the estoppel is claimed should have acted *with knowledge of his rights*; also that the party claiming the estoppel was *without knowledge or means of knowledge of the facts on which he bases his claim of estoppel, that he was influenced by and relied on the conduct of the person sought to be estopped, and that he changed his position in reliance thereon to his injury.*" (Italics supplied.)

The purpose of estoppel is to prevent inconsistency and fraud resulting in injustice. See 31 C. J. S. 192, sec. 1.

"A party may not properly base a claim of estoppel in his favor on his own wrongful act or dereliction of duty, on

fraud committed or participated in by him, or on acts or omissions induced by his own conduct, concealment, or representations.

"The doctrine of estoppel is for the protection of innocent persons, and only the innocent may invoke it." 31 C. J. S. 281, sec. 75. This court has held that a void judgment is a mere nullity which neither affects, impairs, or creates rights, and that as to the person against whom it professes to be rendered it binds him in no degree whatever. It has no effect as a lien upon his property and it does not raise an estoppel against him. See *Minnesota Thresher Mfg. Co. v. L'Heureux,* 82 Neb. 692, 118 N. W. 565.

There is another more important reason, however, which bars the defendant from claiming the benefit of estoppel and retaining the benefits of the foreclosure litigation. The record discloses that the attorneys representing defendant had been plaintiff's attorneys in small matters for many years, and it is admitted that they were employed as attorneys to represent plaintiff and his wife in the particular litigation before the defendant employed them. The interests of plaintiff and defendant were unquestionably adverse, which makes applicable the rule announced by this court in *Zimmer v. Gudmundsen,* 142 Neb. 260, 5 N. W. 2d 707: " 'An attorney owes to his client an undivided allegiance, and after he has been retained by, and received the confidence of, a client, he cannot, without the free and intelligent consent of his client, given after full knowledge of all the facts and circumstances, act both for his client and for one whose interest is adverse to or conflicting with that of his client in the same general matter, however slight such adverse interest may be; nor is it material that the intention and motive of the attorney may have been honest.' 5 Am. Jur. 296, sec. 64." And, these rules are of utmost importance not only to lawyers but to litigants, since we here reaffirm that a litigant in a suit in equity will not be permitted to secure the fruits of a decree in his favor, obtained for him by an attorney whom he knows also represents his adversary in the subject matter before the court, without in

good faith making full disclosure of all the facts to such adversary. See *Baker v. Farnsworth,* 117 Neb. 504, 221 N. W. 17.

We turn now to the question of rents and profits, and hold that plaintiff was rightfully entitled to recover them. The general rule is that, "Where a sale to the holder of the mortgage is voidable, he is accountable for rents and profits. And where possession is not only wrongfully taken by the mortgagee, but accompanied by force and fraud, the mortgagee, on a suit to redeem, cannot be charged with less than the whole rental value during his possession." 3 Wiltsie, Mortgage Foreclosure (5th ed.) 1860, sec. 1237. The trial court allowed $18 a month from May 12, 1936, to May 12, 1939, and $25 a month thereafter until the date of the decree as rental value, which we will not disturb here, and which we find and decide is a proper rental value until the date of judgment on the mandate herein. Further, we sustain plaintiff's second contention in the cross-appeal, since interest on rents and profits is properly allowable at the contract rate. See *Walter v. Calhoun,* 88 Kan. 801, 129 Pac. 1176. The rule is, however, that interest should not be charged upon rents and profits from the end of the year when they accrued, but rents and profits, less taxes paid, without interest on such taxes, should be first applied at the end of each year to extinguish the interest upon the principal for that year (beginning May 12, 1937), and if a balance of rents and profits remains thereafter it should be applied *pro tanto* to payment of the principal of the mortgage until extinguished, after which rents and profits, less taxes paid, shall draw interest from the end of each year at the statutory rate, until date of judgment on the mandate; and in this accounting the trial court shall not permit any interest to be charged upon interest. See 3 Wiltsie, Mortgage Foreclosure (5th ed.) 1863, sec. 1238; *Kinkead v. Peet,* 153 Ia. 199, 132 N. W. 1095; *Dickson v. Stewart, supra.*

For clarity in connection with the accounting, we here discuss and sustain plaintiff's first contention on the cross-appeal. It was error to permit defendant to recover any

costs expended by him in the original foreclosure suit. See 3 Wiltsie, Mortgage Foreclosure (5th ed.) 1875, sec. 1243; 2 Jones, Mortgages (8th ed.) 867, sec. 1388; *Jones v. Dutch*, 3 Neb. (Unof.) 673, 92 N. W. 735. The trial court also erred in permitting defendant to recover for improvements, the rule being, as stated in *Cram v. Cotrel*, 48 Neb. 646, 67 N. W. 452, "For the purpose of redemption a purchaser in good faith at the judicial sale, believing he has a good title, will be entitled to credit for improvements made upon the property; but one who buys with notice of the facts is not a purchaser in good faith within the meaning of the rule, and is not entitled to such credit" which distinguishes *Higginbottom v. Benson*, 24 Neb. 461, 39 N. W. 418, relied upon by defendant herein. See, also, *Jones v. Dutch, supra*; 3 Wiltsie, Mortgage Foreclosure (5th ed.) 1854, sec. 1234.

Defendant's contention that the trial court erred in taxing $50 costs against him as expenses for plaintiff's handwriting expert, as provided by section 20-1266, Comp. St. 1929, cannot be sustained. The amount of the expense is not in dispute. The record discloses that plaintiff made request in writing for admission of the genuineness of two receipts given by defendant to plaintiff for payments made upon the principal of defendant's second mortgage. The written request was served upon the attorney for defendant herein and upon Dwyer & Dwyer, his former attorneys, on September 9, 1942, after this action was commenced and more than two weeks after defendant and his counsel had obtained photostatic copies thereof. No admission of their genuineness was made by any of them in writing within four days or at any other time. At the time the expert was sworn as a witness counsel for defendant admitted the genuineness of defendant's signatures upon both the documents but refused to admit the matter appearing above the signatures. We find no good reason for the refusal to admit their genuineness as required by the statute. From the evidence and circumstances appearing in the record this court has no doubt of their genuineness, and affirmatively finds and decides that the payments of $50 on July 11, 1929,

and $500 on May 12, 1930, were made by plaintiff to defendant upon the principal as recited therein, which together with other admitted payments made by plaintiff left only a balance of $225.50 unpaid upon the second mortgage on April 10, 1933, which bears interest at 5 per cent from that date.

With reference to defendant's last contention, we find that the trial court had inherent jurisdiction and authority derived from the common law, and independent of statute, upon its own motion or otherwise, to vacate its first decree and render another at the same term. In *Lyman v. Dunn,* 125 Neb. 770, 252 N. W. 197, this court said: "In civil cases, a court of general jurisdiction has inherent power to vacate or modify its own judgments at any time during the term at which they are rendered." See, also, *Bradley v. Slater,* 58 Neb. 554, 78 N. W. 1069; *Eager v. Blake,* 1 Neb. (Unof.) 852, 96 N. W. 74; 34 C. J. 207. The fact that the trial court used the misnomer "*nunc pro tunc*" in its order setting aside the first decree is entirely immaterial since the latter decree was entered at the same term and not for the purpose of extending the time for appeal but only in a sincere effort to enter a proper decree, which was more favorable to defendant than the first, and could not have been prejudicial to him in any manner.

We have heretofore affirmatively disposed of plaintiff's contentions on the cross-appeal, and we will not discuss them further.

The judgment of the trial court is affirmed in part, and in part reversed, and the cause remanded with directions to enter a judgment for plaintiff in conformity with this opinion, without adducing any further evidence except to determine the amount of taxes, if any, paid by defendant upon the property involved since the date of the trial court's decree.

AFFIRMED IN PART AND REVERSED IN PART, WITH DIRECTIONS.

JOHN STASKIEWICZ, PLAINTIFF IN ERROR, v. STATE OF NEBRASKA, DEFENDANT IN ERROR.

14 N. W. 2d 184

FILED APRIL 11, 1944. No. 31733.

1. **Contempt.** The strict rules which govern criminal prosecutions apply to criminal contempts and the guilt of the accused must be established by evidence beyond a reasonable doubt.
2. ———. A contempt proceeding to preserve the power and vindicate the dignity of the court and to punish for disobedience of its orders is a criminal contempt.
3. ———. Ordinarily an act may be punished as a criminal contempt, although it is also a criminal offense under the laws of the state.
4. **Appeal and Error.** Prejudicial error must affirmatively appear in the record to afford a basis for a reversal. The presumption is that the proceedings had were regular and correct.
5. **Contempt.** Evidence examined and *held* sufficient to sustain a conviction for criminal contempt.

ERROR to the district court for Douglas county: JOHN A. RINE, JUDGE. *Affirmed.*

Frank L. Burbridge and *William M. Giller*, for plaintiff in error.

Kelso Morgan, Philip R. Kneifl and *C. E. Walsh, contra.*

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

CARTER, J.

Defendant was proceeded against for a constructive criminal contempt. The trial court found the defendant guilty and sentenced him to 60 days in jail and to pay a fine of $100 and costs. The defendant prosecutes error.

On November 4, 1939, the district court for Douglas county enjoined this defendant and others, their agents, representatives, lessees, employees or any one acting for, through, by or under said defendants, from keeping or selling intoxicating liquor or from maintaining a place where persons are permitted to resort for the purpose of drinking intoxicating liquor and beer, on the premises described in the in-

junctive order. The present case arose as a result of alleged violations of the injunctive order on May 23, 1943.

The record shows that five inspectors of the liquor control commission entered the building on the premises described in the injunctive order and made purchases of certain intoxicating drinks described as "spiked cokes." The defendant was present and mixed, sold and accepted payment for these drinks. On subsequent occasions the inspectors made purchases of similar intoxicating drinks from the defendant. Another witness, a deputy state sheriff, searched the place on June 12, 1943, and found more than four quarts of whisky. The record further shows that defendant pleaded guilty on June 29, 1943, to selling intoxicating liquor on June 6, 1943, on the premises described in the injunctive order. The record also shows that defendant was convicted of criminal contempt on December 27, 1941, for violating the same injunctive order. While it is true that defendant denies making the sales and of maintaining the premises in a manner enjoined by the injunctive order, the evidence is ample to sustain the guilt of the defendant beyond a reasonable doubt. The contention of defendant that he did not own the premises is not important. The record does show that the property belonged to his deceased wife and that he and his children are now the owners. His acts of which the state complains are no less contemptuous under the terms of the injunction, even if he does not have a fee simple title to the whole of it. The defendant committed acts which the injunction specifically prohibited him from doing on the premises. This is the essence of the charge.

A prosecution for criminal contempt is *sui generis*, being neither a civil action nor a criminal proceeding, although it is in the nature of a criminal action. The strict rules which govern criminal prosecutions apply and the guilt of the accused must be shown by evidence beyond a reasonable doubt. *Butterfield v. State, ante*, p. 388, 13 N. W. 2d 572.

That the present proceeding is a criminal contempt cannot be questioned. This court has held that a contempt pro-

ceeding to preserve the power and vindicate the dignity of the court and to punish for disobedience of its orders is a criminal contempt. It is distinguished from a civil contempt in that the latter is generally instituted to preserve and enforce the rights of private parties to the suit and to compel obedience to orders and decrees made to enforce such rights, or to administer the remedies to which the court has decreed the parties entitled. *Maryott v. State,* 124 Neb. 274, 246 N. W. 343. The present proceeding was clearly one to preserve the power and vindicate the dignity of the court and is therefore a criminal contempt.

Defendant urges that the court erred in imposing a sentence upon the defendant for the reason that the acts charged constituted a criminal offense and that the punishment was for the criminal courts only. This court disposed of this contention in *Kopp v. State,* 124 Neb. 363, 246 N. W. 718, wherein it was decided that a court has power to punish an act which is a contempt, notwithstanding such act may likewise be punished under the criminal laws of the state. See, also, *Zimmerman v. State,* 46 Neb. 13, 64 N. W. 375.

Defendant contends that the trial court erred in overruling his demurrer to the information. The record does not disclose that a demurrer was filed or any ruling made by the court on a demurrer. There is nothing before the court on this point to be considered. Defendant also argues that it is not shown that the acts charged were willful. We think the very nature of the acts charged, together with the evidence establishing their truth, clearly shows that they were willful and contemptuous.

Defendant contends that the trial court was not authorized to inflict punishment by imprisonment for the reason that the record does not disclose whether the proceedings were conducted in term time or in vacation and cites *Back v. State,* 75 Neb. 603, 106 N. W. 787. We have many times said that prejudicial error must appear from the record to entitle the party alleging it to a reversal. The presumption is that the proceedings were in all respects regular and un-

less reversible error affirmatively appears from the record, no valid objection can be made thereto.

We conclude that the errors assigned are without merit and that the judgment of the trial court must be affirmed.

AFFIRMED.

PLATTE VALLEY PUBLIC POWER AND IRRIGATION DISTRICT, APPELLANT, V. COUNTY OF LINCOLN ET AL., APPELLEES.

14 N. W. 2d 202

FILED APRIL 11, 1944. No. 31554.

1. **Constitutional Law.** The words and terms of a constitutional provision are to be interpreted and understood in their most natural and obvious meaning, unless the subject indicates or the text suggests that they have been used in a technical sense, and while the Constitution, as amended, must be construed as a whole, still where the words employed in a constitutional provision are plain, direct, and unambiguous, no interpretation is necessary to ascertain their meaning, for courts may not supply what they deem unwise omissions, or add words which substantially add to or take from the Constitution as framed.
2. **Taxation.** Under section 2, art. VIII of the Constitution, as amended in 1920, rightful ownership of the property by a governmental subdivision is all that is required or necessary to extend to such property complete exemption and immunity from assessment and taxation.
3. **States.** When a state, by itself or through its corporate creations, embarks in an enterprise, especially when commercial in character or which is usually carried on by individuals or private companies, its sovereign character is ordinarily waived, and it is subject to like regulations with persons engaged in the same calling, however, they never lose their character as public corporations.
4. **Taxation.** A public purpose has for its objective the promotion of the public health, safety, morals, security, prosperity, contentment, and the general welfare of all the inhabitants. A public corporation created for the purpose of irrigation and the development of power for the generation of electricity and transmission, distribution and sale thereof is for such a public purpose.
5. **Constitutional Law.** Legislative construction of a constitutional

provision, although not necessarily conclusive upon the judicial department, is entitled to great weight when deliberately given, and especially when adhered to consistently for a considerable period of time, and this is particularly true when an identical construction has also been placed thereon for a like period of time by the highest officers of the executive department of the government and by the administrative officers who may be affected thereby.

6. **Taxation.** A public corporation authorized by the legislature and organized to engage in the public use of the waters of our natural streams for irrigation and the development of power, the use of which waters has been dedicated to the people of the state for beneficial purposes under sections 4, 5, and 7, art. XV of our Constitution, is a governmental subdivision of the state within the terms of section 2, art. VIII of the Constitution, as amended in 1920, and all its property, both real and personal, is exempt from taxation.

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

M. E. Crosby, M. M. Maupin, R. H. Beatty, R. O. Canaday, P. E. Boslaugh and *August Wagner,* for appellant.

James G. McIntosh, Walter R. Johnson, Attorney General, Carl H. Peterson and *Edwin Vail, contra.*

Neighbors & Danielson, Dana VanDusen, C. A. Sorensen, Samuel O. Clark, Jr., Sewall Key, Paul Freund, Bernard Chertcoff, Edward First, Alan Johnstone, C. Russell Shetterly and *Alvin J. Rockwell, amici curiæ.*

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

WENKE, J.

The action was brought by the Platte Valley Public Power and Irrigation District, as plaintiff and appellant herein, in the district court for Lincoln county, against the county of Lincoln and the members of its board of county commissioners, its county clerk, its county treasurer, and its county sheriff, defendants and appellees herein, to enjoin the levy and enforcement of a distress warrant issued for the purpose of collecting personal taxes levied and assessed against

its property and which taxes it claims were illegally and unlawfully assessed. From an order finding generally for the defendants and dismissing its petition, the plaintiff has appealed.

By stipulation of the parties, the appellant being referred to herein as the district and the appellees as the county, it is agreed that the district is a public corporation organized under and by virtue of Senate File No. 310, as now amended, being section 70-701 to section 70-719, inclusive, Comp. St. Supp. 1941; that the district is engaged in the operation, management and maintenance of a system of diversion works, inlet and outlet canals, reservoirs, powerhouse, transmission lines, and other necessary works and equipment for the diversion and storage of waters from the North Platte River and the release of said stored waters for the purpose of the generation of electric current and the transmission and sale thereof for commercial purposes, and the sale, transportation, and delivery of said released waters for irrigation purposes; that the district in the years 1939 and 1940 owned certain automobiles and trucks which were necessary and being used by it in the operation of its irrigation and power system, upon which the county, by its proper officers, levied and assessed state, county, city and school district taxes for the year 1939 in the total sum of $159.38 for which there was issued and delivered to the sheriff of said county a distress warrant upon which the sheriff made demand of the district for payment. The question presented by this appeal is whether or not the property of the district is, under the Constitution and statutes of the state, subject to taxation.

Two questions are presented by this appeal. The first is whether or not the district's property is exempt from taxation under the provisions of section 2, art. VIII of the Constitution, as amended in 1920, which is in part as follows: "The property of the state and its governmental subdivisions shall be exempt from taxation" because the district is a governmental subdivision of the state; and second, whether the property owned by the district is held by it in trust

for the state, the state, in fact, being the real owner thereof.

The question of whether or not the district in the use of its property used the same in a private or public capacity, often referred to as in a proprietary or governmental use, is not material here. Under section 2, art. IX of the Constitution of 1875, which was in force until the adoption of the amendment thereto in 1920, the provision with reference to tax exemption was in part as follows: "The property of the state, counties, and municipal corporations, both real and personal shall be exempt from taxation * * *." Under this section in the case of *City of Omaha v. Douglas County*, 96 Neb. 865, 148 N. W. 938, we held ownership to be the sole basis of tax exemption. Quoting from the foregoing opinion: "Under the Constitution of this state rightful ownership of property by a municipal corporation such as the city of Omaha is all that is required or necessary to extend to such property complete exemption and immunity from assessment and taxation, whether located within the city or without." Under the provisions of section 2, art. VIII of the Constitution, as amended in 1920, which reads in part as follows: "The property of the state and its governmental subdivisions shall be exempt from taxation" and section 77-202, Comp. St. 1929, which reads in part the same, *ownership* and not *use* of the property is the basis of exemption. While the logic of requiring public agencies engaging in functions of a private nature for a public purpose to pay taxes the same as private persons and corporations engaged therein may appeal to many, however, until the people of the state change the Constitution to make the use thereof rather than the ownership the basis of exemption we must follow the language of the Constitution, for as stated in *Elmen v. State Board of Equalization and Assessment*, 120 Neb. 141, 231 N. W. 772: "The words and terms of a constitutional provision are to be interpreted and understood in their most natural and obvious meaning, unless the subject indicates or the text suggests that they have been used in a technical sense, and while the Constitution, as amended, must be construed as a whole, still where the words em-

ployed in a constitutional provision are plain, direct, and unambiguous, no interpretation is necessary to ascertain their meaning, for courts may not supply what they deem unwise omissions, or add words which substantially add to or take from the Constitution as framed."

Cases are cited from this jurisdiction involving the question of tort liability, *Henry v. City of Lincoln*, 93 Neb. 331, 140 N. W. 664; *Cook v. City of Beatrice*, 114 Neb. 305, 207 N. W. 518; of immunity from suit, *Crete Mills v. Nebraska State Board of Agriculture*, 132 Neb. 244, 271 N. W. 684; of liability for goods purchased, *Sorensen v. Chimney Rock Public Power District*, 138 Neb. 350, 293 N. W. 121; and the sale of appliances, *Nelson-Johnston & Doudna v. Metropolitan Utilities District*, 137 Neb. 871, 291 N. W. 558, wherein the general rule is announced as stated in *Sorensen v. Chimney Rock Public Power District, supra*: " * * * that, when a state, by itself or through its corporate creations, embarks in an enterprise, especially when commercial in character or which is usually carried on by individuals or private companies, its sovereign character is ordinarily waived, and it is subject to like regulations with persons engaged in the same calling." These cases do not involve the question of tax exemption nor are they applicable thereto. This rule applies generally to municipalities as well as to public corporations created by the state to carry on functions for a public purpose and if applied to the matter of tax exemption would create a different basis for tax exemption than provided in our Constitution and as stated in *Elmen v. State Board of Equalization and Assessment, supra*: "Courts may not supply what they deem unwise omissions, nor add words which substantially add to or take from the Constitution as framed." Nor do these corporations thereby lose the character of their corporate entity, for as stated in 1 McQuillin, Municipal Corporations (Rev. 2d ed.) 314: "And though a municipal corporation, in supplying public utilities, as water, light, power and heat, and acting generally as a private corporation, and competing with private corporations and individuals for gain and

profit, is regarded as a private corporation as relates to its liability for its torts and the torts of its servants, it never loses its character as a public corporation." And as stated in *City of Pasadena v. Railroad Commission,* 183 Cal. 526, 192 Pac. 25, 10 A. L. R. 1425: "It is not true that a city is a private corporation when carrying on a municipally owned public utility. No decision so holds. All the decisions on the subject recognize the fact that a city does not change its character by engaging in such enterprises. * * * The distinction does not go to its character as a corporation, but to its liabilities in exercising one class of its powers, as compared to its liabilities in the exercise of its functions as a local governmental agency."

While many jurisdictions, including those cited by the county, base the tax exemption of property owned by the public upon its use as being either private or public, often referred to as proprietary or governmental, however, these decisions are generally based upon the provisions in their Constitutions or statutes, or both, making this classification. But until the people of this state change the basis of tax exemption of property owned by the state or its governmental subdivisions from that of ownership to one of use, we are not authorized or empowered to do so.

A public purpose has for its objective the promotion of the public health, safety, morals, security, prosperity, contentment, and the general welfare of all the inhabitants. That the purpose for which the district has been created, being for irrigation and the development of power for the generation of electricity and its transmission, distribution and sale, is for a public purpose has already been determined by this court and is without question. *Neal v. Vansickle,* 72 Neb. 105, 100 N. W. 200; *Elliott v. Wille,* 112 Neb. 86, 200 N. W. 347; *State ex rel. Loseke v. Fricke,* 126 Neb. 736, 254 N. W. 409. As stated in *State ex rel. Loseke v. Fricke, supra*: "Generally speaking, it relates to the preservation and utilization, for the public welfare, of one of the natural resources of the state, to wit, the waters of its streams and rivers. This is a broad subject and includes

all practical uses and benefits of which such waters are susceptible, not only for irrigation, but canals for transportation, dams for power and production of electricity for purposes of light and power." And with reference to irrigation it is held in *Neal v. Vansickle, supra,* that the promotion and regulation thereof is among the most important of governmental powers, duties and functions.

For many years the proper taxing authorities did not levy or attempt to levy taxes upon the property of irrigation districts or other property owned by the public for a public purpose, either private or public, and this was true when the Constitutional Convention met and the amendments were drafted and adopted in 1920. At this convention, and in the amendments submitted and adopted, the provisions of the Constitution of 1875 as to section 2, art. IX, which read in part as follows: "The property of the state, *counties,* and *municipal corporations,* both real and personal shall be exempt from taxation * * * " were not limited, but, as shown by the records of the convention and from the language used, were broadened to read, section 2, art. VIII of the Constitution, as amended in 1920: "The property of the state and its *governmental subdivisions* shall be exempt from taxation." (Italics ours.) Therefore, in construing this section of the Constitution we should not overlook the following rules as announced in *Laub v. Furnas County,* 104 Neb. 402, 177 N. W. 749: "Long-continued practical construction of a statute by the officers charged by law with its enforcement is entitled to considerable weight in interpreting that law." And in *Elmen v. State Board of Equalization and Assessment, supra*: "Legislative construction of a constitutional provision, although not necessarily conclusive upon the judicial department, is entitled to great weight when deliberately given, and especially when adhered to consistently for a considerable period of time, and this is particularly true when an identical construction has also been placed thereon for a like period of time by the highest officers of the executive department of the government and by the administrative officers who may be affected thereby."

We have held with reference to irrigation districts that, "Irrigation districts organized under our laws are public, rather than municipal corporations, and their officers are public agents of the state. * * * 'they are but mere agencies of the state in local government, without any powers except such as the legislature may confer upon them, and are at all times subject to a revocation of such power, * * * .' " *Board of Directors of Alfalfa Irrigation District v. Collins,* 46 Neb. 411, 64 N. W. 1086. And in *Lincoln & Dawson County Irrigation District v. McNeal,* 60 Neb. 613, 83 N. W. 847, we held: "The defendant is solely a creature of statute, organized for a public purpose, to wit, to furnish water for irrigation purposes, to be usefully and beneficially applied to the lands within the district. It is, as is held in the case of *Board of Directors v. Collins,* 46 Neb. 411, a public rather than a municipal corporation, and its agents are public agents of the state." And as stated in *Elliott v. Calamus Irrigation District,* 120 Neb. 714, 235 N. W. 95: "An irrigation district is a public corporation and the powers of its officers and directors are limited by the terms of the statute under which the district was created." We can see no difference between these irrigation districts and the appellant power and irrigation district and what has been said in regard to the irrigation districts is true of the appellant power and irrigation district.

In a similar situation in the case of *Lennox v. Housing Authority of City of Omaha,* 137 Neb. 582, 290 N. W. 451, wherein the Housing Authority of the City of Omaha, created by an ordinance of the city but which authority was separate from the city and whose functions were for a public purpose, we held: "Public funds of the city may, with legislative sanction, be used to aid in the establishment of a housing authority, it being a *governmental subdivision* organized for a public purpose." And further: "We are obliged to hold that a housing authority, created and operated under the legislation before us, is a *governmental subdivision* within the *purview of the Constitution,* and consequently its property and bonds are legally exempted from taxation." (Italics ours.)

From the reasoning of these cases it must follow that a public corporation, authorized by the legislature and organized pursuant thereto to carry out functions that have been determined to be for a public purpose and the general welfare of the people, is an arm or branch of the government for this purpose and under the plenary control of the legislature and therefore a governmental subdivision of the state within the terms of section 2, art. VIII of the Constitution, as amended in 1920. However, there is a particular reason why the appellant district is a governmental subdivision. The state of Nebraska is primarily agricultural and much of its lands can be benefited by irrigation and its principal source of power is the water of its natural streams. The framers of our Constitution, in order to leave no question or doubt that the use of the water of our natural streams for the purpose of irrigation and the development of power was for a public purpose and a matter that affected the general welfare of the people of the state, provided in section 5, art. XV of the Constitution: "The use of the water of every natural stream within the State of Nebraska is hereby *dedicated to the people of the state for beneficial purposes,* subject to the provisions of the following section." And in section 4, art. XV: "The necessity of water for domestic use and for *irrigation* purposes in the State of Nebraska is hereby *declared to be a natural want.*" And in section 7, art. XV: "The use of the waters of the state for *power purposes* shall be deemed a *public use* and shall never be alienated, but may be leased or *otherwise developed as by law prescribed.*" (Italics ours.)

When the state, through its legislature, provides by statutory enactment the manner in which districts, such as the appellant, may be organized and operated for the purpose of using the waters of our natural streams for irrigation and the development of power for public use and such district is formed and part of the state's waters dedicated to its use for such public purposes, then the district is in fact a governmental subdivision under our Constitution. Therefore, all the district's property, both real and personal, is exempt from taxation.

In view of the foregoing it is not necessary to determine whether the property owned by the district is held by it in trust for the state.

For the reasons stated, the judgment of the lower court is reversed with directions to enter judgment for the district permanently enjoining the county and all of its officers from enforcing the distress warrant.

REVERSED.

SIMMONS, C. J., concurring.

The question here presented is whether or not personal property of the plaintiff used in the conduct of its business is exempt from taxation.

Several applicable sections in article XV of the Constitution answer that question. "The necessity of water for domestic use and for irrigation purposes in the State of Nebraska is hereby declared to be a natural want." Sec. 4. "The use of the water of every natural stream within the State of Nebraska is hereby dedicated to the people of the state for beneficial purposes, subject to the provisions of the following section." Sec. 5. "The right to divert unappropriated waters of every natural stream for beneficial use shall never be denied except when such denial is demanded by the public interest. Priority of appropriation shall give the better right as between those using the water for the same purpose, but when the waters of any natural stream are not sufficient for the use of all those desiring to use the same, those using the water for domestic purposes shall have preference over those claiming it for any other purpose, and those using the water for agricultural purposes shall have the preference over those using the same for manufacturing purposes. Provided, no inferior right to the use of the waters of this state shall be acquired by a superior right without just compensation therefor to the inferior user." Sec. 6. "The use of the waters of the state for power purposes shall be deemed a public use and shall never be alienated, but may be leased or otherwise developed as by law prescribed." Sec. 7.

Sections 4, 5 and 6 were, in their principal provisions, a

part of the statutory law of this state beginning in 1895. Laws 1895, ch. 69, secs. 65, 42, 43. These provisions continued to be the statutory law of this state. See Rev. St. 1913, secs. 3369, 3370, 3372. They were reenacted as a part of the Civil Administrative Code in 1919. See Laws 1919, pp. 831, 832. They now appear as sections 46-501, 46-502 and 46-504, Comp. St. 1929.

It is a sound rule of constitutional construction that where the inquiry is directed to determining the purpose sought to be accomplished by a particular provision, resort may be had to the proceedings of the convention which framed the language, and where the proceedings clearly point out the purpose of a provision, the aid will be valuable and satisfactory. 1 Cooley, Constitutional Limitations (8th ed.) 142; 12 C. J. 711; 16 C. J. S. 69.

It is clear from a reading of the debates of the constitutional convention that it was the purpose of the framers of these constitutional provisions (secs. 4, 5, 6, *supra*) to make the use of the waters a paramount concern of the state and to place these legislative provisions, so far as incorporated in the Constitution, beyond the power of the legislature to change. (See the debates on Proposal 129, Proceedings of the Constitutional Convention, 1919-1920.) The convention, in an "official statement" issued to the people so that they might "have full information of the nature and purpose of the proposed amendments," gave the following "explanatory" statement: "The purpose of these new provisions in the Constitution is to define the use of water and place the same under constitutional protection, to which, owing to its importance in the development of the agricultural interests of the state, it is entitled." (Proposed Amendments to the Constitution of the State of Nebraska as adopted by the Constitutional Convention 1919-1920, p. 37.)

The constitutional convention also submitted a provision which was adopted and became section 7, *supra*, regarding the use of the waters of the state for power purposes and providing that such use "shall be deemed a public use and

shall never be alienated, but may be leased or otherwise developed as by law prescribed." This provision originated as Proposal 282 of the convention. It was thoroughly debated. The debates clearly demonstrate that it was the purpose of the provision to make certain that the water-power resources of the state should be and remain for all time the property of the state and its people, and that those resources could be developed for their benefit. It is further clear that the framers of the provision contemplated that it would authorize the development of the state's water-power resources by the state through the direct appropriation of public funds, through districts or other agencies created by the legislature for that purpose, or through private corporations or individuals, "as by law prescribed." (See debates on Proposal 282, Proceedings of the Constitutional Convention 1919-1920.) The official statement explaining the provision referred to the possible development of power "in this state through the use of the water in our streams. To conserve this for the use of the people is the object of this provision." See Proposed Amendments to the Constitution of the State of Nebraska as adopted by the Constitutional Convention 1919-1920, p. 38.

These constitutional provisions express the will of the people and are the basic law in this state. By adopting these provisions, the people, through the Constitution, have made certain uses of the waters of this state the fundamental law of this state, untouchable by the legislature, and binding upon the courts.

By section 7, *supra,* the people have provided that the development of the waters of the state for power purposes may be provided for by law as a public use, a use never to be alienated. The power to provide for that development has been placed in the legislature. It, from its very nature, is a governmental power, made so by inclusion in the Constitution of the state as one of the purposes and functions of the state, which the legislature is authorized to make effective. On this basis, I am of the opinion that a district, created under the legislative act here considered to develop

the use of water for power purposes, is one created to serve a constitutionally declared purpose of government, and as such is a governmental agency.

It may be advanced that section 7, *supra,* authorizes the development of the use of the waters for power purposes and does not include the creation of agencies of the state for the development for irrigation uses, and that this plaintiff is engaged in both power and irrigation development. However, that beneficial use is recognized by section 6, *supra.* It has long been the experience in this state, and in other states, and was so stated in the debates of the constitutional convention, that water may be more advantageously used where one agency combines both water-power and irrigation development in one system of works. It is in full accord with the purposes of this provision to hold that development of the use for irrigation may be included in the development of the use for power purposes, and as a necessary part of that full development for which the legislature is authorized to provide. Mr. Abbott, the member of the convention who proposed this amendment, in discussing section 7 in connection with sections 4, 5 and 6, said: "One supplements the other, and both together constitute a complete scheme for the utilization of water of this state * * *." (Proceedings of the Constitutional Convention 1919-1920, p. 1810.)

The same convention that submitted to the people of this state for adoption the constitutional provisions above quoted, also submitted the proposal which became a part of section 2, art. VIII that "The property of the state and its governmental subdivisions shall be exempt from taxation." The debates do not indicate that the framers of these provisions considered the immediate problem here presented. The language used is broad enough, and must necessarily be held, to include these state agencies created to develop the waters of the state for power purposes. They, being governmental agencies carrying out governmental purposes, are in my opinion governmental subdivisions, and their property exempt from taxation under the provisions of section 2, *supra.*

If the majority opinion is to be construed, as I think it should be, so as to base the decision upon the constitutional provisions here discussed, then I am in accord with that decision.

My disagreement with the majority goes to statements made in the opinion other than the determination that the plaintiff is a governmental subdivision under the constitutional provisions which I have discussed.

Particularly, I disagree with the inference, that may follow from the discussion, that a public corporation organized for a public purpose is *ipso facto* a governmental subdivision of the state. The majority do not undertake to define a "governmental subdivision." There is a vast difference between corporations, described either by the legislature or the courts as "public corporations," and "governmental subdivisions." The term "public corporation" is a general, all-inclusive term, applied loosely by courts and legislatures to all corporations that are not private corporations. A governmental subdivision is one created for the purpose of aiding in the administration of the law, and through which the state exercises some of its governmental functions and powers by a delegation of a part of its sovereignty. Not all subdivisions of the state are exempt from taxation under section 2, *supra*. It is only those that are "governmental" in character. A "governmental subdivision" falls within a far more restricted classification than a "public corporation." This distinction has been heretofore recognized by this court in *State ex rel. Metropolitan Utilities District v. City of Omaha*, 112 Neb. 694, 200 N. W. 871. See, also, 43 C. J. 69, 70, 182, 183; 1 Fletcher, Corporations (Perm. ed.) 207; 6 McQuillin, Municipal Corporations (Rev. 2d ed.) 1057; *Griffith v. City of Butte*, 72 Mont. 552, 234 Pac. 829; *City of High Point v. Duke Power Co.*, 120 Fed. 2d 866; *Vilas v. City of Manila*, 220 U. S. 345, 31 S. Ct. 416.

If the majority opinion is to be so construed, and it should not be, as to exempt all corporations as "governmental subdivisions" which either the legislature or this court has heretofore or may hereafter label public corporations, or

agencies created for a public purpose, the restrictive provision in section 2 of "governmental subdivisions" will be broadened far beyond any intent of the framers of our Constitution, and that provision will become a wide avenue of escape from taxation—a result that the framers intended should not follow. The late President Theodore Roosevelt is quoted as having written: "Judicial amendment of the Constitution is fatally easy." If the construction just discussed should follow from this decision, then it would be the result of a judicial amendment of the Constitution, which this court has neither the right nor the power to do.

The majority state that they can see no difference between irrigation districts organized under the act of 1895 and the plaintiff district, and argue that, because irrigation districts have not been taxed, the plaintiff district's property is not taxable. Whether or not irrigation districts are or are not taxable is not an issue in this case. Using language taken from the *McNeal* opinion cited by the majority, 60 Neb. 613, 83 N. W. 847: "Resort must be had to the statute providing for the organization and government of an irrigation district to determine the power and scope of authority" of the district. The majority do not resort to the statute to determine that difference. The two districts are organized under different statutory provisions with distinctly different grants of power. One marked difference is the power of taxation which was given to the irrigation districts. See Laws 1895, ch. 70, sec. 15. That power is denied the plaintiff district. See Comp. St. Supp. 1941, sec. 70-708. This court in *Fontenelle Forest Assn. v. Sarpy County,* 118 Neb. 725, 226 N. W. 327, has indicated the answer to that contention and that is, for the state to authorize the taxation of irrigation districts would "involve other taxation for the payment of the taxes so laid" and for that reason the inference is that the legislature did not intend to require an agency having the power of taxation to levy taxes to pay taxes.

Finally, the majority discuss and appear to rely upon two statements in *Lennox v. Housing Authority of City of Oma-*

ha, 137 Neb. 582, 290 N. W. 451. In that case the proposition that the Housing Authority was a governmental subdivision was not seriously controverted. It was a fact largely assumed to be true by the parties in presenting the issues. The *Housing Authority* case construed a statute passed in the exercise of the *police power* of the state. The opinion so states. Furthermore, the legislature there declared the housing projects to be governmental functions, and their property exempt from taxation. Laws 1937, ch. 93, sec. 1. No such legislative finding or declaration is found in Senate File 310 under which plaintiff is organized. The decision in the *Lennox* case is not in point here unless it is first assumed that the plaintiff district was created by the legislature under the authority of the police power of the state. That contention is not advanced by the majority, is at best a debatable premise when applied to the plaintiff district, and is impliedly denied when the majority place the holding upon the foundation of the constitutional provisions herein first discussed.

For the reasons herein expressed, I concur in the result reached by the majority that the plaintiff's property, which the defendant seeks to tax, is exempt from taxation.

YEAGER, J., concurring in the result.

I am convinced that the majority opinion announces a correct decision of the question of whether or not the plaintiff district is exempt from taxation but I think that since, as pointed out by the opinion, a constitutional ground exists for holding that a public power district organized pursuant to statute to engage in the production and distribution of electric current and in irrigation is exempt from taxation, that the decision and the ground therefor should be so limited.

To go beyond that is not only unnecessary but, as I see the situation, goes too far toward determination of the matter of taxation of property of other and different corporations organized under and authorized by Senate File No. 310 for the performance of purposes not contemplated by the constitutional provisions mentioned in the opinion.

It is my view that this court ought not, directly or indirectly, in the opinion in this case, to go beyond a determination of the question of whether or not a corporation organized under Senate File No. 310 for the purpose of performing the functions contemplated by the cited provisions of the Constitution is exempt from taxation.

LOUP RIVER PUBLIC POWER DISTRICT, APPELLANT, V. COUNTY OF PLATTE, APPELLEE.
14 N. W. 2d 210

FILED APRIL 21, 1944. No. 31640.

1. **Eminent Domain.** The only foundation for a local assessment lies in the special benefits conferred upon the property assessed, by the improvement to pay which the assessment is made, and an assessment beyond the benefit so conferred is a taking of property for public use without compensation and therefore illegal.
2. **Municipal Corporations.** Section 77-1923, Comp. St. 1929, authorizes the bringing of an original action to recover taxes paid, where the taxpayer claims that the tax was levied or assessed for an illegal or unauthorized purpose.
3. **Counties and County Officers.** The remedy by petition in error to correct errors of a county board in levying special assessments is not an exclusive remedy.
4. **Taxation.** Said section 77-1923 was adopted by the legislature for the purpose of providing an action at law for the recovery of money paid for taxes that have been levied or assessed for an illegal or unauthorized purpose or which were for any reason invalid.
5. ———. The legislature by said section 77-1923 gave to the taxpayer the right to maintain an action at law to recover such a tax or any part thereof, and made it the duty of the courts to determine whether such tax or any part thereof was illegal, unauthorized, or invalid, and to render judgment for the taxpayer for the amount so determined.
6. **Limitation of Actions.** Where demand for the repayment of money paid has been made as provided in section 77-1923 "Second", the statute of limitations as to when the taxpayer may sue begins to run at the expiration of the 90-day period allowed in which to make the refund.

APPEAL from the district court for Platte county: LOUIS LIGHTNER, JUDGE. *Reversed.*

August Wagner, for appellant.

Jesse L. Dougherty, contra.

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

SIMMONS, C. J.

Special assessments were levied against plaintiff's property for benefits on account of the construction of a drainage ditch. Plaintiff paid the assessments and after notice and demand for a refund brought this action at law to recover the same. The defendant demurred. The trial court sustained the demurrer, and dismissed the action. Plaintiff appeals. We reverse the judgment of the trial court.

Plaintiff's petition contained substantially the following allegations:

The plaintiff is a corporation organized under Senate File 310, Laws 1933 (now sections 70-701 to 70-715, Comp. St. Supp. 1941), is the owner of canals, powerhouses and transmission lines principally located in Nance and Platte counties, and is engaged in the generation of electrical energy.

The county constructed a drainage ditch, and pursuant to article 1, ch. 31, Comp. St. 1929, created a drainage district for the purpose of assessing benefits to property benefited by said ditch, and on June 15, 1936, assessed the plaintiff's right of way and canal within the district in the sum of $5,630.48.

Prior to the creation of the drainage district, plaintiff at a cost in excess of $4,000, had constructed its canal and a good and sufficient drainage ditch to intercept flood waters and drain lands above and north of its canal, emptying such drainage waters into a watercourse on its own land, and from there into the Loup river. Defendant's ditch drained lands to the south of the plaintiff's canal. Defendant included plaintiff's ditch in its drainage scheme, and built its

ditch at a cost of $7,000 less than would have been necessary had it not included the plaintiff's construction in its works. Defendant did not allow the plaintiff for any part of the value of its ditch in making the assessment against the plaintiff's property. The defendant's ditch, when completed, did not protect the plaintiff's property; plaintiff notified the defendant that it had received no benefits, and that it was necessary that defendant's ditch be straightened and widened. Defendant took no action.

Thereafter, the plaintiff, being threatened with litigation and resulting liability for damages due to flood waters overflowing on lands below plaintiff's canal, and in order to protect itself, purchased land, straightened and widened the ditches and natural watercourse, and in doing so expended in excess of $7,000. The amount so expended equaled half the cost of defendant's ditch, including the part constructed by plaintiff and adapted by the defendant in its drainage scheme. Defendant in apportioning benefits assessed some properties at less than one per cent of actual benefits received, and canceled an assessment against a railroad company in consideration of the construction of a bridge over a ditch, which bridge the company was obligated to construct at its own expense. Plaintiff received no benefits whatsoever from the construction work done by defendant. The assessment was made in violation of section 21, art. I of our Constitution, and articles V and XIV of the Amendments of the Constitution of the United States, was in excess of any benefits, amounted to a confiscation of property, was without due process, was inequitable, unjust, disproportionate and illegal.

April 20, 1942, the plaintiff paid the assessment, together with interest, under protest, took a receipt therefor as evidence of said payment, and on April 21, 1942, made demand in writing upon the defendant and its county treasurer for refund, and gave notice that if not repaid within 90 days, suit would be filed. The county treasurer acknowledged receipt of the demand and notice the same day. Plaintiff prayed for judgment against the county for the amount so paid with interest.

We do not find in the petition a direct allegation that the county had not refunded the taxes so paid. However, the defendant here treats the petition as alleging that fact, and we will so consider it.

Defendant demurred to this petition on the grounds: First, that it did not allege facts sufficient to constitute a cause of action; and, second, that the allegations constituted an admission on the part of the plaintiff that it had no cause of action.

The trial court sustained the demurrer. Plaintiff waived its right to plead further and elected to stand on its petition. The trial court then dismissed the action at plaintiff's costs.

The plaintiff contends that this action is authorized by section 77-1923, Comp. St. 1929. The defendant, to sustain the trial court, argues that the petition does not state a cause of action under section 77-1923, *supra,* in that there is no allegation of facts, which, if true, would make the tax levied and assessed an illegal, unauthorized or invalid tax, and argues that plaintiff's only remedy is by petition in error. The defendant further submits that the assessment was made on June 15, 1936, and this action, being brought on August 8, 1942, is barred by the statute of limitations. These contentions present the issues for determination here.

This controversy has been twice before this court. In *Loup River Public Power District v. Platte County,* 135 Neb. 21, 280 N. W. 430, the question presented was as to the "legal method of procedure from the county board to the district court by one dissatisfied with the assessment of benefits * * * in the establishment of a drainage district." Plaintiff sought to "appeal." This court held: "A proceeding in error is the proper remedy under our statutes, and it must be taken within the time provided by statute." Thereafter, in *Loup River Public Power District v. Platte County,* 141 Neb. 29, 2 N. W. 2d 609, plaintiff sought to enjoin the collection of these taxes. The trial court held that the district was benefited only in the amount of $3,400. On appeal and cross-appeal, this court held that it could not cor-

rect the assessment by injunction, and the order reducing the assessment was set aside. Thereafter this action was brought.

Section 77-1923, *supra,* is in part as follows: "No injunction shall be granted by any court or judge in this state to restrain the collection of any tax, or any part thereof hereinafter levied, nor to restrain the sale of any property for the non-payment of any such tax, except such tax or the part thereof enjoined be levied or assessed for any illegal or unauthorized purpose; nor shall any person be permitted to recover by replevin, or other process, any property taken or restrained by the county treasurer for the non-payment of any tax, except such tax be levied or assessed for illegal or unauthorized purpose; but in every case the person or persons claiming any tax, or any part thereof, to be for any reason invalid, who shall pay the same to the county treasurer, may proceed in the following manner, viz.: First. * * * Second. If such person claim the tax or any part thereof to be invalid for the reason that it was levied or assessed for an illegal or unauthorized purpose, or for any other reason except as hereinbefore set forth, when he shall have paid the same to the treasurer, or other proper authority, in all respects as though the same was legal and valid, he may, at any time within thirty days after such payment, demand the same in writing from the treasurer of the state, or the county, city, village, township, district or other subdivision, for the benefit, or under the authority, or by the request of which the same was levied, and if the same shall not be refunded within ninety days thereafter, may sue such county, city, village, township, district or other subdivision for the amount so demanded; and if upon the trial it shall be determined that such tax, or any part thereof, was levied or assessed for an illegal or unauthorized purpose, or was for any reason invalid, judgment shall be rendered therefor with interest and the same shall be collected as in other cases."

This section of the statute was before the court in the recent case of *Hayman v. City of Grand Island,* 135 Neb. 873,

284 N. W. 733. In that action an assessment was made for improvements; the taxes were paid under protest; and an action at law brought to recover on the ground that they were unauthorized, invalid, illegal and confiscatory. It was there contended, among other things, that plaintiff should have appealed by error from the assessment of benefits made by the city council, and that an original action could not be maintained to recover the tax. We there affirmed a previous holding of this court that "The only foundation for a local assessment lies in the special benefits conferred upon the property assessed, by the improvement to pay which the assessment is made, and *an assessment beyond the benefit so conferred is a taking of property for public use without compensation, and therefore illegal.*" (Emphasis supplied.) It may be here pointed out that this rule was announced ten years before the legislature reenacted section 77-1923 in its present form. Consistent with our former decisions we there held: "Section 77-1923, Comp. St. 1929, authorizes the bringing of an original action to recover taxes paid, where the taxpayer claims that the tax was levied or assessed for an illegal or unauthorized purpose."

The trial court from its memorandum opinion in this case, as set out in the briefs, seems to have been of the opinion that the *Hayman* case is not controlling here. This is based upon the analysis of that decision which is made in the opinion in 141 Neb. 29, 2 N. W. 2d 609. We there said that two sections of the statute were involved in the *Hayman* case, to wit: Section 16-628, Comp. St. 1929, and section 77-1923, Comp. St. 1929. Section 16-628 was referred to in the *Hayman* opinion, but in connection with the discussion of the case of *Cain v. City of Omaha*, 42 Neb. 120, 60 N. W. 368, in which the holding was made, herein quoted, that "an assessment beyond the benefit so conferred is a taking of property for public use without compensation, and therefore illegal." The decision rested upon the proper application of section 77-1923. The defendant so construed the *Hayman* decision in the case decided in 141 Neb. 29, 2 N. W. 2d 609, for there in discussing the *Hayman* case in its

brief, defendant said: " * * * the plaintiff paid into the proper authority the amount of the tax and brought an action under Sec. 77-1923, C. S. Nebraska, 1929, claiming that the tax exceeded the benefits. The contention was made by the City that such special assessments could not be collaterally attacked, and that the only proceeding was one by writ of error. The court overruled this contention on the basis that if the assessment exceeded the actual benefits, that part of the assessment over and above the benefits was illegal and therefore subject to recovery in a suit brought under this section of the statute; * * * ."

It was also said in the case in 141 Neb. 29, 2 N. W. 2d 609: "The *Hayman* case * * * is entirely different from the one we have before us." The statement is correct. It refers, however, not to a different statutory basis, but to the fact that the *Hayman* case was a law action based upon a statutory right of recovery; whereas, the latter case was one in equity for injunctive relief. This distinction was recognized by the defendant in its brief in the latter case, wherein it said: "Without conceding that the doctrine as laid down in the *Hayman* case, *supra*, is sound, if it is to be construed as a holding that special assessments of this nature can be collaterally attacked, it in itself defeats the proceeding in this case based on the fundamental legal theory that an injunction will not be granted in a case where there is a choice between the ordinary processes of law and the extraordinary remedy by injunction and the remedies at law are sufficient to furnish the injured party full relief to which he is entitled in the circumstances."

It was further said in the latter case that "this court is powerless *in this proceeding* to correct the excessive assessment *by an injunction proceeding* when the statute clearly requires that such errors of the county board be corrected by a petition in error." (Emphasis supplied.) Such was the holding in the first appearance of this controversy in the case decided in 135 Neb. 21, 280 N. W. 430.

The remedy by petition in error is not exclusive and the case in 141 Neb. 29, 2 N. W. 2d 609, does not so hold. The

remedy by petition in error is of doubtful value, in *fact* matters, in view of the rule announced in *Dodge County v. Acom,* 72 Neb. 71, 100 N. W. 136: "On a petition in error from the judgment of the county board in such a proceeding, its findings and orders are entitled to the same weight as the verdict of a jury, or the findings and judgment of a court, and will not be reversed or set aside unless it appears that the evidence is insufficient to sustain them and they are clearly wrong."

Section 77-1923 was adopted by the legislature for the purpose of providing an action at law for the recovery of money paid for taxes that have been levied or assessed for an illegal or unauthorized purpose, or were for any reason invalid. This was recognized in the early cases of *Chicago, B. & Q. R. Co. v. Nemaha County,* 50 Neb. 393, 69 N. W. 958, and *Chase County v. Chicago, B. & Q. R. Co.,* 58 Neb. 274, 78 N. W. 502. The rule that "where taxes are levied for an illegal and unauthorized purpose * * * they may be recovered back in an action at law" was recognized as "firmly established" in *Chicago, B. & Q. R. Co. v. Lincoln County,* 66 Neb. 228, 92 N. W. 208. See, also, *Darr v. Dawson County,* 93 Neb. 93, 139 N. W. 852. The right to maintain such an action under section 77-1923 was recognized, without citation of authority, in *Monteith v. Alpha High School District,* 125 Neb. 665, 251 N. W. 661, a decision repeatedly followed by this court. The legislature by this act gave to the taxpayer the right to maintain an action at law to recover such a "tax, or any part thereof," and made it the duty of the courts to determine whether "such tax, or any part thereof," was illegal, unauthorized or invalid, and to render judgment for the taxpayer for the amount so determined.

Plaintiff proceeded properly in filing an original action at law for the recovery of these taxes, and the trial court erred in sustaining the demurrer to the petition on the ground here considered.

This leaves for consideration the proposition presented by defendant that the action is barred by the statute of limitations (Comp. St. 1929, sec. 20-212). That statute is:

"An action for relief not hereinbefore provided for can only be brought within four years after the cause of action shall have accrued." The question then is, when did plaintiff's cause of action accrue?

Defendant submits that the assessment against the property was levied on June 15, 1936, and that on that date, or at least at the time of the expiration of the date for appeal by petition in error, which defendant fixes as September 15, 1936, plaintiff could have taken the necessary steps to lay the foundation for this action and that, accordingly, its cause of action accrued at that time.

The statute, section 77-1923, fixes no time within which the payment must be made. It does provide, however: " * * * when he shall have paid the same * * * he may, at any time within thirty days after such payment, demand the same in writing * * * , and if the same shall not be refunded within ninety days thereafter, may sue such county * * * ."

The basic question here presented was decided by this court in *Monteith v. Alpha High School District, supra.* There the taxpayer failed to make the demand in writing within 30 days after the payment of the taxes, the demand being made some three years after the payment. We there held that "The statute of limitations commences to run upon the payment of the taxes" (that being the time when the 30-day period began to run), and because the plaintiff failed to demand repayment within the 30-day period, his action was barred. See a discussion of this case in *McDonald v. Lincoln County,* 141 Neb. 741, 4 N. W. 2d 903. Plaintiff here, however, made the demand in writing within the 30-day period. Thereafter, the county had, under the statute, a period of 90 days after the demand in which to make the refund. Clearly that 90-day period must necessarily expire before the plaintiff "may sue;" otherwise, the county would be denied the time given by statute in which to determine its course and to refund the money so paid, if that be its decision. Under these facts, the statute limiting the time when the action can be brought commences to run upon the

expiration of said 90-day period. If we were to follow defendant's reasoning in this case, it would be in effect to hold that plaintiff's cause of action to recover the taxes so paid was barred before the payment was made. The statute is not a bar to this action.

The trial court erred in sustaining defendant's demurrer to plaintiff's petition and in dismissing the same. Its judgment is accordingly reversed and the cause remanded for further proceedings.

REVERSED.

TEWELL, District Judge, dissenting.

I cannot agree to the majority opinion in this case. Its potential effects are so far reaching that I deem it my duty to state briefly a few of the reasons why I disagree with it.

The drainage district involved was constructed under the provisions of chapter 31, art. 1, Comp. St. 1929. I shall not here attempt to outline the provisions of that article. Suffice it to say that in this action no attack is made upon the constitutionality of such article, or any part of it, and that no attempt is made to allege or show that the proceedings by which the drainage ditch was established, and the special assessments levied, were other than in conformity to the provisions of such article, other than to allege that the special assessments were greater than the benefits. It should further be noted that a section of said article 1, namely, 31-124, provides as follows:

"The collections of assessments to be levied to pay for the location or construction of any ditch shall not be enjoined nor declared void; nor shall such assessment be set aside in consequence of any error or irregularity committed or appearing in any of the proceedings provided by this article, and no injunction shall be allowed restraining the collection of any assessment until the party complaining shall first pay to the county treasurer the amount of his assessment, which amount so paid may be recovered from the county in an action brought for that purpose in case such injunction is made perpetual."

As one basis for my dissent, I submit that the questions

involved in determining whether or not a stated local improvement should be allowed, and, if so, in determining what should be the proceedings to establish it and to levy special assessments thereby, in order to pay the cost thereof, on the property benefited, are questions peculiarly and solely legislative in nature. By said article 1 the legislature placed the power of the determination of the extent of the benefits accruing to a parcel of land from the authorized local improvement in the county board. A review by the courts upon error proceedings of the action of such board is provided by statute. No such proceedings for review having been taken within the time provided by law, the action of such board has become final, and, in the absence of fraud or demonstrable mistake, is not subject to collateral attack. See Special or Local Assessments, 48 Am. Jur. secs. 12, 13, 29 and 185; *Kansas City S. Ry. Co. v. Road Improvement District*, 266 U. S. 379, 45 S. Ct. 136; *Milheim v. Moffat Tunnel Improvement District*, 262 U. S. 710, 43 S. Ct. 694; *Dodge County v. Acom*, 61 Neb. 376, 85 N. W. 292; *Tyson v. Washington County*, 78 Neb. 211, 110 N. W. 634; *Johannes v. Thayer County*, 83 Neb. 689, 120 N. W. 176; *Drainage District No. 1 v. Village of Hershey*, 139 Neb. 205, 296 N. W. 879. In the case last above cited, the streets and alleys were subject to assessment in some amount, but the court could not and did not determine such amount. Under the majority opinion, when this case is tried to a jury, the only questions submissible to the jury are that of whether or not the special assessments exceeded the benefits and, if so, by how much? The jury thereby take the place of the nonjudicial administrative body provided by the legislature.

A second basis for this dissent, which may be said to be a necessary corollary of the first above mentioned, is that section 77-1923, upon which the majority opinion is based, was never intended to apply, in any manner, to special assessments based upon benefits for local improvements, as distinguished from taxes levied without regard to benefits. To so apply it is to allow a jury in a judicial and collateral proceeding to perform the function of the administrative

body in which the legislature placed the power of the determination of the extent of benefits. In the case of *Hayman v. City of Grand Island,* 135 Neb. 873, 284 N. W. 733, cited in the majority opinion, and, for convenience, hereinafter called the *Hayman* case, the jury in a judicial and collateral proceeding determined that the benefits were only about half as much as the administrative body had determined. Is the judgment rendered upon their verdict a final determination of the extent of benefits, or is it any more apt to be equitable and just than was the action of the administrative body? Many statutes that provide for local improvements and special assessments provide for a supplemental assessment, as does article 1 above mentioned (see sec. 31-122). Others provide for a reassessment in case all *or any portion* of an assessment is declared invalid, an example being section 31-429, Comp. St. 1929.

To apply said section 77-1923 to special assessments for local improvements, as distinguished from the common-law remedy, is completely incompatible with the entire theory and the entire practicability of local assessment statutes. Such statutes are very necessary to progress, and are in accord with the growth of local self-government. It is common knowledge that there are in existence today in Nebraska hundreds of local improvement districts in which special assessments have been levied. Many times these special assessments are not paid for years after the local improvement is completed. Such was true in the case at bar. The majority opinion will allow their payment and recovery, either in whole or in part, under the provisions of said section 77-1923. If such a condition exists in our law, it is high time for the legislature to amend section 77-1923 in such manner as to cause it not to apply to special assessments for local improvements based upon benefits, as distinguished from a tax that is levied without regard to benefits.

I agree that special assessments based upon benefits cannot exceed the benefits, but contend that the authority to determine the extent of such benefits is solely in the legisla-

ture, or in such administrative body or bodies as the legislature may create or provide for, and to which it may delegate such authority. Under certain conditions, courts in a collateral proceeding may enjoin all, or parts of, special assessments, but in so doing should not determine the extent of the benefits. *Road Improvement District v. Missouri P. Ry. Co.*, 274 U. S. 188, 47 S. Ct. 563. There does exist a common-law right of action to recover special assessments after involuntary payment, or when paid and the improvement never constructed. Such an action, however, is subject to the defenses of waiver and estoppel, such as failure to object until the improvement was completed, joining in the petition for the improvement, etc. *Geib v. County of Morrison,* 119 Minn. 261, 138 N. W. 24, 9 A. L. R. 839. See, also, Annotation 9 A. L. R. 842. Such an action is a very different proceeding than is a proceeding under section 77-1923.

As a third basis of this dissent, I submit that section 31-124 above quoted is an absolute bar to the maintenance of this action, even though section 77-1923 be held to include special assessments based on benefits. In the case of *Morris v. Merrell,* 44 Neb. 423, 62 N. W. 865, this court held that such section did not prevent an injunction where the proceedings thereunder were such as to render the assessments entirely void. In *Loup River Public Power District v. Platte County,* 141 Neb. 29, 2 N. W. 2d 609, a case involving the same parties and the same assessments as does this case, this court declared "the assessment is not void, neither is it illegal, but it is claimed to be excessive; * * * ." The legislature, without question, had the power to provide the restrictions contained within said section 31-124, so long as there existed no such procedural defect, fraud, or demonstrable mistake, as to render the assessments entirely void. The case last above cited held that no such procedural defect, fraud, or demonstrable mistake existed in the assessments involved. Under such condition, the injunction having been denied, said section 31-124 is a bar to this action.

In the *Hayman* case great reliance seems to have been

placed upon the opinion in *Cain v. City of Omaha*, 42 Neb. 120, 60 N. W. 368. That case was not based upon section 77-1923, but rather upon a section of the same statute under which the special assessments there involved were levied, such section being now section 16-628, Comp. St. 1929. Such section is a part of the method by which the legislature had declared the extent of the benefits should be determined. To my mind, the holding in the *Hayman* case is not in accord with any prior holding of this court. In *City of Omaha v. Hodgskins*, 70 Neb. 229, 97 N. W. 346 (based upon a statute preceding section 77-1923 in date), and in *Dorland v. City of Humboldt*, 129 Neb. 477, 262 N. W. 22, this court, impliedly at least, held section 77-1923 applicable to actions to recover special assessments. Certainly no logical reason for such a holding was given.

I submit that the holding in the *Hayman* case should be overruled, and section 77-1923 held not applicable in an action to recover special assessments based only upon benefits for local improvements. The judgment of the trial court in this action should be affirmed.

JOSEPH C. KRSKA, APPELLANT, V. COUNTY OF SARPY, APPELLEE.

14 N. W. 2d 194

FILED APRIL 21, 1944. No. 31679.

1. **Appeal and Error.** A verdict of a jury in a law action based upon conflicting evidence will not be disturbed on appeal unless clearly wrong.
2. ———. The transcript of a record filed in this court for the purpose of appeal imports absolute verity, and in considering the appeal must be treated as the sole and exclusive evidence of the facts.

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

James J. Krajicek, for appellant.

Guy E. Tate, contra.

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

SIMMONS, C. J.

Plaintiff here seeks by separate actions to recover damages to crops occasioned by rain waters flooding his lands in the years 1941 and 1942, alleging that the same were caused by the negligent construction of a highway by the defendant. By stipulation the cases were tried together. Trial was had to a jury and separate verdicts for the defendant had. Plaintiff appeals, both causes being presented in this appeal. We affirm the judgment of the trial court.

The petitions in the two cases are identical, except as to the dates of the rainfall and the allegations of damages, which are different for the two years. The answers and replies are identical with one exception to be mentioned later.

Plaintiff alleges that he owns land in Sarpy county, intersected by the Papillion Creek Drainage Ditch; that a road known as 48th street lies directly east of the land of the plaintiff; that defendant in 1938 constructed the road and raised the same from two to four feet above the level of the adjacent lands, including plaintiff's, and negligently refused to construct sufficient culverts through the grade of the road which would have allowed surplus water to flow in its natural course, and as a result the same was forced back by the grade of the road upon the lands of the plaintiff; that on September 27 and 28, 1941 (June 19 and 20, and July 19, 1942, in the second action) rain fell upon the plaintiff's and adjoining lands, and because of the defendant's failure to provide and maintain adequate culverts through the grade of the road, the natural flow of the rain water was obstructed, forced in large and unnatural quantities upon his lands, where it remained for several weeks to the material damage and destruction of plaintiff's crops; that it was the duty of defendant to construct and maintain sufficient culverts in said road to permit the natural and normal fall of rain water to pass down and through the natural watercourses,

and to maintain the road so as to permit the rain water to flow in its natural course and be drained from plaintiff's land; and because of defendant's failure to perform its duty, said waters were forced back upon plaintiff's land to his damage.

Defendant, by its answer, denied generally and alleged that sufficient culverts had been placed in the roadway to drain said lands of all natural flow of rain water; and that if damage was caused to plaintiff, it was the direct and proximate result of the acts of the plaintiff in changing the natural flow of the water on his land by building dikes across Papillion creek, by constructing a ditch across his lands intersecting Papillion Drainage ditch, and by failure to maintain the drainage ditch dikes and by plowing them down.

Plaintiff, by reply, denied any allegations of the answer that controverted the allegations of his petition.

Plaintiff makes no complaint here of the instructions submitting the issues to the jury, but rather argues that the jury's verdict is so contrary to the evidence, when measured by the instructions, as to be clearly wrong and requiring a reversal.

The trial court instructed the jury that the burden was upon the plaintiff to prove by a preponderance of the evidence: "1. That the natural drainage from plaintiff's land was from the northwest to the southeast across 48th Street Highway. 2. That said defendant, by raising the grade of 48th Street Highway from two to four feet, and its failure and neglect to construct and maintain sufficient culverts under and through said grade to allow surplus water from plaintiff's land, during normal rain storm, to flow in its natural course, obstructed and forced flood waters in large and unnatural quantities upon plaintiff's land damaging and destroying his crops. 3. The damages plaintiff has sustained and the amount thereof for said years or each of them."

The jury were further instructed that "it was the duty of the defendant to so construct and maintain said highway as

not to interfere with the natural drainage of plaintiff's land, and to provide sufficient culverts in and across said highway to allow ordinary flood waters from plaintiff's land to follow the natural course of drainage."

We review the evidence in the light of the established rule that a verdict of a jury in a law action based upon conflicting evidence will not be disturbed on appeal, unless clearly wrong. *McCown v. Schram*, 139 Neb. 738, 298 N. W. 681.

Plaintiff's land lies in a valley at the lower end of a drainage basin comprising some 135,000 acres. This land was naturally drained by Papillion creek. It has been artificially drained by a drainage ditch, into which there have been added additional drainage burdens by other developments in the upper reaches of the basin, so that at times of heavy rainfall or floods in the basin, the drainage ditch is insufficient in size to carry the water load dumped into it.

The road, about which complaint is made, runs north and south along the east side of plaintiff's land, and is constructed of dirt taken from the sides of the highway. The channel of Papillion creek ran generally from northwest to southeast across plaintiff's land, and crossed the road running in an easterly direction. A bridge was placed across the highway at the point where the old channel crosses, and apparently has been there for many years. Farther south there is a four-foot and still farther south a two-foot diameter culvert across the road. There is evidence that these culverts, or at least one, were not kept fully open. The land involved in this action (some 80 acres) lies north and east of the old creek. The drainage ditch coming from the north intersects the creek channel just to the west of the land involved, follows south, and then runs southeast, at a distance of about a quarter of a mile southwest of the old creek channel.

There are at least three low spots in the drainage ditch bank to the west of plaintiff's lands. Plaintiff had built a dike or irrigation ditch running east and west to the north of the land in question, which ran up to the drainage ditch

and into which, on occasion, he pumped water from the drainage ditch. Plaintiff had also built three dikes across the creek channel, one at the drainage ditch, one to the east thereof, and one just west of the road in question, and created ponds sufficient to propagate fish in them. To the east of the road, and below and not on plaintiff's land, the creek bed had been filled in with sediment, old trees, car bodies, etc., so that the flow of water in the natural channel there was greatly retarded. The land involved in this action sloped naturally from the northwest to the southeast. Along the south border (being the channel of the creek), the land sloped toward the creek and some distance out, away from it. To the north of the land involved was high ground so that a part of this land was lower than the land on either side, and did not have complete natural drainage. The land to the east of the road in places was as high as, and in places higher than, the plaintiff's land to the west of the road.

The defendant rebuilt the road in either 1936 or 1938. It was raised more in the low places than in the high places. Plaintiff's witnesses fix the increased height at from two to four feet. The men who built the road fix the original increase at from 16 inches to two feet. Actual measurements, made by test diggings at the time of the trial, fix the increase at from eight inches to two feet and the average at 17 inches. Additional culverts were not placed in the roadway. When the road elevation was raised, a ditch of substantial size was dug along the west side of and parallel to the road leading to and ending in the old channel at the bridge.

When the heavy rains came, not only the plaintiff's land, but the whole area of low land was flooded. That situation had existed at flood periods for years before the highway was improved. Plaintiff introduced pictures showing that, immediately following the 1942 rains, the land on both sides of the road was under water and the roadway a narrow strip of land leading out into the water. Other pictures show the entire roadway under water for a considerable

distance in the lower part of the valley. Plaintiff's theory and testimony were that the roadway, after the new construction, retarded the drainage and held back the waters on his lands for periods up to three weeks; whereas, before it had been but periods of hours before the water subsided. This evidence was disputed. Defendant's evidence was that this water came from the higher elevations, not on plaintiff's lands; that it drained off more quickly than plaintiff claimed; that it was not drained off because of the obstructions placed in the old channel on plaintiff's lands and below his lands; that the ditch alongside the road furnished as good or better drainage than the natural drainage into the creek, and that considerable water of necessity remained on plaintiff's land, because of natural depressions and the dikes across the channel of the natural creek drain. Defendant's expert witnesses testified that the roadway did not affect the crest elevation of the flood waters, and that the roadway did not have anything to do with holding the flood waters or retarding the drainage. The trial court sent the jury out to view the premises. They had the advantage of that observation. Under this evidence we cannot say that the jury's verdict was wrong.

Plaintiff complains that the court in its instructions referred to "culverts and dikes," and seems to charge that the answer of defendant was changed "after trial" to read "dikes." There is nothing in the record here to show any change in the pleadings. It has long been the rule that "The transcript of a record filed in this court for the purpose of appeal imports absolute verity, and in considering the appeal must be treated as the sole and exclusive evidence of the facts." *In re Estate of Piel*, 141 Neb. 783, 4 N. W. 2d 875. See *Lippincott v. Lippincott*, ante, p. 486, 13 N. W. 2d 721.

The transcript shows that in the answer in one case, defendant stated in part that plaintiff's damage, if any, was caused "by the building of a *dike* across the Papillion Creek" and in the other answer "by the building of *dikes* across the Papillion Creek." Plaintiff testified on cross-ex-

amination, without objection, that he built "dikes" across the creek and indicated the location of three of them. There was no dispute at the trial, or distinction made between "dike" and "dikes." We see no merit in the contention that prejudicial error resulted.

The judgment of the trial court is affirmed.

AFFIRMED.

ALBERT R. DRIER, APPELLEE, V. KNOWLES VANS, INC., APPELLANT.

14 N. W. 2d 222

FILED APRIL 21, 1944. No. 31765.

1. **Appeal and Error.** The record of the trial court in all appellate proceedings imports absolute verity. If such record is incomplete or incorrect, the remedy is by appropriate proceedings to secure a correction thereof in the trial court.
2. **Justices of the Peace.** The above rule applies to proceedings in justice of the peace courts.
3. ———. A case removed to the district court from a judgment of a justice of the peace is rightly dismissed if appellant, by reason of his own laches, failed to file an appeal bond within the time limited by statute for that purpose.
4. ———. The statute is mandatory. The giving of the appeal bond is essential to confer jurisdiction of the cause upon the appellate court.
5. ———: APPEAL AND ERROR. Where a party makes the mails his agent for the purpose of delivering an appeal bond to the court, the negligence of the agent, if any, is the negligence of the party.

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

S. L. Winters, for appellant.

Harry A. Spencer, contra.

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

SIMMONS, C. J.

This is an appeal from the judgment of the district court

dismissing an appeal from justice court because of the failure of appellant to file the required bond in time. We affirm the judgment of the trial court.

The transcript of the proceedings in the justice court, filed in the district court, recited that plaintiff filed his bill of particulars praying judgment against the defendant for the sum of $96.35 and costs, including an attorney's fee. Trial was had on September 2, 1943. Plaintiff and defendant offered testimony, and the cause was taken "under advisement until September 3rd." On September 3 judgment was entered for the plaintiff for $65, costs and attorney's fee. The transcript further recited that a bond for appeal was received by mail September 14, too late "for approving" because received more than ten days after the judgment was rendered. The transcript further recited that I am filing said bond, but this court cannot approve said bond, hereby disapprove same, but include said bond, with all other papers, filed in this case."

Plaintiff thereafter filed a motion to dismiss the appeal because the bond was not approved, because it was filed more than ten days after the judgment was rendered, and the judgment of the justice court had become absolute.

Defendant resisted the motion to dismiss on the grounds that the justice had found the bond satisfactory, except as to filing date; that the postal authorities had not delivered the bond to the right address; that the record should show that the court at the close of the trial had announced he would decide the case on September 4; that on September 4 plaintiff's attorney wrote the defendant's attorney that the justice "advised me today" that he had rendered judgment and that the plaintiff's attorney was so advising in order that defendant "would have ample time to appeal;" that the defendant's attorney received the letter on September 7, the 6th being a holiday; that a bond was secured and mailed to the justice on September 10; that defendant's attorney did not know the street address of the justice; that Mr. Knowles was "out of town on business" and it was impossible to obtain the street address of the justice, so the letter was ad-

dressed to "Judge Woolsey, Justice of the Peace, Lancaster County, Lincoln, Nebraska;" that the postal authorities first delivered it to the wrong address and finally to the justice on September 14; then followed a recital of correspondence with the justice and plaintiff's attorney occurring subsequent to September 14, from which it is claimed that the judge had advised defendant's attorney that the bond "was satisfactory" but "it came too late," and that the attorneys had understood that the judge "agreed" to decide the case on September 4 (the plaintiff's attorney's letter says "by September 4th") and had decided it on the 3d; that the attorney for plaintiff admitted he was partly to blame in not advising that the case was decided on September 3, but had written under the impression that the judge had decided it on the 4th; and that plaintiff's attorney had suggested that a transcript be had and "if there be any contest on this point" that it be had in district court. Defendant contends that the fault was with the justice, and plaintiff's attorney and the postal authorities, and not the defendant. In his objections, defendant suggests a diminution of the record. He, however, did not offer a supplemental transcript in the district court and does not here assign any error in that regard.

A hearing was had on the motion. A "bill of exceptions" was prepared by defendant's attorney, consisting of the series of letters referred to in the objections and copies of the affidavits attached to the objections. The trial court certified that the letters "were, at least read to the court, at the arguments and contents all considered in reaching a decision on the motion to dismiss." Without determining the sufficiency of this record to constitute a bill of exceptions, we will consider the exhibits as properly before us.

The defendant, having filed in the district court a transcript of the justice court proceedings, sought in the district court to impeach that transcript. The transcript recited that the case was taken under advisement until September 3, and then decided, and that the justice disapproved the bond when tendered because it was presented out of time.

The established rule is that the record of the trial court in all appellate proceedings imports absolute verity. If such record is incomplete or incorrect, the remedy is by appropriate proceedings to secure a correction thereof in the trial court. *Omaha Loan & Trust Co. v. Hogeboom*, 47 Neb. 7, 66 N. W. 14; *Lippincott v. Lippincott, ante*, p. 486, 13 N. W. 2d 721. This rule applies to proceedings in the justice of peace courts. *People's Bldg. Loan & Savings Assn. v. Cook*, 63 Neb. 437, 88 N. W. 763.

The statute applicable here is: "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, * * * ." Comp. St. 1929, sec. 21-1302. This period begins to run when the judgment is entered on the docket. *Bishop v. Lincoln Baseball Club*, 98 Neb. 558, 153 N. W. 586. 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. The statute is mandatory. The giving of the appeal bond is essential to confer jurisdiction of the cause upon the appellate court. *Security Mutual Life Ins. Co. v. Gilliam*, 143 Neb. 673, 10 N. W. 2d 670, and decisions there cited.

The fault here does not lie with the justice of the peace; neither was it with the plaintiff's attorney. He, when advised of the decision, promptly and voluntarily wrote the defendant's attorney of the date when he had been told of the decision, not the date when the decision was rendered. He did this not to prevent an appeal, but to facilitate appeal, if defendant desired to make it. There was ample time after that notice was received for defendant to determine when the time began to run. He made no inquiry. He took three days to prepare and mail a bond. There was still ample time to present the bond. It was not the fault of the justice of the peace, nor of the plaintiff's attorney, that Mr. Knowles was out of town on other business, that defendant elected to send the bond to the justice in the mails,

and that defendant's attorney did not know the street address of the justice and used a general address. The defendant made the mails his agent to transport and deliver the bond to the justice of the peace court. Under similar circumstances, this court said: "The agent was selected by the appellant, and the negligence of the agent, if any, was the negligence of the appellant." *Larson v. Wegner*, 120 Neb. 449, 233 N. W. 253. Having so selected his agent, he placed the burden upon that agent to search out and find the justice in Lincoln, Nebraska. The agent performed the task, but too late. The delay here was occasioned by the defendant's laches in proceeding as he did.

The district court rightly dismissed the appeal. Its judgment is affirmed.

AFFIRMED.

IN RE APPLICATION OF MERNA CARPER FOR A WRIT OF HABEAS CORPUS.
RUDOLPH TESAR, PETITIONER, APPELLANT, V. HATTIE BOWLEY ET AL., APPELLEES.

14 N. W. 2d 225

FILED APRIL 21, 1944. No. 31723.

1. **Habeas Corpus.** Habeas corpus is a collateral, not a direct, proceeding when regarded as a means of attack upon a judgment sentencing a defendant. It cannot be used as a substitute for a writ of error.
2. ———. The regularity of the proceedings leading up to the sentence in a criminal case cannot be inquired into on an application for a writ of habeas corpus. If the court had jurisdiction of the defendant and the authority to try the charge against him, its action can be assailed only in a direct proceeding.
3. **Constitutional Law.** While a defendant in a criminal case is entitled to defend by counsel, such right is not inalienable and not conferred by consideration of public policy. He may, by judicial confession of guilt, waive the constitutional rights guaranteed him by the federal and state Constitutions.

APPEAL from the district court for York county: LOVEL S. HASTINGS, JUDGE. *Affirmed.*

Fitzgerald, Tesar & Welch, for appellant.

Maynard M. Grosshans, Walter R. Johnson, Attorney General, and Carl H. Peterson, contra.

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

MESSMORE, J.

An application for a writ of habeas corpus was brought in the district court by her attorney in behalf of Merna Carper, hereinafter referred to as the applicant, containing allegations: That the applicant was denied her constitutional rights under the provisions of the federal and state Constitutions; further that she was induced, through fraud and coercion by police officers, to enter a plea of guilty to breaking and entering; that she was denied counsel and the services of the public defender. The return and answer to the writ denied applicant had been deprived of her constitutional and statutory rights, as she claimed; alleged that she was lawfully detained in the women's reformatory. On these issues joined hearing was had, the writ denied, and applicant appeals.

The record discloses that the applicant, her husband and a friend were arrested almost immediately after the husband had broken into and entered a drug store, to steal some narcotics, for the use of the three; the applicant was standing on the sidewalk near the store. After her arrest she denied having any part or assisting in the commission of the crime. At the police station she informed the inspector of detectives and the deputy county attorney that she was not guilty and was without funds with which to procure counsel and desired counsel. Applicant also testified that the police officers had been abusive to her and, by fraud and coercion, sought to induce her to plead guilty to the crime charged, stating that if she failed to do so an habitual criminal charge would be placed against her.

We are cognizant of the rights of the accused in criminal prosecutions, as set forth in articles V and VI, Amendments to the Constitution of the United States, and likewise section 11, art. I of the Constitution of Nebraska, and the due process clause appearing in section 3, art. I of the Nebraska Constitution. There is no contention that the court lacked jurisdiction to receive the plea of guilty entered by the applicant (defendant) to the crime charged.

From the testimony of the deputy county attorney it is clear that the applicant was informed of her constitutional and statutory rights before entering any plea in the district court. She admitted that she had a conversation with the deputy county attorney and was informed of her rights, and it is apparent, from her previous criminal record, that she was familiar in some degree with her constitutional and statutory right to have counsel represent her if she so desired. On at least two previous occasions she had experience in entering a plea of guilty to forgery in the United States district court, in the district court of the state, and at the time of her arrest there was a forgery charge pending against her.

In *McCarty v. Hopkins*, 61 Neb. 550, 85 N. W. 540, where the defendant entered a plea of not guilty, later changed it to guilty, and then filed a petition for a writ of habeas corpus, challenging the jurisdiction of the trial court, this court said: "The right of an accused person to be tried by a jury drawn from the county or district in which the prosecution was initiated, is a mere personal privilege and, like the other rights conferred by section 11, article I of the constitution, may be waived. Even the right to a trial, anywhere or under any conditions, may be waived, and in practice is waived when the accused makes a judicial confession of his guilt. When no issue is raised; when the prisoner pleads guilty to the information or indictment, there is nothing to try; the right to a jury is waived and with it, of course, the constitutional guaranties with respect to the conduct of criminal prosecutions. The defendant in a criminal case is entitled to defend by counsel, to have a copy of

the accusation, to meet the witnesses against him face to face, to have process to compel the attendance of witnesses in his behalf and to speedy public trial by an impartial jury composed of persons who are presumably acquainted with his good repute; but these rights are not inalienable; they were not conferred upon him from any consideration of public policy, and he may, therefore, insist upon them or abandon them at pleasure."

In the case of *Alexander v. O'Grady*, 137 Neb. 645, 290 N. W. 718, in the opinion the court said:

"As to the failure of the trial court to provide relator with the services of an attorney, the rule appears to be, viz.:

" 'The constitutional right of accused to have the assistance of counsel may be waived, and a waiver will be implied where accused, being without counsel, fails to demand that counsel be assigned him.' 16 C. J. 821." So, also, this court is committed to the view that a person charged with a crime may, by a judicial confession of guilt, waive all rights secured to him by section 11, art. I of the Constitution. See *McCarty v. Hopkins, supra.*

We are cognizant of the provisions of section 29-1803, Comp. St. Supp. 1941, with reference to the public defender's office and duties imposed. From all the circumstances and evidence, it is obvious that the applicant did not seek to avail herself of such service. Her contention that the public defender's office neglected its duty as to her is wholly without merit.

The applicant in this case resorted to a writ of habeas corpus and seeks thereby to question the validity of her sentence, which would properly arise under a writ of error. This court is committed to the view: Habeas corpus is a collateral, and not a direct, proceeding, when regarded as a means of attack upon a judgment sentencing a defendant; it cannot be used as a substitute for a writ of error. *Hulbert v. Fenton,* 115 Neb. 818, 215 N. W. 104; *In re Application of Maher, North v. Dorrance, ante,* p. 484, 13 N. W. 2d 653. See, also, *In re Application of Niklaus, Niklaus v. Holloway, ante,* p. 503, 13 N. W. 2d 655.

When charged with the crime the applicant (defendant) in the first instance entered a plea of not guilty, later entered a plea of guilty, and then, after sentence was pronounced, sought, by motion, to again change her plea to not guilty and procure counsel. She evidently felt that the sentence was too heavy for her participation in the crime charged.

Section 28-201, Comp. St. 1929, provides: "Whoever aids, abets or procures another to commit any offense may be prosecuted and punished as if he were the principal offender."

Applicant was fully informed that her participation in the offense charged, as related by her, would be treated as the cited section of the statute provides. The fact that she testified she was subordinated to the desires and wishes of her husband, was groggy from taking amytal pills and whisky, does not constitute a legitimate excuse for her action.

Viewing the record and all of the facts and circumstances detailed therein, we are led inescapably to the conclusion that the applicant knew she was entitled to a trial; that counsel would be furnished if she desired, and that she could waive trial, services of counsel, and plead guilty. The trial judge who sentenced her recognized such fact, as well as the trial judge who heard the habeas corpus proceedings. The record is insufficient to establish that fraud, coercion, duress or force was used by any of the officers connected with the applicant's arrest, or by any of those who accompanied her to and from court.

We conclude that the trial court did not err in denying the writ of habeas corpus.

AFFIRMED.

EDWARD L. O'SHEA, APPELLANT, V. LOYAL L. SMITH ET AL., APPELLEES.

14 N. W. 2d 174

FILED APRIL 21, 1944. No. 31665.

1. **Appeal and Error.** A finding made by the supreme court on a state of facts becomes binding and *res judicata* or the law of the case on a retrial on remand to the district court when the facts referable to the finding are the same on the second as on the first trial.
2. **Specific Performance.** In an action for specific performance of a contract to convey real estate, where the vendee is willing to accept the vendor's title, the vendor may not set up as a defense to the action a defect therein.

APPEAL from the district court for Kimball county: J. LEONARD TEWELL, JUDGE. *Reversed, with directions.*

John F. Kerrigan and *Torgeson & Halcomb,* for appellant.

Kuns & Van Steenberg and *L. L. Smith, contra.*

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

YEAGER, J.

This is the second appearance of this action in this court. The opinion on the former appearance is reported in 142 Neb. 231, 5 N. W. 2d 348. As there stated it is an action instituted by Edward L. O'Shea, plaintiff and appellant, against Loyal L. Smith, Durland Trust Company, Durland Trust Company, trustee, and Gus Rieseberg and Emma Rieseberg, husband and wife, defendants and appellees, the purpose of which is to obtain specific performance of a contract for the sale of real estate claimed to have been entered into between the plaintiff and defendant Loyal L. Smith.

The appeal on the former appearance was from the action of the court in sustaining a general demurrer to plaintiff's petition and the dismissal of the action.

The petition on the former appearance of the case here, which is the same petition that is here now, sets forth that

the defendant Loyal L. Smith is the owner of the beneficial interest in the real estate in question, which real estate is situated in Kimball county, Nebraska; that the Durland Trust Company, defendant, has no interest in the real estate except that it holds the naked legal title in trust; and that the defendants Gus Rieseberg and Emma Rieseberg have no interest in the controversy but are tenants in possession.

The petition further sets forth that a valid and binding written contract was entered into between the parties by written offer by the defendant Loyal L. Smith and written acceptance by the plaintiff, which offer and acceptance are contained in 23 letters and telegrams of negotiation which passed between these parties. The letters and telegrams are attached as exhibits and made a part of the petition.

The details of the negotiations and the alleged offer and acceptance as disclosed by the letters and telegrams are contained as quotations from this correspondence in the former opinion and will not be repeated here.

After consideration of the petition and the general demurrer thereto this court held that the petition did state a cause of action, and reversed and remanded the action. In the opinion it was stated:

"Applying the rules set forth, the conclusions that the petition sets forth a valid and binding contract between the plaintiff and the defendant Loyal L. Smith, and that the contract has been breached by said defendant, appear inescapable.

"In the light of the further allegations of the petition, it is the opinion of the court that the petition states a cause of action for specific performance of the contract pleaded, and that the trial court erroneously sustained the general demurrer."

On remand to the district court the defendants answered. The answer contained a general denial; a denial that the Durland Trust Company or Durland Trust Company, trustee, had any part in the negotiations for the sale of the real estate in question; that plaintiff has no legal or equitable

interest in the subject matter of the action; that the communications did not amount to a contract or one which would support an action for specific performance.

On the pleadings as thus outlined the case proceeded to trial. At the conclusion of the trial the court found in favor of defendants and entered a judgment of dismissal of plaintiff's petition. From this judgment plaintiff has appealed.

In lieu of bill of exceptions the case comes here on a case stated or "stipulation of evidence in the district court."

To the extent necessary to set it forth here the case stated shows that under a trust agreement the legal title to the real estate is in the Durland Trust Company, with an equitable interest in defendant Loyal L. Smith, which trust agreement is set forth at large in the case stated; that the defendants Rieseberg have no interest in the real estate except as tenants; an admission of the transmittal and the truth of the communications attached to the petition and considered on the former appearance of the case in this court; and a memorandum by the trial court indicating the decision and the basis therefor.

There is nothing whatever to show that any evidence was adduced interpretative or explanatory of or that had a tendency to qualify the meaning of the communications which plaintiff alleged and which this court held amounted to and was a written contract. In the former opinion it was stated:

"Also for the purpose of our consideration of this case, it being the sufficiency of the language of the petition to state a cause of action that is in question, it is the duty of this court to give to the words used in the correspondence their ordinary and popularly accepted meaning in the absence of explanation or qualification. * * * There is nothing of an explanatory or qualifying character appearing in the petition or the exhibits.

"The claimed contract here is not a formal one, but it is claimed by the plaintiff that the letters and telegrams, made a part of the petition, when considered together constitute a valid, binding and enforceable agreement in writing between the parties."

Notwithstanding this pronouncement and without any more explanation or qualification than was before this court when the pronouncement was made the district court found, and in part based its decision on such finding, that no contract existed. This action of the trial court was clearly erroneous. The former finding of this court, in the light of the absence of evidence attaching a difference to the meaning of these communications on the second appearance of the case in the district court, was binding and became *res judicata* or the law of the case. The rule announced in *Callahan v. Prewitt,* 143 Neb. 793, 13 N. W. 2d 660, as follows, is applicable here: "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."

The only other question requiring consideration herein is the fact that the defendant Loyal L. Smith does not have the legal title, and is unable to convey the legal title to the real estate in question because of the interest therein which is disclosed by the case stated in the Durland Trust Company. He contends that this admitted fact defeats the right to specific performance of the contract, especially in view of the fact that the record does not disclose an offer by plaintiff to accept the interest of defendant subject to the rights of the Durland Trust Company.

It is true that in the case stated there is no offer to accept specific performance subject to the rights of the Durland Trust Company. There is an offer to so take in the brief, the effect of which we do not determine. We think, however, that the record does disclose such a willingness and amounts to such an offer. The petition declares an interest in the Durland Trust Company, and of course, by this declaration and admission, the plaintiff by his action sought specific performance of the contract subject to whatever rights the Durland Trust Company had which were superior to those acquired by him under the contract which he seeks to have specifically performed. The fact that as

between him and the Durland Trust Company in his prayer he seeks to have the interest of the Durland Trust Company declared inferior to his own does not appear to have any material significance. This we think is a sufficient offer to accept in specific performance such interest as defendant Loyal L. Smith has subject to the interest of the Durland Trust Company.

This being true this phase of the case is controlled by the holding in *Lutjeharms v. Smith,* 76 Neb. 260, 107 N. W. 256, as follows: "The rule, however, is that where the vendee is willing to accept the vendor's title, the vendor cannot set up as a defense to the action a defect in his title." See, also, *Gartrell v. Stafford,* 12 Neb. 545, 11 N. W. 732; *Davis v. Merson,* 103 Neb. 397, 172 N. W. 50. The plaintiff is entitled to a decree for specific performance in accordance with the prayer of his petition.

The decree of the district court is reversed and the cause remanded with directions to the district court to decree specific performance of the contract as prayed by the petition subject however to the rights and interests of the Durland Trust Company in the real estate in question. The cause is remanded for trial between plaintiff and defendant Durland Trust Company for the purpose of determining and decreeing the rights of plaintiff under his contract as specifically enforced and the Durland Trust Company under its trust agreement in the real estate in question, the pleadings being generally sufficient to permit of litigation in this action of this question between these parties.

REVERSED, WITH DIRECTIONS.

STATE EX REL. O. M. CAMPBELL, DOING BUSINESS AS CAMPBELL AUDITING COMPANY, APPELLEE, V. JOHN SLAVIK, RESPONDENT, APPELLANT.

14 N. W. 2d 186

FILED APRIL 21, 1944. No. 31714.

1. **Counties and County Officers.** Where the necessary elements are present claims against counties are subject to compromise by county boards and they may in the absence of vitiating elements settle litigation against the county.
2. **Evidence.** In the absence of evidence to the contrary the law presumes that public officers have complied with the law and that their proceedings are valid.
3. **Counties and County Officers.** County commissioners act quasi judicially in passing upon claims against a county whenever their action is not merely a formal prerequisite to the issuance of a warrant but involves the determination of questions of fact upon evidence or the exercise of discretion in ascertaining or fixing the amount to be allowed.
4. ———. If a claim is one upon which judicial action is required by the county board the passing upon the claim is a judicial act and unless appealed from cannot be disturbed.
5. **Appeal and Error.** The dismissal of an appeal without an examination of the case upon its merits operates as an affirmance of the judgment appealed or attempted to be appealed from.
6. **Mandamus.** After the statutory period for appeal by a taxpayer has passed, one in whose favor a claim has been duly allowed by a county board may by mandamus compel the issuance of a warrant for the payment of such claim.
7. ———. The mere fact that there is another remedy at law will not prevent the issuance of a writ of mandamus unless the other remedy is adequate to afford relief upon the very subject matter involved, a remedy appropriate and effectual to enforce the right or compel performance of the particular duty in question, and a remedy to which the relator may at all times resort for full relief against the party from whom the duty is owing as distinguished from one against a third person.

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

Kelso Morgan and *Clinton Brome,* for appellant.

Abrahams & Frenzer, contra.

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

CHAPPELL, J.

Respondent appeals from the allowance of a writ of mandamus requiring him to issue a warrant upon the county treasurer to the order of relator for payment of a claim as allowed and directed by the board of county commissioners of Douglas county, Nebraska. The question for decision, based upon undisputed facts, is whether relator has an adequate remedy at law.

Briefly, the facts are, that on November 12, 1941, the county board, acting upon the report and recommendations of a grand jury, entered into a written contract with relator, whereby the county employed him to examine the records of certain county officials and thereafter make a complete report of his findings. Relator proceeded to perform the contract, and filed with the county three itemized claims for services rendered, amounting in the aggregate to $5,915.62. Each of these claims was disallowed by the board of county commissioners by a vote of three to two, and from each disallowance relator perfected a separate appeal to the district court for Douglas county.

In the first of these appeals the county, as defendant, filed a general demurrer to plaintiff's petition which was sustained. Relator, as plaintiff in the action, elected to stand upon his petition, whereupon a judgment of dismissal was entered by the trial court on May 5, 1942, and relator prosecuted an appeal therefrom. On January 29, 1943, this court sustained validity of the contract, held that the county was liable for the reasonable value of the services rendered, that the demurrer should have been overruled, and reversed and remanded the cause to the district court. See *Campbell v. Douglas County*, 142 Neb. 773, 7 N. W. 2d 764.

While that appeal was pending in the supreme court, relator submitted to the board of county commissioners of Douglas county an offer to accept the sum of $5,880 in full payment, satisfaction, and discharge of any and all of his claims and demands against the county for services ren-

dered by him under the contract, and upon payment thereof to dismiss with prejudice any and all proceedings then pending on appeal from disallowance of claims. On August 25, 1942, the county board adopted a resolution accepting the offer, authorizing and directing the county attorney to take the necessary action to effect a dismissal of all such proceedings then pending on appeal, allowing the claim, and specifically directing the county clerk of Douglas county, respondent herein, to draw a warrant on the general fund in the sum of $5,880 in favor of relator in full settlement, satisfaction, and discharge of any and all of relator's claims and demands against the county. The county attorney thereafter appealed from this action of the county board to the district court, but on June 2, 1943, the appeal was duly dismissed by the district court without decision on the merits, and no further action was taken therein.

The evidence discloses that relator was at all times ready, willing, and able to perform the acts required of him by the resolution and to dismiss with prejudice all appellate proceedings instituted by him against the county. On June 28, 1943, he delivered to respondent a written communication, referring specifically to the adoption of the resolution of August 25, 1942, the county attorney's appeal from the action of the county board, and the dismissal of the appeal. Therein he further offered to comply in every respect with the requirements of the resolution, and respectfully requested, in pursuance of and as directed by its terms, that respondent in his capacity as county clerk draw a warrant on the general fund payable to relator in the sum of $5,880. The respondent refused to comply with this request. The chairman of the county board testified that he is now, and was at all times, ready and willing to sign the warrant and meet all requirements for its validity.

The general rule is that, where the necessary elements are present, claims against counties are subject to compromise by county boards and they may in the absence of bad faith, fraud, collusion, or other vitiating elements settle litigation against the county. See 20 C. J. S. 1261, sec.

303. In the absence of evidence to the contrary, the law presumes that public officers have complied with the law and that their proceedings are valid. See *Majerus v. School District,* 139 Neb. 823, 299 N. W. 178; *Kelly v. Broadwell,* 3 Neb. (Unof.) 617, 92 N. W. 643. Therefore, since there is no evidence in this record to the contrary this court will presume that the county board properly and regularly adopted the resolution of August 25, 1942, within the law and authority conferred upon them.

In *Hansen v. Cheyenne County,* 139 Neb. 484, 297 N. W. 902, this court held that, "County commissioners act quasi judicially in passing upon claims against the county, whenever their action is not merely a formal prerequisite to the issuance of a warrant, but involves the determination of questions of fact, upon evidence or the exercise of discretion in ascertaining or fixing the amount to be allowed." And, "If a claim is one upon which judicial action is required by the county board, the passing upon the claim is a judicial act and unless appealed from cannot be disturbed." See, also, *Heald v. Polk County,* 46 Neb. 28, 64 N. W. 376. The case of *Campbell v. Boyd County,* 117 Neb. 186, 220 N. W. 240, is authority for the proposition that the action of a county board in allowing a claim by way of compromise of a pending claim is an exercise of judicial power on the part of the board.

Only recently this court reaffirmed the general rule that, "the dismissal of an appeal from an appellate court without an examination of the case upon its merits operates as an affirmance of the judgment appealed or attempted to be appealed from." *Power v. Federal Land Bank,* 141 Neb. 139, 2 N. W. 2d 924. We must conclude then that when the county attorney's appeal to the district court from the action of the county board in passing the resolution and allowing relator's claim was duly dismissed in the district court for Douglas county such dismissal operated as an affirmance of the county board's judicial action. The allowance of the claim thereby became final, superseded, and was defensive of, the three actions then pending upon appeal. See 20 C. J. S. 1261, sec. 303.

It was held in *State v. Board of County Commissioners of Cass County,* 53 Neb. 767, 74 N. W. 254, that, after the statutory period for appeal by a taxpayer has passed, "One in whose favor a claim has been duly allowed by a county board may, by mandamus, compel the issuance of a warrant for the payment of such claim." In this connection, the duty of the county clerk, respondent herein, is fixed by section 26-115, Comp. St. Supp. 1941, and the remedy of mandamus, upon refusal to perform the duty, is awarded by section 20-2156, Comp. St. 1929.

Nevertheless, it is respondent's contention that under the provisions of section 20-2157, Comp. St. 1929, and by reason of the opinion of this court in *Lobeck v. State,* 72 Neb. 595, 101 N. W. 247, the relator has an adequate remedy at law by the prosecution to judgment of the three pending appeals involved in the resolution of the county board. Under the undisputed facts, which are supported by applicable law, the latter precedent relied upon by respondent is clearly distinguishable from the case at bar. It would unnecessarily prolong this opinion to recite these distinctions in detail. Suffice it to say, that if the county attorney's appeal from the resolution and allowance of relator's claim were still pending in the district court for Douglas county the precedent would be pertinent, but otherwise it has no similarity.

It is conceded that by statute (section 20-2157, Comp. St. 1929), and precedent of this court, the writ of mandamus, "may not be issued in any case where there is a plain and adequate remedy in the ordinary course of the law." *State ex rel Sutton v. Towl,* 127 Neb. 848, 257 N. W. 263. However, there is ample authority that the mere fact that there is another remedy at law will not prevent the issuance of a writ of mandamus unless the other remedy is adequate to afford relief upon the very subject matter involved, a remedy appropriate and effectual to enforce the right or compel performance of the particular duty in question, and, a remedy to which the relator may at all times resort for full relief against the party from whom the duty is owing as

distinguished from one against a third person. See 38 C. J. 561; 34 Am. Jur. 838, sec. 44; *State ex rel. Farmer v. Grand Island & W. C. R. Co.*, 27 Neb. 694, 43 N. W. 419; *State ex rel. Butler County Agricultural Society v. Coufal*, 1 Neb. (Unof.) 128, 95 N. W. 362; *Hopkins v. State ex rel. Omaha Cooperage Co.*, 64 Neb. 10, 89 N. W. 401; *State ex rel. Luben v. Chicago & N. W. R. Co.*, 83 Neb. 524, 120 N. W. 163.

Under the circumstances appearing in this case, we decide that the three appeals still pending in the district court for Douglas county meet none of these requirements and afford relator no adequate remedy in the ordinary course of the law which would bar his right to mandamus as prayed by him.

The judgment of the trial court was correct, and it is hereby affirmed.

AFFIRMED.

W. L. WISTROM, APPELLEE, V. C. A. FORSLING, SHERIFF, ET AL., APPELLANTS.
14 N. W. 2d 217

FILED APRIL 28, 1944. No. 31524.

1. **Judgment.** Where a court has jurisdiction of the parties and the subject matter of the action, a judgment rendered is not void and subject to collateral attack, even though the court was in error in holding that a cause of action was properly stated.
2. ———. There is no connection between jurisdiction and the sufficiency of the allegations of a petition to state a cause of action.
3. ———. Where the allegations of a petition are sufficient to inform the defendant what relief the plaintiff demands, the court having the power to grant it in a proper action, jurisdiction exists.
4. ———. If a defendant, served with a summons in a county other than where the action is brought pursuant to section 20-504, Comp. St. 1929, desires to assert the invalidity of such service, he must do so directly in that action and not collaterally, where the petition shows that the court has jurisdiction of the subject

matter of the action and where a summons has been served upon a resident defendant.

APPEAL from the district court for Kimball county: J. LEONARD TEWELL, JUDGE. Opinion on motion for rehearing of case reported in 143 Neb. 294. *Former opinion modified, former judgment reversing case and dismissing action adhered to and motion for rehearing denied.*

Torgeson & Halcomb and *Chambers, Holland & Locke,* for appellant.

P. J. Heaton and *John H. Kuns, contra.*

Heard before SIMMONS, C. J., PAINE, CARTER, CHAPPELL and WENKE, JJ., and POLK and NUSS, District Judges.

CARTER, J.

Our first opinion in this case will be found in 143 Neb. 294, 9 N. W. 2d 294. In that opinion we determined that the petition filed in the municipal court in Lincoln was sufficient to confer jurisdiction over the plaintiff who was served with process in Kimball county. In determining that question we said that the petition in the municipal court "did state a joint cause of action against Carr and the plaintiff here and that on the basis of the petition summons was properly issued for service in Kimball county, Nebraska." On motion for a rehearing it is pointed out that an endorser of a negotiable instrument must be given notice of dishonor by nonpayment, otherwise such endorser is discharged. Comp. St. 1929, sec. 62-701. The petition filed in the municipal court failed to allege any notice of dishonor to the endorser. It is then urged that as plaintiff failed to state a cause of action against the endorser the municipal court judgment is wholly void. For the purposes of this opinion we concur in the view that the petition filed in the municipal court did not state a cause of action against the endorser and that a demurrer thereto, if timely made, should have been sustained. 10 C. J. S. 1231, sec. 616. The sole question is whether this makes the judgment void so that it may be successfully attacked collaterally.

It seems to be the rule that allegations immaterial and wholly insufficient in law may be sufficient to "set the judicial mind in motion," or to "challenge the attention of the court," and to give actual jurisdiction, though a wrongful one, which will shield the proceedings from collateral attack. "The complaint may seek a specific enforcement of some contract or trust concerning real estate. It may show on its face that the contract was made or trust arose by parol and is barred by the Statute of Frauds; that it is barred by the Statute of Limitations; that the plaintiff is an administrator while the cause of action belongs to the heirs; that the defendant was disabled by law from making such a contract or becoming such a trustee; that no cause of action has yet arisen for want of a demand and refusal, and yet a decree specifically enforcing the same is not void, although no approach towards stating a cause of action is made. * * * A large number of cases are cited * * * where the judgment is not void although the affidavit, complaint or petition showed affirmatively that the plaintiff *had no cause of action whatever.* These illustrations show that there is no connection between jurisdiction and sufficient allegations. In other words, in order to 'set the judicial mind in motion,' or to 'challenge the attention of the court,' it is not necessary that any material allegation should be sufficient in law, or that it should even tend to show facts that are sufficient. If that were the rule, the absence of any material allegation would always make the judgment void, because it cannot be said that such a complaint has any tendency to show a cause of action. It will be seen from the cases about to be cited, that, when the allegations are sufficient to inform the defendant what relief the plaintiff demands—the court having power to grant it in a proper case—jurisdiction exists, and the defendant must defend himself." Vanfleet, Collateral Attack, p. 80. See, also, Freeman, Judgments (5th ed.) 2692.

Our decisions appear to adhere to the foregoing rule. In *Dryden v. Parrotte,* 61 Neb. 339, 85 N. W. 287, we said: "Whether the facts stated in the petition constituted a

cause of action and entitled the plaintiffs to relief, was a judicial question which the trial court had authority to consider and decide; and it is a universal principle—an axiom of the law—that where a court has jurisdiction of both the subject-matter and the parties, power to decide implies authority to decide either way—to reach either a right or a wrong conclusion—and, in conformity therewith, to pronounce a judgment that will be conclusive upon the litigants and those in privity with them, unless reversed, vacated or modified in an appellate or other direct proceeding instituted for that purpose. The sufficiency of the petition is not a test of jurisdiction; although it may be defective in substance it will support a judgment if the court has authority to grant the relief demanded and the facts upon which the demand is based are intelligibly set forth."

In *Logan County v. Carnahan,* 66 Neb. 693, 95 N. W. 812, we said: "The court having jurisdiction to hear and determine the right of a county to enforce a tax lien and to decree foreclosure and sale of real estate in satisfaction thereof, and the county having authority under the statute to institute proceedings and maintain an action in its own behalf and as trustee for those other bodies for whom the taxes are levied, a decree rendered which determines the right of a county to maintain such an action, and directs a sale of the property, would not be subject to collateral attack, even though the court committed an error in holding the petition stated a cause of action. If, in such action brought by a county to foreclose a lien for taxes assessed on real estate, the petition is materially defective because of a failure to properly allege facts disclosing that prior to the institution of the suit to foreclose, the land upon which the tax was a lien had been sold by the county treasurer and tax-sale certificate issued therefor, this fact would not render a decree therein absolutely void for lack of jurisdiction and subject to collateral attack. The sufficiency of a petition is not the test of jurisdiction. Even though the court commits error in holding it sufficient if it had jurisdiction, such holding will not subject the judgment ren-

dered to collateral attack." See, also, *Howell v. Ross*, 69 Neb. 1, 94 N. W. 955; *Brandeen v. Lau*, 113 Neb. 34, 201 N. W. 665; *In re Guardianship of Warner*, 137 Neb. 25, 288 N. W. 39. We conclude, therefore, that the petition filed in the municipal court stated facts bringing the case within the jurisdiction of that court; and the judgment entered, even though based on a petition vulnerable to direct attack, is valid and not subject to collateral attack. Under the circumstances shown, the action was rightly brought in the municipal court of Lancaster county, and the summons properly issued for service on plaintiff in Kimball county, as provided by section 20-504, Comp. St. 1929. See *Hobson v. Cummins*, 57 Neb. 611, 78 N. W. 295; *Hess v. Lell*, 4 Neb. (Unof.) 476, 94 N. W. 975; *Barry v. Wachosky*, 57 Neb. 534, 77 N. W. 1080.

The objection to the sufficiency of the petition filed in the municipal court in failing to state a cause of action against the endorser is here raised by the maker of the note. This is not a matter available to the maker in a collateral attack upon the judgment. *Belcher v. Palmer*, 35 Neb. 449, 53 N. W. 380. See, also, 10 C. J. S. 1232.

Plaintiff relies upon *Burwell v. Gaylord*, 119 Minn. 426, 138 N. W. 685; *Witte v. Broz*, 111 Neb. 76, 197 N. W. 121; and *Adams v. Guthrie & Co.*, 113 Neb. 192, 202 N. W. 867. An examination of these cases reveals that the objections to the sufficiency of the petitions were raised in the original actions and not by collateral attack as in the case at bar. We agree with the rules of law announced in these cases, but they have no application here. It is urged, however, that the following language from the *Adams* case sustains plaintiff's position: "And, as this case does not come within the exceptions referred to in this statute, the indorser, C. E. Adams, was discharged. He had no interest in this case adverse to plaintiff, and was a mere sham defendant. This being true, the trial court erred in not sustaining the objection to jurisdiction presented by each of the defendants other than C. E. Adams, by way of special appearance, and in not sustaining the motion for judgment on that part of

defendants' answers wherein objection to jurisdiction over their respective persons was pleaded." This language is undoubtedly correct in its application to the facts in a case where the sufficiency of the pleadings is directly raised. But in the case at bar the pleadings have in effect been held sufficient and a judgment entered thereon. The entry of the judgment implies that the pleadings were sufficient to sustain the judgment, and no appeal having been taken, the judgment and the proceedings incidental to its procurement have become final and the right to retry such issues in a collateral proceeding does not exist. It is contended that section 62-701, Comp. St. 1929, creates an exception to the general rule. It provides: "Except as herein otherwise provided, when a negotiable instrument has been dishonored by non-acceptance or non-payment, notice of dishonor must be given to the drawer and to each indorser, and any drawer or indorser to whom such notice is not given is discharged." It is urged that a failure to plead a notice of dishonor not only discharges the obligation, but it has the effect of a satisfaction of the obligation. While we do not think the distinction is material, we are of the opinion that a discharge of an endorser within the meaning of section 62-701 is not the equivalent of a satisfaction of the obligation. This is evidenced by the provisions of section 62-721, Comp. St. 1929, as follows: "Notice of dishonor may be waived either before the time of giving notice has arrived or after the omission to give due notice, and the waiver may be express or implied." The fact that notice of dishonor may be waived either before or after the time for giving the notice is convincing proof that a discharge within the meaning of section 62-701 does not amount to a satisfaction of the obligation. See, also, *Kuhl v. Schlichtemeier,* 14 Fed. 2d 593.

We agree fully with the doctrine previously announced by this court that in a personal action the service of summons on a nominal defendant in the county where the suit is brought does not authorize the issuance of a summons to another county for the real defendant. But such an issue

must be raised directly where the subject matter of the action is within the jurisdiction of the court. It is not available in a collateral action such as we have here. The judgment obtained in the municipal court being valid, it is obvious that the action was rightfully brought in the municipal court of Lancaster county and, consequently, the issuance of summons to Kimball county for service on the plaintiff was in accordance with section 20-504, Comp. St. 1929. While it is true that fraud and collusion were alleged, our former opinion properly disposes of those questions in holding that there was no evidence to sustain the allegations.

Our former opinion is modified to the extent stated herein, the judgment reversing the case and dismissing the action is adhered to and the motion for a rehearing is denied.

M. A. LARSON, APPELLANT, V. FRANK MARSH ET AL., APPELLEES.

14 N. W. 2d 189

FILED APRIL 28, 1944. No. 31725.

1. **Officers.** Where a public officer has been clothed by statute with power to do an act which concerns the public interest or the rights of third persons, the execution of the power may be insisted on as a duty, although the wording of the statute is permissive merely and not peremptory.
2. ———. A ministerial act is one that is performed in response to a duty which has been positively imposed by law and its performance required at a time and in a manner or upon conditions which are specifically designated, the duty to perform under the conditions specified not being dependent upon the officer's judgment or discretion.
3. ———. That a public officer may be obliged to ascertain facts on the existence of which a duty to perform becomes clear and specific, does not of itself operate to convert the act into one judicial in nature.
4. ———. Where a statute invests an individual with a direct legal interest and the legal right to require the performance of a ministerial duty by a public officer, such officer may be required

to respond in damages for the breach of the duty owed to such individual.

5. **Elections.** The duty imposed upon the secretary of state by section 32-1175, Comp. St. Supp. 1941, to designate a candidate's post-office address after his name on the ballot, when the conditions prescribed by the statute exist, is a ministerial duty for the breach of which he becomes liable in damages for any injury proximately resulting therefrom.
6. **Pleading.** A demurrer to a petition which states a cause of action presents no question as to the extent of the recovery to be had or the rule that shall govern in measuring the damages.
7. **Damages.** Nominal damages may be recovered where a cause of action for a legal wrong is established and there is no proof of actual damages.
8. **Elections.** In an action against an election officer for damages for failure to place a candidate's post-office address after his name on the ballot as required by section 32-1175, Comp. St. Supp. 1941, the salary of the office sought by such candidate is not a proper element of damage for the reason that such damage is not proximately attributable to the wrongful acts complained of.

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

William L. Walker, for appellant.

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

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

CARTER, J.

This is an action for damages brought by the plaintiff, M. A. Larson, against the defendants, Frank Marsh, secretary of state, and John B. Quinn, deputy secretary of state, and their respective bonding companies, because of the failure of the defendant officers to comply with the request of plaintiff to designate and describe him on the 1942 Republican primary election ballot by placing after his name as a candidate for railway commissioner the words "Central City, Nebraska," as required by section 32-1175, Comp. St. Supp. 1941. The trial court sustained a general demur-

rer to the second amended petition upon which plaintiff elected to stand. The trial court thereupon dismissed the action and plaintiff appeals.

The petition alleges that the defendant, Frank Marsh, is the duly elected, qualified and acting secretary of state of the state of Nebraska and that the defendant, the Great American Indemnity Company, is the surety on his official bond. It also alleges that the defendant, John B. Quinn, is the duly appointed, qualified and acting deputy secretary of state of the state of Nebraska and that the defendant, the Century Indemnity Company, is the surety on his official bond. The petition further alleges that the plaintiff properly filed his name with the secretary of state as a Republican candidate for the office of railway commissioner on July 2, 1942. It is alleged that previous to July 1, 1942, one Ray R. Larson of Wayne, Nebraska, had filed as a Republican candidate for railway commissioner. Enclosed with the necessary filing papers was a letter signed by the plaintiff which contained the following: "Due to the fact that there will be another Larson on the Primary Ballot, I am requesting that my address be placed on the ballot as follows:—M. A. Larson Central City, Nebraska." Plaintiff alleges, also, that he informed John B. Quinn, deputy secretary of state, by telephone and letter of his desire to be identified on the ballot as "M. A. Larson, Central City, Nebraska."

It is alleged that the defendant officers violated the provisions of section 32-1175, Comp. St. Supp. 1941, and the terms of their surety bonds by willfully, maliciously, negligently and carelessly refusing and neglecting to comply with said request. As a result it is alleged that the defendant officers caused ballots to be printed in all counties of the state for the primary election held on August 11, 1942, without such requested designation appearing thereon. Plaintiff further alleges that he was well known over the state as M. A. Larson of Central City, Nebraska, and as a result of the failure of the defendant officers to comply with his request as required by section 32-1175, he was prevented and deprived of receiving all the votes intended for him.

The petition alleges that because of the resulting confusion of candidates, plaintiff was deprived of the Republican nomination for railway commissioner, that one John Knickrehm received the Republican nomination as a result thereof, and that said Knickrehm was elected to said office at the general election held on November 3, 1942. Plaintiff concluded his petition with a prayer for judgment for damages in the sum of $30,309, with interest and costs.

The sole question for our consideration is the correctness of the court's order in sustaining the demurrer to plaintiff's petition. In determining this question we will treat all pleadings of fact contained in the challenged petition and every reasonable and fair intendment which can be drawn therefrom as true.

The statute alleged to have been violated by the defendant officers provides in part as follows: "When two or more of the surnames of candidates for the same office are the same in spelling or sound, the Secretary of State * * * may on request of either of such candidates print on the ballot immediately after his or her name in not to exceed five words the post office address and occupation of such candidate." Comp. St. Supp. 1941, sec. 32-1175.

It is urged that no liability on the part of the defendant officers exists because of a breach of the duty imposed by the statute for the reason that such duty is permissive and discretionary only. This contention is largely based on the language of the statute in providing that the secretary of state *may* under certain conditions print the post-office address and occupation after the name of the candidate on the ballot. That the use of the word "may" means "shall" under such circumstances and imposes a positive duty cannot be questioned. The rule seems to be that where a public officer has been clothed by statute with power to do an act which concerns the public interest or the rights of third persons, the execution of the power may be insisted on as a duty, although the wording of the statute is permissive merely and not peremptory. We are of the opinion therefore that the statute imposes a positive duty upon the sec-

retary of state to perform the acts required by such statute when conditions exist which make the statute applicable.

It is contended by the defendants that when the secretary of state is requested by a candidate to have a designation placed after the candidate's name on the election ballot he is required to exercise judgment and discretion and, consequently, is exempt from liability because of the judicial character of the act. We think the duty prescribed by the statute was ministerial and that the contentions of defendants to the contrary cannot be sustained under the law.

A ministerial act has been defined as one performed in response to a duty which has been positively imposed by law and its performance required at a time and in a manner or upon conditions which are specifically designated, the duty to perform under the conditions specified not being dependent upon the officer's judgment or discretion. Mechem, Public Officers, 442. The fact "that a necessity may exist for the ascertainment, from personal knowledge, or from information derived from other sources, of those facts or conditions, upon the existence or fulfillment of which, the performance of the act becomes a clear and specific duty, does not operate to convert the act into one judicial in its nature." *First Nat. Bank of Key West v. Filer*, 107 Fla. 526, 145 So. 204. See, also, *Grider v. Tally*, 77 Ala. 422.

Defendants urge that the duty imposed by the statute under consideration is a duty owing solely to the public and not to the particular candidate. We agree that if the duty is owing solely to the public, an individual has no right of action against an officer for a breach thereof. *McConnell v. Dewey*, 5 Neb. 385; *School District v. Burress*, 2 Neb. (Unof.) 554, 89 N. W. 609; *Wilson v. Spencer*, 91 Neb. 169, 135 N. W. 546. But when the statute, as here, invests an individual with a direct interest and the legal right to require its performance, an officer may be required to respond in damages for the breach of the duty owed to such individual. It is only where the duty is owing solely to the public that the public officer who fails in performing the duty is exempted from liability. The rule is aptly stated by an au-

thoritative text writer as follows: "So it is immaterial that the duty is one primarily imposed upon public grounds and therefore a duty owing primarily to the public, if, notwithstanding, the individual has in it a distinctive and direct interest and the legal right to require its performance; the right of action springs from the fact that the private individual receives a special and peculiar injury from the neglect in performance against which it was in part the purpose of the law to protect him." Mechem, Public Officers, 448. We think the correct rule is that where a statute imposes on a public officer the performance of ministerial duties in which a private individual has a special and direct interest, the officer will become liable to such individual for damages which he may proximately sustain in consequence of the failure or neglect of such officer to perform the duty or to perform it properly. *Fidelity & Deposit Co. v. Cone,* 138 Fla. 804, 190 So. 268.

That the plaintiff had a special and direct interest in the performance of the ministerial act by the secretary of state is self-evident from a reading of the statute. It is a candidate who meets the conditions prescribed by the statute who may require the performance of the ministerial duty by the secretary of state. The fact that it is left to the candidate affected to invoke the provisions of the statute, evidences legislative recognition that the candidate who comes within its provisions has a direct interest in its enforcement. We are convinced therefore that plaintiff has stated a cause of action in his petition and that the demurrer thereto should have been overruled.

In the case at bar there was a clear legal duty on the part of the defendant officers to designate the post-office address after plaintiff's name on the ballot. Public officers must be held to a faithful performance of their ministerial duties, and where a private individual has a special and direct interest, the officer becomes liable in damages for any injury which he may proximately sustain in consequence of his breach of duty. Ordinarily where there is a wrong there is a remedy, and where a public officer disregards his minis-

terial duties he becomes liable to individuals who sustain special damages because of a breach thereof. *Horner v. Terpin,* 63 S. Dak. 309, 258 N. W. 140; *Amy v. The Supervisors,* 11 Wall. 136, 20 L. Ed. 101; *State v. Title Guaranty & Surety Co.,* 27 Idaho 752, 152 Pac. 189.

Complaint is made that the damages alleged are not properly recoverable in an action such as we have before us. A petition is not vulnerable to general demurrer merely because the extent of recovery is not correctly alleged or the correct measure of damages set out. In *Horner v. Terpin, supra,* the court in discussing this subject said: "There was an absolute right in the plaintiff to have the particular duty performed. The complaint alleges a breach of duty by the treasurer within the terms of each of the bonds given as required by statute for the faithful performance of the duties of his office, entitling plaintiff at least to nominal damages. * * * We express no opinion as to the measure of damages. A demurrer to a complaint which states a cause of action presents no question as to the extent of the recovery to be had or the rule that shall govern in measuring the damages." We conclude therefore that plaintiff, if the allegations of his petition be true, has suffered an injury at the hands of the defendant officers which would entitle him to recover all damages proximately resulting therefrom and which, in any event, would entitle him to a judgment for nominal damages. "Nominal damages may be recovered where a cause of action for a legal wrong is established, but there is no proof of actual damages." 25 C. J. S. 466.

Plaintiff alleges that he expended $309 in making his campaign for the Republican nomination for railway commissioner and that this is a damage resulting proximately from the injury sustained. He also alleges that he has been damaged to the extent of $30,000, the total of six years' salary at $5,000 a year. It is fundamental that plaintiff can recover only such damages as proximately result from the injury inflicted. The injury in the present case is the result of the failure of the defendant officers to designate the post-office address of plaintiff on the primary election

ballot. He is in no position to claim damages because he was not nominated for the office of railway commissioner because such damage cannot be shown to be the proximate result of the breach of duty on the part of the defendant officers. The question whether the expenses incurred in making his primary election campaign is an injury proximately resulting from the breach of duty charged may be dependent upon the nature of the evidence produced with reference thereto. The evidence not being before us, we are in no position to decide the question at this time.

We are of the opinion, however, that defendants are clearly right in their assertions that the salary claimed as damages is too remote and too speculative to be considered a damage proximately resulting from the breach of duty charged. In *Hill v. Carr*, 186 Ill. App. 515, the court said: "It is a well-settled principle of law that if any independent agency intervenes between the cause complained of and the injury inflicted, to which the injury might be attributable, then no recovery could be had as it would not be the proximate cause. Under these counts of the declaration it appears that an election was to be held in November following, for which the appellant must be voted for, and at which he must receive a requisite number of votes before he could obtain the office which he alleges he was deprived of, and if he had failed to receive a plurality of the votes he would have been deprived of the office. It appears to us that the cause alleged in these four counts is too remote from the acts of wilfulness complained of and that it cannot be said that the loss of this office was directly attributable to the acts of appellees in refusing to count such votes at the primary election, and we believe that the court did not err in sustaining the demurrer to these four counts and each of them." See, also, *Judd v. Polk*, 267 Ky. 408, 102 S. W. 2d 325; *Frank v. Eaton*, 225 App. Div. 149, 231 N. Y. Supp. 477.

We conclude that the petition states a cause of action and that the trial court was in error in sustaining defendants' demurrer and dismissing the action. The case is therefore

reversed and the cause remanded for further proceedings in accordance with this opinion.

REVERSED.

HENRY L. MCGOWAN, APPELLANT, V. GEORGE NEIMANN ET AL., APPELLEES.

14 N. W. 2d 326

FILED APRIL 28, 1944. No. 31691.

1. **Adverse Possession.** The plea of title to land by adverse possession to be effective must be proved by actual, open, exclusive and adverse possession under claim of ownership for the full statutory period of ten years.
2. ———. Where a fence has been constructed as a boundary line between the property of two landowners, one of whom claimed ownership to such fence line for the full statutory period of ten years, and is not interrupted in his possession or control during that time, he will, by adverse possession, gain title to such land as may have been improperly enclosed with his own land.

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

Torgeson & Halcomb, for appellant.

R. P. Kepler and *John H. Kuns, contra.*

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

MESSMORE, J.

This action presents a boundary line dispute, as to the division line between the east and west half of section 18, township 17 north, range 51, west of the 6th P. M., in Morrill county, Nebraska. Plaintiff contends that he has been in actual, open, exclusive and adverse possession of the land which he purchased for a period of ten years or more, and thereby became the owner of 20.49 acres of land, the strip of land involved in this action.

Plaintiff's petition alleges, in substance, that he became owner on January 29, 1925, of the east half of section 18, township 17 north, range 51, west of the 6th P. M., described by metes and bounds; further alleges adverse possession ten years prior to the removal by defendants of an old division line fence and the erection of a new fence by the defendants in the spring of 1938.

Defendant George Neimann is the owner of the northwest quarter, and defendant A. J. Heinlein is the owner of the southwest quarter, of the section. The controversy is over the line running north and south across the section and separating the land of the plaintiff from that of the defendants. Plaintiff contends that the true line is not one dividing the section equally in half, the line contended for by the defendants, but that the true line is one arrived at by metes and bounds as described in the petition, and which placed it on a line almost parallel with the center line but at a sufficient distance farther west to give the plaintiff the 20.49 acres of the west geographical half of the section to which the defendants claim ownership.

The defendants' answers and cross-petitions admit their ownership of lands heretofore described; deny the allegations of the plaintiff's petition and admit the boundary line is in dispute. In a previous trial the trial court found generally in favor of the defendants and against the plaintiff, and that the action was brought under section 34-301, Comp. St. 1929, which provides for court action for settling disputed corners; further that the pleadings did not raise the issues of recognition and acquiescence of boundaries or adverse possession. The court fixed the boundary line as contended for by defendants, and entered decree accordingly.

On appeal to this court, in the case of *McGowan v. Neimann,* 139 Neb. 639, 298 N. W. 411, the cause was remanded for a new trial on the issues presented by the pleadings, holding that "section 34-301, Comp. St. 1929, is broad enough to, and does, authorize action in equity to determine boundaries of real estate, the ownership of which is in

whole or in part in dispute." In the instant case, the pleadings are the same.

The reply of the plaintiff to the answers and cross-petitions of the defendants is, in effect, a general denial. At the conclusion of the trial, defendants were granted leave to amend their cross-petitions and answers to conform to the evidence, alleging, in substance, that in June, 1928, the plaintiff acquiesced in and agreed to surrender the strip of land in dispute, and took possession of other land in lieu thereof, and has violated the agreement.

The trial court found the boundary line to be as contended for by the defendants and as set forth in what is referred to as the Chaloupka survey in the spring of 1928; found the survey to be correct in establishing the true section corners and boundaries and confirmed the survey; further that the plaintiff failed to establish adverse possession of the disputed strip of land, although the plaintiff actually held possession of the strip since his purchase in 1925; that in June, 1928, his statements and agreements with defendants and the witness Delashmett interrupted his adverse and hostile possession thereof; that from June, 1928, until this case was filed in May, 1938, his possession was not adverse. From this decree plaintiff appeals.

The record discloses: The plaintiff purchased the land described in the petition under an agreement for a warranty deed January 29, 1925, from one Roland Rodman. At the time of purchase, the boundaries of the land were pointed out to him; that is, the division fence as it existed previous to, at the time of and until removal by the defendants in the spring of 1938. From the time of taking possession of the land plaintiff's tenants farmed on the west up to the line; on the south up to the line, and on the north, with the exception of a small patch of alfalfa. On the east there is a strip of sod inside of the fence. The road on the east at the time was a trail but was improved in 1928 and moved a little farther to the east, creating a narrow strip of land, which he also farmed, between the old fence and the new fence. The plaintiff's testimony was to the effect that the new road was created two or three rods farther east.

Exhibit 1, received in evidence, is a plat of the east half of section 18, prepared by the county surveyor (Drake at that time), employed by the plaintiff to establish the boundary lines of his land. The surveyor was informed by plaintiff of his claim, and the land was checked by both. The surveyor furnished plaintiff a description of his land by metes and bounds. The starting point was the southeast corner of the east half of section 18, an accepted corner with concrete markers, on the plat of the surveyor's record, as disclosed by the records of Morrill county. County surveyor Chaloupka made a survey in May, 1928, and the trial court found that the Chaloupka survey resulted in the establishment of the true section corner, quarter-section corner, and the center of said section 18.

The evidence further discloses that the land in question had, for a number of years, been farmed up to the old fence line, and that the old fence had remained in such position for a period of more than 25 years. About the middle of June, 1928, defendant George Neimann drove to Kimball, met and talked with the plaintiff. He testified he told plaintiff: "I found out that our fences and old lines wasn't on the corners, the surveyor showed us the corners, and I would like him to move east so we could give ours up on the west and move east also because I was having trouble on the west of me with a farmer * * * ." The plaintiff said "he didn't want any trouble moving east, but, he says, 'In time if I can move east without any trouble you can have your's on the west.'" He further testified that the plaintiff did move east in 1935 and plowed the land from the old line to the road. This strip of land was put in crops and has been in constant cultivation. A few days later defendant A. J. Heinlein and the witness Delashmett called on the plaintiff at his home. Defendant Heinlein testified that he told plaintiff: "* * * we ought to do something about that line; that it had been drifting along and that there had been a dispute, and that we ought to get something done. Q. What did he say to that? A. And he said to let it go a little while until he seen what he would get on the east side. * * * I told

him that we could just as well fence it up and get these lines on the place where they belonged, and if anything happened that he should lose that I would give it back to him. Q. What did he say to that? A. He agreed to that; he didn't want to be moving back and forth; he said he would rather do it all at once. Q. Now, do you know whether or not he ever did get that on the east straightened out—and get possession of it? A. Yes; I am sure he got it."

The witness Delashmett testified that plaintiff said, "he wasn't interested in giving up anything until he got some land on the east—possession of that without any trouble" and that "he would like to be fair about anything." The witness testified that plaintiff told him "if he got that east side straightened up then he was willing to try to get this west side straightened up." There is some evidence that in accordance with the survey of 1928 there was a move of land lines among owners in an attempt to meet the geographical lines as established by such survey. Defendant Neimann further testified that he had a conversation with one Mayer, who owned land east of section 18, in township 17, and who testified he moved east to the line of the new survey; that after this conversation Mayer and defendant Neimann went to see the plaintiff and told him "that the land on the east side was there for him if he would move over there and that we could move east on the center line on the dividing—middle of the Section." All of these conversations were denied by the plaintiff, in that he did not remember what was said.

This brings us to the question, whether or not the conversations heretofore related were sufficient to consummate an agreement between plaintiff and defendants so that the claimed adverse possession of the plaintiff was interrupted and of no avail. Did the plaintiff, by taking possession of the strip on the east side of this section, ratify the conversations as to agreements and thus interrupt his adverse possession from and after June, 1928?

The plea of title to land by adverse possession must be proved by actual, open, exclusive and adverse possession

under claim of ownership for the full statutory period of ten years. *Conkey v. Knudsen,* 135 Neb. 890, 284 N. W. 737.

The plaintiff did not cease farming the strip of land up to the old line; nor did he, by his action, show that he had any intention of doing so. Nothing more was said by the defendants; nor was anything done from and after June, 1928, until the spring of 1938, when defendants removed the old line fence and erected another fence, in accordance with the Chaloupka survey.

The defendants contend that agreements made between adjoining landowners as to boundary lines are enforceable, and cite *Clark v. Thornburg,* 66 Neb. 717, 92 N. W. 1056, and *Ryan v. City of Lincoln,* 85 Neb. 539, 123 N. W. 1021. In the *Clark* case it is disclosed that an understanding existed between the parties that the location of the fence was temporary and that it should be removed when the true line was finally established. In *Ryan v. City of Lincoln, supra,* the plaintiff specifically testified that when he took title to the land he would not assert title against the city, which shows that plaintiff never intended to take title against the city by adverse possession.

In the instant case there was no agreement between the parties that the boundary should be changed to what is contended to be the true division line. From an analysis of the conversations which defendants contend constitute the agreement, we gather that plaintiff wanted to be sure that they had a right to dispossess him and that until they did dispossess him he would let the line stay where it was and where he claimed it was,—the old fence line.

The facts of this case show the applicability of the rule announced in *Ohme v. Thomas,* 134 Neb. 727, 279 N. W. 480, in which this court held: "Where a fence is constructed as a boundary fence between two properties, and where the parties claim ownership to the fence for the full statutory period of ten years, and are not interrupted in their possession or control during that time, they will, by adverse possession, gain title to such land as may have been improperly inclosed with their own."

Our attention is directed to exhibit 2, being the contract for warranty deed entered into by the plaintiff and the grantor Rodman, which states the description of the land to be the east half of section 18, township 17 north, range 51, a legal description. The contention probably is that the exhibit indicates that the east half-section, by government survey instead of a tract of land by metes and bounds, was sold to the plaintiff. Nothing further appears to have been presented by the defendants on this proposition other than directing our attention to this exhibit, perhaps on the theory that the rule sometimes announced, that the adverse possession of land cannot be extended beyond the calls of the deed means that possession by construction cannot be extended beyond the calls of the written instrument by virtue thereof, is applicable. However, if land be actually occupied beyond the calls of the deed, hostile to the true owner, the written instrument does not preclude such occupancy from being adverse. The occupancy does not refer to the deed, but to the fact itself and its hostile character. See *Frank v. Smith,* 138 Neb. 382, 293 N. W. 329, 134 A. L. R. 458; also *Rice v. Kelly,* 81 Neb. 92, 115 N. W. 625.

We conclude that the plaintiff has established adverse possession to the strip of land in controversy, as required by law.

The judgment of the district court is reversed and the cause remanded, with directions to enter judgment establishing the boundaries to the east half of section 18 as prayed for in plaintiff's petition, and defendants be permanently enjoined from interfering with such established boundaries.

REVERSED.

MARIE LEE, APPELLANT, V. LINCOLN CLEANING & DYE WORKS ET AL., APPELLEES.

14 N. W. 2d 227

FILED APRIL 28, 1944. No. 31755.

1. **Statutes.** If an act is complete and independent in itself, it may modify the provisions of existing statutes without controverting the provisions of the Constitution relating to amendments.
2. ———. Section 20-1912, Comp. St. Supp. 1941, as interpreted in *Barney v. Platt Valley Public Power and Irrigation District, ante*, p. 230, 13 N. W. 2d 120, does not apply to the filing fee as provided in section 48-175, Comp. St. Supp. 1941, which is a part of chapter 57, Laws 1935, it being a complete and independent act by which filing fees in compensation cases were placed in a class by themselves by legislative enactment.
3. ———. A particular intention expressed in a legislative act, if in conflict with a general intention expressed in a later enactment, should be given effect, leaving the latter act to operate only outside of the scope of the former.

APPEAL from the district court for Lancaster county: FREDERICK E. SHEPHERD, JUDGE. *Motion to dismiss appeal overruled.*

Frederick J. Patz, for appellant.

Baylor, TouVelle & Healey, contra.

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

MESSMORE, J.

The appellees move to dismiss this appeal for the reason that this court is without jurisdiction of the subject matter, in that the appellant neglected and failed to deposit with the clerk of the district court for Lancaster county a docket fee, in the amount of $20, as is required by law. Attached to the motion is a certificate of the clerk of the district court, setting forth that the filing fee of $20 was never paid through the office of the clerk of the district court. This court has held in *Barney v. Platte Valley Public Power and Irrigation District, ante*, p. 230, 13 N. W. 2d 120, the following:

"The supreme court has no power to exercise appellate jurisdiction in proceedings to review the judgment of a district court in civil cases unless the appellant shall have filed a notice of appeal and deposited the docket fee in the office of the clerk of the district court within the time fixed and as provided in section 20-1912, Comp. St. Supp. 1941."

This court in *Scott v. Dohrse*, 130 Neb. 847, 266 N. W. 709, held: "Chapter 57, Laws 1935, is a complete and independent act in itself" in ruling on a motion to refund costs collected by the clerk of the supreme court for the docketing of an appeal, under section 33-105, Comp. St. 1929, which provides, in substance, that at the time of filing each transcript or an original suit or proceeding in the supreme court there shall be paid to the clerk the sum of $20 as a docket fee.

Section 48-175, Comp. St. Supp. 1935 (a part of chapter 57, Laws 1935, and now appearing as section 48-175, Comp. St. Supp. 1941), provides: "No filing fees shall be charged by the clerk of any court for any service required by this Act" specifically referring to compensation cases under such act, which is a complete and independent act in itself.

Appellees contend that section 20-1912, Comp. St. Supp. 1941, a procedural act making the payment of a docket fee mandatory and making no exception in compensation cases, would, in effect, nullify or make inapplicable *Scott v. Dohrse, supra,* and that the procedural act passed in 1941 is a complete and independent act in itself.

Chapter 57, Laws 1935, is a complete and independent act in itself. True, it is in conflict with section 20-1912, Comp. St. Supp. 1941. Nevertheless, in so far as said section 48-175 is concerned, it modifies section 20-1912, Comp. St. Supp. 1941, in so far as said section applies to compensation cases. The very nature of the workmen's compensation act and the purpose for which it has been established, which we need not detail, discloses conclusively the reason for its being complete, separate, distinct and independent, as against civil cases generally, to which section 20-1912, Comp. St. Supp. 1941, applies. In view of *Scott v. Dohrse,*

supra, and in view of the workmen's compensation law, it is obvious that the legislature did not intend that the provisions of section 20-1912, Comp. St. Supp. 1941, would apply to the workmen's compensation law, in so far as filing fees are concerned. *Scott v. Dohrse, supra,* pronounces the well-established rule: "If an act is complete and independent in itself, it may * * * modify the provisions of existing statutes without controverting the provisions of the Constitution relating to amendments." See, also, *State ex rel. Crosby v. Moorhead,* 100 Neb. 298, 159 N. W. 412; *Sheridan County v. Hand,* 114 Neb. 813, 210 N. W. 273.

The legislative intent was to furnish a sure method of adjudicating compensation claims without expense to the injured workman. We know of no limitation on the power of the legislature to permit litigants to pursue legal remedies without expense to them. The state has taken a sympathetic interest in injured workmen and their claims for compensation, and this matter is within the discretion of the legislature. *Scott v. Dohrse, supra.*

It will be observed that the general statute governing appeals in civil cases was adopted in 1941, while the special act dealing with appeals in compensation cases, they also being civil cases, was enacted in 1935. Does the later general statute supersede the earlier special enactment?

The general rule in such cases is: "It is a fundamental rule that where the general statute, if standing alone, would include the same matter as the special act, and thus conflict with it, the special act will be considered as an exception to the general statute, whether it was passed before or after such general enactment. Where the special statute is later, it will be regarded as an exception to, or qualification of, the prior general one; and where the general act is later, the special statute will be construed as remaining an exception to its terms, unless it is repealed in express words or by necessary implication." 59 C. J. 1057.

In *State ex rel. Missouri P. Ry. Co. v. Clarke,* 98 Neb. 566, 153 N. W. 623, this court held: "A particular intention expressed in a legislative act, if in conflict with a general

intention expressed in a later enactment, should be given effect, leaving the later act to operate only outside of the scope of the former."

In *State ex rel. Lutt v. Raymond Township*, 100 Neb. 788, 161 N. W. 426, we said: "The enactments do not contain contradictory or inconsistent provisions. The act of 1889 contains a special provision relating to highways in the Sioux Indian reservation. The act of 1901 is a general one and does not in direct terms or by implication amend or repeal the former law. Both may be enforced as enacted." See, also, *State v. Kastle*, 120 Neb. 758, 235 N. W. 458; *In re Yellow Cab & Baggage Co.*, 126 Neb. 138, 253 N. W. 80; *Plattsmouth Bridge Co. v. Turner*, 128 Neb. 738, 260 N. W. 562. We necessarily conclude that section 48-175, Comp. St. Supp. 1941, remains in force, unaffected by the subsequent enactment of section 20-1912, Comp. St. Supp. 1941.

We conclude that section 20-1912, Comp. St. Supp. 1941, as interpreted in *Barney v. Platte Valley Public Power and Irrigation District, supra*, does not apply to filing fees as provided by section 48-175, Comp. St. Supp. 1941, which is a part of chapter 57, Laws 1935, it being a complete and independent act by which filing fees in compensation cases were placed in a class by themselves by special legislative enactment.

The motion to dismiss the appeal is overruled.

MOTION TO DISMISS OVERRULED.

NITZEL AND COMPANY, APPELLANT, V. WARREN NELSON ET AL., APPELLEES.

14 N. W. 2d 197

FILED APRIL 28, 1944. No. 31632.

1. **Usury.** The burden of proving usury as a defense to an action on a promissory note rests upon the party charging it unless usury is apparent on the face of the note.
2. **Pawnbrokers.** A service charge of $100 included as a part of a loan on which the statutory rate of interest under the 1941

small loan law is charged is a violation of such law and is sufficient to bring about a forfeiture of the loan and interest.

3. ———. In an action based upon an illegal contract by a licensee under the small loan law such licensee loses all right to collect any sum whatever on the indebtedness under the contract.

4. **Appeal and Error.** This being an action in equity it became the duty of this court to retry the issues of fact upon the evidence contained in the bill of exceptions and upon trial *de novo* of such questions of fact to reach an independent conclusion as to what findings were required upon the pleadings and all the evidence, without reference to the conclusion reached in the district court.

5. ———. In an action in equity where the evidence on material questions of fact is in irreconcilable conflict, this court will, in determining the weight of evidence, consider the fact that the trial court observed the witnesses and their manner of testifying, and must have accepted one version of the facts rather than the opposite.

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

Harry Grimminger, for appellant.

Evans & Lee, contra.

J. Jay Marx, amicus curiæ.

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

YEAGER, J.

This is an action in equity by plaintiff and appellant in five causes of action against Warren Nelson, Lyndell T. Nelson and Fred Shafer, defendants and appellees, to foreclose five chattel mortgages and one conditional sales contract given to secure the payment of five promissory notes, on account of delinquency in payment of the notes, and for the appointment of a receiver.

The first cause of action is for the foreclosure of a chattel mortgage securing a note for $1,508.18 bearing date of September 23, 1941, with interest at the rate of 9 per cent per annum, signed by Warren Nelson and Lyndell T. Nelson; the second is for the foreclosure of a chattel mortgage

securing a note for $816 bearing date of September 23, 1941, with interest at 9 per cent per annum, signed by Warren Nelson and Lyndell T. Nelson; the third is for the foreclosure of two chattel mortgages securing a note for $1,184 bearing date of August 19, 1941, with interest at 9 per cent per annum, signed by Warren Nelson and Lyndell T. Nelson; the fourth is for the foreclosure of a conditional sales contract securing a note for $1,706.65 bearing date of October 4, 1941, with interest at 9 per cent per annum, signed by Warren Nelson; and the fifth is for the foreclosure of a mortgage securing a note for $140.40 bearing date of August 18, 1941, with interest at 9 per cent per annum, signed by Warren Nelson.

To the petition setting forth the five causes of action defendants answered denying generally the allegations of the petition and charging, among other things, that the notes were usurious under the small loan law of the state of Nebraska and that by reason thereof plaintiff is barred of a recovery on each and all of said notes, but for the purpose of settling all claims offered to pay the amount claimed to be due on the fifth cause of action.

By reply plaintiff denied that the notes were usurious.

The action was tried to the court. Foreclosure of the fifth cause of action was decreed. As to the other four the court found that the notes were usurious under the small loan laws of the state and that they were therefore unenforceable and in accordance with that finding decree was entered against the plaintiff. From this decree plaintiff has appealed.

There are other issues presented by the pleadings but the only one requiring consideration on this review is that of whether or not the transactions involved are tainted with usury in violation of the statutes of the state since from an examination of the record it becomes clear that according to their tenor the notes were in default and plaintiff was entitled to foreclosure of the chattel mortgages and the conditional sales contract.

The instruments in question taken separately do not have

on their face the appearance of usury, hence the burden of so showing rests upon the defendants in this respect. 66 C. J. 305, sec. 299.

The particular sections of the statute which defendants contend that plaintiff has violated, the burden of which rests upon them to prove, are the following:

"Any licensee hereunder may contract for, collect, or receive interest or charges, upon any loan, which loan may be repayable in installments as may be agreed upon between the parties, not in excess of the following: (a) Interest at the rate of nine per cent per annum, computed on unpaid balances of the loan: Provided, such interest shall not be paid, deducted, or received in advance. (b) A service charge of one-tenth of the amount under one thousand dollars received and retained by the borrower, but no brokerage or service charge shall be made on any such amount in excess of one thousand dollars and such service charge shall not be paid, received or deducted in advance, but may be made payable in installments, computed on an actuarial basis together with the regular payments on the loan, and which service charge shall be deemed to have been earned in full at the expiration of twelve months from the date of such loan, and which shall be returned or credited to the borrower on an actuarial basis if the loan is paid or renewed within said twelve month period: Provided, a service charge shall not be contracted for, charged, collected or received more than once in any twelve month period on any renewal, extension or transfer of any loan unless the service charge of said loan which is being renewed, extended or transferred, is payable in installments computed on an actuarial basis during the period of the loan and the charge for any unexpired period is credited to the borrower; and provided further, that where loans are made for a period of less than twelve months, the service charge shall not exceed that part of ten per cent which the period of the loan bears to twelve months. In the event that a loan is made for a longer period than twelve months, an additional service charge may be made at the end of twelve months on the

unpaid balance, in the same manner and at the same rate as though a new loan was being made." Comp. St. Supp. 1941, sec. 45-143.

"It shall not be lawful for any lender to divide or split up applications for loans or to divide or split up loans under any pretext whatsoever, so as to require or exact any other or greater charges than prescribed herein. A licensee hereunder shall not be entitled to any charge whatsoever unless a loan is actually made. If interest or charges for any loan in excess of the amount of interest or charges hereinbefore prescribed shall be contracted for, collected or received by any licensee, the said licensee shall thereupon lose all of his right to collect or receive any sum whatsoever on said indebtedness." Comp. St. Supp. 1941, sec. 45-144.

It will be noted that the first section quoted provides that the maximum rate of interest shall be nine per cent per annum, computed on unpaid balances of the loan, with a provision that such interest shall not be paid, deducted or received in advance. The section also provides that a service charge or brokerage fee of ten per cent may be made on any amount less than one thousand dollars but that no such charge or fee shall be made on any excess over one thousand dollars, also that such charge or fee shall not be paid, received or deducted in advance, but may be made payable in installments computed on an actuarial basis together with the regular payments of the loan.

The next quoted section, it will be noted, makes it unlawful for the lender to divide or split up loans so as to require or exact any other or greater charges than those prescribed in the first quoted section. It also provides for the forfeiture of the right to collect in case of violation.

The principal contention of defendants is that the first four causes of action represent a single transaction in excess of one thousand dollars split up in such manner as to permit the plaintiff to exact service charges or brokerage fees in excess of one hundred dollars, the maximum allowed by the statute.

That this was but a single transaction in essence is be-

yond serious question. The three defendants so testify as well as J. H. Nitzel, president and manager of the plaintiff corporation. In his testimony with regard to this matter Nitzel pointed out that all of the amounts represented by the four notes with proper and legal charges were in the first instance included in a single note. In this connection his testimony was in part the following: (B. of E. 424, Q. 2226) "Q. Mr. Nitzel, it has been testified here by Mr. Nelson that Mr. Shafer was going to sign this note, and it was later testified that he was going to sign it only in the amount of $1184 guaranteed payment. What are the facts relative to whether Mr. Nelson advised you that Mr. Shafer was going to sign this note, and if he was, in what amount. That is the amount covering the first four causes of action. A. Well, to begin with, that was the understanding Mr. Nelson had given me,—was that Mr. Shafer was going to sign the note for the entire amount. That's how come I made the first note up for the four causes of action."

In the light of this statement we deem it unnecessary to refer to or discuss the other evidence supporting the contention that this was a single transaction split up into four promissory notes.

The splitting of the transaction is of no importance in itself since the statute does not condemn splitting loans but only splitting for the purpose of exacting greater charges than those prescribed. Comp. St. Supp. 1941, sec. 45-144.

It becomes necessary then to ascertain whether or not the defendants have sustained their burden of showing that the plaintiff has made greater exaction in interest charges, or service charges or brokerage fees, or both, than the statute permits.

Taking the causes of action in their order we find that the first note is for $1,508.18 with interest on unpaid balances at the rate of 9 per cent per annum. It is an installment note payable over a period of 18 months in monthly installments. According to the terms of the note no service charge is exacted. Defendants contend that notwithstanding the terms of the note there is included a hidden service

charge in excess of that allowed by law. They claim that the plaintiff's evidence in this case shows that in the note is in fact what amounts to a service charge in the amount of $330.43. This claim is supported by exhibit No. 12 which is the record of this transaction as entered on the books of the plaintiff, which carries this amount as a service charge. The defendants by analysis of the evidence and computation attempt to break it down into two separate items, namely $133.72 as 5 per cent commission on sale of equipment, and $196.71 service charge. This latter item is the equivalent of 15 per cent of all items included in the transaction except the commission charge.

The only explanation of this given by J. H. Nitzel, who handled the entire transaction, as gleaned from his testimony, is that when he made out the note covering the matter as a single transaction, which note did not become effective, he added all amounts together, added $100 as a service charge and made out the note for that amount, and when that deal did not go through four notes were drawn up for a like amount. He has not disclosed into what note or notes the $100 service charge was absorbed. In fact in his testimony, outside the exhibits introduced in evidence, he has wholly failed to break down or even attempt to break down the items going into this note or the note which is the basis of the fourth cause of action which will be discussed herewith. The only attempt on his behalf is made by his counsel in the brief, which attempt is without evidentiary basis or background.

For such further light as is obtainable it is necessary to resort to the contents of exhibits, the testimony of defendants and arithmetical computations.

In the first place this hidden service charge of $100 made a part of the loan on which is being charged 9 per cent interest is in violation of the statute which has been quoted herein. This in and of itself would be sufficient, since this is a single transaction, upon which to declare a forfeiture of the right of plaintiff to recover on any of these notes.

This court said in *Mack Investment Co. v. Dominy*, 140

Neb. 709, 1 N. W. 2d 295: "The legislature has the power to regulate interest, and legislation like that under consideration (the small loan act) is within the police power of the state." See, also, *Althaus v. State*, 99 Neb. 465, 156 N. W. 1038; *Griffith v. State of Connecticut*, 218 U. S. 563, 31 S. Ct. 132. Further in the same opinion, speaking to the effect of an excess charge made on a loan by a small loan licensee under a provision of the then statute which was in all substantial particulars the same as section 45-144, Comp. St. Supp. 1941, it was stated: "The action is based upon an illegal contract, * * *, and the plaintiff, as licensee, loses all right, under section 45-119, Comp. St. 1929, to collect any sum whatever on this indebtedness. The letter of the statute admits of no other interpretation by any construction."

In the second place, on defendants' analysis no reasonable conclusion can be arrived at other than that a service charge or service charges were made in excess of those permitted by statute.

Independent of the analysis and computation by defendants we have made one of our own which considers the first and fourth causes of action together as one transaction. Thus the first note, according to the books of plaintiff, embraces the sale of equipment in the amount of $587.50, insurance on equipment $62.50, loan $420, life insurance $107.75 and service charge, "18 mo. payt. service" $330.43, making a total of $1,508.18. The fourth embraces the sale of equipment in the amount of $1,971.50, less $420 called a down payment. This item appears to be a charge in the first and a credit in the fourth. To the balance of $1,551.50 for merchandise, $155.15, or 10 per cent, was added as a service charge, making the total of the face of the note $1,706.65. From all of this we have attempted to find out if there was any basis upon which to harmonize the testimony of Nitzel with these entries on the books of the plaintiff. We have found none.

It will be noted that as to the two causes of action the total of service charges is $485.58. In this, Nitzel says is a 5 per cent commission on sale of equipment. This com-

mission would amount to $127.95 leaving a balance charged in some other manner of $357.63.

One explanation as to a part of this amount appears to be that there is a loan service charge of $100 which, as has already been pointed out, would be illegal since it was included in the loan with interest charged thereon. Another is that it was in part accounted for by a "mark up" on the purchase price of equipment on account of credit extended. This contention finds no support since from the record it is clear that the "mark up" claimed and complained of by defendants was included in the recognized sale price of the equipment. If defendants were allowed credit against this amount for the illegal service charge of $100 there would still be $257.63, or slightly more than 10 per cent of the purchase price of the equipment, unaccounted for. If this credit be not allowed then there would be the entire amount of $357.63, or a little less than 14 per cent of the equipment purchase price.

Considering the first cause of action separately on the basis of the computation made by defendants, and on the theory most favorable to plaintiff there is a service charge of 15 per cent on the items going into the note. To do this, however, would be to allow plaintiff a 5 per cent commission on all equipment included in the notes which are the basis of the first and fourth causes of action. Considering the fourth on defendants' computation and the records of plaintiff it becomes necessary to find that there was a service charge of 10 per cent on the equipment sold for which payment was not received, or $155.15.

It cannot be said with any degree of accuracy or certainty that either of the analyses or computations is reflective of the transaction being examined in this action but either or both or the records of plaintiff show unmistakably a usurious transaction and a patent violation of the small loan laws of this state. On plaintiff's part there was not even the slightest evidentiary analysis from which an opposing conclusion could be predicated.

It may be well to note here another thing which weakens

further the contention of plaintiff that these charges are not service charges made by plaintiff. The fact is, as disclosed by the record, that Nelson bought no equipment from the plaintiff company. This merchandising transaction was with J. H. Nitzel as an individual. Why then would the items be set up on the books of the plaintiff as a service charge after computation of the total of the other items going into the notes? Is it not reasonable to infer from this method of making the entries that the charge was made by the plaintiff company rather than by Nitzel? If it was a charge made by the company it could not be anything other than a service charge on the loan transaction.

The duty of the court in the premises is clear and distinct.

Complaint is made that the note which is the basis of the second cause of action, considered as a separate transaction, is usurious and violative of the statutes quoted.

Without referring to it specifically it will be stated here that the evidence in this respect is so uncertain that if this cause of action were being considered as a separate transaction we could not say that the defendants had sustained the burden of showing by a preponderance of the evidence that the note was illegal as claimed.

What has been said with reference to the evidence supporting the contention of defendants in relation to the second cause of action may be said with like effect as to the third cause of action as a separate transaction.

In view of the fact that the fourth cause of action was discussed, considered and disposed of along with the first no separate discussion is here required.

By statute, on the consideration of this case, it being in equity, it became the duty of this court to retry the issues of fact upon the evidence contained in the bill of exceptions and upon trial *de novo* of such questions of fact, to reach an independent conclusion as to what findings are required upon the pleadings and all the evidence, without reference to the conclusion reached in the district court. Comp. St. 1929, sec. 20-1925. In such cases when the evidence on

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

From an examination of the record in this case we have arrived at the independent conclusion that the matters involved in the four causes of action discussed were but a single transaction split into four parts; that by reason thereof the notes carry within themselves an exaction of interest in excess of that permitted by law; that service charges are included in said notes illegally and in excess of amounts which may be exacted, all of which have the effect of rendering the said notes void and uncollectible.

We assume and have considered that the finding of the trial court depended in part upon the observation of the witnesses and their manner of testifying. We have taken this into consideration in reaching the conclusions arrived at here but we do not hesitate to say that independent of this no other conclusion could have been reached.

Other grounds for reversal have been assigned but they do not require discussion in the light of the finding on the matters discussed herein. Likewise there were other grounds upon which defendants urged in the district court and are urging here that this was an illegal and unenforceable transaction under the small loan law which, while we do not hold that they lack merit, we do not consider require determination in the light of the findings made on the questions discussed.

The decree of the district court is affirmed.

AFFIRMED.

DELORES MOYER, PLAINTIFF IN ERROR, V. STATE OF NEBRASKA, DEFENDANT IN ERROR.

14 N. W. 2d 220

FILED APRIL 28, 1944. No. 31746.

1. **Criminal Law.** In a proceeding to vacate an order of the district court granting probation, the correct practice requires a verified information stating specifically the conduct constituting a violation of probationary conditions, but a proceeding by motion, stating that defendant violated his probation, may be sustained, if defendant had timely notice of a hearing, the assistance of counsel, the testimony of witnesses, and a fair and impartial trial.
2. ———. By section 29-2215, Comp. St. 1929, the court is required to fix the conditions of the probation and may include therein directly or by reference those enumerated in this section of the statute.
3. ———. The right of the court to revoke probation depends upon a breach of the conditions of the probation by the probationer.

ERROR to the district court for Douglas county: JAMES M. FITZGERALD, JUDGE. *Reversed.*

William N. Jamieson, for plaintiff in error.

Walter R. Johnson, Attorney General, and *Carl H. Peterson, contra.*

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

YEAGER, J.

This is a criminal action wherein in an information filed in the district court for Douglas county, Nebraska, Delores Moyer, defendant there, plaintiff in error here, was charged with the criminal offense of uttering a forged bank check. Herein said Delores Moyer will be referred to as defendant and the state as defendant in error will be referred to as the state. To the information defendant entered a plea of guilty. On August 30, 1943, the court without pronouncing sentence and agreeable to the terms of sections 29-2214 and 29-2215, Comp. St. 1929, placed the defendant on probation in charge of John O. Hiddleston, Adult Probation Officer of Douglas county, Nebraska, for a period of two years.

Thereafter on September 21, 1943, the county attorney of Douglas county, Nebraska, filed in the action an information charging that on September 18, 1943, the defendant violated the terms and conditions of her probation. The particular charge against her was the following: " * * * in that said defendant, Delores Moyer, * * * did * * * move her place of residence without the consent of the Court and also stayed out on the streets of Omaha late at night from her place of residence; that she visited and associated with persons of disreputable and harmful chararter."

A formal arraignment was had on this information and defendant pleaded not guilty. Following this plea a hearing was had and evidence taken, at the conclusion of which defendant's probation was revoked and she was sentenced to serve a term of two years in the Nebraska Reformatory for Women at York, Nebraska. To reverse this judgment and sentence the defendant brings the case to this court by petition in error.

There are five assignments of error numbered 1, 2, 3, 6 and 7. Numbers 3, 6 and 7 relate to procedural questions. They require no discussion beyond the statement that they are without merit. The procedure followed was the same as that which was outlined and declared to be a pattern in such cases as this in *Sellers v. State,* 105 Neb. 748, 181 N. W. 862. The pattern is found in the second point of the syllabus and is the following: "In a proceeding to vacate a parole granted by the district court, the correct practice requires a verified information stating specifically the conduct constituting a violation of probationary conditions, but a proceeding by motion, stating that defendant violated his parole, may be sustained, if defendant had timely notice of a hearing, the assistance of counsel, the testimony of witnesses, and a fair and impartial trial."

Numbers 1 and 2 are to the effect that the evidence was insufficient to support the charge that defendant violated the terms of her probation.

Section 29-2215, Comp. St. 1929, requires that the court shall fix the conditions of the probation and may include

therein conditions enumerated in this section. The record discloses that no conditions were imposed except the statutory conditions, which by reference were made a part of the probationary order. These statutory conditions are the following: "That the probationer (a) shall indulge in no unlawful, disorderly, injurious or vicious habits; (b) shall avoid places or persons of disreputable or harmful character; (c) shall report to the probation officer as directed by the court or probation officer; (d) shall permit the probation officer to visit him in a reasonable manner at his place of abode or elsewhere; (e) shall answer any reasonable inquiries on the part of the probation officer concerning his conduct or condition; (f) shall work faithfully at suitable employment; (g) shall remain or reside within a specified place or locality; (h) shall abstain from the use of alcoholic beverages if the use of the same contributed to his offense; (i) shall pay in one or several sums a fine imposed at the time of being placed on probation; (j) shall make reparation or restitution to the aggrieved parties for actual damage or losses caused by his offense; and (k) shall support his wife or children."

It appears from the statute and the decisions of this court that the right of the court to revoke probation depends upon a breach of the conditions of the probation by the probationer. The pertinent provision of the statute in such cases is contained in section 29-2215, Comp. St. 1929, as follows: " * * * in case of violation of the probationary conditions, the court may impose any penalty which it might have imposed before placing the defendant on probation: * * * ."

In *Sellers v. State, supra,* it was stated: "It seems to follow that any probative evidence showing a violation of probationary conditions by conduct sufficient to convince the district court that defendant will not refrain from criminal acts in the future without punishment will sustain the revocation of a parole."

It appears therefore that the question of whether or not probation shall be granted is to rest in the discretion of the

court in the light of the guiding principles set forth in the statute. It further appears that after the court has, within its discretion, granted probation such probation may not be revoked except upon a proper charge and probative evidence of violation.

The information charges that defendant violated her probation in three respects. First, that she moved her place of residence without consent of the court; second, that she stayed out on the streets of Omaha late at night; and third, that she visited and associated with persons of disreputable and harmful character.

As to the first there is nothing in the order of the court requiring that defendant shall reside at any particular place. The only requirement therefore is the statutory requirement that she "shall remain or reside within a specified place or locality." It appears from the record that following the grant of probation she went to live with her mother at 509 South Twenty-ninth street, Omaha, Nebraska. A few days later she went with her mother to the home of a friend at 1840 North Nineteenth street in the same city where she took up residence and remained until she was taken into custody following the filing of the information for violation of probation. The distance was about 34 city blocks. The new place of abode was within the jurisdiction of the court. There was nothing surreptitious in the removal. There is nothing in the record from which this removal could be construed as a violation of the terms of probation.

The only support for the other two charges in the information is evidence that defendant, a married woman, was out on the street until 1:30 in the morning with her husband.

It may be reasonably inferred from the evidence that defendant was separated from her husband but there is no evidence from which it might be inferred that he was a person of disreputable and harmful character. While we do not pass upon the question it is doubted, in any event, that the legislature intended to include in the description, "per-

sons of disreputable or harmful character," the spouse of a probationer.

We do not find in the bill of exceptions any probative evidence showing a violation of the probationary conditions set forth in the information.

The judgment of the district court is reversed and the sentence of that court ordered vacated.

REVERSED.

COUNTY OF MADISON, APPELLEE, V. LAWRENCE R. WALZ ET AL., APPELLANTS.
14 N. W. 2d 319

FILED APRIL 28, 1944. No. 31727.

1. **Taxation.** Procedure for the foreclosure of valid tax sale certificates which have been purchased by counties for delinquent taxes upon real estate at an administrative sale, whether the action is commenced either within or after a two-year period subsequent to the issuance of the certificate, is provided by sections 77-2040 and 77-2041, Comp. St. Supp. 1941.
2. ———. A county purchasing and foreclosing a tax sale certificate on real estate does so as trustee of an express trust for the use and benefit of the state and all other governmental subdivisions entitled to participate in the distribution of the proceeds.
3. ———. The trust property or trust *res* is the tax sale certificate with the rights evidenced thereby. Prior and subsequent taxes become merged in and a part of the certificate, all of which constitutes a single cause of action.
4. ———. The money for such valid delinquent tax liens being due the county either in its own or in a representative capacity, it is unnecessary for the county to pay or issue receipts to itself for the taxes represented by the certificate.
5. ———. Where there has been a valid administrative sale and a valid tax sale certificate issued therefor by the county treasurer to the county, and the latter has not brought foreclosure action until more than two years after the issuance of the tax sale certificate, then the owner or other person interested is not entitled to two years in which to redeem from the confirmation of sale under decree of foreclosure.

APPEAL from the district court for Madison county: LYLE E. JACKSON, JUDGE. *Affirmed.*

William A. Ehlers, pro se.

Andrew D. Mapes and *Moyer & Moyer, contra.*

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

CHAPPELL, J.

The question for decision in this appeal is whether a county, purchaser as provided by sections 77-2009 and 77-2014, Comp. St. Supp. 1941, of a tax sale certificate at a valid administrative sale for delinquent taxes upon real estate, may, after the two-year period of redemption has elapsed, foreclose the certificate and subsequent tax liens thereon in the manner provided by sections 77-2040 and 77-2041, Comp. St. Supp. 1941, as a single action without being required to pay or issue a receipt to itself for the taxes represented by the certificate. Importance of the question presented arises by reason of the fact that the county followed the same procedure in foreclosing other tax sale certificates upon some 1,200 pieces of property.

The appeal comes to this court upon a transcript from the district court which by former precedent imports absolute verity. See *In re Estate of Piel,* 141 Neb. 783, 4 N. W. 2d 875. The record discloses that in conformity with the statutes the certificate was purchased by plaintiff on January 10, 1940. The certificate covered and included the taxes due, unpaid, and delinquent for the years 1936, 1937, and 1938 upon a small business property described as the East 20 1/3 feet of the West 38 feet of Lot 1, Block 17, Original town of Battle Creek, Madison county, Nebraska. Subsequent taxes were for the years 1939, 1940, and 1941.

Plaintiff's petition, which contains all the necessary allegations and elements, including a copy of the certificate duly executed with subsequent taxes endorsed and certified thereon by the county treasurer, was filed in the district court for Madison county, Nebraska, on April 21, 1942,

more than two years after the period of redemption had elapsed on January 10, 1942. In conformity with section 77-2042, Comp St. 1929, the petition contained causes of action for the foreclosure of other certificates owned by plaintiff. This appeal involves the 11th cause of action. The real estate itself, and all persons having or claiming any right, title or interest therein, including William A. Ehlers, defendant, appellant, and his spouse, were made defendants. Personal service was had upon the latter but they made no appearance and their default was duly entered.

Decree was entered by the trial court in favor of plaintiff on December 11, 1942, specifically finding and adjudging that the described real estate was lawfully sold to plaintiff on January 10, 1940, for the general taxes for the years 1936 to 1938, inclusive, for the total sum of $40.28 as evidenced by county treasurer's certificate of tax sale No. 1606; that subsequent taxes for the years 1939 to 1941, inclusive, became delinquent, unpaid, and were properly and legally certified upon the certificate as such. Also, that there was due plaintiff as of that date upon the certificate for taxes, interest, and penalties the sum of $48.46, and for subsequent taxes, interest, and penalties the sum of $40.84, or a total due plaintiff of $89.30, together with an attorney's fee of $8.93 taxed as costs, and court costs were lawfully apportioned.

In conformity with the decree and proper order of sale the property was sold at sheriff's sale on March 1, 1943, to one Leonard V. Dufphey for the sum of $75. Defendant did not offer to redeem but on March 5, 1943, filed objections to confirmation and motion to vacate the decree and dismiss the 11th cause of action. On July 10, 1943, the sale was presented for confirmation at which time the trial court overruled objections to confirmation, denied the motion to vacate the decree and dismiss the cause of action, and entered an order confirming the sale, from which this appeal was taken.

It is argued by defendant that the county could foreclose

the tax sale certificate under sections 77-2040 and 77-2041, Comp. St. Supp. 1941, but that it was without power or authority to include and recover subsequent taxes in such an action, and must resort to section 77-2039, Comp. St. Supp. 1941, for that purpose or defendant would be deprived of his constitutional and statutory right to redeem. Contention is also made that in any event the county was without power or authority to maintain the procedure which it adopted without actual payment of the taxes involved and issue of a receipt therefor.

We are unable to sustain these contentions. At the outset we call attention to the fact that by chapter 176, Laws 1943, the legislature has passed a new act in an effort to provide for the enforcement of delinquent real estate taxes and special assessments by one form of foreclosure proceedings, which also repealed certain sections involved in this action. Under former statutes still applicable here this court has held that the purpose and effect of section 77-2039, Comp. St. Supp. 1941, is to provide a complete and definite procedure for the foreclosure of *tax liens* by a county where there has been no prior administrative sale for delinquent taxes. The apparent reason for the passage of the act was that in *Logan County v. Carnahan*, 66 Neb. 685, 693, 92 N. W. 984, 95 N. W. 812, it was held that no such remedy existed under former statutes. However, procedure for the foreclosure of valid tax sale certificates which have been purchased by counties for delinquent taxes upon real estate at an administrative sale, whether the action is commenced either within or after a two-year period subsequent to the issuance of the certificate, is provided by sections 77-2040 and 77-2041, Comp. St. Supp. 1941, which should not be confused in any manner with procedure as set forth in section 77-2039, Comp. St. Supp. 1941. See *City of Grand Island v. Willis*, 142 Neb. 686, 7 N. W. 2d 457; *Knox County v. Perry*, 142 Neb. 678, 7 N. W. 2d 475.

Clearly in the case at bar the county bought the tax sale certificate at administrative sale on January 10, 1940, as provided by law, and it is conceded that the county adopted

the procedure for its foreclosure as provided by sections 77-2040 and 77-2041, Comp. St. Supp. 1941.

Section 77-2040, Comp. St. Supp. 1941, provides specifically that the county may so proceed by suit in equity in the district court of the county in which the land is situated to foreclose its certificate and "cause such real estate to be sold for the satisfaction thereof and all prior or *subsequent tax liens thereon,* in all respects so far as is practicable in the same manner and with like effect as is provided for the foreclosure of real estate mortgages: * * * ." (Italics ours.) See, also, *Knox County v. Perry, supra.* This court has heretofore held in a case similar to the one at bar in many respects, that the foreclosure of a valid tax sale certificate, together with prior and subsequent taxes paid, constitutes a single cause of action. See *Cushman v. Taylor,* 2 Neb. (Unof.) 793, 90 N. W. 207; *Otoe County v. Brown,* 16 Neb. 394, 20 N. W. 274.

By section 77-2017, Comp. St. 1929, the purchaser of the tax sale certificate "acquires a perpetual lien of the tax on the land, and if, after the taxes become delinquent he subsequently pays any taxes levied on the same, whether levied for any year or years previous or subsequent to such sale, he shall have the same lien for them, and may add them to the amount paid by him in the purchase." A county purchasing and foreclosing a tax sale certificate on real estate does so as trustee of an express trust for the use and benefit of the state and all other governmental subdivisions entitled to participate in the distribution of the proceeds. The trust property or trust *res* under these circumstances is the tax sale certificate with the rights evidenced thereby. Prior and subsequent taxes become merged in and a part of the certificate. See *City of McCook v. Johnson,* 135 Neb. 270, 281 N. W. 69.

Contentions of defendant that the record does not show that the county ever paid the taxes or issued a receipt therefor, and that it must do so to give these proceedings validity, have no merit. It was unnecessary since the law will not require a useless procedure. This is not a case

where the county bought at the foreclosure sale as in *City of Grand Island v. Willis, supra,* or *City of McCook v. Johnson, supra.* Here, the county bought the tax sale certificate at administrative sale and sold to a third person under foreclosure thereof. In this connection, section 77-2011, Comp. St. Supp. 1941, provides: "Whenever real estate is purchased by a county board, or by the city or village treasurer, the county treasurer shall not be required to account to the state treasurer, or to any person, for the amount of taxes due, until the county board or city or village authorities have sold the certificate or certificates of purchase of such real estate, or until, by redemption or foreclosure proceedings, he shall have received the money thereon: * * * ." In *Nolan v. Klug,* 134 Neb. 860, 279 N. W. 791, error was predicated upon the contention, "That the purchase by the city of the certificate was a 'paper sale' with no money changing hands and therefore it was not a true sale but only a transfer of the lien." The court refused to sustain the contention, and held that under our statutes the sale was complete when the certificate was issued. As early as *County of Lancaster v. Trimble,* 34 Neb. 752, 52 N. W. 711, a case similar to the one at bar in most respects, defendant demurred to the county's petition upon three grounds. The third was, "Because it does not appear that the plaintiff, the county of Lancaster, has paid any portion of said tax." The demurrer was overruled and this pertinent statement appears in the opinion: "The money being due the county, either in its own or a representative capacity, it is unnecessary for it to pay the amount of the tax to the treasurer, and the taxes in question, so far as appears, are valid liens upon the land in controversy. This disposes of the * * * ground of demurrer." See, also, *Logan County v. Carnahan,* upon rehearing, 66 Neb. 693, 95 N. W. 812. *A fortiori,* it being unnecessary to pay the taxes it would be unnecessary for the county treasurer to issue receipts to the county for the taxes represented by the certificate and certified thereon by endorsement of the county treasurer as in the case at bar. To defeat the enforcement of valid liens for

taxes there must be something more appearing than mere technical errors or omissions which do not affect the substantial rights of the parties. See *Otoe County v. Brown*, upon rehearing, 16 Neb. 398, 20 N. W. 641.

Upon this basis we can find no conflict between the procedural methods of foreclosing tax liens (section 77-2039 Comp. St. Supp. 1941) and the foreclosure of tax sale certificates (sections 77-2040 and 77-2041, Comp. St. Supp. 1941). They are not in conflict with each other nor with the statutory and constitutional right of redemption as contended by defendant. These distinctions have been discussed in many opinions of this court. True, the constitutional and statutory right to redeem from sales of real estate for nonpayment of taxes applies to both judicial and administrative sales. It is the rule that where an action is brought by the county to foreclose *tax liens*, without a valid administrative sale first occurring, the two-year period for redemption begins upon the date of the judicial sale and ends by confirmation two years thereafter. See *Commercial Savings & Loan Assn. v. Pyramid Realty Co.*, 121 Neb. 493, 237 N. W. 575. Likewise, where there has been a valid administrative sale to the county and an action is brought to foreclose the tax sale certificate immediately thereafter or before the two-year period for redemption has elapsed, then the period for redemption begins at the confirmation of sale. See *Lincoln County v. Shuman*, 138 Neb. 84, 292 N. W. 30. But, where there has been a valid administrative sale and a valid tax sale certificate issued therefor by the county treasurer to the county and the latter has not brought foreclosure action until more than two years after the issuance of the tax sale certificate, as in the case at bar, then the owner or other person interested is not entitled to two years in which to redeem from the confirmation of sale under decree of foreclosure. He is entitled to only one two-year period for redemption which has been given from the time of the administrative sale and before commencement of the foreclosure action. It is true, however, that in such case he is entitled to an additional period in which to re-

deem, that is, at any time prior to the confirmation of the sale. See *Connely v. Hesselberth*, 132 Neb. 886, 273 N. W. 821; *Peterson v. Swanson*, 133 Neb. 164, 274 N. W. 482; *Nolan v. Klug, supra*; *Knox County v. Perry, supra*. *Connely v. Hesselberth, supra*, holds also that personal notice to occupants, required by section 3, art. VIII of the Constitution, has no application to a proceeding to foreclose a valid tax sale certificate.

Finally, there is a further rule applicable to defendant's objections to confirmation which is, that alleged errors of law in a decree and in the proceedings leading thereto are not reviewable upon objections to confirmation. See *Douglas County v. Barker Co.*, 125 Neb. 253, 249 N. W. 607; *Beatrice Paper Co. v. Beloit Iron Works*, 46 Neb. 900, 65 N. W. 1059.

We find no error in the record, and the judgment of the trial court is affirmed.

AFFIRMED.

WENKE, J., not participating.

LEWIS H. HOLLENBECK, APPELLANT, V. GUARDIAN NATIONAL LIFE INSURANCE COMPANY ET AL., APPELLEES.

14 N. W. 2d 330

FILED MAY 5, 1944. No. 31627.

1. **Trial.** A motion for a directed verdict must, for the purpose of a decision thereon, be treated as an admission of the truth of all material and relevant evidence submitted on behalf of the party against whom the motion is directed, and said party is entitled to have every controverted fact resolved in his favor, and to have the benefit of every inference that can reasonably be deduced from the facts in evidence.
2. **Limitation of Actions.** An action for relief on the ground of fraud may be commenced only within four years after the discovery of the facts constituting the fraud or of facts sufficient to put a person of ordinary intelligence and prudence on an inquiry, which, if pursued, would lead to such discovery.

3. **Notice.** Where one is put upon inquiry, he is charged with notice of all of such facts as he would have learned by reasonable inquiry.
4. **Limitation of Actions.** A new promise as an agency for the continuance or revival of a cause of action operates only in the field of contractual obligations to save a remedy as against the bar of a statute of limitation.
5. ———. Section 20-216, Comp. St. Supp. 1941, has no application to actions founded on a tort liability.

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

T. R. P. Stocker and *Bruce Fullerton,* for appellant.

Allen, Requartte & Wood and *James L. Brown, contra.*

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

SIMMONS, C. J.

This is an action in which plaintiff charges that the defendants conspired, and cheated and defrauded him of certain bonds and securities, and seeks to recover $13,000 damages therefor. Defendants denied generally, pleaded a prior suit, dismissal and settlement, and the statute of limitations. Plaintiff by reply pleaded that the prior action and proceedings subsequent thereto were a part of the conspiracy, and that he received nothing of value therefrom. Trial was had, and at the close of plaintiff's case, the court dismissed the action, basing its decision upon the statute of limitations. We affirm the decision of the trial court.

The parties defendant to this action, as named in the caption of the petition, were Guardian National Life Insurance Company, a corporation, William L. Richardson, Samuel J. Fieselman and Rose I. Haist. It is not shown that service was had upon Richardson, nor did he appear in the action. The action proceeded against the other named defendants.

We review the evidence in the light of the established rule that "A motion for a directed verdict must, for the purpose of a decision thereon, be treated as an admission of the truth of all material and relevant evidence submitted on be-

half 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." *Bowerman v. Greenberg,* 142 Neb. 721, 7 N. W. 2d 711.

Plaintiff is a farmer. He and his wife accumulated savings from time to time, which they considered as jointly owned. These savings were invested in mortgage bonds and other securities. Some of these securities were purchased from a company with which defendant Fieselman was connected. In 1929 plaintiff became acquainted with Richardson. Early in 1932 Richardson approached plaintiff and told him that he (Richardson) and others were planning on organizing a mutual insurance company, and needed securities to deposit with the state, and sought some of plaintiff's securities for that purpose, promising increased earnings and a delivery of surplus notes of the insurance company to the plaintiff. During these conversations Richardson told the plaintiff that defendants Fieselman and Haist would be connected with the new company, which would likely be known as the Guardian National Life Insurance Company. March 26, 1932 (plaintiff's wife signing a memorandum), it was agreed that $10,000 should be placed "in surplus notes of the Guardian National Life Ins. Co. upon demand by Wm. L. Richardson." On April 2, 1932, plaintiff's wife signed a statement listing certain bonds "to be given to Wm. L. Richardson." Under date of April 4, 1932, Richardson acknowledged receipt of said securities listed at $10,000. About that time a proposal, more in detail, as to the formation of the company was prepared and discussed with the plaintiff and his wife, at which time a lawyer, later counsel for defendant company, was present, prepared the proposal, and recommended the proposed company. Also, on April 4, 1932, Richardson signed a statement agreeing to give plaintiff's wife "1% commission on all first year premiums received in this State." On May 5, 1932, Richardson receipted for $9,500 first mortgage bonds,

to be "used for temporary surplus." These are not the same bonds as the $10,000 block of securities for which receipt was previously given. On October 10, 1932, Richardson receipted for $5,100 bonds (not listed and purpose not stated). It appears that some of these bonds were passed back and forth between Richardson and the plaintiff, and some disposed of by Richardson, with plaintiff's knowledge, for purposes other than the insurance company. The exact amount of bonds which plaintiff appears to claim was received by Richardson at this time was $15,100, although that amount was reduced by later transactions between plaintiff and Richardson. Plaintiff does not know for sure which ones Richardson took for the company.

Richardson became a director of the American Indemnity Life Insurance Company in December, 1932. The name of that company was changed to Guardian National Life Insurance Company in January, 1933, and defendants Fieselman and Haist became president and secretary-treasurer, respectively, and Richardson, vice-president. Richardson resigned as vice-president and director in June, 1933, and thereafter was agency manager and general agent until August 1, 1934, when his connections with the company were terminated.

On February 3, 1933, defendant company issued to plaintiff and wife its voucher check for $45. This check (on the voucher) listed $6,600 of plaintiff's bonds and showed interest due of $145. Defendant Haist, called as a witness by plaintiff, testified that this check was issued at Richardson's direction on figures submitted by him, and the amount charged to Richardson's account with the company.

Also, Richardson sold plaintiff, his wife and daughter thrift policies in defendants' company in February, 1933. Defendants' records show premiums paid to August 20, 1934, on these thrift contracts. On August 2, 1934, Richardson, signing as agency manager for defendant company, stated on a plain piece of paper that the thrift premiums were paid in full to January 1, 1935. This was not brought to the attention of the officers of the company. Richardson

also sold plaintiff a life insurance policy on March 2, 1934, and issued a company receipt for the premium. The defendants' records show that the net of the premium was paid to the company by Richardson, and that the thrift premiums were charged to Richardson's account. Plaintiff paid nothing for any of this insurance, and testified that the interest due him on his securities was to pay these premiums. The life policy lapsed in 1935.

At different periods during this time, plaintiff and his wife called upon defendants at their place of business, found Richardson there, and received assurances that he was a reliable representative of the defendant company.

Two $1,000 bearer bonds which plaintiff turned over to Richardson were shown to have become the property of the company. However, defendant Haist testified that those bonds were secured in due course from one Burrill and not from Richardson. None of the other securities ever was shown to have been in the possession of the company. What Richardson did with them is not disclosed.

Thus the matters stood, when, early one morning in August, 1934, Richardson, much excited, called upon plaintiff at his home and told him and his wife that the only way they could get their money was to bring suit against the company. Plaintiff agreed to do so. Richardson employed an attorney who prepared a petition, based upon the transactions herein recited, wherein the plaintiff sued the company, Fieselman, Richardson and Haist for damages. Plaintiff signed and acknowledged the petition on August 20, 1934, although he read only the last of the three pages. The petition was filed on the same day. Later Richardson came to plaintiff and told him that if the suit went through it would break the company, and the plaintiff and other people would lose their money. Plaintiff then signed a dismissal of the action with prejudice on September 26, 1934, and the instrument was filed in the action September 28, 1934. Richardson paid the attorney for his services in the action. Also, on September 26, 1934, plaintiff and his wife executed and acknowledged a "Release and Settlement," releasing

these defendants and others (not including Richardson) "from any and all obligation or liability of every kind or description * * * growing out of the facts set forth" in the action referred to above.

It further appears that Richardson was at this time settling with the company and that the company required that this suit be dismissed as a part of the settlement. Richardson told plaintiff that the company "would see that we would get our money."

Also, in October, 1934 (day not given), Richardson and plaintiff entered into a written "agreement" reciting that Richardson owed plaintiff $9,550, which was to be due and payable within three years and payable in bonds "that are paying interest." This instrument also recited that plaintiff had "turned" to Richardson $3,450 surplus notes of the company, which were to be dealt with by Richardson as he deemed advisable, and that Richardson was to "turn over" to plaintiff bonds in exchange for said surplus notes. Plaintiff's wife witnessed this agreement. Plaintiff entered into this agreement of October, 1934, "in place of" his lawsuit. Plaintiff received $3,450 in surplus notes from Richardson at the time or before this agreement was entered into, and these were returned to Richardson.

Sometime between September and the latter part of December, 1934, the defendants Haist, Fieselman and Richardson, told plaintiff "they would pay it in three years if I would give them time."

On December 30, 1934, Richardson and plaintiff entered into an "agreement" whereby Richardson agreed to "furnish" plaintiff $4,550 in surplus notes of the company drawing 6 per cent interest (Richardson to pay an additional 2 per cent); and Richardson agreed to "furnish" plaintiff a specified $7,200 in mortgage bonds. The recited consideration was the "relinquishment of all personal indebtedness" of Richardson to plaintiff. Plaintiff acknowledged receipt of $1,450 in "surplus notes and all outstanding interest obligations as of January 1, 1934." Plaintiff did not receive the mortgage bonds. Although plaintiff took the matter up

at different times with Richardson, he made no demand upon these defendants between the close of these transactions and just before the present action was instituted on July 7, 1941.

Under these circumstances is the statute of limitations a defense? Section 20-201, Comp. St. 1929, provides: "Civil actions can only be commenced within the time prescribed in this chapter, after the cause of action shall have accrued." Section 20-207, Comp. St. 1929, provides: "Within four years * * * an action for relief on the ground of fraud, but the cause of action in such case shall not be deemed to have accrued until the discovery of the fraud."

The established construction of this statute is that "An action for relief on the ground of fraud may be commenced only within four years after the discovery of the facts constituting the fraud or of facts sufficient to put a person of ordinary intelligence and prudence on an inquiry, which, if pursued, would lead to such discovery." *Baxter v. National Mtg. Loan Co.*, 128 Neb. 537, 559, 259 N. W. 630.

It is a further rule that "Where one is put upon inquiry, he is charged with notice of all such facts as he would have learned by reasonable inquiry." *Talich v. Marvel*, 115 Neb. 255, 212 N. W. 540.

It is obvious that plaintiff knew the facts of this alleged fraud on or before he brought his action in 1934; he knew that his securities had been delivered to Richardson; he knew that Richardson had disposed of them to some one; he knew that the defendant company was in existence; he knew its officers; he knew that he had not received surplus notes, or other securities therefor; he knew that the defendant company and its officers did not propose to issue the surplus notes in exchange; he was advised that if he was to recover his losses he would have to sue; he did so, and although disclaiming knowledge of the recitals in part of the petition, he does not disclaim knowledge of the facts upon which the petition seeking recovery was based; he knew that he had a claim against these defendants for he executed a written release thereof; he knew that his securities

were gone for he accepted Richardson's promise to pay in other securities. The record shows these and other facts were known to him in 1934. It is likewise obvious that other facts, such as the records of the company disclosed, could have been developed had he made reasonable inquiry or pursued his 1934 litigation to trial and determination.

It further is apparent that he knew or that reasonable inquiry, if pursued, would have revealed in 1934 every fact of the alleged fraud which he produced at the trial of the action. In fact, the record is barren of any discovery of any fact relating to the alleged fraud which occurred between the date of the events of 1934 and the filing of the instant action.

During this period of six and one-half years, plaintiff sought no information of these defendants regarding these transactions, made no demands upon them, and they made no representations to him and concealed nothing from him. The statute began to run on this action in the latter part of 1934 at the latest. See *Marshall v. Rowe,* 126 Neb. 817, 254 N. W. 480.

We are not unmindful of the fact that in the October, 1934, agreement with Richardson, a three-year period was fixed for the performance of the terms of that instrument. It was, however, time given for the performance of a settlement agreement, and not the performance of the agreement upon which the plaintiff surrendered his securities and upon which the charge of fraud is based. The October agreement was one clearly between Richardson and the plaintiff, made after Richardson's connections with the defendant company had been severed. It recited the existence of a debtor and creditor relationship between Richardson and plaintiff; did not purport in any way to bind these defendants; and was made after these defendants had been released and discharged from liability by the plaintiff. It further appears that the October agreement with Richardson was superseded by the December agreement between the same parties, which fixed no extended period for performance.

We are also mindful of the testimony of the plaintiff that Richardson, Fieselman and Haist orally promised, sometime in late 1934, that "they would pay it in three years if I would give them time." This, however, was a promise, if binding and enforceable, which we do not decide, that these named defendants would pay some undisclosed amount in settlement. It was a promise not made as a part of the alleged fraudulent transaction, but one made to plaintiff when he had full knowledge and notice of the facts upon which his present action is based and was a promise to give something in settlement of a claim of alleged fraud. This court has quoted with approval the rule that "there can be no fraud where the agreement is entered into with knowledge of the facts." *Marshall v. Rowe, supra.*

This promise can be of no avail to toll the statute for another reason. This is not an action based upon the promise, but upon the alleged fraud in securing plaintiff's securities. It is a tort action. The rule is that "A new promise as an agency for the continuance or revival of a cause of action operates only in the field of contractual obligations to save a remedy as against the bar of a statute of limitation." It does not apply to a cause of action for a tort. *Burleson v. Langdon,* 174 Minn. 264, 219 N. W. 155. See 37 C. J. 1097; 17 R. C. L. 894; 34 Am. Jur. 235; 1 Wood, Limitations (4th ed.) 354; *Briley v. Crouch,* 115 Fed. 2d 443.

Section 20-216, Comp. St. Supp. 1941, provides in part: "In any case founded on contract, when any part of the principal or interest shall have been voluntarily paid, or an acknowledgment of an existing liability, debt, or claim, or any promise to pay the same shall have been made in writing an action may be brought in such case within the period prescribed for the same, after such payment, acknowledgment, or promise: * * * ." This statute applies to actions founded on contract. It has no application to actions founded on a tort liability. *Marchetti v. Atchison, T. & S. F. Ry. Co.,* 123 Kan. 728, 255 Pac. 682; *Montgomery County Commissioners v. McKittrick,* 141 Kan. 283, 40 Pac. 2d 352.

It follows that the trial court properly held the plaintiff's

action was barred by the statute of limitations. The judgment of the trial court is affirmed.

AFFIRMED.

JAMES FRANKS, APPELLANT, V. JOHN R. JIRDON ET AL., APPELLEES.

14 N. W. 2d 372

FILED MAY 5, 1944. No. 31597.

1. **Trial.** The jury are the sole judges of the credibility of the witnesses and the effect to be given their testimony, and it is error for the trial court, at the close of the evidence, to withdraw a case from the jury and dismiss it, if evidence relating to disputed questions of fact has been given, from which different minds might well draw different conclusions.
2. ———. When competent evidence offered by one party at a trial tends to discredit that offered by the other, it presents a question for the jury to weigh and decide under proper instructions from the court.
3. **Evidence.** In weighing the testimony of witnesses, the jury have the right to determine how much dependence is to be placed upon it. There are many things, such as the conduct of a witness upon the stand, and sometimes in the mode in which his answers are drawn from him through the questioning of counsel, which assist a jury in determining the weight and credibility to be given to his testimony.
4. **Appeal and Error.** In reviewing an instruction to the jury to return a verdict for defendant at the close of all the evidence, the appellate court will assume the existence of all material facts which competent evidence on behalf of the plaintiff establishes or tends to prove, and also give him all proper and logical inferences from such facts.
5. **Trial.** The court should not take a case from the jury unless, as a matter of law, no recovery can be had, upon any view which can properly be taken of the evidence of the plaintiff, but where reasonable men differ as to the proof of the facts, a question is presented for a jury.
6. **Evidence.** A competent witness may state his estimate of the quality of specific articles observed by him, as they existed at any time sufficiently near to be relevant, and also whether the quality so observed conforms as to certain standards as to merchantability.

7. ———. Where the quantity of potatoes sold, which were removed and weighed by the buyer, is in issue, testimony of men experienced and skilled in handling potatoes, as to the total space occupied by the potatoes, and as to the cubic space required for a bushel, or hundredweight, of potatoes, is admissible as tending to show the actual amount of potatoes occupying such space, for on the question of quantity any competent evidence is admissible, if relevant and material.
8. ———. In an action to recover the price of potatoes sold, a witness may give his estimate of quantity, provided he is qualified by observation and possesses sufficient data, knowledge, or experience on which to ground his opinion.
9. ———. Where a contract for the sale of potatoes provides exactly how the potatoes must be processed, a witness who examined the potatoes in the bins, and who has knowledge and experience in processing and handling this type of potatoes, may properly estimate the loss in quantity which will be sustained in processing the potatoes to meet the conditions of the contract.

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

F. J. Reed, for appellant.

Mothersead & Wright, contra.

Heard before SIMMONS, C. J., PAINE, CARTER, CHAPPELL and WENKE, JJ., and POLK and NUSS, District Judges.

PAINE, J.

Plaintiff brought an action at law for $2,305.70 balance due from defendant on purchase of potatoes. At the close of the evidence the trial court instructed the jury to return a verdict for the defendants, from which plaintiff appeals.

In the amended petition plaintiff brought suit against John R. Jirdon, Theodore Currier and three others, doing business as an unincorporated association, for the balance due on an oral contract to buy certain potatoes. It is alleged that on March 1, 1942, plaintiff by this verbal agreement sold Theodore Currier, who was acting for the said association, which was doing business under the trade name of "John R. Jirdon Potato Division," all of the potatoes contained in 14 bins of potatoes in his potato cave south of

Lingle, in Goshen county, Wyoming, for the agreed price of $1.45 per cwt. for all salable potatoes; that under the terms of the agreement all of the potatoes were to be run over a 1½-inch potato screen, and that all rots, cuts and greenheads were to be discarded; that this processing, removal and hauling of the potatoes were all to be done by the defendants at their expense; that within two weeks of said date defendants took the potatoes from where they were stored. Plaintiff claims that there were in excess of 5,965 cwt. of marketable potatoes; that plaintiff was given no opportunity to count the number of bags removed, or to weigh or measure them before defendants mingled them with potatoes purchased from other sellers, whereby the potatoes of plaintiff lost their identity, and plaintiff denies that the defendants weighed all the potatoes.

Plaintiff charges that in processing these potatoes they should have been run over a 1½-inch potato screen, but instead they were run over a 1 7/8-inch screen several times, which made it appear that the salable potatoes were much less than the bins actually contained. Plaintiff admits that defendants paid the sum of $6,343.55 during the time the potatoes were being processed, and that there is a balance due and owing of $2,305.70, which defendants refuse to pay.

The defendants for answer admit that they are an unincorporated association, engaged in the wholesale handling of potatoes, admit that they made the contract to buy potatoes in the cave of plaintiff in Wyoming, admit that they received the potatoes; deny that there were 5,965 cwt. of marketable potatoes in the 14 bins of potatoes which they purchased after discarding all small potatoes which passed through a 1½-inch potato screen and all rots, cuts and greenheads; deny that plaintiff had no opportunity to check the quantity of potatoes removed, and allege that they properly processed the said potatoes, and that it was agreed that the term "hundredweight" of potatoes should mean a sack of potatoes weighing 101 pounds including the sack, and allege that they paid $6,343.55, which was the full purchase

price for all of said potatoes purchased by them under their contract. The reply was a general denial.

The principal assignment of error charged that the court erred in withdrawing the case from the jury and sustaining defendants' motion for a directed verdict. As this assignment involves the questions of fact, we will briefly review the evidence.

The plaintiff testified that he had long been engaged in raising potatoes, and had averaged 50,000 bushels a year; that one of his farms was in the state of Wyoming, and that the potatoes from that farm were stored in a potato cellar about 80 feet long, with a driveway through the middle of it, and the bins are 15 feet wide. The walls were all the same size, so that one bin board would fit any bin in the cellar. In the fall of 1941 the bins were filled with potatoes and absolutely level, by being hand dressed on the top after they were filled to make them all level. The potatoes were extremely sound and good; there had been no frost that season, and they were of a uniform, medium size. The planks of the trucks, as they transported them to the bin, were padded with sacks to avoid bruising the potatoes, and the potatoes had settled in the bin about nine inches.

He testified there was a four-acre tract in one of the fields that was inclined to be "seepy" where the potatoes were watered too heavily, and these potatoes carried some dirt. He said the agreement when he sold them was that they should go over an inch and a half screen, cuts, rots and greenheads out, and that defendant Currier said, "I will give you $1.50 over an inch and seven-eighths screen, and I will give $1.45 over an inch and a half screen," and the plaintiff accepted the offer of $1.45 per cwt. over a 1½-inch screen, with cuts, rots and greenheads out; that when plaintiff went out to the potato cellar a day or so later he objected to their sorting them over a 1 7/8-inch screen, and defendant Currier said that he would make the necessary adjustments. Plaintiff testified that as they were running them out the potatoes were sound and had very few sprouts and would roll of their own accord.

The plaintiff testified that the ten bins on the north side were 79.66 feet long and 14.66 feet wide, and the potatoes in the bin were 9.4 feet high. On the south side there were three bins 24.16 feet long and 14.66 feet wide and nine feet high, making a total of 14,162.46 cubic feet of potatoes sold to the defendants, and this includes 90 sacks that were in the 14th bin, and 1.34 cubic feet of these particular potatoes would produce a bushel, or 60 pounds, of potatoes, making due allowance for their passing over a 1½-inch screen, with cuts, rots and greenheads out.

According to the plaintiff's estimate, there were 5,965 cwt. of potatoes sold, at $1.45 a cwt. This would give a total value of $8,649.25, upon which the defendants paid $6,-343.55, leaving a balance of $2,305.70, for which suit was brought.

After the plaintiff had determined that there was a shortage, he was asked: "Q. What, if anything, was said by Mr. Currier to you after you done your figuring? A. He said that we were short. He was short and way short and wondered where they were. They were gone, but where were they? Q. I will ask you if Mr. Currier said anything to you about using the volume and what you got out of the six bins that you kept as a check against this? A. He did."

Jake Steben testified he was the plaintiff's foreman, and was living on the farm of plaintiff, and with the help of the hired man had grown about 51 acres of the potatoes which went into this cave on this place, and that they were pretty nice potatoes. He testified he went down the first afternoon after the crew was there; they were using a power sorter, as there was electric current at the cave, and that he was there at the cave once or twice a day all the time the potatoes were being processed by the defendants' crew. He did not see but very few sprouts on the potatoes, and only the potatoes in the three west bins carried any dirt, and in the rest of the bins there was no dirt on them.

Mr. Steben testified that he heard the conversation out there between plaintiff and Currier. "Q. Tell the jury what was said? A. Well, Jim told him that there was too many

potatoes thrown out that wasn't necessary and Ted admitted it, that there were." They counted all the sacks that had been filled, and there were 1,282 sacks run over the 1 7/8-inch screen and the drops which had come from the first three bins.

Mr. Steben also testified that he sorted the potatoes in the six bins on the south side after the defendants had taken away the potatoes they bought, and the potatoes stood about four inches lower on the south side than in the north side bins taken by the defendants; that he sorted them over a 1½-inch screen, and kept count of the bags and took out the rots and cuts, but testified that he only took out some of the greenheads, for it does not hurt to plant greenheads, and the large greenheads were kept separate and used later for planting; that out of all the six bins on the south side there were only about 150 bushels of rots and cuts, and he got 2,846 bags of potatoes out of these six bins.

Witness Steben also explained in detail the unusual care with which he had gathered the crop and stored them in this potato cellar; that they used precaution to keep them from bruising, using sacks with straw as pads, and canvas over the top, and drove the trucks very slowly; that during the months after they were put in the cave he went there twice a day to see that the temperature was right for ventilation.

The plaintiff called Reid Gamble, a member of a partnership which bought and shipped potatoes, living at Torrington, Wyoming, who was a potato inspector for the government and the state from 1932 to 1937. He had been a field man for defendant company for over three years, buying potatoes for them. Mr. Gamble testified he saw these potatoes while they were being dug and being put in the cellar. Later, about the middle of February, he inspected them with a view of buying them. He measured the bins to determine the amount, and took samples by going on top and digging down, and said the potatoes were in very good condition, they were level on top, uniform, medium-sized potatoes. He did not observe any sprouts which would be det-

rimental to the potatoes. From the knowledge he had of these potatoes when they were being harvested, and his inspection of them in February, he gave it as his opinion that only 10 per cent of the total volume of these bins would be discarded over a 1½-inch screen, with cuts, rots and greenheads out. However, the objection to this answer was sustained as not responsive to the question put to the witness, but further examination brought that there were very few cuts or rots, and on cross-examination he said he saw some sprouts.

Witness Gamble produced the card upon which he had made the measurements in the middle of February, and testified to the jury that ten bins were 80 feet long, 15 feet deep, and 9 feet 6 inches high to the top of the potatoes; that the bins on the south side were 9 feet 6 inches high and 24 feet long, and the same depth; that there were some potatoes in the 14th bin which he also inspected and estimated at 250 bushels, this being about two weeks prior to the time the defendants started processing them on March 1.

He testified that defendant Currier admitted there was a shortage, this evidence being as follows: "Q. Mr. Gamble, did you have occasion to talk to Mr. Currier sometime after these potatoes had been removed from the cellar? A. I have. Q. I will ask you if anything was said by Mr. Currier as to these potatoes? A. Yes, sir. * * * Q. Just state what was said. * * * A. We were just talking about them and he said there was a shortage, couldn't find it and asked me what I would do. I told him." When Mr. Currier was on the stand he admitted the conversation, but said he only stated that Mr. Franks claimed there was a shortage.

We will now examine the evidence of the defendants. The defendants put what is known as a "country crew" in this potato cellar, consisting of six men and the foreman and one extra trucker, who was paid on a contract. The potatoes were first run over a 1 7/8-inch screen, and all cuts, rots and greenheads were taken out, then the potatoes which went through the 1 7/8-inch screen were run over a 1½-inch screen, and all sacked in 101-pound sacks. All

potatoes except 310 sacks which were hauled to a car at Lingle, Wyoming, were weighed twice, with the exception of one truckload which reached Morrill too late, on account of a blowout, to be weighed over the scales. After the potatoes reached the warehouse they were run through the washer and washed, graded and repacked.

Some of defendants' witnesses testified that the potatoes would run 15 to 20 per cent greenheads, that the potatoes carried considerably more dirt than the average potatoes, and that these potatoes were sprouted so badly that they would not roll down by themselves, but had to be dug loose in the bin; that the sprouted potatoes were in the center of the bin.

Herbert N. Renfro, Jr., federal supervising inspector for several states, testified that he had held that position for 15 years, and has occasion to compute the amount of potatoes in bins frequently, principally for purchase by the government or in passing on loans, and that the formula that is gotten up by the Bureau of Standards takes the cubic feet contents of a bin and divides it by 2.4, which gives the hundredweight of potatoes in the bin.

Howard McLean, the Scottsbluff manager of the Nebraska Certified Potato Growers, testified that he had been handling from 900 to 1,200 cars of potatoes a year through his office, and that the formula they used for determining the amount of potatoes was by dividing the cubic feet in a bin by 1.43 cubic feet, which would give the 60-lb. bushels of potatoes in the bin.

The deposition of Z. Schwanz, the warehouse foreman for defendant company at Morrill, disclosed exactly the care given to the plaintiff's potatoes from the time they began arriving at the warehouse on February 27 and were weighed, washed, again sacked, this time putting 102 pounds in each sack, according to the rules of the Western Weighing and Inspection Bureau. Exhibits A, B and C were the original warehouse records of the quantity of these "Bliss Triumph" variety of potatoes sold to them by plaintiff.

Mr. Schwanz testified that exhibit A shows the receipt of

332,320 pounds, exhibit B shows 15,010 pounds, exhibit C shows 55,280 pounds, or a total of 402,610 pounds of potatoes; that they were put up in 3,908½ sacks, and adding the 310 sacks trucked to Lingle makes a total of 4,218½ sacks.

The evidence of the defendants admits the purchase of the potatoes, and that the "country crew" at once went out to the cave and began processing the potatoes according to contract, and preparing them for sale as commercial stock; that with the exception of those hauled to a car at Lingle, and one truckload late because of a blowout, they were all weighed twice, once in the cellar by the cellar foreman and again over the scales at the warehouse, checked twice on sack counts, and paid for in full, according to the defendants' figures.

At the close of the evidence the trial court instructed a verdict for the defendants.

This was not an action to recover damages for potatoes the defendants refused to accept. The defendants accepted all of the potatoes in the bins they contracted to buy. They claim to have paid for all the sacks of potatoes they took away. The plaintiff, on the other hand, gives us the exact cubic contents of the bins, and claims they took out over $2,300 worth of potatoes for which they did not pay him.

Section 69-463, Comp. St. 1929, provides: "Where, under a contract to sell or sale, the property in the goods has passed to the buyer, and the buyer wrongfully neglects or refuses to pay for the goods according to the terms of the contract or the sale, the seller may maintain an action against him for the price of the goods."

The plaintiff has brought the proper action under this law for the balance of the purchase price he claims to be due him.

From this brief synopsis of the evidence, sufficient to give the main contentions of each party, but without going into the cumulative evidence of many more witnesses as found in the two volumes of the bill of exceptions, we are faced with the question: Should such a case be taken from the jury and dismissed by the court?

In the case at bar, the controversy is narrowed to a single question: What was the true and actual amount of potatoes, of certain specifications, contained in some 14 bins of potatoes sold by the plaintiff and accepted by defendants? If defendants have paid for all such potatoes therein, then the defendants should prevail, but if they took out more potatoes than they have paid for, then the question would be up to the jury to determine the amount of the shortage under the evidence.

The law is that, as the jury are the sole judges of the credibility of the witnesses and the effect to be given their testimony, it is error for the trial court, at the close of the evidence, to withdraw a case from the jury and dismiss it if disputed questions of fact are involved and different minds could draw different conclusions from the evidence. See *Interstate Airlines, Inc. v. Arnold,* 124 Neb. 546, 247 N. W. 358.

"When evidence offered by one party at the trial tends to discredit that offered by the other, it is for the jury to weigh and decide, under proper instructions from the court." *Aetna Life Ins. Co. v. Ward,* 140 U. S. 76, 11 S. Ct. 720. In the same case, at page 88, the court said: "The jury were the judges of the credibility of the witnesses * * * and in weighing their testimony had the right to determine how much dependence was to be placed upon it. There are many things sometimes in the conduct of a witness upon the stand, and sometimes in the mode in which his answers are drawn from him through the questioning of counsel, by which a jury are to be guided in determining the weight and credibility of his testimony. That part of every case, such as the one at bar, belongs to the jury, who are presumed to be fitted for it by their natural intelligence and their practical knowledge of men and the ways of men; and so long as we have jury trials they should not be disturbed in their possession of it, except in a case of manifest and extreme abuse of their function."

In *Zielinski v. Dolan,* 127 Neb. 153, 254 N. W. 695, we said: " * * * the appellate court, in reviewing such decision,

will assume the existence of every material fact which the evidence on behalf of the plaintiff tends to establish and, in addition, give the plaintiff the benefit of the logical inferences therefrom." See *In re Estate of Skade,* 135 Neb. 712, 283 N. W. 851; *Ross v. Carroll,* 138 Neb. 1, 291 N. W. 726; *In re Estate of Hoagland,* 126 Neb. 377, 253 N. W. 416.

"An ordinary witness may state his estimate of the common qualities of familiar articles observed by him, as they existed at any time sufficiently near to be relevant. He may also state that a similarity in quality exists, or state his inference as to whether the quality observed conforms to a given standard, as merchantability, that prescribed by contract, or that established by a sample." 32 C. J. S. 154, sec. 498.

"Quantity, like number, is a matter which from its nature must frequently be the subject of opinion evidence. Persons who have qualifications which show them to be capable of forming opinions which may reasonably be expected to be correct and trustworthy may give opinion testimony upon the question as to the quantity of goods delivered. Conversely, if it appears that witnesses do not have sufficient knowledge or opportunity of observation, their opinions are inadmissible." 20 Am. Jur. 680, sec. 808.

Plaintiff contends that the total weight of the potatoes as reported by defendants was not in accord with known physical facts, and adduced evidence of the kind and condition of these potatoes, and the quantity which certain bins held when filled with such potatoes. This made a *prima facie* case. In the absence of countervailing evidence, plaintiff would have been entitled to recover the difference in value between the amount so proved and the amount paid.

Can such a *prima facie* case be taken from the jury because testimony on the part of defendants is that a less amount was taken from such bins of potatoes and that the bins did not hold the amount claimed? We think not. For the plaintiff had a right, under such circumstances, to have his case submitted to the jury, so that they might say by their verdict whether or not the plaintiff's case was sufficient as against the evidence of defendants.

Such evidence of the plaintiff was not conclusive, yet it was a fact which, if established by witnesses according to plaintiff's contentions, was entitled to consideration by the jury in deciding what amount, if any, was due to plaintiff. See *Cunningham v. Scott*, 109 Neb. 586, 191 N. W. 673; *Bissett v. Bryant Lumber Co.*, 156 N. Car. 162, 72 S. E. 205; *Calnon v. Fidelity Phenix Fire Ins. Co.*, 114 Neb. 53, 205 N. W. 942.

We find a hay case which is very similar under the facts to the case at bar. Plaintiff sold defendant all the hay in a barn, to be weighed as drawn, and paid for at its actual weight. Defendant's evidence was that he drew out all the hay in four loads which totaled 9,830 pounds. Plaintiff was permitted to introduce evidence tending to show the extent of cubic space in the barn from which the hay was taken, and how much space a ton of hay would occupy. Defendant contended it was error to receive this evidence. The court said: "But it was clearly admissible as substantive evidence * * * . It was competent to show that the amount of hay accounted for could not have filled a given space * * * ." Judgment for plaintiff was affirmed. *Alger v. Morrill*, 68 Vt. 598, 35 Atl. 483.

Where the quantity of potatoes sold, which were removed and weighed by the buyer, is in issue, testimony of men experienced and skilled in handling potatoes, as to the total space occupied by the potatoes, and as to the cubic space required for a bushel, or hundredweight, of potatoes, is admissible as tending to show the actual amount of potatoes occupying such space, for on the question of quantity any competent evidence is admissible if relevant and material. See 55 C. J. 402; *Bissett v. Bryant Lumber Co., supra.*

"Physical facts may not be accepted as a matter of law or as ground for refusal to submit a case to a jury as against the testimony of witnesses on a controverted question of fact, unless they are demonstrable to a degree that reasonable minds cannot disagree as to their existence, and unless the results flowing therefrom are demonstrable to the same degree agreeable to the known and immutable laws of phys-

ics, mechanics or mathematics." *Jones v. Union P. R. Co.*, 141 Neb. 112, 2 N. W. 2d 624. See, also, *Dodds v. Omaha & C. B. Street Ry. Co.*, 104 Neb. 692, 178 N. W. 258; 3 Am. Jur. 451, sec. 891; Annotation, 21 A. L. R. 141.

In an action to recover the price of potatoes sold, a witness may give his estimate of quantity, provided he is qualified by observation and possesses sufficient data, knowledge, or experience on which to ground his opinion. See 32 C. J. S. 154, sec. 498.

Where the contract of sale provides that the potatoes were to be processed for the purpose of eliminating greenheads, cuts, sprouts, dirt and drops from a 1½-inch screen, and only the potatoes remaining were to be the subject of the sale, a witness who examined the potatoes in the bins, and who has knowledge and experience in processing and handling this and similar grades and types of potatoes, may properly estimate the loss in quantity that will be sustained in processing the potatoes to meet the conditions of the contract.

In the case at bar, we find that the plaintiff's evidence was sufficient to require a submission of the case to the jury. Because a retrial of the case will follow, it is not necessary to discuss the other assignments of error.

The trial court erred in sustaining defendant's motion for a directed verdict, and the judgment entered is reversed and the cause is remanded.

REVERSED.

PONTIAC IMPROVEMENT COMPANY, APPELLEE, V. KATHERINE S. LEISY ET AL., DEFENDANTS: JULIUS LUDWIG, APPELLANT, OSCAR R. THOMPSON ET AL., APPELLEES.

14 N. W. 2d 384

FILED MAY 5, 1944. No. 31763.

1. **Corporations.** Several laws of the state of Ohio, relating to corporations, were properly received in evidence under the certifi-

cate of the secretary of state of Ohio, and under such laws the plaintiff has perpetual corporate succession.

2. **Judgments.** A judgment of the district court becomes a lien against real estate in that county from the time of its entry on the judgment record.

APPEAL from the district court for Cuming county: FAY H. POLLOCK, JUDGE. *Affirmed.*

A. R. Oleson, for appellant.

Zacek & Nicholson, James D. Elliott and *John J. Gross, contra.*

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

PAINE, J.

This is an equity action for the foreclosure of a real estate mortgage. Decree was duly entered, from which two of the defendants appeal.

On June 17, 1925, Harry E. Leisy and wife gave a mortgage to Hugo A. Leisy upon a residence property, being lots 19 and 20, block 28, original town of Wisner, Cuming county, Nebraska, to secure payment of three notes amounting to $10,000 and interest, which mortgage was recorded in Book 44 at page 596. On April 20, 1932, this mortgage was assigned to the plaintiff corporation. On April 1, 1936, an extension agreement was entered into between the assignee corporation and the original mortgagors, extending said mortgage for five years from April 1, 1936, and agreeing that the mortgage has been re-recorded in Book 55 at page 638 of the mortgage records of Cuming county.

In the amended answer of defendant Julius Ludwig he denies that the plaintiff is a corporation, charging that its charter expired in 1939 "and no further provisions have been made to authorize the maintaining of this action," and also charging that he obtained a judgment of $39,882.50 against Irvin O. Leisy and Harry E. Leisy on November 5, 1935, and that execution was returned unsatisfied.

Said defendant further alleges that there was no consid-

eration for the mortgage of $10,000, which was given to a brother of the mortgagor for the sole purpose of hindering, delaying and defrauding his creditors. He further alleges that the extension agreement of said mortgage was executed without consideration, and that in June, 1935, the $10,000 mortgage and note which it was given to secure were barred by the statute of limitations and ceased to be a lien upon the lots involved, and that his judgment became a first lien upon the lots in question, subject only to a tax lien, and prays that he be decreed to have a prior lien to the mortgage of plaintiff.

On April 15, 1942, Oscar R. Thompson and Thomas Thompson filed their amended answer, in which they admit the corporate existence of the plaintiff corporation; admit the filing of all instruments set out in the petition, but allege that none of them have any valid force or effect; admit that defendant Ludwig recovered a judgment as alleged in his answer, but claim that the lien of Ludwig's judgment is inferior to and subject to the lien of a judgment of $13,514.03 which they recovered against Harry E. Leisy, mortgagor, and another on November 5, 1935. They further charge in their answer that the purported mortgage, notes and assignment and extension agreement are all part of an evil plan, device, or scheme, without consideration, to perpetrate a fraud upon existing creditors, especially these answering defendants; that if the notes and mortgage and assignment set up in plaintiff's petition are valid, they are now barred by the statute of limitations, and pray that they be decreed to have a prior lien on the real estate involved superior to the claim of the plaintiff and of other defendants.

On September 10, 1943, the cause came on for trial upon the petition of the plaintiff and the amended answers of defendants. Thereupon defendant Ludwig was granted leave to amend his answer instanter by interlineation to set out that plaintiff corporation had been chartered for 25 years only, and that its charter had expired in 1939.

The plaintiff introduced as exhibits copies of the several

statutes of Ohio relating to corporations, being duly authenticated exemplifications of the same under certificate of the secretary of state, together with a certified copy of the original articles of incorporation of the plaintiff company, showing that it was organized May 28, 1914, and was to exist for the term of 25 years.

Plaintiff also offered in evidence five certificates of amendments to the articles, duly certified by the secretary of state. The last amendment to said articles of incorporation was under date of October 15, 1940, raising the stated capital of the corporation from $500,000 to the sum of $1,000,000.

Section 8623-14 of the General Corporation Act of Ohio, in evidence before us, provides that any corporation may alter or amend its articles, and further, in section 8623-15, provides that such "amended articles shall supersede and take the place of the then existing articles of the corporation and all amendments thereto."

An examination of these exhibits shows that in paragraph three of the original articles of incorporation its life was fixed at 25 years, which would end May 28, 1939, but on May 20, 1939, the third paragraph of the said articles was amended *in toto* by written consent of all the stockholders, and entirely omitting the time of termination of the life of the corporation; that is to say, the new and amended third paragraph of the articles of incorporation established no length of life for the corporation, nor was this referred to in any other paragraph.

Section 8623-7, as set out in exhibit No. 1, provides that "Upon the filing of the articles the incorporators and their associates, successors and assigns by the name stated herein, shall, from the date of such filing, be and constitute a body corporate, with perpetual succession."

This general corporation act of Ohio, which became effective June 8, 1927, long before the amendment of the articles on May 20, 1939, repealing the limit of 25 years for its corporate existence, thus placed the corporation under the above section 8623-7, which thereby gave this corporation perpetual succession.

"If the period of its existence is not limited by its charter a corporation will exist indefinitely and until it is legally dissolved." 18 C. J. S. 469, sec. 78.

In our opinion, the plaintiff Ohio corporation was a valid, existing corporation, and there appears no ground whatever for the claim that there was anything irregular or wrong in so amending the articles of incorporation of this company, and it had the legal right to foreclose its mortgage in the state of Nebraska.

The trial court found that there was due the plaintiff the sum of $10,000 and interest, and that the mortgage had become absolute, and that plaintiff was entitled to have the premises sold to satisfy said mortgage unless the same was paid within 20 days after the date of the decree. It was ordered that the sheriff sell the premises as upon execution and bring the proceeds into court in satisfaction, first, of the plaintiff's lien, and the issues between the defendants were reserved for future determination. The defendant Ludwig filed motion asking that the decree be modified by determining the respective priority of the two answering defendants.

Thereafter, on October 19, 1943, the district court entered a supplemental decree, finding that each of the aforesaid judgments of the two defendants was rendered on the 5th day of November, 1935, but that the judgment of the defendants Thompson was first entered on the journal of the records of the court, and that thereafter the judgment of Ludwig was entered upon the journal, and therefore finds that the Thompson judgment is a lien prior to the judgment of Ludwig, which is a third lien against the property in suit; whereupon notice of appeal was given by the defendants.

The question is also presented in the brief of defendants' counsel that Thompsons' judgment is not prior to the Ludwig judgment, and that the court erred in holding that the journalizing fixed the time when the lien accrued. Attorney Oleson charges further that "it would be travesty on justice if a casual helper in the office of the clerk could, by

his entry, determine the priority of the judgments journalized."

In support of this contention, attorney A. R. Oleson called himself as a witness, and testified that he presented the evidence to the court and secured the judgment for his client, Ludwig, in the sum of $39,882.50; that he took a statement of what had been done to the clerk of the court, and asked him if the Thompson case had been decided and turned over, and he said not, and that this was the first one that came in that day.

Further evidence was taken in said matter on October 19, 1943, when attorney A. R. Oleson was examined by attorney Gross, and testified that he had called the attention of the clerk, Carl R. Stieren, to the matter, as he had prepared his journal entry and presented it to the court right after lunch and obtained his signature, and it was an hour afterward before the attorneys representing the Thompsons got theirs and took it to the clerk.

Carl R. Stieren, the clerk of the court on November 5, 1935, was then called and testified that he did not think he was present in the office that day, as "the filings and entries were made by John Dill and my brother." On cross-examination by attorney Oleson, witness testified that he had no recollection of any conversation with Mr. Oleson in reference to the judgments, and identified the filings and the entry on the appearance docket as all having been made by John Dill or his brother, but not by him.

The record then shows: "All parties rest. By the court: According to the Nebraska decisions, including the rather recent case of *Luikhart v. Bredthauer* (132 Neb. 62, 271 N. W. 165), judgments become a lien on real estate at the time of their entry upon the journal. Priority of judgment liens is accordingly determined according to the order of their entry upon such journal. Exhibit '12' is a copy of the journal of this Court showing two judgments against Harry E. Leisey, et al. The judgment of Oscar R. Thompson, et al preceeds the judgment of Julius Ludwig, et al. I therefore find that the Thompson judgment has priority over the Ludwig judgment."

In *Luikart v. Bredthauer,* 132 Neb. 62, 271 N. W. 165, upon which the trial court based its decision, we held that a judgment is rendered when the court announces its decision upon the law and the facts, but that "The entry of a judgment upon the records is not an integral part of the judicial act of rendering a judgment, although the entry thereof may be required before it can become available for certain purposes." In the text of this opinion it is said that "a judgment must be docketed before it becomes a lien upon real estate." See, also, *Rathbone Co. v. Kimball,* 117 Neb. 229, 220 N. W. 244; *Reconstruction Finance Corporation v. Maley,* 125 Fed. 2d 131.

Section 20-1504, Comp. St. 1929, reads in part as follows: "The lands and tenements of the debtor within the county where the judgment is entered, shall be bound for the satisfaction thereof, only from the day on which such judgments are rendered. * * * Provided that a judgment shall be considered as rendered when such judgment has been entered on the judgment record."

As this last clause, under consideration in the case at bar, was added by an amendment found in Laws 1929, ch. 83, cases cited prior to this amendment would not govern on the point involved herein.

It is clear from the bill of exceptions that both judgments were announced by the court on the same day, but the judgment of the Thompsons was entered on the judgment record by the clerk prior to the entry of the judgment of Ludwig.

Finding no prejudicial error in the record, the decree and judgment of the trial court are hereby affirmed.

AFFIRMED.

LEONARD BREWER, APPELLANT, V. PAUL W. FISCHER, APPELLEE.

14 N. W. 2d 315

FILED MAY 5, 1944. No. 31772.

1. **Malicious Prosecution.** As a general rule, the test as to whether probable cause for instituting a criminal prosecution exists does not depend upon mere belief, however sincerely entertained. The law has imposed an additional ground, viz., such knowledge of facts as would induce a reasonable man to believe the accused was guilty.
2. **Trial.** Generally, questions of fact are for the jury, under proper instructions, and not for the trial court, no matter how disproportionate the evidence may be. This rule is based upon the maxim that it is the office of the judge to instruct the jury in points of law and of the jury to decide on matters of fact.

APPEAL from the district court for Gage county: CLOYDE B. ELLIS, JUDGE. *Reversed.*

Hubka & Hubka, for appellant.

Jack & Vette, contra.

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

PAINE, J.

This is an action to recover damages for malicious prosecution. At the close of all the evidence, the court sustained the motion of the defendant, discharged the jury, and dismissed the petition, from which plaintiff appeals.

The petition alleged that on August 10, 1942, the defendant falsely and maliciously, and without reasonable and probable cause, made complaint against plaintiff to the county attorney, and signed a formal and written complaint before a justice of the peace, who thereupon issued a warrant for the arrest of the plaintiff.

The complaint charged that the plaintiff had issued a check for the payment of money upon the Wymore National Bank in the sum of $10.50, knowing that he had not sufficient funds in, or credit with, the bank for the payment of

the check, and with the intent of unlawfully defrauding Paul W. Fischer by obtaining merchandise of the value of $10.50, contrary to the form of the statutes in such case made and provided.

Upon said complaint a warrant was duly issued, and he was placed under arrest by the deputy sheriff of Gage county on August 11, 1942, all against the will of the plaintiff, who claims that the same caused him much embarrassment and mental suffering, that he has been greatly injured in his credit and reputation and brought into public scandal, infamy and disgrace, and has suffered anxiety and pain of body and mind, and has been forced to expend the sum of $100 in procuring his discharge from imprisonment and defending himself therefrom, and has lost several days of working time.

To this petition the defendant filed an amended answer, alleging that a man, who said his name was Leonard Brewer, gave him said check in payment for merchandise; that the check was returned to him by the bank, marked "No account with us;" that he recited all the facts to Dean Sackett, acting county attorney, and pursuant to his direction he caused the check to be protested, and later signed a complaint prepared by the acting county attorney, who was in charge of all prosecutions in criminal matters in Gage county, and that all of his acts were done because this defendant believed there was probable cause that an offense had been committed against the laws of Nebraska by Leonard Brewer, and that defendant acted in good faith and under the advice and direction of the acting county attorney; that defendant has now been informed and believes that the plaintiff who was arrested is not the person who executed the worthless check, and that defendant in no way pointed out plaintiff to the sheriff as the one who made the check, and denies all other allegations of the petition. The reply was a general denial.

Upon the case going to trial before a jury, the evidence disclosed that the defendant signed the complaint as charged, that on the same day a state warrant was issued,

that the plaintiff was arrested the next day at Wymore and brought to Beatrice and placed in the county jail, and that this complaint was not dismissed until November 18, 1942, by the state; that the same afternoon of his arrest the plaintiff was released to his attorney upon his personal guaranty to produce him when wanted.

The evidence further shows that the plaintiff had nothing whatever to do with the check, but that a man named Chester Hoefling was finally arrested and pleaded guilty to forging the name of Leonard Brewer, plaintiff, to the check in question.

The defendant testified that he had been in the harness business in Beatrice for some years, that he has no helper in the store; that a man came into his place of business, picked out a horse collar, and gave him this check for it; that the purchaser asked for a check on the Wymore National Bank, but as defendant had none he changed a Beatrice National Bank check, and wrote out the check; that the buyer was a stranger to the defendant. Defendant testified that he believed the man was Leonard Brewer, for that was the name signed to the check; that in a few days the check was returned, marked "No account with us," whereupon he inquired of several people where Leonard Brewer lived, and the W. P. A. informed him that he had been working for the W. P. A., but was not at that time. The witness testified that he then went to see the county attorney, who told him he could do nothing until he protested the check, and he had that done, and upon returning to the county attorney's office later a complaint was drawn up and signed by the defendant; that as soon as the plaintiff was arrested he employed Frank E. Crawford, an attorney, who came to the harness shop of the defendant and asked him to come to the courthouse. The defendant admits that he refused to go, because he had more work than he could get out that day. After a while, defendant testified, the deputy sheriff came and asked him to go to the county attorney's office, where he met the plaintiff and his wife and his attorney, whereupon Mr. Crawford and Mrs. Brewer were asked to leave

the room, and then the county attorney asked the defendant whether that was Mr. Brewer, and defendant says he told the county attorney, "I think he is a little shorter and maybe a little older than the man that gave me the check."

On cross-examination the defendant testified that he now knows that it was the man Hoefling who came to his place of business and signed the check, and it was not Leonard Brewer who had the transaction in his place on July 30, 1942. He also testifies that Hoefling had been there several weeks before and bought some snaps. The man who gave him the check told defendant he lived two miles north of Blue Springs. Defendant admits that he never went down to see if Leonard Brewer did live two miles north of Blue Springs, that he did not write any letter to Leonard Brewer, and made no effort to find him, except to make inquiry of several people, and sign the complaint before the county attorney.

Frank E. Crawford testified that he is an attorney, living at Wymore, Nebraska; that the plaintiff called him by telephone at night, and was greatly agitated and excited about a probable arrest; that the next morning between 9:00 and 9:30 he saw the plaintiff in the custody of the deputy sheriff, who brought him to his office, and he asked him to accompany them to Beatrice to act as his attorney; that he drove his car directly to Fischer's place of business in Beatrice, found him in the back room, introduced himself, told him that he was attorney for Mr. Brewer, whom he had known for 40 years, and he was a good, reputable citizen, and that he had not owned a team for 15 years and had no occasion to buy a horse collar, and insisted that defendant Fischer accompany him to the county attorney's office, which he refused to do; that he said to Mr. Fischer, "I am sure you (are) wrong in the man, and he has got a good job, for God's sake go up, look him over," and Fischer said, "No, I won't, I am not going to lock up my place of business" and finally Fischer became very angry and said, "To hell with him, tell him I will meet him in the courtroom," and Crawford left.

Dean R. Sackett testified that he was acting county attorney of Gage county; that when Mr. Fischer came over to his office to identify Mr. Brewer, who was under arrest by the deputy sheriff, Fischer requested Mr. Brewer to stand up, and then said, "It does look some like him, * * * I am not sure it is him;" that he told Mr. Fischer that he would have to identify Mr. Brewer positively as the man that gave him the check before he could proceed with any prosecution, and that Mr. Fischer said "he didn't think he could do so."

Mr. Sackett further testified, "I was fully convinced at the time Mr. Brewer left my office, * * * that he had not written this check and I was also satisfied that Mr. Fischer could not identify him as the man who had." He testified that the latter part of October Mr. Crawford telephoned him to bring Fischer down, that he had the man who had given the check, and that he filed complaint against Chester Hoefling, charging him with forgery.

At the close of all the evidence, the defendant moved the court to direct a verdict for the defendant for the reason that there was sufficient undisputed evidence to show probable cause to file the complaint which was filed; that the defendant related all the facts known to him fully to the county attorney and acted on his advice. After argument upon this motion, it was sustained by the court.

Among the assignments of error, we find these set out: Error in sustaining motion to dismiss the plaintiff's action and in not submitting it to a jury; error in overruling motion for new trial.

In the case of *Ross v. Langworthy*, 13 Neb. 492, 14 N. W. 515, this court states as follows: "Probable cause does not depend upon mere belief, however sincerely entertained. Because if that were so, any citizen would be liable to arrest and imprisonment without redress, whenever any person, prompted by malice, saw fit to swear that he believed the accused was guilty of the offense charged. The law, therefore, has imposed an additional ground, viz., such knowledge of facts as would induce a reasonable man to believe that the accused was guilty. Nothing short of this

will justify the institution of a criminal charge against another."

"(1) A private person who initiates criminal proceedings against another who is not guilty of the offense charged is liable to him for the harm done thereby if the proceedings (a) were initiated (i) without probable cause, * * * ." 3 Restatement, Torts, 382, sec. 653.

On the other hand, "Where there is sufficient undisputed evidence to show probable cause, the trial court should direct a verdict for the defendant. This rule applies even though some of the facts supporting probable cause were disputed by evidence on behalf of the plaintiff." *Bronnenkant v. Kucera,* 141 Neb. 408, 3 N. W. 2d 913. See, also, *Bechel v. Pacific Express Co.,* 65 Neb. 826, 91 N. W. 853; *Kersenbrock v. Security State Bank,* 120 Neb. 561, 234 N. W. 419.

"The test as to whether or not there was probable cause is to be determined in the light of facts and circumstances as they existed and were known at the time the prosecution was commenced and not from the viewpoint of subsequently appearing facts." *Bronnenkant v. Kucera, supra.*

"The failure of a person who has received information tending to show the commission of a crime to make such further inquiry or investigation as an ordinarily prudent man would have made in the same circumstances, before instituting a proceeding, renders him liable for proceeding without probable cause. * * * So, also, there is authority to the effect that to proceed without inquiry would be to act without probable cause where the information is readily obtainable, or where the accused himself points out sources of information which would establish his innocence." 34 Am. Jur. 735, sec. 51.

With these guides before us, and narrowing this case down to the question of fact whether defendant initiated the proceedings without probable cause, and without making such an investigation as an ordinarily prudent man would be required to make, let us examine the evidence.

A stranger came in and bought a horse collar and gave

defendant a forged check. He investigated just far enough to ascertain there was a man bearing that name who had worked for the W. P. A. He could easily have obtained his residence; he made no effort to contact him.

However the defendant did absolutely nothing in the way of making inquiry, such as a reasonable and prudent man should have done before having an entirely innocent man placed under arrest and in jail. The rule applicable is stated in *Clausen v. Omaha Loan & Bldg. Assn.*, 131 Neb. 666, 269 N. W. 517.

The important thing in the mind of the defendant appears, during this entire proceeding, not to vindicate the law, or punish a crime, but to force the payment of the amount due him for his horse collar. This court has held such a motive wrong. See *Ross v. Langworthy, supra.* The criminal case filed against the plaintiff was not dismissed until November 18, 1942.

"Mere belief of the defendant in plaintiff's guilt, however strong, sincere, and honest, will not constitute probable cause, unless founded on circumstances sufficient in reason to warrant it." *Eggett v. Allen,* 119 Wis. 625, 96 N. W. 803.

"Probable cause is a reasonable ground of suspicion, supported by facts and circumstances of such a nature as to justify a cautious and prudent person in believing that the accused was guilty." *Diers v. Mallon,* 46 Neb. 121, 64 N. W. 722.

"This court has said that where evidence if uncontradicted would support a verdict, it is the duty of the court to submit the case to the jury. 'It is not the function of the court to weigh the evidence for the purpose of saying how the verdict should go.' *Blackwell v. Omaha Athletic Club,* 123 Neb. 332; *Glarizio v. Davis,* 110 Neb. 679. It is the function of the jury to weigh the evidence, and not the prerogative of the court." *In re Estate of Hoagland,* 126 Neb. 377, 253 N. W. 416.

Ordinarily, the trial court should not take a case from the jury unless, as a matter of law, no recovery can be had upon any view which can properly be taken of the evidence.

We believe that in the case at bar there was very substantial evidence in support of the plaintiff's petition, and while reasonable men might differ on the facts proved, yet this case, in our opinion, presented a question for the jury.

As the case is to be retried, it will not be necessary to consider the other errors assigned by plaintiff. The cause is reversed.

REVERSED.

PEARL ZIMMERMAN BUCK, FORMERLY PEARL ZIMMERMAN, APPELLANT, V. HOMER H. ZIMMERMAN, APPELLEE.

14 N. W. 2d 335

FILED MAY 5, 1944. No. 31732.

1. **Appeal and Error.** On appeal, error will not be presumed; it must affirmatively appear from the record.
2. ———. In the absence of a bill of exceptions it will be presumed that an issue of fact raised by the pleadings was supported by the evidence, and that such issue was correctly determined.
3. ———. If there is no bill of exceptions, questions which require an examination of the evidence cannot be determined on appeal.

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

Johnson & Johnson and *J. T. Keefe,* for appellant.

Allan F. Black, contra.

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

CARTER, J.

This is an appeal from an order placing the custody of Larry Dean Zimmerman, a minor child, with his father in accordance with the terms of an original divorce decree. From the adverse order, Pearl Zimmerman Buck, the mother of the boy, seeks a review in this court.

The record shows that on November 17, 1941, Pearl Zimmerman, now Pearl Zimmerman Buck, obtained a decree of divorce from Homer H. Zimmerman, wherein it was determined in accordance with an agreement by the parties that one should have the custody of the child during the school year of 1942-1943 and thereafter to alternate such custody each nine-months' term of school, the one not having his custody during the school term to have him during the summer vacation period.

On June 10, 1943, Homer H. Zimmerman filed his application praying for the custody of the child, alleging that Pearl Zimmerman Buck took the custody of the child on July 22, 1942, and has retained the child since that date. The application alleges further that Homer H. Zimmerman is a member of the armed forces, stationed in North Africa, and prays that the child be placed in the care of Violet E. Zimmerman, the child's paternal grandmother, during the father's absence.

On June 22, 1943, the order from which this appeal was taken was duly entered. The order states that the parties were present by counsel, a hearing had and evidence taken. The court further found that Violet E. Zimmerman is a proper and competent person with whom said child may be kept and cared for on behalf of the father during his right of custody, and that Pearl Zimmerman Buck is not entitled to the custody of the child until the end of the 1943-1944 school year as provided by the original decree.

No bill of exceptions setting forth the evidence adduced at the hearing on June 22, 1943, has been filed. Appellant contends that no evidence was taken and hence there was no evidence to make up a bill of exceptions. The order entered by the trial court plainly shows that a hearing was had and evidence taken. This court has held many times that the record imports absolute verity and it may not be disputed on appeal.

On appeal, error will not be presumed, but must affirmatively appear from the record. *First Nat. Bank v. Stockham,* 59 Neb. 304, 80 N. W. 899. In the absence of a bill of

exceptions it will be presumed that issues of fact raised by the pleadings were supported by the evidence and that such issues were correctly determined. *Backes v. Schlick,* 82 Neb. 289, 117 N. W. 707. The evidence upon which the trial court acted not being before us, there is nothing for us to decide. It is a rule long established that a question requiring an examination of the evidence will be disregarded in the absence of a bill of exceptions preserving the evidence. *Doolittle v. American Nat. Bank of Omaha,* 58 Neb. 454, 78 N. W. 926.

There being no error affirmatively appearing from the record, the judgment of the trial court will be affirmed.

AFFIRMED.

JOHN SUTTON, APPELLEE, V. INLAND CONSTRUCTION COMPANY ET AL., APPELLANTS: JOHN E. MARTIN ET AL., DEFENDANTS.

14 N. W. 2d 387

FILED MAY 5, 1944. No. 31737.

1. **Automobiles.** A corporation is liable for the negligence of the driver of an automobile only when the relation of master and servant, or principal and agent, exists between the corporation and the negligent driver.
2. ———. A person is liable for the negligent operation of an automobile by his servant or agent only where such servant or agent, at the time of the accident, was engaged in employer's or principal's business with his knowledge and direction.
3. **Master and Servant.** Where an employee departs from his employment and undertakes a mission of his own, the employer is not liable for the negligence of the employee occurring prior to his return to the duties of his employment.
4. **Automobiles.** The fact that such employee, during a deviation from his employment, may travel the same route he usually travels in his employment will not of itself constitute a return to the employment and restore the relation of master and servant.
5. **Master and Servant.** To restore the relation of master and servant, or principal and agent, after a deviation or departure from the employment, the employee must resume the duties of his em-

ployment. A return to the route usually traveled in his employment is evidence merely which may be considered in determining whether there has been a resumption of the duties of the employment.

6. **Automobiles.** Where the evidence fails to establish a resumption of the duties of the employment by an employee after a deviation therefrom, the employer is not liable for the employee's negligence, and a motion for a directed verdict by the employer should be sustained.
7. ———. Where an owner of an automobile permits another to operate it while he is an occupant, the owner, having and exercising the authority and control of a principal or master, is responsible for and bound by the negligence of such operator.
8. ———. Falling asleep while driving an automobile constitutes evidence of negligence sufficient to require the question of the driver's negligence to be submitted to a jury.
9. **Pleading.** An amendment to a pleading may be made at the close of the evidence to make it conform therewith when it does not have the effect of changing the issues or the quantum of proof required as to any material fact.
10. **Damages.** Where the evidence shows that a civil engineer 38 years of age suffered a fractured arm resulting in permanent injury thereto, a severe concussion of the brain resulting in a permanent impairment thereof, much pain and suffering extending over a period of several months, a verdict for $14,800, when accompanied by the circumstances detailed in the opinion, will not be *held* excessive.

APPEAL from the district court for Douglas county: WILLIAM A. DAY, JUDGE. *Affirmed in part and in part reversed and dismissed.*

Crofoot, Fraser, Connolly & Stryker and *Richard E. O'Brien,* for appellants.

Reed O'Hanlon and *Webb, Beber, Klutznick & Kelley, contra.*

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

CARTER, J.

This is an action to recover damages for personal injuries sustained by the plaintiff as the result of an automobile accident. The plaintiff obtained a verdict and judg-

ment for $14,800. The defendants Inland Construction Company and Harry Meek appeal.

The evidence shows that plaintiff was a civil engineer in the employ of the highway department of the state. On August 11, 1941, he was in charge of a preliminary survey being made on Highway No. 30 between Chappell and Lodgepole. At about 5:30 o'clock on the morning in question, plaintiff and two assistants had arrived at a point about four miles west of Chappell for the purpose of proceeding with the survey. Plaintiff had alighted from his car and set up his transit on a tripod at a point four and one-half feet south of the center line of the highway, when he was struck by an automobile owned by the defendant Harry Meek and being operated by one John E. Martin, causing very serious injuries to the plaintiff. The evidence is clear that plaintiff was struck on the south half of the highway by the Meek car as it was proceeding west. The evidence of Martin, the driver of the car, was to the effect that he saw the plaintiff and his helpers some distance back, but simply did not see them immediately before the accident, it being evident that he fell asleep at the wheel, with the results heretofore shown. The defendant Meek was reclining on the back seat of the car and knew nothing of the accident until after it had occurred. Plaintiff's two helpers were a quarter mile west of the scene of the accident and did not know of its occurrence until Meek came for them.

The defendant Inland Construction Company contends that the evidence is insufficient to charge it with the negligence of Martin and that its motion for a directed verdict should have been sustained. The evidence shows that Meek was a foreman or superintendent in charge of highway construction and repair work for the Inland Construction Company. In addition to his regular salary the company paid Meek $50 a month and provided oil and gasoline for the use of his car in performing his work for the company. Martin was a tractor operator working for the company under the direction of Meek. Both Martin and Meek were rooming in Sidney and driving to and from their work in

Meek's car. The record shows that on August 8 and 9, both had worked on a job south of Big Springs. In going to work they had gone east from Sidney to Big Springs junction and then turned south through Big Springs to the point where their work was being done. In returning to Sidney they traveled the same road.

The evidence further shows that the company was obligated to maintain the sections of the highway repaired for 72 hours after completion. Meek, as foreman, was in charge of this 72 hour-maintenance work. On Sunday, August 10, Meek and Martin drove down to Big Springs where Meek performed certain duties pertaining to the maintenance work, requiring an hour's time. When Meek completed his work they drove to Benkelman, a distance of approximately 100 miles, Martin to visit his parents and Meek to visit friends. At 3:00 o'clock a. m. on August 11, they left Benkelman for Sidney. Meek drove the car to Ogallala at which point Martin became the driver. Shortly thereafter Meek climbed into the back seat and lay down to rest or sleep. As they approached Big Springs junction, about 20 miles west of Ogallala, Martin inquired if Meek desired to go into Big Springs, and receiving a negative answer, continued on to the scene of the accident about four miles west. The evidence is clear that Martin and Meek left Big Springs for Benkelman on business of their own. When they left Benkelman they were intending to go to Sidney, where they expected to go to work on another job at seven o'clock that morning. The accident occurred on a section of Highway No. 30 which they had traveled in going to and from their work on the Big Springs job. There is no evidence in the record that either Martin or Meek had any work to perform for the company from the time they left Big Springs on Sunday until the time of the accident on Monday morning.

It is not disputed that Meek and Martin were both in the employ of the Inland Construction Company. The question to be determined is whether they were working within the scope of their employment at the time the accident occurred. It is a fundamental rule that a corporation is liable for the

negligence of the driver of an automobile only when the relation of master and servant, or principal and agent, exists between the corporation and the negligent driver. *Neff v. Brandeis,* 91 Neb. 11, 135 N. W. 232; *Mackechnie v. Lyders,* 134 Neb. 682, 279 N. W. 328. It is also fundamental that a person is liable for the negligent operation of an automobile by his servant or agent only where such servant or agent, at the time of the accident, was engaged in his employer's or principal's business with his knowledge and direction. *Weber v. Thompson-Belden & Co.,* 105 Neb. 606, 181 N. W. 649; *Mackechnie v. Lyders, supra*; *Dirks v. Ensign Omnibus & Transfer Co.,* 107 Neb. 556, 86 N. W. 525.

The evidence shows without dispute that Meek and Martin were not engaged in the performance of any duty pertaining to their employment after they left Big Springs on Sunday morning. They pursued an exclusive purpose of their own. They had departed from their employment and had not returned to it at the time the accident happened. It is true that in returning to Sidney to resume their employment they used the same section of Highway No. 30 after arriving at Big Springs junction that they had used in driving to and from the Big Springs job. But this alone is not sufficient to establish that they had resumed their duties as employees. We think the case is controlled by the rules announced in *Riesland v. Dawson County Irrigation Co.,* 134 Neb. 773, 279 N. W. 726, a case very similar on the facts wherein this court said: "In an action against an employer for a personal injury inflicted by an employee upon a third person by the negligent use of an automobile owned and operated by the employee, the burden is on plaintiff to prove that the employee was acting within the scope of his employment at the time of the injury." In the foregoing case the plaintiff was going home over a route usually traveled by him in his employment, after departing from his employment and pursuing a mission of his own. The effect of the holding is that the fact that he had returned to his usual route of travel was not of itself sufficient, the evidence must show a return to the duties of his employment.

See, also, *Dafoe v. Grantski*, 143 Neb. 344, 9 N. W. 2d 488; *Ebers v. Whitmore*, 122 Neb. 653, 241 N. W. 126; *Harrell v. People's City Mission Home*, 131 Neb. 138, 267 N. W. 344.

The plaintiff relies principally upon *Keebler v. Harris*, 120 Neb. 739, 235 N. W. 328, and *Peterson v. Brinn & Jensen Co.*, 133 Neb. 796, 277 N. W. 82, 134 Neb. 909, 280 N. W. 171. These cases are distinguishable in that the evidence showed that after a deviation from the employment, the employee had resumed duties within the scope of his employment. The rule applied was: "Notwithstanding the servant's deviation or departure from his employment for purposes of his own, if at the time of the act complained of the servant had fulfilled his purpose and resumed the prosecution of the master's business, the master will be liable for his act, * * * ." 39 C. J. 1298, sec. 1495. No such evidence is present in the case at bar which would have the effect of bringing it within the contemplation of that rule. Many cases from foreign jurisdictions are cited by the plaintiff in support of his theory that upon their return to Big Springs junction Meek and Martin thereby resumed the trip commenced on Sunday morning and that the relation of master and servant was then resumed. A close examination of these cases reveals that they are similar in principle with *Keebler v. Harris, supra,* and are distinguishable for the same reasons. An examination of the evidence convinces us that plaintiff failed to make a case against the Inland Construction Company and that the trial court erred in not directing a verdict as to it.

Defendant Meek contends that the court erred in not sustaining his motion for a directed verdict. The evidence shows that Meek was the owner of the car being operated by Martin, that he was riding in it at the time of the accident and that Martin was driving with his permission. Under such circumstances, if the automobile was negligently operated, it must be held that the driver's negligence is imputed to him. The prevailing rule is that the relation of principal and agent or master and servant exists between the owner and the driver under such circumstances, and

that the owner, being present in the car at the time of the accident and having the control and authority of a principal or master, is responsible for and bound by the negligence of his agent or servant. *Baker v. Maseeh,* 20 Ariz. 201, 179 Pac. 53; *Smith v. Wells,* 326 Mo. 525, 31 S. W. 2d 1014. We find no evidence in the record which tends to relieve Meek from the operation of this rule.

The evidence is sufficient to sustain a finding by a jury that the driver of the car was negligent. He saw the plaintiff and his helpers on the highway in ample time to have avoided an accident. He drove his car onto the left side of the road without any justification whatever and thereby caused the accident. The evidence is clear that he did not keep a proper lookout. It is the contention of the defendant Meek that no negligence exists for the reason that where a driver of an automobile, without warning, involuntarily falls asleep while driving, he cannot be held guilty of negligence. In the first place, there is no direct evidence in the record that Martin fell asleep while driving the car, although the inferences to be drawn from the evidence support that theory. Assuming, as contended, that the accident was the result of the driver falling asleep, the question was still for the jury, the rule being: "Without extended discussion, we hold that going to sleep at the wheel while operating a car is evidence of negligence. The dangers of running a car while asleep are so obvious as to need no comment. It is the duty of the driver to keep awake or cease to drive. A failure so to do is *prima facie* evidence of negligence. The burden passes to the defendant to show some unusual cause of his falling asleep which reasonable diligence could not foresee nor forestall." *Whiddon v. Malone,* 220 Ala. 220, 124 So. 516. In *Diamond State Telephone Co. v. Hunter,* 41 Del. 336, 21 Atl. 2d 286, it was said: "Sleep does not ordinarily come upon one unawares, and by watching for indications of its approach, or heeding circumstances which are likely to bring it about, one may either ward it off or cease an activity capable of danger to others or to their property. The failure to either ward off

sleep or to cease such a dangerous activity, as in this case the operation of an automobile, after having been warned of the imminence of sleep, constitutes negligence." We think, therefore, that the fact that one falls asleep while driving an automobile constitutes sufficient evidence of negligence to require the question of the driver's negligence to be submitted to the jury. An annotation of the cases on this subject will be found in 138 A. L. R. 1388.

Defendant cites *Bittner v. Corby*, 138 Neb. 738, 295 N. W. 277, in support of his contention that falling asleep at the wheel while operating an automobile does not constitute evidence of negligence. The case is not in point for the reason that it involves the question whether falling asleep at the wheel while driving constitutes proof of reckless driving within the meaning of the Iowa guest statute. Obviously the question there determined has no relation to the one at bar.

The defendant complains of the action of the trial court in permitting the plaintiff to amend his petition after the evidence was in. An examination of the amendment allowed reveals that it did not result in a change of the issues or the theory upon which the evidence was adduced. No prejudice appearing from the record, error cannot be predicated thereon. The rule is: "At any stage of a proceeding an amendment to a pleading may be made which does not change the issues nor affect the quantum of proof as to a material fact. Prejudice to a party as a result of an amendment to pleadings must appear from the record to constitute reversible error." *Miller Rubber Products Co. v. Anderson*, 123 Neb. 247, 242 N. W. 449.

Defendant complains that the judgment for $14,800 was excessive. The evidence shows that plaintiff was 38 years of age with an expectancy in excess of 28 years. His right arm was so badly shattered that two major operations were necessary to set the arm. He also suffered a severe concussion of the brain in the accident, so severe that he was in a state of unconsciousness for a period of six weeks. There is ample evidence in the record that plaintiff has sustained

permanent injuries to his brain and to his right arm. There is evidence of much suffering endured by the plaintiff during the time his injuries were being treated. There is also evidence that plaintiff will never be able to carry on his profession as civil engineer as before because of the injuries he received. No method of exact computation can be devised in determining compensatory damages in cases of this kind. We think the evidence was such that the jury could properly arrive at the amount determined upon by them. We can find no yardstick whereby we can say as a matter of law that the verdict was excessive. Under such circumstances this court may not substitute its judgment for that of the jury, even if it be assumed that this court would determine that a lesser amount would constitute adequate compensation for the injuries sustained.

The action of the trial court in entering judgment against the Inland Construction Company is reversed and the cause dismissed as to it. The judgment against the defendant Meek is affirmed.

AFFIRMED IN PART AND IN PART REVERSED AND DISMISSED.

IN RE ESTATE OF JOHN POTTS.
TRUST COMPANY OF CHICAGO, ADMINISTRATOR, APPELLANT, V. RAY POTTS, ADMINISTRATOR, APPELLEE.

14 N. W. 2d 323

FILED MAY 5, 1944. No. 31768.

1. **Witnesses.** Ordinarily it is not proper to cross-examine a witness upon a matter not related to his testimony in chief. This does not mean that the cross-examination must be confined to questions asked on direct examination, but rather to the subject matter of such examination.
2. **Appeal and Error.** The scope of the cross-examination of a witness rests largely in the discretion of the trial court and its ruling will not be disturbed unless it results in prejudice to the rights of the complaining party.

3. **Evidence.** Ordinarily the speed of an automobile is not a matter of exclusive expert knowledge and any one who has knowledge of time and distance and a reasonable opportunity to formulate a basis for an opinion is a competent witness to give an estimate of speed.
4. ———. A witness who has shown himself qualified to give such an opinion as to the speed of a moving car may do so even though it appears that the car was coming directly toward him and that his view was partially blocked. Such facts go to the weight and not the competency of the evidence.
5. ———. Testimony that the speed of an automobile was "fast" and that the colliding cars came together "fast and hard" are mere conclusions and form no basis from which a jury may determine negligence as a result of excessive speed.
6. **Appeal and Error.** While objections to conclusions of fact should ordinarily be sustained by the trial court, yet where there is other competent evidence on the subject in the record, their improper admission will not be considered as reversible error where prejudice is not shown.
7. ———. Where a jury found the defendant to be free from negligence in a personal injury action, an error in the instruction stating the measure of damages is necessarily harmless.
8. ———. When the evidence is conflicting, a jury's verdict based thereon will not be disturbed on appeal unless clearly wrong.

APPEAL from the district court for Antelope county: FAY H. POLLOCK, JUDGE. *Affirmed.*

Frederick M. Deutsch and *Alexander J. Reiff*, for appellant.

R. J. Shurtleff and *Elmer Rakow, contra.*

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

CARTER, J.

This is an action against the estate of John Potts, deceased, by the Trust Company of Chicago as administrator of the Estate of Marlene Harvey, deceased, for her wrongful death. The jury returned a verdict for the objector and the claimant appeals.

The evidence in this case shows that on June 23, 1941, at approximately 5:20 p. m., a Buick automobile driven by

Florence Luckey was proceeding west on Highway No. 20 and as it arrived at a point about six miles east of Bassett it collided with a Ford automobile driven by John Potts. The occupants of the Buick car were four women, a boy ten years of age and a baby, Marlene Harvey, eleven months of age. All lost their lives in the accident except one of the women and the ten-year-old boy. The occupants of the Ford car consisted of John Potts, the driver, who was killed in the accident, Zane Wood, a hitchhiker, who suffered a broken leg, and Donald Potts, the nine-year-old nephew of John Potts, who escaped serious injury. The action was brought by the administrator of the estate of the eleven-months-old child, Marlene Harvey, to recover damages for her wrongful death alleged to have been caused by the negligence of John Potts, the driver of the Ford car.

The evidence generally shows that as the cars approached each other the left front tire of the Buick automobile blew out. The driver was unable to hold the Buick car on its course and it gradually encroached upon the south half of the highway. There is evidence that the Buick was wholly on the south side of the highway immediately prior to the accident, although its right front wheel was north of the center line of the highway after the accident.

Zane Wood, an occupant of the rear seat of the Ford car, testified that the Ford was traveling at 55 miles an hour and that it did not slow down prior to the accident. He observed the deflated tire on the Buick when the Ford was one and one-half blocks away. He observed the Buick gradually coming over onto the south side of the highway and when the cars were a half block apart he dropped to the floor of the Ford car, taking the Potts boy with him. He did not see the cars come together, nor the situation existing immediately prior to the accident.

Mrs. Nellie Blekfeld, an occupant of the Buick car, testified that the Buick was traveling at 35 miles an hour when the tire blew out, that the car gradually moved over the center line to its left, that the driver regained control and turned the car back toward its proper side of the highway

when the Ford car suddenly turned to its left and crashed head on into the Buick car. Her testimony is that the Buick was traveling at 10 miles an hour when the collision occurred.

The only other eyewitness who was able to give an account of the accident was one John Shald, a farm and ranch operator who lived near Stuart. He was traveling east on Highway No. 20 at a point about three-quarters of a mile west of the place where the accident happened, when he was passed by the Ford car. He was then driving at 50 miles an hour. His opinion was that the Ford was traveling 65 to 70 miles an hour at that time. He also testified that the Buick car was approaching at about the same rate of speed. He observed the Buick when the tire blew out, saw it move over gradually onto the south side of the highway, and states that the Buick was at least two-thirds on its left-hand side of the white line when the accident occurred.

A state highway patrolman testified to conditions existing at and near the scene of the accident. His testimony is that the road had an oil mat surface, was 32½ feet wide, with the usual white stripe in the center. The rim mark made by the left front wheel of the Buick after the blowout was plainly visible. From the point of beginning to the point where it crossed the center line the distance was 204 feet. From the point where it crossed the center line to the point of the collision it was 180 feet. After the accident it was seven feet two inches from the southerly most part of the Buick to the south edge of the oil mat. The shoulder was four feet three inches wide at that point. It was upon this evidence, substantially as here recited, that the jury returned a verdict for the objector.

The only question involved in the present case is whether John Potts was guilty of any negligence proximately contributing to the accident. No question of contributory negligence was involved. The case was clearly one for the jury. Consequently, the only question remaining is whether the trial court committed any error prejudicial to the rights of the claimant in the course of the trial.

Claimant contends that the trial court erred in refusing to give his requested instruction No. 9 and in giving instruction No. 16 on the court's own motion. The instruction given, as well as the one requested, purports to set forth the measure of the claimant's damage in the event the jury found that the objector was liable for the death of Marlene Harvey. In view of the finding of the jury that John Potts was free from actionable negligence, any error in the instructions relating to the measure of damages is necessarily harmless. *Potach v. Hrauda,* 132 Neb. 288, 271 N. W. 795.

Claimant complains of the ruling of the trial court in permitting the witness Shald to testify on cross-examination to the speed of the Buick car. The record shows that claimant interrogated the witness about his knowledge of the accident, but did not ask him concerning the speed of the Buick car. He had testified on direct examination to the speed of the Ford car. Whether the speed of the Buick car was so closely related to the testimony of the witness on direct examination as to permit of cross-examination is a question on which reasonable minds might differ. For this reason a trial judge has a wide discretion in fixing the limits of cross-examination and the court's ruling with reference thereto will not ordinarily be disturbed unless it results in prejudice to the rights of the complaining party. *Peterson v. State,* 63 Neb. 251, 88 N. W. 549; *Goemann v. State,* 100 Neb. 772, 161 N. W. 421. Ordinarily a party may properly cross-examine a witness only as to such matters as were touched upon in the direct examination. If a party desires to examine a witness on matters not touched upon in the direct examination, he should make the witness his own. But the cross-examination of a witness should be and is something more than a mere recapitulation of the witness' testimony on direct examination. We think the trial court might well have limited the cross-examination of this witness more than was done in compliance with the foregoing rule, but we cannot say that the wide latitude allowed a trial judge in such matters was abused to the preju-

dice of the claimant. The interrogation of the witness with relation to the Buick car was in connection with the manner of its operation. It seems to us that if all matters with reference to its operation except its speed were touched upon in the direct examination, it cannot be said that an inquiry as to the speed of the car was such a different subject as to be outside the scope of the discretion reposed in a trial judge in determining the limits of cross-examination. In *Zelenka v. Union Stock Yards Co.*, 82 Neb. 511, 118 N. W. 103, we said: "Any question concerning the matter which is the subject of the direct examination may be inquired into. In this case the witness had sought to give a history of the circumstances of this accident as observed by him, and the fact that he failed to mention some of them on the direct examination does not preclude the right to bring out such circumstances on cross-examination."

Claimant contends also that the witness Shald was incompetent to testify to the speed of the Buick car for the reason that he had no reasonable time, distance or opportunity to formulate a basis for an opinion as to its rate of speed. The evidence shows that the witness observed the Buick approaching before the tire blew out. Consequently, he had an opportunity to observe it for more than 500 feet at least. It is true that the Buick was coming almost directly toward him and that the Potts car partially blocked his view for a part of that distance, but that is a matter affecting the weight rather than the competency of his evidence. *Brooks v. Thayer County*, 126 Neb. 610, 254 N. W. 413. We conclude, therefore, that the witness was properly qualified to give his opinion as to the speed of the car. The objections of the claimant are proper ones to argue to the jury as affecting the weight of the evidence and the credibility of the witness, but they do not affect the competency of the evidence. *Lewis v. Miller*, 119 Neb. 765, 230 N. W. 769; *Patterson v. Kerr*, 127 Neb. 73, 254 N. W. 704.

Complaint is also made to the overruling of an objection to the following question on the ground that it called for a conclusion on the part of the witness: "But at all times you

saw the Buick car, it was moving and moving fast from east to west, was it not?" The witness answered in the affirmative. Another similar question duly objected to was: "In other words, they hit fast and hard?" The answer: "That is right." The objections to these questions should have been sustained as calling for the conclusion of the witness. Such evidence has no probative force, and standing alone would be insufficient to establish excessive speed. Other evidence was in the record to the effect that the Buick car was traveling 65 to 70 miles an hour. The overruling of the objections under such circumstances does not constitute reversible error. See *Baldwin v. Omaha & C. B. Street Ry. Co.*, 105 Neb. 614, 181 N. W. 525.

The evidence in the case was conflicting. The instructions of the court on the issue of negligence were correct. The jury determined the facts in favor of the defendant. We are unable to say that the verdict was clearly wrong within the rule announced by this court. No error prejudicial to the rights of the claimant appearing in the record, the judgment of the trial court must be affirmed.

AFFIRMED.

IN RE ESTATE OF AUGUST REIKOFSKI.
ALBERT REIKOFSKI, APPELLANT, V. RUDOLPH E. REIKOFSKI ET AL., APPELLEES.

14 N. W. 2d 379

FILED MAY 5, 1944. No. 31744.

1. **Pleading.** A general demurrer admits only facts that are well pleaded and does not admit conclusions of law or conclusions of the pleader.
2. **Wills.** It is as a rule not sufficient to allege generally that due diligence has been used, but the facts constituting diligence must be set out in a petition to set aside a decree or judgment of the county court, admitting a codicil to probate.
3. ———. In an action to set aside a decree of the county court, admitting a codicil to probate, on the ground of fraud, the plain-

tiff must allege sufficient facts to show that the failure to secure a just decision at the former trial was not attributable to his own fault or negligence.

4. ———. The petition to set aside a decree of the county court, admitting a codicil to probate, must show, not generally or inferentially but by specific averments, that the petitioner has not been in fault or that he has exercised due diligence and vigilance.
5. ———. A decree of the county court, admitting a codicil to probate, can only be set aside on proof of such fraud as would justify the setting aside of any other judgment.
6. **Fraud.** To maintain an action for fraudulent concealment, there must be shown a duty to disclose the truth, and that the disclosure was not made when opportunity was presented whereby the party to whom the duty was due was induced to act to his injury.
7. ———. An allegation that an act was fraudulently done, or that one fraudulently conceals, is merely a conclusion and characterization.
8. **Wills.** Actions in the county court for probate of a will and codicil are *in rem,* and every person interested in the subject matter is a party in the county court whether named or not. Such person may appear for the purpose of protecting his interest in the county court, and an appeal to the district court removes the whole case to that court.
9. **Courts.** By the provisions of section 16, art. V of the Constitution of Nebraska, and of section 27-503, Comp. St. 1929, the county court has exclusive original jurisdiction of all actions relating to the settlement of estates of deceased persons.
10. **Wills.** Section 20-2001, Comp. St. 1929, providing for vacation or modification of judgments at a subsequent term, for fraud practiced by the successful party in obtaining the judgment or order, applies to county courts as well as district courts, and the fact that the county court rules on a demurrer to such petition at a subsequent term is immaterial.

APPEAL from the district court for Antelope county: LYLE E. JACKSON, JUDGE. *Reversed, with directions.*

W. G. Whitford, for appellant.

Moyer & Moyer and *Ralph M. Kryger, contra.*

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

MESSMORE, J.

This case originates in the county court of Antelope coun-

ty where the appellees filed a petition to set aside a decree of the court admitting the codicil of a will to probate, to enable the appellees to file objections to the probate of such codicil. The transcript discloses:

August Reikofski, late of Tilden, Antelope county, departed this life March 16, 1942, leaving as his heirs the widow, six sons, six daughters and a grandson, child of a deceased son. Albert Reikofski filed a petition in the county court to probate the last will and testament of August Reikofski, deceased, executed July 15, 1935, and a codicil executed February 13, 1942. The notice of probate was published in the Oakdale Sentinel, located in Antelope county, in which August Reikofski resided at the time of his death. On May 8, 1942, the will and codicil were regularly admitted to probate. On May 29, 1942, the appellees, a daughter and two sons of the deceased, filed petition in the county court to set aside the decree of May 8, 1942, admitting the codicil to probate, and that petitioners be permitted to file objections to the admission of such codicil to probate. The will was not attacked. We will review the allegations of the petition in the opinion as occasion requires.

A motion to require appellees to make the application more definite and certain was overruled on September 8, 1942. On August 13, 1942, the appellant filed a demurrer to the petition of appellees, stating therein:

"1. The court has no jurisdiction of the subject of the action.

"2. There is a defect of parties, plaintiff.

"3. The 'Application' does not state facts sufficient to constitute a cause of action against this proponent."

On September 30, 1942, the county court overruled the demurrer. Appeal was perfected and the cause was submitted to the district court on the transcript from the county court. On August 28, 1943, the district court overruled appellant's demurrer and granted five days in which to plead further. Appellant elected to stand on his demurrer; hence this appeal.

A general demurrer admits only facts that are well plead-

ed and does not admit conclusions of law or the conclusions of the pleader. *Scully v. Central Nebraska Public Power and Irrigation District,* 143 Neb. 184, 9 N. W. 2d 207.

Paragraph V of the appellees' petition alleges: "Petitioners further state that all facts relative to the probate of said will and to the hearings thereon were deliberately and intentionally concealed from your petitioners by certain of said heirs. That the notice of probate of said Will was published in the Oakdale Sentinel and that your petitioners were not subscribers to said paper and never saw or heard of said notice of probate and never knew that a Decree of Probate had been entered in said cause until ten days thereafter, and had no actual notice of said notice of probate." The foregoing allegation bears on the subject of appellees' diligence and is the only allegation in the petition disclosing what, if any, diligence was exercised by the appellees with reference to the probate of the codicil.

The Oakdale Sentinel, in which the notice was published, is a legal newspaper in Antelope county, fully qualified to publish legal notices. No other notice was required of the proponent to any of the parties in interest; nor was it the duty of the proponent to ascertain whether any or all of the parties in interest were subscribers to such newspaper. In fact, there is no attack made on the legality of the notice, so we conclude that the notice is proper in all respects.

On the proposition of exercising diligence, in 49 C. J. 58, it is said: "It is, as a rule, not sufficient to allege generally that due diligence has been used, but the facts constituting diligence must be set out."

Appellees allege further, in paragraph VII of their petition: "That petitioners failure to attend the hearing on May 8, 1942 was because they had no personal knowledge or notice of said hearing, all of which was without fault or negligence on their part." That had they been advised of the date of said hearing they would have attended the same and would have filed objections to the probate of the codicil of the will.

In analyzing the appellees' petition as to the diligence ex-

ercised by them, we conclude that such petition is insufficient in that it fails to allege facts constituting diligence.

In an action to vacate a decree of the county court to set aside the probate of a codicil on the ground of fraud, "the plaintiff must allege sufficient to show that the failure to secure a just decision at the former trial is not attributable to his own fault or negligence." *Miller v. Estate of Miller*, 69 Neb. 441, 95 N. W. 1010.

Taking cognizance of the appellees' petition and allegations V and VII thereof, as heretofore set out, we now make reference to allegations in paragraph IV therein, reading as follows: "That seven days prior to the execution of said alleged Instrument, the said August Reikofski, who was 86 years of age, had for a valuable consideration executed a release of certain mortgage indebtedness owing by Rudolph E. Reikofski to the deceased and had surrendered and cancelled the said mortgage and note. The execution of said release and the cancellation of said indebtedness having been made at the special instance and request of the said August Reikofski in order that the purported indebtedness of the said Rudolph E. Reikofski to deceased might be cancelled and discharged. That at the time said Codicil was presented to the said August Reikofski for his signature it was falsely represented to him, that it was necessary for him to sign said instrument in order to complete the execution of the mortgage release and the cancellation of indebtedness of his said son Rudolph E. Reikofski. That the said August Reikofski was unable to read the English language and was unable to and did not understand the meaning and purport of said Codicil and said Codicil was not in fact executed by him nor is it his voluntary act and deed."

A careful analysis of the foregoing paragraphs discloses that they are not sufficient to show due diligence on the part of the appellees, or to excuse their failure to contest the codicil when it was offered for probate. "Proceedings in probate are *in rem*, and notice of such proceedings, of necessity, is generally constructive." See *Miller v. Estate of Miller, supra.*

Referring to paragraphs V and VII of their petition, the most claimed by the appellees is that they had no notice of the proceedings; that, if they had had such notice, they would have been present at the hearing when the codicil was offered for probate. In the *Miller* case it was said that such statements only go to the question of diligence.

As heretofore stated, the testator was a resident of Antelope county and died March 16, 1942, leaving an estate. Such facts were sufficient to put the appellees on inquiry as to whether or not their father had died testate or intestate, and as to whether proceedings had been instituted to administer his estate. Again, almost the identical language appears in *Miller v. Estate of Miller, supra.* The following language, which is pertinent to the petition here, also appears in the *Miller* case (p. 449): "Had such inquiry been instituted and pursued with due diligence, it would have led inevitably to a knowledge of the proceedings. But it does not appear that the appellants took a single step to inform themselves in regard to the estate, or whether any steps were being taken to administer it according to law, (in the instant case three weeks after the codicil had been admitted) * * *. That was not the conduct of an ordinarily careful and prudent person, which is the standard by which their conduct must be tested, but it is what appears to have been an indifferent and reckless disregard of their own rights." On the proposition of pleading due diligence and pleading diligence, the foregoing language in the *Miller* case applies directly to the circumstances as shown in the instant case.

With reference to paragraph IV of the appellees' petition, heretofore quoted, there is nothing in such paragraph to show who, if any person, had falsely represented to the deceased that it was necessary for him to sign said instrument in order to complete the execution of the mortgage release and the cancellation of indebtedness of his son Rudolph E. Reikofski. A petition setting forth facts sufficient to constitute a defense to the probate of a will and codicil does not meet the requirements necessary to be set forth in

a petition to set aside a decree of the county court admitting a will and codicil to probate. More is required to be pleaded, as stated in *Miller* v. *Estate of Miller, supra*: "These allegations are all admitted by the demurrer, and the only logical deduction from the admitted facts is that the decree is the product of false testimony, adduced by the appellees with a full knowledge of its falsity. That of itself would amount to fraud in procuring the decree. *Secord v. Powers, supra* (61 Neb. 615, 85 N. W. 846).

"But it is not sufficient for a party seeking the vacation of a judgment or decree to show that it was obtained by the fraud of his adversary, but he must go farther and show that the failure to obtain a just decision is not attributable to his own fault or negligence."

The appellees' petition does not reflect that which is required to enable them to obtain the relief which they seek. "The petition, complaint, or moving papers must show, not generally or inferentially, but by specific averments, that the applicant (petitioner) has not been in fault, or that he has exercised due diligence and vigilance." 34 C. J. 329.

In *In re Estate of Josephson,* 138 Neb. 193, 292 N. W. 595, this court held: "An order of the county court, approving a final report and discharging an administrator, can only be set aside on proof of such fraud as would justify the setting aside of any other judgment." Likewise, to set aside a decree admitting a codicil to probate would require the same proof.

Apparently appellees are relying on fraudulent concealment and contend that paragraphs V, VI and VII of their petition are sufficient pleading in this respect. We have heretofore set out, in part, paragraphs V and VII.

Paragraph VI refers to a premature reading of the will and codicil by certain heirs, who deliberately and intentionally failed to notify the petitioners of said premature reading and hearing and failed to notify or advise the petitioners of the facts gained thereat, appellees' contention being that, by demurrer, appellant admits all facts, relative to the probate of the codicil and the hearing thereon, were delib-

erately and intentionally concealed from said heirs, constituting an admission by appellant that everything was done that was necessary to deprive the appellees of notice of the fact that there was a will, and particularly a codicil, and that it was being offered for probate, and that such concealment successfully deprived the appellees of knowledge of the probate proceedings.

The mere allegation of concealment or fraudulent concealment, or to deliberately and intentionally conceal, is insufficient pleading. It is necessary to allege a duty to disclose or opportunity to disclose, neither of which is pleaded in the petition. The petition alleges the act complained of was committed by certain of the heirs. Such is not an allegation of fact sufficient to show fraud, if any, perpetrated by the real party in interest.

In *National Park Bank v. Louisville & N. R. Co.*, 199 Ala. 192, 74 So. 69, the court held: "To maintain an action for fraudulent concealment, there must be shown a duty to disclose the truth, and that the disclosure was not made when opportunity was presented whereby the party to whom the duty was due was induced to act to his injury." See 3 Pomeroy, Equity Jurisprudence (5th ed.) sec. 900.

In the instant case there is an absence of averments showing facts and circumstances of the concealment under such pleading. As said in *Kent v. Snyder*, 30 Cal. 667, 674: " * * * the complaint must be held to be as destitute of allegations of fraud as if it was entirely silent on the subject." See, also, *Feeney v. Howard*, 79 Cal. 525, 21 Pac. 984. In *Madsen v. Madsen*, 72 Utah 96, 269 Pac. 132, it was held: "An allegation that an act was fraudulently done or that one fraudulently conceals is merely a conclusion and characterization." The foregoing authorities state the generally accepted rule. See, also, 27 C. J. 31.

Appellees contend that in *Miller v. Estate of Miller*, *supra*, there was no fraud or deceit or concealment, extrinsic of the record, and that this court very reluctantly denied relief because of lack of diligence; that by the averments in a demurrer of certain facts heretofore stated, the words,

"deliberately and intentionally concealed," contained in appellees' petition, and used in co-ordination with other facts, constitute the statement of an ultimate fact as against a conclusion of law. There is no allegation in the appellees' petition of extrinsic fraud well pleaded. Whether the fraud pleaded in *Miller v. Estate of Miller, supra,* is extrinsic, or not, the opinion holds that it is still necessary to show diligence.

The demurrer raises the point of defect of parties. Actions of the type here involved are *in rem,* and every person interested in the subject matter is a party in the county court, whether named or not. Such person may appear for the purpose of protecting his interest in the county court, and an appeal to the district court removes the whole case to that court. See Dame, Probate and Administration (3d ed.) 16, sec. 17; 33 C. J. S. 890, sec. 12; *In re Estate of Nilson,* 126 Neb. 541, 253 N. W. 675; *Nilson v. Tekamah Investment Co.,* 133 Neb. 180, 274 N. W. 465; *In re Estate of Statz, ante,* p. 154, 12 N. W. 2d 829.

By the provisions of section 16, art. V of the Constitution of Nebraska and of section 27-503, Comp. St. 1929, the county court has exclusive original jurisdiction of all matters relating to the settlement of estates of deceased persons. *Starr v. Fidelity & Deposit Co.,* 134 Neb. 240, 278 N. W. 478; *In re Estate of Jurgensmeier,* 142 Neb. 188, 199, 5 N. W. 2d 233; *In re Estate of Statz, supra.*

The part of the demurrer referring to defect of parties is overruled, and the part of the demurrer, that the court has no jurisdiction of the subject of the action, is overruled.

Appellant contends that the record discloses the decree admitting the codicil to probate was rendered May 8, 1942; that appellees filed a petition to vacate the decree May 29, 1942; that the demurrer was filed August 13, 1942, and was overruled by the county court September 30, 1942; that the statute (Comp. St. 1929, sec. 20-2009) provides that there are three terms of four months each applying to the county court, the first term starting the first day of January of each year; therefore, the ruling having been made in the

September term, the rule as announced in *Schuyler Bldg. & Loan Assn. v. Fulmer,* 61 Neb. 68, 84 N. W. 609, *Lyman v. Dunn,* 125 Neb. 770, 252 N. W. 197, and *Cronkleton v. Lane,* 130 Neb. 17, 263 N. W. 388, and other cases cited, applies.

We are not in accord with the appellant's contention on this point. In the case of *In re Estate of Vodvarka,* 97 Neb. 757, 151 N. W. 298, appears this language (p. 760):

"A county court in the exercise of its probate jurisdiction is not bound by the statute which fixes terms within which its jurisdiction in civil cases must be exercised. There is nothing in the statute to prevent a county judge from taking a case under advisement and rendering his decision at any time at which the parties are present either in person or by their attorneys." The *Vodvarka* case has never been modified or overruled. In addition, the instant case comes under section 20-2001, Comp. St. 1929, which provides in part:

"A district court shall have power to vacate or modify its own judgments or orders after the term at which such judgments or orders were made: * * * For fraud practiced by the successful party in obtaining the judgment or order; * * *."

The petition attempts to charge fraud in the procuring of the probate of the codicil. In connection with section 20-2001, *supra,* section 20-2009, Comp. St. 1929, provides that the provisions of article 20, ch. 20, which includes section 20-2001, shall apply to the county court and that the parties "shall be limited to the same time in which to commence proceedings; and in estimating time, the county court shall, for such purpose, be considered as holding, in each year, three terms of four months each, the first commencing on the first day of January of each year." This being true, it would be immaterial when the county court ruled on the demurrer, or in what term the hearing was had on the petition to set aside a decree admitting the codicil to probate. The appellant's contention in this respect is without merit.

We hold that the cause be reversed and remanded, with

directions to sustain the appellant's demurrer to the petition, in that the petition does not state facts sufficient to constitute a cause of action against the proponent, and that the demurrer be overruled in all other respects.

REVERSED, WITH DIRECTIONS.

EDNA KOMMA, ADMINISTRATRIX, APPELLANT, V. ROBERT KREIFELS, APPELLEE.

14 N. W. 2d 591

FILED MAY 19, 1944. No. 31785.

1. **Automobiles.** Gross negligence means great or excessive negligence; that is, negligence in a very high degree. It indicates the absence of even slight care in the performance of a duty.
2. ———. What amounts to gross negligence in any given case must depend upon the facts and circumstances. What would amount to gross negligence under certain circumstances might, under different circumstances, be even slight negligence. Ordinarily, the question of negligence, whether slight or gross, is one of fact. If the evidence respecting it is in conflict and is such that ordinary minds might draw different conclusions therefrom, then a question of fact is presented for the jury to determine.
3. ———. In an action for gross negligence under the automobile guest statute (Comp. St. Supp. 1941, sec. 39-1129), where there is adequate proof of negligence, a verdict should be directed for defendant only where the court can clearly say that it fails to approach the level of negligence in a very high degree under the circumstances. In all other cases, it must be left to the jury to determine whether it amounts to gross negligence or to mere ordinary negligence.
4. **Evidence.** Where there is no evidence connecting the use of intoxicating liquors with the cause of an automobile accident, and where, shortly after an accident, the seriously injured driver was asked "How he was getting along" and answered "I'll never drink anymore," the answer, standing alone, does not constitute an admission that the defendant had been drinking intoxicating liquors, nor that he was under the influence of such liquors at the time of the accident.
5. ———. A statement to be admissible as a part of the *res gestæ* must have been spontaneous and impulsive, and made at a time

and under such circumstances as to induce the belief that it was not the result of reflection and premeditation.

6. **Automobiles.** The doctrine of assumption of risk has no application in a case where, although the guest in an automobile had previously ridden with his host, the host was considered to be a safe driver, had never had an accident and the host testified that there was no occasion to protest his manner of driving prior to an accident in which the guest was killed.

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

Lloyd E. Peterson and *Betty Jean Peterson,* for appellant.

Jessen & Dierks, contra.

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

SIMMONS, C. J.

This is an action brought to recover damages for the death of plaintiff's intestate, and involves the guest statute. Trial was had. At the close of all the evidence, the trial court sustained a motion to dismiss plaintiff's action on the ground that gross negligence was not shown. Plaintiff appeals. We reverse the judgment of the trial court and remand the case.

We state the evidence relative to the issue presented in the light of the rule that " 'If there be any testimony before the jury, by which a finding in favor of the party on whom rests the burden of proof can be upheld, the court is not at liberty to disregard it, and direct a verdict against him.' * * * (b) 'In reviewing the action of a trial court in directing a verdict, this court will regard as conclusively established every fact favorable to the unsuccessful party which the evidence proves or tends to establish.' " *Bainter v. Appel,* 124 Neb. 40, 245 N. W. 16. The same rule applies to a motion to dismiss for insufficiency of the evidence.

The place of the accident was some three miles west of Nebraska City on a graveled country highway which runs east and west. At the place where the accident occurred,

the highway is 66 feet wide, the improved portion was 28 feet from shoulder to shoulder. Looking west the highway goes over a rather sharp hill and enters a valley. To the south of the shoulder of the highway was a slight depression running parallel with the road. Along the fence line there was a 50-year old Osage hedgerow. This was about 15 feet from the edge of the shoulder of the road. The hedge had been cut down, leaving large stumps sticking out of the ground. It had a second growth. Some of this growth had been trimmed to make posts; wire was attached thereto; and a live hedge was along the line. There was a power line pole located between the hedge and the graded portion of the road. This was about 315 feet beyond the crest of the hill.

About 4:30 p. m. on March 2, 1943, a car making "an awful roar," traveling at an "awful rate" and raising an unusual and "terrible cloud" of dust, went west past the crest of the hill. The accident followed immediately. The sheriff and a near-by resident inspected the scene within a few minutes after the accident. The tracks of the car were clearly visible. They went west 50 feet beyond the crest of the hill and on the right-hand side of the road. They then turned to the southwest and went 180 feet further on the graveled portion of the highway. They then traveled 20 feet in the depression, then hit and ran alongside of or on the hedge for 65 feet to the power line pole, past it a few feet, then turned abruptly to the left and the car came to a stop, headed almost due east, some 15 or 20 feet south of the power line pole. The marks of the tire treads were clearly visible along the highway, into the depression and up to the hedge. They were somewhat deeper in the lower part of the depression. There were no skid marks. During its progress down the hedgerow, the car broke off three fence posts, hit, sheared off and broke off the tops of some 12 or 15 of the stumps, throwing a large part of one stump about 25 feet, hit the power pole on its south side, knocked down and sheared off the hedge, leaving a pile of debris beyond the power pole, where it made the abrupt left-hand turn.

The right-hand door of the car was found some ten feet east of the power pole. The deceased, unconscious, covered with hedge brush, his head crushed, was found lying on the ground about ten feet east of the power line pole. He died from his injuries shortly thereafter. Pictures in evidence show two stumps, larger than the power pole in diameter, to the east of the place where deceased's body was found.

The car was damaged front, back, top, bottom, inside and outside. The right-hand door was torn off; the rear trunk door was off; the right and left fenders were caved in; the top was crushed in; the lining was torn on the inside of the car; and contents from the car were in the pile of debris at the turn beyond the pole. The left front tire was down and almost torn from the wheel; the left rear tire was down and the left rear wheel was locked. The left rear brake rod was bent, which caused the locking of the wheel.

The deceased and the defendant were old acquaintances. Deceased had ridden with defendant before, and defendant was considered "a safe driver." Defendant was seriously injured. Shortly after and on the afternoon of the accident, defendant said: "When he got over the hill the car went out of control." Some weeks later he told a witness that "they were going down the road and he looked out the side and when he turned back he thought he saw something in the road and tried to turn out for it and tried to turn back."

Defendant by his answer admitted that he owned the automobile; that on the day in question he was driving it west of Nebraska City; that an accident occurred; and that deceased was riding as a guest in the automobile with him.

At the close of plaintiff's case in chief, defendant moved for an instructed verdict on the ground that the evidence did not show defendant guilty of gross negligence. The motion was overruled. Defendant then testified in his own behalf that he and deceased left Nebraska City, going west, about 3:45 p. m.; that they stopped at a farm about 1½ miles out, then proceeded west; that his speedometer was

broken; that he was driving from 40 to 45 miles an hour and not over 50 miles an hour; that he was driving on the right-hand side of the road; that he thought he had the car under control at all times; that he was not familiar with this road; that as he came over the top of the hill, it seemed like there was a depression or something in the road; that he turned to avoid it, put on the brakes, and "the car seemed to turn around in the road and we went south off the road"; that he was afraid if he turned "too fast," he would upset; that he was trying to get back on the road and had both hands on the steering wheel at all times; that he came to the hedge fence, hit a stump with an "awful jar", and that both he and deceased were thrown out before they reached the power pole, and both landed at the same place. That is all defendant remembers. He further testified that his car, including the brakes, was in good mechanical condition, except that the wheels "shimmied" at 50 miles an hour, and did not do so just before the accident. His tires were all inflated immediately before the accident, and he does not know when they went down.

After both parties had rested, defendant renewed his motion to dismiss, which the court sustained on the ground that gross negligence of the defendant was not shown.

The evidence here digested is sufficient to sustain a finding that the defendant, driving the car in which deceased as a guest was riding with him, approached and went over the hill on a road with which he was not familiar, at an excessive and dangerous rate of speed, a speed so fast that he lost control of the car upon an effort to make a slight turn in direction; that defendant, so driving, took his eyes and attention off the road, looked to one side and looking back thought he saw a depression in the road; that the car started its course to the left and the defendant did not apply his brakes; that he continued his excessive speed; that he elected not to turn "too fast" and accordingly, he did not correct his direction during 200 feet of travel (180 feet on the traveled road bed); that he hit the hedge and traveled on it a distance of over 65 feet with sufficient speed to break off

stumps and posts and to throw deceased against the door, break off the door and throw deceased out to his death; that the tires were torn and deflated in passing over the stumps and posts; that the brake rod was bent in the same way; that as a result of this deflation and the bending of the brake rod, the car turned to the left and stopped with the rear left wheel locked. We do not find testimony that the car turned over, but it is difficult to understand the heavy dents in the top of the car except on that basis.

Does this evidence show gross negligence?

The guest statute provides: "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." Comp. St. Supp. 1941, sec. 39-1129. In construing this statute we have said: "Gross negligence means great or excessive negligence; that is, negligence in a very high degree. * * * it indicates the absence of even slight care in the performance of a duty." *Morris v. Erskine,* 124 Neb. 754, 248 N. W. 96. More recently we have said: "Gross negligence means just what it indicates, gross or great negligence, that is, negligence in a very high degree." *Johnson v. Batteen, ante,* p. 384, 13 N. W. 2d 625.

We have also, since *Morris v. Erskine, supra,* followed the rule there stated that "What amounts to gross negligence in any given case must depend upon the facts and circumstances. What would amount to gross negligence under certain circumstances might, under different circumstances, be even slight negligence. Ordinarily, the question of negligence, whether slight or gross, is one of fact. If the evidence respecting it is in conflict and is such that ordinary minds might draw different conclusions therefrom, then a question of fact is presented for the jury to determine."

It is apparent that no one act of the defendant can be separated from the whole of these acts and held to be the

independent cause of this accident. Under these circumstances each act is not to be segregated and weighed separately to determine whether or not it constituted gross negligence. The several acts are to be considered as a whole. While each of several acts, standing alone, may not exceed the bounds of ordinary negligence, yet, taken together, they may establish gross negligence. In such cases, it is for the jury to determine whether a defendant is guilty of gross or ordinary negligence. A verdict should not be directed nor a cause of action dismissed unless a court can definitely determine that the evidence of defendant's negligence, when taken as a whole, fails to reach that degree of negligence that is considered gross. Here the jury were not bound to find that defendant's acts were negligence in a very high degree, but a jury question was in our opinion presented as to whether or not, under the circumstances here, the things which defendant did and failed to do amounted to negligence in a very high degree, i. e., gross negligence. See *Thompson v. Edler*, 138 Neb. 179, 292 N. W. 236. The trial court erred in dismissing plaintiff's cause.

Two other matters require attention. After the accident, defendant, seriously injured, was taken or went to a nearby house. There the sheriff talked with him as he lay on the floor. The sheriff asked him "how he was getting along." Defendant answered: "Carl, I'll never drink anymore." The trial court sustained an objection to the statement and it was stricken. There was no evidence of drinking on the part of the defendant. This statement stands isolated and alone. The question does not relate to the way in which the accident happened. Standing alone, as it does, it was not an admission that defendant had been drinking intoxicating liquors, nor that he was under the influence of such liquors at the time of the accident. The statement is not admissible as a part of the *res gestæ*. The rule is: "A statement to be admissible as a part of the *res gestæ* must have been spontaneous and impulsive, and made at a time and under such circumstances as to induce the belief that it

was not the result of reflection and premeditation." *Tongue v. Perrigo,* 130 Neb. 564, 265 N. W. 737. Here the statement was made a considerable time after the accident; it was not spontaneous; it shows by its very words that it was the result of reflection and premeditation. The trial court did not err in ordering the statement stricken.

Defendant pleaded that deceased had ridden with him on many previous occasions, was aware of defendant's proficiency in driving, and his usual and customary habits of driving; that deceased accordingly assumed the risk incident to being defendant's guest passenger and made no protest as to the manner of driving; and that, therefore, the judgment should be sustained. Defendant's testimony is that deceased had ridden with him before; that he, defendant, had never had an accident before; that deceased made no protest and there was no need for protest until the car started to leave the road; that thereafter defendant would not have expected deceased to protest. Defendant cites *Kelly v. Gagnon,* 121 Neb. 113, 236 N. W. 160, and *Landrum v. Roddy,* 143 Neb. 934, 12 N. W. 2d 82. As this court said in *Sterns v. Hellerich,* 130 Neb. 251, 264 N. W. 677, there is no evidence that deceased had any knowledge that defendant "was a reckless driver or would be guilty of gross negligence." Deceased did not expose himself to a known danger. Defendant's testimony negatives any such conclusion. The doctrine of assumption of risk has no application here.

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

REVERSED.

CASSEL REALTY COMPANY, APPELLANT, V. CITY OF OMAHA ET AL., APPELLEES.

14 N. W. 2d 600

FILED MAY 19, 1944. No. 31628.

1. **Municipal Corporations.** The city of Omaha under its home rule charter has power by ordinance to zone the city into districts and to restrict the use to which buildings in particular districts may be put.
2. ———. The city of Omaha has power to change or supplement the zoning of the city and may change restrictions on the use of buildings.
3. ———. The statute and home rule charter of the city of Omaha granting the right to zone the city into districts and to restrict the use to which buildings may be put is a valid exercise of the legislative prerogative under the police power.
4. ———. An ordinance of the city zoning the city or restricting the use to which buildings may be put must not be unreasonable, discriminatory or arbitrary and must bear some relationship to the purposes sought to be accomplished by the ordinance.
5. **Constitutional Law.** A zoning ordinance may not operate retroactively to deprive a property owner of his previously vested rights.
6. **Municipal Corporations.** In an action to enjoin the enforcement of a zoning ordinance on the ground that it is unreasonable, arbitrary and confiscatory it is necessary to indulge the presumption that the city commission in its enactment was in possession of the facts relating to the necessity for the zoning restriction and that its legislation related and responded to the necessitous condition.
7. ———. If the court finds in an action to enjoin the enforcement of a zoning ordinance that necessity under the police power could have justified the zoning ordinance the court must assume that it did.
8. ———. If the court finds in an action to enjoin the enforcement of a zoning ordinance that the city commission could have said that the zoning ordinance was necessary in consideration of public health, safety, comfort or general welfare it is beyond the province of the court to say that it is unreasonable, arbitrary or confiscatory even though it may depreciate in value business property or restrict the liberty of citizens in regard to ownership and use of property.

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

Ziegler, Dunn & Becker, for appellant.

Harold C. Linahan, G. H. Seig and *Edward F. Fogarty, contra.*

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

YEAGER, J.

This is an action in equity originally instituted in the district court for Douglas county, Nebraska, by Cassel Realty Company, a corporation, plaintiff and appellant, against the city of Omaha, the individual members of the city commission of that city and the chief engineer of said city, defendants and appellees, the object and purpose of which is to have a zoning ordinance declared unconstitutional, null and void in its application to a certain tract of land belonging to plaintiff and to enjoin the enforcement of the ordinance in so far as it applies to the said tract of land.

The action was tried to the court whereupon decree was rendered denying the relief prayed by plaintiff. From this decree plaintiff has appealed.

As grounds for reversal plaintiff asserts that the court erred in finding that the ordinance in question was valid and constitutional; that the decree is contrary to and not sustained by the evidence; and that the decree is contrary to law.

Certain pertinent facts necessary to a proper understanding of the matter in controversy are the following: Fifty-second street in Omaha, Nebraska, extends north and south. Maple street extends east and west. Military avenue east of Fifty-second and south of Maple street extends from southeast to northwest. At or near the intersection of Fifty-second and Maple streets Military avenue enters and from that point westward about nine blocks coincides with Maple street. A double track street car line starting from downtown Omaha extends northwesterly over Military avenue to Fifty-second street, thence westerly over that part of Military avenue which is coincident with Maple street. Immediately west of Fifty-second street and north of Military

avenue is a body of land, approximately 20 acres, owned by plaintiff. The west boundary is Fifty-fourth street and the northern Bedford avenue. For many years this land was used and occupied as an amusement park. It was known as Krug Park. Prior to the times involved in this action this use had been discontinued and nearly all of the buildings and structures thereon had been removed. The only important structures remaining were a two-story brick building in the extreme southeast corner and a large wooden building. The lower part of the brick building had been used as a saloon and the upper part as an apartment. The wooden building had been used as a dance pavilion. At the time of the commencement of this action it was being used as a roller skating rink. Across Fifty-second street to the east in an area the north and south length of which is two blocks is situated the Benson High School. To the north in the same area is a public grade school. A part of the grade school building is used for high school purposes. Over 1,500 pupils attend the high school. Pupils come to the school from all directions. Access from the west and northwest is along Military avenue past the land of plaintiff and across Fifty-second street, from the south across Military, and from the southwest along and across Military and Fifty-second or across Military and Fifty-second. Several blocks to the west of Fifty-second and Military beginning at about Fifty-ninth street is a business or commercial area. In this area are stores, shops, a bank and various other commercial enterprises. This is known as the business center of Benson. This center with its surrounding territory was at one time a separate municipal corporation. It has since been made a part of the metropolitan city of Omaha. This is not to say that there are no business or commercial establishments east of Fifty-ninth street. It appears that between Fifty-fourth and Fifty-ninth streets on the north side of Military somewhat more than half of the frontage is either occupied by residences or are vacant and the buildings on the remainder are devoted wholly or in part to some kind of business. On the north side of Military avenue from

Fifty-second street to Fifty-fourth street, which is the property of the plaintiff, the condition has already been generally described. On the south side from Fifty-second to Fifty-ninth, about 600 feet are used in whole or in part for business, about 775 feet for residences, about 675 feet are vacant, 260 feet of which were formerly used as a used car sales and parking lot and on the rear of a space of 55 feet are two five-car garages.

In 1924, under authority of sections 14-401, 14-402 and 14-403, Comp. St. 1929, which sections are now a part of the home rule charter, the city commission adopted an ordinance classifying and zoning the city of Omaha for the purpose of regulating and restricting the location of trades and industries and the location of buildings designed for specific uses and for the division of the city into districts.

By the terms of this ordinance an area 125 feet in depth on both sides of Military avenue along plaintiff's property and for many blocks in both directions was zoned for commercial use, that is, it was ordained that in this area could be constructed buildings for commercial use, with exceptions not necessary to be mentioned here. Use for single or multiple unit residences was not prohibited. The name classification was "C" or Commercial District.

This classification and this zoning continued in full force and effect until December 24, 1941, when the city commission enacted a new ordinance by the terms of which an area 125 feet in depth on both sides of Military avenue from Fifty-second street to Fifty-sixth street was reclassified and rezoned. The rezoning removed the area from "C" to the classification of "B", Residence District.

The new or "B" classification prohibits construction on the property of buildings to be used for commercial purposes. It permits residences, multiple dwellings, boarding and lodging houses, hotels, hospitals and clinics, educational, philanthropic and eleemosynary institutions, nurseries and greenhouses, private clubs, fraternities and lodges, and certain accessory buildings customarily incident to the specific uses allowed.

Plaintiff contends that this reclassification and rezoning ordinance is illegal, unconstitutional and void for the reason that it is unreasonable, arbitrary and confiscatory.

Section 14-401, Comp. St. 1929, which is, as has been stated, a provision of the home rule charter of the city of Omaha, empowers the city commission to zone the city into districts and to restrict the use to which buildings in the particular districts may be put. Section 14-403 provides for the supplementing or changing of any such district.

The rezoning ordinance conformed to power granted to the city commission by the statute and the home rule charter. That the statute and charter is a valid exercise of the legislative prerogative under the police power can hardly be questioned. Also the exercise by the city commission of the power granted, if exercised reasonably and with due regard to rights of property and in the interest of public health, safety, morals and general welfare, is a proper prerogative.

On this subject in *Pettis v. Alpha Alpha Chapter of Phi Beta Pi,* 115 Neb. 525, 213 N. W. 835, this court quoted with approval the following from *Miller v. Board of Public Works,* 195 Cal. 477, 234 Pac. 381: "The police power, as such, is not confined within the circumscription of precedents, resting upon past conditions which do not cover and control present-day conditions obviously calling for revised regulations to promote the health, safety, morals, or general welfare of the public, and as a commonwealth develops politically, economically, and socially, the police power likewise develops, within reason, to meet the changed and changing conditions, and what was at one time regarded as an improper exercise of the police power may now, because of changed living conditions, be recognized as a legitimate exercise of that power. In its inception the police power was closely concerned with the public peace, safety, morals, and health, without specific regard for the general welfare, but the increasing complexity of our civilization and institutions later gave rise to cases wherein the promotion of the public welfare was held by the courts to be a legitimate

object for the exercise of the police power, and as our civic life has developed, so has the definition of 'public welfare,' until it has been held to embrace regulations to promote the economic welfare, public convenience and general prosperity of the community."

The power of a city to adopt and enforce the provisions of zoning ordinances was sustained in *City of Lincoln v. Foss,* 119 Neb. 666, 230 N. W. 592.

Even before the passage of legislation authorizing the zoning of cities by ordinance legislation permitting cities to regulate the erection of buildings and other structures within the corporate limits in the interest of good government, general welfare, health, safety and security of the citizens was recognized and upheld. Within the right to regulate was included the right to preclude or prohibit the erection of buildings or structures for particular purposes.

In *State v. Withnell,* 91 Neb. 101, 135 N. W. 376, it was said: "By charter the state legislature delegated power to the city of Omaha in the following terms: 'To make and enforce all police regulations for the good government, general welfare, health, safety and security of the city and the citizens thereof;' and 'to prescribe fire limits and regulate the erection of all buildings and other structures within the corporate limits;' and 'to define, regulate, suppress and prevent nuisances.' * * * Under the authority thus conferred, the city council in passing the ordinance obviously intended to exercise the police power of the city, and the courts should not interfere with its enforcement unless its unreasonableness, or the want of necessity for such measure, is shown by satisfactory evidence." The case was one involving the prohibition of the erection of structures on real estate for a particular use.

The city of Omaha under its home rule charter has the power, by ordinance, to zone the city in the interest of public health, safety, morals and the general welfare. Any such act of the city must however not be unreasonable, discriminatory and arbitrary and it must bear some relationship to the purpose or purposes sought to be accomplished

by the ordinance. *State v. Withnell, supra*; *Standard Oil Co. v. City of Kearney,* 106 Neb. 558, 184 N. W. 109; *State ex rel. Westminster Presbyterian Church v. Edgecomb,* 108 Neb. 859, 189 N. W. 617, 27 A. L. R. 437; *Pettis v. Alpha Alpha Chapter of Phi Beta Pi, supra; City of Lincoln v. Foss, supra*; *City of Lincoln v. Logan-Jones,* 120 Neb. 827, 235 N. W. 583; *Hawkins v. City of Red Cloud,* 123 Neb. 487, 243 N. W. 431; *Richardson v. Braham,* 125 Neb. 142, 249 N. W. 557; *Baker v. Somerville,* 138 Neb. 466, 293 N. W. 326; *Dundee Realty Co. v. City of Omaha, ante,* p. 448, 13 N. W. 2d 634.

It may be added here that a zoning ordinance may not operate retroactively to deprive a property owner of his previously vested rights, that is to say, a zoning ordinance could not deprive the owner of a use to which property was put before the enactment of the ordinance.

In *Baker v. Somerville, supra,* it was said with regard to a zoning ordinance of the city of Omaha: "They acquired vested rights by contract and by expenditure of money before the city extended this regulation to their property. It is well-settled law that an ordinance cannot operate retroactively to deprive them of their previously vested rights."

It follows therefore that the zoning ordinance before us cannot operate to take away any right which became vested prior to its adoption.

We come now to a determination of the question of whether or not the zoning ordinance in question is unreasonable, arbitrary and confiscatory in its application to the plaintiff and its property hereinbefore described. Whether or not it is unreasonable, arbitrary and confiscatory must be determined by the evidence of the special surrounding conditions and circumstances. In *City of Lincoln v. Foss, supra,* a case dealing with a zoning ordinance, it was said: "It is difficult, if not impossible, to lay down any general rules describing the exact field of operation of such power that will fit cases arising in the future. Each must be controlled by the special conditions and circumstances surrounding it."

In an action in court to enjoin the enforcement of a zoning ordinance on the ground that it is unreasonable, arbitrary and confiscatory it is necessary to indulge the presumption that the city commission in the enactment was in possession of the facts relating to the necessity for the zoning restriction and that its legislation related and responded to such necessitous condition. *State v. Withnell, supra*; *Hawkins v. City of Red Cloud, supra*; *Dundee Realty Co. v. City of Omaha, supra.*

Another rule requiring observance by the court in such actions is that if necessity under the police power could have justified the zoning ordinance the court must assume that it did. On this proposition this court in *Pettis v. Alpha Alpha Chapter of Phi Beta Pi, supra,* quoted with approval the following from *State v. City of New Orleans,* 154 La. 271, 97 So. 440: "If considerations of public health, safety, comfort, or general welfare could have justified zoning ordinance, the court must assume that they did justify it, and cannot take issue with the city council."

If then on the record presented there was evidence upon which the city commission could have said that the zoning ordinance in question was necessary in consideration of public health, safety, comfort or general welfare, it is beyond the province of the court to say that it is unreasonable, arbitrary or confiscatory even though it may depreciate in value business property or restrict the liberty of citizens in regard to ownership and use of property. *Pettis v. Alpha Alpha Chapter of Phi Beta Pi, supra*; *Hawkins v. City of Red Cloud, supra.*

It becomes necessary now to examine further the evidence to ascertain whether or not there were facts upon which the city commission could have concluded that this zoning was in the interest of public health, safety, comfort or general welfare.

We find nothing upon which to base a decision that the zoning was in the interest of public health.

On the matter of public safety we find that, as has already been pointed out, immediately to the east of the area

involved is a public high school accommodating more than 1,500 pupils; that the major portion of these pupils must pass along the street in front of the property involved or cross at the street intersection directly to the east; that traffic on Military avenue and at the intersection is already heavy and that a hazardous condition exists; that additional commercial establishments in the area rezoned and particularly on the property of plaintiff would materially increase the hazard and increase the danger to school pupils going to and from this high school.

On the matter of comfort witnesses who live or have lived in or near the location involved testified to the discomfort occasioned by commercial enterprises already in the vicinity. At least one witness testified that the confusion from commercial enterprises was so great that in order to obtain sufficient quietude for sleep he was compelled to abandon his residence in the area at a very great sacrifice. These witnesses concluded that from an increase in commercial enterprises would flow added confusion.

On the matter of public morals, which we take it is an element of general welfare, it was indicated in the evidence that commercial institutions such as would probably be established in this area would provide distractions for school pupils and loafing places which would bring about delinquencies in attendance upon classes. This conclusion depended upon observations of places already in close proximity and experiences at other schools.

Again under the general welfare witnesses, among whom were real estate men informed as to the elements affecting the value of residence properties, testified that a commercial area at this location would decrease the residence value of the surrounding area materially. Some said the value would be adversely affected for a distance of one block and some more than that. One said the effect would extend four or five blocks. Witnesses for plaintiff admitted that there would be an effect but that it would be slight and that it would not extend beyond the first block.

In this connection it may be well to note that the entire

area in every direction for many blocks from the location involved here was zoned, used and being developed for residence purposes except the lands of plaintiff, the grounds used for school purposes and 125 feet along both sides of Military avenue or Maple street. Also it may be said that it was the contemplation of the plaintiff that all of its land except 125 feet or a slightly deeper area should be platted and subdivided for residence purposes.

The evidence discloses that necessity or convenience to the community does not require that commercial enterprises shall be established between Fifty-second and Fifty-sixth streets. To the west and in the Benson business section it sufficiently appears that the community needs and convenience may now be adequately met and that in this area are vacant locations available for additional commercial enterprises.

On the other side plaintiff makes two contentions which are substantially supported by evidence. The first is that its property to the depth of 125 feet along Military avenue is not suitable for residence property of any kind or character. The second is that if permitted to use the area for commercial purposes plaintiff could sell it for prices greatly in excess of prices that could be obtained for any other purpose.

As against this, witnesses for the defendants say that this frontage likely could be sold for higher prices for commercial purposes than any other but that if platted in conformity with the rezoning ordinance the loss on the frontage would be made up in an increased value for residence purposes of plaintiff's land to the north.

This we think is a fair summary of the pertinent evidence bearing on this inquiry.

The law presumes and this court must therefore assume that the city commission was informed of these facts and that the rezoning ordinance was enacted with reference to this information.

Was this evidence sufficient to a degree that the Omaha city commission could have said that the zoning ordinance

was necessary in consideration of the public health, safety, comfort or general welfare? If it was of such quality then this court is bound by the action of the commission and may not hold the ordinance unreasonable, arbitrary and confiscatory and therefore void and unconstitutional. The finding of this court is an affirmative answer to the foregoing question.

The decree of the district court is affirmed.

AFFIRMED.

JOHN M. CHRISTENSEN, APPELLANT, V. ELSIE F. CHRISTENSEN, APPELLEE.

14 N. W. 2d 613

FILED MAY 19, 1944. No. 31749.

1. **Marriage.** A marriage is not void unless the statutes expressly so declare, and courts should not so construe it unless the legislative intent to such effect is clear and unequivocal.
2. **Equity.** The marriage in the case at bar is held to be voidable only, and the maxim that "he who comes into equity must come with clean hands" has application which bars annulment.

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

John A. McKenzie, for appellant.

Henry F. Pedersen, contra.

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

CHAPPELL, J.

Plaintiff filed a petition in the district court for Douglas county, Nebraska, on February 25, 1943, alleging that the parties were married on September 24, 1941, and that subsequently defendant was guilty of specific acts of extreme cruelty, all of which were designed to wrongfully acquire the property belonging to plaintiff. Plaintiff also alleged that at the time of the marriage his physical condition,

known to all the parties, was such that the marriage was void and should be so declared by the court. However, the prayer of the petition was for an absolute divorce from defendant.

Defendant answered admitting the marriage but denying generally the charges made against her; asserting her continued love, affection and respect for plaintiff; declaring her desire to continue the marriage relation; alleging that their marital difficulties resulted because of plaintiff's condition of health, of which she became apprised just prior to their marriage; and praying that the petition of plaintiff be dismissed and the relief sought be denied.

During the trial plaintiff was given leave to file a supplemental reply alleging that at the time of the marriage, and before license was issued, he, the plaintiff, was afflicted with tertiary syphilis, and that the marriage by reason thereof was void, concluding with a prayer that the marriage be so declared.

The trial court by its decree found specifically that the marriage was legal and valid; that plaintiff had failed by his evidence to sustain the allegations of the petition and reply; and dismissed the action, from which plaintiff appeals.

An examination of the record discloses that plaintiff failed in his evidence to establish any grounds for an absolute divorce. The only evidence that defendant was guilty of any offense in the marriage relation was plaintiff's own testimony to the effect that defendant had called him unprintable names, which is contradicted by defendant. It is elementary in this state that it is not error to deny a divorce from the bonds of matrimony on the charge of extreme cruelty on the part of the defendant where the evidence of the plaintiff as to alleged misconduct is not corroborated. See *Haines v. Haines*, 79 Neb. 684, 113 N. W. 125; Comp. St. 1929, sec. 42-335.

Nevertheless, plaintiff contends that there is sufficient evidence to sustain the allegations of his petition and permissive supplemental reply, which prays for an annulment

of the marriage on the basis that the marriage was void. The reasons given for this contention are that section 42-102, Comp. St. 1929, provides that, "No person who is afflicted with a venereal disease shall marry in the state"; and, that it appears from the undisputed evidence that plaintiff made an affidavit with respect thereto, as required by section 42-104, Comp. St. 1929, which was false, and of which defendant had full knowledge.

The regularity of plaintiff's pleadings for the purpose of judicial annulment is not presented for decision by the parties. Therefore, assuming their regularity, but not deciding the question, we find that plaintiff's pleadings and evidence supporting them failed to either state or prove any right to such relief in a court of equity since under our statutes and authorities generally the marriage was at most voidable at the hands of an innocent party, of which class plaintiff is not a member.

In this connection, the record discloses that the parties, a widow and widower, were middle-aged, respectable people, with kindred intellectual and spiritual interests. They discovered just prior to their marriage, for which all plans had been perfected, that plaintiff was afflicted with tertiary syphilis, but that defendant was negative of any venereal taint. A reputable physician to whom they both went for a physical examination discovered the disease, which the evidence does not disclose was other than innocently acquired. Thereafter both plaintiff and defendant were called to the doctor's office where, in his presence, and in the presence of each other, they were fully informed of all the facts. They were told by the physician, however, that this condition need in no manner interfere with their marriage plans since the particular disease with which plaintiff was afflicted was not in a stage which then or thereafter would become communicable to a marital partner. The latter condition was verified by medical evidence. However, plaintiff was informed at the time that he should at some date not far in the future receive medical treatments to abate the progress and cure the disease. After full knowledge and consulta-

tion the plaintiff and defendant decided to proceed with their marriage. They thereupon went to Papillion, Nebraska, where, with other members of the family present, they obtained a marriage license and the marriage was solemnized as required by section 42-104, Comp. St. 1929, each of the parties making affidavit previous to obtaining the license that they were free from any venereal disease. Of course, plaintiff's affidavit was false, and defendant's affidavit was true, although she knew then of plaintiff's physical condition. They celebrated with a dinner, and went to plaintiff's home where the marriage relation was consummated. After a few days of happiness plaintiff went to a hospital for treatments in conformity with the physician's advice. After his return from the hospital domestic difficulties of small consequence arose, which later grew to larger proportions and resulted eventually in the filing of plaintiff's petition.

A marriage affected in its inception with recognized legal imperfections is classified by the law as void or voidable depending in each case upon the statutes and other legally recognized impediments to perfection. Speaking in general terms and disregarding minor distinctions which courts are often required to do in promulgating definitions, we find that a marriage is termed void when it is not valid for any legal purpose. It is void *ab initio* by statute and its invalidity may be maintained in any proceeding in any court between any proper parties whether in the lifetime or after the death of the supposed husband and wife, and whether the question arises directly by petition for an annulment or collaterally in other proceedings. On the other hand, a marriage is voidable when it has legal imperfections in its constitution which can be inquired into only during the lives of both of the parties in a proceeding by annulment to obtain a judgment of a competent court declaring its invalidity. Otherwise, a voidable marriage is legally valid for all civil purposes until its nullity is so pronounced. See 1 Bishop, Marriage, Divorce and Separation, 107, secs. 258, 259; 35 Am. Jur. 212, sec. 46, and 219-221, secs. 56-58; 38 C. J. 1279; 18 R. C. L. 439-441.

The law of marriage in this country traces its origin back to the ancient decrees of the church and the civil law which were the basis of the matrimonial laws of England, and the nature of these distinctions peculiar to marriage can be truly seen only in the light of its history. See 1 Bishop, Marriage, Divorce and Separation, 108-122, secs. 262-292; 35 Am. Jur. 181, sec. 2; 18 R. C. L. 389. Therefrom the rule has been evolved that every marriage statute is to be interpreted in harmony with the common law theretofore existing and as superseding it only to the extent required by its express terms or necessary operation. In view of the importance of marriage as a social institution it is favored by public policy and the law raises a strong presumption in favor of its legality, the strength of which increases with lapse of time. See *Allen v. Allen,* 121 Neb. 635, 237 N. W. 662. It is generally held that a marriage is not void unless the statutes expressly so declare, and that courts should not so construe it unless the legislative intent to such effect is clear and unequivocal. See 35 Am. Jur. 181, sec. 3, 212, sec. 46, and 234, sec. 85; 38 C. J. 1280; 18 R. C. L. 397. While the purpose and intent of the provision relied upon in section 42-102, Comp. St. 1929, was undoubtedly to protect the innocent, prevent the spread of infectious social disease, and safeguard posterity, we find no provision in the statutes of this state applicable here which expressly declares that a marriage by such a person is void. The same section also provides that the parties must have arrived at certain ages, or upwards, but this court has held that a marriage in violation thereof is not void but only voidable. See *Willits v. Willits,* 76 Neb. 228, 107 N. W. 379.

An examination of all marriage statutes of this state discloses that there are only two sections expressly declaring what classes of marriages are void. They are section 42-103, Comp. St. 1929, which specifically provides that four certain classes of marriages are void; and section 42-104, Comp. St. 1929, which makes common-law marriages void. *See Collins v. Hoag & Rollins,* 122 Neb. 805, 241 N. W. 766. None of these classes include the type of marriage involved in the case at bar.

The latter section has particularly to do with the manner and method of the valid creation of the marriage relation, but, in the absence of express statutory invalidation, this court has held that the fact that the license required was wrongfully or fraudulently procured may subject the parties to the pains and penalties of the law for violation thereof, but it does not alone affect the validity of the marriage itself. See *Baker v. Baker*, 112 Neb. 738, 200 N. W. 1003; *Melcher v. Melcher*, 102 Neb. 790, 169 N. W. 720; 35 Am. Jur. 195, sec. 23.

Finally, there is a well-known maxim of equity which provides that "he who comes into equity must come with clean hands." Its application by equity courts generally bars redress to those guilty of improper conduct in the matter as to which they seek relief. As a defense the doctrine need not be pleaded since it may be invoked and supplied by the court *sua sponte* to protect the integrity of the court, and it has generally been held applicable in proceedings for annulment of marriages. See 30 C. J. S. 475, sec. 93, 487, sec. 97, and 494-497, sec. 99. Although there is authority to the contrary, the majority rule is that for reasons of public policy the doctrine does not ordinarily apply in proceedings to annul a marriage void *ab initio*, particularly where the impediment is an element distinct from the fraud and not dependable in any measure upon it, but the maxim is always applicable in proceedings to annul a voidable marriage. See 1 Bishop, Marriage, Divorce and Separation, 312, sec. 722; 38 C. J. 1350. In this connection, it has been authoritatively stated that, "Beside denying and disproving the facts relied on to show the invalidity of the marriage, defendant in nullity cases may defend on the ground that plaintiff does not come into court with clean hands, having been guilty of fraud or misconduct, or, as it is otherwise expressed, that he is not an innocent and injured party, having had full knowledge at the time of the marriage of the defects or impediments alleged." 38 C. J. 1350. Also, "We may presume that the party guilty of the wrong would not be permitted to take advantage of it, by main-

taining a suit of nullity solely on that ground" and, "When the parties are equally in the wrong neither is entitled to redress." 1 Bishop, Marriage, Divorce and Separation, 234, sec. 546, 234, sec. 547. It is particularly true and applicable here that, "A court of equity will refuse its aid to a litigant who has been guilty of a violation of a statute, if the act of violation is directly connected with the matter in litigation." 4 A. L. R. 104.

We decide that the marriage in the case at bar is voidable only, and that the maxim that "he who comes into equity must come with clean hands" has application which bars annulment. Therefore, the judgment of the trial court is correct, and it is hereby affirmed.

AFFIRMED.

RUTH CULL SMITH ET AL., APPELLANTS, V. LYDIA M. JOHNSON ET AL., APPELLEES: CARROLL O. STAUFFER, EXECUTOR, APPELLANT.

14 N. W. 2d 424

FILED MAY 19, 1944. No. 31649.

1. **Husband and Wife.** The common-law disabilities of a married woman to enter into contracts exist in this state except in so far as they have been abrogated or changed by statute.
2. ———. Postnuptial contracts entered into between husband and wife while residents of this state in which they settle their property rights, including their respective rights of inheritance in the property of the other, are not authorized by express statute and are invalid and unenforceable.

APPEAL from the district court for Burt county: HERBERT RHOADES, JUDGE. *Reversed.*

Carroll O. Stauffer and *John A. McKenzie,* for appellants.

John L. Barber, Jr., and *Chatt & Ellenberger, contra.*

Heard before SIMMONS, C. J., PAINE, CARTER, CHAPPELL and WENKE, JJ., and POLK and NUSS, District Judges.

POLK, District Judge.

This is an action in partition involving 160 acres of land in Burt county, Nebraska. It was instituted by the devisees under the will of Emma B. Samson against Lydia M. Johnson, devisee under the will of Oscar Samson, and others. From a decree denying partition an appeal is prosecuted to this court.

The record shows that Oscar Samson and Emma B. Cull were married on October 5, 1911, and at this time he was 62 years of age and she was 44 years of age. He was the father of five children by two prior marriages and she was the mother of three children by a prior marriage. They lived together from the time of marriage until his death on August 27, 1940. On August 12, 1927, Samson and wife, then of Oakland, Nebraska, executed a postnuptial agreement which provided in substance that Mr. Samson should not have any right or interest in the estate of his wife after her death and that Mrs. Samson upon the payment to her of $32,500 in cash or sound securities by the executor of Mr. Samson's estate and a deed by his other heirs to the family home in Oakland, Nebraska, would release and quitclaim all right, title and interest in his estate. The agreement recited that Mr. Samson had by will bequeathed and devised Mrs. Samson $32,500 and the above property in Oakland, Nebraska, but it was not until August 22, 1927, that the will was executed.

In the will he devised the land which is sought to be partitioned to his daughter, Lydia M. Johnson, and to his wife he devised the home place in Oakland, Nebraska, and bequeathed her $32,500, all household goods and a pleasure automobile. This will was admitted to probate on September 23, 1940. Before her death on August 3, 1941, Mrs. Samson elected to take her distributive share under the statute rather than the provisions made for her under the will.

In the lower court the postnuptial agreement was interposed as a defense against partition, the contention being that the plaintiffs and appellees as devisees of Mrs. Samson

were estopped from claiming any interest in the land by reason of the agreement of their mother in which she released all hereditary interest therein. It was on this theory of defense that the trial court denied partition.

The assignments of error raise several questions among which we find the question as to whether the postnuptial agreement was valid. This question involves the power of a married woman in this state to enter into contracts. It has been before this court many times. The rule seems to be firmly established that the common-law disabilities of a married woman exist in this state except in so far as they have been abrogated or changed by statute. *Fidelity & Deposit Co. v. Lapidus,* 136 Neb. 473, 286 N. W. 386.

Postnuptial contracts were void at the common law. 26 Am. Jur. 914, sec. 318. Has this disability to contract been abrogated by statute in this state? Sections 30-105 and 30-106, Comp. St. 1929, prescribe certain methods whereby the right of inheritance of a husband or wife may be barred in the other's real estate. These methods are (1) by conveyance of husband and wife, (2) by sale under execution or other judicial sale, and (3) by an antenuptial contract. It will be observed that section 30-106 only refers to a contract before marriage and is silent as to a postnuptial contract between husband and wife. This silence we think is significant. Had the legislature desired to change the common-law rule it would have been a simple matter to have included postnuptial contracts. We think the statutory method of barring the right of inheritance is limited to the methods outlined in the foregoing sections of the statute.

Appellees have called attention to the cases of *In re Estate of Lauderback,* 106 Neb. 461, 184 N. W. 128, and *Ladman v. Ladman,* 130 Neb. 913, 267 N. W. 188, as authority for the recognition of postnuptial contracts in this state. The foregoing cases are what are commonly called separation agreement cases. They do not recognize the right of husband and wife to enter into a postnuptial agreement barring their respective rights in the other's real property while the complete marriage relation exists. The rule in

AFFIRMED.

this state is clearly stated in the case of *In re Estate of Lauderback, supra,* to the effect that where the husband and wife find it impossible to dwell together in harmony because of the misconduct of one which would warrant a legal separation, and as a consequence they decide to enter into a contract adjusting all their property rights and each relinquishes any rights in the property of the other, and providing for the immediate separation of the parties, this kind of a contract is valid and enforceable. Separation agreements founded on this broad, equitable doctrine do not contravene public policy.

Appellees also place considerable reliance on the case of *Jorgensen v. Crandell,* 134 Neb. 33, 277 N. W. 785, as authority for the recognition of postnuptial contracts in this state. This case holds that a postnuptial contract made in California, where this kind of contract is recognized as valid, will be enforced in the state of Nebraska and is in complete harmony with the position that postnuptial contracts without separation, made between husband and wife while residents of Nebraska, will not be recognized and are unenforceable.

The trial court erred in holding that the postnuptial contract was valid and binding on Emma B. Samson, her heirs, executors and representatives. The decree of the trial court is reversed and the cause remanded for further proceedings in consonance with this opinion.

REVERSED.

CHAPPELL, J., dissents.

SAM PHILLIPS, PLAINTIFF IN ERROR, V. STATE OF NEBRASKA, DEFENDANT IN ERROR.

14 N. W. 2d 606

FILED MAY 26, 1944. No. 31761.

1. **Criminal Law.** The jury are the judges of the credibility of the witnesses who testify before them and of the weight of their testimony, when properly admitted, and, unless the decision of

the jury thereon is clearly wrong, their verdict will not be molested.

2. **Larceny.** The intent with which the property alleged to be stolen was taken by accused may be proved by circumstantial evidence.
3. ———. Nonconsent of the owner of the property alleged to have been stolen may, in a proper case, be inferred from circumstances, the same as any other essential fact.

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

G. B. Hastings, for plaintiff in error.

Walter R. Johnson, Attorney General, Rush C. Clarke and *H. Emerson Kokjer, contra.*

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

SIMMONS, C. J.

The defendant was charged, tried and convicted of hog stealing. He appeals. We affirm the judgment of the trial court.

The appeal presents the question of the sufficiency of the evidence to sustain a conviction, and, particularly, the sufficiency of the evidence to prove a felonious intent at the time of the taking.

In summary the evidence of the state follows: One Humphrey gave a Hampshire boar to a boy named Wayne Todd. On February 19, 1943, Todd took the hog to the sales pavilion at Imperial. There he met the defendant, who also had a hog, and they traded hogs. Todd was to get $3 "to boot." Todd did not get the $3. The boar, marked "for slaughter only," was put in the sales ring, and only $2 was bid. The defendant refused to sell it. It was returned to the pen and Todd and defendant traded back. The next morning Todd went to the sales barn, found the boar in a pen used by defendant, took it out, put it in his own pen and wired the gate shut. A few hours later Todd, returning to the sales barn, found the wire off the gate, the gate open and the hog gone. Todd reported the matter to the sheriff. February 24, defendant sold the boar and another pig in Ogallala for

a total of $16. It was found near there on the 27th. February 25 or 26 defendant asked Todd if he had found his pig. During the week following the disappearance of the hog, defendant went to Humphrey, who had given the boar to Todd, told him he understood that he, defendant, was going to be arrested for stealing Humphrey's hog from Todd, and told Humphrey that he, defendant, had bought the hog from Todd, and at the same time asked Humphrey, "What do you want for this pig?" Also, about that same time, defendant went to Todd's mother and tried to pay her for the boar.

At the preliminary hearing, defendant offered in evidence a "bill of sale" written on the back of a blank check, reciting: "Sold Sam Phillips one hamp boar for one dollar on Feb. 19, 1943 Wayne Todd". The defendant and his witnesses testified that he bought the hog after the sale on the 19th from Todd for $1; that defendant did not have the dollar in change; that defendant's wife paid it to Todd; that defendant's wife wrote the above instrument, and Todd signed it. The state offered the exhibit in evidence in the district court, together with expert testimony that the signature on the exhibit was not that of Todd, and that the same person wrote the entire exhibit. Todd denied selling the hog to defendant and denied the signature.

The serious dispute in the evidence goes to the question of whether or not Todd had sold the hog to the defendant. As to that, the evidence is in conflict. Todd's complaint to the sheriff when he found the hog missing negatives a sale. Defendant's inquiry of Todd as to whether or not he had found the hog, his offer to pay Todd's mother and Humphrey for the hog are not consistent with a prior purchase.

The rule is: "The jury are the judges of the credibility of the witnesses who testify before them and of the weight of their testimony, when properly admitted, and, unless the decision of the jury thereon is clearly wrong, their verdict will not be molested." *Lillard v. State*, 123 Neb. 838, 244 N. W. 640.

The jury resolved the disputed questions of fact against

the defendant. The evidence is sufficient to sustain their decision. The state charged that the defendant did "feloniously steal, take and carry away" the boar, the property of Todd, "without the consent" of the owner "and against his will."

"The intent with which the property alleged to be stolen was taken by accused may be proved by circumstantial evidence; * * * ." 36 C. J. 912. See 32 Am. Jur. 1046. See, also, *Lillard v. State, supra*; *Farrin v. State*, 112 Neb. 608, 200 N. W. 54. " * * * nonconsent of the owner of the property alleged to have been stolen may, in a proper case, be inferred from circumstances, the same as any other essential fact." *Holthus v. State*, 138 Neb. 200, 292 N. W. 603. In the light of the jury's finding against defendant, it is quite apparent that the evidence establishes the necessary intent.

The judgment of the trial court is affirmed.

AFFIRMED.

PAUL L. PASSMORE, APPELLANT, V. JOYCE H. PASSMORE, APPELLEE.

14 N. W. 2d 670

FILED MAY 26, 1944. No. 31764.

1. **Divorce.** The amount of alimony, if any, to be awarded the wife in a divorce action must be determined from the facts and circumstances of each case.
2. ———. The husband's property holdings, his age, his health and his ability to earn are matters to be considered in determining the amount of alimony, if any, to be awarded.
3. ———. The judgment of the trial court fixing the amount of alimony will not be disturbed on appeal unless good cause is shown.
4. ———. In determining the conditions under which a parent may visit the child of divorced parties, the age, health and best interest of the child are to be considered, as is also the convenience of the parent having custody.
5. ———. The judgment of the trial court as to the visitation privileges of a parent with an infant child is subject to revision by that court upon proper showing.

6. ———. The order of the trial court as to visitation privileges will not be disturbed on appeal in the absence of a showing that it is unreasonable.

APPEAL from the district court for Dundy county: CHARLES E. ELDRED, JUDGE. *Affirmed.*

George J. Marshall and *Leon L. Hines,* for appellant.

Victor Westermark, contra.

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

SIMMONS, C. J.

By this appeal a husband seeks a reduction of permanent alimony granted the wife, and a modification of the conditions affecting the custody of an infant son and visitation accorded him. We affirm the judgment of the trial court.

Plaintiff sued his wife for divorce. The wife filed an answer and cross-petition. Trial was had. The court denied the plaintiff's petition and granted the defendant a divorce on her cross-petition. He awarded the defendant $1,500 in permanent alimony, payable $100 on the date of the decree, $100 the month following, and $30 a month thereafter until the total sum was paid. The court awarded the care, custody and control of the infant son of the parties to the defendant, awarded $15 a month as support money, payable until the child became 18 years of age, or until further order of the court, and provided that "plaintiff shall have permission to visit child on convenient and proper occasions during daylight hours, but not to remove said child or attempt to remove said child from the custody and control of defendant nor in any way to intrude himself on defendant's presence."

Plaintiff complains here only as to the award of $1,500 permanent alimony and the above quoted conditions under which he may visit the child. Accordingly, a statement of the evidence upon which the court granted the divorce is not required. Plaintiff testified in his own behalf, but offered no corroborating evidence. Defendant testified in her

own behalf and offered corroborating evidence. The evidence is ample to sustain the decree.

The parties were married May 20, 1940. The child was born September 25, 1942, and was 13 months old at the time of the trial and decree. The parties separated in May, 1943. The evidence as to the amount and value of the property of the plaintiff and his income was furnished almost entirely by the plaintiff. The plaintiff was engaged in the dairy and farming business with his father, in what appeared to be an equal partnership, at least as to a division of net income. The plaintiff testified that all records were kept by the father, title to the property was in the father, the bank account was in the name of the father. No records were produced. The products of the rented farm were used in part in the dairy business and in part sold. Plaintiff, while admitting a gross income to the partnership of from $4,500 to $5,000 a year, submitted no definite figures of expenses and stated his own annual income at $740, although in his petition he alleged an income of "about $75.00 per month." Apparently in determining his income, no credit was given for living quarters, provisions and such matters, which it may be assumed were in addition to the amount so shown. Plaintiff testified to the ownership of personal property, the value of which he stated in his petition to be "about $400.00." While on the witness stand, he fixed it at a lesser amount. He testified that he did not know how much money was in the bank, nor his net of the bank account. He testified that when the parties were married, plaintiff had $500, which he put into the cost of a house; and that his wife put in $42.35. The wife testified she put in $197 or $198. The father loaned them $685.04. The house was built on land, title to which was then and remained in the father. The plaintiff testified that he owed his father $500 on the house at the time of the trial, and that it was then worth $1,400. It is quite apparent that he did not make a full and complete disclosure of his property or his income to the trial court.

The defendant testified that plaintiff refused to advise

her as to the standing of his financial accounts with the father, but plaintiff did tell her that the debt on the house was paid. After the marriage, defendant worked in the dairy, along with the plaintiff. The value of her services went to the partnership business. Before the child was born, she returned for a short time to her profession as a nurse, contributing her earnings to the family expenses. Defendant, while in good health when married, is not now in good health. Plaintiff is in good health, able to work and earning a substantial income.

Section 42-318, Comp. St. 1929, provides: "Upon every divorce from the bonds of matrimony for any cause excepting that of adultery committed by the wife, and also upon every divorce from bed and board, from any cause, if the estate and effects restored or awarded to the wife shall be insufficient for the suitable support and maintenance of herself and such children of the marriage as shall be committed to her care and custody, the court may further decree to her such part of the personal estate of the husband and such alimony out of his estate 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 of the case." The amount of alimony, if any, to be awarded, must be determined from the facts and circumstances of each case. The trial court had the opportunity to study the witnesses and to determine what evidence to believe and what to disbelieve. No good purpose will be served by attempting to draw a pattern from our previous decisions and then to fit this case into that pattern. Prior decisions may guide but do not control for the obvious reason that the same "circumstances" do not exist in any two cases. Plaintiff's position here is that the alimony judgment should be limited to a part of his disclosed property holdings. Plaintiff's age, his health, his ability to earn are also to be considered. The trial court clearly considered all these matters. Its judgment will not be disturbed on appeal, unless good cause is shown. It does not appear here.

Likewise, we find no merit in plaintiff's complaint against the provisions of the decree as to visiting his child. In determining the conditions under which a parent may visit the child of divorced parties, the age, health and best interest of the child are to be considered, as is also the convenience of the parent having custody. At the time the decree was entered, the child was a babe in arms of an age requiring constant attention, care and adequate rest. Plaintiff does not complain that he cannot visit the child under the terms of the order. He makes no complaint that the defendant has in anywise prevented him from visiting his child. The mother's convenience must also be considered. The requirements of the order are not shown to be unreasonable, nor to work a hardship on plaintiff. The order of the trial court as to visitation privileges will not be disturbed on appeal in the absence of a showing that it is unreasonable. The order, of course, is subject to revision by the trial court upon proper showing.

The judgment of the trial court is affirmed.

AFFIRMED.

LUCY TOOLE ET AL., APPELLEES, V. DEWEY M. LAWRENCE, APPELLANT: ALICE LAWRENCE ET AL., APPELLEES.

14 N. W. 2d 607

FILED MAY 26, 1944. No. 31786.

1. **Tenancy in Common.** Where one of several tenants in common removes a burden resting upon the land in the joint estate, he is entitled to a just contribution from the others, so that the burden may be equal.
2. ———. When land belonging to several cotenants is purchased at a foreclosure sale by one of them, he will be compelled in equity to account to the others as an express trustee, unless it appeared that the others had in some manner waived or surrendered their rights.
3. ———. When one of several co-owners of property acquires a tax title thereto founded on default in the payment of taxes which are a common burden on all, his purchase amounts merely to a

payment of the taxes or a redemption from the sale, and gives him no rights against his associates except in so far as they may fail or refuse to contribute to the expenditure so made.

4. ———. In order to avail themselves of the purchase by a cotenant of an outstanding title to the common property, other cotenants must elect within a reasonable time whether they will contribute to the expense of acquiring such title.

5. ———. Although the husband of the tenant in common may not be able to acquire a valid title under a tax sale, as against the cotenants other than his wife, he nevertheless is entitled to be repaid the whole amount paid as the purchase price under the tax sale, and not merely the portion of the sum represented by the shares of the cotenants other than his wife.

6. ———. When a piece of real estate belongs to a number of heirs, and a wife, who is one of such cotenants, actively assists her husband in securing title, through tax foreclosure thereof, by neglecting to pay delinquent taxes thereon from trust funds in her hands belonging to all cotenants, and by securing deeds to her husband from some of the heirs, to the end that he will be the only one to profit from the transaction, such co-operation between the wife and the husband in carrying out his designs places the husband in the same position as if he were one of the cotenants, and he will be held to hold such title so obtained in trust for all the cotenants thereof.

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

William E. Shuman, for appellant.

E. H. Evans, contra.

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

PAINE, J.

This was an equitable action for an accounting to quiet title and for equitable relief. The court found generally for plaintiffs, and one of the defendants appeals.

The record shows that Emma V. Mathewson died the owner of a small two-room house, which was located upon lot 6, block 6, Graceland's Addition to North Platte; that she died intestate December 30, 1925, while a resident of Rock county, Nebraska, and that the said lot was inherited

by her six children; that Leon W. Mathewson, one of the six children, and the only one residing in North Platte, took charge of the property, but he died intestate on April 2, 1938, and his interest was inherited by his four daughters, one of them being the plaintiff Lucy Toole, and another is her sister, Alice Lawrence, a defendant herein, each of whom is therefore the owner of a 1/24th interest in said property.

The evidence disclosed that, by the death of the grandmother, Emma V. Mathewson, and also by the death of several of her heirs, the title to this small house and lot in the outskirts of the city of North Platte finally vested in many persons who had inherited interests in the ownership thereof, and that these parties were scattered in several states.

Exhibit No. 4 is an escrow agreement, addressed to McDonald State Bank, dated January 15, 1937, accompanied by a warranty deed, each of them signed by 15 heirs, giving Leon W. Mathewson the power to perfect the title, sell the property, and divide the proceeds between the heirs, for which work it provides he shall receive no compensation whatever, but he died before he could complete a sale of the property for the benefit of all of these heirs.

The court finds in the decree that the lot was foreclosed for taxes by Lincoln county, and that subsequent thereto and in May, 1941, while Alice Lawrence was in possession of said premises and collecting the rents therefor, Dewey M. Lawrence, her husband, who was living with her as her husband, purchased the assignment of the bid of Lincoln county, and the sale was confirmed in him as assignee, and sheriff's deed issued to said Dewey M. Lawrence under date of July 30, 1941, and three weeks thereafter, on August 20, 1941, he contracted to sell the said property to Walter A. Quinn for $700, who paid $100 down and entered into possession of said property under said contract, and thereafter paid the remainder of the purchase price in the full sum of $700 principal and $26.97 interest.

Dewey M. Lawrence testified that the purchase of the lot from the county was his own private investment, and

his wife knew nothing about it until he told her. He said, "It wouldn't have been any investment of mine to throw my money in the pool for twenty-seven heirs."

It is necessary to examine in detail the evidence as to who was in charge of renting this house while the taxes were allowed to become delinquent.

The real estate agent whom Leon W. Mathewson had employed to have charge of the place continued to collect the rents for May and June, 1938. Thereupon Alice Lawrence, defendant, took charge of renting the property, and continued to rent it at $10 a month until August 15, 1941, a period of over three years, but made no distribution of the rents she collected to the other heirs.

She testified that she opened an account in the name of Mrs. D. M. Lawrence, and the first deposit was made November 8, 1939, $7, when Mr. Jackson was in the house. She testified: "Like I say, none of them ever came over with $10.00 at a time, and I would save, keep little dribbles until I would get enough to pay me to go to the bank and then I would bank it." The bankbook showed only deposits of a total of $74, and against this deposit she had drawn personal checks, saying: "When I wrote the checks I thought a reasonable fee for taking care of the property—In fact, Mr. Toole told me that himself, and it was $1.00 a month, so that is the reason I felt free to write some personal checks, and thought if the time would come when we were to settle with the heirs that if they were not entirely satisfied with that I would be glad to refund them."

She testified that her husband had written two receipts for rent when she was back east, and that he had taken care of some of the estate business downtown, the same as the rest of the heirs.

The court found in the decree that Alice Lawrence while in possession of said property collected rents thereon in the sum of $220 over and above pay for her services and repairs expended by her, which balance she holds in trust for the owners of said property, of whom she is one. Upon judgment being entered against her, she paid the amount of

$220 into court for distribution among the heirs. It is clear that she did not use any of this money to pay off the delinquent taxes for the year 1935, assessed in the amount of $9.18, upon which delinquent taxes her husband finally secured a sheriff's deed to the premises.

Louis B. Toole testified generally that about 30 days before the property went to tax sale he was over at Lawrence's home and talked to him and his wife, "and he said being there was so many heirs in it, it would be the best to let it go through tax foreclosure and buy it and divide it up that way."

Dewey M. Lawrence on direct examination testified in regard to Mr. Toole: " * * * he came over to the house several times, and he kept talking about somebody was going to get that place down there and he was helpless. He said 'I have got no money, and I can't do anything about it, why don't you do something?' and I was busy on the road that time of the year, and it kind of got on my mind, and the last time he came over he had his car, and I said 'How much is against it,' and he said 'Let's run down and see,' and so we did, and we went in and I was a little surprised to see there was that little against it, so I laid down my own personal check and said 'protect.' That is, in other words I would like to have first chance on it from Mr. Davis."

Exhibit No. 19 was a check, dated May 21, 1941, for $78.65, to the clerk of the district court and signed by Dewey M. Lawrence. Exhibit No. 20 is the sheriff's deed issued for said check to Dewey M. Lawrence, which on its face shows that in case No. A-1807 there was due from Arthur James Mathewson upon said real estate the sum of $10.79 with interest at 7 per cent from November 5, 1938, together with attorney's fees of $1.07 and costs taxed at $49.

The original petition in the case at bar was filed September 4, 1941, by Lucy Toole, plaintiff, against Dewey M. Lawrence, Alice Lawrence, his wife, and Walter A. Quinn, the purchaser of this lot under contract from Dewey M. Lawrence. On May 19, 1942, the case came on for trial, and the court held that the plaintiff could not maintain action on

behalf of her several cotenants, and continued the cause so that she might make all of such cotenants parties to the suit, and an amended petition was filed August 17, 1942, bringing in all of the heirs.

Among the exhibits we find letters written by Alice Lawrence just a few days after the court continued the case to bring in all the heirs. Exhibit No. 22 is dated May 26, 1942, and exhibit No. 23 is dated May 25, 1942. Exhibit No. 22 was written by Alice Lawrence to her uncle, Arthur Mathewson, residing in Lincoln, and exhibit No. 23 was written to her aunt, Esther Kyler, at Wewela, South Dakota, and her family. The letters were each four pages long, and the first page of each inquired about the health of their families, and then told about the trouble her husband, Dewey, was having about "Grandma's little house," and that it was put up for sale on account of unpaid taxes. Exhibit No. 22 states, beginning on the second page: "and rather than have a stranger buy it, Dewey (my husband) paid off all past taxes & rec'd a clear title to it, by the county. After papa died, I was the only person who took any interest in it & tried my best to keep it rented although it was terribly run down) & I have all the rent money I collected in the bank to be divided among the heirs. This money would have been divided last fall, but immediately after Dewey came into possession of it, Lucy & Louis (her husband) filed suit against us. Now, in this suit, they claim Dewey was acting for you (all) heirs when he bo't it. Of course, this is not true, as each one of you & they to, had the same chance to buy it. However, you do get your share of rent money. Now Uncle Art, Lucy & Louis is just mad because they didn't buy it & they are trying to push the heirs into filing suit against us. I am enclosing a paper which I tho't you would sign, which will show that you & Aunt Grace had nothing to do with Dewey buying the place, & therefore, you expect him to pay you no share, since the deed was made out to him. Of course, all money taken in before the county turned the deed over to Dewey, will be divided among the heirs as soon as this trouble is cleared

up. Dewey is fighting the case against them as he feels as though, since he paid off all indebtedness, the place belongs to him. They claim not & are trying to take the title away from him. If you can take the enclosed paper to a Notary & sign the same, it will be of great assisstance to him in getting this thing cleared up. We have one of these papers already signed by Aunt Tiny & Uncle George. Could you do this immediately & return in stamped envelope which I am enclosing with $1.00 your fee for signature & .50 for Notary. With a lot of gratitude to you & Aunt Grace I am your neice Alice." Exhibit No. 23 is to the same effect.

As a result of her efforts she received a quitclaim deed from Arthur James Mathewson and wife, running to Dewey M. Lawrence, in consideration of one dollar, acknowledged May 29, 1942, another quitclaim deed from her aunt, Esther Carrie Kyler, and husband to Dewey M. Lawrence, dated June 2, 1942, and a quitclaim deed from Ella Lula Atkinson and husband to Dewey M. Lawrence, dated May 23, 1942. The grantors in these three quitclaim deeds later repudiated the deeds after they had learned the true facts, and all filed cross-petitions to cancel the deeds and obtain the same general relief sought by the other heirs.

It is argued in the brief of the appellees that, in writing and negotiating for these deeds and securing them for a nominal sum, in each of which her husband was named as grantor, entire concord of action and understanding is proved between Dewey M. Lawrence and his wife in their general course of conduct in securing the title to this property away from the other heirs. Alice Lawrence in her answer alleged that she acquiesced in and consented to said purchase by her husband, and makes no claim to any interest therein.

In the decree the court finds that the quitclaim deeds of three cross-petitioners were executed in expectation of payment of *pro rata* share of purchase price to vendors, and that the defendant Dewey M. Lawrence held title in trust for the owners of said property just before and at the time the tax deed was obtained from Lincoln county.

The court also finds that Dewey M. Lawrence paid out in purchase of bid, subsequent taxes and recording fee the full sum of $125.93, for which he should receive credit, leaving a balance of $601.04, which he holds in trust for the owners of said property, and that the costs of the action should be taxed jointly against the defendants Dewey M. Lawrence and Alice Lawrence, and should not be paid out of the sums involved, and that judgment be entered in favor of the owners of said real estate in the proportions set out.

The errors relied upon for reversal are that the court erred in finding that Dewey M. Lawrence held the title to said property in trust for the owners thereof, and in entering judgment against him for the profits he made on the transaction.

Complaint is also made of the finding of the court that the three cross-petitioners executed the quitclaim deeds in expectation of receiving a *pro rata* share of the profits of the deal.

The first proposition of law involved is whether a tenant in common may acquire a tax title for his own benefit. The earliest case on the points involved is that of *Brown v. Homan,* 1 Neb. 448, decided by the supreme court of the territory of Nebraska, involving a deed dated April 2, 1856, in which Judge Lockwood said it was not material as to what the nature of the controversy was between Brown and Curtis, as the relation of tenants in common existed between them. "One tenant in common before partition cannot purchase in an outstanding title or incumbrance, on the joint estate, for his exclusive benefit, and use it against his cotenant. The purchase enures to the common benefit, and the purchaser is entitled to contribution."

In the case of *Carson v. Broady,* 56 Neb. 648, 77 N. W. 80, 71 Am. St. Rep. 691, an opinion written by Judge Sullivan reversed the district court for Richardson county, and cited the paragraph just quoted from *Brown v. Homan, supra,* and said "this is believed to be the universal rule" citing 7 Am. & Eng. Ency. of Law (2d ed.) 353, which says: "Where one of several tenants in common, or joint tenants

of land removes a burden resting upon the joint estate, he is entitled to a just contribution from the others, so that the burden may be equal" citing cases in support thereof from England and many states.

Where an estate in lands descended to several heirs as tenants in common, and was sold to foreclose a mortgage given by the ancestor, and was purchased by one of the cotenants, the latter would be compelled in equity to account to the others as an express trustee, unless it appeared that they had in some manner waived or surrendered their rights. The court said that nothing was better settled in equity jurisprudence than that a cotenant, under such circumstances, could not take to himself individually the benefits of his purchase to the exclusion of his cotenants. See *Tisdale v. Tisdale,* 2 Sneed (Tenn.) 595, 64 Am. Dec. 775.

The authorities appear to approve the general rule that, when one of several co-owners of property acquires a tax title thereto founded on default in the payment of taxes which are a common burden on all, his purchase amounts merely to a payment of the taxes or a redemption from the sale, and gives him no rights against his associates except in so far as they may fail or refuse to contribute to the expenditure so made. See 14 Am. Jur. 123, sec. 54; 54 A. L. R. 896, Annotation.

It is said in *Gilb v. O'Neill,* 225 Ala. 92, 142 So. 397, 85 A. L. R. 1526: "In order to avail themselves of the purchase by a cotenant of an outstanding title to the common property, other cotenants must elect within a reasonable time whether they will contribute to the expense of acquiring such title." And in the A. L. R. annotation thereon cases are cited from many states in support of this rule. See, also, 6 A. L. R. 297, Annotation.

In the case at bar, the husband of a cotenant insists that a husband is not a tenant in common by reason of the fact that his wife is a tenant in common, and there is no obligation growing out of the marriage contract which will invalidate the husband's purchase of the interest of the other tenants in common on sale of the common property for nonpayment of taxes.

It is also argued by appellant that, if a husband purchases title of property through tax foreclosure, in which his wife has an interest, and she does not complain, but acquiesces in such purchase, others having interests in the property cannot make complaint because of the husband's acquisition of interests belonging to his wife, citing *Smith v. Casto,* 107 W. Va. 1, 148 S. E. 566, 61 C. J. 1201, and *Ruark v. Harper,* 178 N. Car. 249, 100 S. E. 584. However, we believe the weight of the better authorities holds to the contrary.

In the case of *Willard v. Ames,* 130 Ind. 351, 30 N. E. 210, we find this statement in the text: "It seems to be settled law that a husband, whose duty it is to look after the business interests of his wife and family, as well as to support them, will not be permitted to acquire title to the property of his wife by purchase at a tax sale; * * * ." This statement is quoted with approval by our court in *Winn v. Winn,* 131 Neb. 650, 269 N. W. 376.

In the very old case of *Laton v. Balcom,* 64 N. H. 92, 6 Atl. 37, 10 Am. St. Rep. 381, it is stated: "The obligations and duties of husbands and wives to each other, both express and implied, create such relations of trust and confidence between them that neither can acquire the other's property by a clandestine payment of taxes. Such a seizure of each other's estate, alike inequitable and shocking to the moral sense, is believed to be unsupported by any adjudged case, and would be a palpable violation of the marital contract, which, from its very nature, creates a mutual right of faith in the constant regard of each for the interests and welfare of the other."

"As a general rule, neither husband nor wife can purchase the other's land at a tax sale, nor can a husband gain an interest in land in which his wife owns a life estate when he allows the land to be sold for taxes, by purchasing a deed thereto from the holder of the tax title, and such transaction results in a redemption of the land from the tax sale." 61 C. J. 1200.

"But, although the husband of the tenant in common may

not be able to acquire a valid title under a tax sale, as against the cotenants other than his wife, he nevertheless is entitled to be repaid the whole amount paid as the purchase price under the tax sale, and not merely the portion of the sum represented by the shares of the cotenants other than his wife." 54 A. L. R. 901, Annotation.

As set out in the evidence in the case at bar, when the trial court continued the case on May 19, 1942, to enable Lucy Toole, who was then sole plaintiff, to bring in all the heirs, Alice Lawrence at once co-operated in the scheme of her husband, and entered actively into the plan to save to her husband all of the net profits of $601.04 arising from his purchase of the land at the county foreclosure, based on the delinquent tax for one year of $9.18, which they had failed to pay out of the rents both of them had collected for the heirs, and which foreclosure would have been dismissed as to this property if she had paid the tax out of the money belonging to all the heirs which she still held on hand.

She at once wrote these cotenants, sending them one dollar and notary fee of 50 cents, and a deed made out to her husband, explaining that by this deed they would expedite closing the matter, and implying they would profit thereby. They each relied upon her representations and executed and returned to her the deed. It appears to us that this active co-operation between the husband and wife to keep the other cotenants from sharing in the profits of over $600 which the husband had made on the transaction violates the rules set forth in the cases herein cited.

We find that the trial court was right in the decree, which held, among other things, that defendant Dewey M. Lawrence held the title to this real estate in trust for the owners of said property in the ratio of the proportions and ownerships of each, and said decree is hereby affirmed.

AFFIRMED.

MARY G. WHITAKER, APPELLANT, V. MARY ALICE KEOGH, ADMINISTRATRIX, APPELLEE.

14 N. W. 2d 596

FILED MAY 26, 1944. No. 31750.

1. **Automobiles.** The driver of an automobile entering an intersection of two streets or highways is obligated to look for approaching cars and to see those within that radius which denotes the limit of danger.
2. ———. If the driver of an automobile entering an intersection looks for approaching vehicles but fails to see one which is favored over him under the rules of the road, he is guilty of contributory negligence sufficient to bar a recovery as a matter of law.
3. ———. When the driver of an automobile entering an intersection looks but fails to see an approaching automobile not shown to be in a favored position, the presumption is that the driver of the approaching automobile will respect his right of way, and the question of his contributory negligence in proceeding to cross the intersection is a jury question.
4. ———. Where the operator of an automobile about to enter an intersection sees an approaching car and tests an obvious danger by moving from a place of safety into the path of the oncoming vehicle and is struck, he is guilty of contributory negligence sufficient to bar a recovery as a matter of law, whether he is driving the favored car or not.
5. ———. Where an automobile proceeding across a street intersection had passed the center of the intersecting street and was struck by a car approaching from its left, and it appears that no collision would have occurred if the approaching car had proceeded on its right-hand side, no justification being shown for the approaching car being to the left of the center of the street, any negligence of the driver of the first car in failing to see the approach of the second is not a proximate cause of the accident.
6. **Principal and Agent.** Whatever an agent or employee does in the lawful exercise of his authority is imputable to the principal, and where the acts of an agent or employee will bind the principal, his representations, declarations and admissions respecting the subject matter will also bind him, if made at the same time and constitute a part of the same transaction.

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

Emmet S. Brumbaugh and *Harry W. Whitaker, Jr.*, for appellant.

Kennedy, Holland, DeLacy & Svoboda, contra.

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

CARTER, J.

This is an action to recover damages for personal injuries sustained in an automobile accident. At the close of plaintiff's evidence the trial court directed a verdict for the defendant and dismissed the action. The plaintiff appeals.

The record shows that on November 27, 1940, the plaintiff, Mary G. Whitaker, was traveling east on Chicago street in the city of Omaha and as she was passing across 49th street she was struck by the car owned by Mary A. Keogh, now deceased, which was being driven at the time by her chauffeur in the course of his employment. The evidence of plaintiff is that as she approached the intersection of Chicago and 49th streets she looked north at a point just short of the west curb line of 49th street, that the car was then in second gear and proceeding at a speed of eight to ten miles an hour, that she could see for half a block north at that time and that no car was in sight. She testifies that she then looked south and, seeing no car approaching from that direction, proceeded into the intersection. Her car was struck between the door and front fender on the left side. Plaintiff's evidence is that she was on the streetcar track when struck and that the rear of the car extended about two feet over the east rail of the track after the collision occurred. She testifies that she was 61 years of age, had driven a car for 26 years, and had good eyesight. She also testifies that she did not see the car until the very moment of the collision. That she sustained injuries in the accident is not questioned. There is other evidence in the record to the effect that 49th street was 29 feet wide from curb line to curb line and that the streetcar track was in the center of the street, each rail being 12 feet from its adjacent curb.

Other evidence as to the location of trees and other obstructions indicates that plaintiff's view was unobstructed to the north for considerably more than half a block. The damage to plaintiff's car indicates that it was struck at about the point to which plaintiff testified. Upon this evidence the trial court directed a verdict for the defendant.

In the consideration of the case we are obliged to adhere to the rule that in reviewing an order sustaining a motion for a directed verdict at the close of plaintiff's evidence we will assume the existence of every material fact which plaintiff's evidence tends to establish and all logical inferences deducible therefrom.

It is the contention of the defendant that plaintiff, under the evidence adduced, has shown herself to be guilty of contributory negligence in such degree as to bar recovery. The particular rule relied upon is that it is the duty of the driver of a vehicle about to enter a street intersection to look for other vehicles entering the same intersection and that the duty to look implies the duty to see that which is in plain sight, unless some excuse for not seeing is shown. The contention of the defendant infers a duty on the part of one entering an intersection, not only to see all approaching cars within the range of his vision, but also a duty to take the measures necessary to avoid a collision, irrespective of the negligence of the driver of such an approaching car. Such a rule places an unprecedented burden upon one about to enter a highway or street intersection.

This court has held that the failure of the driver of an automobile, upon approaching an intersection, to look for vehicles approaching the same intersection, where, by looking, a collision could be avoided, constitutes negligence more than slight as a matter of law and operates to defeat a recovery. *Bergendahl v. Rabeler*, 133 Neb. 699, 276 N. W. 673; *Cuevas v. Yellow Cab & Baggage Co.*, 141 Neb. 662, 4 N. W. 2d 790. But this rule is subject to certain limitations. It was not intended to make a person entering a street intersection an insurer against a collision irrespective of the negligence of the other party.

In the instant case the plaintiff approached the intersection from the defendant's right and, consequently, had the right of way over all cars approaching from the left which had not entered the intersection ahead of her. Comp. St. 1929, sec. 39-1115. Plaintiff had the right to assume that the driver of any car approaching the intersection in an unfavored position would take the steps necessary to permit her to clear the intersection. The record does not disclose the position of defendant's car at the time plaintiff entered the intersection. There is no evidence, therefore, that defendant's car first entered the intersection and thereby became the favored car, and giving plaintiff's evidence all inferences most favorable to her as required in reviewing the correctness of an instructed verdict, we think the record shows that plaintiff had the right of way. The proper rule is that when a person enters an intersection of two streets or highways he is obligated to look for approaching cars and to see those within that radius which denotes the limit of danger. If he fails to see a car which is favored over him under the rules of the road, he is guilty of contributory negligence sufficient to bar a recovery as a matter of law. If he fails to see an automobile not shown to be in a favorable position, the presumption is that its driver will respect his right of way and the question of his contributory negligence in proceeding to cross the intersection is a jury question.

In the instant case, plaintiff, under the undisputed evidence, entered the intersection first, and no basis for a finding of contributory negligence sufficient to bar a recovery as a matter of law exists. Before a verdict can be properly directed in such a case the position of the defendant's car must be definitely located in a favored position, otherwise the question becomes one for the jury.

In a similar case the rule was stated as follows: "The driver of a car is not required to notice every car that happens actually to be within the range of vision, but only those within that radius which denotes the limit of danger." *Smith v. Blafkin,* 95 Pa. Super. Ct. 520. In another

case the court said: "If the jury believed his story that he looked and saw nothing, they might have inferred that defendant was so far away that he was not within the area which ordinarily would be covered in the act of looking. Plaintiff was not required to apprehend that defendant was going to approach at a reckless rate of speed. * * * Although, under the law, had these two parties come to the intersection at the same time, the defendant would have had the right of way, the fact that the plaintiff did not see defendant when he was at the second track would indicate that he must have been some distance away and that, therefore the plaintiff might reasonably believe that he had the right of way by reason of his being on the crossing without any other car being near to the right. In view of these facts, we do not think the case was one that the court could decide that contributory negligence was present as a matter of law." *Marshall v. Staab*, 83 Pa. Super. Ct. 365.

This type of case must not be confused with those where the driver, seeing a car approaching an intersecting street or highway, undertakes to cross in front of it. In such case, one, who sees an approaching car and tests an obvious danger by moving from a place of safety into the path of the oncoming vehicle and is struck, is guilty of contributory negligence sufficient to bar a recovery as a matter of law, whether he is driving the favored car or not.

The general rule governing the type of case at bar is that when the injured party fails to look at all, or looks straight ahead without looking to either side, or is in such a position that he cannot see, or, in other words, when he takes no precaution at all for his own safety, it is usually a question for the court. Where he looks and does not see an approaching vehicle, or, seeing one, erroneously misjudges its speed or distance, or for some other reason assumes that he can proceed and avoid a collision, the question is usually one for the jury. We think, however, that a proper interpretation of the foregoing rules requires one to see other automobiles approaching or entering intersections which have been favored with the right of way under the statutory rules of the

road, and the failure to see such a favored car bars recovery. To hold otherwise would permit one to ignore the rules of the road as to right of way with impugnity and render valueless the beneficent purpose of the right of way statute by the mere expedient of saying that he did not see the approach of the favored car.

The decisions of this court appear to have so limited the rule in its application in requiring one approaching an intersection to look and to see that which is in plain sight. See *Bergendahl v. Rabeler, supra*; *Cuevas v. Yellow Cab & Baggage Co, supra*; and *Thrapp v. Meyers*, 114 Neb. 689, 209 N. W. 238. The rule herein announced does not disturb the rules announced in the foregoing cases in respect to their application to the facts in those cases. The announced rule does, however, place limitations upon the scope of the rule which do not appear to have been previously stated.

The evidence shows that plaintiff's car was struck after it had passed the center of the intersecting highway. It is evident under the present state of the record that if defendant's car had been on its right-hand side of the intersecting street there would have been no accident. Under such circumstances it appears that the contributory negligence charged to plaintiff could not have been a proximate cause of the injury. On this ground alone the motion for a directed verdict should have been overruled.

The plaintiff complains of the ruling of the trial court in excluding a statement made by the chauffeur of defendant's car immediately after the collision. Plaintiff offered to show that the chauffeur said: "Lady, I am sorry. I just saw you the instant I collided with you." We think the evidence was properly receivable as an admission against interest. Whatever an agent or employee does in the lawful exercise of his authority is imputable to the principal, and where the acts of an agent or employee will bind the principal, his representations, declarations and admissions respecting the subject matter will also bind him, if made at the same time and constitute a part of the same transaction. Wigmore, Evidence, sec. 1078. The question is one

of substantive law, the law of agency. It is not a question of *res gestæ* as is often supposed. Wigmore, Evidence, sec. 1797.

We conclude therefore that the trial court was in error in directing a verdict. The judgment of the district court is reversed and the cause remanded for a new trial.

REVERSED.

HARRY W. WHITAKER, APPELLANT, V. MARY ALICE KEOGH, ADMINISTRATRIX, APPELLEE.

14 N. W. 2d 600

FILED MAY 26, 1944. No. 31751.

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

Emmet S. Brumbaugh and *Harry W. Whitaker, Jr.*, for appellant.

Kennedy, Holland, DeLacy & Svoboda, contra.

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

CARTER, J.

This is a companion case to *Whitaker v. Keogh, ante,* p. 790, 14 N. W. 2d 596. In this case the plaintiff, the husband of Mary G. Whitaker, sues to recover for the loss of the services and society of his wife, the medical and hospital expenses resulting from his wife's injury and for the damages sustained to his automobile, all resulting from a collision between plaintiff's and defendant's automobiles at a street intersection. The trial court directed a verdict for the defendant at the close of plaintiff's evidence and plaintiff appeals.

All of the material facts necessary to a decision are set out in the companion case and will not be recited here. For the reasons stated in the opinion in *Whitaker v. Keogh,*

supra, the judgment of the district court is reversed and the cause remanded for a new trial.

REVERSED.

IN RE ESTATE OF JAMES O. BAKER.
ROY R. BAKER, APPELLEE, V. W. H. KIRWIN, ADMINISTRATOR DE BONIS NON, APPELLANT.
14 N. W. 2d 585

FILED MAY 26, 1944. No. 31663.

1. **Executors and Administrators.** The general rule is that if payment for services was to be made by a conveyance or devise of property by decedent, but he refused or neglected to perform the agreement in his lifetime, and the amount to be paid for such services was not agreed upon, then the person rendering the same is entitled to recover the reasonable value thereof.
2. ———. The presumption of gratuity which is said to exist with reference to services rendered and received between closely related persons is entirely rebuttable by circumstantial as well as direct evidence, and such presumption diminishes in direct proportion to the remoteness of the degree and nature of the family relationship and the character of the duties performed.
3. ———. Such presumption is not conclusive and recovery is permitted for services rendered if the evidence shows that they were rendered under an express contract, either written or oral, to pay for them, or where there was an implied agreement or contract to pay as when the circumstances are such that a mutual intention, understanding or expectation that the services should be paid for is a reasonable and just conclusion established by clear and satisfactory evidence.
4. **Limitation of Actions.** Where services are rendered under a contract of employment which does not fix the term of service or the time for payment, the contract is continuous and the statute of limitations does not commence to run until the employee's services are terminated.
5. **Witnesses.** A person who has filed a claim against the estate of a deceased person for services performed under a contract is not incompetent to testify to independent acts which he performed when the deceased had no personal connection with the act and as to which the deceased did not participate.
6. **Evidence.** If it is shown by satisfactory proof that the originals of letters or telegrams have been lost or destroyed then second-

ary evidence of their contents becomes admissible. Their loss or destruction need not be proved beyond possibility of mistake as the court is vested with a judicial discretion in the matter and it is enough if the testimony satisfies the court of the fact with reasonable certainty.

7. ———. If letters or telegrams are accidentally destroyed by a party without fault secondary evidence may be given of their contents, and even if their destruction is voluntary secondary evidence of their contents may be given if the circumstances accompanying the act are free from suspicion of intent to defraud and consistent with an honest purpose.

8. ———. Ordinarily the rule is that their loss or destruction should be proved by the last custodian of the instruments unless his absence is satisfactorily explained or his disqualification appears, as in cases like the one at bar, in which event the proof may be made by any competent witness who has knowledge of the facts.

9. ———. Persons engaged in performing services of the same character as those to be valued, and persons who have knowledge of the business in and for which the services have been rendered, and of their value, may give their opinion as to the value of the services.

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

Morrow & Miller, for appellant.

Raymond & Sheldon, contra.

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

CHAPPELL, J.

Appeal is taken from an allowance of the claim of Roy R. Baker against the estate of James O. Baker, deceased, for the reasonable value of services rendered the deceased during the latter years of his lifetime. Hereinafter appellant will be designated as defendant, and appellee as plaintiff. The claim was allowed in the county court and upon appeal to the district court a jury affirmed the award by returning a verdict for plaintiff in the sum of $10,950. The assignments of error are that the verdict is not sustained by the evidence and is contrary to the instructions of the trial

court; that the trial court erred in giving and refusing to give certain instructions, and in the admission of evidence; all of which we decide are without merit.

The petition on appeal to the district court alleged, in substance, that in September, 1935, plaintiff entered into an oral contract with James O. Baker to work for him and render certain services consisting of the management of his farms, general business, and personal affairs, in pursuance of which plaintiff commenced his duties on November 1, 1935, and continued in such employment until December 2, 1941, the date of the death of James O. Baker; that the reasonable value of such services rendered was $10,950, no part of which had been paid; that the claim and cause of action were just and after allowing all credits, there was due thereon $10,950 for which plaintiff prayed judgment and allowance. The answer denied generally the allegations of plaintiff's petition and alleged, in substance, that plaintiff was a nephew of deceased, and during the period mentioned lived with deceased in a family relationship; that if any services were rendered to deceased they were fully paid for during his lifetime, and that the statute of limitations barred the claim. Plaintiff's reply admitted that he was a nephew of the deceased, but denied generally all other allegations of the answer which did not admit the allegations of plaintiff's petition.

The record discloses that defendant offered no affirmative evidence disputing the evidence introduced by plaintiff, except one witness whose testimony is devoted exclusively to the question of the value of the services rendered by plaintiff. All other evidence, facts and circumstances are unanswered and uncontradicted.

Briefly, the evidence discloses that plaintiff was a nephew who had never theretofore occupied an intimate association or family relationship with deceased. He was a man of maturity and business experience, having for many years maintained a home and successfully managed an independent real estate business of substance in Chicago, Illinois, before entering the services of deceased. Because of failing

health and eyesight, the deceased had for some time previous to September, 1935, consistently importuned plaintiff to come to Mitchell, Nebraska, and assume responsibility for the management and supervision of his extensive and substantial property, business, and personal affairs. In September, 1935, upon telegraphic request of deceased, he and plaintiff had a business conference, following which the plaintiff abandoned his home and business interests in Chicago, and went to Mitchell, Nebraska, the residence of deceased, when and where he assumed such duties. Before plaintiff's arrival deceased informed many persons that his nephew was coming out from Chicago to supervise and manage his property, business, and personal affairs for him. Upon plaintiff's arrival deceased presented him to many of his friends and business associates as his nephew, of whom he had previously spoken advising them that plaintiff would thenceforth have charge of all his business affairs, all of which in the future should and would be conducted by and through plaintiff. Deceased made many and various statements and declarations to plaintiff by letters, and to other persons orally, some of which were in plaintiff's presence, clearly indicating a mutual intention that plaintiff was to be amply compensated for his services, although there appeared to be no fixed or agreed rate of compensation which he was to receive. The plaintiff satisfactorily devoted his exclusive time and effort to the services of deceased without the payment of compensation during the entire period of approximately six years, until December 2, 1941, the date of his demise, and the evidence discloses that the reasonable value of such services was at least the amount of the verdict or in excess thereof. Plaintiff's petition supported by this evidence brings the case almost squarely within the rules announced in *Anderson v. Estate of Akins*, 99 Neb. 630, 157 N. W. 334, and the authorities from other jurisdictions in similar cases.

Because of the statute (Comp. St. 1929, sec. 20-1202), which prohibits a claimant against an estate from testifying to any transactions or conversations with the deceased,

ordinarily such claims for services rendered the deceased in his lifetime must of necessity be proved in large part by declarations and admissions of the deceased made to others and by indirect and circumstantial evidence. See *In re Estate of Skade,* 135 Neb. 712, 283 N. W. 851; Dame, Probate and Administration (3d ed.) 415, sec. 404.

Statements made by deceased in his lifetime and appearing in the evidence here to the effect that he would give plaintiff an interest in his property and business, or would convey or devise property to him, while not independently enforceable and not offered here for that purpose, since this is not a suit for specific performance, were admissible to rebut any presumption that the services were rendered gratuitously and permit recovery for the reasonable value of his services. See 21 Am. Jur. 567, sec. 327; *Estate of Kessler,* 87 Wis. 660, 59 N. W. 129; *Laughnan v. Estate of Laughnan,* 165 Wis. 348, 162 N. W. 169; *Anderson v. Estate of Akins, supra.*

The general rule is that if payment for services was to be made by a conveyance or devise of property by decedent, but he refused or neglected to perform the agreement in his lifetime, and the amount to be paid for such services was not agreed upon, then the person rendering the same is entitled to recover the reasonable value thereof. See Dame, Probate and Administration (3d ed.) 414, sec. 403; 34 C. J. S. 118, sec. 373; 24 C. J. 277; *Anderson v. Estate of Akins, supra.*

It has been held that, "A contract to pay for services rendered by a person for a decedent and his family may be implied by proof of actual performance of such services, their reasonable value, and facts, circumstances and conditions which show that it was not the intent of either decedent or claimant that such services were gratuitous." Dame, Probate and Administration (3d ed.) 415, sec. 404. In this connection, the relation of claimant to decedent is an important element to consider. The presumption of gratuity which is said to exist with reference to services rendered and received between closely related persons is entirely re-

buttable by circumstantial as well as direct evidence, and such presumption diminishes in direct proportion to the remoteness of the degree and nature of the family relationship and the character of the duties performed. If, as in the case at bar, the parties were not closely related, had not theretofore lived in an intimate family relationship, and plaintiff owed no such duties to decedent, but abandoned his independent home, property, and business to perform services of a personal and business character for deceased at his request, over a long period of time, it may be truly said that the presumption has been greatly weakened and is very slight in degree. See Dame, Probate and Administration (3d ed.) 416, sec. 405; 34 C. J. S. 106, sec. 371, and 114, sec. 371 b (6); 28 R. C. L. 682, 683; *Bell v. Rice*, 50 Neb. 547, 70 N. W. 25; *In re Estate of Skade, supra.*

Even in cases between parent and child living in an intimate family relationship where the strongest presumption prevails, it is not conclusive and recovery is permitted for services rendered if the evidence shows that they were rendered under an express contract, either written or oral, to pay for them, or where there was an implied agreement or contract to pay as when the circumstances are such that a mutual intention, understanding or expectation that the services should be paid for is a reasonable and just conclusion established by clear and satisfactory evidence. See *In re Estate of Chalupa*, 134 Neb. 918, 280 N. W. 164; 34 C. J. S. 106, sec. 371; 24 C. J. 284. The trial court submitted all these propositions in its instructions to the jury for their decision in a manner favorable to defendant rather than prejudicial, and the verdict is amply sustained by the evidence.

Defendant complains that instructions No. 6 and No. 7 given by the trial court were conflicting. Instruction No. 6 in substance told the jury that the burden was upon plaintiff to prove all of the material allegations of his petition by a preponderance of the evidence, while instruction No. 7 advised the jury that plaintiff must prove certain specific propositions by clear, satisfactory, and unequivocal evi-

dence. We cannot find that these instructions were conflicting. "Preponderance" is a measurement of the comparative weight or quantity of the evidence. On the other hand, "clear, satisfactory, and unequivocal" is definitive of the kind or quality of the evidence of which plaintiff must adduce a preponderance. The evidence here is clear, satisfactory, and unequivocal, and uncontradicted. Therefore, defendant could not have been prejudiced thereby in any event.

Complaint is also made that instruction No. 14 given by the trial court erroneously submitted the question of the statute of limitations in the disjunctive rather than the conjunctive form. With reference to the statute of limitations, there is a well-settled applicable rule which has been approved by this court in similar cases to the effect that, where services are rendered under a contract of employment which does not fix the term of service or the time for payment, the contract is continuous and the statute of limitations does not commence to run until the employee's services are terminated, which in the case at bar would be upon the demise of James O. Baker by whom plaintiff was employed. See *Phifer v. Estate of Phifer,* 112 Neb. 327, 199 N. W. 511; *In re Estate of Skade, supra.* See, also, *Harmon v. Smitch,* 86 Ind. App. 527, 157 N. E. 284, which cites and relies upon the *Phifer* case. Speaking technically, instruction No. 14 should have been stated in the conjunctive, but at most it was a grammatical error which could not be prejudicially erroneous since the uncontradicted evidence clearly shows that there was no fixed term of service or time for payment, and that plaintiff in fact rendered the services continuously to the time of his employer's demise.

We have examined the other instructions given by the trial court and find no error prejudicial to defendant in any of them. We have also examined defendant's requested instructions and find that their substance either appears in other instructions given to the jury or that they were properly refused.

Error is also assigned because of the alleged erroneous

admission of certain evidence as in violation of the prohibition contained in section 20-1202, Comp. St. 1929. As to a part thereof, which we will not detail here, it was either stricken from the record by the trial court during the trial or there was no proper objection made thereto by defendant, and its incompetency will be treated as waived. See *Hansen v. Estate of McDougal,* 126 Neb. 538, 253 N. W. 674. Over objection, however, plaintiff was permitted to testify concerning the duties which he performed in connection with certain described properties. For example, plaintiff testified concerning what he did in connection with the management, rentals, sales, and improvement of certain described real properties, and the purchase and sale by him of certain stock placed and kept thereon; also concerning the receipt and expenditure of moneys in connection therewith which were under his personal direction and control. There is, however, no direct evidence by plaintiff that deceased participated in any of these acts by either conduct or conversation, or that they were performed in consequence of a contract of employment with, or done for, or at the request of, deceased.

The general rule is that, "the adverse party may testify to any fact which is not either a transaction, a communication or a statement of the deceased or incompetent person, even if it is material to the case, unless the statute expressly makes him incompetent as to facts equally within the knowledge of the deceased or incompetent person." Jones, Evidence (Pocket ed.) 986, sec. 786. See, also, 5 Jones, Commentaries on Evidence (2d ed.) 4376, sec. 2265. It is also held that a person who has filed a claim against the estate of a deceased person for services performed under a contract is not incompetent to testify to independent acts which he performed when the deceased did not participate. See 5 Jones, Commentaries on Evidence (2d ed.) 4376, 4382, sec. 2265. See, also, *Fitch v. Martin,* 74 Neb. 538, 104 N. W. 1072, for application of the rule both by word and illustration applicable here. In that opinion the court said: "Where the act was one with which the deceased had

no personal connection so far as disclosed by the evidence of the interested witness, it is admissible, if it tends to establish the truth of the claim he makes; but, if any act or conversation of the deceased is involved, the statute excludes it." We find that the trial court observed and correctly applied this rule in the case at bar. Further, we find no violation of the rule announced in *Fitch v. Martin,* 83 Neb. 124, 119 N. W. 25, to the effect that in giving such testimony, "it is not proper for his counsel to interrogate claimant on the assumption that such services were performed for the deceased."

It is contended that the trial court erroneously permitted plaintiff's sister-in-law, and a niece, who lived in the same household with him while in Chicago, to testify concerning the contents of certain letters and a telegram sent by deceased to plaintiff. Therein deceased informed plaintiff of his failing health and eyesight, and repeatedly urged plaintiff to come to Mitchell, Nebraska, and assume responsibility for his property, business, and personal affairs, for which plaintiff would be well recompensed. The substance of the telegram, sent in September, 1935, was that the funeral of a relative would be held at Morrison, Illinois, and plaintiff was urged to come to the funeral because deceased had important business matters to talk over with him.

As a foundation for this testimony, the sister-in-law testified that regularly every week or two for several years while plaintiff lived in the same household, she personally received from the hands of the mailman who delivered mail to her home, many letters written by deceased to plaintiff. She identified the signature of the deceased and testified that she, by permission, had read some of the letters and remembered their contents. She also testified that she read the telegram and that plaintiff went to Morrison, Illinois, in response thereto. Her evidence is that the letters and the telegram were later burned; that she was present when they were destroyed and assisted in carrying some of them to the basement for that purpose. The niece also gave like testimony but she was unable to identify the signature of the de-

ceased and did not personally see or know that the instruments were destroyed, although she did make a search and was unable to find them. Plaintiff himself did not seek by his own testimony to prove either the execution, receipt, destruction, or contents of the particular instruments involved so as to bring the case within the rule announced in *Owens v. Reed,* 141 Neb. 796, 4 N. W. 2d 914, relied upon by defendant.

Of course, the rule is that secondary evidence of the contents of a letter or telegram, the original of which would have been competent evidence, cannot be given unless some legal excuse is shown for failing to produce the original. If it is shown by satisfactory proof that the originals have been lost or destroyed one of the principal objections to secondary evidence at once disappears and such evidence becomes admissible. Their loss or destruction need not be proved beyond the possibility of mistake as the court is vested with a judicial discretion in the matter and it is enough if the testimony satisfies the court of the fact with reasonable certainty. If they are accidentally destroyed by a party without fault secondary evidence may be given of their contents, and even if their destruction is voluntary secondary evidence of their contents may be given if the circumstances accompanying the act are free from suspicion of intent to defraud and consistent with an honest purpose. See Jones, Evidence (Pocket ed.) 245, sec. 200, 262, sec. 212, 266, sec. 214, 270, sec. 217; 32 C. J. S. 719, sec. 792b, 751, secs. 822, 823, 752, sec. 824, 771, sec. 842. Ordinarily the rule is that their loss or destruction should be proved by the last custodian of the instruments unless his absence is satisfactorily explained or his disqualification appears, as in cases like the one at bar, in which event the proof may be made by any competent witness who has knowledge of the facts. See 32 C. J. S. 768, sec. 839.

Clearly the original letters themselves would have been admissible if available, and the evidence of the witnesses who read the letters and the telegram and remembered their contents, and knew of their destruction many years

before the litigation under such circumstances as to negative any fraudulent design, could properly testify as to their contents.

Finally, defendant contends that the trial court erroneously permitted certain of plaintiff's witnesses, without the necessary qualifications, to give their opinion of the reasonable value of the services rendered by plaintiff. Their evidence discloses that they were competent, substantial, and experienced farmers, ranchers, feeders, bankers, or real estate agents, all of whom had been business associates and personal friends of the deceased for many years. They were all generally and some intimately acquainted with the extent of his property and business, and with the duties performed for him in connection therewith by plaintiff.

In this connection, the opinion of a qualified witness as to the value of the services is admissible to prove such value when his testimony will aid the jury and this question is within the judicial discretion of the trial court to decide, and rulings thereon will not be reversed except in case of manifest error. See 32 C. J. S. 279, sec. 545. A witness who has observed the services rendered and has sufficient familiarity with services of that nature to form a reasonable opinion as to their value, is qualified. He need not be an expert in the strict sense of that term if he is shown to be better equipped to determine the value of the services than the jury or men in general. Also, persons engaged in performing services of the same character as those to be valued, and persons who have knowledge of the business in and for which the services have been rendered, and of their value, may give their opinion as to the value of the services. See 32 C. J. S. 320, sec. 545 (2); 20 Am. Jur. 757, sec. 901; *Anderson v. Estate of Akins, supra.* We can only find that the evidence of these witnesses was properly admitted.

There are other assignments of error but we do not deem it necessary to discuss them here since they are without merit. We do not find any error in the record prejudicial to defendant, and, therefore, the judgment of the trial court is affirmed.

AFFIRMED.

GLEN MEYER, A MINOR, BY GEORGE MEYER, HIS FATHER AND NEXT FRIEND, APPELLANT, V. HARTFORD BROTHERS GRAVEL COMPANY ET AL., APPELLEES.

14 N. W. 2d 660

FILED JUNE 2, 1944. No. 31781.

1. **Automobiles.** A driver of a motor vehicle about to enter a highway protected by stop signs must stop as directed, look in both directions and permit all vehicles to pass which are at such a distance and traveling at such a speed that it would be imprudent for him to proceed into the intersection.
2. ———. Where the evidence fails to show that a driver of a motor vehicle was guilty of any act of negligence in proceeding across such a highway intersection, a directed verdict for the defendant is required.

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

Rosewater, Mecham, Shackelford & Stoehr, for appellant.

Brown, Crossman, West, Barton & Fitch, contra.

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

CARTER, J.

This is an action to recover damages for personal injuries sustained in an automobile accident. At the close of plaintiff's evidence the trial court directed a verdict for the defendants and dismissed the action. The plaintiff appeals.

The plaintiff, a boy 16 years of age, brings the action by his father and next friend. The evidence shows that on August 12, 1942, at about 9:15 a. m. plaintiff was proceeding north on highway No. 275 at a speed of 35 or 40 miles an hour. The highway was paved, level and dry and protected by stop signs at highway intersections. The day was clear and visibility good. As plaintiff approached the point where the highway intersected with county highway No. 33, he observed the defendants' truck in the middle of, and moving across, the intersection from west to east. When plaintiff first observed the gravel truck he was about 40

feet from it. He testifies that he was traveling at a rate of speed that did not permit his stopping before he struck the truck. He swerved his car to the left side of the highway in an attempt to pass behind the truck, with the result that the collision occurred in the southwest quadrant of the intersection. Both vehicles continued in a northeasterly course and came to a stop on the north side of highway No. 33, plaintiff's car coming to rest 14 feet east of the pavement on highway No. 275 and the truck 33 feet east thereof. Plaintiff testifies that when he first saw the truck it was half way over the center line of highway No. 275. There is no evidence in the record concerning the speed of the truck or of the manner of its operation. There is evidence that a growth of weeds and willows obstructed plaintiff's view to his left. That the plaintiff sustained serious injuries is not questioned. The ownership of the truck by defendants and its operation by Monford Meier as their employee in the course of his employment is admitted by the pleadings. Upon this evidence the trial court directed a verdict for defendants. The question before us is the correctness of this ruling.

In reviewing the correctness of the order sustaining the motion for a directed verdict we are required to assume the existence of every material fact which plaintiff's evidence tends to establish and all logical inferences that can be drawn therefrom.

The evidence in this case shows clearly that defendants' truck entered the intersection before plaintiff's car. Under such circumstances the driver of the truck cannot be said to be negligent unless it be shown by the location and speed of plaintiff's car that he ought to have seen it and that such an appearance of danger existed that it would constitute negligence to proceed across the intersection. Plaintiff says he did not see the truck until it was in the center of the intersection and he was at a distance of 40 feet from it. The evidence shows that the truck could have been observed for at least 20 feet before it reached the west edge of the pavement, but plaintiff failed to see it. How far back plaintiff's

car was at that time is not shown. Neither is the distance of plaintiff's car from the intersection shown at the time the truck entered the intersection. The driver of the truck cannot be said to have acted unreasonably in proceeding across an intersection on which he has a right of way, in the absence of evidence showing that plaintiff's car was at that time so close and traveling at such a speed that it would be negligence for him to proceed. There is no evidence that the truck driver failed to stop at the stop sign as charged. There is no evidence that the truck was traveling at an excessive rate of speed as it entered and proceeded across the intersection. There is no evidence that the truck had defective brakes or that the driver failed to apply his brakes to avoid the collision, as charged by the plaintiff. There is no evidence that the driver of the truck failed to signal with his horn, except the testimony of plaintiff that he did not hear a horn. For aught this record shows, plaintiff's car may have been so far south of the intersection that any reasonable person would have proceeded across the intersection with full confidence that the driver of the approaching automobile would respect his rights which accrued to him when he entered the intersection without any reason for believing that it was obviously dangerous for him to have done so. We fail to find any evidence in the record that would be sufficient to sustain a finding of negligence on the part of the driver of the truck. Plaintiff not having sustained the burden of so doing, the trial court is required to direct a verdict for defendants. *Benson v. Peters*, 82 Neb. 189, 117 N. W. 347; *Bergendahl v. Rabeler*, 133 Neb. 699, 276 N. W. 673.

It is urged by plaintiff that the evidence shows a violation of section 39-1036, Comp. St. Supp. 1941, which 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." There was no evidence of a failure to obey the stop

sign in the present case. The contention of plaintiff seems to be that one driving a favored highway has the right of way under all circumstances and that one entering an intersection from a nonfavored highway does so at his peril. This is not the law. A driver of a vehicle about to enter a highway protected by stop signs must stop as directed, look in both directions and permit all vehicles to pass which are at such a distance and traveling at such a speed that it would be obviously dangerous for him to proceed across the intersection. See *Schrage v. Miller*, 123 Neb. 266, 242 N. W. 649. Before one entering such an intersection protected by a stop sign can be held negligent, no statutory violations being shown, it must appear that the approaching car was at a point which, after considering its speed, indicated that it was within the limit of danger and that to proceed would be imprudent. In the present case no such evidence is shown by the record and, consequently, no basis exists upon which negligence on the part of the driver of the truck can be predicated.

There being no proof of negligence by the driver of the truck sufficient to sustain a verdict for the plaintiff, it is not necessary to discuss the alleged contributory negligence of the plaintiff. The judgment of the district court was correct and is affirmed.

AFFIRMED.

HERBERT E. NELSON, ADMINISTRATOR, APPELLEE, V. EILERT JANSSEN ET AL., APPELLANTS.

14 N. W. 2d 662

FILED JUNE 2, 1944. No. 31756.

1. **Executors and Administrators.** An administrator may, in a proper pleading, ask the county court for instructions as to his conduct, with respect to various matters relating to the administration of an estate, where there is room for doubt as to his duties or as to the policy which should be pursued.
2. ———. The right of an administrator to retain a distributive

share from a debtor to the estate and apply it to his indebtedness, in so far as personal property is concerned, has long been recognized by law as existing without any statute.

3. **Descent and Distribution.** The right to offset an indebtedness owing by an heir to the estate and apply it to his distributive share, as far as personal property is concerned, may be properly asserted in the county court having exclusive, original jurisdiction over the administration of estates.

4. ———. The right to inquire into and determine the indebtedness of a distributee of an estate, and to order a reduction of the same from his share, as far as personal property is concerned, is an incident to the authority of the court to make settlement and distribution of a decedent's estate.

5. **Witnesses.** Where an administrator, by his testimony, identifies a promissory note, as one found among the assets of the estate, constituting an indebtedness against an heir of the estate, and computes the amount due thereon, he is not such a witness who shall have testified in regard to a transaction or conversation had with a deceased person, within the contemplation of section 20-1202, Comp. St. 1929, constituting an exception, and persons having a direct legal interest in a civil action are not privileged to testify to transactions and conversations had with the deceased person, respecting the execution of a new note in payment of the debt and an oral agreement for cancellation of the indebtedness for services rendered, or direction to destroy the new note, constituting the indebtedness, the administrator having testified to no such state of facts. *Held*, the court did not err in refusing the admissibility of such evidence.

APPEAL from the district court for Adams county: FRANK J. MUNDAY, JUDGE. *Affirmed in part and reversed in part.*

F. L. Carrico, for appellants.

Bruckman & Dunmire, contra.

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

MESSMORE, J.

The administrator of the estate of John Janssen, deceased, originally instituted this action in the county court. The pleadings in the county court are not in the transcript. The administrator's petition, filed in the district court, in so far as it need be considered here, is in substance as follows:

John Janssen, single, departed this life March 1, 1942, leaving two brothers, a sister, nephews and nieces as his heirs at law, to share in real and personal property constituting his estate. The administrator came into possession of a note dated March 1, 1932, due March 1, 1933, bearing 5 per cent interest, signed by Eilert Janssen, a brother of deceased, and Eilert's wife Anna. The endorsements on the note show interest paid for 1932, 1933, 1934 and 1936. The note is a binding legal obligation and, as such, should be taken into consideration as an asset of the estate and accordingly adjusted and deducted or offset from the share of Eilert Janssen in the distribution of the estate. The execution and delivery of the note are admitted, as well as the payments of interest endorsed. The prayer asks the court to enter a decree finding the amount, represented by the note, constitutes an indebtedness due and that the administrator be ordered and directed to adjust, deduct and offset the same against the distributive portion of Eilert Janssen from the estate, and to certify the decree to the county court.

The defendants' answer admits the allegations of the petition relating to John Janssen's death, his estate and his heirs, and the appointment of the administrator; denies all other allegations of the petition, and alleges affirmatively that defendants deny that the note, set forth in plaintiff's petition, represents any indebtedness on the part of the defendants to said estate, but alleges the facts to be that in 1939 John Janssen sought and obtained from the defendants a new note in payment of the note pleaded in plaintiff's petition; that the new note was for the sum of $1,500, executed by defendants at John Janssen's request and delivered to him for the purpose of, and in payment of, the note as pleaded in plaintiff's petition; that the last referred to note was not delivered to defendants but was canceled by verbal agreement; that the failure to return the note was by neglect and oversight, it being in an old trunk where it was at the time of the execution of the new note. The defendants further allege that in 1941 John Janssen came to their home, recounted many favors, kind deeds done and

labor performed, by Anna Janssen, and gave to her the note, then representing the indebtedness, saying that it canceled the obligation of Eilert Janssen and herself; that it constituted a gift to her. The answer prayed a dismissal of the plaintiff's petition. The reply was a general denial of the new matter contained in the answer.

Jury was waived and trial had to the court. The court granted the prayer of the petition and rendered a general judgment for the plaintiff and against the defendants in the sum of $1,991.25, with interest at 6 per cent per annum, and certified the judgment to the county court. Defendants appeal from this judgment, and assign as error that the trial court erred in finding the amount due on the note in question.

It is established in most jurisdictions that an administrator may ask the county court for instructions as to his conduct with respect to various matters relating to the administration of the estate, where there is room for doubt as to his duties or as to the policy that should be pursued, and in a suit by a personal representative for advice a considerable latitude may be properly allowed in giving scope to the questions propounded, where to do so places no unfair burden upon the parties and they have not been in any way misled as to the issues to be presented to the court. See 21 Am. Jur. 492, sec. 214.

In the present action, the case is one wherein the right of retainer is involved. This court has said that the right rests on broad principles of equity. *First Trust Co. v. Cornell,* 114 Neb. 126, 206 N. W. 749; *Stanton v. Stanton,* 134 Neb. 660, 279 N. W. 336. See, also, *Oxsheer v. Nave,* 90 Tex. 568, 40 S. W. 7, 37 L. R. A. 98.

The right of an administrator to retain a distributive share from a debtor to the estate, and apply it to his indebtedness, "has long been recognized by the law as existing without any statute. It is not the technical right of set-off in actions at law. * * * It is an equitable right of its own nature, and not at all dependent upon any statute. It is the plain moral as well as legal duty of the debtor to pay his

debt to the estate. He has had the value from the estate. He ought in morals and law to restore it." *Webb v. Fuller,* 85 Me. 443, 27 Atl. 346, 22 L. R. A. 177; Annotation, 1 A. L. R. 993. See, also, *Stanton v. Stanton, supra*; *Lester v. Toole,* 20 Ga. App. 381, 93 S. E. 55. The weight of authority is to the effect that the right may be asserted in a court of probate; in this state, it is the county court, which court has exclusive and original jurisdiction over the probate of wills and administration of estates. Const. art. V, sec. 16; Comp. St. 1929, sec. 27-503; *In re Estate of Lietman,* 149 Mo. 112, 50 S. W. 307; *Stenson v. H. S. Halvorson Co.,* 28 N. Dak. 151, 147 N. W. 800; Annotation, 1 A. L. R. 998.

The right to inquire into and determine the indebtedness of the distributee of an estate and to order a reduction of the same from his share is an incident to the authority of the court to make settlement and distribution of a decedent's estate. *Stenson v. H. S. Halvorson Co., supra*; 34 C. J. S. 390, sec. 494. There is no dissent from the proposition that the indebtedness of a distributee to the estate of his intestate may be set off against his distributive share of his personal property. *Boden v. Mier,* 71 Neb. 191, 98 N. W. 701; Annotation, 1 A. L. R. 1013. The result follows, regardless of what theory of this "right of retainer" may be adopted, since the personal estate descends to the administrator in cases of intestacy and he has the funds in hand.

The right of retainer carries with it the right to retain interest; the majority rule, which this court adopts, being that the interest should be computed up to the time of settlement. See Annotation, 1 A. L. R. 1011, and cases cited.

So, in this state in cases of this kind, the foregoing authorities are applicable, and an heir at law, owing the estate a debt, is required, when the matter is properly presented, to have the debt offset against his distributive share. The judgment of the trial court, in conformity with the pleadings, was proper, to determine the past-due note as an asset of the estate of John Janssen, deceased, and that the note should be adjusted or deducted from the proportionate share of Eilert Janssen in the John Janssen estate, and

that the case should be remanded to the county court for such purpose. The entry of the general judgment was erroneous. However, under the doctrine which applies to the instant case, the administrator is not required to first reduce the note to judgment in a separate action.

This court, in *Stanton v. Stanton, supra,* has held: "The debt of a devisee to the testator cannot be retained from or charged on the lands devised to him in the absence of language in the will making such debt a charge." Therefore, in this state, the doctrine of retainer does not apply to an heir's interest in real estate.

The foregoing disposes of defendants' first assignment of error.

The defendants assign as error rulings of the trial court in refusing the admissibility of evidence offered by them, relating to transactions and conversations had with the deceased. Their contention is that when the administrator testified to the promissory note and computed the interest on it as to what constituted the indebtedness, then, under section 20-1202, Comp. St. 1929, the bars were down, and the defendants had the right to offer any and all of the transactions or conversations had, touching upon the indebtedness.

The administrator identified the note that he found in a trunk belonging to the deceased at the Eilert Janssen home and computed the interest thereon, and that was, substantially, his testimony bearing upon the transaction. The defendants, having a direct legal interest in this civil action and proceeding, testified to a new note, executed and delivered by them to John Janssen in 1941, which they claim was in payment of the note pleaded in the plaintiff's petition; that the first note remained in the trunk and, through neglect or oversight, was not delivered to the defendants. They further testified to conversations had with John Janssen, wherein he told them that, on account of the services rendered him by Anna, Eilert's indebtedness was canceled; that he brought the new note over to their home, gave it to Anna and she destroyed it by burning it. There was no

evidence offered by the administrator with reference to the new note, or the cancellation of the indebtedness, or the services rendered by the defendants for which the deceased had orally agreed that their indebtedness was canceled. The statute involved is:

"No person having a direct legal interest in the result of any civil action or proceeding, when the adverse party is the representative of a deceased person, shall be permitted to testify to any transaction or conversation had between the deceased person and the witness, unless the evidence of the deceased person shall have been taken and read in evidence by the adverse party in regard to such transaction or conversation or unless such representative shall have introduced a witness who shall have testified in regard to such transaction or conversation, in which case the person having such direct legal interest may be examined in regard to the facts testified to by such deceased person or such witness, but shall not be permitted to further testify in regard to such transaction or conversation." Comp. St. 1929, sec. 20-1202.

Under the statute in question one of the requisites to the admission of testimony is: Such representative shall have introduced a witness who shall have testified regarding such transaction or conversation. In the instant case, the administrator introduced no witness who testified to the conversation or transaction which constituted the defense. At no time did the plaintiff introduce any part of the controverted evidence, and consequently the defendants are not in a position to take advantage of the exception created by the statute. The condition precedent, created by the statute, does not appear in the record. See *Mills v. Mills*, 130 Neb. 881, 266 N. W. 759. A transaction or conversation, within the meaning of the statute, is an action participated in by witness and decedent and to which the decedent could testify of his own personal knowledge, if alive. *Hlavaty v. Blair*, 101 Neb. 414, 163 N. W. 330.

The testimony offered by defendants called for conversations and transactions that they had with the deceased, and

to which the deceased could have testified, had he been alive, and such testimony was therefore incompetent. The testimony was in conformity with defendants' affirmative defense. The distinction between what the administrator testified to and what the defendants sought to testify to is apparent. If the rule, as contended for by the defendants, should prevail, then a personal representative of a deceased person in an action involving a promissory note would not be privileged to identify a note found among the assets of the estate. Such was not the legislative intent in passing the law, and there are no authorities in this state that go to the length as contended for by the defendants. The exception granted by the statute, contended for by defendants, is not here existent, and defendants' testimony was properly rejected.

The defendants have failed to prove by a preponderance of the evidence that they rendered certain services, as pleaded affirmatively in their answer. The record discloses that Eilert's wife Anna, who claimed to have performed the services, testified that she did little after a niece arrived some 20 years ago to take over the household duties for John Janssen. In this part of their defense, defendants have failed.

For the reasons given in this opinion, the judgment of the trial court, in rendering a general judgment, is reversed. That part of the judgment finding the promissory note to be an asset of the estate, requiring an adjustment to be made thereon, that the same constitutes an indebtedness owing by Eilert Janssen, one of the makers and an heir, and that such indebtedness shall be deducted from his distributive share of the personal property of the estate and the cause remanded to the county court for that purpose, is affirmed.

AFFIRMED IN PART AND REVERSED IN PART.

MARGARET L. VOSS, APPELLEE, V. LESLIE L. VOSS, APPELLEE: MABEL VOSS, INTERVENER, APPELLANT.

14 N. W. 2d 849

FILED JUNE 2, 1944. No. 31806.

Divorce. In an action for the modification of a decree of divorce with reference to the custody of a minor child, suit money and attorney's fees are not chargeable against a third person, having the custody of such child and seeking to intervene in the action, unless provided for by statute.

APPEAL from the district court for Brown county: DAYTON R. MOUNTS, JUDGE. *Reversed.*

William B. Quigley and *Frederick M. Deutsch,* for appellant.

William M. Ely, contra.

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

MESSMORE, J.

This appeal involves the assignment of error as to whether or not the trial court erred in making the award for allowance of suit money and attorney's fees against a paternal grandmother, who had been awarded the custody of a minor child until such child was 21 years of age or until the further order of the court, and where, subsequently, the mother of the child sought to modify the decree with reference to the custody, the paternal grandmother being required by the court to have the child brought before the court, and thereafter seeking to intervene in the action. The trial court made an order requiring the paternal grandmother to pay into court $150 for the wife's use in taking depositions and procuring the attendance of witnesses, and attorney's fees in the sum of $100 for the wife's attorney.

Section 42-308, Comp. St. 1929, provides, in substance, that the court may, in its discretion, require the husband to pay any sum necessary to enable the wife to carry on or defend the suit during its pendency.

The general rule of practice in this state is that "attor-

neys' fees are allowed to the successful party in litigation only where such allowance is provided by statute." See *Higgins v. J. I. Case Threshing Machine Co.*, 95 Neb. 3, 144 N. W. 1037; *State ex rel. Charvat v. Sagl*, 119 Neb. 374, 229 N. W. 118; *Blacker v. Kitchen Bros. Hotel Co.*, 133 Neb. 66, 273 N. W. 836.

In 17 Am. Jur. 412, sec. 505, it is said that the "liability for alimony and suit money has no foundation other than the marital relation between the parties, and, as has been shown, by virtue of its very definition, the allowance must be made out of the estate of the husband."

It is clear that, before the paternal grandmother can be charged with suit money and attorney's fees during the pendency of litigation to modify a decree, affecting the custody of a child and the change of that custody, such must be provided for by statute, and it is not so provided in this state.

The judgment for suit money and attorney's fees is reversed.

REVERSED.

IN RE APPLICATION FOR WRIT OF HABEAS CORPUS.
IRVING TAIL, RELATOR, APPELLANT, V. NEIL OLSON, WARDEN, RESPONDENT, APPELLEE.

14 N. W. 2d 840

FILED JUNE 2, 1944. No. 31795.

1. **Habeas Corpus.** The denial of an application for, and refusal to allow, a writ of habeas corpus by the district court is a final order affecting a substantial right made in a special proceeding which in effect terminates the action.
2. ———. Such a final order is reviewable upon appeal to this court, thereby presenting for decision the sole question of whether the application states facts sufficient to constitute a cause of action requiring the allowance of a writ of habeas corpus.

APPEAL from the district court for Lancaster county:

JEFFERSON H. BROADY, JUDGE. *Special appearance overruled.*

Lee Card, for appellant.

Walter R. Johnson, Attorney General, H. Emerson Kokjer and *Rush C. Clarke, contra.*

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

CHAPPELL, J.

The record here discloses that appellant, Irving Tail, hereinafter called relator, filed an application on December 22, 1943, in the district court for Lancaster county, Nebraska, praying the allowance of a writ of habeas corpus directed to Neil Olson, Warden of the Nebraska penitentiary, respondent. The trial court examined the application and on January 3, 1944, entered a written opinion and judgment denying the application and refusing to grant the writ upon the ground that the application did not state facts sufficient to constitute a cause of action for allowance of the writ. On January 20, 1944, the trial court overruled relator's motion to set aside the judgment and grant a new trial. Thereafter relator took all of the required statutory steps for appeal to this court.

The attorney general then filed and presented for argument here a special appearance on behalf of respondent contending that this court is without jurisdiction over the person of respondent, appellee, he never having been served with process in any manner either in the lower court or in this court. It appears under the circumstances as above outlined that if the judgment of the trial court was a final order, appealable and reviewable by this court, the questions involved are all answered.

It is generally agreed by the authorities that at common law an appeal does not lie in habeas corpus proceedings, but under the Constitutions and statutes of most jurisdictions all judgments or orders, if final, are reviewable. The right to a review of judgments or orders in habeas corpus pro-

ceedings being purely statutory, it exists only in such cases and to the extent provided by applicable statutes. 39 C. J. S. 705, 707, sec. 109b; Church, Habeas Corpus (2d ed.) 590, sec. 389b, 592, sec. 389e. Because of differences in statutes and their interpretations by courts of the various jurisdictions, the authorities are in conflict upon the question here involved. 39 C. J. S. 705, 707, sec. 109b.

To judicially solve the problem we are required to consider the nature of habeas corpus proceedings as well as the provisions of our Constitution and statutes. By section 8, art. I of our Constitution it is provided: "The privilege of the writ of habeas corpus shall not be suspended, unless in case of rebellion or invasion, the public safety requires it, and then only in such manner as shall be prescribed by law." It has been said that the writ of habeas corpus is the precious safeguard of personal liberty and there is no higher duty imposed upon courts and legislative bodies than to maintain it unimpaired. 39 C. J. S. 424, sec. 1. Habeas corpus, under statutes like our own, is a special proceeding, civil in character providing a summary remedy open to persons illegally detained. 39 C. J. S. 424, sec. 1; 1 C. J. S. 1096, sec. 43; 1 C. J. 1010; 29 C. J. 8; *People ex rel. Curtis v. Kidney,* 225 N. Y. 299, 122 N. E. 241; *Winnovich v. Emery,* 33 Utah 345, 93 Pac. 988. It has been held that the proceedings are not adversary in character, are not in a technical sense a suit between the applicant and the officer, whose responsibility ceases when he makes return to the writ and brings the applicant into court, for the court to pass upon the ultimate question whether or not the applicant is unlawfully restrained of his liberty. *Addis v. Applegate,* 171 Ia. 150, 154 N. W. 168; 39 C. J. S. 424, sec. 1; 29 C. J. 6. This court has held that a habeas corpus proceeding involving the custody of a child is a proceeding *in rem,* in which the *res* is the child and its custody. *Terry v. State,* 77 Neb. 612, 110 N. W. 733. As has been ably stated by other judicial authority, "It may be analogized to a proceeding *in rem,* and is instituted for the sole purpose of having the person restrained of his liberty produced before the

judge, in order that the cause of his detention may be inquired into and his status fixed. The person to whom the writ is directed makes response to the *writ,* not to the *petition.* * * * The respondent, in his answer to the writ, seeks simply to justify his conduct and relieve himself from the imputation of having imprisoned without lawful authority a person entitled to his liberty. He comes to no issue with the applicant for the writ. He answers the writ." *Simmons v. Georgia Iron & Coal Co.,* 117 Ga. 305, 43 S. E. 780. See, also, Comp. St. 1929, secs. 29-2802, 29-2817; 25 Am. Jur. 241, sec. 137. Also, it has been held that since the issues are raised by the return to the writ, the function of the petition is to procure the issuance of the writ, and ordinarily when this is done, the petition is *functus officio* for procedural purposes. 25 Am. Jur. 235, sec. 124. We are unable to find any provision in our statutes for service upon respondent of any other process except the writ, although in a few other jurisdictions, either by rule or statute, it is required that an order to show cause why the writ should not be allowed should be served upon respondent. *Walker v. Johnston,* 312 U. S. 275, 61 S. Ct. 574.

Our statute, section 29-2801, Comp. St. 1929, as applicable here, provides: "If any person, * * * shall be unlawfully deprived of his or her liberty, and shall make application, * * * *to any one of the judges* of the district court, * * * and does at the same time produce to such judge a copy of the commitment or cause of detention of such person, or if the person so imprisoned or detained is imprisoned or detained without any legal authority, upon making the same appear to such judge, by oath or affirmation, it shall be his duty forthwith to allow a writ of habeas corpus, * * * ." (Italics supplied.) Other sections of the same chapter provide for service of the writ, return, hearing, and review.

It is generally held that the trial court may refuse to allow a writ of habeas corpus where the facts alleged in the application would not warrant discharge of the prisoner, and the grant or refusal of the writ is a judicial act. 1 Bailey, Habeas Corpus, 13, sec. 5; *Goetz v. Black,* 256 Mich.

564, 240 N. W. 94, 84 A. L. R. 802. Habeas corpus is a writ of right, but not a writ of course, and probable cause must first be shown which rightly prevents the writ from being trifled with by those who manifestly have no right to be at liberty. 25 Am. Jur. 153, sec. 16. Judicial discretion is exercised in its allowance, and such facts must be made to appear in the application to the court as in its judgment will, *prima facie*, entitle the applicant to be discharged from custody. 39 C. J. S. 436, sec. 6; 25 Am. Jur. 238, sec. 131; 29 C. J. 14. Therefore, since the allowance of the writ by the court is a judicial act, as distinguished from a ministerial one, it is generally held that mandamus will not lie to compel a judge to award a writ of habeas corpus upon his refusal to do so. 25 Am. Jur. 239, sec. 133.

The constitutional and statutory right of appeal in habeas corpus proceedings is now given in most states, and it operates as a substitute for successive applications from court to court, or judge to judge, which the prisoner had a right to make at common law, in case his application was refused. Church, Habeas Corpus (2d ed.) 590, sec. 389b. Such successive applications are not appeals since each court and judge thereof exercises a primary jurisdiction. That procedure was always attended by some danger of injustice and hazard of hardship or expense to both the prisoner and the state. As a result legislative bodies including our own have substituted the right of appeal for the successive applications permissible at common law. Church, Habeas Corpus (2d ed.) 601, sec. 389g. In this connection, it is to be noted that the statute (Comp. St. 1929, sec. 29-2801), provides that the application shall be made to any one of the judges of the district court, and this court has held that "An application for a writ of habeas corpus to release a prisoner confined under sentence of court must be brought in the county where the prisoner is confined." *Gillard v. Clark*, 105 Neb. 84, 179 N. W. 396.

The Constitution of Nebraska, art. I, sec. 24, provides: "The right to be heard in all civil cases in the court of last resort, by appeal, error, or otherwise, shall not be denied."

Responding thereto section 29-2823, Comp. St. 1929, provides: "The proceedings upon any writ of habeas corpus shall be recorded by the clerk and judges, respectively, and may be reviewed as provided by law for appeal in civil cases." Also, section 20-1911, Comp. St. 1929, "A judgment rendered or final order made by the district court may be reversed, vacated or modified by the supreme court, for errors appearing on the record." And, section 20-1902, Comp. St. 1929, "An order affecting a substantial right in an action, when such order in effect determines the action and prevents a judgment, and an order affecting a substantial right made in a special proceeding, * * * is a 'final order' which may be vacated, modified or reversed, as provided in this chapter and chapter 19."

The question of the right to appeal from a disallowance of the writ has never been heretofore directly raised in this court, although the right to review generally final orders in habeas corpus cases has been recognized and the procedure well established. *In re White*, 33 Neb. 812, 51 N. W. 287; *In re Van Sciever*, 42 Neb. 772, 60 N. W. 1037; *State v. Decker*, 77 Neb. 33, 108 N. W. 157; *In re Application of Selicow*, 100 Neb. 615, 160 N. W. 991; *Gillard v. Clark, supra*. In several other cases it has evidently been assumed that denial of the writ was a final order and reviewable. For example, in *Hawk v. O'Grady*, 137 Neb. 639, 290 N. W. 911, and *Alexander v. O'Grady*, 137 Neb. 645, 290 N. W. 718, appeals were directly taken to this court from denials of the writ by the trial court, and therein it was adjudged whether the application stated a cause of action requiring allowance of the writ.

It is generally held that an *ex parte* judgment is appealable where a statute reasonably construed gives a right of appeal therefrom. 4 C. J. S. 337, sec. 157. The test of finality for the purpose of an appeal in a habeas corpus proceeding is not necessarily whether the whole matter involved in the action is concluded, but whether the particular proceeding or action is terminated by the judgment. Any judgment which ends the particular action or proceeding is final

for the purposes of appeal, if an appeal is permissible. *Winnovich v. Emery, supra.*

There are numerous authorities holding that appeal will lie from denial of the writ under constitutional and statutory provisions in many respects similar to our own. *In re Hammill,* 9 S. Dak. 390, 69 N. W. 577, includes this statement: "When instituted in the circuit court, its decision will be a final order, affecting a substantial right made in a special proceeding, from which an appeal will lie to this court." See, also, *State ex rel. Keyes v. Buckham,* 29 Minn. 462, 13 N. W. 902. In *Ex parte Edwards,* 11 Fla. 174, the court held that, "error will lie to the Supreme Court from a refusal to grant a writ of habeas corpus," which was reaffirmed in *Cooper v. Lipscomb,* 97 Fla. 668, 122 So. 5. In *In re Jennings,* 46 Idaho 142, 267 Pac. 227, an application for a writ of habeas corpus was denied by the district court and appeal taken to the supreme court, wherein it was urged that the order was not a final judgment. However, the supreme court overruled the contention citing, quoting from, and relying upon *Winnovich v. Emery, supra.* See, also, *Costello v. Palmer,* 20 App. D. C. 210; 25 Am. Jur. 239, sec. 133. Likewise, in *Ex parte Quirin,* 317 U. S. 1, 63 S. Ct. 2, decided as late as July 31, 1942, the supreme court of the United States said (p. 24): "While it is the usual procedure on an application for a writ of habeas corpus in the federal courts for the court to issue the writ and on the return to hear and dispose of the case, it may without issuing the writ consider and determine whether the facts alleged by the petition, if proved, would warrant discharge of the prisoner. *Walker v. Johnston,* 312 U. S. 275, 284. Presentation of the petition for judicial action is the institution of a suit. Hence denial by the district court of leave to file the petitions in these causes was the judicial determination of a case or controversy, reviewable on appeal to the Court of Appeals and reviewable here by certiorari. See *Ex parte Milligan,* 4 Wall. 2, 110-13; Betts v. Brady, 316 U. S. 455, 458-461." See, also, Church, Habeas Corpus (2d ed.) 592, sec. 389d.

It would seem conclusive, under our constitutional and statutory provisions, that the case at bar is a proceeding upon a writ of habeas corpus which may be reviewed as provided by law in civil cases. Thus, we decide that the denial of relator's application for a writ of habeas corpus and the refusal to allow the writ by the district court was a final order affecting a substantial right made in a special proceeding, which in effect terminated the action. Such a final order is reviewable upon appeal to this court, thereby presenting for decision the sole question of whether relator's application states facts sufficient to constitute a cause of action requiring the allowance of a writ of habeas corpus. Therefore, the special appearance of respondent is hereby overruled.

JOSEPH T. MACAVOY, PLAINTIFF IN ERROR, V. STATE OF NEBRASKA, DEFENDANT IN ERROR.

15 N. W. 2d 45

FILED JUNE 6, 1944. No. 31774.

1. **Homicide.** A murder may be committed in the perpetration of a rape within the meaning of section 28-401, Comp. St. 1929, although it occurs after the rape itself has been technically completed, if the homicide is committed within the *res gestæ* of the rape.
2. ———. One who kills another in the perpetration of or attempt to perpetrate a rape is guilty of first degree murder without proof of premeditation, malice or intention.
3. ———. In a prosecution for murder in the perpetration of or attempt to perpetrate a rape, necessary elements of the crime may be established by circumstantial evidence.
4. ———: EVIDENCE. In a prosecution for murder, torn and bloody articles of clothing found upon the body of the victim are proper to be received in evidence when sufficient foundation has been laid, where they tend to illustrate or clarify any controverted issue in the case.
5. ———: ———. A photograph of the victim of a murder which tends to throw light upon or illustrates any controverted issue, a proper foundation for its reception in evidence having been laid,

may properly be received in evidence even if it presents a gruesome spectacle.

6. ———: ———. The admission in evidence of a chisel found in defendant's car at the time of his arrest which was shown to have fitted into various wounds inflicted upon the head of the victim of the homicide, and shown further to have been such an instrument as could have inflicted such wounds, was not erroneous under the evidence and circumstances related in the opinion.

7. ———: INSANITY: TRIAL. Where a defendant asserts that he is not guilty of the crime charged because of insanity, it is the province of the jury to determine whether the defendant, at the time of the commission of the alleged crime, had sufficient mental ability to distinguish between right and wrong in respect to the subject matter of the inquiry.

8. ———: ———: ———. A determination by the jury upon conflicting evidence that a defendant was responsible for his acts under the foregoing rule will not ordinarily be disturbed on appeal.

9. ———: TRIAL. Evidence examined and *held* to sustain the verdict of guilty of murder in the first degree and the death penalty prescribed by the jury and imposed by the trial court.

ERROR to the district court for Clay county: EDMUND P. NUSS, JUDGE. *Affirmed.*

August C. Krebs and *D. B. Massie,* for plaintiff in error.

Walter R. Johnson, Attorney General, H. Emerson Kokjer and *Rush C. Clarke, contra.*

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

CARTER, J.

The plaintiff in error, who will hereafter be referred to as the defendant, was convicted of first degree murder and a sentence of death imposed. Plaintiff in error brings the case to this court for review.

On Saturday evening, August 7, 1943, the defendant, Joseph T. MacAvoy, aged 23, a soldier stationed at the Harvard Army Air Base, went to Sutton, Nebraska, in company with other soldiers. Considerable drinking of intoxicating liquors was indulged in by the defendant and his

companions. During the forepart of the evening defendant purchased a used car. The only tool in the car at the time it was purchased was an automobile crank.

During the course of the evening defendant made an appointment to meet Anna Milroy, a local girl 16 years of age, at 11:30 p. m. At about the appointed hour defendant advised the others in his group that he had to return to the air base. He drove away, but came back and picked up Anna Milroy, who likewise by pretense had managed to separate herself from the group. They drove one mile south of Sutton, turned off on a little used county highway and parked the car on the right side of the road.

On August 9, the Monday following, the body of Anna Milroy was found in the ditch near the place where defendant's car was parked on Saturday evening. There were many severe bruises on the back of the head apparently made with a blunt instrument. There was a gash on the left side of the head which penetrated the skull and was apparently inflicted with a sharp instrument. The jaw was badly broken. There were numerous bruises and discolorations about the head and face. Numerous bruises and scratches appeared on the shoulders, arms, abdomen and legs. The head and face were covered with blood. Decomposition had commenced, indicating that death had taken place at some period of time previous to the discovery of the body.

On the Saturday evening when she was last seen on the streets of Sutton, Anna Milroy was wearing blue slacks, a pink blouse, and blue slippers. When her body was discovered she was wearing the same clothes. The legs of her slacks were pulled up to her knees and the upper part was pulled down from the waist below her hips. Her blouse was pushed up and was partly over her face, exposing the body from the hips to the breasts. The blouse was torn, one sleeve and the back being ripped open. The slacks were torn laterally in the crotch for six to eight inches. The underpants were torn, one section being entirely ripped out. They were down below the hips in approximately the

same position as the slacks. The heel of one slipper was broken off and was found in the immediate vicinity. Several buttons were torn from her clothing and were found near the body.

There was a pool of blood eight inches in diameter in the grass just off the traveled portion of the highway. There was a smaller pool of blood near the head and approximately nine feet from the larger one. Hair was found between the fingers of each hand. The body was removed to a mortuary where a picture was taken with the body in the same position it was in when it was discovered. The picture was received in evidence.

The defendant testifies that two other soldiers had informed him that the girl was an "easy make" and that he had dated her for that reason. He says that after the girl got into his car they drove to the place where the girl's body was subsequently found. His testimony is that they "petted" for a little while and then engaged in voluntary sexual intercourse on the ground near the car. They then sat in the car and visited until defendant made some remark or inquiry regarding whether Anna was free from venereal disease. He says that she then slapped him and he flew into a rage and struck her, that she got out or fell out of the car and that he grabbed her and tore her clothes as she left the car. He thereupon seized the car crank on the floor of his car and beat her over the head with it and drove away after he had dragged her into the ditch north of the road. He testifies that he then went back to the air base and went to bed. The next day he washed his car and remained on duty until evening. He then returned to Sutton and later in the evening returned to the scene of the tragedy. He says that he turned the body over on its back, discovered that the girl was dead and returned to Sutton and later to the air base. On Monday evening he was taken into custody by the officers, and late in the evening when he was being taken to Geneva for safe-keeping he confessed to the story that we have here related. He later reduced his confession to writing and signed it. It was received in evidence against him at the trial.

At the time he was taken into custody the crank which he asserted he used in killing the girl was not in his car, but was later produced and identified by him. There was found in the car at the time a chisel with a peculiarly split handle which made it easy to recognize. There is evidence that many of the wounds on the back of the head and the wound on the side of the head which penetrated the skull were of the exact size as the chisel and had the appearance of having been made by such an instrument. The defendant admits using the car crank in killing the girl, but generated a great deal of excitement whenever the chisel was mentioned. He claims he never used the chisel on the girl and that it was placed in his car by a soldier at the air base. The chisel was recognized as one which had been in a tool box in the room where defendant slept. It was not in the car on Saturday night, the night of the killing, because defendant had purchased his car that same evening and had never had it out to the air base. The chisel was used at the air base on Monday and one of the soldiers testified he put it in defendant's car before they left for Sutton on Monday evening.

It is upon this general state of facts that the jury found that defendant killed Anna Milroy in the perpetration of a rape and that defendant was therefore guilty of first degree murder as defined by section 28-401, Comp. St. 1929.

The defendant contends that the evidence is insufficient to sustain a finding by the jury that Anna Milroy was killed by defendant while perpetrating a rape upon her. We think the evidence is amply sufficient to sustain such a finding. There is evidence that the girl had had recent sexual intercourse with a man as was shown by a microscopic examination of the contents of the vaginal tract. There was ample evidence of force as was shown by the condition of her clothes and the manner in which they had been pulled up or down to afford access. That a struggle took place cannot be questioned. It requires no recitation of details to show that a jury could reasonably believe that Anna Milroy met her death as the result of a rape or an attempted rape. The evidence shows that the injuries then received were suf-

ficient to cause death. It is true that the defendant tells another story which would indicate that rape as a motive had been removed by the voluntary and concerted action of the parties before any physical assault was made. The jury did not believe this story and chose instead to believe that she met her death as the result of an attempted or perpetrated rape, a theory which was amply supported by the evidence and the physical facts. The defendant did not attempt to explain, if his version of what happened were true, why the girl's clothing was disarranged in such a manner as to afford sexual access. Neither does he explain the marks and bruises on the lower limbs and body which strongly indicated that gratification of sexual desires was the objective. All the circumstances indicate that rape was the motive and no reason is shown for their existence if defendant's story were true.

When a person is killed by another in the perpetration of or attempt to perpetrate a rape, an intent to kill is not a necessary element of the crime. It is first degree murder, whether an intent to kill be shown or not. *Morgan v. State,* 51 Neb. 672, 71 N. W. 788. The defendant urges, however, that the killing occurred after the act of sexual intercourse took place and, consequently, it was not a killing in the perpetration of a rape. There is no merit in this argument. If a killing is committed within the *res gestæ* of the felony charged it is committed in the perpetration of, or attempt to perpetrate, the felony, within the meaning of the statute. *Francis v. State,* 104 Neb. 5, 175 N. W. 675. The reasons for this rule are well stated in *Bissot v. State,* 53 Ind. 408. wherein it is said: "Although we must construe criminal statutes strictly, adhere closely to the definition of crimes, and interpret technical words according to their fixed meaning, yet we cannot give to the section under consideration the construction contended for by the appellant. In our opinion, where the homicide is committed within the *res gestæ* of the felony charged, it is committed in the perpetration of, or attempt to perpetrate, the felony, within the meaning of the statute; and, being convinced in this case

that the burglary charged was committed, and that the homicide was committed within the *res gestæ* of the burglary, we must hold that it was committed in the perpetration of the burglary, within the true intent and fair meaning of the statute. It seems to us that such a construction is safe to the State and the citizen, and the only one by which the intention of the legislature can be practically carried into effect." See, also, *Conrad v. State,* 75 Ohio St. 52, 78 N. E. 957; *Commonwealth v. Osman,* 284 Mass. 421, 188 N. E. 226; *State v. Whitfield,* 129 Wash. 134, 224 Pac. 559.

Complaint is also made that the state failed to prove that Anna Milroy was killed by the defendant in the perpetration of a rape; that the evidence does not show that any rape was perpetrated or attempted. We have held many times that to sustain a conviction for crime the *corpus delicti* must be proved beyond a reasonable doubt and that it can properly be established by circumstantial evidence. *Maher v. State, ante,* p. 463, 13 N. W. 2d 641. The evidence and circumstances here shown are ample to sustain the conclusion reached by the jury.

Defendant urges that the trial court should instruct only on such degrees of homicide as find support in the evidence and infers that the trial court failed in this respect. The information charged the defendant with first degree murder on two counts. The first was on the theory that defendant killed Anna Milroy in the perpetration of a rape. The second count was on the theory that defendant returned to the scene of his crime on the night following and finding the girl still alive, completed the crime with the aid of a sharp instrument by projecting it through the skull and into her head. There is sufficient evidence to submit both theories to the jury.

Defendant contends there was error in the admission of the various articles of clothing in evidence. We quite agree with defense counsel that torn and blood-covered clothing may not be properly in evidence where its only purpose is to horrify the jury. But where such articles of clothing have evidentiary value in determining the nature and mo-

tive for the assault, they may properly be received in evidence. *Hanks v. State,* 88 Neb. 464, 129 N. W. 1011; *Simmons v. State,* 111 Neb. 644, 197 N. W. 398; *Egbert v. State,* 113 Neb. 790, 205 N. W. 252.

Complaint is also made of the court's ruling permitting the picture of the girl in evidence, showing the position and condition of her clothing when she was found and the wounds which had been inflicted upon her. Where a photograph illustrates or makes clear some controverted issue in the case, a proper foundation having otherwise been laid for its reception in evidence, it may properly be received, even though it may present a gruesome spectacle. *Blazka v. State,* 105 Neb. 13, 178 N. W. 832; *Bassinger v. State,* 142 Neb. 93, 5 N. W. 2d 222.

It is also urged that the trial court erred in admitting the chisel in evidence. The chisel was found in defendant's car at the time he was taken into custody. There is evidence tending to show that an instrument similar in size was used in inflicting the wound which extended through the skull and into the brain. There is expert evidence in the record that the girl was alive when this wound was inflicted. The chisel fit into the opening in the skull with exactness. It is true that there is evidence that defendant received the chisel into his possession on Monday afternoon shortly before his arrest. The chisel was ordinarily kept in the room where defendant slept. It must be pointed out, also, that defendant was convicted of killing Anna Milroy in the perpetration of a rape on the Saturday night of August 7, as charged in the first count of the information. The chisel, in so far as the evidence shows, played no part in the killing if it occurred on that night. The chisel was offered as part of the proof that defendant returned to the scene of his crime on Sunday night, found Anna alive and proceeded to terminate her life with some sharp instrument, claimed by the state to have been the chisel received in evidence. Under the circumstances shown the rights of the defendant were not prejudiced by the reception of the chisel in evidence. *Bassinger v. State, supra.*

Exceptions are taken to the instructions given by the trial court. We have examined them and find that they correctly state the law governing such cases. No error has been pointed out and we have found none in our scrutiny of them.

It is urged that the sentence of the court is excessive and that, in the event the conviction is sustained, this court should reduce the sentence by virtue of the power vested in the court to so do by section 29-2308, Comp. St. 1929. The defendant contended that he killed the girl while in a fit of temporary insanity. A medical expert in the field of neurology and psychiatry testified that the defendant was technically classified as a psychopathic personality with an abnormal emotional response which is made worse by the use of alcoholic beverages. It was his opinion that defendant was in such a mental state at the time the crime was committed that he was unable to distinguish right from wrong. There was expert evidence to the contrary. The evidence of several lay witnesses who had known the defendant for several months was to the effect that in their opinion he was sane on and after the time of the killing. The issue was properly submitted to the jury, who determined it contrary to the claims of the defendant. Defense counsel contend that defendant was abnormal when the crime was committed and that we should recognize and give effect to that fact by reducing the sentence. We think the defendant was abnormal when he committed this gruesome crime. We do not think any normal person could do the things the defendant did and have any valid claim of normalcy thereafter. The legislature, in drafting and enacting our homicide law and in providing the penalties for its violation, must have felt that crimes would be committed by such abnormal persons as would warrant the infliction of the death penalty. The test is whether defendant had sufficient mental ability to distinguish between right and wrong in respect to the particular things he did in causing the death of this girl. The jury found that he was responsible for his acts. We think the evidence shows that the jury were entirely correct in so finding. The crime here committed is so

gruesome and depraved in character that a reduction of the sentence prescribed by the jury and imposed by the trial court would amount to a holding that capital punishment will never be enforced in this state, irrespective of the legislative enactments on the subject. We can find no justifiable reason for substituting our judgment for that of the jury and the trial court in prescribing and assessing a penalty which the law authorizes in such cases. The accused has had a fair trial, free even of any technical error. The judgment of the district court is in all respects affirmed, and Friday, September 29, 1944, between the hours of six o'clock a. m. and six o'clock p. m. of said day, is fixed as the date for carrying into effect the sentence of the district court.

AFFIRMED.

J. A. TEST, APPELLANT, V. JACK REICHERT, APPELLEE.
14 N. W. 2d 853

FILED JUNE 9, 1944. No. 31788.

1. **Public Lands.** One may go upon open public land and, without enclosing such land within a fence, may establish himself there temporarily, and is not considered technically as a trespasser. Only the government, or one holding rightfully under the government, can interfere with such occupation, and any rights growing out of such possession may be bought and sold.
2. ———: CROPS. The right to a crop of wheat which is growing on unenclosed public land is in the one who has planted it and looked after it, rather than in one who forcibly takes possession thereof against the will of the planter.

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

F. J. Reed, for appellant.

Mothersead & Wright, contra.

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

PAINE, J.

In a law action for the value of wheat wrongfully appropriated, the court instructed a verdict for defendant, and plaintiff appeals.

Petition was filed November 3, 1943, alleging that plaintiff, J. A. Test, was during the month of July, 1943, the owner of approximately ten acres of growing wheat located on the southeast quarter of the northwest quarter of section 27, township 22, range 58, Scotts Bluff county; that said wheat was a good stand, a good quality, and well matured, and produced 30 bushels of wheat per acre; that during the last week of July, 1943, the defendant, Jack Reichert, wrongfully and unlawfully cut, harvested, hauled off, and appropriated to his own use all of the aforesaid ten acres of wheat, and has ever since retained possession of said grain and wheat straw; that said wheat wrongfully appropriated by defendant was reasonably worth the sum of $357 and the wheat straw so appropriated was worth $25, and that there is due and owing from defendant to plaintiff the sum of $382, for which sum plaintiff prays judgment against defendant.

On November 24, 1943, defendant filed answer to plaintiff's petition, denying each and every allegation therein contained, and praying that said action be dismissed.

On December 8, 1943, the jury having been duly selected, the plaintiff introduced his evidence and rested. Whereupon defendant moved the court to direct a verdict for the defendant. At 1:30 p. m., same day, motion was argued and submitted, and the court thereupon sustained the motion and directed a verdict. Whereupon, the following verdict was returned into court:

"We, the Jury duly impanelled and sworn in the above entitled cause do find for the defendant.

"Dated this 8th day of December, 1943.

"Mrs. May Hawley
"Foreman."

The motion for a new trial was overruled January 5, 1944.

The plaintiff sets up his assignment of errors as follows:

The court erred in withdrawing this case from the jury and sustaining the defendant's motion for a directed verdict in favor of the defendant, and in overruling plaintiff's motion for a new trial. Plaintiff also charges error in sustaining the defendant's objection to question No. 7, and to the offer of exhibits Nos. 3, 4, 5 and 6.

The evidence disclosed that plaintiff had negotiated the sale of 160 acres of land about five miles south of Lyman in Scotts Bluff county, belonging to his wife, whom he had married six or eight months before, and which land was in section 27, township 22 north, range 58, to the defendant early in May, 1943, and gave possession of the crops on the place. There were no improvements on the land.

However, in planting wheat in February, 1943, on the place he had sold, plaintiff had planted over ten acres of wheat on government land adjoining the place, and land which by the contour was easily farmed in connection with the 160 acres, but no public road led to this ten-acre tract, which could be easily reached by going across the land sold to defendant, and this ten acres had been farmed the year before by Guy Cavett, the tenant of plaintiff's wife, in connection with her 160 acres of land, but he was leaving the place, so the plaintiff and a man hired by him went on and planted the wheat. After plaintiff planted this wheat in February, he was over there looking after the crop several times.

When plaintiff and defendant were negotiating for the sale of the 160 acres in May, 1943, the defendant asked about the wheat on the government land adjoining, and plaintiff said he would sell him this ten acres of wheat for $50, and defendant answered, "No, I don't want it." "Q. What further, if anything, was said about it? A. Nothing more was said about it only I just laughed, well, I said, 'You say it ain't worth it.' I said, 'I will cut three hundred bushels off of that little patch.' He just laughed and that was about the extent of the conversation. * * * Q. Was there anything said between you and Mr. Reichert about your having the right to come across his place to harvest your

place? A. I said, 'Well, if you don't want to buy it, I want to reserve the right to go in and get that wheat.' Q. What did Mr. Reichert say? A. 'Okeh.' "

The evidence discloses that one Saturday night in July, between 6 and 7 o'clock, the plaintiff, who was living on the place across the road, and was out irrigating his alfalfa, noticed that defendant and his hired man, Russell Janis, had started cutting his wheat on this ten-acre tract, and he went right over, and he was asked to tell what happened. "A. I drove over there and turned around and drove back to the end, Mr. Reichert drove up with his tractor, and I said, 'Hello, Jack.' He spoke. I said, 'Why didn't you let me know you were going to harvest my wheat?' He said, 'Your wheat?' He said, 'You ain't got no wheat over here.' I said, 'Jack, I offered to sell you this wheat and you refused to buy it.' And he said, 'Hell, everybody in the country knows I farm this place, and this place belongs to this place.' I said 'You remember I offered to sell you this wheat for $50.00?' And he said, 'Yeah; it wasn't worth it then.' Q. Was Mr. Janes present when you were having this conversation? A. Yeah, he was a short distance away—not too far. Q. What further, if anything, was said by Reichert? A. He just said, 'You are just snooping in too much about me and about my business.' And he said, 'You are going to get hell knocked out of you.' And I said, 'By who?' And he patted himself on the chest and said 'Who?' And he said, 'By me.' And I said, 'I wouldn't do that, if I were you, Jack, it might not turn out right.' He said, 'Get the hell out of here and stay out of my place.' I said, 'Okeh.' Q. Did he continue on to cut the wheat? A. He continued on to cut the wheat."

Plaintiff testified that three or four days before he had gone over and looked at this wheat of his, and made arrangements to get the wheat cut. He testified that he had raised wheat since 1917, and that in his opinion the wheat would make 28 to 30 bushels to the acre, and described how he accurately measured the field of wheat and it had an area of 11 acres less one-tenth of an acre, and gave the exact dimensions in feet.

From this brief statement of the evidence, it can be seen that the plaintiff went upon this ten-acre tract and peaceably planted this crop of wheat. He offered to sell it to the defendant when he bought the adjoining land, and upon defendant's refusal to buy this growing wheat for the price offered of $50, the plaintiff reserved the right to go over the land he was selling for the purpose of harvesting this wheat.

The defendant calls our attention to a United States statute, 43 U. S.C. A. 302, sec. 1061, which is entitled "Inclosure of or assertion of right to public lands without title" and defendant insists that under this statute plaintiff's assertion of a right to the exclusive use of the land on which he had planted his wheat was unlawful. This act was passed by Congress on February 25, 1885, and was doubtless designed for the purpose of making it illegal for the cattlemen to fence in vast tracts of government land. Under the annotations to this section, we find that in 1889 this act came before the Wyoming court, which placed a limitation upon this section, which may be briefly stated as follows: It has been said that two things are forbidden by this act, (1) the enclosure, and (2) the assertion of a right to the exclusive use of public lands without right or color of title. "The actual use, as distinguished from the assertion of the right to use, is not forbidden." It has been held that the only judgment which can under this act be rendered in a civil suit is for the destruction of the fence and an injunction against its rebuilding. *United States v. Douglas-Willan Sartoris Co.*, 3 Wyo. 287, 22 Pac. 92.

In *Tarpey v. Madsen*, 178 U. S. 215, 20 S. Ct. 849, Mr. Justice Brewer said: "It must be remembered that mere occupation of the public lands gives no right as against the government. It is a matter of common knowledge that many go on to the public domain, build cabins and establish themselves, temporarily at least, as occupants, * * * . These occupants are not in the eye of the law considered as technically trespassers. No individual can interfere with their occupation, or compel them to leave. Their possessory

rights are recognized as of value and made the subjects of barter and sale."

From these authorities it appears that one may go on open public lands and establish himself there temporarily, but not enclose such lands with a fence, and is not considered as technically a trespasser. No individual can interfere with such occupation, and any rights growing out of such possession may be sold.

It is the law that "one may acquire rights in public lands by adverse occupancy against all third persons, and this is true even though the claimant admits the government's ownership; in other words, the claimant's possession may be adverse without being hostile to the government." 1 Am. Jur. 848, sec. 104.

While it is true that the title of the United States to public land carries with it everything growing on the land, and a trespasser on public lands does not acquire title against the government as to crops grown by him on such lands, yet as between two trespassers the one who sowed the seed would have the title.

"The title of the United States to public land carries with it everything growing on such land, and as against the United States a trespasser on public lands does not acquire title to crops grown by him on such lands; but as between two claimants of a crop, it has been held that the one in possession of the public land and who sowed the seed has title, and that one in possession in good faith endeavoring to perfect his title, is entitled to crops sown and harvested by him during his possession, as against another who is finally adjudged the owner by virtue of an entry made by himself." 50 C. J. 907.

In *Buford v. Houtz,* 133 U. S. 320, 10 S. Ct. 305, it is said: "We are of the opinion that there is an implied license, growing out of a custom of nearly a hundred years, that the public lands of the United States, especially those in which the native grasses are adapted to the growth and fattening of domestic animals, shall be free to the people who seek to use them where they are left open and unenclosed, and no act of government forbids this use."

"There is an implied license to the public to go upon the unappropriated public lands of the United States, and pasture stock thereon, and cut the native grasses therefrom, for the purpose of making hay. One who has cut hay from such land is the owner thereof, and therefore may sue for destruction by fire negligently set out by another." *Mathews v. Great Northern Ry. Co.*, 7 N. Dak. 81, 72 N. W. 1085. See, also, 50 C. J. 906.

The right to a crop of wheat which is growing on public land is in the one who has planted it and looked after it, rather than in one who forcibly takes possession thereof against the will of the planter.

In our opinion, the trial court was in error in instructing a verdict for defendant. As the case will again be tried to a jury, the other assignments of error about errors as to rulings upon the oral evidence and admission of exhibits may not occur in the next trial. The verdict is set aside and the cause reversed.

REVERSED.

ALTA BERYL SAUM, APPELLANT, V. WILLIAM C. SAUM, APPELLEE.

14 N. W. 2d 844

FILED JUNE 9, 1944. No. 31787.

1. **Divorce.** The decree for child support in a divorce action is at all times subject to review in the light of changing conditions regardless of the particular language of the award.
2. ———. In determining the amount of alimony to be allowed in a divorce action the character and situation of the parties and the other surrounding circumstances should be considered as well as economic considerations.

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

William E. Shuman, for appellant.

E. H. Evans, contra.

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

YEAGER, J.

This is an action for divorce instituted by Alta Beryl Saum, plaintiff and appellant, against William C. Saum, defendant and appellee.

The parties were married on October 26, 1933, and as a result of the marriage one child, a daughter, was born on June 1, 1940.

On October 16, 1943, a decree was entered granting a divorce to the plaintiff. By the decree plaintiff was awarded the custody of the minor child of the parties. Also by the decree the defendant was required to pay to plaintiff for the support of the minor child $5 per week until the further order of the court, and as alimony for the plaintiff $1,000 payable at the rate of $10 per week. Later on rehearing based on newly discovered evidence the weekly payments for the support of the child were increased to $7 per week and otherwise the decree remained the same.

The grounds for divorce need not be set out beyond the statement that it appears that the ground upon which it was granted was extreme cruelty on the part of defendant which was sufficiently proved. No defense was tendered.

That part of the decree relating to divorce is not in issue here. The plaintiff has appealed from the part of the decree pertaining to support for the child and alimony for herself. She seeks to have the decree modified so that weekly payments for child support shall continue until the child shall attain her majority and so that payments of alimony of $10 per week shall continue until the child shall have attained the age of 10 years.

As to the first of these propositions we cannot see any useful purpose in a change of the decree in the manner requested. The decree for child support in a divorce action is at all times subject to review and adjustment in the light of changing conditions regardless of the particular language of the award. Section 42-312, Comp. St. 1929, dealing with this subject is the following: "If the circumstances

of the parents shall change, or it shall be to the best interests of the children, the court may afterwards, from time to time, on its own motion, or on the petition of either parent, revise or alter to any extent, the decree so far as it concerns the care, custody and maintenance of the children or any of them."

The second proposition does not permit of such ready determination. The pertinent statutory provision is section 42-318, Comp. St. 1929, as follows: "Upon every divorce from the bonds of matrimony for any cause excepting that of adultery committed by the wife, and also upon every divorce from bed and board, from any cause, if the estate and effects restored or awarded to the wife shall be insufficient for the suitable support and maintenance of herself and such children of the marriage as shall be committed to her care and custody, the court may further decree to her such part of the personal estate of the husband and such alimony out of his estate 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 of the case."

The facts to be applied to this statutory provision are substantially as follows: At the time of the divorce plaintiff was 37 years of age; defendant was 34; there was a child 3 years of age, nervous and high-strung with some kind of ailment requiring medical attention; the custody of the child was given to the mother; neither of the parties had any money or property except a small amount of household goods which was given to the plaintiff; prior to and since the decree plaintiff made a home for herself and the child in a small, rented, three-room dwelling; plaintiff has not been trained for any gainful occupation; defendant is a bartender, regularly employed with a net weekly income of slightly more than $37.50 per week; the responsibility for the divorce was entirely that of defendant; that under conditions obtaining before and at the time of the trial it required approximately $80 per month to maintain plaintiff and the child of the parties, which monthly amounts were

paid by defendant except for a short time before the trial.

On the face of the record there can hardly be any question that plaintiff has no estate or effects from which support and maintenance may be obtained for her and the child of the parties. There is further no question that at the time of the trial the amounts allowed were reasonable, having regard to the ability of the husband, the character and situation of the parties and the other circumstances disclosed by the record in the case.

There is nothing in the record to disclose that after the expiration of 100 weeks the situation will have changed in any material particular. On the other hand the evidence would seem to indicate that the child of the parties will, on account of characteristics outlined in the evidence, require close care and attention by the mother, and the mother seeks the increased alimony in order that she may give the required care until the child arrives at the age of 10 years.

It would seem therefore that adequate provision under the factual situation and the statute for a sufficient length of time for this woman and child has not been made.

From an examination of the precedents it is readily ascertainable that no fixed rule has been or can be established governing the determinations of the courts in such cases as this. In some cases where the economic considerations were somewhat similar to those surrounding these parties lesser amounts of alimony have been awarded and in some greater amounts.

As the statute points out, however, economic considerations are not the only ones to be examined. The character and situation of the parties and the other surrounding circumstances must be considered.

To require that defendant pay in accordance with the demand of plaintiff is, under present conditions, within the ability of defendant.

On the matter of the character of the parties there is no reflective word in the record against the plaintiff. On the other hand the evidence is without dispute that the defendant sacrificed his own home and gave up his faithful wife

and his child because of an amour with another woman, or as he said his chance "to go to the top" with another woman.

Under such circumstances the courts ought not to permit him to throw off his ties without making reasonable provision for those who were cast aside.

The difficulty arises in determining what is reasonable and the making of provision for payment.

In *McGechie v. McGechie,* 43 Neb. 523, 61 N. W. 692, the practice of providing periodical payments of alimony for an indefinite period of time or for life was disapproved in the following words: "We do not approve of allowing alimony in the form of an annuity, or requiring the husband to pay a fixed sum each month during the life of the other party, or for an indefinite period of time."

By the later decisions it becomes apparent that the disapproval contained in this case has not been deemed a prohibition against allowing alimony in the form of an annuity, or against requiring a husband to pay a fixed sum each month during the life of the other party, or for an indefinite period of time. See *Hays v. Hays,* 75 Neb. 728, 106 N. W. 773; *Boxa v. Boxa,* 92 Neb. 78, 137 N. W. 986; *McCord v. McCord,* 119 Neb. 891, 231 N. W. 957; *McCord v. McCord,* 128 Neb. 230, 258 N. W. 474. It appears however that it is a caution to be observed and that the practice disapproved should not be resorted to unless the facts and circumstances of the particular case will not permit of any other just and equitable determination of the rights and liabilities of the parties flowing from the previously existing marriage relationship.

As has been pointed out plaintiff seeks to have the weekly payments of alimony continue until the child attains the age of 10 years. This might appear to invoke a contingency which would justify the application of the exception to the rule that alimony payments should not be allowed at fixed intervals for an indefinite period of time, yet under the facts and circumstances disclosed by the record we do not believe such a decree is justified.

The design of the statute and the decisions is, if reason-

ably practicable, at the time of severance of the marriage, by decree, to fix definitely the property rights of the parties in the light of the then and previously existing conditions. It cannot be said that this attitude eliminates every species of possible injustice or uncertainty, but it contributes less to injustice and uncertainty than property divisions and allowances which depend upon speculative contingencies. This is especially true in respect to title to real estate since contingent decrees as well as decrees for a definite amount of alimony payable periodically are liens upon real estate for the unpaid amounts allowed.

We conclude therefore that an award of alimony for plaintiff should have been made approximating the amount requested by her. An amount so approximating would be $3,000, instead of $1,000, payable at the rate of $10 per week for 300 weeks. This would be slightly less than the amount requested.

The decree of the district court is to the extent indicated reversed and the cause remanded with directions to enter decree in accordance with this conclusion with provision that the date for commencement of payments shall be October 16, 1943, the date fixed in the original decree.

Plaintiff having made application to the district court for an allowance for counsel fees, which was denied, and the record having been preserved thereon and presented to this court by assignment of error, an allowance of $25 is allowed for service of counsel in that court. A further allowance of $100 is allowed for service of counsel in this court.

REVERSED, WITH DIRECTIONS.

CLARENCE RUNNER ET AL., APPELLANTS, V. FRED PIERSON ET AL., APPELLEES.

14 N. W. 2d 847

FILED JUNE 9, 1944. No. 31777.

1. **Fixtures.** Fences constructed upon a farm are generally held to be fixtures and a part of the realty unless specifically exempted

by contract or otherwise. Whatever is thus affixed to the land becomes subject to the same rules of law as the land itself.

2. ———. Fixtures placed upon the land of another by a stranger without previous consent of the owner and without any contract with him, express or implied, to the contrary, become a part of the realty and may not be removed by the party erecting them or his vendee as against the owner of the soil.

APPEAL from the district court for McPherson county: J. LEONARD TEWELL, JUDGE. *Reversed, with directions.*

Hoagland, Carr & Hoagland, for appellants.

Beeler, Crosby & Baskins, contra.

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

CHAPPELL, J.

This is a suit to enjoin defendants, appellees, from trespassing upon lands belonging to plaintiffs, appellants, and removing wire fences therefrom. The trial court in its decree dismissed the action as to defendant William Chessmore, but permanently enjoined defendant Fred Pierson from trespassing upon the lands and removing fences between sections 28 and 29. There is no controversy here about this portion of the decree. However, in its decree the trial court also found for Fred Pierson, hereinafter called defendant, as to the fences between sections 20 and 21 and across the center of section 29, all in township 17 north, range 32, McPherson county, Nebraska, from which plaintiffs appeal contending that this part of the decree is contrary to the evidence and the law. We agree with these contentions.

The record discloses that plaintiffs are owners of all the property involved, except 80 acres in section 29, and have been in possession thereof for several years. Defendant for a long period of time leased, but now owns, certain adjoining lands. When defendant and his predecessor fenced their own lands, they, without any lease or other authority of the owner from whom plaintiffs obtained title, fenced

and cross-fenced the lands here involved to give them wider and more extensive grazing lands.

The trial court found specifically in its decree that in 1924 fences were constructed between sections 20 and 21, and in an easterly and westerly direction near the half-section line across section 29, out of material belonging to defendant or his vendor, and that such fences were defendant's personal property which never became affixed to the land and were therefore removable by him. While we believe there is compelling evidence in this record that the fences were constructed in the first instance before 1924, and by persons other than defendant, it is immaterial in our view of the case.

Counsel for the parties have devoted a large part of their briefs to a discussion of the law of fixtures, which we do not deem it necessary or proper to discuss at length in this opinion. Suffice it to say, that fences constructed upon a farm are generally held to be fixtures and a part of the realty unless specifically exempted by contract or otherwise. 36 C. J. S. 915, 916, sec. 11; *Pabst v. Ferch,* 126 Minn. 58, 147 N. W. 714; *Leo Co. v. Jersey City Bill Posting Co.,* 78 N. J. Law 150, 73 Atl. 1046. Whatever is thus affixed to the land becomes subject to the same rules of law as the land itself. Ewell, Law of Fixtures (2d ed.) 77, sec. 51.

Defendant long ago parted with possession of the lands upon which the court found that he had constructed the fences. If he ever was a tenant at will, as contended by him, his right to remove such fences was lost when his tenancy terminated and he parted with possession, in the absence of a contract with, or consent of, the owner to the contrary. This principle finds support in many decisions of this court in cases of a similar nature. *Friedlander v. Ryder,* 30 Neb. 783, 47 N. W. 83; *Free v. Stuart,* 39 Neb. 220, 57 N. W. 991; *Fuller v. Brownell,* 48 Neb. 145, 67 N. W. 6; *Stevens v. Burnham,* 62 Neb. 672, 87 N. W. 546; *Fenimore v. White,* 78 Neb. 520, 111 N. W. 204; *Frost v. Schinkel,* 121 Neb. 784, 238 N. W. 659. See, also, 22 Am. Jur. 756, sec. 43; 36 C. J. S. 978, sec. 41; Ewell, Law of Fixtures (2d ed.) 199, sec. 139.

However, the record discloses that defendant never was a tenant at will or otherwise of the land involved. It is admitted that he never had any lease or right to a lease of the property or any agreement with any one concerning either constructing or removing the fences. Under these circumstances, we are required to apply the general rule that fixtures placed upon the land of another by a stranger without previous consent of the owner and without any contract with him, express or implied, to the contrary, become a part of the realty and may not be removed by the party erecting them or his vendee as against the owner of the soil. Ewell, Law of Fixtures (2d ed.) 80, sec. 54, and 86, sec. 57; 26 C. J. 672; 36 C. J. S. 962, sec. 25a.

There are many cases almost directly in point which support this position. It was held in *Ebersol v. Trainor*, 81 Ill. App. 645, that, "Where a person erects a wire fence upon the land of another without the owner's consent, such fence becomes a part of the realty and such person parts with his ownership of the materials entering into the fence and has no further right thereto." Also, in *Kimball v. Adams*, 52 Wis. 554, 9 N. W. 170, "Where a fence is built, as a permanent structure, by one person upon the land of another without any agreement between the parties as to a right of removal, it becomes a part of the realty; * * * ." Likewise, in *Burlerson v. Teeple*, 2 Greene (Ia.) 542, where a fence was constructed without consent upon government lands which were later sold to another, the court said: " 'It is a general principle that all permanent buildings follow the tenure of the soil on which they are erected. The fence which encloses a field is within the doctrine. It is necessary for the use and occupation of the ground, and cannot be removed without injury to the freehold. On alienation it passes with the soil.' *Seymour v. Watson*, 5 Blackf. 555; * * * ." Finally, in *Heubschmann v. McHenry*, 29 Wis. 655, it was said: "And, indeed, it would be strange * * * if it were to be held that the mere trespasser, entering without any title and erecting * * * improvements, having in all other respects the character of fixtures, could show that they

were not, by showing that his intention was at some future day to remove them. This would be a new way of defeating the rights of the owner of the soil to fixtures and improvements thus annexed, and which, by the common law as it now exists and always has, confessedly belong to him." See, also, Ewell, Law of Fixtures (2d ed.) 59, sec. 41.

Defendant contends that he is entitled to remove the fences by reason of a custom prevailing among ranchmen in western Nebraska. Whether such a custom, if proved, would have application here we need not decide since the record shows a complete failure to prove the necessary elements to establish it. In this connection, the rule is that, "It is incumbent upon one relying on a special custom as a basis of recovery or of defense, not only to allege and prove such custom, but also to prove that the person sought to be bound thereby had knowledge thereof and contracted with reference thereto." *State ex rel. Sorensen v. Nebraska State Bank,* 120 Neb. 539, 234 N. W. 82.

We conclude that the trial court in its decree should also have permanently enjoined defendant Fred Pierson from trespassing on plaintiffs' lands and removing the fences between sections 20 and 21 and across section 29. Therefore, the judgment of the trial court is reversed and the cause remanded with directions to enter a judgment for plaintiffs in conformity with this opinion.

REVERSED, WITH DIRECTIONS.

GEORGE SCHRAM, APPELLANT, V. FRANK O. LOWDEN ET AL., APPELLEES.

15 N. W. 2d 42

FILED JUNE 23, 1944. No. 31783.

Trial. Where instructions are not inconsistent or contradictory but, considered together, correctly state the law, the judgment will not be reversed because one does not state the entire law on the subject, unless it appear that the jury were misled.

APPEAL from the district court for Gage county: CLOYDE B. ELLIS, JUDGE. *Affirmed.*

Hubka & Hubka, for appellant.

Chambers, Holland & Locke and *Jack & Vette, contra.*

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

SIMMONS, C. J.

In this action plaintiff sought to recover damages for personal injuries resulting from being struck by the gate on a stock loading platform of the defendants. Trial was had. The jury found for the defendants. Plaintiff appeals. We affirm the judgment of the trial court.

The defendants maintained a yard at their Clatonia station for the use of shippers of livestock. This yard was near a sidetrack, had a chute running from it, inclined upward to a loading platform built alongside the track. The loading platform, parallel with the track, was 16½ feet long and five feet wide. The edge of the platform was about three and one-half feet from the nearer rail and 14 inches from a car on the tracks. The chute was perpendicular to the platform and centered on the side away from the track. Attached to the chute posts at the edge of the platform were two swinging, slatted gates, of heavy timber, about five feet wide and five feet high. One of these gates, referred to here as the east gate, had an extension which made the gate five and one-half feet wide when closed. The west gate did not have such an extension at the time of the accident. Each gate was equipped with iron "holder" rods, so placed that when raised they did not interfere with the free movement of the gates and when lowered they locked the gates in position. These gates had a 180 degree arc, and, when extended at right angles to the platform, extended a few inches beyond the loading platform. The extension wing was so made that when extended it would fit against a car being loaded or unloaded. There also was a removable wooden "apron" used to floor the space between the

platform and a car being loaded or unloaded. When in place for the loading or unloading of a car, the gates, the apron, the platform and the chute made a runway from the pens to the car.

The yards were used largely by one William Heller for the shipment of stock. To the west of the yards about 150 feet was a highway crossing, and still beyond was an elevator served by the same sidetrack as the stockyard.

On October 27, 1942, William Heller was preparing to ship a load of hogs. Plaintiff, a man 77 years of age, and about five feet, four inches tall, a relative of Heller's by marriage, was asked to assist. A car was spotted at the platform. Plaintiff, at Heller's direction, went upon the platform into the car, bedded down the car with straw and assisted in the selection of hogs to be shipped. Heller sent plaintiff to the station of defendants to order another car. Heller loaded the car. Plaintiff then went to Heller's home to bring a lunch to Heller. Heller closed the car, removed the apron and placed it between the two gates. The extension wing was pushed back into the main gate. The holder rods were not used to fasten the gates in position. The gates were left standing, with the extension pushed back, at about right angles to the front end of the platform, so that the gates may have extended over the edge of the platform, and with a clearance space of several inches between the car and the gates.

An empty car stood east of the loaded car with a space of about 40 feet between the two cars. Shortly after noon, Heller had a truck preparing to move the loaded car and spot the empty car. An engine of the defendants moved into the side track to pick up the loaded hog car, to get a load of grain at the elevator, and to spot an empty car for loading. They instructed the truck driver to move and he did move out of the way.

Stairsteps led up to the platform from the west. Heller instructed plaintiff to go upon the platform and watch the movement of the hogs in the car when the engine coupled on and moved the car, and to see that the second car was spotted properly. Plaintiff went upon the platform.

Up to this point there is no material dispute in the testimony. Plaintiff testified that he went upon the platform and stood with one hand on the west gate and the other on the car in a position where he could see around the gates and into the inside of the east end of the loaded car. He looked up, saw the engine coming down the sidetrack at a high rate of speed (fixed by another witness at ten to 15 miles an hour), and the engine swaying from side to side, gaining speed; and that it made no stop either for the empty car or to couple on the loaded car. He saw defendants' employees looking at him. He turned to run off the platform to safety, heard the contact of cars coming together, then a crash. He was knocked to the ground and seriously injured. Plaintiff further offered evidence that the cars were painted red, the engine black, and that following the accident there was a gouge in the extension section of the east gate, near the bottom, leaving a black mark. Plaintiff's evidence also was that there was no wind at the time. Plaintiff's theory was that the engine struck the east extension gate, pushed it against the apron and against the west gate, causing that gate to hit the plaintiff.

Defendants offered evidence that the engine moved into the siding, stopped east of the stockyard and cars to remove a derail appliance, then moved toward the stockyard at from two to four miles an hour, stopped to couple onto the empty car, then moved to the loaded car, stopped to couple onto it, and then moved to the elevator to get the grain car. The brakeman making these connections was working on the side of the train away from the platform. As the engine approached the yards, the gates were observed to be in a position allowing ample space to clear the movement of the car and engine. The plaintiff was not seen to be on the platform. After observing that condition, the fireman (on the side next to the stockyard) was observing conditions at the crossing. The train moved down to the elevator (about 600 feet from the yards), got the grain car and was returning toward the stockyard, when a man or men were observed running toward the plaintiff, and for the first time

defendants' employees knew that an accident had happened. Defendants offered evidence that there was a strong wind blowing that day from the northwest, and that there were no marks on either the gate or the engine. The gates were farther to the west after the accident. There also was evidence that the wind and its effect on the gates were discussed right after the accident in plaintiff's presence and hearing.

Plaintiff alleged negligence of the defendants in nine particulars, in that they did not keep a proper lookout; did not give any warning; could have avoided injuring plaintiff had they kept a proper lookout; failed to note the condition of the gates, and had they done so could have stopped the engine and avoided the accident; failed to use any care to avoid hitting the gates; caused the engine to travel at a high rate of speed at the time it hit the gates and should have known that the plaintiff was on the platform; failed to discover plaintiff on the platform; failed to notify plaintiff that they were going to proceed to the elevator; and that the gate construction was unsafe.

Defendants, answering, alleged plaintiff's negligence in going upon the platform knowing that the cars were to be moved, and when he knew or should have known that plaintiff and his fellow workers had not fastened the gates to prevent their swinging into the side of the train; that plaintiff knew or should have known that the fastenings of the gates had not been properly adjusted and nevertheless placed himself in a hidden position behind the gates and remained there when the gates swung into the train; and that plaintiff's negligence was gross and proximately caused and contributed to the accident and injury.

Two of plaintiff's allegations of negligence were "(h) That defendant's employees and servants failed and neglected to inform and give plaintiff notice that train was backing past the usual spotting place of stock cars and that engine would continue backing to the elevator in said yard" and "(i) Defendants permitted gates to be so constructed as to extend past south edge of platform, which condition

exposed danger to the plaintiff and caused premises to be unsafe." The trial court did not submit these allegations of negligence to the jury. Plaintiff assigns that as error. As to paragraph (h), without determining whether or not defendants had a duty so to advise plaintiff, it is patent that plaintiff had that information. He knew the engine was coming in to move the loaded car and spot the empty one. He knew the cars were to be moved. He knew these had to be moved either forward or backward. He went upon the platform and close to the car to observe the effect of that movement on the hogs in the car. He, according to his testimony, anticipated a possible rough handling. The distance of the movement, after it began, does not seem to be material. As to paragraph (i), there is no evidence that there was a faulty or dangerous construction of the gates. The evidence is that the gates were properly constructed for the purpose intended. We see no merit in this assignment.

Plaintiff, contending that the trial court in five different instructions submitted the issue of contributory negligence to the jury, argues that there was no evidence of contributory negligence and, hence, these instructions were erroneous. The trial court rightly submitted that issue. The evidence would sustain a jury finding that the plaintiff went upon the platform when he knew or should have known that the gates were unfastened, extending out toward the track and loaded car, and would swing toward him if force were applied to them from the opposite side; that he assumed a largely hidden position behind the gates in relation to the approaching engine, placed himself near the gates and the loaded car, and there awaited the coming of the engine and the moving of the cars; and that he knew or should have known that if force were applied to the gates, injury might follow. We see no merit in this assignment.

Plaintiff contends that by several instructions given, the jury were in effect told that if they found Heller negligent in not fastening the gates, they then must find for the defendants, even though defendants' negligence also was a

proximate cause of the injury; that the jury were in effect instructed to find that the defendants' negligence was the sole cause of the accident before plaintiff could recover; that undue emphasis was placed upon defendants' evidence and theory of the case; and that the trial court in one instruction erroneously assumed certain facts to be supported by the evidence. Plaintiff further complains that the court should have given two tendered instructions to "offset" the claimed error in the instructions as given.

The trial court instructed the jury that it had not attempted to state all the law in one instruction, and that any single instruction must be considered in connection with all the other instructions and to "consider them in harmony with each other." We have examined the criticized instructions and, when taken as a whole, together with other instructions given, find no basis for a claim that the jury were misled or that prejudicial error occurred. The rule is: "Where instructions are not inconsistent or contradictory but, considered together, correctly state the law, the judgment will not be reversed because one does not state the entire law on the subject, unless it appear that the jury were misled." *Torske v. State,* 123 Neb. 161, 242 N. W. 408.

The judgment of the district court is affirmed.

AFFIRMED.

GRACE JENSEN, APPELLEE, V. CHARLES J. JENSEN, APPELLANT.

15 N. W. 2d 57

FILED JUNE 23, 1944. No. 31757.

1. **Divorce.** To secure an injunction against disposition of husband's property in a divorce action, there must be a proper showing in the application. Peril to the fund or sufficient cause for belief that an unlawful disposition is to be made of the property out of which relief is sought must appear from the pleadings, or by evidence.

2. ———. When it is necessary to prevent defeating the order of the court by alienation of property, an injunction against alienation of real or personal property may be granted.
3. ———. The court has ample power to enforce a decree for alimony by the appointment of a receiver, and likewise, if expedient, by injunction, either through a petition filed in the same suit, or by a separate application in the court which granted the decree.
4. **Courts.** Courts of general jurisdiction have the inherent power to do all things necessary for the proper administration of justice and equity within the scope of their jurisdiction.
5. **Divorce.** When the defendant's property consists in a large measure of bank deposits, currency, bonds and liquid assets, it is proper for a court to issue an injunction restraining the withdrawal of such funds upon proper application being made and a proper showing as to the need therefor.
6. ———. It is charged that attorney's fees are clearly unreasonable and excessive. Fees in a divorce case must be reasonable in amount, and can only be awarded after a careful examination into the nature of the case, the skill necessarily devoted to the preparation and presentation of the questions, the character and standing of the counsel, together with a consideration of the amount involved and the results obtained for the client. Fees of $1,500 are not excessive.

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

Ziegler, Dunn & Becker, for appellant.

J. M. Emmert, contra.

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

PAINE, J.

In an action by the wife for a divorce, the trial court dismissed the husband's cross-petition, and granted the wife an absolute divorce, with alimony in the sum of $21,886.10 and attorney's fees in the sum of $1,500. From this decree the defendant appeals.

Said decree also permanently enjoined defendant from transferring and conveying to any person any real or personal property owned by him, and enjoined defendant from

disposing of his stock or holdings in the Chris Jensen & Sons Realty Company, and further enjoined the defendant from transferring any of the real or personal property of said corporation, but provided that such injunction should not apply to defendant's personal checking account in the Omaha National Bank, which was under the name of the Omaha Wrecking Company, or his personal checking account in the Douglas County Bank of Omaha. It was further provided that said restraining order and injunction shall be dissolved only upon the payment of alimony to the plaintiff of $21,886.10, with attorney's fees and costs.

The errors relied upon for a reversal by the defendant may be summarized as follows: The court erred in the finding that the defendant's property is of the value of $70,889.14, and entering judgment for alimony in the sum of $21,886.10; the court erred in basing its finding of alimony in favor of plaintiff on the gross value of defendant's property, and in refusing to take into consideration tax liens and indebtedness of the defendant and of Chris Jensen & Sons Realty Company; the court erred in issuing an injunction, upon filing of plaintiff's original petition, enjoining defendant from disposing of or transferring his property and from going to his home, and continuing said injunction until the alimony and attorney's fees are paid; the court erred in allowing attorney's fees in favor of plaintiff in the sum of $1,500, and said judgment and decree of the court is contrary to law and contrary to the evidence.

We will now present the main facts as disclosed by the evidence. The plaintiff is 56 years of age, and the defendant about the same. They were married in Omaha August 21, 1917, and neither had been married before. Two children were born to this union, a daughter, Mary Annalee, who is now 23 years old and married to Wendell Anderson, and a son, Sgt. Edward C. Jensen, of Company A, 381st Infantry, United States Army, stationed at Fort Lewis, Washington, at the time of trial. The son, being unmarried and aged 21 years, testified to the fine Christian character of his mother. The testimony of the plaintiff and the two

children amply supported the charge of extreme cruelty as alleged in the third amended petition.

The defendant has been more or less seriously ill since April 6, 1933, being afflicted with tuberculosis and diabetes, and has no chance at this time of being restored to good health. At the time of trial he was confined to the Douglas County Hospital, because that was the only Omaha hospital prepared to handle serious tubercular conditions. Defendant's evidence was taken by deposition, as he was too sick to appear in court.

It will be seen that the defendant is making no complaint against granting the wife an absolute decree of divorce. The argument of defendant is, however, addressed principally to these two points: That the value of defendant's property was fixed at much too high an amount, and the alimony judgment based thereon is excessive, as are the attorney's fees; that the granting of a temporary injunction on the same day the petition was filed, and continuing the said injunction in full force and effect after decree was entered until the decree for alimony had been paid in full, with plaintiff's attorney's fees, is an error on the part of the trial court warranting a reversal of such decree for alimony and injunction.

We will, therefore, examine the facts in reference to the financial conditions. Christian Jensen, father of the defendant, who died July 18, 1938, was a very successful business man, and incorporated the Chris Jensen & Sons Realty Company in 1909, with 400 shares of stock. This was a holding company, of which the father retained 398 shares and one share was issued to the defendant by his father, and the remaining share was issued to John A. Byrne, a half-brother of the defendant, a man 63 years of age, who was one of the original officers of said corporation, and testified that he had given all his time to looking after the interests of the corporation and working for it. He was supposed to get $100 a month, but in Item III in the will of Christian Jensen he was given $1,000 cash, the same to be in full of all sums due him for labor and services, and it was

further provided that he was to surrender his share of stock in said corporation, the same to be retired into its treasury as a condition precedent to receiving the $1,000 cash.

In Item VIII testator stated that he was the owner of the capital stock of said corporation, and also of the Omaha Wrecking Company, which was not incorporated. Such will, after making numerous bequests, made Charles J. Jensen the residuary legatee of all of the remainder of his father's property. Mr. Byrne testified he had not been paid anything for his services since Christian Jensen died, although he had continued to give all his time to looking after the varied business interests of the defendant.

It was stipulated between the parties that cash on hand, cash in banks, and deposits in the Omaha Loan & Building Association and liquid assets amounted to $36,680.90. The home at 909 North Forty-ninth street, Omaha, was inherited by the defendant from his mother's estate. A farm near Louisville, Nebraska, was valued at $3,500, and a farm near Modale, Iowa, was valued at $4,000, making a total of $11,500 for these three pieces of real estate, or a total of $48,180.90 for assets the value of which was undisputed.

There were, in addition, a large number of old brick and frame buildings in Omaha, including a three-story 40-room hotel building and the interest in a number of pieces of real estate belonging to the estate of Mary E. Jensen, his mother, in which the defendant owns a one-sixth interest, and all of these many pieces of real estate were given a value of $20,650 by the defendant Jensen and a value of $19,600 by Thomas F. Quinlan, a real estate expert called by the defendant, and a value of $25,783.34 by W. O. Larson, a real estate expert called by the plaintiff.

In the decree entered by the trial judge, the total value of the defendant's holdings was fixed at $70,889.14, from which it appears that the trial judge added a few thousand dollars to the defendant's value, and his final amount appears to be practically the average between the amounts reached by the two experts, and from a careful analysis of each of the many items making up these values we have reached the

conclusion that the trial judge gave a very patient and careful study to each and every item of real and personal property owned by the defendant and all of his interests therein, and we have reached the conclusion that the trial judge was right.

From this property, the trial judge directed that the plaintiff should be given a total amount of alimony of $21,886.10, which was practically 30 per cent of the defendant's holdings. In the alternative, the trial judge provided that the plaintiff, at her election, might take in lieu thereof $9,000 worth of the $20,000 worth of Omaha city and school district bonds in the safety deposit box, the $1,336.10 deposit of the defendant held in the name of the Omaha Wrecking Company in the Omaha National Bank, $2,550 due and payable on a land contract from the Miller Chemical Company, and the home place at 909 North Forty-ninth street, Omaha, valued at $4,000, together with the three-story brick building used as a hotel and rooming house, appraised by the defendant's appraiser at $5,000, these various items making a total of $21,886.10 at the value fixed upon them by the court in the decree.

The decree further provided that Charles J. Jensen was permanently restrained and enjoined from transferring or conveying to any person his money, stock, bonds, bank account, building and loan association account, personal or real property, or from transferring his stock in the Chris Jensen & Sons Realty Company, or from transferring any of the real or personal property of said corporation, which injunction should continue until the alimony and attorney's fees were paid, but it was specifically provided that the injunction should not apply to his personal checking account in the Omaha National Bank under the name of the Omaha Wrecking Company, or to his deposit in the Douglas County Bank of Omaha.

The defendant, instead of appealing, could have paid the alimony of $21,886.10 in cash out of his liquid assets of $36,680.90 standing in the name of the Chris Jensen & Sons Realty Company, the Omaha Wrecking Company, and in

his own safety deposit box, or if, on request, the plaintiff had elected to accept the alternative provisions provided in the terms of the decree, the bonds and the cash could have been turned over to plaintiff at once, and the title to the home and the hotel property transferred, and all of the remainder of the property would have belonged to the defendant, and in either case the injunction would have been dissolved at once by its terms if the attorney's fee had also been paid.

It is charged in the assignment of errors and argued in the brief that the judgment for alimony becomes a lien upon the property of the defendant, and is enforceable by execution, and the court was entirely without authority to enjoin the defendant from transferring any of his property, there being no evidence that the defendant had any such intention, and that the issuance of the injunction on the filing of the original petition, and the insertion of an injunction in the final decree, indicates a profound disregard of the principles of law recognized by this and other courts.

In this case it also appears that at the time of the trial the defendant owned every share of stock of the Chris Jensen & Sons Realty Company, and therefore that corporation, while owning title to many pieces of real estate and doing business with several financial institutions, was in reality the sole property of the defendant, and therefore plaintiff charges as proper for the trial judge to enjoin the defendant from transferring the capital stock of said corporation, or transferring the real and personal property owned by the corporation, as it was to enjoin the transfer of any other property owned solely by the defendant in his individual right. Therefore, we will consider the question whether in this particular case the fact that a judgment for alimony is a lien against the property of the defendant was a sufficient protection for the plaintiff's judgment in this case, in which practically all defendant's real and personal property stood in corporate names of which he was sole owner.

In regard to alimony, we find that prior to 1883 this

court had held that alimony judgments were not a lien on real estate (See *Swansen v. Swansen,* 12 Neb. 210, 10 N. W. 713; *Brotherton v. Brotherton,* 14 Neb. 186, 15 N. W. 347) and the legislature of 1883 enacted chapters 40 and 41, Laws 1883, to remedy this situation. Thereafter, it was held in *Wharton v. Jackson,* 107 Neb. 288, 185 N. W. 428, and *Lynch v. Rohan,* 116 Neb. 820, 219 N. W. 239, that a decree was a lien upon the real estate of the husband.

In *Bigelow v. Bigelow,* 131 Neb. 201, 267 N. W. 409, this court discussed the case of *Cizek v. Cizek,* 69 Neb. 800, 99 N. W. 28, and called attention to the fact that that decision had been rendered in 1904 and that in 1907 the legislature had enacted section 42-321, Comp. St. 1929, which law made it discretionary with the court to award to the innocent party a share or interest in the real estate of the guilty party.

Section 42-323, Comp. St. 1929, provides that the court may require the husband to give sufficient security for the payment of the alimony; that if he neglects to give such security, or pay such alimony, his real or personal estate may be sold as upon execution, and further provides that the court may also appoint a receiver to take charge of his real and personal property, or both, and hold the same, together with the rents and profits therefrom, for security for the payment of installments of alimony.

In *Bruening v. Bruening,* 143 Neb. 335, 9 N. W. 2d 399, it was said that the appointment of a receiver was a drastic remedy, and the orders therefor must be made in strict compliance with the statute.

In *Wolfe v. Wolfe, ante,* p. 55, 12 N. W. 2d 368, defendant sought to obtain an injunction to restrain the plaintiff from collecting payments of temporary alimony awarded to her. It was held that the trial court erred in failing to dismiss the defendant's petition for an injunction.

Upon granting an absolute decree, the trial court may assign the property, both real and personal, between the parties as the demands of justice and equity may require. See *Johnsen v. Johnsen, ante,* p. 208, 12 N. W. 2d 837.

The situation which caused the trial judge to issue the injunctions in the case at bar developed as follows: The original petition was filed March 2, 1943, and alleged that the defendant was about to transfer and convey certain property owned by him to another woman for the purpose of preventing plaintiff from having her lawful interest therein and from ever becoming in possession of said property, and that by reason thereof an injunction should issue preventing the defendant from transferring and conveying any property whatsoever owned by him to any person or persons, and the plaintiff took oath to the statements therein being true.

On March 2, 1943, the trial court entered a restraining order against the defendant molesting the plaintiff and forbidding him to go on the home property, and on the same day a restraining order was issued against the defendant, enjoining him from transferring or conveying to any person any of his real or personal property or that of the Chris Jensen & Sons Realty Company until further order of the court, and giving him ten days within which to show cause why said injunction should not become permanent.

On March 8, 1943, defendant filed a motion to vacate the temporary injunction on the ground that the court had no authority or jurisdiction to issue the injunction, and that the same is void and of no effect in that it was issued without notice to the defendant or opportunity for a hearing, and that the allegations of the petition were not sufficient to authorize or confer jurisdiction on the court to issue the injunction, and on March 11, 1943, the application of plaintiff for a temporary injunction and for attorney's fees and court costs came on to be heard upon defendant's motion to vacate the temporary injunction, and thereafter on March 13 a new order was entered, which enjoined the defendant from transferring any real or personal property of his own, or of the Chris Jensen & Sons Realty Company, or of the Omaha Wrecking Company, and further enjoined him from interfering with the plaintiff or her use or occupancy of the family home, and directed that he pay her $15 a week and

all utility charges in connection with the home, and pay temporary attorney's fees of $35 and court costs. This more extensive order of injunction provided that it should remain in full force and effect until further order of the court, and the temporary order of injunction issued March 2, 1943, was vacated.

The evidence of Carrie Lee was introduced for the purpose of supporting the defendant's motion to dissolve the restraining order enjoining defendant from transferring property. She testified that she had been the superintendent of nurses of the Douglas County Hospital since September, 1942, and prior to that had been a nurse there since 1936. She testified that the defendant had been in the tubercular hospital four different times, staying from two or three months up to six months at one time; that she had frequently been invited to the defendant's home by his wife, Mrs. Jensen; that the wife had given her a Christmas present of $25, and that, as he was in an advanced stage of tuberculosis, and his condition was serious, she had spent nights at his home to take care of him.

The inference from all of the evidence on this point appears to be that she was an excellent nurse, and became acquainted with the defendant, and she invited the Jensen family to her home at 2719 North Forty-fifth street, and that she was repeatedly invited to the Jensen home, and between September and December stayed there and helped take care of defendant during the nights for fear he might have a serious hemorrhage, and that she slept with Mrs. Jensen, and made no charge for her services in sleeping there at night while she was working at the Douglas County Hospital in the daytime.

The son, Sgt. Edward C. Jensen, testified that at least on two occasions when his father was not at the hospital he had seen his father's car in front of the residence of Carrie Lee, and that on these occasions his father did not return home until 11:30 or 12 o'clock at night. On one occasion, when the plaintiff was writing a letter for the defendant, he said, "Carrie could do this business better than you can for me."

Carrie Lee testified that she knew nothing of his holdings, and that he had never given her any presents, as all of the presents she had received came from his wife.

The defendant, to support his charge that the court was without any authority to grant an injunction in this case, cites seven Nebraska authorities. The first one cited is *Omaha Grain Exchange v. Spillman,* 118 Neb. 729, 226 N. W. 452, an action to enjoin the attorney general of the state of Nebraska from enforcing a law with regard to reshipment of grain in carlots as unconstitutional.

The second case cited is *Hotchkiss v. Keck,* 84 Neb. 545, 121 N. W. 579, which action involved a contest between the trustees of the city of Valparaiso as to who were duly elected to that position.

The third authority relied upon for reversal is *State Bank of Nebraska v. Rohren,* 55 Neb. 223, 75 N. W. 543, which involved a lease from a Seward bank to a farm in that county.

The fourth case cited by the defendant is that of *School District v. De Long,* 80 Neb. 667, 114 N. W. 934, and involved the payment of school taxes under protest.

In addition to these four cases, the defendant cites three divorce cases, one being *Cizek v. Cizek, supra,* which case has already been discussed herein, another being *Ford v. Ford,* 101 Neb. 648, 164 N. W. 577, which involved the appointment of a receiver.

The last of the seven cases cited by defendant on the injunction is *Kimbro v. Kimbro,* 73 Neb. 171, 102 N. W. 271, which seems to be taken up with a discussion of the alimony allowance of $5,500, and holds that it is excessive, and it is reduced to $2,500. These were all of the cases cited by the defendant in support of his proposition that the court was without authority to issue the injunction restraining the defendant from transferring his property, and, strictly speaking, not one of them appears to support the defendant's contention.

However, the general powers of an equity court are broad enough to cover any emergency which threatens to

place defendant's property out of the reach of plaintiff's judgment for alimony.

"There must be a proper showing for an injunction in the application. Peril to the fund or sufficient cause for belief that an unlawful disposition is to be made of the property out of which relief is sought must appear from the pleadings, or by evidence." 27 C. J. S. 1064, sec. 267d.

" * * * there seems to be no question of her right to an injunction, in a proper case, to restrain him from wrongfully interfering with the control or enjoyment of her separate estate, * * * ." 27 Am. Jur. 187, sec. 586.

In *Hagert v. Hagert*, 22 N. Dak. 290, 133 N. W. 1035, it was held that an injunction may be granted where it is necessary to prevent defeating the order of the court by alienation of property.

In *Harding v. Harding*, 120 Ill. App. 389, it was held that the court has ample power to enforce a decree for alimony by the appointment of a receiver, and likewise, if expedient, by injunction, either through a petition filed in the same suit or by a separate bill filed in the court which granted the decree. See *Kiplinger v. Kiplinger*, 172 Mich. 552, 138 N. W. 230.

"Courts of general jurisdiction have the inherent power to do all things necessary for the administration of justice within the scope of their jurisdiction." *Wassung v. Wassung*, 136 Neb. 440, 286 N. W. 340.

"As was stated by this court in *Earle v. Earle*, 27 Neb. 277, 43 N. W. 118: 'We are of the opinion that courts of equity should have and do have the jurisdiction to grant relief in cases of this kind without reference to the statutes of the state, but by and through the jurisdiction growing out of the general equity powers of the court.' " *Wassung v. Wassung, supra.*

We now reach the seventh assignment of error, that the court erred in allowing attorney's fees to the plaintiff in the sum of $1,500. The briefs present considerable argument, pro and con, about the amount of attorney's fees, which are claimed to be excessive. After the original peti-

tion was filed March 2, 1943, there were motions for temporary allowance, and restraining orders, and a constant succession of motions and hearings. In addition to the trial of the case, considerable time was spent in ascertaining the value of the defendant's property, which was in an unusual form,—but only one expert witness on real estate values was called.

Without citing cases, it is the rule that the attorney's fees allowed in a divorce case are subject to review by this court, and they must be reasonable in amount, and cannot be based solely upon the amount of the alimony secured.

We have made an examination of the nature of the case, the type of questions involved, the skill necessarily devoted to the preparation and presentation of these questions to the court, the amount involved and the results obtained, and the character and standing of the counsel in this rather protracted litigation, and have reached the conclusion that, under all the circumstances, the fee of $1,500 allowed in the lower court was rather liberal, and because of that fact no additional sum is allowed plaintiff's attorney for services in this court.

And finally, we will discuss the eighth assignment of error, that the judgment and decree is contrary to law. In this case, in which there was such a large amount of liquid assets, we find it would work no hardship on the defendant to fix the alimony at $21,886.10, to be paid at once in cash or bonds, but the decree then added, "that in lieu thereof, and at her election, the plaintiff may take"—then followed bonds, $9,000, and $1,336.10 bank deposit, $2,550 balance on land contract, the home at $4,000, the old hotel building for $5,000, total value, $21,886.10. After describing these items, the court added: "in the event, however, Grace Jensen, plaintiff, elects to take the moneys and property so designated, same shall be accepted by her in full and complete payment of the said alimony judgment in the sum of $21,886.10."

In the opinion of this court, it was improper to enter such an alternative decree, giving the plaintiff an election

to choose between two forms of decree. The trial court should enter a definite decree for $21,886.10 alimony, and provide the time of its payment.

As thus modified, the decree of the trial court is affirmed.

AFFIRMED AS MODIFIED.

IN RE ESTATE OF MERTON E. HOUSE.
FRED C. WARNEMUNDE, CLAIMANT, APPELLEE, V. W. ROLLIN SMITH, ADMINISTRATOR WITH THE WILL ANNEXED, OBJECTOR, APPELLANT.

15 N. W. 2d 56

FILED JUNE 23, 1944. No. 31794.

Appeal and Error. Where the defeated party undertakes to perfect an appeal from an adverse ruling of the county court in a probate proceeding and orders a transcript in accordance with section 30-1605, Comp. St. 1929, and the county judge by inadvertence neglects to certify the same, all other requirements having been met, the failure to certify the transcript will not defeat the appeal.

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

Frank M. Johnson, for appellant.

Cook & Cook, contra.

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

CARTER, J.

Appellant complains of the action of the trial court in dismissing his appeal from the allowance of a claim against the estate of Merton E. House, deceased, for the reason that the transcript from the county court was not properly certified by the judge of that court.

On an appeal being taken in a probate matter the duty to prepare and transmit to the clerk of the district court a certified transcript of the record and proceedings, on payment

of his fees therefor, is placed by statute with the county judge. Comp. St. 1929, sec. 30-1605. Where, as here, a duty is placed upon a public officer to perform acts necessary to perfect an appeal, his failure to perform cannot be charged to the litigant nor operate to defeat the appeal. *In re Estate of Tagart*, 119 Neb. 647, 230 N. W. 492.

Appellee contends, however, that counsel for appellant became the agent for the county judge when he called at the office of the county judge, accepted the transcript and proceeded to file it in the office of the clerk of the district court. Assuming that appellant's counsel was the agent of the county judge for the purpose of delivering the transcript to the clerk of the district court within the time prescribed, the record shows that appellant's counsel was not remiss in performing that duty. The duty of preparing and certifying the transcript was, however, never delegated. The oversight of the county judge in failing to attach his signature to the certification of the transcript cannot therefore be charged to the appellant and he cannot be deprived of his right to be heard on appeal because of the omission on the part of the county judge.

The trial court erred in refusing to permit the proper certification of the transcript and in dismissing the appeal.

REVERSED.

DONALD S. WIGHTMAN, APPELLANT, V. CITY OF WAYNE, APPELLEE: C. H. HENDRICKSON, INTERVENER, APPELLEE.
15 N. W. 2d 78

FILED JUNE 23, 1944. No. 31819.

1. **Municipal Corporations.** In order for a city of the second class to enter into a valid contract, the yeas and nays of the city council must be called and recorded with reference thereto, with a majority of the whole number thus shown in the affirmative.
2. ———. Where no record of the proceedings of the city council with reference to a purported contract can be shown, there is a presumption that no such contract was entered into.

3. **Judgment.** The doctrine of *res adjudicata* includes not only the things which were determined in the former suit, but also any other matter properly involved which might have been raised and determined therein.

APPEAL from the district court for Wayne county: FREDERICK L. SPEAR, JUDGE. *Affirmed.*

H. E. Siman, for appellant.

Russell W. Bartels and *Mark Ryan, contra.*

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

CARTER, J.

This is a suit to perpetually enjoin the city of Wayne from enforcing its lien for paving assessments upon certain real estate owned by the plaintiff and for a decree requiring the city of Wayne to specifically perform its contract to satisfy such lien. The trial court found against the plaintiff and dismissed the case. Plaintiff appeals.

This case is a sequel to the case of *Taxpayers' League v. Wightman,* 139 Neb. 212, 296 N. W. 886. The property in question was formerly owned by Alfred H. Lewis. The taxes being in arrears, the city of Wayne brought a suit to secure a sale of the property for payment of the taxes. On March 18, 1932, a decree of foreclosure was entered in which it was found that one Alice V. Lewis had a first lien on the property for $235.72 with interest at 12 per cent per annum and that the city of Wayne had a second lien for $2,713.76 with interest at the same rate. The property was sold at judicial sale and one Walter S. Bressler bid it in for the city in the amount of $4,600, the approximate amount of the two liens and the interest due upon them. Plaintiff then began negotiating with the officers of the city for a purchase of the property. It was finally agreed that plaintiff was to pay $1,500 for the property, free from all liens. Plaintiff paid $319.21 to Alice V. Lewis to satisfy her lien and $40 to Alfred H. Lewis for a quitclaim deed to the property. The balance of the $1,500 was paid to the city

and applied on taxes which accrued subsequent to the commencement of the foreclosure action. It is not disputed that the $4,600 bid, or any part of it, was ever paid by the city or its representative, Walter S. Bressler.

The record discloses that the agreement made was entered into by plaintiff and the officers of the city without any record thereof appearing in the minutes of the city council. It is the contention of the intervener that a city of the second class cannot in this manner enter into a valid contract for the sale of real estate. In this we concur. The power of the city of Wayne to contract with reference to its real estate is limited by section 17-401, Comp. St. Supp. 1941, and section 17-522, Comp. St. 1929. These provisions have been held to be mandatory. *Payne v. Ryan,* 79 Neb. 414, 112 N. W. 599. And where, as here, no record of the proceedings of the city council exists with reference to the matter under consideration, the presumption is that none took place. *Beverly Land Co. v. City of South Sioux City,* 117 Neb. 47, 219 N. W. 385. We necessarily conclude that there was no binding agreement made between the plaintiff and the city and, consequently, there is no agreement that can be enforced by the equitable remedy of specific performance.

Plaintiff prays in this suit for a perpetual injunction against the enforcement of the city's lien for taxes. In this respect we point out that in *Taxpayers' League v. Wightman, supra,* this court held that a finding that Donald S. Wightman was the owner of the property was correct, but that the finding that the city had no right, interest or claim upon said property and that the title thereto should be quieted in Wightman as against the city was erroneous. The effect of that holding was to confirm the title to the property in Wightman by virtue of the deed obtained from Alfred H. Lewis, the former title owner, subject to the lien of the city which is under discussion in the present litigation. We can find no basis for the entry of an injunction restraining the enforcement of the lien. There is no valid contract that can afford the basis for such a decree. The

lien of the city is valid and no reason has been pointed out that would entitle plaintiff to relief by injunction.

Plaintiff prays for general equitable relief and points out the facts which indicate that the equities of the situation are with him. He contends that he purchased the real estate in question for $1,500 which he paid. He proceeded during the pendency of the litigation to build a home upon the property worth approximately $8,500. He satisfied the first lien and procured a deed from the former title owner. Under these circumstances plaintiff claims that a court of equity should intervene and protect him by requiring the city to comply with an agreement which the city itself did not make. Ordinarily, if a city obtains money by mistake, or without authority of law, it has a duty to return it, but under the facts here recited plaintiff contends that this would not constitute an adequate remedy, and has not asked for its return.

The intervener contends that any claims of plaintiff for general equitable relief are barred under the principles of *res adjudicata.* In *Taxpayers' League v. Wightman, supra,* the defendant Wightman filed an answer in which he asked for a dismissal of plaintiff's amended petition and for general equitable relief. Any available remedy could have been asserted in that case. The issues in that case in effect determined every issue raised by the present case. But whether they were specifically determined or not, every issue in the present case could have been raised in the former suit.

This court has adopted the following rule on the subject: "The rule is that a party should not be vexed more than once for the same cause of action, and the doctrine of *res adjudicata* includes not only the things which were determined in the former suit, but also any other matter properly involved which might have been raised and determined therein." *Shepard v. City of Friend,* 141 Neb. 866, 5 N. W. 2d 108.

It will be observed that in *Taxpayers' League v. Wightman, supra,* the trial court quieted the title to the property in Donald S. Wightman against all parties, including the

city of Wayne. On appeal, this court reversed the judgment and directed the trial court to quiet the title in Wightman, subject to the valid lien of the city of Wayne. The validity of the lien of the city was the primary issue in that case. In the present case plaintiff seeks to enjoin the enforcement of the lien which our previous decision held valid. The defense of *res adjudicata* which intervener interposed is a complete bar to the remedy of injunction which he now seeks. See *State v. Broatch,* 68 Neb. 687, 94 N. W. 1016; *Triska v. Miller,* 86 Neb. 503, 125 N. W. 1070; *State ex rel. Sorensen v. Newman Grove State Bank,* 128 Neb. 422, 259 N. W. 170.

The question is raised whether the money paid by Wightman should be credited on the lien of the city. While plaintiff did not ask that this be done, it would seem that the city is obligated to mitigate plaintiff's loss in any way that it can, consistent with its powers and duties as prescribed by statute. Whether plaintiff has any rights in the funds to be derived by the sale of the property by virtue of the construction of the residence on the property is a question that is not an issue in the present suit and is a matter incidental to the distribution of the fund derived from the sale.

It is urged by the city that we ought to declare the rights of the parties to avoid a future multiplicity of suits. It is contended that the claims of plaintiff resulting from the construction of the house on the property, if they are not previously determined, will have the effect of chilling the bidding when the property is offered for sale to satisfy the city's lien. The query is also made whether the retention of the $1,500 by the city up to the present time might not estop the city from asserting any claim to proceeds derived from the sale of the property with the house on it as distinguished from the sale of the real estate alone. Whether the city may enrich itself by retaining the proceeds from the sale of the house as well as the proceeds from the sale of the real estate in view of the negotiations of its officers and the subsequent action of the city in retaining the $1,500 after the rights of the parties had been determined by the final decree of this

court is a question not now before us. Any holding by us on these questions would in effect be a declaratory judgment on questions not presented, argued or briefed by the parties. This court is clearly without power to so declare the law unless the Uniform Declaratory Judgments Act (Comp. St. 1929, sec. 20-21,140 *et seq.*) is complied with.

We think the trial court was correct in holding that the pleadings and evidence afford the plaintiff no basis for relief.

AFFIRMED.

HAROLD PUCKETT, PLAINTIFF IN ERROR, V. STATE OF NEBRASKA, DEFENDANT IN ERROR.

15 N. W. 2d 63

FILED JUNE 23, 1944. No. 31742.

1. **Indictment and Information.** The statute, Comp. St. 1929, sec. 29-1512, which prescribes a short form information for charging the crime of manslaughter is constitutional, and an information drawn in the language of such statute is sufficient to properly charge the crime.
2. **Criminal Law:** INDICTMENT AND INFORMATION. The same rule as to the information, conduct of the case, and punishment, applicable to a principal in fact now governs his aider, abettor or procurer, and no additional facts need to be alleged in an information against the latter than are required against his principal.
3. **Homicide:** AIDERS AND ABETTORS. A person may be an aider, abettor or procurer in involuntary manslaughter because of a common purpose to participate in unlawful acts, the natural and proximate result of which is to kill another, but when persons are present, aiding and assisting each other in the commission of unlawful acts which proximately result in the death of another all such persons are in fact principals.
4. **Automobiles.** When one drives an automobile in violation of law pertaining to the operation of such vehicles on the public highway and in so doing, as a result of the violation of law, causes death to another, he is guilty of manslaughter.

ERROR to the district court for Adams county: FRANK J. MUNDAY, JUDGE. *Affirmed.*

J. E. Willits, for plaintiff in error.

Walter R. Johnson, Attorney General, H. Emerson Kokjer and *Rush C. Clarke, contra.*

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

CHAPPELL, J.

Plaintiff in error, hereinafter called defendant, was found guilty of manslaughter by a jury in the district court for Adams county, Nebraska. He was sentenced to serve one year in the Nebraska state penitentiary, and prosecutes error to this court. His assignments are that the trial court erred in sustaining the sufficiency of the information, and in refusing and giving certain instructions to the jury. He also contends that the evidence is insufficient to sustain his conviction.

The applicable definition of manslaughter is found in section 28-403, Comp. St. 1929, which provides: "Whoever shall unlawfully kill another * * * unintentionally, while the slayer is in the commission of some unlawful act, shall be deemed guilty of manslaughter; and, upon conviction thereof, shall be imprisoned in the penitentiary not more than ten years nor less than one year."

The information, drawn in the language of the statute, Comp. St. 1929, sec. 29-1512, charged: "that Harold Puckett late of the county aforesaid, on or about the 7th day of August, A. D. 1943, in the County of Adams, and State of Nebraska aforesaid, then and there being, did then and there unlawfully and feloniously kill and slay one Carol Ann Wendt, thereby committing the crime of manslaughter."

Defendant's primary contentions concerning the insufficiency of the information, including the constitutional questions argued in the brief and before this court, are answered adversely to him in *Cowan v. State,* 140 Neb. 837, 2 N. W. 2d 111. The information in that case was almost identical with the one here involved. Therein the court held that, "The statute prescribing a short form informa-

tion for charging the crime of manslaughter (Comp. St. 1929, sec. 29-1512) *held* constitutional, and an information drawn in the language of such statute *held* sufficient to properly charge the crime of manslaughter." However, in the *Cowan* case the defendant was in fact the principal, and defendant here contends that the information was insufficient because at most he was an aider, abettor, or procurer, but was not charged as such. Section 28-201, Comp. St. 1929, provides that, "Whoever aids, abets or procures another to commit any offense may be prosecuted and punished as if he were the principal offender." In construing this statute the court held in *Scharman v. State*, 115 Neb. 109, 211 N. W. 613, "That the same rule as to the information, conduct of the case, and punishment, heretofore applicable to a principal, should thereafter govern his aider, abettor, or procurer, and that no additional facts need be alleged in an information against such accessory before the fact than are required against his principal." See, also, *In re Resler*, 115 Neb. 335, 212 N. W. 765; *State v. Girt*, 115 Neb. 833, 215 N. W. 125. In any event, the evidence in this record amply supports the proposition that defendant was in fact a principal, present and acting in concert with the driver of the car involved at all times, which brings him within the rule that any person who is present at the place of the crime, aiding and assisting in the commission thereof is in fact a principal and may be prosecuted as such. *Hill v. State*, 42 Neb. 503, 60 N. W. 116; *Dixon v. State*, 46 Neb. 298, 64 N. W. 961; *Clernt v. State*, 109 Neb. 628, 192 N. W. 209.

It is now well established that a person may be an aider, abettor, or procurer in involuntary manslaughter because of a common purpose to participate in unlawful acts, the natural and proximate result of which is to kill another, but when persons are present aiding and assisting each other in the commission of unlawful acts which proximately result in the death of another all such persons are in fact principals. *Wade v. State*, 174 Tenn. 248, 124 S. W. 2d 710; *Black v. State*, 103 Ohio St. 434, 133 N. E. 795. Thus view-

ing the matter we conclude that the information was sufficient to charge defendant with the crime of manslaughter whether he was in fact a principal, or an aider, abettor, or procurer subject to prosecution and punishment as if he were a principal.

We have examined the instructions given to the jury and find no error therein in any manner prejudicial to defendant. Furthermore, all the instructions requested by defendant either appear in substance in other instructions given or were properly refused by the trial court. They speak for themselves and we do not believe it necessary to discuss them in this opinion.

In *Benton v. State*, 124 Neb. 485, 247 N. W. 21, this court held that, "When one drives an automobile in violation of law pertaining to the operation of such vehicles on the public highway and in so doing, as a result of the violation of law causes death to another, he is guilty of manslaughter." See, also, *Schultz v. State*, 89 Neb. 34, 130 N. W. 972; *Crawford v. State*, 116 Neb. 125, 216 N. W. 294; *Cowan v. State, supra;* Annotation, 30 A. L. R. 66.

Bearing this in mind, we turn to the question of the sufficiency of the evidence to sustain conviction. The record discloses that early in the afternoon of August 7, 1943, defendant, after drinking a glass of beer, invited two married women, whom he had previously known, to ride with him in his Chevrolet coach from Hastings, Nebraska, to his place of employment to procure his pay check. They accepted his invitation. After receiving the check defendant drove the car east on the highway for some distance where it was stopped and each drank a bottle of coca cola "spiked" with whisky from defendant's bottle which was in his car. One of the women then drove the car from that point to Harvard, Nebraska. There they visited a beer tavern where each drank two bottles of beer and defendant purchased six bottles to take in the car with them. At about 5 p. m. defendant went to the car and drank the small amount of whisky remaining in his bottle, after which they started their return to Hastings. Defendant drove out of Harvard

to the highway where they stopped and the second woman took the wheel. She had no driver's license and it is doubtful whether she had ever driven a car before. Nevertheless with this knowledge defendant, sitting between the two women, volunteered or undertook to teach the operator how to drive. He shifted the gears and kept his foot upon and operated the accelerator at all times thereafter. In these positions they started the car and drove west on the highway at a fast rate of speed while defendant pursued an amorous adventure with the driver, which, because of its character, we will not describe. They crossed a railroad track where the car striking a bump swerved sharply and widely, whereupon defendant took the wheel, straightened its course, and again released the wheel to the driver. They proceeded westward along a perfectly level paved highway and defendant again pursued his adventure with the woman driver, whereupon she took her hands from the wheel to defend herself, and the car, traveling at from 40 to 50 miles an hour, swerved to the extreme north off the paved portion of the highway. Defendant grasped the wheel. Thenceforth with wheels screeching, women occupants screaming, the car swerved back to the middle, then to the north almost to the ditch, and turning at increased speed lurched to the south across the pavement and crashed into a Model A Ford coach driven from the west on its own side of the highway at a low rate of speed. A farmer, his wife and four small children were riding in the Ford. The father was driving; his wife sat next to him; and their three older children were in the back seat. The fourth child, Carol Ann Wendt, 15 months old, riding on the mother's lap, asleep, with her head toward the door, was thrown from the car and critically injured. She was taken immediately to a hospital but upon arrival it was found that she was dead. Others in both cars, including the defendant, were more or less seriously injured. After the crash defendant's breath indicated the presence, and his conduct the influence, of intoxicating liquor. He took the witness stand in his own behalf, but his testimony does not differ greatly

in important respects from the evidence adduced by the many witnesses for the state.

We can only decide that the evidence is amply sufficient to sustain a finding of the jury that the car was driven in such a grossly negligent and unlawful manner as to be criminal in character, which, having resulted in death to another, will sustain defendant's conviction. We find no error in the record prejudicial to the defendant, and the judgment of the district court is affirmed.

AFFIRMED.

TONY SCAVIO, PLAINTIFF IN ERROR, V. STATE OF NEBRASKA, DEFENDANT IN ERROR.

15 N. W. 2d 50

FILED JUNE 30, 1944. No. 31677.

1. **Criminal Law:** When, in a criminal case, the information contains two or more counts, and a general motion for a directed verdict is made at the close of all the evidence, such motion is properly overruled if there is evidence to sustain a conviction upon any count in the information.
2. ———. If there are two counts in an information, under one of which certain evidence is clearly admissible, it is not reversible error for the trial court to fail to give an instruction to the jury relating thereto, when no such instruction was requested.

ERROR to the district court for Douglas county: HENRY J. BEAL, JUDGE. *Affirmed.*

Joseph M. Lovely and *Edward T. Hayes,* for plaintiff in error.

Walter R. Johnson, Attorney General, H. Emerson Kokjer and *Rush C. Clarke, contra.*

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

PAINE, J.

Upon a verdict of guilty of arson in the fourth degree,

the defendant was sentenced to two years in the penitentiary, and brings his conviction to this court for review.

An information was filed in the district court on March 17, 1943, against William Maher and Tony Scavio, charging them in Count I with a malicious attempt on February 25, 1942, to set fire to and burn a certain building in Omaha and committing acts preliminary thereto and in furtherance thereof, which is, under section 28-5,101, Comp. St. Supp. 1941, known as fourth degree arson. Count II of said information charged them with the same crime, but adding thereto that the building was the property of Lucille F. Lanphier, and was insured against loss by fire in the amount of $2,000, and that the personal property, consisting of stock and fixtures therein, was owned by Raymond C. Agosta, and was of the value of $500, and was insured against loss by fire in the sum of $1,300, charging defendants with an attempt to burn the same and to thereby injure and defraud the insurance companies therein named, who were the insurers thereof.

Motions of defendant Tony Scavio to quash the information and demur to the information were severally overruled. William Maher was granted a separate trial. Tony Scavio was thereupon tried to a jury. The jury returned a separate verdict of guilty upon each count of the information.

On May 14, 1943, a motion for new trial was duly filed, setting out 36 errors of the court. On May 22, 1943, the county attorney appeared in open court and confessed that Count II of the information was defective in proof, and upon oral motion of the county attorney it was ordered that the verdict of the jury on Count II of the information be set aside, and that Count II of the information be dismissed, and on the same day, defendant appearing in court, motion for new trial was overruled, and the defendant was sentenced to imprisonment in the penitentiary for a period of two years.

Notice of intention to appeal was thereupon given. Poverty affidavit was duly filed. The two defendants, after thus

being jointly charged in the same information, were given separate trials, and this is a companion case to *Maher v. State, ante,* p. 463, 13 N. W. 2d 641. In such opinion, released March 17, 1944, appears a complete statement of all the facts which constitute the basis of the charge in this case.

In the trial of the *Maher* case a great deal of evidence was taken which was not produced in the shorter three days' trial of the case at bar. However, because all of the facts were so fully set out in the *Maher* opinion they will not be repeated in this opinion.

The 12th paragraph of the errors relied upon for reversal and the first proposition of law argued in the brief were found as paragraph 35 in the motion for a new trial, and read as follows: "Section 28-5,101 of the 1941 Supplement, Compiled Statutes of Nebraska, 1929, and the act of which it is a part is unconstitutional and void—(1) Because the subject matter was not included in the title; (2) Because it contains more than one subject; (3) For want of certainty and clearness; (4) Because the title to the bill, and the bill, are in violation of Section 14, Article 3, of the Constitution of the State of Nebraska, reading: '* * * No bill shall contain more than one subject and the same shall be clearly expressed in the title. * * *.'"

These questions as to the constitutionality of the act were discussed at length and disposed of in the *Maher* case.

The objections based on the proof of *corpus delicti* were also discussed in the *Maher* case, where this court determined that "The *corpus delicti* and the guilt of the defendant in an arson case may be established by circumstantial evidence. *Held,* evidence sufficient to establish the *corpus delicti* and guilt of the defendant under the circumstantial evidence rule."

The giving of instructions Nos. 2, 5 and 7 was assigned as error. These three instructions all related to the charge contained in Count II of the information. The defendant was found guilty under both counts by the jury. Thereafter, and before sentence was pronounced, the county at-

torney moved that the verdict returned on Count II be set aside, and that Count II be dismissed, which motion was granted by the court, and any possible error, which we do not find, would be cured by the action taken by the court.

It is also argued that the court erred in overruling defendant's motion for a directed verdict at the close of the state's testimony and renewed at the close of all the evidence. It is a sufficient answer to this complaint that this motion for a directed verdict was to an information containing two counts, and by the verdict of the jury and sentence of the court there was ample evidence to warrant a conviction on Count I in any event, so the motion as made for a directed verdict was properly overruled.

The defendant lays great stress in his brief that the judgment and sentence to two years in the penitentiary should be reversed because, it is argued, "Where the property and policy of insurance were owned by someone other than defendant, the Court erred and defendant was prejudiced in admitting over objection of defendant evidence dealing with the subject of insurance without having first required the State to show knowledge of insurance on part of defendant or otherwise connect him with insurance."

We have not reached the conclusion that the evidence about the insurance policies was improper under Count I, considering the fact that defendant was the manager of the business, as well as brother-in-law of the owner, which gave defendant a very close relationship to all the facts and circumstances about this business and its attempted destruction by fire.

The second count of the information charged an attempt to burn insured property with intent to injure and defraud the insurers. Upon the trial the state offered evidence that the property was insured, which was received, although there was no direct evidence that defendant had knowledge of this insurance.

An examination of the bill of exceptions discloses that no part of the oral testimony of the two insurance agents was objected to by defendant. But when the two policies, ex-

hibits Nos. 14 and 15, were offered in evidence, the defendant simply made the formal objection as incompetent, irrelevant and immaterial. No motion was made asking the court to direct a verdict of not guilty on the second count alone, nor was any request made for an instruction that the evidence relating to insurance was improper to be considered in relation to Count I.

In the trial of a criminal case it is not customary to offer evidence as to a certain count found in the information, but the prosecuting attorney simply offers evidence on the whole case.

These two exhibits were perfectly proper under Count II of the information, but after the jury found him guilty on both counts the court had set aside the conviction on Count II charging defrauding insurance companies.

This court has held that "If there are two counts in an information, under one of which a dying declaration is admissible, it is not reversible error for the trial court to fail to give an instruction to the jury relating thereto when no such instruction was requested." *Piercy v. State,* 138 Neb. 301, 293 N. W. 99.

" * * * a dying declaration might not have been admissible on the second count alone. However, the defendant could have asked the judge to give an instruction to the jury to limit the scope of the dying declaration to the charge set out in count No. 1, but the court did not have to give such limitation instruction unless the defendant asked for it, and as defendant did not ask for it we do not see how it can be reversible error, for the dying declaration was properly admitted under count No. 1. In our opinion, a sufficient foundation was laid for its introduction, and while it was not a model of what a dying declaration should contain, it gave support upon important facts." *Piercy v. State, supra.*

It is clear that the evidence relating to the insurance was applicable and pertinent to one issue, and the court properly admitted it. We cannot see that it was error for the court to fail to direct the jury to confine this evidence to the

issue raised under the second count of the information when only a general objection was made to the admission of the policies, and no objection whatever made to the oral testimony relating thereto, or any request made for an instruction limiting its effect. If any such request had been made and refused by the court, and this refusal raised in the motion for a new trial, and then assigned as error here, we would have an entirely different question raised for our determination.

The last error assigned for reversal is: "37. The Court erred in submitting the second count to the jury in that same prejudiced the jury as concerned count one."

The only error set out in the motion for new trial relating in any way to the two counts in the information is this: "34. For the reason that the Court erred in not sustaining the Demurrer to Count One and Two of the information for the reason set forth in said Demurrer."

It is therefore clear that this last error assigned, as set out above, is simply not found in the motion for a new trial, and was therefore not called to the attention of the trial court in any way.

In order to justify this court in reviewing an alleged error which it is charged occurred during the trial of a criminal case, such error must have been presented to the trial court in the motion for a new trial, otherwise such error cannot properly be reviewed by this court. See *Luster v. State,* 142 Neb. 253, 5 N. W. 2d 705.

We have examined the other assignments, but find no prejudicial error. In our opinion, the defendant's interests were carefully guarded throughout the trial, and there is no reversible error in the record, and the judgment and sentence are hereby affirmed.

AFFIRMED.

IN RE ESTATE OF FRED GEORGE.

W. O. COLLETT, EXECUTOR, ET AL., APPELLANTS, V. JENNIE GEORGE FREDERIKSEN ET AL., APPELLEES.

15 N. W. 2d 80

FILED JUNE 30, 1944. No. 31720.

1. **Wills.** Where a will is attacked on the ground that it was procured by undue influence, the burden is on the party so alleging, so to prove.
2. ———. An instruction on undue influence, which provides for the shifting of the burden of proof under certain conditions to be determined by the evidence, and leaves the jury to discern whether or not the burden is on the contestants at one stage of the proceedings and on the proponent at another, is prejudicially erroneous.
3. **Evidence.** 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.
4. ———. The question of where the burden of proof shall rest shall be determined by the pleadings.
5. **Wills.** The elements necessary to be established to warrant the rejection of a will on the ground of undue influence are: (1) That the testator was subject to such influence; (2) that the opportunity to exercise it existed; (3) that there was a disposition to exercise it; (4) that the result appears to be the effect of such influence.
6. ———. Undue influence, in order to invalidate a will, must be of such character as to destroy the free agency of the testator and substitute another person's will for his own.
7. ———. Undue influence is usually surrounded by all possible secrecy. It is almost always difficult to prove by direct and positive proof. It is largely a matter of inferences from facts and circumstances surrounding the testator, his life, character, mental condition, as shown by the evidence, and opportunity afforded designing persons for the exercise of improper control.
8. ———. In making proof of undue influence a contestant is not limited to the bare facts that he may be able to adduce, but he is entitled to all inferences that may be legitimately derived from established facts.
9. ———. The general rule, that where a part of a will is invalid the valid bequest should be sustained, has its limitations, and when the rule will defeat the testator's intent and interfere with the general scheme of distribution, or work an injustice on other heirs, it should not be applied.

10. ———. The real question presented, where a will contains both valid and invalid provisions, is whether the two are so parts of a single plan or scheme, or so dependent one upon the other, that by avoiding the invalid conditions and allowing the valid to stand there will result a disposition of the estate so different from what the testator contemplated or so unreasonable that it must be presumed that the testator would not have made the valid provisions if he had been aware of the invalidity of the others.

APPEAL from the district court for Lincoln county: ERNEST G. KROGER, JUDGE. *Reversed.*

Clarence A. Davis, Paul E. Boslaugh, William W. Redmond, M. M. Maupin, M. C. Murphy and *Zelma Derry,* for appellants.

Hoagland, Carr & Hoagland, F. Reed Poore and *I. D. Beynon, contra.*

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

MESSMORE, J.

This is a will contest. The executor named in the last will and testament of Fred George, a bachelor, who departed this life May 24, 1942, leaving an estate valued at $125,000, consisting of more than 6,000 acres of land, other real estate, personal property, consisting of livestock, farm and ranch equipment, and money and securities, offered for probate the will dated March 27, 1935, together with a codicil dated March 16, 1938, and a second codicil dated September 2, 1941. The beneficiaries, devisees and legatees of the will and codicils are nieces and a nephew, children of a deceased sister, Tom Bickley, an employee of the testator, and Anna Harris Snyder, a half sister of Tom Bickley, who had been employed by the testator. Objections to probate were filed by Jennie George Frederiksen, a sister, and as next friend of Emma George, an insane sister, numerous nieces and nephews. Hearing was had, the will and codicils were admitted to probate, and contestants appealed to the district court.

The will, after providing for payment of administering

the estate, expenses of last illness and funeral expenses, bequeathed to Tom Bickley all the personal property, except money on hand and securities, a life estate in certain lands, consisting of approximately 4,417 acres, title in fee simple to some lots in the town of Brady, and $2,000 in cash. Bickley was restricted in that he had no power or authority to sell, mortgage, encumber, or subject this life estate in and to the real estate devised to debt or obligation. Three nieces, Elsie, Goldie and Esther Rosentrator, were each bequeathed $1,000 in cash, Anna Harris Snyder $1,000 and an additional $1,000 conditionally. The will devised to a nephew, George Rosentrator, three sections of land, to a niece, Louise Rosentrator Dillon, a half-section of land, and to the niece, Rosie Rosentrator, the bank building in Brady. The same nieces and nephew, together with Anna Harris Snyder, were bequeathed, share and share alike, the fee simple title to the real estate in which Tom Bickley was devised a life estate, and also shares in the residue of the estate. The testator declared that he had a large number of other relatives, brothers, sisters, nieces and nephews, for whom he made no provision, and directed that they take no part of his estate; that he had not forgotten or overlooked any one, either relative or otherwise, to whom he desired to give his property or estate.

The codicil of March 16, 1938, provided that on the testator's death Bickley should not be disturbed in the possession of the property given him by the terms of the will; that, in the event any beneficiary named in the will contest the same, such person shall take nothing. The codicil confirmed, ratified and approved the will. The codicil of September 2, 1941, provided that, due to the fact that two attesting witnesses of the former codicil have since died, the second codicil was made to confirm, ratify and approve the will dated March 27, 1935, and codicil thereto dated March 16, 1938.

The contestants objected on two grounds, both of which were raised on appeal in the district court, viz.: (1) That the testator lacked testamentary capacity, and (2) that the

will and codicils were procured by the exercise of undue influence over the testator. The jury returned a verdict for the contestants. In response to special interrogatories, the jury replied that they found that the testator possessed testamentary capacity, but the will and codicils were found to be due to undue influence exercised on the testator. Motion for a new trial was denied, and judgment entered on the vedict. It is from this verdict and judgment that proponents appeal.

The proponents contend that the court erred in giving instruction No. 4, which reads:

"If you find from a preponderance of the evidence in this case that Tom Bickley is the chief beneficiary under said will and codicils thereto and that he occupied a position of trust and confidence with the testator Fred George and that the provisions of said will and codicils are unjust and inequitable, then the law would presume that said instruments were the result of undue influence on the part of said Tom Bickley and the burden would be upon him to furnish you with a reasonable explanation of the provisions of said will and the codicils thereto. But unless you find from the evidence that Tom Bickley is the chief beneficiary under said will and that he occupied a position of trust and confidence with the testator and that the provisions of said will are inequitable and unjust, or if you find that he has furnished you with a reasonable explanation of the provisions of said will and the codicils thereto, then the burden of proof on the issue of whether or not the making and signing of said will was the result of undue influence exercised upon said Fred George is upon the contestants.

"Before you may find that the making and signing of said will and codicils was the result of undue influence upon said Fred George you must be satisfied that such making and signing of said instruments has been shown by a preponderance of all the evidence to have been occasioned by undue influence exercised upon said Fred George by Tom Bickley. * * * ."

Proponents contend that the instruction required the

proponent Bickley to assume the burden of proof that under the law could not be rightfully placed upon him, and that it was error for the court in this case to advise the jury that the burden of proof on the issue of undue influence was upon the proponent Bickley under any circumstances and conditions. The instruction provides for the shifting of the burden of proof under certain conditions to be determined by the evidence, and leaves the task to the jury to discern whether or not the burden of proof is on the contestants at one time and on the proponent Bickley at another time. This instruction is in keeping with the exception to the general rule on the burden of proof where undue influence is involved and in accord with the case of *Wixson v. Nebraska Conference Assn.*, 122 Neb. 771, 241 N. W. 532. In the *Wixson* case the court approved an instruction which placed on the jury the burden of determining where the burden of proof rested.

This court in *In re Estate of Hagan,* 143 Neb. 459, 9 N. W. 2d 794, stated: "In so far as will contests are concerned where the ground of the contest is undue influence, the exception to the general rule that the party charging undue influence assumes the burden of proving it, as contained in *Wixson v. Nebraska Conference Ass'n, supra,* is rejected and overruled and the general rule as set forth in *In re Estate of Wilson, supra* (114 Neb. 593, 208 N. W. 961), is reannounced without exception as follows: 'Where it is alleged that the execution of a will was procured by undue influence, the burden is upon the party alleging it to establish that the testator was induced by improper means to dispose of his property differently from what he intended.' " See third syllabus point in *Seebrock v. Fedawa,* 30 Neb. 424, 46 N. W. 650. *In re Estate of Hagan, supra,* on the burden of proof in will contests, where undue influence is involved, was reaffirmed in *In re Estate of Bowman,* 143 Neb. 440, 9 N. W. 2d 801.

The proponents tendered two instructions on the burden of proof, in accordance with the general rule, as announced in the cases heretofore cited. See, also, *Boggs v. Boggs,* 62

Neb. 274, 87 N. W. 39; *In re Estate of Dovey*, 101 Neb. 11, 162 N. W. 134; *In re Estate of Fenstermacher*, 102 Neb. 560, 168 N. W. 101; *In re Estate of Bayer*, 119 Neb. 191, 227 N. W. 928. Instruction No. 4 is clearly violative of the rules on the burden of proof in this class of cases. The burden of proof, in its proper sense, rests, as to each issue, on the party having the burden of such issue. *Pierce v. Miller*, 107 Neb. 851, 187 N. W. 105; *Moore v. Williams*, 111 Neb. 342, 196 N. W. 695; *In re Estate of Hagan, supra.* The question of where the burden of proof shall rest shall be determined from the pleadings.

In 31 C. J. S. 709, sec. 104, it is said: "The test for determining which party has the affirmative, and therefore the burden of establishing a case, is found in the result of an inquiry as to which party would be successful if no evidence at all were given, the burden being, of course, on the adverse party." We conclude that instruction No. 4 is prejudicially erroneous.

Instruction No. 8 is attacked. While it contained, in the main, the four elements to be proved where undue influence is charged, viz.: (1) That the testator was subject to such influence; (2) that the opportunity to exercise it existed; (3) that there was a disposition to exercise it; (4) that the result appears to be the effect of such influence (*In re Estate of Hagan, supra,* and *In re Estate of Bowman, supra*), the instruction incorporated certain other matters shown by the evidence that the jury might take into consideration. The vice of an instruction of this kind is that it indicates to the jury certain facts which might leave the impression with the jury that such facts, having been stressed, must be taken to be true, or are conclusive. Under the decisions, all facts, circumstances and legitimate inferences may be considered. In the event of retrial this instruction, in all probability, will be modified to meet the requirements of proof, as announced in *In re Estate of Hagan, supra,* and *In re Estate of Bowman, supra.*

While there is some effort made to connect the scrivener, who drew the will and codicils, with taking an active part

in building up evidence of the testamentary capacity of the testator through his intimate friendship with the family, there is nothing to disclose that the scrivener acted otherwise than he should have acted in the preparation of the instruments, and suffice it to say that his acts were such as a well-informed attorney would have performed under like or similar circumstances, and in keeping with legal ethics.

The testator was born in Crete, Nebraska, on April 8, 1872. He was one of a large family of brothers and sisters, and, in fact, as the eldest son, under a custom existing in the old country and within the family, would have charge of and control over, in the event of the loss of his parents, the estate, to care and provide for his brothers and sisters. In 1886, when the testator was 14 years of age, he removed to what is known as Brady Island, in Lincoln county. His father was a farmer and stockman, owning some considerable land and stock. There the testator worked for his father for a period of years. In 1900 the father made a partial division and distribution of his estate among his children. The testator at that time received the home place which was well improved, and twice as much personal property as the other children. In dispute is the fact that after this division the father continued to own a large herd of cattle, some horses and hogs, and continued in the livestock business with the testator on the home place. It is claimed that testator received five sections of pasture land in addition to the home place, and in excess of the land given to the other children. In this connection, the proponents offered to put in evidence the records, disclosing the transfers of land, which was objected to, due to a stipulation; the court felt that the matter might be confusing and sustained the objection. This evidence should have been received; it would have given the proponents an opportunity to dispute the statements, with reference to the division of land, as testified to by witnesses for the contestants.

In 1909 the testator's father died, and the testator handled his estate and made a proper accounting for all of the items and proper distribution as directed by the county court.

Throughout his lifetime testator performed many services of a civic nature. He was a member of the school board and, as such, took an interest in school activities, both scholastic and athletic, using his automobile for conveying the school board members to different functions and accompanying them. He served as a member of the taxpayers' committee in Lincoln county, to assist in tax matters. He bought the majority stock in a bank in Brady, and purchased the bank building in 1937. Contention is made that he bought the bank stock and the bank building for more than they were worth. There was an offer to show the book value of the stock which was denied admission in evidence. It would have been proper to have admitted this evidence. The testator was a member of a church and served on its board of trustees. He was a member of the Odd Fellows Lodge and held the highest office in the local lodge at one time. He belonged to the stockmen's organization, attended their conventions and meetings. He was on the reconciliation board during the depression. His advice on business matters was sought, and he was described by an array of witnesses as being a man of sound mind, good business judgment and not easily influenced. The record is replete with circumstances, as heretofore set out, but it would unnecessarily lengthen this opinion to detail them further. We deem the evidence sufficient to disclose that the testator possessed testamentary capacity to make the will and codicils thereto.

While the evidence on testamentary capacity and undue influence in cases of this kind are closely related, undue influence may be, and oftentimes is, separate and distinct from the question of testamentary capacity. In discussing whether or not undue influence is exerted, the facts and circumstances of each individual case must be taken into consideration and applied to the law governing this class of cases.

"It has been held impossible to describe with precision and exactness what is undue influence, and what the quality and the extent of the power of one mind over another must

be to make it undue." 68 C. J. 743. "Undue influence, in order to invalidate a will, must be of such character as to destroy the free agency of the testator and substitute another person's will for his own." *In re Estate of Stuckey,* 105 Neb. 641, 181 N. W. 564.

In 28 R. C. L. 142, sec. 97, it was said that undue influence can rarely be established by direct proof, and, accordingly, it is the rule that undue influence may be proved by indirect evidence and by proof of facts from which it may be inferred. And in *Ginter v. Ginter,* 79 Kan. 721, 101 Pac. 634, we find this language: "In making his proof a contestant is not limited to the bare facts which he may be able to adduce, but he is entitled to the benefit of all inferences which may be legitimately derived from established facts." See *In re Estate of Bowman, supra.*

In *In re Estate of Noren,* 119 Neb. 653, 230 N. W. 495, this court said: "Undue influence * * * is usually surrounded by all possible secrecy. It is almost always difficult to prove by direct and positive proof. It is largely a matter of inferences from facts and circumstances surrounding the testator, his life, character, and mental condition, as shown by the evidence, and the opportunity afforded designing persons for the exercise of improper control."

In 1911 Tom Bickley, a native of South Carolina, and a man of two years of common school education, came to work for the testator on his ranch. He worked intermittently, and in 1918 worked steadily for the testator until the latter's death. This latter employment was interrupted only for a short period of time, due to failure to make proper arrangements for pay for services of both Tom's mother and himself. Shortly thereafter an adjustment was made and the mother worked for a period of time as housekeeper until her health failed her, after which she returned for such time as her services were required. Tom's sister, now Anna Harris Snyder, worked on the ranch as a young girl in the field and in the home, doing washing and other household duties. She continued this employment until her marriage, and at different times subsequent thereto would help

with the work. Tom performed the ordinary duties incident to farming and ranching, and, in addition, on occasions did some cooking and washing and shaved the testator when he was ill and at other times. Tom received an average wage from and after 1918 of $45 a month and was privileged to have a few cattle and chickens of his own. He and the testator lived together until the latter's death.

The contestants' evidence on the question of undue influence in the following general particulars discloses that there was insanity in the testator's family. Many occasions and incidents are testified to, showing that the testator had a dislike for other members of the family; that he was moody, given to temper tantrums, and would strike inanimate objects, and that some of these spells would last for a period of three weeks. At different times he had much trouble with other members of the family, and his dislike would reach an abusive stage, toward his brothers and sisters. This feeling continued throughout testator's lifetime. He formed a hatred for his brother Henry that lasted from and after 1920 to the time of testator's death. This developed over disputes about fences and fence lines, straying of cattle and other matters. Just before he died he refused to see Henry. During the period of time that testator and Tom Bickley lived on the ranch together, Bickley would make disparaging remarks about Henry, and when he would make such remarks in the presence of the testator it would incite in testator a visible showing of dislike and hatred of Henry. These acts on the part of Bickley were continuous.

Psychiatrists, as expert witnesses, testified that the testator was afflicted with dementia præcox of the paranoid type and possessed the symptoms incident to that form of insanity,—in brief: That he was suspicious, believed he was being persecuted by those who were close to him, formed a hatred and dislike for those closest to him, the family, and was susceptible to the influence of those outside of the family, as against the family. This being true, the continuous derogatory remarks of Bickley added fuel to the hatred that testator bore toward Henry. Bickley was subservient

to the desires of the testator. In this manner he could get along with testator well, and this made the latter a good listener to the remarks and insinuations by Bickley, he being aware of the testator's weakness in this particular. Other occasions and incidents appear in the record, such as Bickley claiming on one occasion that Henry ran him off the highway, telling the testator the facts, while a man working on the premises, who saw both Henry and Bickley on the road, said that they were nearly a half a mile apart; an occasion when Henry's cattle strayed onto testator's land, and Bickley met Henry in a downtown store, and told him about it and there was some argument; Bickley going to the hospital when testator was there and inducing him to write to a bank with reference to Henry's cattle; an occasion when a Yale lock was placed on a door leading upstairs in testator's house, and when Bickley explained, using profanity, that testator had a brother who liked to "pry around" and they had missed some things. Other occasions, together with incidents developed in the family history, are in the record, which we deem unnecessary to state.

We have set out such portions of contestants' testimony to disclose that there is a sufficient controverted issue of fact on the question of undue influence to submit the case to the jury on such matter. All of the foregoing and other items appearing in the record are controverted by the proponents' testimony. The question is one for the jury.

The proponents contend that, where the evidence discloses that certain beneficiaries under the will and codicils have not been charged with or shown to have exerted undue influence, only that part of the will where the person asserts undue influence, if such be the fact, shall be denied probate and all other beneficiaries, legatees or devisees under the will will not be disturbed, in so far as the will and codicils relate to them, citing *In re Estate of Kajewski*, 134 Neb. 485, 279 N. W. 185, wherein it was said (p. 488): "Upon the question of undue influence, it had been held by this court that the will may be invalid as to one exerting the undue influence, and valid as to one legatee for whom

no influence was present. Where a will contains a bequest due to undue influence, it may stand as to other bequests not so procured. *In re Estate of Koller*, 116 Neb. 764, 219 N. W. 4. A careful annotator states: 'The authorities, with but few exceptions, support the general proposition that parts of a will may be held valid and enforceable, notwithstanding the fact that other parts have been affected by undue influence and are invalid; provided, however, that the parts so affected are separable, so that the will remains complete and intelligible in itself.' 69 A. L. R. 1129." The test is whether the parts so affected are separable, so that the will remains complete and intelligible.

In *Estate of Van Wyck*, 185 Cal. 49, 196 Pac. 50, it was said in the opinion (p. 62): "The real question presented where a will contains both valid and invalid provisions is whether the two are so parts of a single plan or scheme or otherwise so dependent one upon the other that by avoiding the invalid provisions and allowing the valid to stand there will result a disposition of the estate so different from what the testator contemplated or so unreasonable that it must be presumed that the testator would not have made the valid provisions if he had been aware of the invalidity of the others."

In *Walker v. Irby*, 238 S. W. (Tex. Com. App.) 884, it was held: "The general rule that, where a part of a will is invalid, the valid bequests should be sustained, has its limitations; and when the rule will defeat the testator's intent, and interfere with the general scheme of distribution, or work an injustice to other heirs, it should not be applied."

It is not a question as to whether the Rosentrator children or Anna Harris Snyder exercised undue influence. The question is whether or not Bickley exerted undue influence on the testator and was the controlling cause of the execution of the will and codicils. Take from the will the bequests to Bickley, it would defeat the testator's intent and interfere with the general scheme of distribution. This will comes within the classification of wills wherein the rule as contended for by proponents should not be applied, if undue influence of Bickley be properly proved.

The proponents predicate error on the admissibility of certain evidence. In view of our holding, we deem it unnecessary to discuss these matters any further than they have been discussed in the opinion, except to say that in a retrial certain evidence given by the witness, Jennie George Frederiksen, should be kept within more orderly bounds and restricted to responses to the questions propounded. We recognized the difficulty of this situation.

We deem it unnecessary to discuss the other assignments of error raised.

For the reasons given in this opinion, the cause is reversed and remanded for trial on the question of undue influence.

REVERSED.

Supplemental opinion filed in this case appears p. 915, *post.*

COUNTY OF DOUGLAS, APPELLANT, V. CHARLOTTE A. CHRISTENSEN ET AL., APPELLEES: HARVEY E. RASP, APPELLEE.
15 N. W. 2d 53

FILED JUNE 30, 1944. No. 31848.

1. **Taxation.** Section 3, art. VIII of the Constitution of Nebraska, reads in part: "The right of redemption from all sales of real estate for the non-payment of taxes or special assessments of any character whatever, shall exist in favor of owners and persons interested in such real estate, for a period of not less than two years from such sales thereof." The provision for the delay of two years was for the benefit of the owner of the fee or person having a legal interest in the land, and where such owner or all persons legally interested in the land files waiver of their right to redeem during such period the court may at once hear a motion to confirm sale.
2. ———. Section 3, art. VIII of the Constitution, is self-executing. Therefore no statute or decree is necessary to enforce it, or place it in operation, and the provisions of section 3, ch. 176, Laws 1943, are not intended as a limitation on the power of the court.
3. ———. The right of redemption from a tax sale is a property

right, and a person having property rights to preserve or protect may do so by redeeming the property, within the concept of section 3, art. VIII of the Constitution.

4. ———. The right to redeem being a property right, it may, as such, be sold or transferred by the owner, and section 3, ch. 176, Laws 1943, is not intended to forbid the transfer of this property right.
5. ———. Section 3, ch. 176, Laws 1943, reiterates the constitutional provision as construed by the court and is not an enlargement or limitation on the power of the court.
6. **Statutes.** Section 3, ch. 176, Laws 1943, is a reenactment of section 77-2039, Comp. St. Supp. 1941, and when the legislature reenacts a law it thereby adopts a judicial construction which has been theretofore placed upon it by the court.
7. ———. The legislature will be presumed to have known the effect that such statute originally had and, by its reenactment, to have intended that the same effect should again be had.
8. **Taxation.** Section 3, subdivision 1 thereunder, ch. 176, Laws 1943, interpreted to mean that in the foreclosure of a tax lien, as provided by section 1 of the act, final confirmation of sale cannot be had until two years shall have expired from the date of the sale held by the sheriff in the foreclosure proceedings, unless the right to redeem is waived by the owner of the fee or all persons having a legal interest in the land.

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

Kelso Morgan, A. H. Gutberlet and *August Ross,* for appellant.

A. J. Whalen and *Bolus J. Bolus, contra.*

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

MESSMORE, J.

This action was brought by the county of Douglas to foreclose liens for delinquent taxes on certain lots located within the boundaries of the county pursuant to the provisions of chapter 176, Laws 1943. The petition was filed September 8, 1943. Decree of foreclosure was entered December 21, 1943. The lots were sold March 21, 1944. On May 1, 1944, the purchaser filed a motion to confirm the

sale, supported by a waiver and consent to confirmation by the record owner of the lots. Douglas county objected to the confirmation of the sale for the reason that the property was sold under a decree entered pursuant to section 1, ch. 176, Laws 1943, and the court is without jurisdiction to confirm the sale until two years from March 21, 1944, date of the sale. Under subdivision 1 of section 3, ch. 176, Laws 1943, the objection was overruled. Douglas county appeals.

The question presented is whether or not a confirmation of a tax sale, brought by a county without a prior administrative sale, under the provisions of section 1, ch. 176, Laws 1943, may be had prior to two years from date of the sale, with the consent of all parties entitled to redeem.

Sections 77-2039, 77-2040, 77-2041, Comp. St. Supp. 1941, and section 77-2042 to and including section 77-2048, Comp. St. 1929, covering the same subject matter, and all amendments thereto in force, were repealed by chapter 176, Laws 1943. The county's contention is that section 3 of said chapter is mandatory and not directory, calling attention to section 3 of chapter 176, and subdivision 1 thereof, viz.: "In the foreclosure of a tax lien, as provided by section 1 of this act, final confirmation of sale cannot be had until two years have expired from the date of the sale held by the sheriff in the foreclosure proceedings; * * * ."

Chapter 176, Laws 1943, in so far as it need be considered here, by section 1 gives the counties a lien on real estate within its boundaries for all taxes due, and directs that, if any real estate is offered for sale for three consecutive years and not sold for want of bidders, the county shall bring an action, similar to a mortgage foreclosure, to foreclose the tax lien. Section 2 directs the manner of foreclosing tax sale certificates and provides that the action shall not be commenced until the time for redemption has expired. Section 3 provides that the foreclosure proceedings provided by the foregoing provisions of this act "shall be conducted as nearly as possible in the same manner, except in the following particulars: (1) In the foreclosure of a tax lien, * * * final confirmation of sale cannot be had until two

years have expired from the date of the sale held by the sheriff in the foreclosure proceedings; * * * ." Section 77-2039, Comp. St. Supp. 1941, provided for foreclosure of tax liens after a parcel of real estate had been offered at regular tax sale and not been sold for three consecutive years. It directed foreclosure similar to a mortgage foreclosure, without prior administrative sale, and a sale to the highest bidder. It provided for redemption within two years from the date of the sale by the owner, or any person having a direct legal interest in the property. It directed a confirmation of sale after two years from the sale on motion of the county attorney.

This court in *Douglas County v. Village of Ralston,* 133 Neb. 834, 277 N. W. 341, deciding the identical question as here presented, and interpreting section 77-2039, Comp. St. Supp. 1935 (Comp. St. Supp. 1941, sec. 77-2039), now repealed, and the language therein contained, viz.: "At any time after the expiration of two years the court shall, on motion * * * make and enter an order of confirmation," held:

"Where such statute grants the owner of the fee or any person having legal interests in lands two years from the date of sale in which to redeem, and further provides that the court may, at any time after two years, on motion of the county attorney, confirm the sale, *held,* that the provision for delay of two years was for the benefit of the owner of the fee or person having legal interest in the lands, and where such owner or person legally interested in the lands files a waiver of his right to redeem during such period, the court may proceed at once to hear a motion to confirm sale."

Section 3, art. VIII of the Constitution of Nebraska, reads in part: "The right of redemption from all sales of real estate for the non-payment of taxes or special assessment of any character whatever, shall exist in favor of owners and persons interested in such real estate, for a period of not less than two years from such sales thereof."

Previous to the adoption of the Constitution of 1920, the language appearing in section 3, art. VIII of the Constitu-

tion of 1920, appeared in section 3, art. IX of the former Constitution. This constitutional provision has been held by this court to be self-executing. See *Lincoln Street Ry. Co. v. City of Lincoln,* 61 Neb. 109, 84 N. W. 802; *County of Logan v. McKinley-Lanning Loan & Trust Co.,* on rehearing, 70 Neb. 406, 101 N. W. 991; *City of Lincoln v. Lincoln Street Ry. Co.,* 75 Neb. 523, 106 N. W. 317. Thereafter no statute or decree is necessary to enforce it or place it in operation, and the provisions of section 3, ch. 176, Laws 1943, add nothing to the self-executing constitutional provision and are not intended as a limitation on the power of the court. The right of redemption from tax sale is a property right. *Parsons v. Prudential Real Estate Co.,* 86 Neb. 271, 125 N. W. 521. And in *Connely v. Hesselberth,* 132 Neb. 886, 273 N. W. 821, the court clearly indicates that a person having property rights to preserve or protect may do so by redeeming the property, within the concept of section 3, art. VIII of the Constitution. Being a property right, it may, as such, be sold or transferred by the owner, and section 3 of chapter 176, Laws 1943, is not intended to forbid the transfer of this property right.

Section 3, ch. 176, Laws 1943, merely reiterates the constitutional provision as construed by the court and is not an enlargement of the right or a limitation on the power of the court, and is but a reenactment of section 77-2039, Comp. St. Supp. 1941, and as reenacted has now repealed section 77-2039, as construed in *Douglas County v. Village of Ralston, supra.* However, such case is pertinent and determinative of the question here presented.

In *Johnson v. Weborg,* 142 Neb. 516, 521, 7 N. W. 2d 65, we said: " * * * when the legislature reenacts a law, it thereby adopts the judicial construction which has theretofore been placed upon it by this court. *State v. Cornell,* 54 Neb. 647, 75 N. W. 25. And, as subsequently stated, the legislature will be presumed to have known the effect which such statute originally had, and by its reenactment to have intended that that same effect should again be had. *Shandy v. City of Omaha,* 127 Neb. 406, 255 N. W. 477."

We deem the legislative intent and the correct interpretation to be placed on section 3, subdivision 1 thereunder, of chapter 176, Laws 1943, to be that in the foreclosure of a tax lien, as provided by section 1 of the act, final confirmation of sale cannot be had until two years shall have expired from the date of the sale, held by the sheriff in the foreclosure proceeding, unless the right to redeem is waived by the owner of the fee or all persons having legal interest in the land.

AFFIRMED.

GEORGE CRNKOVICH ET AL., APPELLANTS, V. MARY CRNKOVICH ET AL., APPELLEES.

15 N. W. 2d 66

FILED JUNE 30, 1944. No. 31745.

1. **Specific Performance.** Before specific performance of an oral contract to convey real estate will be decreed the acts claimed to be in part performance themselves must unequivocally indicate the existence of the contract alleged and cannot be accounted for on any other reasonable hypothesis.
2. ———. In an action for specific performance of an oral contract where one is claiming the estate of a deceased person the evidence of such contract and its terms must be clear, satisfactory and unequivocal.

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

Henry R. Meissner and *Guy E. Tate,* for appellants.

Thomas J. Sheehan, Jr., contra.

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

YEAGER, J.

This is an action in equity by George Crnkovich and Mary Crnkovich, his wife, plaintiffs and appellants, against

Mary Crnkovich, widow of Michael Crnkovich, deceased, and guardian of Michael Crnkovich, Jr., Michael Crnkovich, Jr., son of Michael Crnkovich, deceased, and Thomas J. Sheehan, Jr., executor of the estate of the said Michael Crnkovich, deceased, defendants, to enforce specific performance of an alleged oral contract between George Crnkovich and Michael Crnkovich, deceased, alleged to have been entered into in the lifetime of said Michael Crnkovich, whereby the said Michael Crnkovich agreed to convey to the said George Crnkovich Lots 28 and 32, Hillcrest Addition, in Sarpy county, Nebraska. No appeal was taken as to the defendant Sheehan, hence the remaining defendants are appellees here.

The case was tried to the court, at the conclusion of which trial a finding on the issues was made in favor of defendants and judgment was entered dismissing the petition of plaintiffs. From this judgment plaintiffs have appealed.

As grounds for reversal of the judgment plaintiffs by assignments of error assert (1) that the court erred in dismissing the action and (2) that the court erred in not finding that plaintiff had established an oral contract.

The particular contract which plaintiffs claim was entered into and which they seek to have specifically enforced, as disclosed by the petition and evidence, is the following: In April, 1939, Michael Crnkovich, then being the owner of the real estate hereinbefore described, orally agreed, on the payment of the value thereof which they say was $3,500, to convey to George Crnkovich the said real estate.

They say in their petition in substance that in performance of the contract George Crnkovich endorsed to Michael Crnkovich a check for $617.21; that he paid $20 a month for 3 years under the terms of the contract or a total in this manner of $720; that he put into improvements which were erected on the real estate and which contributed to its value a kitchen sink and used and new lumber; that he paid out for excavating, landscaping and cultivating, approximately $225; that the labor in this connection was furnished by George Crnkovich; and that in addition thereto he further

improved the real estate by way of graveling a private road, erecting a cow shed, installing partitions in a chicken house, setting posts and erecting gates, of the total value and cost of $272.

The total amount of the credit to which plaintiffs claim that George Crnkovich is entitled is not declared in the petition.

The prayer is substantially for specific performance of the contract subject to a vendor's lien in favor of defendants for the unpaid balance under the oral contract.

For answer, to the extent necessary to outline it here, the defendants first deny the existence of the alleged oral contract, and second, they allege that the oral contract, if there was such a contract, is void and unenforceable for the reason that it is in violation of the statute of frauds of the state of Nebraska.

The plaintiffs contend that they have proved the oral contract alleged and that there was part performance thereof within the meaning of the statute of frauds and therefore they are entitled to have specific performance.

The provisions of the statute which require consideration in a determination of the questions presented 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."

It is well settled by the decisions of this court that before specific performance of an oral contract to convey real estate will be decreed the acts claimed to be in part performance themselves must unequivocally indicate the existence of the contract alleged and cannot be accounted for on any other reasonable hypothesis, also the evidence of the contract must be clear, satisfactory and unequivocal.

In *Taylor v. Clark,* 143 Neb. 563, 13 N. W. 2d 621, it was said:

"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."

Also in *Taylor v. Clark, supra,* is found the following which is quoted with approval from *Overlander v. Ware,* 102 Neb. 216, 166 N. W. 611: "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."

The evidence is wholly insufficient to sustain the burden devolving on plaintiff within the meaning of this rule or, perhaps more accurately stated, these two related rules.

A summary of the evidence which plaintiffs, in effect, contend unequivocally indicates the existence of the contract alleged and excludes every other reasonable hypothesis is the following: First on behalf of plaintiffs; Michael Crnkovich was the owner of the real estate in question. He purchased it for $750. George Crnkovich was without a home. It was agreed that on the real estate a house and other improvements should be constructed. George used certain new and old lumber in the construction of the improvements, the value of which was fixed by one witness at from $100 to $200. George expended in addition for improvements approximately $225. Work was done on the premises by George and his family, the value of which has not been fixed. The taxes were paid by Michael. The insurance was carried in the name of Michael and the premiums thereon paid by him. A check payable to George for $617.21, endorsed by him and by Michael and thereafter cashed, was admitted in evidence but without any competent evidence that the money went to Michael. One witness testified to the following: Q. 1059: "You don't know how much the house did cost, do you? A. Well, the way they said, it cost them $3,500.00." Q. 1060: "Who said that? A. Mike said to dad: 'This house cost us $3,500.00.'" Answer to Q. 1107: "My uncle Mike tell my dad, after the completion of the house. He said, 'You pay me $20.00 a month. This place and garden is yours and when I get my share paid out we will turn over the papers.'" On behalf

of defendants the evidence shows that the land and improvements, instead of costing $3,500, as a witness for plaintiffs stated that Michael said it cost, actually represented an outlay of cash in the amount of at least $5,469.61 as disclosed by cancelled checks appearing in the record. During his lifetime and up to the time of his death Michael had the property listed for sale. At one time Michael appears to have asked George to vacate the premises. George paid $20 a month for about three years. He was delinquent in his payments before the death of Michael. While Michael was on his deathbed George made a partial payment on delinquencies and significantly in this connection the record is devoid of evidence that he suggested the giving of a deed or some other evidence of the agreement alleged in the petition herein. When after the death of Michael the representatives of the deceased demanded payment of delinquent rent George declined to make payment but said he would move out in the fall, said nothing about the alleged agreement, and later made a payment and accepted a receipt therefor as rent. No claim was made by George to any representative of the deceased, heir, devisee or legatee that he had an oral contract for the conveyance of the real estate in question until the petition herein was filed.

It cannot reasonably be said that the evidence of part performance unequivocally indicates the existence of the contract alleged and that the acts of George Crnkovich cannot be accounted for on any other reasonable hypothesis. Likewise it cannot be said that there is clear, satisfactory and unequivocal evidence of the contract alleged.

In their brief plaintiffs request, if specific performance is denied, that a lien be impressed upon the real estate for the amount of the investment of George Crnkovich therein. Such relief must be denied. His remedy in such case would be in an action at law for the recovery back of such payment or payments as were made under the alleged oral contract. See *Taylor v. Clark, supra.* The fact that the statute barring the filing of claims against decedent estates

may bar a recovery furnishes no legal reason for the granting of relief in this action.

The judgment of the district court is affirmed.

AFFIRMED.

HOWARD E. ROBEEN, ALSO KNOWN AS H. E. RABEEN, PLAINTIFF IN ERROR, V. STATE OF NEBRASKA, DEFENDANT IN ERROR.

15 N. W. 2d 69

FILED JUNE 30, 1944. No. 31800.

1. **Forgery.** To utter and publish a forged, counterfeited, altered, or changed instrument is to offer to pass it to another with intent to defraud, declaring or asserting, directly or indirectly, by words or actions that it is good.
2. ———. To "put in circulation" such an instrument within the meaning of section 28-611, Comp. St. 1929, is to pass it or cause it to be passed to another with intent to defraud.
3. **Criminal Law.** The Constitution, art. I, sec. 11, and statute, Comp. St. 1929, sec. 29-1301, give defendant in a criminal prosecution the right to be tried by an impartial jury in the county where the alleged offense was committed.
4. ———. Where a person in one county procures the commission of a crime in another through the agency of an innocent person, he is a principal and subject to prosecution in the county where the acts were done by the agent, without reference to the whereabouts of the principal.
5. ———. Ordinarily the prompt withdrawal of improper evidence by the trial court, followed by an instruction that the jury give it no consideration, cures the error of its admission.

ERROR to the district court for Lancaster county: JEFFERSON H. BROADY, JUDGE. *Affirmed.*

William L. Walker, for plaintiff in error.

Walter R. Johnson, Attorney General, and *Carl H. Peterson, contra.*

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

CHAPPELL, J.

Plaintiff in error, hereinafter called defendant, was found guilty by a jury in the district court for Lancaster county, Nebraska, of feloniously uttering, publishing, and putting in circulation a forged, counterfeited, and altered railroad ticket. The trial court, after overruling defendant's motion for new trial, sentenced him to serve three years in the Nebraska state penitentiary. He prosecutes error to this court, contending that the trial court erroneously submitted the question of venue in its instructions to the jury; that the trial court erroneously admitted certain evidence; and that the verdict is not sustained by the evidence. We decide that the law and the facts do not sustain these contentions.

Decision upon the question of venue depends upon the application of well-established legal principles to new and unusual facts and circumstances. The defendant did not take the witness stand nor adduce any evidence in his own behalf. The uncontradicted evidence of the state discloses that defendant boarded a train at Kansas City, Kansas, a station where the Missouri Pacific Railway Company has no ticket agent. The conductor sold him a ticket to Lincoln, Nebraska, collecting therefor the sum of $4.10. Before the ticket was delivered to defendant the conductor wrote across the face of it, "Kansas City Ks to Lincoln Nebr Date issued 9-6-41 * * * $4.10" Both the original ticket and its attached counterpart, made out by the conductor at the same time, are in evidence. The attached counterpart was detached from the original at the time of its delivery to defendant. It was retained by the conductor who sent it to the auditor of passage receipts. Between Kansas City, Kansas, and Union, Nebraska, and while in defendant's possession, the original ticket was unquestionably altered and changed, without authority, so that it read, "Kansas City Ks to Billings Mont Date issued 9-6-41 * * * $21.10" Defendant changed trains at Union to travel to Lincoln, Nebraska. Between Union and Nehawka, in Cass county, he presented this altered and changed ticket to the conductor, who at the trial identified not only the defend-

ant but also the ticket presented by him. The ticket bears upon its face the conductor's punch marks which are each distinguishable from all others. The conductor noticed that the ticket was not in the usual form because of its failure to designate inter-line passage over the Burlington railroad from Lincoln, Nebraska, to Billings, Montana. He questioned defendant about this, and the latter said, "he didn't know, that was the way it was issued to him, given to him. * * * He said (by) the conductor on the train out of Kansas City." The conductor was not entirely satisfied with the ticket but since the fare recited was approximately correct he concluded that perhaps it was so issued by an inexperienced conductor. He told defendant that he would keep the ticket and upon arrival in Lincoln defendant should go to the station, wait for him, and they would make inquiry of the agent about it. Upon arrival in Lincoln the conductor, after completing his duties, went to the ticket office. There the conductor and the agent, in defendant's presence, talked over the authenticity of the ticket and what should be done under the circumstances. The agent endeavored by telephone to verify the ticket but was unable to contact the company's general agent. Finally the conductor requested that the agent issue to defendant a new ticket over the Burlington railroad from Lincoln, Nebraska, to Billings, Montana. The agent thereupon issued to defendant a genuine ticket which he accepted and took into his possession in exchange for the original altered and changed ticket which the company retained. The conductor then wrote defendant's name and address, given by him as "H. E. Robeen Box 173 Joliet Mont", on the back of the original ticket, and took defendant with him in his car from the Missouri Pacific to the Burlington depot that defendant might catch his train.

The statute, Comp. St. 1929, sec. 28-611, as applicable here, provides, in substance, that whoever, having in his possession, shall knowingly utter, publish, or put in circulation any forged, counterfeited, altered, or changed railroad ticket with the intent to defraud any person or per-

sons, body politic or corporate, shall be imprisoned in the penitentiary not more than ten years. In this connection, the rule is that to utter and publish a forged, counterfeited, altered, or changed instrument is to offer to pass it to another with intent to defraud, declaring or asserting, directly or indirectly, by words or actions that it is good. *Smith v. State,* 20 Neb. 284, 29 N. W. 923; *Folden v. State,* 13 Neb. 328, 14 N. W. 412. To "put in circulation" such an instrument within the meaning of section 28-611, Comp. St. 1929, is to pass it or cause it to be passed to another with intent to defraud.

Venue is a jurisdictional fact and in this state the Constitution, art. I, sec. 11, and statute, Comp. St. 1929, sec. 29-1301, give the defendant in a criminal prosecution the right to be tried by an impartial jury in the county where the alleged offense was committed. However, it is generally held that where a person in one county procures the commission of a crime in another through the agency of an innocent person, he is a principal and subject to prosecution in the county where the acts were done by the agent, without reference to the whereabouts of the principal. 22 C. J. S. 288, sec. 185-o; 16 C. J. 200; *Harrell v. State,* 79 Fla. 220, 83 So. 922; *Lindsey v. State;* 38 Ohio St. 507; *Girdley v. State,* 161 Tenn. 177, 29 S. W. 2d 255; *State v. Robinson,* 71 N. Dak. 463, 2 N. W. 2d 183; *The People v. Rathbun,* 21 Wend. (N. Y.) 509.

Defendant in the case at bar comes squarely within these rules. He not only procured the commission of a crime through the agency of an innocent person who acted for him in Lancaster county, but also, by being present himself, taking part in the transaction, and accepting a genuine ticket in lieu of the altered original, he thereby both directly and indirectly by the words and acts of the innocent agent and his own actions and conduct, asserted and declared that the altered instrument was good, and not only offered to but did pass it to another with the intent to defraud in Lancaster county, Nebraska. Whether defendant committed an offense in Cass county we need not here de-

cide. In any event, the crime charged was unquestionably committed by him in Lancaster county.

Defendant complains of certain instructions given by the trial court, but upon examination of all the instructions given we find that they properly presented the questions involved to the jury for their determination, and it would serve no good purpose to quote from or enter into a detailed discussion of them.

Defendant also complains that certain evidence calculated to present an admission of guilt by defendant was improperly admitted. In this connection, the record discloses that objection was made to only a part of it, but upon motion of counsel for defendant all of the objectionable evidence was promptly stricken from the record and the jury were instructed by the trial court to disregard all of such testimony. The applicable rule is that ordinarily the prompt withdrawal of improper evidence by the trial court, followed by an instruction that the jury give it no consideration, cures the error of its admission. *Ambrose v. State,* 111 Neb. 606, 197 N. W. 409; *Robinson v. State,* 71 Neb. 142, 98 N. W. 694; *McCormick v. State,* 66 Neb. 337, 92 N. W. 606; *Dinsmore v. State,* 61 Neb. 418, 85 N. W. 445.

We find that the verdict is amply sustained by the evidence, and, no error prejudicial to defendant appearing in the record, the judgment is hereby affirmed.

AFFIRMED.

IN RE ESTATE OF GEORGE.
W. O. COLLETT ET AL., APPELLANTS, V. JENNIE GEORGE FREDERIKSEN ET AL., APPELLEES.

FILED MARCH 9, 1945. No. 31720.

Rehearing of opinion reported *ante*, p. 887. *Motion for rehearing overruled and former opinion adhered to as modified.*

New Trial: JUDGMENT: VACATION. When a general verdict is vacated or set aside by the trial court for errors specified in section 25-1142, R. S. 1943, it should award a new trial and when on appeal this court, under the provisions of section 25-1926, R. S. 1943, vacates or sets aside such general verdict it should either grant a new trial or remand the cause to the trial court for such judgment.

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

WENKE, J.

Motion for rehearing denied, supplemental opinion filed December 1, 1944, withdrawn and the following supplemental opinion filed:

On re-examination of the record in this case on motions for rehearing no reasons appear for a departure from the conclusions arrived at in the original opinion, reported *ante*, p. 887, 15 N. W. 2d 80, except that the paragraph remanding the case for retrial solely on the question of undue influence should be modified.

With regard to the issue of testamentary capacity the following appears in the body of the opinion: "We deem the evidence sufficient to disclose that the testator possessed testamentary capacity to make the will and codicils thereto." This statement is sustained by the record but it may tend to imply that in the circumstances it was a function of this court to weigh the evidence on this issue. The only function of this court was to ascertain whether or not there was sufficient evidence adduced by the contestants to overcome the presumption flowing from the *prima facie* showing of the proponents that the testator was competent to

make a will. See *In re Estate of Witte*, decided November 3, 1944, 16 N. W. 2d 203.

Accordingly this portion of the opinion is withdrawn and the following shall be considered as a substitute statement therefor: We conclude that the evidence of contestants was insufficient upon which to justify a submission of the issue of testamentary capacity of the testator to a jury. There was no evidence to support a verdict finding a lack of testamentary capacity.

By the pleadings the contestants raised two issues: (1) Lack of testamentary capacity; and (2) undue influence. Both issues were submitted to the jury and a general verdict returned finding that it was not the will and codicils thereto of Fred George and that they should be denied admission to probate. From this verdict and judgment thereon the proponents appealed and it is this verdict and judgment thereon which our opinion vacates and sets aside. Our reversal, however, limits the question on retrial to undue influence.

With reference to our authority on vacating and setting aside a verdict and ordering a retrial of the case, we held in *Cerny v. Paxton & Gallagher Co.*, 83 Neb. 88, 119 N. W. 14: " * * * the practice has been to regard the setting aside of a general verdict by a jury as necessitating a re-examination of all the questions submitted to the jury in the trial which resulted in such verdict. * * * When a case brought to this court is sought to be reversed for any of the errors which are specified in section 314 of the code (now section 25-1142, R. S. 1943) as ground for a new trial, the making of a motion in the district court for such new trial in the time and manner required by the statute is an essential prerequisite to the right of the party appealing to have such error considered in this court. In such cases the appeal is in effect an appeal from the order refusing a new trial. Under section 594 of the code (now section 25-1926, R. S. 1943) which provides that, when a judgment or final order shall be reversed either in whole or in part in the supreme court, the court reversing the same shall proceed to render

such judgment as the court below should have rendered, or remand the cause to the court below for such judgment, it logically follows that, since, when a cause is reversed for any of the errors specified in section 314 (section 25-1142, R. S. 1943), the court below should have rendered a judgment awarding a new trial, it is the duty of this court to either render the judgment granting a new trial, or remand the cause to the court below for such judgment." This is stated in *Winterson v. Pantel Realty Co.*, 135 Neb. 472, 282 N. W. 393, as follows: " 'If the trial court is of the opinion that it erred in submitting the case to a jury and should have directed a verdict for the defendant because of the insufficiency of plaintiff's evidence to make a case, the proper remedy is to grant a new trial.' *Barge v. Haslam*, 65 Neb. 656, 91 N. W. 528."

In this case where the jury returned a general verdict, under the provisions of section 25-1926, R. S. 1943, we can do no more.

Upon retrial, if the proponents make a *prima facie* case as to testator's testamentary capacity and the evidence of contestants again proves to be insufficient upon which to justify a submission of that issue, the court should not submit it to the jury but should direct a verdict thereon for the proponents.

Therefore, in accordance with the supplemental opinion in *In re Estate of Witte*, decided February 2, 1945, 17 N. W. 2d 477, we withdraw from the opinion the last paragraph and substitute therefor the following: For the reasons given in this opinion, the cause is reversed and remanded for retrial.

With this supplement to the original opinion the motion for rehearing is denied and the original opinion adhered to as modified.

ORIGINAL OPINION ADHERED TO AS MODIFIED.

MESSMORE, J., dissenting.

With due consideration and respect for the supplemental opinion adopted by the majority, I am unable to concur therein because I believe the majority have unintentionally

misconceived the issue determinative of testamentary capacity in this case. As a consequence I believe this is a case where a dissent is of some value.

The following, labeled interrogatory, was propounded to the jury: "Do you find from a preponderance of the evidence that at the time of executing his last will and testament, Exhibit No. 1, and at the time of executing the Codicil thereto, Exhibit No. 2, and at the time of executing the codicil thereto, Exhibit No. 3, the said Fred George possessed testamentary capacity?" The answer was "Yes." In addition thereto a second interrogatory was propounded to the jury as to whether or not the testator had been unduly influenced in the making of the will and codicils thereto. The answer was "Yes." The foregoing interrogatories were sent together with the general verdict. The jury returned the general verdict setting aside the will and the codicils thereto. It is clear that the jury felt that undue influence was exerted upon the testator in the making of the will and the two codicils and returned their verdict accordingly. This brings us to what the court chose to label a special interrogatory dealing with testamentary capacity.

Before going farther, I might state that the matter which is under discussion now was not before us in its present form, nor was it adequately briefed.

The issue of special interrogatories, special findings and special verdict is not definitely clear. The text writers and judges of the various courts consider all such matters as constituting a fog, built over not years but centuries, and through which it is difficult to see the light.

Section 25-1120, R. S. 1943, provides: "Special verdict; controls general verdict. When the special finding of facts is inconsistent with the general verdict, the former controls the latter, and the court may give judgment accordingly."

It will be noted in analyzing this section that a special finding of fact is, in fact, a special verdict, at least in the mind of the annotator. The section speaks for itself, having in mind the significance of its caption "special verdict" and in the body of the section "special finding." Following

the foregoing section is section 25-1121, R. S. 1943. It reads as follows:

"In every action for the recovery of money only, or specific real property, the jury, in their discretion, may render a general or special verdict." This part of the statute does not apply to the instant case. The following part is applicable: "In all other cases the court may direct the jury to find a special verdict, in writing, upon all or any of the issues; * * * ." The phrase "upon all or any of the issues" is significant. Such indicates, to my mind, the two issues involved in this case, "testamentary capacity" and "undue influence." The form of the interrogatory will be remembered; also it will be remembered that all of the evidence pertaining to the question of testamentary capacity, as well as the instructions on the subject, were before the jury. To continue with the statute: " * * * and in all cases may instruct them, if they render a general verdict, to find upon particular questions of fact to be stated in writing, and may direct a written finding thereon." The jury made a written finding on testamentary capacity.

Section 25-1122, R. S. 1943, defines "special verdict" in the following language: " * * * A special verdict is that by which the jury finds the facts only. It must present the facts as established by the evidence, and not the evidence to prove them; and they must be so presented that nothing remains to the court but to draw from them conclusions of law." In connection with this Nebraska definition of a special verdict, referring to the interrogatory, or what you may choose to call it, it fits quite snugly into this definition, because the jury had the benefit of all the evidence, none of which was recited in the instrument propounded to them. They had the benefit of instructions upon the subject of testamentary capacity. They found by a preponderance of the evidence that Fred George possessed testamentary capacity. What then would be the function of the court under the definition? Nothing remains to the court but to draw a conclusion of law. The conclusion of law to be drawn from the inquiry answered by the jury is that Fred George met

all the legal requirements on testamentary capacity to make the will and codicils. So much for the statute.

Getting into the question of the distinction generally, over different jurisdictions, between special interrogatories, special findings and special verdicts as I previously pointed out; in addition I will say that there are hundreds of cases, and an examination of all of them would take unlimited time. So in the preparation of this dissent I will discern as best I can what I believe might be advantageous.

In Clementson, Special Verdicts (here again I desire to point out special findings, special interrogatories and special verdicts are in many instances in the decisions cited in this text analogous), I call attention to certain language appearing on page 44: "It is necessary for the practitioner to bear in mind the distinction between special verdicts and findings in response to special interrogatories. They are not the same thing, though they to some extent subserve the same purpose and are in pari materia." The general principle applicable to the case appears in the Illinois case of *Chicago & N. W. Ry. Co. v. Dunleavy*, 129 Ill. 132, 22 N. E. 15, and the subject matter is treated as *in pari materia*. The text continues: "The ideas of the profession upon this distinction, and upon matters generally connected with special verdicts and findings, are apparently confused, and it must be admitted that the decisions, to which we are wont to go for assistance, in many instances do little to dissipate, if they do not actually thicken, the fog." So the matter must be determined and treated from the basis of the statute of the state where it is sought to give effect to the special finding or special verdict. Otherwise, there will be little help. On page 45 of the text it is said: "In a way, any response by a jury to a question which seeks to uncover the jury's view of the weight of the evidence, and the jurors' opinions as to the existence or nonexistence of a fact or facts, is a 'special verdict.' It is special inasmuch as it is not the usual form. So, too, any return the jury may make which departs from the ordinary formulæ may be said to be a 'special verdict.' In strictness, however, by a special

verdict the jury, instead of finding for either party, find and state all the facts at issue, and conclude conditionally that if, upon the whole matter, the court should be of the opinion that the plaintiff has good cause of action, they find for the plaintiff, * * * ." Special findings are designed to explain and test the general verdict. It depends solely upon the instrument because generally special findings embrace answers to one or more questions pertinent to but not necessarily covering any of the issues. They are never required except when a general verdict is returned. A special interrogatory is an exploratory effort by which the court determines from the jury's answers whether or not the general verdict is sound and in place and the proper treatment accorded it. In Clementson, Special Verdicts, p. 170, it is further said: "A special verdict is where the jury find the facts only, and leave the questions of law arising on them to the court. Where the jury respond affirmatively or negatively to the issues submitted to them, it is a general verdict, although there be several issues. When they state the facts, and leave the court to apply the law arising from them, it is a special verdict. A general verdict is a finding in favor of one of the parties to an action; a special verdict finds the facts, but is not in favor of either party until the court declares the law arising thereon. The special verdict reiterates all the facts alleged which are sustained by the proofs, and these facts must be sufficiently numerous and explicit to leave nothing for the court to do but determine questions of law." See *Williams v. Love,* 1 Ind. T. 585, 43 S. W. 856.

In keeping with the foregoing are California, Connecticut, Indiana, New York, Utah, Washington, Wisconsin and federal cases. In Nebraska, together with Arkansas, California, Colorado, Idaho, Indiana, Iowa, Kansas, Minnesota, Missouri, Montana, New York, North Carolina, Oklahoma, Oregon, South Carolina, Texas, Utah and Wyoming, a general verdict is that by which the jury pronounce generally upon any or all of the issues in favor of plaintiff or defendant. A special verdict is that by which the jury find the facts only, leaving the judgment to the court. The special

verdict must present the conclusions of fact as established by the evidence and not the evidence to prove them, and those conclusions of fact must be so presented that nothing shall remain to the court but to draw from them conclusions of law.

Take the instrument in the instant case. The conclusion of fact is there; it is established by the evidence. The instrument does not contain the evidence to prove the conclusion of fact, and the conclusion of fact is so presented as nothing remains for the court to do but to draw from such conclusion of fact a conclusion of law. In keeping with this statement, and remembering that in Nebraska we have drawn no definite distinction between special findings of fact and special verdicts, and considering the rule as stated in *In re Estate of Kerr*, 117 Neb. 630, 222 N. W. 63: " 'To entitle a party to a judgment on the special findings of a jury, where the general verdict is against him, such findings must establish all the ultimate facts from which his right to a judgment results as a necessary legal conclusion.' *Omaha Life Assn. v. Kettenbach*, 55 Neb. 330", it would seem to me that the ultimate fact, testamentary capacity, from which the proponent's right to a judgment results as a necessary legal conclusion, is within the instant case.

Upon the trial of an issue of fact a special verdict should find facts to which the law gives a determinate effect conclusive of the issue. The special verdict must be a statement of the ultimate facts, not of the evidence upon which they rest. It follows from the requirements that nothing further shall remain but for the court to draw the proper conclusion of law from the facts found. It is only when the evidentiary facts returned are such as the law has made conclusive evidence of the ultimate facts that they are tantamount to finding the latter and will support the judgment. *Chicago & N. W. Ry. Co. v. Dunleavy, supra.* There is no conclusion of law stated to the jury's answer to the instrument in the instant case. The answer is an answer to the ultimate facts from which the legal conclusion may be drawn.

To proceed: "The purpose of a special verdict is to furnish the basis of a judgment to be rendered, and of special findings in answer to interrogatories, by eliciting a determination of material facts, to furnish the means of testing the correctness of the verdict rendered, * * * ." 27 R. C. L., sec. 37, p. 865; citing *Parkinson Sugar Co. v. Riley,* 50 Kan. 401, 31 Pac. 1090, 34 Am. St. Rep. 123.

Section 25-1121, R. S. 1943, uses the language: "In all other cases the court may direct the jury to find a special verdict, in writing, upon all or any of the issues; * * * ." Questions submitted for a special verdict should be such that a judgment can properly be rendered on the answers given to them. Special interrogatories, however, bearing directly on the special issues in the case, calling for findings as to ultimate facts essential to the determination of such issues should be submitted to the jury although they are not determinative of the case under all of its issues. The universal rule is that it is essential to a special verdict that it contain all of the ultimate facts on which the law is to arise and the judgment of the court is to rest. 27 R. C. L., sec. 49, p. 875. Citing *Ward v. Cochran,* 150 U. S. 597, 14 S. Ct. 230; *Rice v. Evansville,* 108 Ind. 7, 9 N. E. 139; *Schellenbeck v. Studebaker,* 13 Ind. App. 437, 41 N. E. 845; *Welland Canal Co. v. Hathaway,* 8 Wend. (N. Y.) 480; *State v. Hanner,* 143 N. C. 632, 57 S. E. 154, 24 L. R. A. n. s. 1, and note; *Brown v. Ferguson,* 4 Leigh (Va.) 37, 24 Am. Dec. 707; *Gatzow v. Buening,* 106 Wis. 1, 81 N. W. 1003. It should be of such a nature that nothing remains for the court but to draw from the facts found the proper conclusions of law and enter judgment thereon. Citing *Graham v. Bayne,* 18 How. 60, 15 L. Ed. 265; *Emery v. Raleigh & G. R. Co.,* 102 N. C. 209, 9 S. E. 139.

A few definitions given in cases will not be amiss: In general: "Special findings are particular findings of individual facts." *Atchison, T. & S. F. Ry. Co. v. Osburn,* 79 Kan. 348, 100 Pac. 473.

"In a will contest, where jury found against will, and also found that just that part made in housekeeper's favor

was procured by undue influence, latter answer constituted 'special finding' (Crawford & Moses' Dig. sec. 1304)." *Hyatt v. Wroten,* 43 S. W. 2d 726 (184 Ark. 847).

From Indiana, where special findings are analogous to special findings in Nebraska: "The office of a special finding is to state the ultimate facts, and not the probative or evidentiary facts." *Behler v. Ackley,* 89 N. E. 877 (173 Ind. 173), citing *Taylor v. Canaday,* 155 Ind. 671, 57 N. E. 524.

Special Interrogatory: " * * * the purpose of 'special interrogatories' is to elicit facts to test the correctness of the general verdict." *Freedman v. New York, N. H. & H. R. Co.,* 71 Atl. 901 (81 Conn. 601).

Special Verdicts: "A special verdict is where the jury find the facts particularly, and then submits to the court the questions of law arising upon them." *Day v. Webb,* 28 Conn. 140.

A special verdict must contain the conclusions of fact as established by the evidence to the satisfaction of the jury, and not the evidence to prove them. *People v. McClure,* 148 N. Y. 95, 42 N. E. 523.

Getting to a neighboring state: A "special verdict" is defined by statute as that by which the jury finds the facts only, leaving the judgment to the court. *Morrison v. Lee,* 13 N. D. 591, 102 N. W. 223; also *Heuther v. McCaull-Dinsmore Co.,* 52 N. D. 721, 204 N. W. 614.

Now, an important analysis: The purpose of a special verdict is to furnish the basis of the judgment, while the purpose of special interrogatories is to elicit facts to test the correctness of the judgment. *Freedman v. New York, N. H. & H. R. Co., supra.* The cases are without dispute as I have analyzed them. Now, then, what is the instrument we are dealing with? It is labeled a special interrogatory. The label makes no difference. It is, in effect, a special verdict under the decisions I have cited. If that is the effect of the instrument, and if it means the general and universal rule as to what a special verdict is, then what would be the function of the court when it draws a conclusion of law

from it? It would seem natural that the court should then protect the interest of the litigant in whose favor such conclusion of law is found. The conclusion of law develops from what the jury found and the manner in which they found it is certainly in keeping with the special verdict. I would like to call attention, however, to how a few states in the Union consider the purpose of the foregoing:

Iowa: Special findings are designed to exhibit the grounds upon which the general conclusion is based. The design of special interrogatories is to point out the controlling questions in the case, exact for them separate consideration, and thereby guard against misapprehension of what are the vital issues to be determined. When the answers cover all the ultimate facts, these furnish a full explanation of the general verdict and a safe test of its accuracy.

Michigan: The statute authorizing special questions contemplates that they shall be put in explanation of the general verdict. The object of the statute is to ascertain whether the jury had, in making up their verdict, *properly applied the law as given by the court to the facts of the case.*

Nevada: By submitting special interrogatories, the expense and delay of a second trial may be often avoided, and by this practice the law is much more effectually separated from the fact than by giving hypothetical instructions.

New York: The object of the provision in regard to special findings was to enable the court to leave the case to the jury generally, *but to control their verdict by findings,* which would render a second trial unnecessary in cases where no exceptions were taken, or rather to prevent the necessity of exceptions to the charge.

Where a jury answers proper interrogatories and substantive facts are conflicting, then the general verdict cannot stand if the answer to the special interrogatory is of an ultimate fact from which a legal conclusion develops. *Bence v. Denbo,* 98 Ind. App. 52, 183, N. E. 326. When a jury returns a general verdict and in answer to special

questions makes special findings of fact inconsistent therewith, the special findings control, and the court may render judgment accordingly. *Kansas State Bank v. Skinner*, 121 Kan. 322, 246 Pac. 497.

The court may render judgment on answers to special questions regardless of general verdict inconsistent therewith. *Musgrave v. Equitable Life Assurance Society*, 124 Kan. 804, 262 Pac. 571. Special findings on material issues inconsistent with general verdict and irreconcilable, control general verdict if sufficient to authorize judgment when taken with facts admitted by pleadings. *Forest Products Co. v. Dant & Russell*, 117 Or. 637, 244 Pac. 531.

In Nebraska, the rule is announced in *In re Estate of Kerr, supra*, on special findings; is also announced in *McClary v. Stull*, 44 Neb. 175, 62 N. W. 501; *Norfolk Beet-Sugar Co. v. Preuner*, 55 Neb. 656, 75 N. W. 1097; *Kafka v. Union Stock Yards Co.*, 78 Neb. 140, 110 N. W. 672; *Walker v. McCabe*, 110 Neb. 398, 193 N. W. 761. Such cases have reference primarily to section 25-1120, R. S. 1943.

In *Culbertson Irrigating & Water Power Co. v. Olander*, 51 Neb. 539, 71 N. W. 298, we held: "A general verdict will be set aside if in irreconcilable conflict with a special finding of fact * * * ."

Now, I am fully cognizant that, had the court left the general verdict out, the two issues presented would be determinative of the case, and the will and codicils would necessarily be set aside on account of undue influence exercised on the testator, and I recognize that, while the general verdict exists, the question is with reference to just what is "special interrogatory No. 1." From the manner in which it is worded and the answer which it solicits, it is a factual determination of an issue from which a legal conclusion may be drawn. That is a special verdict. The jury have no concern beyond finding the facts only. It is for the court alone to say what is the legal significance of the facts found, and it may neither trespass upon the jury's province or permit invasion of its own. In determining whether

the findings of a special verdict will support a judgment and what judgment should be rendered, the special verdict is to be fairly and liberally construed. A special verdict settles the facts, and the court, by its judgment, pronounces the conclusions of law upon such facts. Where a motion for a new trial is submitted to the trial court, setting forth error generally occurring at the trial, or preserving a right with reference to such an incident as we have in the instant case, the matter is reviewable here. Upon appeal, reversal with directions to enter judgment in accordance with the opinion of an appellate court, where the appellant has taken such steps in the lower court as to entitle him to judgment there, is the pertinent question.

However, in a case of this kind, there would be some reason why a special finding on testamentary capacity was given to the jury. Was it simply advisory to the trial court, or does it disclose to the trial court that the issue of testamentary capacity is determined and the trial court should draw a legal conclusion therefrom and dispose of the issue? What other function could it serve? Is it analogous to the rule in certain states where a special finding disposes of the issue when a judge derives a legal conclusion therefrom, the purpose being to avoid a retrial of the same issue and thereby save expense and time of the litigants?

If the findings are tantamount to a special verdict, of what value are they if controlled by the general verdict? The issue is distinct. The jury said from a preponderance of the evidence that the testator possessed testamentary capacity. If he did, then there was only one other matter and that was undue influence, and to discern undue influence the testator must have possessed testamentary capacity.

In connection with what I have said, I desire to call attention to section 25-1314, R. S. 1943. There are no annotations under it. It is as follows: "Entry of judgment by court; when required. Where the verdict is special, or where there has been a special finding on particular questions of fact, or where the court has ordered the case to be

reserved, it shall order which judgment shall be entered."

To my mind, there is no doubt but that the jury's answer to the query propounded to them, that Fred George possessed testamentary capacity to make the will and two codicils, is at least a special finding on a particular question of fact, within the meaning of the above section. If it is, then, applying the section, it would read this way: "Where there has been a special finding on particular questions of fact, the court shall order what judgment shall be entered." Now this section simply does not make the general verdict conclusive, does not even talk about it. Certainly, the section cannot be said to be meaningless; nor is there anything that I can find which raises the sanctity of a general verdict over and above special findings of fact. The law is distinctly to the contrary. Special findings control a general verdict. If this were not so, there would be no occasion for the legislature to pass section 25-1314, *supra*. In none of the cases cited in the supplemental opinion are special interrogatories, special findings of fact or special verdicts included, and they certainly have no bearing on this case.

The following is enlightening on the subject:

"In Massachusetts, while the practice permits special verdicts, general verdicts and answers to questions framed by the court, the special verdict does not rest upon any statute but is the common law special verdict recognized by statute of Westminster 2, 13 Edw. 1, chapter 30, section 2, and by Massachusetts G. L., chapter 11, section 5, but its use is not very common. Chapter 231, section 124, Massachusetts G. L., passed in 1913, provides that when special questions are submitted to a jury the judge may or may not take a general verdict and may report the case on the answers of the jury or may make such other order thereon as he deems proper. This statute, says Chief Justice Rugg of the Supreme Judicial Court of Massachusetts, was presented by the Legislative Committee of the Massachusetts Bar Association and in a statement in support of the act it was said:

" 'One object of this section is to assist the appellate

court by encouraging the practice of framing separate issues and taking special verdicts in cases where such course would enable the court to correct errors of the trial judge by dealing with the case as justice required upon the findings of the jury without sending the case back to be tried all over again simply because the general verdict was taken, when this whole expense and delay of a second trial could have been avoided if the jury had been requested by the trial court to answer specific questions and decide separate issues. This section is not drawn in such a way as to make it obligatory upon the trial court, but it is to favor the practice of taking special verdicts in proper cases, which we believe to be an important and necessary step in any attempt to materially reduce delays and exceptions resulting from new trials.' " American Judicature Society Journal, Vol. XIII, p. 178.

If special findings of fact are not to be considered, let's dispense with them and say they mean nothing and serve no purpose. This case should be remanded to conform to the original opinion.

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24. If driver of automobile entering intersection fails to see automobile not shown to be in a favored position, the presumption is that the driver of the approaching automobile will respect the former's right of way and the question of his contributory negligence in proceeding to cross intersection is for the jury. *Whitaker v. Keogh* 790
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3. A contract complete in itself will be conclusively presumed to supersede and discharge another one made prior thereto between same parties concerning same subject matter where the terms of later contract are inconsistent with former. *In re Estate of Wise* 273
4. Changes in a contract do not necessarily abrogate it or imply its abandonment. *In re Estate of Wise* 273
5. Where it is claimed that by reason of inconsistency between terms of new agreement and those of the old, the old one is discharged, the fact that such was the intention of the parties must clearly appear. *In re Estate of Wise* 273
6. A new contract with reference to subject matter of a former one does not supersede the former except so far as new one is inconsistent therewith when it is evident that the new contract is supplementary only. *In re Estate of Wise* 273
7. Where a new contract is consistent with continuance of former one and only provides new mode of discharging it, there is no rescission until new contract is performed. *In re Estate of Wise* 273
8. A contract, the fulfillment of which by express or implied agreement is made to depend upon the act or con-

sent of a third person, over whom neither party has any control, cannot be enforced unless the act is performed or consent given. *Evans v. Platte Valley Public Power and Irrigation District* 368

9. Value of property is a matter of judgment and a contract based on inadequate consideration will not be set aside for that reason alone, unless the inadequacy is so great as to furnish of itself a convincing evidence of fraud. *Johnson v. Radio Station WOW* 406

10. The practical interpretation given a contract by parties while engaged in its performance and before any controversy arose indicates true intent of contract and courts will ordinarily enforce such construction. *Hanley v. Stratbucker* 437

Corporations.

1. The directors of a corporation have no authority to make or authorize contracts or do other acts which are beyond powers conferred on corporation by its charter. *Johnson v. Radio Station WOW* 406

2. The wisdom and expediency of corporate business policies and methods of executing them are left to the discretion and decision of board of directors. *Johnson v. Radio Station WOW* 406

3. In absence of usurpation, fraud, gross negligence or transgression of statutory limitation, courts of equity will not interfere at suit of dissatisfied stockholders merely to overrule discretion of directors on question of corporate management, business or policy. *Johnson v. Radio Station WOW* 406

4. Under laws of Ohio, corporation has perpetual succession. *Pontiac Improvement Co. v. Leisy* 705

Costs.

Only where one of several persons having a common interest in property, at his own cost, takes legal action to protect such interest for benefit of all, may equity court order successful litigant reimbursement for costs, expenses and counsel fees from common property in order that all benefited may share proportionately in such expense. *School District No. 70 v. Wood* 241

Counties and County Officers.

1. A petition for allowance of claim against a county is demurrable where it shows on its face that the claim was not filed with county clerk within time limited by a mandatory statute. *Coverdale & Colpitts v. Dakota County* .. 166

2. The remedy by petition in error to correct errors of a county board in levying special assessments is not an exclusive remedy. *Loup River Public Power District v. County of Platte* 600
3. Where necessary elements are present, claims against counties are subject to compromise by county boards and they may, in absence of vitiating elements, settle litigation against the county. *State ex rel. Campbell v. Slavik* 633
4. County commissioners act quasi judicially in passing upon claims against county whenever their action is not merely a formal prerequisite to issuance of a warrant but involves determination of questions of fact upon evidence or the exercise of discretion in ascertaining or fixing the amount to be allowed. *State ex rel. Campbell v. Slavik* 633
5. Where claim against county is one upon which judicial action is required by the county board, the passing upon claim is a judicial act and unless appealed from cannot be disturbed. *State ex rel. Campbell v. Slavik* 633

Courts.

1. The appointment by supreme court of members of court of condemnation is a ministerial act and does not enlarge the jurisdiction of supreme court. *In re Application of City of Sidney* 6
2. A proceeding in supreme court to vacate appointment of members of court of condemnation for irregularities in the condemnation proceeding is not within original or appellate jurisdiction of supreme court, nor is it incidental to any pending judicial proceeding which could bring it within jurisdiction of supreme court. *In re Application of City of Sidney* 6
3. The county court has exclusive original jurisdiction of all matters relating to settlement of estates of deceased persons. *In re Estate of Statz* 154
4. County courts are without general equity jurisdiction, but, in exercising exclusive original jurisdiction over estates, may apply equitable principles to matters within probate jurisdiction and render such relief as situations of interested parties may justify. *In re Estate of Statz* 154
5. Jurisdiction of the subject matter is to be tested by the authorized extent of court's powers in respect to the cause of action before it. *In re Estate of Statz* 154
6. Generally, same issues must be tried on appeal as in original proceedings in county court, but plaintiff is not confined to the allegations in his pleading in the court

below, as long as identity of the original cause of action is preserved. *In re Estate of Statz* 154
7. Under Constitution and statutes the county court has exclusive original jurisdiction of all matters relating to settlement of estates of deceased persons. *In re Estate of Reikofski* 735
8. Courts of general jurisdiction have inherent power to do all things necessary for administration of justice within the scope of their jurisdiction. *Jensen v. Jensen* 857
9. Where the defeated party undertakes to perfect an appeal from an adverse ruling of the county court in a probate proceeding and orders a transcript in accordance with statute, and the county judge by inadvertence neglects to certify the same, all other requirements having been met, the failure to certify the transcript will not defeat the appeal. *In re Estate of House* 870

Criminal Law.
1. Where accused appeared in person and by counsel and went to trial before a jury regularly impaneled and sworn, accused would be deemed to have waived arraignment and to have entered a plea of not guilty. *Maher v. State* 463
2. The transcript imports absolute verity and cannot be impeached, and, if incorrect or if it fails to speak the truth, correction must be made in district court, and not in the supreme court. *Maher v. State* 463
3. An application for a continuance is addressed to the discretion of the trial court and its ruling thereon will not be held erroneous unless an abuse of discretion is disclosed by the record. *Maher v. State* 463
4. It is the duty of the court, with or without request, to instruct the jury as to the law of the case. *Maher v. State* 463
5. The approved journal entry of a judgment is indisputable evidence of what the judgment was. *Maher v. State* 463
6. A judgment of a court is valid and effective when it is declared and announced by the judge, although it may not be reduced to writing until afterwards. *Maher v. State* 463
7. It is the duty of the court to endeavor to surround the trial with an atmosphere of fairness, undisturbed by prejudice, passion or ill will. *Maher v. State* 463
8. Under constitutional provision guaranteeing accused a speedy public trial, there is room for exercise of discretion on part of the trial court. *Maher v. State* 463

9. The constitutional right of accused to have the assistance of counsel may be waived, and a waiver will be implied where accused pleads guilty and fails to demand that counsel be assigned to him. *In re Application of Rice, Rice v. Olson* 547
10. When a defendant enters a plea of guilty, he thereby waives all defenses, other than those that are jurisdictional. *In re Application of Rice, Rice v. Olson* 547
11. The acceptance of a plea of guilty authorizes the imposition of the legal sentence for the crime properly charged in the information. *In re Application of Rice, Rice v. Olson* 547
12. In proceeding to vacate order of district court granting probation, correct practice requires a verified information stating specifically the conduct constituting violation of probationary conditions, but proceeding by motion may be sustained if defendant had timely notice of hearing, assistance of counsel, testimony of witnesses, and a fair and impartial trial. *Moyer v. State* 673
13. The court is required to fix the conditions of the probation and may include therein directly or by inference the conditions enumerated in the statute. *Moyer v. State* 673
14. The right of the court to revoke probation depends upon a breach of the conditions of the probation. *Moyer v. State* 673
15. The jury are judges of credibility of witnesses and weight of their testimony and, unless decision of jury thereon is clearly wrong, their verdict will not be molested. *Phillips v. State* 772
16. Where a defendant asserts he is not guilty of the crime charged because of insanity, it is the province of the jury to determine whether the defendant, at the time of the commission of the alleged crime, had sufficient mental ability to distinguish between right and wrong in respect to the subject matter of the inquiry. *MacAvoy v. State* 827
17. A determination by jury upon conflicting evidence that a defendant who asserts he is not guilty of the crime charged because of insanity was responsible for his acts will not ordinarily be disturbed on appeal. *MacAvoy v. State* 827
18. Rules as to information, conduct of case, and punishment applicable to a principal in fact apply to aider, abettor, or procurer, and information against accessory before the fact need not allege facts different from those required against principal. *Puckett v. State* 876

19. Where evidence would warrant conviction on one of the two counts in an information, a general motion for a directed verdict was properly refused. *Scavio v. State*.... 881
20. If there are two counts in an information, under one of which certain evidence is clearly admissible, it is not reversible error for the trial court to fail to give an instruction to the jury relating thereto, when no such instruction was requested. *Scavio v. State*..... 881
21. The Constitution and statute give defendant in criminal prosecution right to trial by impartial jury in county wherein alleged offense was committed. *Robeen v. State* 910
22. Where a person in one county procures the commission of a crime in another through the agency of an innocent person, he is a principal and subject to prosecution in the county where the acts were done by the agent, without reference to the whereabouts of the principal. *Robeen v. State*..... 910
23. Ordinarily the prompt withdrawal of improper evidence by the trial court, followed by an instruction that the jury give it no consideration, cures the error of its admission. *Robeen v. State*..... 910

Crops.

1. Damages based on value of unmatured crops are analogous to profits lost, and are governed by the same rule precluding recovery in cases of either uncertainty or remoteness, but question of whether damages are speculative must be determined by whether there is sufficient data to determine with reasonable certainty the probable value crops would have had if matured. *Snyder v. Platte Valley Public Power and Irrigation District*..... 308
2. The right to crop of wheat growing on unenclosed public land is in one who has planted and looked after the crop, rather than in one who forcibly takes possession thereof against the will of the planter. *Test v. Reichert* 836

Damages.

1. Damages based on value of unmatured crops are analogous to profits lost, and are governed by the same rule precluding recovery in cases of either uncertainty or remoteness, but question of whether damages are speculative must be determined by whether there is sufficient data to determine with reasonable certainty the probable value crops would have had if matured. *Snyder v. Platte Valley Public Power and Irrigation District*..... 308
2. In action for personal injuries which are permanent and have impaired earning capacity, damages for pecuniary

loss by reason of decreased earning power are to be based on life expectancy immediately before the injury and for future mental and physical suffering on probable expectancy of life in plaintiff's injured condition. *Crecelius v. Gamble-Skogmo, Inc.* 394

3. The only future pain and suffering which jury are entitled to consider in assessment of damages is such as evidence shows with reasonable certainty will be experienced. *Crecelius v. Gamble-Skogmo, Inc.* 394
4. Nominal damages may be recovered where a cause of action for a legal wrong is established and there is no proof of actual damages. *Larson v. Marsh* 644
5. Verdict for $14,800 was not excessive where civil engineer, 38 years of age, received permanent injuries, accompanied by pain and suffering extending over several months. *Sutton v. Inland Construction Co.* 721

Death.

1. A presumption of pecuniary loss exists in favor of one legally entitled to service or support from one killed by negligent act of another. *Tate v. Barry* 517
2. Personal representative bringing action for wrongful death in district court must bring such action for the exclusive benefit of the widow or widower and next of kin, and if he secures judgment it is reported to county court and distribution ordinarily is to be made in that court in same proportions as personal property of an intestate. *Tate v. Barry* 517
3. When objection is made to distribution in county court by any one in whose behalf action for death was brought and a showing is made in support thereof, it is the duty of county court to determine who, of the widow or widower and next of kin, have suffered a pecuniary loss and extent thereof and distribute the funds recovered to such persons as are entitled thereto. *Tate v. Barry* 517
4. In action for death, expectancy tables are not conclusive but must be regarded merely as aids in estimating the probable expectancy of life of deceased. *Tate v. Barry* .. 517
5. The law does not provide a positive, definite mathematical formula or legal rule by which jury shall fix pecuniary loss suffered in death of head of family. *Tate v. Barry* 517

Deeds.

In action to cancel deed, plaintiff may allege as many different grounds for cancellation as he desires, and failure

to prove one ground will not prevent a recovery on others. *Cunningham v. Brewer* 211

Divorce.

1. The entry of final order or decree is a necessary attribute to final hearing as used in order awarding temporary alimony in monthly payments pending final hearing of said cause. *Wolfe v. Wolfe* 55
2. In civil contempt proceeding to enforce alimony decree, plaintiff's affidavit should allege court order for payment of alimony and defendant's willful failure, without just cause, to comply therewith. *Thuman v. Thuman* 177
3. The strict rules applicable to a proceeding for criminal contempt do not apply to a civil contempt proceeding. *Thuman v. Thuman* 177
4. In a civil contempt proceeding a substantial and general statement in the affidavit will suffice to give the court jurisdiction to proceed. *Thuman v. Thuman* 177
5. Remarriage does not relieve a defendant from the obligations fixed by an alimony decree. *Thuman v. Thuman* 177
6. It is impossible to lay down any general rule as to degree of corroboration required in a divorce action, as each case must be decided on its own facts and circumstances. *Johnsen v. Johnsen* 208
7. Upon granting of an absolute divorce, trial court may assign property, both real and personal, acquired during marriage by joint efforts of parties, between them as demands of equity require. *Johnsen v. Johnsen* 208
8. In a divorce suit, where the court has jurisdiction of the parties, it has power to adjust all their respective property interests. *Lippincott v. Lippincott* 486
9. In fixing the amount of alimony, the court will consider the estate of each party at time of marriage, their respective contributions since marriage, duration of marriage, and conduct of the parties. *Lippincott v. Lippincott* 486
10. The amount of alimony to be awarded divorced wife must be determined from the circumstances of each case. *Passmore v. Passmore* 775
11. In determining amount of alimony to be awarded divorced wife, husband's age, health and ability to work, as well as his property holdings, must be considered. *Passmore v. Passmore* 775
12. The judgment of trial court fixing the amount of alimony will not be disturbed on appeal unless good cause is shown. *Passmore v. Passmore* 775

13. In determining conditions under which divorced parent may visit minor child whose custody is awarded to other parent, child's age, health and best interests and convenience of parent having custody must be considered. *Passmore v. Passmore* 775
14. Order of trial court as to privileges of divorced husband respecting visitation of his minor child, whose custody was awarded to wife, will not be disturbed on appeal, in absence of showing that order was unreasonable. *Passmore v. Passmore* 775
15. In action for modification of a decree of divorce with reference to the custody of a minor child, suit money and attorney's fees are not chargeable against a third person, having the custody of such child and seeking to intervene in the action, unless provided for by statute. *Voss v. Voss* 819
16. Decree for child support in a divorce action is at all times subject to review in light of changing conditions, regardless of the particular language of the award. *Saum v. Saum* 842
17. In determining the amount of alimony to be allowed in a divorce action the character and situation of the parties and other surrounding circumstances should be considered as well as economic considerations. *Saum v. Saum* 842
18. To secure an injunction against disposition of husband's property in a divorce action, there must be a proper showing in the application, and peril to the fund or sufficient cause for belief that an unlawful disposition is to be made of the property out of which relief is sought must appear from the pleadings or by evidence. *Jensen v. Jensen* 857
19. An injunction against husband's disposition of property may be granted in divorce suit where it is necessary to prevent defeating the order of the court by alienation of property. *Jensen v. Jensen* 857
20. When the defendant's property consists in a large measure of bank deposits, currency, bonds and liquid assets, it is proper for the court to issue an injunction restraining defendant from transferring any of the property until alimony and attorney's fees are paid. *Jensen v. Jensen* 857
21. Attorney's fees of $1,500 were not excessive in view of elements required to be taken into consideration. *Jensen v. Jensen* 857
22. The court has power to enforce decree for alimony by appointment of receiver and likewise, if expedient, by in-

junction, either on a petition filed in the same suit or by separate bill filed in the court which granted the decree. *Jensen v. Jensen* 857

Elections.

1. The duty imposed upon the secretary of state to designate a candidate's post-office address after his name on the ballot, when the conditions prescribed by the statute exist, is a ministerial duty for the breach of which he becomes liable in damages for any injury proximately resulting therefrom. *Larson v. Marsh* 644
2. In action against an election officer for damages for failure to place a candidate's post-office address after his name on the ballot as required by statute, salary of office sought by candidate is not a proper element of damage. *Larson v. Marsh* 644

Eminent Domain.

1. The statutory power of supreme court to appoint members of court of condemnation does not have the effect of lodging the condemnation proceeding in supreme court. *In re Application of City of Sidney* 6
2. Where supreme court appoints court of condemnation in accordance with statute, petition to vacate appointment for irregularities in proceedings will not be entertained. *In re Application of City of Sidney* 6
3. A proceeding in supreme court to vacate appointment of members of court of condemnation for irregularities in the condemnation proceeding is not within original or appellate jurisdiction of supreme court, nor is it incidental to any pending judicial proceeding which could bring it within jurisdiction of supreme court. *In re Application of City of Sidney* 6
4. Procedure in condemnation is a matter of state-wide concern. *Nagle v. City of Grand Island* 67
5. A public power and irrigation district has power of eminent domain in acquisition of property and rights of way necessary to carry into effect the purposes for which it is organized. *Snyder v. Platte Valley Public Power and Irrigation District* 308
6. The measure of damages to land damaged by public improvement is difference in value before and after the construction causing damage, taking into consideration the uses to which the land was put and for which it was reasonably suitable. *Snyder v. Platte Valley Public Power and Irrigation District* 308
7. Where property is taken by eminent domain, the con-

demnor is liable to compensate for the taking and is liable for consequential damages to other property in excess of damage sustained by the public at large. *Snyder v. Platte Valley Public Power and Irrigation District*.... 308

8. Where a party sufficiently pleads and proves right of recovery under eminent domain provisions of Constitution, the party is entitled to a recovery notwithstanding charge in petition of negligence, which charge has failed of proof. *Snyder v. Platte Valley Public Power and Irrigation District*.... 308

9. Where public power and irrigation district purchases land instead of taking it by eminent domain, the purchase carries with it all incidents of taking by eminent domain so far as question of damages by reason of construction is concerned. *Snyder v. Platte Valley Public Power and Irrigation District*.... 308

10. The proper procedure in a condemnation action, where an appeal is taken from award and case is tried to jury in district court, is for court to reserve question of interest for its determination and direct the jury not to include interest in their verdict. *Langdon v. Loup River Public Power District*.... 325

11. The owner of property taken in condemnation proceeding is entitled to interest on the amount of compensation due him from the time of the taking, unless condemnor brings himself within statute which would defeat owner's right to interest. *Langdon v. Loup River Public Power District*.... 325

12. Where, on appeal from award of damages for property taken in condemnation action, verdict is less than amount of award, neither condemnor nor property owner will be liable for all of costs of appeal, but ordinarily such costs should be divided between the parties. *Langdon v. Loup River Public Power District*.... 325

13. In condemnation action, in order that benefits may be set off against damages in making an improvement, they must be special or local or such as result directly and peculiarly to the particular tract of which a part is taken. *Langdon v. Loup River Public Power District* 325

14. In condemnation action, witnesses should not be allowed to give their opinions regarding value of property for particular purpose but should state its market value in view of any purpose to which it is adapted. *Langdon v. Loup River Public Power District*.... 325

15. The only foundation for a local assessment lies in the special benefits conferred upon the property assessed

by the improvement, and an assessment beyond the benefit so conferred is a taking of property for public use without compensation and therefore illegal. *Loup River Public Power District v. County of Platte* 600

Equity.

1. In the determination of the interests of parties, equity looks through the form and regards the substance of the transaction. *Johnson v. Radio Station WOW* 406
2. The maxim that "he who comes into equity must come with clean hands" has application which bars annulment. *Christensen v. Christensen* 763

Estoppel.

1. Public policy forbids the application of the doctrine of estoppel to the state growing out of conduct and representations of its officers. *Goble v. Zolot* 70
2. Where one of two innocent parties must suffer, that one must suffer who by his own acts, conduct, or laches has made the loss possible. *In re Guardianship of Phillips* 183
3. Waiver is an intentional relinquishment of a known and existing advantage, and there can be no waiver unless party against whom it is invoked was in possession of material facts and acted with intent to waive. *George v. Guarantee Mutual Life Ins. Co* 285
4. A party may not claim estoppel in his favor on his own wrongful act or dereliction of duty, on fraud committed or participated in by him, or on acts or omissions induced by his own conduct, concealment or representations. *Sedlak v. Duda* 567

Evidence.

1. Where party seeks to establish an alleged oral agreement, made out of court, by evidence other than the testimony of the attorney making the same, and proper objection is made, it is error to receive and consider the evidence. *Oddo v. Fred F. Shields Co.* 111
2. Material admissions and declarations of party to action against his own interest may be proved as original evidence, and foundation therefor need not be laid by cross-examination of such party. *Prince v. Petersen* 134
3. The admissions and declarations of party to action against his own interest on a material matter, contained in deposition may be proved as original evidence, and foundation therefor need not be laid by cross-examination of such party. *Prince v. Petersen* 134
4. Physical facts, to be sufficient to bar recovery, must in-

disputably demonstrate that collision out of which the cause of action arose was not caused by defendant's negligence. *Riekes v. Schantz* 150

5. In action on policy, plaintiff may not, by parol evidence, impeach insured's written statements in application if it has become part of contract by stipulation and copy thereof is attached to policy at time of delivery. *George v. Guarantee Mutual Life Ins. Co.* 285
6. In condemnation action, witnesses should not be allowed to give their opinions regarding value of property for particular purpose but should state its market value in view of any purpose to which it is adapted. *Langdon v. Loup River Public Power District* 325
7. The weight to be given to expert testimony ordinarily is question for jury, and jurors are not bound by testimony of experts whose evidence is to be weighed as that of all other witnesses. *Langdon v. Loup River Public Power District* 325
8. Generally, either lay or expert witnesses may testify regarding value of land taken in condemnation action or value of remainder thereof immediately before and immediately after the taking, if proper foundation is laid showing they have acquaintance with property or are informed regarding state of market. *Langdon v. Loup River Public Power District* 325
9. A witness is qualified to testify to the market value of land if he has had an opportunity to form a correct opinion as to its value, and he need not have bought or sold land in the vicinity. *DeVore v. Board of Equalization* 351
10. Witnesses familiar with the rental value or value of use of realty are qualified to testify to market value for assessment purposes. *DeVore v. Board of Equalization* 351
11. Where witness had reasonable time, means, distance and opportunity to formulate basis for opinion as to speed of automobile, such witness could express his opinion as to speed, and credibility and weight to be given such testimony was for jury. *Crecelius v. Gamble-Skogmo, Inc.* 394
12. As foundation for admissibility of experiments to illuslustrate a given subject, it must be shown that person who makes experiment is competent to do so, that apparatus used was of a kind and in condition suitable for the experiment, and that experiment was honestly and fairly made. *Crecelius v. Gamble-Skogmo, Inc.* 394
13. The reception of evidence of experiments is within the discretion of the trial court, and in order to authorize a

reversal of a judgment on account of admission or rejection of such evidence there must have been a clear abuse of discretion. *Crecelius v. Gamble-Skogmo, Inc.* 394

14. Admissions and declarations of a party to an action against his own interests on a material matter may be proved as original evidence, even though they are contained in a deposition. *In re Estate of Heineman* 442
15. In absence of evidence to contrary, the law presumes that public officers have complied with the law and that their proceedings are valid. *State ex rel. Campbell v. Slavik* 633
16. A competent witness may state his estimate of quality of specific articles observed by him at time sufficiently near to be relevant, and he may also state whether quality so observed conforms to certain standards as to merchantability. *Franks v. Jirdon* 693
17. In action for balance due on purchase price of potatoes removed from seller's bin and weighed by buyers, testimony of men experienced and skilled in handling potatoes as to total space occupied by potatoes sold and cubic space required for a bushel or hundredweight of potatoes was admissible as tending to show actual amount of potatoes occupying such space. *Franks v. Jirdon* 693
18. In action for price of potatoes sold, a witness may give his estimate of quantity, if he is qualified by observation and possesses sufficient data, knowledge or experience on which to ground his opinion. *Franks v. Jirdon* 693
19. Where contract for sale of potatoes provides exactly how the potatoes must be processed, a witness who examined the potatoes in the bins, and who has knowledge and experience in processing and handling this type of potatoes, may properly estimate the loss in quantity which will be sustained in processing potatoes to meet contract conditions. *Franks v. Jirdon* 693
20. Laws of foreign state may be received in evidence when properly authenticated by proper official. *Pontiac Improvement Co. v. Leisy* 705
21. Ordinarily speed of an automobile is not a matter of exclusive expert knowledge and any one who has knowledge of time and distance and a reasonable opportunity to formulate a basis for an opinion is a competent witness to give an estimate of speed. *In re Estate of Potts* 729
22. A witness who has shown himself qualified to give an opinion as to speed of moving car may do so even though it appears that car was coming directly toward him and that his view was partially blocked. *In re Estate of Potts* 729

23. Testimony that speed of an automobile was "fast" and that the colliding cars came together "fast and hard" are mere conclusions and form no basis from which a jury may determine negligence as a result of excessive speed. *In re Estate of Potts* 729
24. In absence of evidence connecting use of liquor with cause of automobile accident, defendant motorist's statement, made a considerable time after accident, that he would never drink any more, was not admissible as a part of *res gestæ* or as an admission that defendant had been drinking or was under influence of liquor at time of accident. *Komma v. Kreifels* 745
25. A statement to be admissible as a part of the *res gestæ* must have been spontaneous and impulsive, and made at a time and under such circumstances as to induce belief that it was not result of premeditation. *Komma v. Kreifels* 745
26. Trial court is vested with a judicial discretion in determining whether proof that originals of letters or telegrams have been lost or destroyed is satisfactory, so as to render secondary evidence of their contents admissible. *In re Estate of Baker* 797
27. If letters or telegrams are accidentally destroyed by party without fault secondary evidence may be given of their contents, and even if their destruction is voluntary secondary evidence of their contents may be given if circumstances accompanying the act are free from suspicion of intent to defraud and consistent with an honest purpose. *In re Estate of Baker* 797
28. Ordinarily the loss or destruction of originals of letters or telegrams should be proved by the last custodian of the instruments unless his absence is satisfactorily explained or his disqualification appears, in which event proof may be made by any competent witness who has knowledge of the facts. *In re Estate of Baker* 797
29. Persons engaged in performing services of same character as those to be valued, and persons who had knowledge of business in and for which services had been rendered and of their value, may give their opinion as to the value of the services. *In re Estate of Baker* 797
30. If it is shown by satisfactory proof that originals of letters or telegrams have been lost or destroyed, secondary evidence of their contents becomes admissible. *In re Estate of Baker* 797
31. The admission in evidence of a chisel found in defendant's car at the time of his arrest which was shown to

have fitted into various wounds inflicted upon the head of the victim of the homicide, and shown further to have been such an instrument as could have inflicted such wounds, was not erroneous. *MacAvoy v. State* 827

32. A photograph of the victim of a murder which tends to throw light upon or illustrates any controverted issue, a proper foundation for its reception in evidence having been laid, may properly be received in evidence even if it presents a gruesome spectacle. *MacAvoy v. State* 827
33. In prosecution for murder, torn and bloody articles of clothing found upon the body of the victim are proper to be received in evidence when sufficient foundation has been laid, where they tend to illustrate or clarify any controverted issue in the case. *MacAvoy v. State* 827
34. 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 George* 887
35. The question of where the burden of proof shall rest is to be determined by the pleadings. *In re Estate of George* 887

Executors and Administrators.

1. The right of widow or next of kin to nominate a suitable person to administer estate of deceased person exists only for period of 30 days after death. *In re Estate of Wortman* 141
2. An administrator is not chargeable with interest on money which he holds subject to order of the court, unless he received interest thereon, or the circumstances are such that he might and ought to have received interest. *In re Estate of Wortman* 141
3. The county court has power to require an executor or administrator to render a true and just account of all assets and property which have come into his possession, and, if he is deceased, to compel his personal representative and his bondsmen to make such accounting. *In re Estate of Statz* 154
4. If a third person, who has himself planned, or who has participated in, the wasting of an estate, is before the county court, as on objections to final account, the court may compel him to refund to the representative what he has unlawfully received. *In re Estate of Statz* 154
5. An executor or administrator should preserve property of the estate entrusted to him, separate and apart from his own, to give it an earmark so that it will always be

technically in custody of the county court and readily known and traceable, and violation of this duty is a breach of trust which may make him personally liable though acting in good faith. *In re Estate of Statz*..... 154

6. The rule against a trustee, executor, or administrator borrowing money from trust fund in his charge at expense of beneficiary or advantage to himself applies where spouse of trustee is the recipient of such loan, advantage or profit. *In re Estate of Statz*..... 154
7. The statute of limitations is not available as a defense to an executor or administrator, or the personal representative of a deceased executor or administrator, in an action for an accounting of the assets of an estate, unless he repudiates the trust or until termination thereof. *In re Estate of Statz*..... 154
8. Any person beneficially interested in the estate embraced in an administration account may cite the executor or administrator to file an account, object, or file objections to the terms or matters contained in the account, and representative may be surcharged with losses occurring because of breach of trust. *In re Estate of Statz*..... 154
9. Legatees and distributees are within rule authorizing interested persons to object to representative's account, and when they positively allege their status in a petition or objections to the account, which is admitted by demurrer, they have such interest as will permit the action to be maintained. *In re Estate of Statz*..... 154
10. An intelligible statement of facts under oath showing an existing substantial right by reason of breach of trust, which the court has jurisdiction to enforce, concluding with prayer for general equitable relief, is sufficient to state a cause of action and sustain a judgment in county court. *In re Estate of Statz*..... 154
11. An administrator has burden of proving defense that claim against deceased's estate was paid in full during life of deceased. *In re Estate of Johnson*..... 372
12. Generally, if payment for services was to be made by conveyance or devise of property by decedent, but he refused or neglected to perform agreement in his lifetime, and amount to be paid for such services was not agreed upon, person rendering services is entitled to recover reasonable value thereof. *In re Estate of Baker*.... 797
13. The presumption of gratuity which exists with reference to services rendered and received between closely related persons is rebuttable by circumstantial as well as direct evidence, and such presumption diminishes in direct pro-

portion to remoteness of the degree and nature of the family relationship and character of the duties performed. *In re Estate of Baker* 797

14. Recovery is permitted for services rendered to decedent during his lifetime if evidence shows that services were rendered under an express contract, either written or oral, to pay for them, or where there was an implied agreement to pay as when circumstances are such that a mutual intention, understanding or expectation that the services should be paid for is a reasonable and just conclusion established by satisfactory evidence. *In re Estate of Baker* 797
15. An administrator may ask the county court for instructions as to his conduct respecting matters relating to the administration of an estate, where there is room for doubt as to his duties or policy which should be pursued. *Nelson v. Janssen* 811
16. The right of an administrator to retain a distributive share from a debtor to an estate and apply it to his indebtedness rests on broad principles of equity, and such right exists without statute. *Nelson v. Janssen* 811
17. The right of an administrator to retain distributive share of decedent's estate from distributee indebted thereto and apply it to his indebtedness may be asserted in the county court, which has exclusive and original jurisdiction over probate of wills and administration of estates. *Nelson v. Janssen* 811
18. The right to inquire into and determine the indebtedness of a distributee of an estate and to order a reduction of the same from his share of the estate is incident to the county court's authority to make settlement and distribution of estate. *Nelson v. Janssen* 811

Fixtures.

1. Removable chattels annexed to the freehold may remain personalty where the parties so intend, as evidenced by their conduct. *Goble v. Zolot* 70
2. Fences constructed upon farm are generally held to be fixtures and a part of the realty unless specifically exempted by contract or otherwise, and when thus affixed become subject to the same rules of law as the land itself. *Runner v. Pierson* 847
3. Fixtures placed upon land of another by a stranger without previous consent of the owner and without any contract with him, express or implied, to the contrary, become a part of the realty and may not be removed by

the party erecting them or his vendee as against the owner of the soil. *Runner v. Pierson* 847

Forgery.

1. To utter and publish a forged, counterfeited, altered, or changed instrument, such as a railroad ticket, is to offer to pass it to another with intent to defraud, declaring or asserting, directly or indirectly, by words or actions, that it is good. *Robeen v. State* 910
2. To put in circulation a forged, counterfeited, altered, or changed railroad ticket, within statute fixing punishment for such offense, is to pass such instrument or cause it to be passed to another with intent to defraud. *Robeen v. State* 910

Fraud.

1. To maintain an action for damages for false representations, plaintiff must allege and prove by preponderance of evidence representation was made, that it was false, that defendant knew it was false, or else made it without knowledge as a positive statement of known fact, that plaintiff believed representation to be true, and relied on and acted on representation, that plaintiff was injured thereby and amount of damages. *Bauer v. Wood* 14
2. Fraud is never presumed, but must be proved by a preponderance of evidence by person alleging it. *Bauer v. Wood* 14
3. Where fraud is material with reference to transaction subsequently entered into by person defrauded, it is assumed in absence of facts showing the contrary that it was induced by fraud. *George v. Guarantee Mutual Life Ins. Co.* 285
4. Party relying on false representations as ground for recovery is required to sustain burden of proving that the representations were false and so known to be or made without knowledge but as a positive statement of known fact, that they were believed to be true, that they were relied and acted upon, and that party believing and relying thereon was thereby damaged. *Cantrell v. Owen* .. 361
5. Constructive fraud is a breach of legal or equitable duty which, irrespective of the moral guilt of the fraudfeasor, the law declares fraudulent because of its tendency to deceive others, to violate public or private confidence, or to injure public interest. *Johnson v. Radio Station WOW* 406
6. Neither actual dishonesty of purpose nor intent to de-

ceive is an essential element of constructive fraud. *Johnson v. Radio Station WOW* 406
7. Fraud in a transaction may be proved by inferences which may reasonably be drawn from intrinsic evidence respecting transaction itself, such as inadequacy of consideration, or extrinsic circumstances surrounding the transaction. *Johnson v. Radio Station WOW* 406
8. To maintain an action for fraudulent concealment, a duty to disclose the truth and that disclosure was not made when opportunity was presented whereby the party to whom the duty was due was induced to act to his injury must be established. *In re Estate of Reikofski* 735
9. An allegation that an act was fraudulently done, or that one fraudulently conceals, is merely a conclusion and characterization. *In re Estate of Reikofski* 735

Fraudulent Conveyances.

A homestead of debtor to extent of $2,000 is not subject of fraudulent alienation, but if, above any valid encumbrance thereon, there is a surplus in excess of $2,000 within the homestead limits, a conveyance of such surplus may be set aside when made in fraud of creditors. *Stocker v. Hilger* 202

Guardian and Ward.

1. A guardian must apply to and receive from county court an order authorizing him to loan ward's funds, and is liable for loss ensuing from loan without such authority. *In re Guardianship of Phillips* 183
2. Approval by county court, without notice to interested parties, of guardian's reports of loans of ward's funds made without court order, is not equivalent to order authorizing such loans. *In re Guardianship of Phillips* .. 183
3. Before investing ward's funds in mortgage security, guardian should file written application with probate court, and that court should give proper notice and enter a written order authorizing the specific investment. *In re Guardianship of Phillips* 183
4. A guardian need not have unusual ability in management of ward's estate, but must employ such diligence and prudence as men of ordinary intelligence employ in their own affairs. *In re Guardianship of Phillips* 183
5. A guardian's duties are similar to those of trustee in handling trust funds, and every violation of duty required by law, whether willful, fraudulent, or done through negligence or mistake, is a breach of trust. *In re Guardianship of Phillips* 183

6. A guardian is not protected because he acts in good faith or upon advice of counsel, since if in doubt he can protect himself by obtaining court orders for his guidance. *In re Guardianship of Phillips* 183
7. Guardian's claim that ward was estopped from questioning his illegal handling of her assets because, as a minor, she apparently acquiesced in his actions, was not supported by any evidence of ward's consent to his acts after reaching majority. *In re Guardianship of Phillips* 183

Habeas Corpus.
1. Habeas corpus is a collateral, not a direct, proceeding when regarded as a means of attacking a judgment sentencing a defendant, and it cannot be used as a substitute for a writ of error. *In re Application of Maher, North v. Dorrance* 484
2. Habeas corpus is a proper remedy when one is deprived of his liberty by reason of a void judgment. *In re Application of Maher, North v. Dorrance* 484
3. Habeas corpus is not a substitute for appeal and error or writ of review. *In re Application of Niklaus, Niklaus v. Holloway* 503
4. Habeas corpus is a proper proceeding in which to determine whether or not a charge of contempt under which a person is detained is void. *In re Application of Niklaus, Niklaus v. Holloway* 503
5. In the return of a writ of habeas corpus, facts must appear which warrant restraint of the relator. *In re Application of Niklaus, Niklaus v. Holloway* 503
6. A return to a writ of habeas corpus showing that the arrest was by virtue of a mittimus issued on proper authority is *prima facie* sufficient as a showing of cause of detention. *In re Application of Niklaus, Niklaus v. Holloway* 503
7. Habeas corpus is a collateral, not a direct, proceeding when regarded as a means of attack upon a judgment sentencing a defendant, and it cannot be used as a substitute for a writ of error. *In re Application of Carper, Tesar v. Bowley* 623
8. Regularity of proceedings leading up to sentence in criminal case cannot be inquired into on an application for writ of habeas corpus, and if court had jurisdiction of defendant and the authority to try the charge against him, its action can be assailed only in a direct proceeding. *In re Application of Carper, Tesar v. Bowley* 623
9. The denial of an application for, and refusal to allow, a

writ of habeas corpus by the district court is a final order affecting a substantial right made in a special proceeding which in effect terminates the action. *In re Application of Tail, Tail v. Olson* 820

10. Generally, final orders in habeas corpus proceedings may be reviewed on appeal. *In re Application of Tail, Tail v. Olson* 820

Homestead.

1. Where husband and wife acquired homestead as tenants in common, and wife predeceased husband and he and daughter occupied homestead until his death, homestead interest vested on father's death in daughter as sole heir, and was not subject to payment of any liability existing against father, except those existing under the homestead law. *Stocker v. Hilger* 202
2. Where surviving heir owns a one-fourth interest in the fee, and in addition a homestead interest in amount of $2,000, free from debts of father, heir was entitled to *pro rata* share of rent in ratio that homestead interest bore to value of the three-fourths interest in fee, subject to payment of debts, where debts of estate would absorb the excess. *Stocker v. Hilger* 202
3. Money expended for repairs and improvements on homestead property may be recovered *pro rata* on the basis of the ownership of the fee. *Stocker v. Hilger* 202
4. Where a husband and wife reside upon a homestead and the wife dies, the homestead character of the land continues and the surviving husband, although he may have no children or dependents residing with him, may still retain the homestead as such. *Forshay v. Johnston* 525
5. The right to use and enjoyment of homestead which passes to surviving spouse on death of homestead owner is transferrable and may be mortgaged or conveyed, and it is not lost by abandonment of premises, by change in character of the use of the premises or by remarriage of the spouse. *Forshay v. Johnston* 525

Homicide.

1. Murder may be committed in perpetration of rape within the meaning of statute making it first degree murder, although it occurs after the rape itself has been technically committed, if the homicide is committed within the *res gestæ* of the rape. *MacAvoy v. State* 827
2. One who kills another in the perpetration of or attempt to perpetrate a rape is guilty of first degree murder without proof of premeditation, malice or intention. *MacAvoy v. State* 827

3. In prosecution for murder in the perpetration of or attempt to perpetrate a rape, necessary elements of the crime may be established by circumstantial evidence. *MacAvoy v. State* 827
4. In prosecution for murder, torn and bloody articles of clothing found upon the body of the victim are proper to be received in evidence when sufficient foundation has been laid, where they tend to illustrate or clarify any controverted issue in the case. *MacAvoy v. State* 827
5. A photograph of the victim of a murder which tends to throw light upon or illustrates any controverted issue, a proper foundation for its reception in evidence having been laid, may properly be received in evidence even if it presents a gruesome spectacle. *MacAvoy v. State* 827
6. The admission in evidence of a chisel found in defendant's car at the time of his arrest which was shown to have fitted into various wounds inflicted upon the head of the victim of the homicide, and shown further to have been such an instrument as could have inflicted such wounds, was not erroneous. *MacAvoy v. State* 827
7. A person may be an aider, abettor or procurer in involuntary manslaughter because of a common purpose to participate in unlawful acts, the natural and proximate result of which is to kill another, but when persons are present, aiding and assisting each other in the commission of unlawful acts which proximately result in the death of another all such persons are in fact principals. *Puckett v. State* 876
8. Where one drives an automobile in violation of law pertaining to operation of such vehicles on public highway and in so doing, as a result of the violation of law, kills another, he is guilty of manslaughter. *Puckett v. State* 876

Husband and Wife.

1. The common-law disabilities of a married woman to enter into contracts exist in Nebraska except in so far as they have been abrogated or changed by statute. *Smith v. Johnson* 769
2. Postnuptial contracts entered into between husband and wife while complete marriage relation exists settling their property rights, including their respective rights of inheritance in property of the other, are invalid. *Smith v. Johnson* 769

Indemnity.

A contract of indemnity is an obligation or duty resting on one person to make good any loss or damage another has

incurred or may incur by acting at his request for his benefit. *Lyhane v. Durtschi* 256

Indictment and Information.

The statute which prescribes a short form information for charging manslaughter is constitutional, and an information drawn in the language of such statute is sufficient to properly charge the crime. *Puckett v. State* 876

Insanity.

1. Where a defendant asserts he is not guilty of the crime charged because of insanity, it is the province of the jury to determine whether the defendant, at the time of the commission of the alleged crime, had sufficient mental ability to distinguish between right and wrong in respect to the subject matter of the inquiry. *MacAvoy v. State* 827
2. A determination by jury upon conflicting evidence that a defendant who asserts he is not guilty of the crime charged because of insanity was responsible for his acts will not ordinarily be disturbed on appeal. *MacAvoy v. State* 827

Insurance.

1. Untrue answers in application for life insurance in regard to matters which are shown to be within knowledge of applicant and are material to the risk will avoid the policy. *George v. Guarantee Mutual Life Ins. Co* 285
2. An applicant for insurance should exercise toward insurer the good faith demanded of it. *George v. Guarantee Mutual Life Ins. Co* 285
3. A false statement by applicant for life policy that he has not consulted physicians is material because it conceals from insurer fact of such consultations and deprives it of opportunity of making independent investigation. *George v. Guarantee Mutual Life Ins. Co* 285
4. Where insured has made several misrepresentations in securing life insurance, a partial and incomplete disclosure of falsity to insurer's agent is insufficient to avoid effect of the fraud and is no basis for a waiver of insurer's right to cancel the policy on ground of fraud. *George v. Guarantee Mutual Life Ins. Co* 285
5. A person may in good faith and without fraud, collusion or an intent to enter into a wagering contract, lawfully take out a policy of insurance on his own life and make benefit payable to whomsoever he pleases, either himself or his estate or a third person, regardless of whether or

not the latter has an insurable interest. *Guardian Nat. Life Ins. Co. v. Eddens* 339

6. Where there is a named beneficiary followed by the term "wife," that term is descriptive of the person and of assistance in determining the identity of the beneficiary. *Guardian Nat. Life Ins. Co. v. Eddens* 339

Intoxicating Liquors.

1. In suit to abate a roadhouse as a public nuisance, evidence sustained finding that defendants were maintaining a place where persons are permitted to resort for purpose of drinking alcoholic liquors contrary to the provisions of the liquor control act. *State ex rel. Johnson v. Hash* 495
2. A place of business in a rural district, where sale of alcoholic liquors by the drink may not be made, which provides necessary ingredients for mixed drinks to customers who furnish their own liquor, is a public nuisance and may be abated by injunction. *State ex rel. Johnson v. Hash* 495

Judges.

A party to an action may, in good faith, make a motion for change of venue or disqualification of trial judge. *Lippincott v. Lippincott* 486

Judgment.

1. A prayer for general relief in equity action is sufficient to authorize any judgment to which party is entitled under the pleadings and evidence, though he may have misconstrued his remedy and prayed specially for lesser relief. *School District No. 70 v. Wood* 241
2. A prayer for general relief in an equity action is sufficient to authorize any judgment to which the party is entitled under the pleadings and evidence adduced in support thereof. *Johnson v. Radio Station WOW* 432
3. The minutes of the judge cannot be regarded as the judgment or decree rendered by the court, but are merely a memorandum of the decision made by the trial judge upon his docket for guidance of the clerk in entering the decree upon the journal. *In re Application of Niklaus, Niklaus v. Holloway* 503
4. The failure of a judge to sign the judgment does not have the effect of rendering it invalid. *In re Application of Niklaus, Niklaus v. Holloway* 503
5. Where court has jurisdiction of parties and subject matter of action, a judgment rendered is not void and is not

subject to collateral attack, even though court was in error in holding that cause of action was properly stated. *Wistrom v. Forsling* 638

6. Where allegations of petition are sufficient to inform defendant what relief plaintiff demands, the court, having power to grant the relief in a proper action, has jurisdiction to render judgment. *Wistrom v. Forsling* 638
7. A judgment of the district court becomes a lien against real estate from time of its entry on the judgment record. *Pontiac Improvement Co. v. Leisy* 705
8. The doctrine of *res adjudicata* includes not only the things which were determined in the former suit, but also any other matter properly involved which might have been raised and determined therein. *Wightman v. City of Wayne* 871

Judicial Sales.

The only matters adjudicated in proceedings for confirmation of judicial sale are those steps required to be done for satisfaction of the decree. *County of Scotts Bluff v. Frank* 512

Jury.

1. On challenge to array or motion to quash the venire, it will be presumed, in absence of evidence to contrary, that officers charged with duty of selecting, drawing and summoning jury have acted faithfully and according to law, and burden of showing contrary is upon challenging party. *Maher v. State* 463
2. When a general verdict is set aside by trial court, it should award a new trial. *In re Estate of George* 915

Justices of the Peace.

1. A case removed to district court from judgment of a justice of the peace is rightly dismissed if appellant, by reason of his own laches, failed to file an appeal bond within time limited by statute. *Drier v. Knowles Vans, Inc.* 619
2. The statute requiring one appealing from justice of the peace court to district court to furnish an appeal bond within 10 days is mandatory, and giving of such bond is essential to confer jurisdiction of cause on district court. *Drier v. Knowles Vans, Inc.* 619
3. Where a party makes the mails his agent for the purpose of delivering an appeal bond to the court, the negligence of the agent, if any, is the negligence of the party. *Drier v. Knowles Vans, Inc.* 619
4. The rule that record of trial court in all appellate pro-

ceedings imports absolute verity applies to proceedings in justice of the peace courts. *Drier v. Knowles Vans, Inc.* 619

Landlord and Tenant.

In absence of express covenant or stipulation in lease lessor is not bound to make repairs to leased property. *Bartholomew v. Skelly Oil Co.* 51

Larceny.

1. The intent with which property alleged to have been stolen was taken by accused may be proved by circumstantial evidence. *Phillips v. State* 772
2. Nonconsent of owner of stolen property may be inferred from circumstances. *Phillips v. State* 772

Libel and Slander.

1. A demurrer admits truth of allegations of petition for libel and implications flowing naturally from the publication. *Heckes v. Fremont Newspapers, Inc.* 267
2. Publication is libelous *per se* if language imputes to person the commission of crime, subjects him to public ridicule, renders him contemptible, or hinders virtuous men from associating with him. *Heckes v. Fremont Newspapers, Inc.* 267

Licenses.

1. Where defendant established by uncontradicted evidence that securities had been outstanding and in the hands of the public for not less than five years and were therefore exempt from operation of the blue sky law, conviction for sale of such securities should be reversed. *Robbins v. State* 43
2. Where defendant was shown by evidence to have engaged in the business of selling, exchanging and offering to sell and exchange securities without a permit from the department of banking to do business as a broker, conviction under the blue sky law should be sustained. *Robbins v. State* 43
3. The power to license a radio station or to transfer, assign or annul such license is within the exclusive jurisdiction of the Federal Communications Commission. *Johnson v. Radio Station WOW* 432
4. A judgment vacating a lease of a radio station for constructive fraud and ordering return of property in no way encroaches upon the powers of the Federal Communications Commission to license, transfer, assign or annul such license. *Johnson v. Radio Station WOW* 432

5. The Constitution does not specifically forbid the imposition of a license fee by the state at large to hunt and fish and the legislature is constitutionally free to provide by what authority such licenses shall be imposed and to direct the legal use to which the fees shall be appropriated. *Wilcox v. Havekost* 562

Limitation of Actions.

1. The statute of limitations is not available as a defense to an executor or administrator, or the personal representative of a deceased executor or administrator, in an action for an accounting of the assets of an estate, unless he repudiates the trust or until termination thereof. *In re Estate of Statz* 154
2. A cause of action to recover on an indemnity contract accrues when the loss occurs. *Lyhane v. Durtschi* 256
3. The statute of limitations bars an action on a written indemnity contract when the loss has occurred five years previous to the bringing of the action. *Lyhane v. Durtschi* 256
4. Where loss on an indemnity contract occurs and no counterclaim then exists in favor of the defendant, the statute of limitations is not tolled, but begins to run from the time plaintiff's loss occurs. *Lyhane v. Durtschi* 256
5. An action to enforce the provisions of a pension law is an action upon a liability created by statute and, in absence of a limitation period in the act, is barred in four years. *Barney v. City of Lincoln* 537
6. An action to determine the liability of a city for payment of pension benefits necessarily precedes and is distinct from an action to recover delinquent installments after pension has been granted. *Barney v. City of Lincoln* 537
7. A cause of action accrues when a suit may be maintained thereon and the statute of limitations begins to run at that time. *Barney v. City of Lincoln* 537
8. A cause of action to establish right to pension from city accrued at time plaintiff became totally and permanently disabled and, where action was not commenced within four years thereafter, the statute of limitations barred a recovery. *Barney v. City of Lincoln* 537
9. Where right to pension has been established, the statute of limitations operates against delinquent payments from date each payment accrues. *Barney v. City of Lincoln* 537
10. The statute of limitations on right to refund of special

assessments paid under protest begins to run at expiration of the 90-day period allowed in which to make refund after demand and not from time assessment was levied. *Loup River Public Power District v. County of Platte* 600

11. A new promise as an agency for the continuance or revival of a cause of action operates only in the field of contractual obligations to save a remedy as against the bar of a statute of limitations. *Hollenbeck v. Guardian Nat. Life Ins. Co.* 684
12. The statute providing that any written promise to pay an existing liability extends the statute of limitations applies to actions founded on contract and has no application to actions founded on a tort liability. *Hollenbeck v. Guardian Nat. Life Ins. Co.* 684
13. An action for relief on ground of fraud may be commenced only within four years after discovery of the facts constituting the fraud or of facts sufficient to put a person of ordinary intelligence on inquiry, which, if pursued, would lead to such discovery. *Hollenbeck v. Guardian Nat. Life Ins. Co.* 684
14. Where services are rendered under a contract of employment which does not fix term of service or time of payment, contract is continuous and the statute of limitations does not commence to run until the employee's services are terminated. *In re Estate of Baker* 797

Malicious Prosecution.

Probable cause for instituting a criminal prosecution does not depend upon mere belief however sincerely entertained, but knowledge of facts as would induce a reasonable man to believe that accused was guilty is essential. *Brewer v. Fischer* 712

Mandamus.

1. After statutory period for appeal by taxpayer has passed, one in whose favor a claim has been duly allowed by a county board may, by mandamus, compel issuance of a warrant for payment of such claim. *State ex rel. Campbell v. Slavik* 633
2. The existence of remedy at law will not prevent issuance of writ of mandamus unless legal remedy is adequate to afford relief upon the very subject matter involved, and appropriate and effectual to enforce right or compel performance of particular duty in question. *State ex rel. Campbell v. Slavik* 633

Marriage.

1. A common-law marriage, alleged to have taken place prior to adoption of statute abolishing such marriages, may be proved by showing the mutual consent of the parties thereto. *Forshay v. Johnston* 525
2. A common-law marriage is a holding forth to the world by conduct, demeanor, habits and manner of daily life that the man and woman who live together have agreed to take each other in marriage, permanently and exclusively of all others, and to stand in mutual relation of husband and wife. *Forshay v. Johnston* 525
3. The validity of a marriage is determined by the law of the place where it was contracted, and if valid there it will be held valid everywhere, but if invalid by the *lex loci contractus* it is invalid wherever the question may arise. *Forshay v. Johnston* 525
4. A marriage is not void unless the statutes expressly so declare, and courts should not so construe it unless the legislative intent to such effect is clear. *Christensen v. Christensen* 763

Master and Servant.

1. Where an employee departs from his employment and undertakes a mission of his own, employer is not liable for employee's negligence occurring prior to his return to duties of his employment. *Sutton v. Inland Construction Co.* 721
2. To restore relation of master and servant, or principal and agent, after a deviation or departure from employment, employee must resume duties of his employment. *Sutton v. Inland Construction Co.* 721

Militia.

An enlisted member of the National Guard when called for training by the governor through order of the adjutant general under National Defense act is in the service of the state. *Lind v. Nebraska National Guard* 122

Mortgages.

1. A foreclosure sale will not be set aside for inadequacy of price unless it appears that the inadequacy of price is so great as to shock the conscience or justify a finding of fraud, surprise or mistake. *Federal Land Bank v. Palmer* 46
2. On objection to confirmation of foreclosure sale an element to be considered is the question of whether or not a higher bid may be obtained in event of resale. *Federal Land Bank v. Palmer* 46

3. A notice of sale under foreclosure decree is not rendered invalid by including therein more property than was authorized by the decree, in absence of anything to indicate that any one was prejudiced or misled thereby. *Federal Land Bank v. Palmer* 46
4. Payment of interest is a "partial payment" within the provisions of statute barring partial payments from tolling or extending the ten-year limitation period for mortgage foreclosure. *Weekes v. Rumbaugh* 103
5. Where confirmation of sale has been had after death of a party thereto, and no objection was made prior to confirmation, it cannot be attacked collaterally. *Vybiral v. Schildhauer* 114
6. It is not error to appoint a receiver for premises involved in mortgage foreclosure suit on showing that mortgaged premises are probably insufficient to discharge mortgage debt. *Modisett v. Campbell* 222
7. Where mortgage foreclosure sale to mortgagee is voidable, owner of equity of redemption may maintain an action to redeem, and where mortgagee goes into possession, the owner may require an accounting. *Sedlak v. Duda* 567
8. Offer in petition to pay amount due mortgagee is sufficient to support redemption suit without previous tender of amount due. *Sedlak v. Duda* 567
9. The right to redeem and right to foreclose a mortgage are reciprocal, and action to redeem may be brought at any time before statutory bar of ten years is complete. *Sedlak v. Duda* 567
10. The right to redeem from mortgage foreclosure is a favorite of equity, and will not be allowed to be taken away, except upon strict compliance with steps necessary to divest it, and by due process of law. *Sedlak v. Duda* 567
11. For purpose of redemption from mortgage foreclosure, a purchaser in good faith at judicial sale believing he has a good title will be entitled to credit for improvements made upon the property, but one who buys with notice of facts is not a purchaser in good faith. *Sedlak v. Duda* 567
12. Where sale to mortgagee is voidable, he is accountable for rents and profits, together with interest allowed at contract rate, and where possession is accompanied by force and fraud, mortgagee, on suit to redeem, cannot be charged with less than the whole rental value during his possession. *Sedlak v. Duda* 567

13. Interest should not be charged upon rents and profits from end of year when they accrued, but rents and profits, less taxes paid, without interest on such taxes, should be first applied at end of each year to extinguish interest upon principal for that year, and if a balance of rents and profits remains thereafter it should be applied *pro tanto* to payment of principal of mortgage until extinguished, after which rents and profits, less taxes paid, shall draw interest from end of year at statutory rate until date of judgment. *Sedlak v. Duda* 567

Motions.

A motion which cannot be allowed in substantially the same terms as requested may be overruled. *Sedlak v. Duda* 567

Municipal Corporations.

1. Where legislature has enacted a law affecting municipal affairs, which are also of state-wide concern, such law takes precedence over any provision in a home rule charter. *Nagle v. City of Grand Island* 67
2. The existence of legislation making pension and retirement provisions for members of a police department and the acceptance or retention of employment as a member of a police department does not establish a contract, between the member and the city, that such members will thereafter be granted the retirement and pension benefits provided in such legislation. *Lickert v. City of Omaha* 75
3. The right of legislative body to amend the pension law is not affected by the fact that a given sum was required by law to be deducted each month from police officer's pay by disbursing officer and paid into a pension fund. *Lickert v. City of Omaha* 75
4. The court will not substitute its judgment for that of the city council if council's classification for zoning purposes is fairly dependable. *Dundee Realty Co. v. City of Omaha* 448
5. In determining the validity of a city zoning ordinance regularly passed in exercise of police power, the court will presume that the city council acted with full knowledge of the conditions relating to the subject of municipal legislation. *Dundee Realty Co. v. City of Omaha* 448
   Cassel Realty Co. v. City of Omaha 753
6. The ownership and use of private property in a city is subject to proper police regulations required by public safety and welfare. *Dundee Realty Co. v. City of Omaha* 448

7. If a city ordinance is valid as an exercise of police power, courts will not inquire into the motives of the city council in enacting it. *Dundee Realty Co. v. City of Omaha* 448
8. Where a state, by itself or through its corporate creations, embarks in an enterprise commercial in character or which is usually carried on by individuals or private companies, its sovereign character is ordinarily waived, and it is subject to like regulations with persons engaged in same calling, but such corporate creations do not lose their character as public corporations. *Platte Valley Public Power and Irrigation District v. County of Lincoln* 584
9. Statute authorizes bringing of original action to recover special assessments allegedly levied or assessed for illegal or unauthorized purposes. *Loup River Public Power District v. County of Platte* 600
10. City of Omaha, under home rule charter, has power by ordinance to zone city into districts, to restrict use to which the buildings in particular districts may be put, to change or supplement the zonings and to change restrictions on use of buildings. *Cassel Realty Co. v. City of Omaha* 753
11. The statutes and Omaha home rule charter empowering city to zone city into districts and to restrict use to which buildings may be put is valid exercise of police power. *Cassel Realty Co. v. City of Omaha* 753
12. An ordinance zoning city or restricting use to which buildings may be put must not be unreasonable, discriminatory, or arbitrary, and must bear some relationship to purposes sought to be accomplished. *Cassel Realty Co. v. City of Omaha* 753
13. If necessity under the police power could have justified enactment of zoning ordinance, court, in action to enjoin enforcement of ordinance, must assume that it did. *Cassel Realty Co. v. City of Omaha* 753
14. In action to enjoin enforcement of zoning ordinance, if court finds that city commission passed ordinance as necessary for public health, safety, comfort or general welfare, court cannot say ordinance is unreasonable, arbitrary or confiscatory even if it depreciates value of business property or restricts liberty of citizens regarding ownership and use of property. *Cassel Realty Co. v. City of Omaha* 753
15. In order for a city of the second class to enter into a valid contract, the yeas and nays of the city council

must be called and recorded with reference thereto, with a majority of the whole number thus shown in the affirmative. *Wightman v. City of Wayne* 871

16. Where no record of the proceedings of the city council with reference to a purported contract can be shown, there is a presumption that no such contract was entered into. *Wightman v. City of Wayne* 871

Negligence.

1. Negligence is the failure to do that which an ordinarily prudent person would do, or the doing of that which an ordinarily prudent person would not do, under the same circumstances. *McCullough v. Omaha Coliseum Corporation* 92
2. Negligence cannot be proved by speculation or conjecture. *McCullough v. Omaha Coliseum Corporation* 92
3. Where driver of automobile is suddenly confronted with an emergency requiring instant decision, he is not necessarily guilty of negligence in pursuing a course which mature reflection or deliberate judgment might prove to be wrong. *Riekes v. Schantz* 150
4. Where different minds may reasonably draw different conclusions from the same facts as to whether or not they establish negligence or contributory negligence, such issues should be submitted to a jury. *Riekes v. Schantz* 150
5. Slight negligence means small or little negligence. *Johnson v. Batteen* 384
6. Gross negligence means gross or great negligence, that is, negligence in a very high degree. *Johnson v. Batteen* 384
7. Where operator of automobile sees an approaching automobile and tests an obvious danger by moving from a place of safety into path of oncoming vehicle and is struck, he is guilty of contributory negligence sufficient to bar recovery as a matter of law, regardless of whether he is driving favored automobile. *Whitaker v. Keogh* 790

New Trial.

To justify new trial on ground verdict is excessive, that fact must be evident, and it is not sufficient merely to raise doubt as to whether damages are too large. *Tate v. Barry* 517

Notice.

Where one is put upon inquiry, he is to be charged with notice of all such facts as he would have learned by reasonable inquiry. *Hollenbeck v. Guardian Nat. Life Ins. Co.* 684

Novation.

In order to result in a novation, agreement must contain stipulations extinguishing existing liability and substituting a new one in its place. *In re Estate of Wise* 273

Nuisance.

1. A place where gambling is publicly and continuously permitted is a public nuisance which may properly be abated by injunction. *State ex rel. Johnson v. Hash* 495
2. The operation of a place which permits minors to gather for purpose of gambling and drinking intoxicating liquors is a public nuisance. *State ex rel. Johnson v. Hash* 495

Officers.

1. Where public officer has statutory power to do an act which concerns the public interest or rights of third persons, execution of the power may be insisted on as a duty, although wording of the statute is merely permissive. *Larson v. Marsh* 644
2. A ministerial act is one performed in response to a duty which has been positively imposed by law and its performance required at a time and in a manner or upon conditions which are specifically designated, the duty to perform under the conditions specified not being dependent upon officer's judgment or discretion. *Larson v. Marsh* 644
3. That a public officer may be obliged to ascertain facts on existence of which a duty to perform becomes clear and specific does not of itself convert the act into a judicial act. *Larson v. Marsh* 644
4. Where statute invests an individual with a direct legal interest and legal right to require performance of a ministerial duty by a public officer, such officer may be required to respond in damages for breach of the duty. *Larson v. Marsh* 644

Parties.

1. Actions should be prosecuted in the name of the real party in interest who should be a living entity, a person of legal responsibility. *Vybiral v. Schildhauer* 114
2. A defect of parties must be taken advantage of by demurrer or answer, or defect is waived. *Cunningham v. Brewer* 218
3. When the determination of a controversy cannot be had without the presence of new parties, the court is required by statute to order such parties to be brought in. *Cunningham v. Brewer* 218

4. Indispensable parties are those whose interest in subject matter of controversy is of such a nature that final decree cannot be made without affecting such interests, or leaving controversy in such condition that final determination may be wholly inconsistent with equity and good conscience. *Cunningham v. Brewer* 218

Partition.

1. A referee in partition is an officer of the court subject to its lawful orders and directions. *Siekert v. Soester* 321
2. Every person who buys from a referee in partition takes with knowledge that contract of sale is not binding on referee until entire transaction is properly presented to and approved by the court. *Siekert v. Soester* 321
3. In partition proceeding, it is duty of referee and trial court to endeavor to secure highest possible price for property sold for benefit of those lawfully entitled to proceeds of sale. *Siekert v. Soester* 321
4. Substantially increased offers to referee in partition for property sold by him made before confirmation of sale to the highest bidder are sufficient evidence to support finding of trial court that confirmation should be denied and new sale ordered. *Siekert v. Soester* 321

Pawnbrokers.

1. A service charge of $100, included as part of loan upon which statutory rate of interest under small loan law is charged, is a violation of such law authorizing forfeiture of the loan and interest. *Nitzel and Co. v. Nelson* 662
2. A licensee under small loan law suing upon illegal contract loses the right to collect any sum on indebtedness under the contract. *Nitzel and Co. v. Nelson* 662

Payment.

A payment or other performance by third person, accepted by creditor as full or partial satisfaction of his claim, discharges debtor's duty in accordance with terms on which third person offered it. *Fender v. McCain* 58

Pleading.

1. Allegations and proof must agree. *Bauer v. Wood* 14
2. A litigant may not plead one cause of action and upon trial rely on proof establishing a different cause, but allegations and proof must agree. *Cunningham v. Brewer* 211
3. Both a special appearance and a special demurrer must specifically point out the defects complained of. *Modisett v. Campbell* 222
4. A prayer for general relief in equity action is as broad

as the pleadings and equitable powers of the court. *School District No. 70 v. Wood* 241
5. A will incorporated into a pleading as part of a cause of action controls allegations which it contradicts or which are inconsistent therewith. *School District No. 70 v. Wood* 241
6. A motion to strike admits the truth of all facts well pleaded and any inferences fairly deducible therefrom. *In re Estate of Wise* 273
7. Redundancy consists of the needless repetition of material allegations, or of the insertion of irrelevant matter. *In re Estate of Wise* 273
8. Matter is irrelevant in a pleading which has no bearing upon the subject matter of the controversy, and cannot affect decision of the court. *In re Estate of Wise* 273
9. A plaintiff has the right to set out his entire statement of facts constituting his alleged cause of action, and where such action is based on a series of acts which together constitute allegation of one complete transaction, a portion of it may not be stricken out against the plaintiff's objection. *In re Estate of Wise* 273
10. Under the Code system of pleading, it is not necessary to state a cause of action or defense in any particular form, but the facts are to be stated. All that the law requires is that there shall be a cause of action or defense. *In re Estate of Wise* 273
11. A demurrer to an answer searches the entire record and is applicable to the first pleading found to be defective. *Wilcox v. Havekost* 562
12. All facts necessary to fix responsibility for injury complained of constitute but one cause of action, although the prayer of the petition is for more than one kind of relief. *Sedlak v. Duda* 567
13. There is no connection between jurisdiction and the sufficiency of the allegations of a petition to state a cause of action. *Wistrom v. Forsling* 638
14. Where allegations of petition are sufficient to inform defendant what relief plaintiff demands, the court, having power to grant the relief in a proper action, has jurisdiction to render judgment. *Wistrom v. Forsling* 638
15. A demurrer to a petition which states a cause of action presents no question as to the extent of recovery or the rule that shall govern in measuring damages. *Larson v. Marsh* 644
16. An amendment to pleadings may be made at close of evidence to make it conform therewith when it does not

have the effect of changing the issues or quantum of proof required as to any material fact. *Sutton v. Inland Construction Co.* 721

17. A general demurrer admits only facts that are well pleaded and does not admit conclusions of law or conclusions of the pleader. *In re Estate of Reikofski* 735

Principal and Agent.

1. A person relying on acts of agent has burden of proving agent's authority. *Bartholomew v. Skelly Oil Co.* 51
2. Whatever an agent or employee does in the lawful exercise of his authority is imputable to the principal, and where acts of agent or employee will bind principal, his representation, declaration and admission respecting subject matter will also bind principal, if it is made at same time and if it constitutes a part of the same transaction. *Whitaker v. Keogh* 790

Process.

If a defendant, who is served with process in a county other than where the action is brought, desires to assert the invalidity of such service, he must do so directly in the action and not collaterally where court has jurisdiction of subject matter. *Wistrom v. Forsling* 638

Public Lands.

1. One may go upon public lands and establish himself temporarily, without enclosing them by fence, and is not considered technically as a trespasser. *Test. v. Reichert* 836
2. Only the government, or one holding rightly under the government, can interfere with occupation of public lands by one going thereon and establishing himself there temporarily, without enclosing them by fence, and any rights growing out of such possession may be sold. *Test v. Reichert* 836

Railroads.

The railway commission's restoration of station agent at village was not justified where only evidence of a changed condition was that there was an increase in business of station covering period from date when supreme court authorized discontinuance of service of an agent. *Cole v. Chicago & N. W. Ry. Co.* 558

Receivers.

1. A court of equity having authority to act on the person may, by receivership, indirectly act upon real estate in

another state through the instrumentality of its authority over the person. *Modisett v. Campbell* 222
2. Lack of approval of receivership bonds is not a jurisdictional error and where no objection thereto is made in the district court it is waived and will not be considered by the supreme court. *Modisett v. Campbell* 222
3. Parties, by appearing in court to resist application for receiver on grounds other than lack of proper notice, waive such notice. *Modisett v. Campbell* 222

Rescission.

In suits for rescission or cancellation all persons whose rights, interests or relations with or through the subject matter of suit would be affected by the cancellation or rescission should be brought before the court so that they can be heard on their own behalf. *Cunningham v. Brewer* 218

Sales.

1. The description of property in a bill of sale is sufficient where it will enable a third party, aided by inquiries which the instrument itself suggests, to identify the property. *Roderick v. Wiens* 198
2. The fact that a stock in trade may change by sales and replacements of merchandise after delivery of an unconditional bill of sale by the seller does not constitute such a variance, as between the parties, which would defeat an action in replevin where it appears from the bill of sale and surrounding circumstances that such changes were contemplated. *Roderick v. Wiens* 198

Schools and School Districts.

1. An employment contract, made with teacher who failed to have certificate registered in office of county superintendent as required by statute, is void. *Zevin v. School District No. 11* 100
2. A teacher's contract, which was void under statute because entered into with teacher who failed to have certificate registered in office of county superintendent, could not be ratified by school district. *Zevin v. School District No. 11* 100

Specific Performance.

1. In action for specific performance of contract to convey real estate, where vendee is willing to accept vendor's title, vendor may not set up as a defense to action a defect therein. *O'Shea v. Smith* 628
2. Before specific performance of an oral contract to con-

vey real estate will be decreed, the acts claimed to be in part performance themselves must unequivocally indicate the existence of the contract and cannot be accounted for in any other reasonable hypothesis. *Crnkovich v. Crnkovich* 904

3. In action for specific performance of an oral contract where one is claiming the estate of a deceased person, the evidence of such contract and its terms must be clear, satisfactory and unequivocal. *Crnkovich v. Crnkovich* 904

States.

Where a state, by itself or through its corporate creations, embarks in an enterprise commercial in character or which is usually carried on by individuals or private companies, its sovereign character is ordinarily waived, and it is subject to like regulations with persons engaged in same calling, but such corporate creations do not lose their character as public corporations. *Platte Valley Public Power and Irrigation District v. County of Lincoln* 584

Statutes.

1. The provisions of Constitution relating to titles of bills are to be liberally construed and so construed as to admit of insertion in a legislative act of all provisions which, though not specifically expressed in the titles, are comprehended within objects and purposes of the act as expressed in its title, and to admit all provisions which are germane to provisions of the act as expressed in its title. *Maher v. State* 463
2. If an act is complete and independent in itself, it may modify existing statutes without controverting constitutional provisions relating to amendments. *Lee v. Lincoln Cleaning & Dye Works* 659
3. The general statute governing appeals in civil cases, adopted in 1941, did not supersede the earlier special act dealing with appeals in compensation cases. *Lee v. Lincoln Cleaning & Dye Works* 659
4. A particular intention expressed in a legislative act, if in conflict with a general intention expressed in a later enactment, should be given effect, leaving the later act to operate only outside the scope of the former. *Lee v. Lincoln Cleaning & Dye Works* 659
5. When the legislature reenacts a law, it adopts a judicial construction theretofore placed upon it by the supreme court. *County of Douglas v. Christensen* 899

6. When the legislature reenacts a law it will be presumed to have known the effect which statute originally had, as construed by the supreme court, and to have intended that the same effect should again be had. *County of Douglas v. Christensen* 899

Stipulation.

Where party seeks to establish an alleged oral agreement, made out of court, by evidence other than the testimony of the attorney making the same, and proper objection is made, it is error to receive and consider the evidence. *Oddo v. Fred F. Shields Co.* 111

Taxation.

1. The assessment of property and collection of taxes are governmental as distinguished from proprietary functions. *Goble v. Zolot* 70
2. A decree of the court fixing the value of real estate on a previous assessment made is not competent evidence in a further suit affecting the assessment values of property. *DeVore v. Board of Equalization* 351
3. Witnesses familiar with the rental value or value of use of realty are qualified to testify to market value for assessment purposes. *DeVore v. Board of Equalization* 351
4. Under constitutional provision that property of state and its governmental subdivisions shall be exempt from taxation, rightful ownership of property by governmental subdivision is all that is necessary to extend to such property complete immunity from taxation. *Platte Valley Public Power and Irrigation District v. County of Lincoln* 584
5. A public purpose has for its objective the promotion of public health, safety, morals, security, prosperity, contentment and general welfare of all inhabitants, and a public corporation created for purpose of irrigation and development of electric power, and distribution and sale thereof, is for a public purpose as respects exemption from taxation. *Platte Valley Public Power and Irrigation District v. County of Lincoln* 584
6. Public corporation authorized to use waters of natural stream for irrigation and for development of electric power is a governmental subdivision of the state within constitutional provision granting exemption from taxation, and all its property, both real and personal, is exempt from taxation. *Platte Valley Public Power and Irrigation District v. County of Lincoln* 584
7. The statute dealing with injunction to restrain collec-

tion of taxes and recovery of taxes paid under protest gave taxpayer right to maintain action at law to recover such tax or any part thereof, and made it the duty of the court to determine whether such tax is illegal, unauthorized or invalid. *Loup River Public Power District v. County of Platte* 600

8. Procedure for the foreclosure of valid tax sale certificates which have been purchased by counties for delinquent taxes is governed by statute. *County of Madison v. Walz* 677
9. A county, purchasing and foreclosing tax sale certificate, acts as trustee of express trust for use and benefit of state and all other governmental subdivisions entitled to participate in distribution of proceeds. *County of Madison v. Walz* 677
10. The trust property or trust *res* is the tax sale certificate with the rights evidenced thereby. *County of Madison v. Walz* 677
11. Taxes prior and subsequent to those covered by tax sale certificate are merged in and part of such certificate. *County of Madison v. Walz* 677
12. It is unnecessary for county to pay or issue receipts to itself for the taxes represented by a tax sale certificate. *County of Madison v. Walz* 677
13. Where a county, purchasing realty at valid administrative sale for taxes, does not bring action to foreclose its tax sale certificate until over two years after issuance thereof, owner of or other person interested in realty is not entitled to two years in which to redeem realty from confirmation of sale under decree of foreclosure. *County of Madison v. Walz* 677
14. A person having property rights to protect may redeem property from a tax sale under the Constitution. *County of Douglas v. Christensen* 899
15. A right of redemption from tax sale is a property right which may be sold or transferred, and statute relating to confirmation of tax lien foreclosure sale does not forbid the transfer. *County of Douglas v. Christensen* 899
16. Constitutional provision according two-year period for redemption from tax sale is for benefit of owner of fee or person having legal interest in land, and may be waived. *County of Douglas v. Christensen* 899
17. The statute providing that final confirmation of tax lien foreclosure sale cannot be had until two years have expired from date of sale means that final confirmation cannot be had until expiration of two-year period, unless

right to redeem is waived by owner or all persons having a legal interest in the land. *County of Douglas v. Christensen* 899

Tenancy in Common.

1. One of several tenants in common who removes burden on land held in joint tenancy is entitled to just contribution from the others so that burden may be equal. *Toole v. Lawrence* 779
2. One cotenant purchasing at foreclosure sale land will be held in equity to account to other cotenants as express trustee unless others in some manner have waived or surrendered their rights. *Toole v. Lawrence* 779
3. One co-owner's acquisition of tax title amounts merely to payment of taxes or redemption from tax sale and gives him no right against his co-owners except in so far as they fail or refuse to contribute to expenditure so made. *Toole v. Lawrence* 779
4. To avail themselves of purchase by one cotenant of outstanding title to common property, other cotenants must elect within reasonable time whether they will contribute to expense of acquiring such title. *Toole v. Lawrence* 779
5. Although husband of tenant in common cannot acquire valid title under tax sale as against cotenants other than his wife, he is entitled to be repaid whole amount paid by him as purchase price under tax sale and not merely portion of sum represented by shares of cotenants other than his wife. *Toole v. Lawrence* 779
6. Where a wife, who is one of cotenants with other heirs owning realty, actively assists husband in securing title through a tax foreclosure to the end that he will be only one to profit from transaction, husband is in same position as if he were one of cotenants and holds title so acquired in trust for all other cotenants. *Toole v. Lawrence* 779

Theaters and Shows.

1. An operator of public amusement place is not an insurer of his patrons' safety, but he owes duty to exercise ordinary and reasonable care for their safety under particular circumstances. *Tite v. Omaha Coliseum Corporation* 22
   McCullough v. Omaha Coliseum Corporation 92
2. An operator of public amusement owes his patrons duty to provide reasonable protection from, and warn them of, any dangers known to him or which he should know in exercise of reasonable care and not known to his pat-

rons, unless such dangers are observable by them in exercise of reasonable care for their own safety. *Tite v. Omaha Coliseum Corporation* 22
McCullough v. Omaha Coliseum Corporation 92
3. Evidence that an operator constructed and operated a hockey rink in conformity with custom and approved methods of prudent operators in such business did not conclusively fix standard of care of operator as matter of law, but was only evidence which jury might consider in determining whether due care was exercised by operator. *Tite v. Omaha Coliseum Corporation* 22
4. A spectator at hockey game assumes risk of, and owes duty to protect himself against, such dangers incident to playing of game as are known to him or should be obvious and apparent to reasonable and prudent person in exercise of due care under circumstances. *Tite v. Omaha Coliseum Corporation* 22
5. The manner of construction of hockey arena, and dangers incident to spectators attending game of hockey, are not so general as to be matters of common knowledge. *Tite v. Omaha Coliseum Corporation* 22
6. A spectator at hockey game who voluntarily places himself in a box seat not protected by a screen does not as a matter of law assume the risk of being hit by a flying puck from the playing arena. *Tite v. Omaha Coliseum Corporation* 22
7. One who participates in ice skating in a public skating rink assumes the necessary and obvious risks incidental to the recreation. *McCullough v. Omaha Coliseum Corporation* 92

Trial.

1. Error cannot be predicated upon refusal of an instruction which is not applicable to the evidence. *Muller v. Jensen* 1
2. Where a witness has been examined thoroughly upon a given matter, it is not prejudicial error to restrict further cross-examination. *Muller v. Jensen* 1
3. Where evidence is insufficient to sustain verdict for plaintiff, dismissal of action is not erroneous. *Bauer v. Wood* 14
4. An objection to taxation of costs in district court must be addressed to that court on motion to retax costs to make it available for review by supreme court. *Federal Land Bank v. Palmer* 46
5. The ordinary meaning of term "hearing in equity" is the

trial of the case, including introduction of evidence, argument of counsel, and decree of court. *Wolfe v. Wolfe* 55
6. Where word "hearing" in equity suit is qualified by word "final" it refers to proceeding by which case was absolutely determined and necessarily includes rendition of final order or decree. *Wolfe v. Wolfe* 55
7. Where different minds may draw different inferences from facts proved, or if there is conflict in evidence, matter at issue must be submitted to jury; but, where evidence is undisputed and but one reasonable inference can be drawn therefrom, the question is one of law for the court. *Chew v. Coffin* 170
8. Each party is entitled to have jury pass on evidence without having its effect or importance altered, either as to credibility or value, by indulgence of court in remarks to witnesses, or comments upon them or their testimony. *Langdon v. Loup River Public Power District* 325
9. The purpose of an instruction is to furnish guidance to jury in its deliberations and to aid it in arriving at proper verdict. *Langdon v. Loup River Public Power District* 325
10. Whether jury should be permitted to view the *locus in quo* is question addressed to sound discretion of the court. *Langdon v. Loup River Public Power District* 325
11. An instruction should state clearly and concisely the issues of fact and principles of law which are necessary to enable the jury to arrive at a proper verdict. *Langdon v. Loup River Public Power District* 325
12. Trial court in its discretion may view premises for assessment purposes. *DeVore v. Board of Equalization* 351
13. In action at law where minds may reasonably draw different conclusions from the evidence the question is for the jury. *Cantrell v. Owen* 361
14. Error cannot be predicated on the refusal of the court to instruct on matters contained in the pleadings not supported by evidence. *Cantrell v. Owen* 361
15. Communications between trial judge and jury after retirement of jury should be controlled by a high degree of circumspection. *Crecelius v. Gamble-Skogmo, Inc.* 394
16. Where different minds may reasonably draw different conclusions from evidence in a law action, question to be decided is for the jury. *Crecelius v. Gamble-Skogmo, Inc.* 394
17. A judge, in the exercise of his discretion, may view the premises, or a part thereof, without consent of the parties, although it is better practice to inform parties and

their counsel that he intends to do so and, in so far as practical, make such inspection in their presence or with opportunity for them to be present. *Lippincott v. Lippincott* 486

18. Instruction, in simple language, giving concise summary of the pleadings, in so far as evidence tends to support same, thereby placing the issues of the case fairly before the jury, is proper. *Tate v. Barry* 517
19. A motion for a directed verdict must be treated as an admission of the truth of all material and relevant evidence submitted on behalf of party against whom the motion is directed, and such party is entitled to have every controverted fact resolved in his favor, and to have the benefits of every inference that can reasonably be deduced from the facts. *Hollenbeck v. Guardian Nat. Life Ins. Co.* 684
20. The jury are the sole judges of the credibility of witnesses and the effect to be given their testimony, and it is error for trial court to withdraw case from the jury or dismiss it at close of evidence, if disputed questions of fact are involved and different minds might draw different conclusions from evidence. *Franks v. Jirdon* 693
21. When evidence offered by one party tends to discredit that offered by other party, it is for jury to weigh evidence and decide question presented thereby under proper instructions from the court. *Franks v. Jirdon* 693
22. The court should not take a case from the jury unless, as a matter of law, no recovery can be had upon any view which can properly be taken of plaintiff's evidence, but where reasonable men differ as to proof of facts a question is presented for the jury. *Franks v. Jirdon* 693
23. Ordinarily, the trial court should not take a case from the jury unless, as a matter of law, no recovery can be had upon any view which can properly be taken of the evidence. *Brewer v. Fischer* 712
24. Where evidence fails to show that driver of motor vehicle was guilty of any negligence in proceeding across highway intersection, a directed verdict is required. *Meyer v. Hartford Bros. Gravel Co.* 808
25. Where defendant was able to distinguish right from wrong, the fact that defendant was technically classified as a psychopathic personality did not require reduction of death sentence to life imprisonment. *MacAvoy v. State* 827
26. Where instructions are not inconsistent or contradictory but, considered together, correctly state the law, judg-

ment will not be reversed because one instruction does not state the entire law on the subject, unless it appears that the jury were misled. *Schram v. Lowden* 851

27. When a general verdict is set aside by trial court, it should award a new trial. *In re Estate of George* 915

Trusts.

1. Ordinarily, a trust for support and maintenance of a named beneficiary can be reached to satisfy the claim of a wife or minor child for support against such beneficiary. *In re Will of Sullivan* 36
2. Words used by settlor that a trustee shall have "uncontrolled discretion" are ordinarily construed as merely dispensing with the standard of reasonableness. *In re Will of Sullivan* 36
3. The extent of the discretion conferred upon a trustee is measured by the settlor's manifestation of intention. *In re Will of Sullivan* 36
4. Where the exercise of a power by a trustee is required by the trust or by law and the trustee fails to act, his failure constitutes arbitrary action which the courts will correct. *In re Will of Sullivan* 36
5. Where the court may properly control the exercise of a power by a trustee but not the discretion to be employed by such trustee, it may direct him to act or refrain from acting, set aside the transaction when he has already acted, hold him for the results of his action or nonaction, or, if necessary, remove him as such trustee, but may not substitute its discretion for that reposed in the trustee. *In re Will of Sullivan* 36

Usury.

1. The burden of proving usury as a defense to an action on a promissory note rests upon the party charging it unless usury is apparent on face of note. *Nitzel and Co. v. Nelson* 662
2. A service charge of $100, included as part of loan upon which statutory rate of interest under small loan law is charged, is a violation of such law authorizing forfeiture of the loan and interest. *Nitzel and Co. v. Nelson* 662

Waters.

1. Surface water includes such water as is carried off by surface drainage, that is, drainage independent of a watercourse. *Snyder v. Platte Valley Public Power and Irrigation District* 308
2. When water has a definite course and takes a definite

channel, it is a watercourse. *Snyder v. Platte Valley Public Power and Irrigation District* 308

3. Surface water is a common enemy, and a proprietor may, by embankment or dike or otherwise, defend himself against its encroachments, except where he is negligent. *Snyder v. Platte Valley Public Power and Irrigation District* 308
4. A person through whose land a watercourse flows does not have a right to divert it from its natural channel, so as to cause injury to another landowner by the diversion. *Snyder v. Platte Valley Public Power and Irrigation District* 308
5. The question whether there has been negligence in diversion for defense against surface water is ordinarily one for jury under circumstances in evidence in case. *Snyder v. Platte Valley Public Power and Irrigation District* 308

Wills.

1. Fact that will provides that a testamentary trustee is under a duty to support a named beneficiary and leaves the exercise of such duty to trustee's discretion does not defeat claim of a wife or minor child for support against such beneficiary. *In re Will of Sullivan* 36
2. Administrator who failed to make charitable gift available to school district upon happening of certain events as required by will was accountable to district for principal and all interest, profits, or other accumulations arising out of such fund, district being entitled to demand such accumulations in lieu of interest. *School District No. 70 v. Wood* 241
3. Whether or not a testator was of sufficient mental capacity to make a will is determined by the state of his mind at the time the will was executed. *In re Estate of Thomason* 300
4. Testator who, at time of executing will, knew the extent of his property, the natural objects of his bounty and the disposition he was making of his property, was competent to make a will. *In re Estate of Thomason* 300
5. In contest of will on ground of incompetency, it does not necessarily follow as a matter of law from proof of temporary mental infirmities before and after the testamentary date that the jury should be permitted to pass on the state of testator's mind at that time, in absence of proof that there was then a mental disturbance. *In re Estate of Thomason* 300
6. Where proponent in will contest has made a *prima facie*

case that testator was mentally competent to make a will, contestant must produce sufficient evidence to support a contrary finding by jury. *In re Estate of Thomason* 300

7. In contest of will on ground of mental incompetency trial court should withdraw the issue from jury and direct a verdict for proponent, where the evidence is insufficient to support a finding of testamentary incapacity. *In re Estate of Thomason* 300

8. Undue influence which will invalidate a will must be of such a character as to destroy the free agency of testator and substitute another person's will for that of his own. *In re Estate of Heineman* 442

9. Where all requirements for a valid will have been met, the burden of proof is on the contestant to establish by competent proof that the will was procured by undue influence. *In re Estate of Heineman* 442

10. Evidence of events occurring long after execution of will to be admissible or to have weight must be connected with direct or circumstantial evidence tending to prove that undue influence existed and that it was exercised at or near time will was made. *In re Estate of Heineman* .. 442

11. Evidence of undue influence subsequent to execution of will is not properly admissible until there is competent evidence of undue influence at time will was executed, unless it follows so closely as to have evidentiary value. *In re Estate of Heineman* 442

12. An abuse of discretion by the trial court in denying a continuance to obtain additional witnesses cannot be successfully asserted where there was no showing made as to the nature of their testimony. *In re Estate of Heineman* 442

13. In action to set aside a decree admitting a codicil to probate, facts constituting diligence must be set out in petition and generally it is not sufficient to allege that due diligence has been used. *In re Estate of Reikofski* 735

14. The petition to set aside a decree of county court admitting a codicil to probate must show, not generally or inferentially but by specific averments, that the petitioner has not been in fault or that he has exercised due diligence and vigilance. *In re Estate of Reikofski* 735

15. A decree admitting a codicil to probate can only be set aside on proof of such fraud as would justify the setting aside of any other judgment. *In re Estate of Reikofski* 735

16. In action to set aside decree admitting a codicil to probate on ground of fraud, plaintiff must allege sufficient

facts to show that failure to secure a just decision at former trial was not attributable to his own fault or negligence. *In re Estate of Reikofski* 735

17. Actions in county court for probate of a will and codicil are *in rem* and every person interested in the subject matter is a party in the county court regardless of whether he is named. *In re Estate of Reikofski* 735
18. Statutes providing for vacation or modification of judgment at subsequent term for fraud practiced by successful party in obtaining judgment or order applies to county court exercising probate jurisdiction, and county court could rule on demurrer to petition to set aside for fraud decree admitting codicil to probate at subsequent term. *In re Estate of Reikofski* 735
19. Burden of proof is on party alleging that will was procured by undue influence. *In re Estate of George* 887
20. An instruction on undue influence, which provides for the shifting of the burden of proof under certain conditions to be determined by the evidence, and leaves the jury to discern whether or not the burden is on the contestants at one stage of the proceedings and on the proponent at another, is prejudicially erroneous. *In re Estate of George* 887
21. The essential elements of "undue influence," necessary to invalidate a will, are testator's susceptibility to such influence, opportunity to exercise it, disposition to exercise it, and result clearly showing effect of such influence. *In re Estate of George* 887
22. "Undue influence," in order to invalidate a will, must be of such character as to destroy the free agency of the testator and substitute another person's will for his own. *In re Estate of George* 887
23. Undue influence which invalidates a will, being usually surrounded by secrecy and difficult to prove by direct and positive proof, may be established by inference from facts and circumstances surrounding testator, his life, character and mental condition, as shown by the evidence and opportunity afforded designing persons for exercise of improper control. *In re Estate of George* 887
24. In making proof of undue influence a contestant is not limited to the bare facts that he may be able to adduce, but he is entitled to all inferences that may be legitimately derived from established facts. *In re Estate of George* 887
25. The general rule that valid bequests should be sustained though part of will is invalid should not be applied to

defeat testator's intention and interfere with general scheme of distribution or work injustice on other heirs. *In re Estate of George* 887

26. Where will contains both valid and invalid provisions, real question presented in determining whether valid provisions can stand is whether the two are so part of a single plan or so dependent upon each other that by avoiding the invalid provisions and allowing the valid to stand there will result a disposition of estate so different from what testator contemplated or so unreasonable that it must be presumed that testator would not have made the valid provisions if he had been aware of invalidity of the others. *In re Estate of George* 887
27. Where jury, in special findings, found that testator was sane but will was result of undue influence, and general verdict in favor of contestant was reversed on appeal for error in instructions, proper order on appeal was to direct a new trial on all issues. *In re Estate of George* 915

Witnesses.

1. Agreement between parties which establishes a common-law marriage is not a communication between husband and wife concerning which they are prohibited by statute from testifying. *Forshay v. Johnston* 525
2. Identification of promissory note by administrator and computation of amount due thereon does not constitute introduction of testimony in regard to transaction with deceased person, so as to permit persons having direct legal interest adverse to deceased person to testify respecting execution of new note in payment of debt and an oral agreement for cancellation of indebtedness. *Nelson v. Janssen* 811
3. The rule that ordinarily it is not proper to cross-examine a witness on a matter not related to his testimony in chief does not confine cross-examination to questions asked on direct examination but confines it to subject matter of such examination. *In re Estate of Potts* 729
4. A person who has filed a claim against decedent's estate for services performed under an oral contract is not incompetent to testify to independent acts which he performed when the deceased had no personal connection with the act and as to which the deceased did not participate. *In re Estate of Baker* 797

Workmen's Compensation.

1. For person to be eligible for compensation under workmen's compensation law he must be an employee within

the meaning of the law. *Lind v. Nebraska National Guard* 122
2. The Nebraska National Guard is a governmental agency of the state within meaning of workmen's compensation law. *Lind v. Nebraska National Guard* 122
3. Members of the Nebraska National Guard are not employees of the state or any agency created by it within the meaning of the workmen's compensation law, since members when on duty are engaged in performance of the duty which the citizen owes to the sovereign. *Lind v. Nebraska National Guard* 122
4. Employee's failure to give timely notice of compensation claim is not necessarily a defense where injury is latent and progressive, and notice is given within six months from time employee acquires knowledge of compensable disability. *Lind v. Nebraska National Guard* 122
5. Duration of separation, sums contributed to wife's support, intention of the parties and all other facts and circumstances are to be considered in determining whether wife was dependent upon husband living apart at time of his death. *Bulman v. Lyman-Richey Sand & Gravel Corporation* 342
6. Issue of wife's dependency upon husband living apart at time of death must be determined against wife, where it appears that separation continued for a considerable period, and during such time support was derived from sources other than earnings of husband. *Bulman v. Lyman-Richey Sand & Gravel Corporation* 342
7. Where widow never recognized husband's obligation to support her, and never made any demand on him for support, or attempted in any way to enforce her rights, the trifling gifts he may have made did not come within the term "in any way contributing to her support." *Bulman v. Lyman-Richey Sand & Gravel Corporation* 342
8. Where no justifiable cause is shown for husband and wife living apart, statutory presumption of dependency is inapplicable and proof must be made that in fact wife was dependent. *Bulman v. Lyman-Richey Sand & Gravel Corporation* 342